NO. 45041-1-II

THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION TWO

STATE OF WASHINGTON,

Respondent,

v.

DENNIS WOLTER,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF THE STATE OF WASHINGTON FOR CLARK COUNTY

APPELLANT'S OPENING BRIEF

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A. INTRODUCTION.

During Dennis Wolter's trial, the judge removed a seated juror because she received "innocuous" information about Mr. Wolter. The judge found the juror had not committed misconduct, was not biased, and had not received information that made her unable to be fair, but removed her from the jury in an "abundance of caution" despite Mr. Wolter's objection. When dismissing a sitting juror mid-trial without evidence of her unfitness to serve and over the accused's objection, the court applied the wrong legal standard and violated Mr. Wolter's right to a fair trial by a jury that he participated in selecting.

The court also applied the wrong legal standard when deciding that the police did not need to give Mr. Wolter *Miranda* warnings when holding him by the side of the road for close to one hour while they searched his car, repeatedly questioned him, and determined there were several grounds to arrest him. Later, when Mr. Wolter said, "I need an attorney," the court erroneously found the police could continue to question him without counsel.

Furthermore, the court did not instruct the jury on the essential elements of the aggravating factor that the victim was a witness in an adjudicative proceeding whose death was related to her official duties,

and the State failed to prove this aggravating factor which underlies his sentence of life without the possibility of parole.

B. ASSIGNMENTS OF ERROR.

1. The court improperly removed a qualified juror from serving on the case during trial, in violation of the controlling statute and the state and federal constitutional rights to a fair trial by jury.

2. Mr. Wolter was impermissibly questioned by police officers while held in custody without *Miranda* warnings, contrary to the Fifth and Sixth Amendments and article I, sections 9 and 22.

3. The police denied Mr. Wolter his right to have counsel present during questioning upon his request for an attorney as required by the Sixth Amendment and article I, section 22.

4. The court erroneously entered CrR 3.5 Finding of Fact 7, which misstates the timing of the police investigation and reason for Mr. Wolter's arrest. CP 230 (written findings attached as Appendix A).

5. The court erroneously entered CrR 3.5 Finding of Fact 9, which misrepresents the conversation that followed Mr. Wolter's request for counsel and the significant questioning that followed. CP 231.

6. To the extent CrR 3.5 Conclusion of Law 3 contains findings of fact, it is not supported by substantial evidence. CP 232.

7. To the extent CrR 3.5 Conclusion of Law 5 contains findings of fact, it is not supported by substantial evidence. CP 232.

8. To the extent CrR 3.5 Conclusion of Law 9 contains findings of fact, it is not supported by substantial evidence. CP 233.

9. The prosecution did not present sufficient evidence of the aggravating circumstance that the person killed was a witness in an adjudicative proceeding whose death was related to her official duties as a witness.

10. Instruction 21 omitted an essential element of the aggravating factor requiring that the person killed be a witness in an adjudicative proceeding. CP 374.

C. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR.

1. The court lacks authority to remove a selected juror during trial without evidence demonstrating juror's manifest unfitness. During trial, a seated juror learned that a friend had met Mr. Wolter one time when Mr. Wolter said hello to him. Over Mr. Wolter's objection, the court dismissed this juror even though it found the juror had not committed misconduct, received innocuous information, and promised

to apply the law and facts as instructed by the judge. Did the court impermissibly dismiss a selected juror who had not shown a manifest unfitness to serve?

2. *Miranda* warnings are required when police question a person who would not reasonably feel free to terminate the encounter and leave. The court found that *Miranda* warnings were not required until the police actually arrested Mr. Wolter. Did the court apply the wrong legal standard and deny Mr. Wolter his rights to remain silent and have counsel when he was questioned while being held in a manner that a reasonable person would perceive as akin to police custody?

3. When a person asks for an attorney without using equivocal words, police may not continue questioning the person without providing counsel. Mr. Wolter clearly asked for an attorney while being custodially interrogated. When the police continued questioning Mr. Wolter without an attorney, did they violate his right to counsel?

4. The prosecution bears the burden of proving all essential elements of a charged crime, including aggravating factors, and the jury must deliberate based on a complete understanding of all essential elements. The court did not instruct the jury that it must find the person killed was a witness "in an adjudicative proceeding," and the State did

not prove the essential element that the witness had "official duties" that were related to her death. Was there insufficient evidence of this aggravating factor and did the inaccurate jury instruction dilute the State's burden of proof?

D. STATEMENT OF THE CASE.

In 2011, Dennis Wolter learned that his friend had moved away, abandoning his young son Kyle. 8A RP 1512.[1] He befriended Kyle and later became romantically involved with Kyle's mother, Kori Fredricksen. 10A RP 1976.

On May 17, 2011, Mr. Wolter and Ms. Fredricksen argued. 8B RP 1570. Neighbor Dylan Lenganis called 911 because he heard plates breaking. 11C RP 2625. When the police arrived, both Mr. Wolter and Ms. Fredricksen had left. 8B RP 1569. Mr. Wolter went to a friend's house to calm down. 10B RP 2028. Mr. Wolter returned when he learned the police were there. 8B RP 1570. Mr. Wolter was arrested for malicious mischief because he damaged property inside the home. 8B RP 1572-73, 1607. Ms. Fredricksen returned later and spoke with the police after Mr. Wolter's arrest. 8B EP 1571, 1595. Although Mr.

[1] The consecutively paginated verbatim report of proceedings ("RP") is referred to by the volume number listed on the cover page.

Wolter said Ms. Fredricksen hit him during their argument, Ms. Fredricksen had a "minor" cut on her finger and he was also charged with fourth degree assault against her. 8B RP 1574, 1591-92.

Mr. Wolter spent several days in jail before making bail and the court ordered him not to have contact with Ms. Fredricksen. 10B RP 2031-32. Once he was released, Ms. Fredricksen called and texted Mr. Wolter repeatedly using her phone and a friend's phone, which upset and confused Mr. Wolter. 10B RP 2137; 11C RP 2562; 12B RP 2969-72, 3011-15; 13B RP 3542-43 (158 calls from Ms. Fredricksen to Mr. Wolter from May 21 to 25, 2011). On May 25, 2011, Mr. Wolter returned to court with a new attorney, hoping that the no-contact order would be lifted. 11B RP 2535-36. The judge did not mention the no-contact order during this hearing, but Mr. Wolter's attorney gave him the impression that the no-contact order was rescinded. 3RP 355, 358; 10A RP2007-08, 2011; 11C RP 2574.

Mr. Wolter discovered some of his property was missing when he returned to his house. 11C RP 2556. While he had been in jail, Ms. Fredricksen had come to his home with two friends late one night. 11C RP 2590. They "partied," stayed up all night, and removed items from the home that included equipment that belonged to Mr. Wolter's

employer and his clothes. 10B RP 2022-34; 11C RP 2556, 2590-91. Mr. Wolter was very upset about losing the equipment and called the police to report it stolen. 10B RP 2034; 11C RP 2582. He learned from others that Ms. Fredricksen was using drugs and had threatened to kill a female friend of Mr. Wolter's while Mr. Wolter was in jail. 10B 2059; 12A RP 2694.

Late on the night of May 25, 2011, Ms. Fredricksen convinced a friend's son, Dustin Sparks, to drive her to Mr. Wolter's house. 10B RP 2069; 11C RP 2654-55. She said she needed to retrieve her end tables and an air conditioner because she was moving away. 10B RP 2086, 2089. She directed the friend's son to drop her off down the street from the house and told him she would call in one hour or so to be picked up. 10B RP 2072, 2092. Even though Mr. Sparks offered to help Ms. Fredricksen, she insisted that he leave. 10B 2072, 2095. He dropped her off near Mr. Wolter's house between 11 and 12 in the evening. 10B RP 2069.

Mr. Wolter returned to his home that night after previously staying at a friend's house. 10B RP 2032. He drank some beer with his neighbor Mr. Lenganis, told him Ms. Fredricksen was moving away, and seemed happy. 11C RP 2623, 2638; 12A 2715. Although Mr.

Wolter and Ms. Fredricksen had exchanged some brief phone calls during the evening, it is unclear whether Mr. Wolter expected Ms. Fredricksen to arrive at his home that night.10B RP 2024; 11C RP 2623, 2625; 12B RP 3011-15 (text messages from Ms. Fredricksen to Mr. Wolter on day of incident).

At 12:20 a.m., a police officer clocked Mr. Wolter speeding and pulled him over. 2RP 233. He noticed Mr. Wolter smelled of alcohol and had blood on his hands and face, as well as in the bed of his pick-up truck. 2RP 200, 202. Mr. Wolter admitted he drank a few beers and he was unable to balance during field sobriety tests. 2RP 206, 210. He said the blood came from his dog, who had been hit by a car and died. 2RP 202. He described taking the dog to a vet to dispose of his body. 2RP 214, 219, 264, 281, 308. Four officers separately and jointly questioned Mr. Wolter about his dog and he answered repeated questions about his whereabouts that night. 2RP 257-58. They also discovered an out-of-state warrant for his arrest and questioned him about that. 2RP 203, 221-22, 251. After about 45 minutes, they confirmed the Wisconsin arrest warrant and arrested him for impaired driving. 2RP 287, 292-93.

During this roadside detention, the police obtained Mr. Wolter's consent to search his car, purportedly to look for the veterinary receipt confirming the dog's death. 2RP 214. While searching the car, they found a no-contact order for Kori Fredricksen. 2RP 217-18. They asked Mr. Wolter about when he last saw Ms. Fredricksen and whether they had recently been involved in a domestic violence incident. 2RP 218. Other police officers went to Mr. Wolter's home and reported that they could see blood inside the home and on the front door. 8B RP 1576.

At the police station, Mr. Wolter agreed to speak to two detectives in a recorded interview. 3RP 322, 334-36. The interview lasted over one hour. 15B RP 4179. Toward the middle, the tone of the interview became more accusatory and the detectives told Mr. Wolter they would take his clothes and have them tested to confirm whether the blood was from a dog or human. 3RP 376-78. Mr. Wolter told the police they were "going way over the line" and "I'd like to have an attorney present for that." 3RP 378-79. Sergeant Scott Creager interrupted Mr. Wolter. 3RP 379. The sergeant said, "before you go on with this," and explained how important it was for the police to hear him "tell the story." 3RP 379-81. Mr. Wolter again said, "I think I need a lawyer present for anything like that." 3RP 381. Detective John Ringo

interjected and said he assumed Mr. Wolter was asking for a lawyer "when we get to the point of dealing with your clothes." 3RP 381. Mr. Wolter agreed. 3RP 381. The detectives continued questioning Mr. Wolter about the incident, asking direct questions about whether he killed Ms. Fredricksen or her son Kyle. 3RP 382-406. After substantial probing by the detectives to get Mr. Wolter to change his story, Mr. Wolter said, "Can I see a lawyer." 3RP 406. Before ending the recorded conversation, Sergeant Creager told Mr. Wolter that they had "found Kori" and he should stop insulting them by acting surprised. 3RP 406-07.

Shortly after Mr. Wolter's arrest, a police officer found Ms. Fredricksen's body in bushes on a downslope about one mile from where Mr. Wolter was stopped for speeding. 8A RP 14001, 1404. She had been stabbed numerous times. 11A RP 2296. Although she had methamphetamine in her system, blood loss was the cause of her death. 11A RP 2296, 2304.

At his trial for aggravated first degree murder, his attorney explained that Mr. Wolter had killed Ms. Fredrickson but it was not premeditated. 15C RP 4184. A psychiatrist, neuropsychologist, and forensic psychologist testified about Mr. Wolter's diminished mental

capacity. 12A RP 2822; 12C RP 3090-92; 13A RP 3206, 3250. The three doctors evaluated Mr. Wolter's brain functioning, diagnosing him with partial fetal alcohol syndrome and traumatic brain injury, resulting in widespread brain abnormalities and large areas of low brain function. 12C RP 3090-92. His significant impairments gave him difficulty acting rationally when unexpected and upsetting incidents occur, such as happened after his arrest, jailing, and subsequent barrage of phone calls and texts from Ms. Fredricksen. 13A RP 3206, 3250. Mr. Wolter told Dr. Natalie Novick-Brown that he did not remember what happened when Ms. Fredricksen came to his house. 13A RP 3360.

The jury convicted Mr. Wolter of the charged offense of aggravated first degree murder and imposed a mandatory sentence of life without the possibility of parole. CP 333, 334, 385. The jury also convicted him of a related charge of witness tampering. CP 337. Pertinent facts are addressed in further detail in the relevant argument sections below.

E. ARGUMENT.

1. **The court interfered with Mr. Wolter's right to a jury trial by removing a seated juror who was not biased, partial, or unable to serve**

a. *The right to a fair trial by jury includes the right to select jurors serving in the case.*

The state and federal constitutions protect an accused person's right to participate in the selection of a jury and to receive a fair trial by that selected jury. *Batson v. Kentucky*, 476 U.S. 79, 85, 106 S.Ct. 1712, 90 L.Ed.2d 69 (1986); *State v. Irby*, 170 Wn.2d 874, 884-85, 246 P.3d 796 (2011), U.S. Const. amends. 6, 14; Wash. Const. art. I, section 22. Even more protective than the federal constitution, Washington expressly guarantees the inviolate right to a 12-person jury and unanimous verdict in a criminal prosecution. *Irby*, 170 Wn.2d at 884; *see also Hicks v. Oklahoma*, 447 U.S. 343, 346, 100 S.Ct. 2227, 65 L.Ed.2d 175 (1980) (once state guarantees right to jury trial, Fourteenth Amendment guards against its arbitrary denial); *State v. Williams-Walker*, 167 Wn.2d 889, 896 n.2, 225 P.3d 913 (2010) ("greater protection" for jury trial rights under article I, sections 21 and 22 than federal constitution).**Error! Bookmark not defined.**

Once a juror is selected to serve, the juror is presumed to be "impartial and above legal exception; otherwise he would have been challenged for cause." *State v. Reid*, 40 Wn.App. 319, 322, 698 P.2d 588 (1985). A court does not have unbridled discretion to remove a sitting juror. *See e.g.*, *Miller v. State*, 29 P.3d 1077, 1083-84 (Ok. Crim.App. 2001) (court's discretion to dismiss selected juror for good cause "ought to be used with great caution"); *People v. Bowers*, 87 Cal.App.4th 722, 729 (Cal.App. 2001) (court's discretion to dismiss juror is "bridled to the extent" that juror's inability to perform his or her functions must appear in the record as a "demonstrable reality, and court[s] must not presume the worst of a juror.").

A selected juror may not be dismissed for her inclination to view the case more favorably to one party or her opinions on the sufficiency of the evidence. Dismissing a selected juror based on her views risks violating the right to an impartial jury because it may appear that the trial court is reconstituting the jury in order to reach a certain result. *State v. Elmore*, 155 Wn.2d 758, 767, 123 P.3d 72 (2005).

CrR 6.5 provides that a juror shall be excused only after the court has "found" she is "unable to perform the duties" of a juror. RCW 2.36.110 explains that the court shall excuse a juror if she has

"manifested unfitness as a juror by reason of bias, prejudice, indifference, inattention, or any physical or mental defect or by reason of conduct or practices incompatible with proper and efficient jury service."

When considering whether to dismiss a juror, the court must err on the side of caution by protecting the defendant's constitutional right to ensure that a juror is not dismissed for his views of the evidence. *State v. Depaz*, 165 Wn.2d 842, 854, 204 P.3d 217 (2009) (citing *Elmore*, 155 Wn.2d at 777–78). In *Depaz*, a juror improperly communicated with her husband about the case during deliberations, but this "bare misconduct" did not provide legal basis to dismiss her without further evidence of inability to serve. *Id.* at 858. Some misconduct by a juror does not "necessarily indicate that she had been improperly influenced or unable to continue to deliberate." *Id.* The removal of a juror should occur only upon a determination that removal is necessary to avoid prejudice to one of the parties. *Id.*

In *Depaz*, the Court construed RCW 2.36.110 to require that the court find the seated juror's actual inability to serve as a fair juror. Even when considering a cause challenge to a prospective juror who has an opinion about the case, that opinion is not grounds for dismissal

without evidence "that the juror cannot disregard such opinion and try the issue impartially." *State v. Noltie,* 116 Wn.2d 831, 837, 809 P.2d 190 (1991) (citing RCW 4.44.190).

The court abuses its discretion if its decision to dismiss a juror stems from using the wrong evidentiary standard. *Elmore*, 155 Wn.2d at 778 ("once the proper evidentiary standard is applied, the trial court's evaluation of the facts is reviewable only for abuse of discretion"). In *Elmore*, the court failed to apply a heightened evidentiary standard when weighing conflicting evidence about whether a juror was participating in deliberations or was refusing to do so. *Id.* at 779. Because the court had not applied the correct evidentiary standard, the Supreme Court held that the trial court had improperly dismissed the juror. *Id.* at 780.

b. *Juror One did not commit misconduct and should not have been removed from the selected jury panel.*

The trial court found Juror One did not commit misconduct yet it removed her from the jury over defense objection. The court explained its decision as acting in "an abundance of caution." 9A RP 1658. But an "abundance of caution" is not the legal standard for dismissing a seated juror over a party's objection. The court did not

find the juror demonstrated a "manifest unfitness" to serve and because the juror was not actually prejudiced, biased, or otherwise unfit, the court improperly removed her from the trial.

During the trial, a friend of Juror One's asked what she was doing the next day and she replied that she had jury duty. 9A RP 1646, 1650. Her friend, Jessie Rassi, said, "I don't know if it's the one on the news," and Juror One responded, "I can't really say anything." 9A RP 1650. Mr. Rassi told her he had spoken to Mr. Wolter once. Mr. Rassi happened to spend three days in the local jail due to an altercation and while there, Mr. Wolter "just said hi" to Mr. Rassi and also said, "say hi to the people that are free." 9A RP 1648. That was the extent of the conversation. *Id.*

Juror One assured the court that she had not said anything to her friend and "it doesn't really mean anything." 9A RP 1646, 1651. She saw it as "[j]ust a coincidence" and "I still feel the same, I'm just here to do a job and that's it." *Id.* at 1652. She agreed that her role was to listen to what she heard in the courtroom and not outside of it. *Id.* at 1654.

When asked if anything about this contact impaired her ability to follow the Court's instruction on the law or the facts in the case, she

said "No. I hope not." 9A RP 1652-53. The only thing, "if anything" was that it "made it more, like personable, or like - - I don't know if the word, like, humane or something." *Id.* at 1653. Her friend had not given any personal impressions or opinions about Mr. Wolter. *Id.* at 1654-55.

When defense counsel asked if the encounter impacted her feelings about Mr. Wolter's guilt or innocence, the prosecution objected to the question and the court sustained the objection. 9A RP 1652.

The court characterized the information as "somewhat innocuous" and found the juror had not deliberately violated a court order not to discuss the case. 9ARP 1657. But the court dismissed this selected juror at the prosecution's request because learning that Mr. Wolter said hello to her friend may have "had an effect on the juror's ability to be fair." 9ARP 1655-57. The court did not explain its ruling further, although when informing the juror of her dismissal, he told her she had not "done anything wrong" but "in an abundance of caution, I'm going to make sure that only jurors who don't have that sort of outside information in effect are seated." 9ARP 1658.

Juror One did not manifest unfitness to serve as required by RCW 2.36.110, and the court did not find demonstrable unfitness. The juror did not solicit her friend's communication, she took steps to end

the conversation, and she conscientiously reported it to the trial judge. 9A RP 1650. She did not learn substantive information about the case that would affect her deliberations and she said it did not mean anything to her. *Id.* at 1648, 1651-52.

Juror One did not show she was not unable to perform her function, on the contrary, she said she still felt the same and did not think the conversation affected her ability to follow the instructions in the case. 9A RP 1652-53. She agreed that she would base her decision on evidence presented in the courtroom and not any information she came across outside the courtroom. 9ARP 1654. She had no fixed bias or prejudice. She only expressed surprise that a friend had met Mr. Wolter and noted that the fact of this meeting made Mr. Wolter seem "humane." *Id.* at 1653.

To remove a selected juror for bias, the record must show that the juror was unable to "try the issue impartially and without prejudice to the substantial rights of the party challenging." *Hough v. Stockbridge*, 152 Wn.App. 328, 340, 216 P.3d 1077 (2009) (quoting RCW 4.44.170(2)). The court did not find Juror One was unable to try the case impartially, but rather decided to dismiss her, over defense objection, in an abundance of caution. 9ARP 1658.

Although the judge is best placed to assess the demeanor of the juror, Judge Lewis's ruling was not predicated on Juror One's demeanor. *See generally State v. Jorden*, 103 Wn.App. 221, 229, 11 P.3d 866 (2000). The judge did not claim his observations underlied his decision to dismiss the juror. He did not indicate the juror seemed less than forthright. The judge's decision to disqualify the selected juror was based on her words alone and no deference is due the court's opportunity to observe her demeanor. The record does not show Juror One was unable to try the issue impartially, she did not learn information about the case, did not know the involved parties, and did not have fixed opinions.

When selecting a jury, the court did not strike prospective jurors for cause based on ambiguous feelings that they might be more inclined to favor prosecution witnesses. For example, the court denied Mr. Wolter's cause challenge to prospective juror 6, who had close friends or family in law enforcement. 6A RP 819. This person thought police officers were likely to be more credible. *Id.* at 830. He said "I'm not sure" when asked if he had a predisposition to favor police, and "I'm not positive" when asked if he could treat law enforcement witnesses and lay witnesses the same in terms of credibility. *Id.* at 822, 826. The

court denied the defense request to challenge this prospective juror as someone with a preconceived bias favoring police. *Id.* at 830. The court acknowledged the juror "candidly admitted" he might find some witnesses more credible, but "that doesn't seem to me to be a disqualifying factor." *Id.*

Prospective juror 6's inclination to trust law enforcement witnesses was a more specific potential bias than stricken Juror One, who merely thought it was possible that knowing someone who had once spoken to Mr. Wolter made him more humane. The court did not strike the juror who was more favorably inclined to police but did strike the juror who may have seen humanity in Mr. Wolter.

Prospective juror 23 had been married to a police officer, heard stories about what he did at work, and thought most officers are "good people." 6A RP 879. She thought Mr. Wolter was in a "difficult position" because of the charges he faced but said she was not biased. 6A RP 884-85. No party asked to strike her for cause even though she had exposure to law enforcement work and thought officers were good people. 6A RP 885. She served as a juror on the case. 7A RP 1215.

The court denied Mr. Wolter's cause challenge to prospective juror 57, who did not know if she could view a person accused of

murder as innocent. 6B RP 1065. Because of what she felt "in her heart," she could not be sure she could apply the presumption of innocence. *Id.* at 1065-66. She said she "would have to think long and hard" to say whether she could perform the function of the juror. *Id.* at 1068-69. The court did not find her unfit to serve despite her equivocation about her ability to apply the law fairly.

The tangential information received by Juror One did not demonstrate a bias justifying her removal from the case after she was seated. She did not consider the information about the greeting passed between Mr. Wolter and her friend to be meaningful and promised to follow the court's instruction far more directly than prospective juror 57. 9A RP 1652-54. Similarly to people who knew police officers, she might have a basis to see Mr. Wolter as more of a person, but she had no opinion of him, no information about the case, and it had "no effect" on her ability to decide the case based on the evidence presented. 9A RP 1652, 1655.

c. *Striking a qualified, seated juror without sufficient cause requires reversal.*

Removing a qualified, seated juror without properly applying the legal standard necessary for dismissal requires reversal. *See Elmore*,

155 Wn.2d at 781. As the *Irby* Court explained when addressing the remedy that follows the improper dismissal of prospective jurors,

> It is no answer to say that the 12 jurors who ultimately comprised Irby's jury were unobjectionable. Reasonable and dispassionate minds may look at the same evidence and reach a different result. Therefore, the State cannot show beyond a reasonable doubt that the removal of several potential jurors in Irby's absence had no effect on the verdict.

Irby, 170 Wn.2d at 886-87. The court removed Juror One in an abundance of caution even though she did not commit misconduct, received innocuous information, and did not believe the random information she received affected her ability to do her job as a juror. The court applied the wrong standard and unreasonably removed a qualified juror who had been selected and sworn without evidence of her manifest unfitness to serve, over defense objection. This error requires reversal.

2. **The court improperly admitted statements Mr. Wolter made to police without *Miranda* warnings and after he requested counsel**

a. *Mr. Wolter was in custody when questioned by police officers without Miranda warnings.*

The right to counsel and the right to remain silent when accused of criminal activity are bedrock protections guaranteed by the

Fifth**Error! Bookmark not defined.** and Sixth Amendments as well as article I, sections 9 and 22 of the Washington Constitution. *Miranda v. Arizona*, 384 U.S. 436, 458, 466, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966). Custodial interrogation must be preceded by advice that the defendant has the right to remain silent and the right to the presence of an attorney during interrogation. *Miranda*, 384 U.S. at 479.

"[T]he safeguards prescribed by *Miranda* become applicable as soon as a suspect's freedom of action is curtailed to a 'degree associated with formal arrest.'" *State v. Harris*, 106 Wn.2d 784, 789, 725 P.2d 975 (1986) (quoting *Berkemer v. McCarty,* 468 U.S. 420, 104 S.Ct. 3138, 3151, 82 L.Ed.2d 317 (1984)). This objective test rests on the perspective of a reasonable person in the suspect's position. *State v. Heritage*, 152 Wn.2d 210, 218, 95 P.3d 345 (2004). A person may reasonably perceive he is being held by police even though the police are still investigating whether they have probable cause to arrest. *State v. Short*, 113 Wn.2d 35, 41, 775 P.2d 458 (1989) ("sole inquiry [is] . . . whether the suspect reasonably supposed his freedom of action was curtailed"); *State v. Solomon,* 114 Wn.App. 781, 789, 60 P.3d 1215 (2002) ("legal inquiry [is] . . . whether a reasonable person would have

felt he or she was not at liberty to terminate the interrogation and leave" (internal citation omitted)).

Four police officers, who arrived in separate cars, held Mr. Wolter by the side of the highway for almost one hour before he was formally arrested and given *Miranda* warnings. 2RP 215. The trial court ruled that because the police were investigating various potential criminal charges, they did not need to give *Miranda* warnings until the actual arrest occurred. This ruling erroneously focuses on whether the police had definitively decided they had probable cause to arrest, not the determinative inquiry of whether a reasonable person in Mr. Wolter's position would have felt he was not at liberty to terminate the interrogation and leave. *See Short*, 113 Wn.2d at 41; *Solomon,* 114 Wn.App. at 789.

The court made no finding that the State proved a reasonable person in Mr. Wolter's position would have felt he was not being held by the police to a degree associated with arrest. CP 228-33. Mr. Wolter was stopped for speeding and admitted he had a "few beers." 2RP 200. Officer Stephen Hausigner took his driver's license and never returned it to Mr Wolter throughout the detention. 2RP 201, 243, 249. Over the course of 40 to 45 minutes, the police directed Mr. Wolter through field

sobriety tests, most of which he did not perform well; tested his breath for the presence of alcohol after he admitted having a couple of beers; told him they located an arrest warrant for him from South Carolina and were confirming its validity; determined that the warrant was from Wisconsin and inspected Mr. Wolter's tattoos to verify he physically matched the person named in the out-of-state arrest warrant; gave him *Ferrier* [2]warnings and searched his car; questioned him about the no contact order found in his car as well as whether he had been arrested for domestic violence recently; and repeatedly asked him to explain how he came to be covered in blood. 2RP 207-08, 210, 212, 214, 217-19, 221-22, 264, 269, 281, 308.

Notably, one factor in assessing whether the consent to search is validly given is "whether *Miranda* warnings had been given prior to obtaining consent." *State v. Bustamante-Davila*, 138 Wn.2d 964, 981, 983 P.2d 590 (1999). Here, the police gave formal warnings to Mr. Wolter to get his consent to search his car, and in fact searched it two times after seeking Mr. Wolter's consent, yet they never provided *Miranda* warnings until formally arresting him. 2RP 283

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[2] *State v. Ferrier,* 136 Wn.2d 103, 118, 960 P.2d 927 (1998).

The trial court concluded that none of Mr. Wolter's pre-arrest statements were made in a custodial situation for which *Miranda* warnings were required. CP 232 (Conclusion of Law 3). But it neglected to apply the correct test. A reasonable person in Mr. Wolter's shoes would not have felt free to terminate the interrogation and leave. *Solomon,* 114 Wn.App. at 789. Mr. Wolter was restrained to the degree of a custodial arrest after he was stopped by police for speeding, he admitted drinking several beers, and he performed poorly on field sobriety tests. The police held his driver's license throughout the encounter, which meant he could not legally drive away. He knew not only that the police had discovered his impaired driving but also that they found a warrant for his arrest from another jurisdiction and they saw a lot of blood in his car and on his body which they actively investigated, searching his car and trying to confirm his story. A reasonable person in Mr. Wolter's position would not have felt free to terminate the encounter and would have understood he was being arrested for impaired driving, an out-of-state warrant, or something more serious.

The court's failure to hold the State to its burden of proving Mr. Wolter did not reasonably feel free to terminate the inquiry constitutes an error of law. *State v. Corona*, 164 Wn.App. 76, 78-79, 261 P.3d 680 (2011) (court abuses its discretion when it "applies the wrong legal standard or bases its ruling on an erroneous view of the law"). The court also erroneously ruled that Mr. Wolter was arrested on the Wisconsin warrant, when the police admitted they had probable cause to arrest him for negligent driving from close to the inception of the stop, as Sergeant Douglass Norcross admitted. 2RP 287; CP 230 (Finding of Fact 7).

Because the State did not meet its burden of proving a reasonable person would have felt free to terminate the encounter, the court erroneously admitted all of Mr. Wolter's pre-arrest statements to the police. As explained below, these statements were used against Mr. Wolter at trial, as a means to challenge his diminished mental state and to claim he caused Ms. Fredrickson's death by premeditated design. The erroneous admission of these statements affected the outcome of the case.

b. *Mr. Wolter's request for an attorney during interrogation was not honored by police.*

i. *When a person requests a lawyer, the police must cease questioning him.*

If, during questioning, an accused person requests counsel, "the interrogation must cease until an attorney is present." *Miranda***Error! Bookmark not defined.**, 384 U.S. at 474. So long as the accused has made "some statement that can reasonably be construed to be an expression of a desire for the assistance of an attorney," questioning must end. *Davis v. United States*, 512 U.S. 452, 459, 114 S.Ct. 2350, 129 L.Ed.2d 362 (1994). Law enforcement officers may not resume interrogation until counsel has been made available. *Edwards v. Arizona*, 451 U.S. 477, 484-85, 101 S.Ct. 1880, 1885, 68 L.Ed.2d 378 (1981). This is a "rigid rule" protecting an "undisputed right." *Id.* at 485.

To invoke the right to counsel during custodial questioning, the suspect's request must be unequivocal. *State v. Nysta*, 168 Wn. App. 30, 41, 275 P.3d 1162, 1168 (2012), *rev. denied*, 177 Wn.2d 1008 (2013) (quoting *Davis,* 512 U.S. at 459). An unequivocal request means "the suspect 'must articulate his desire to have counsel present

sufficiently clearly that a reasonable police officer in the circumstances would understand the statement to be a request for an attorney.'" *Id.*

In *Nysta*, the defendant said he wanted an attorney but this request arose in the context of a discussion about whether he would agree to take a polygraph. *Id.* at 39. The prosecution claimed the request was equivocal because he couched it as a request for counsel only for the purpose of deciding whether to take a polygraph. *Id.* at 41-42. But the Court of Appeals refused to consider this request equivocal. *Id.* at 42.

When the detective said he would set up a polygraph if the defendant wanted to take it, Mr. Nysta said, "I gotta talk to my lawyer someone." *Id.* at 39. The detective said, "Okay," and Mr. Nysta said, "man if it is cool which [sic] you then I take it." *Id.* The detective said, "fair enough," and told Mr. Nysta to give him a call or have his attorney call him to set up the polygraph if he decided to take it. *Id.* But the defendant continued talking about the allegations sua sponte and the detective resumed questioning him. *Id.*

Nysta explained, "all questioning must cease" when the request for counsel is not ambiguous. *Id.* at 42. "If the interrogator does continue, the suspect's post request responses 'may not be used to cast

retrospective doubt on the clarity of the initial request itself.'" *Id.* (quoting *Smith v. Illinois*, 469 U.S. 91, 98, 105 S.Ct. 490, 83 L.Ed.2d 488 (1984)). In *Nysta*, the fact that he continued to answer questions and agreed his statements were voluntary did not render equivocal his statement that he needed to "talk to my lawyer." *Id.*

ii. *Mr. Wolter requested a lawyer in clear language.*

Like *Nysta*, Mr. Wolter plainly requested a lawyer. But after the police continued questioning him, Mr. Wolter agreed to answer questions as long as he received a lawyer before his clothes and blood were seized. 3RP 379-81. These later statements cannot cast retrospective doubt on Mr. Wolter's initial request. Because Mr. Wolter's request for counsel was not hedged by words like "maybe" or "perhaps," his invocation of his right to access an attorney was impermissibly ignored. *Nysta*, 168 Wn. App. at 41-42.

After speaking to police detectives voluntarily for some time, the detectives began pressing Mr. Wolter to prove whether the blood on his clothes and body was canine or human. 3RP 378. Detective Ringo told Mr. Wolter "we're going to collect your clothing, and we're going to do some swabbing [for] . . . samples of blood on your hands and stuff." 3RP 377. The detective assured Mr. Wolter that once they

confirm the blood is from a dog, "then we're done." *Id.* Mr. Wolter responded that they would need a warrant and told the police "you're going way over the line here." 3RP 378-79. Detective Ringo said, "I appreciate your honesty." 3RP 379.

Then Mr. Wolter said, "But I think something like that, I'd like to have an attorney present for that." *Id.*

After Mr. Wolter said he wanted "an attorney present," Sergeant Creager cut off Mr. Wolter from his further remarks and said,

> Can I - - can I - - for one - - this - - this – *just before you go on with this*, okay? Is that you – you've given us a very logical explanation of what has been going on here today. And, if it wasn't for like some recent events in your life, but, you know, but we've got the YWCA is going to be asking us questions, you know, there's all people that - - that second guess our work, and so we just have to cover all the bases here. So, if there's for example, if - - if, you know, that's a pretty good chunk of blood, and if you told me, "I got into a bar fight tonight in Portland, and I broke some guy's nose."

3RP 379-80 (emphasis added). Sergeant Creager continued with a hypothetical about how blood could come from a broken nose, or a poached elk, and explained how the crime lab would test Mr. Wolter's sweatshirt, "just to make sure your story is - - is - - this is your chance to tell the story." 3RP 380-81.

Mr. Wolter responded that, "I have" been telling you my story, to which Sergeant Creager said, "if it turns around, and it's like, 'Hey, - -." Mr. Wolter interjected and said, "the problem I have with that is, *I think I need a lawyer present for anything like that.*" 3RP 381 (emphasis added).

Sergeant Creager said, "So . . . for my benefit for - -." 3RP 381. Mr. Wolter tried to explain that "taking my property and swabbing it, is - - is not going to happen - -." *Id.* Detective Ringo interjected and reframed Mr. Wolter's statement. *Id.* Detective Ringo said, "So, for clarification, you're saying that when we get to this point of dealing with your clothing, that's where you need your attorney present with you." *Id.* Mr. Wolter agreed that he would answer their questions "but, that is, you know, it's like your attorney tells you, you know, you can't be doing that." 3RP 382.

Then Detective Ringo said to Mr. Wolter, "let me be just point blank. Is Kori dead and did you kill her?" 3RP 382. Both detectives began pressing Mr. Wolter about Ms. Fredrickson and her son Kyle more directly than they had previously. 3RP 382-406. After significant further questioning about Ms. Fredrickson and her son, Sergeant

Creager asked Mr. Wolter to declare whether he was a lying criminal or con, and Mr. Wolter said, "Can I see a lawyer." 3RP 406.

At this time, the detectives stopped questioning Mr. Wolter. 3RP 406. However, as Detective Ringer said he would turn off the recording, Sergeant Creager said he needed to tell Mr. Wolter that they "found Kori." *Id.* When Mr. Wolter expressed surprise and asked about her son Kyle, Sergeant Creager said, "Don't insult me. Don't play that game. . . . We'll be happy to provide you with a business card . . . and get you a lawyer and (inaudible) if you want to tell the truth outside the courtroom." 3RP 407. The sergeant said they would "get that warrant because we can't have you destroying the evidence of Kori that's all over you." 3RP 407. The recording ended after these remarks from Sergeant Creager to Mr. Wolter. *Id.*

iii. *The request for counsel was not honored by the police, contrary to the court's ambiguous and incomplete finding.*

The court found that once Mr. Wolter "raised the need for a lawyer, the officer appropriately clarified with him that he was not asking to stop the questioning, or asking to have an attorney present at that time, but rather sometime in the future." CP 232 (Conclusion of Law 5); CP 231 (Finding of Fact 9).

Contrary to the court's finding, no "clarification" directly followed Mr. Wolter's request for an attorney. 3RP 379-81. Instead, the detective interrupted Mr. Wolter as he was explaining his request for an attorney, saying, "before you go on with this." 3RP 379-80. Then the detective gave a lengthy explanation of why it was important that Mr. Wolter used this chance to tell his story, without counsel. 3RP 379-81. Rather than clarify, the detectives responded by ignoring Mr. Wolter's request for counsel and pressing him to explain how he got covered in blood. After Sergeant Creager's lengthy interruption, in which he made no mention of Mr. Wolter's desire for an attorney, then Detective Ringo told Mr. Wolter "for clarification" they assumed he was only asking for a lawyer "when we get to the point of dealing with your clothes." 3RP 381. Mr. Wolter agreed with the retrospective clarification as framed by Detective Ringo but only after the police interrupted Mr. Wolter as he asserted his right to counsel, told him of the importance of making sure his story was heard, and said "this was his chance" to do so. 3RP 381-82.

Nysta explains that the detectives impermissibly responded to Mr. Wolter's request for an attorney by ignoring and then limiting the request. When a person uses clear words to say "I'd like to have an

attorney for that," the police are not free to interrupt and tell the accused that "this is your chance to tell your story."

In its oral ruling, the court said there was "no need to resolve" when Mr. Wolter requested a lawyer because "it [d]idn't strike me that" much more was said. 3RP 453-54. In its written finding, the court similarly said only "a few more minutes of conversation" occurred after Mr. Wolter first requested counsel. CP 231 (Finding of Fact 9). But in fact, the post-request conversation lasted longer than the pre-request questioning. As transcribed, the recorded interview starts with *Miranda* warnings at 3RP 334; Mr. Wolter said he wanted an attorney at 3RP 379 (45 pages later); and his final request for an attorney that ended the questioning occurred at 3RP 459 (80 pages after his first request for counsel). The court incorrectly minimized the 80 pages of interrogation following Mr. Wolter's request for counsel as merely "a few more minutes" until the interview ended. CP 231.

The court also misapprehended the nature of the conversation after Mr. Wolter said he needed "an attorney present." 3RP 453-54; CP 231. The prior questioning had been generally sympathetic and friendly in tone, but after Mr. Wolter asked for counsel, the detectives made plain their disbelief of Mr. Wolter's explanation and directly questioned

him about killing Ms. Fredricksen. They pressed Mr. Wolter to explain his changed story about speaking to Ms. Fredicksen that evening, as opposed to the evening before. 3RP 382. They asked him if he "dumped her half-naked body," told him he needed to "explain to the world" what he had been doing and he could not "make this go away." 3RP 391. They said he would need to explain to eight-year old Kyle what happened to his mother. 3RP 392. They insisted they would be able to prove his story was not true. 3RP 396-97. They accused him of being "covered in human blood" and "very shortly" they would know "it's Kori's blood." 3RP 398. More than half of the interrogation occurred after Mr. Wolter asked for an attorney and the resulting discussion was not insignificant, as the court suggested. It constituted powerful incriminating evidence documenting Mr. Wolter's reaction to the accusations of the police and should have been suppressed because it followed Mr. Wolter's unequivocal statement that he wanted a lawyer. 3RP 453-54.

c. *The violations of Mr. Wolter's rights to counsel and to remain silent affected the outcome of the case.*

Admitting an accused person's statements that were obtained without constitutionally required warnings or in violation of a request

for counsel are "presumed to be prejudicial." *Nysta*, 168 Wn.App. at 42. The prosecution must prove the error is harmless beyond a reasonable doubt. *Id.*

Mr. Wolter's statements to the police were a central part of the prosecution's case. The recorded interview was so important to the prosecution that they played it in its entirety during closing argument. 15B RP 4072 ("This thing [the videotape] is crucial. . . . I'm going to play the whole thing again.").[3] His pre-arrest statements to police were similarly central to the State's efforts to show Mr. Wolter's intentional, premeditated acts and to debunk the experts who testified about Mr. Wolter's cognitive limitations and inability to premeditate. *See, e.g.*, 15B RP 4067-69 (closing argument describing Mr. Wolter as "calm, cool, and collected and calculating in his manipulation" of the officers when questioned at roadside). Officer Hausinger was the first witness called to testify in the multi-week trial. 7B RP 1301. The questions that various police officers asked Mr. Wolter before his arrest formed the prosecution's introduction to the case. 7B RP1308-24, 1346-49; 8A 1365, 1380, 1391-94. Substantial portions of this recorded interview

and Mr. Wolter's on-the-scene explanation to the police should not have been admitted in the State's case.

Mr. Wolter's mental state at and near the time of the incident was the focus of the multi-week trial. 15B RP 4048. The prosecution claimed that the best evidence of how his "brain works" at the time of the incident were his responses to police-initiated questions when he was held by the side of the road for almost one hour. *See* 15B RP 4052, 4066-67. His ability to "stop and be cool" for the police, and be "spot on" with the story he concocted, show his deliberative efforts and awareness of his circumstances. 15B RP 4067-70. The prosecutor described the entire recorded interview between Mr. Wolter and the detectives as "an absolutely crucial piece of evidence in this case." 15B RP 4072.

Because the prosecution concedes that the videotaped interview was an "absolutely crucial piece of evidence" and a significant part of it should not have been admitted once Mr. Wolter asked for an attorney, its admission was not harmless beyond a reasonable doubt. The prosecution replayed the entire videotape, lasting over one hour long,

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[3] Although the parties agreed to redact some portions of the conversation that were not admissible under the Rules of Evidence, the minimal redactions

because it wanted to be sure the entirety of Mr. Wolter's statements were fresh in the jurors's minds as they deliberated. 15B RP 4074. The violations of Mr. Wolter's rights to remain silent and have counsel when requested during custodial interrogation were not harmless and therefore they require reversal and remand for a new trial.

3. **The prosecution did not prove the aggravating factor that the victim was a witness in a court proceeding with official duties which is required impose a sentence of life without the possibility of parole**

a. *The prosecution did not prove the essential elements of the aggravator involving preventing an official witness from testifying.*

The State "aggravated" Mr. Wolter's sentence by imposing a mandatory term of life without the possibility of parole predicated on the aggravating factor that the victim was a witness in an adjudicative proceeding and her death was related to her exercise of official duties. CP 326. 378, 385.[4] Yet the prosecution did not prove each element of this aggravating factor. Consequently, this aggravating factor must be stricken.

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focused on statements by the detectives, not Mr. Wolter. 4RP 492, 626-32.

[4] The jury also found a second aggravating factor that a no-contact order had been issued at the time of the victim's death. CP 334.

The State is required to prove each element of the crime charged beyond a reasonable doubt. *In re Winship*, 397 U.S. 358, 364, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970); U.S. Const. amends. 5; 14; Wash. Const. art. I, § 3, 22. It does not meet this burden by asking the court to justify a conviction by "mere surmise or arbitrary assumption." *State v. Vasquez*, 178 Wn.2d 1, 16, 309 P.3d 318, 325 (2013) (quoting *Bailey v. Alabama,* 219 U.S. 219, 31 S.Ct. 145, 55 L.Ed. 191 (1911)).

This burden of proof extends to aggravating factors because they are also elements of the offense. *State v. Allen*, 159 Wn.2d 1, 9, 147 P.3d 581 (2006); *see Allyene v. United States*, _ U.S. _, 133 S. Ct. 2151, 2160, 186 L. Ed.2d 314 (2013); *Ring v. Arizona*, 536 U.S. 584, 609, 122 S.Ct. 2428, 153 L.Ed.2d 738 (2002). "[A] fact increasing either end of the range produces a new penalty and constitutes an ingredient of the offense" that must be proved beyond a reasonable doubt. *Allyene**Error! Bookmark not defined.***, 133 S. Ct. at 2160. A jury finding at least one of the aggravating factors turns the offense into aggravated first degree murder, which is punishable only by life imprisonment *without* the possibility of parole or death. RCW 10.95.030(1), (2); *see* RCW 9A.20.021(1); RCW 9A.32.030 (2). The aggravating factor elevates the punishment and is the functional

equivalent of an element of aggravated first degree murder. *Thomas,* 150 Wn.2d at 848.

The automatic, discretionless imposition of the most serious sentence permissible short of the death penalty stems from an aggravating factor in a first degree murder prosecution requires rigorous application and narrow construction of the statutory aggravating factors that mandate such a sentence. *See State v. Cross*, 156 Wn.2d 580, 594, 132 P.3d 80 (2006); *State v. Thomas*, 150 Wn.2d 821, 848-49, 83 P.3d 970 (2004) (refusing to apply harmless error to erroneous jury instruction pertaining to aggravating circumstance for first degree murder). The two aggravating circumstances used in the case at bar were not proven to a unanimous jury and must be reversed.

b. *The court did not instruct the jury that it must find the person was a witness in an adjudicative proceeding as required by RCW 10.95.020.*

As charged in the case at bar, RCW 10.95.020 states that:

> A person is guilty of aggravated first degree murder, a class A felony, if he or she commits first degree murder as defined by RCW 9A.32.030(1)(a), . . . and the following aggravating circumstance[ ] exist[s]:
>
> (8) The victim was:
> (a) A . . . prospective, current, or former witness in an adjudicative proceeding; . . . and

> (b) The murder was related to the exercise of official duties performed or to be performed by the victim.

CP 326.

However, the jury instruction explaining what the State needed to prove omitted an essential portion of the required element. CP 374. It did not require the State to prove that the victim was a witness in "an adjudicative proceeding." RCW 10.95.020(8); CP 374. The court instructed the jury to answer the special verdict form "yes" if it found that the prosecution proved:

> Whether Kori Fredricksen was a prospective witness or current witness and the murder was related to the exercise of official duties performed or to be performed by Kori Fredricksen.

CP 374.

Penal statutes are construed strictly. *State v. Johnson*, 119 Wn.2d 167, 172, 829 P.2d 1082 (1992). No word may be presumed to be superfluous, and courts "may not delete language from an unambiguous statute." *State v. Roggenkamp*, 153 Wn.2d 614, 624, 106 P.3d 196 (2005); *State v. J.P.*, 149 Wn.2d 444, 450, 69 P.3d 318 (2003) ("Statutes must be interpreted and construed so that all the language used is given effect, with no portion rendered meaningless or superfluous." (internal citations omitted)).

A juror could find a person was a witness in the broad sense of having seen something happen but not a witness in the narrow, legal sense of having a legal obligation to appear at a formal judicial hearing. *See, e.g.*, RCW 34.05.010(1) (defining "adjudicative proceeding" in administrative law as "a proceeding before an agency in which an opportunity for hearing before that agency is required by statute or constitutional right before or after the entry of an order by the agency."). Whether Ms. Fredricksen was a prospective or current witness in "an adjudicative proceeding" was an essential element of this aggravating circumstance. RCW 10.95.020(8). Because the instruction, and not the verdict form, dictates what the jury is asked to find, the jury did not find that the State proved all essential elements of this aggravating factor. *Williams-Walker*, 167 Wn.2d at 898-99.

c. *The prosecution did not prove the witness had official duties in an adjudicative proceeding.*

This aggravating circumstance is further undermined by the State's failure to present sufficient evidence of the second essential element that the death occurred in the course of the witness's "official duties." The trial court faulted the prosecution for failing to establish that Ms. Fredricksen had "official duties" as a witness and came close

to dismissing this aggravating factor at the end of the State's case-in-chief. 11B RP 2494-2507. The court said it had "grave concerns" about whether the evidence supported it without evidence of the witness having "official duties." 15B RP 4017. But after finding a dearth of case law addressing what the State was required to prove to establish that the murder occurred in relation to a witness's "official duties," it decided to present the aggravator to the jury. 15B RP 4018-19.

The court correctly reasoned that the statute requires the State to establish the person was not only a witness in an adjudicative proceeding, but that her death was related to her "official duties" as a witness. *See* 11B RP 2497. This explicit requirement of the aggravating circumstance must be given its plain meaning, not read as superfluous or duplicative. *See Roggenkamp*, 153 Wn.2d at 624.

An official duty to be a witness arises when a person is subpoenaed to appear or otherwise formally required to participate in the proceedings. *See* CrR 4.8 (describing process of issuing subpoena and requirement to obey or risk contempt of court); CR 45 (same). A witness's official duty is plain when the person has already testified, such as in *State v. Campbell*, 103 Wn.2d 1, 13, 691 P.2d 929 (1984). There are no cases finding this aggravating factor when the witness has

not testified nor been subpoenaed to do so. *See State v. Mason*, 160 Wn.2d 910, 925 n.4, 162 P.3d 396, 404 (2007) (jury rejected allegation that decedent's death was related to official duties where victim was also complaining witness in pending prosecution from an earlier incident).

Although the use of similar language in other statutes may shed light on the statutory requirements, the elements of the aggravating circumstance must be strictly and narrowly construed, with any ambiguity viewed in the light most favorable to the accused. *See State v. Sutherby*, 165 Wn.2d 870, 878-79, 204 P.3d 916 (2009).

In the context of whether a police officer is acting as part of his official duty, the court has held that an officer is "duty bound in law and oath to uphold and enforce the law, [which] persists throughout all stages of a criminal proceeding until final adjudication thereof in the courts." *State v. Austin*, 65 Wn.2d 916, 924, 400 P.2d 603, 608 (1965). In a third degree assault case, official duties of a police officer require "good faith performance of job-related duties." *State v. Mierz*, 127 Wn.2d 460, 479, 901 P.2d 286 (1995). A prosecutor acts in his official capacity when prosecuting a criminal offense as part of his employment. *State v. Chance*, 105 Wn.App. 291, 298, 19 P.3d 490

(2001) (comparing stalking of prosecutor to "retaliation against a member of the criminal justice system" which justifies an exceptional sentence). While a witness with official duties would not be an employee like a police officer, official duties arise upon having been subpoenaed, not just having been the victim of an alleged crime.

There was no evidence that Ms. Fredricksen had been subpoenaed as a witness. She did not have a public duty to serve as a witness. She had no official duties related to the case. If the Legislature had intended this aggravating factor to apply to any prospective witness in an adjudicative proceeding, it would not have included the separate requirement that the killing have occurred in relation to the witness's "official duty" as a witness. RCW 10.95.020(8).

The police arrested Mr. Wolter without having spoken to Ms. Fredricksen. 8B RP 1595. She left the scene after arguing with Mr. Wolter. Neighbors called the police, not Ms. Fredricksen; she did not seek help. 8B RP 1568-69, 1581, 1613. After Mr. Wolter was arrested, Ms. Fredricksen returned at the behest of the police to talk to them. 8B RP 1595. Her statement to the police was not elicited at trial. *See* 8B RP 1571. While Ms. Fredrickson could have testified at a later trial, the case could have been prosecuted even without her testimony or

cooperation, just as Mr. Wolter was arrested before Ms. Fredricksen had even spoken to the police. The State did not prove Ms. Fredrickson's death was related to her official duties as a witness, which is essential to establishing this aggravating factor.

d. *The instructional error and lack of proof of an essential element undermine this aggravating factor.*

Jurors are lay people who are not expected to construe statutes, therefore the instructions themselves must adequately convey the law. *State v. Kyllo*, 166 Wn.2d 856, 864, 215 P.3d 177 (2009). Due process compels accurate and complete jury instructions just as it requires the prosecution to prove the essential elements of a charged offense without relying on mere surmise or assumption. *See Vasquez*, 178 Wn.2d at 16. Here, the court omitted an essential element from the jury instruction defining the aggravating factor, failing to inform the jury that the person must have been a witness in an adjudicative proceeding. Furthermore, the State failed to prove that Ms. Fredricksen had official duties as a witness. The State's failure to prove the essential elements requires reversal of the aggravating circumstance.

F. CONCLUSION.

Mr. Wolter's conviction for aggravated first degree murder should be reversed and a new trial ordered.

DATED this 10th day of March 2014.

Respectfully submitted,

NANCY P. COLLINS (WSBA 28806)
Washington Appellate Project (91052)
Attorneys for Appellant

APPENDIX A

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Scott G. Weber, Clerk, Clark Co.

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF CLARK

STATE OF WASHINGTON, Plaintiff, v. DENNIS LEE WOLTER, Defendant.	No. 11-1-00862-2 FINDINGS OF FACT AND CONCLUSIONS OF LAW RE: CrR 3.5 HEARING

This matter came on regularly before Judge Robert Lewis on December 14, 2012 and January 4, 2013 for the purpose of a hearing to determine, pursuant to CrR 3.5, whether the statements of the accused, Dennis Wolter, were admissible. The State of Washington was represented by and through Prosecuting Attorney Anthony F. Golik. The defendant was present and represented by and through his attorney, Therese Lavallee. The court heard the testimony of the ~~parties~~ witnesses and reviewed cases provided by counsel.

The court has considered the records and files herein, the testimony and the exhibits presented at the December 14 and January 4th hearings, and the arguments of the parties. The court is fully advised. Based upon review and consideration, the court makes the following:

FINDINGS OF FACT

1. May 26, 2011 around 12:15-12:20 am Officer Stephan Hausinger of Camas PD, near Camas, WA observed a vehicle that eventually entered the city limits, and was travelling 51 in a 40 mph zone. Officer Hausinger stopped the vehicle to talk to driver regarding

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the speeding infraction. When Officer Hausinger contacted the defendant, identified as Dennis Wolter, he asked for his driver's license, registration and insurance and provided the defendant with the basis for stop. The defendant cooperated providing his information. During the contact, Officer Hausinger noted the defendant had a noticeable amount of blood on his face, hands and clothing. Officer Hausinger asked Mr. Wolter, concerned Mr. Wolter may be injured and/or bleeding, what happened to cause the blood and if Mr. Wolter was okay. Mr. Wolter provided the explanation that his dog had been hit by a vehicle and he had been working with the dog and a veterinarian clinic and that the dog had died, and that was the source of the blood.

2. During the course of the investigation, Officer Hausinger noted a fair amount of blood in the back of the truck and on the fender. Officer Hausinger was concerned about the explanation given by Mr. Wolter, although he indicated he believed it was a plausible explanation.
3. In speaking with Mr. Wolter, Officer Hausinger noted that there was a slight odor of intoxicants on the defendant's breath and his eyes were bloodshot. He asked Mr. Wolter to perform some field sobriety tests based on that information. Mr. Wolter agreed. The HGN test showed no signs of intoxication, but the defendant had some balance problems on some other tests that were performed and Mr. Wolter was found to have .065 blood alcohol level on a portable breath test.
4. A driver's check revealed Mr. Wolter had a clear local record but he had a possible hit on a felony warrant which Officer Hausinger initially thought was out of South Carolina. Hausinger asked dispatch to confirm, and in the meantime other officers had arrived on the scene.
5. While at the scene, attempting to verify if there was a warrant from another state, and whether Mr. Wolter was the person involved, and while investigating the DUI, the officers attempted to verify Mr. Wolter's explanation for all the blood. They asked Wolter to provide someone to corroborate the story about the blood. Mr. Wolter indicated he had a receipt in the vehicle from the vet clinic. He was provided with Ferrier warnings and asked for permission to search the car. He was told he did not need to grant the

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permission and that he could stop or limit the search at any time. He agreed to allow the search. Officers could not find a receipt, but found a copy of a No Contact Order between Dennis Wolter and Kori Frederickson. When asked about that, Mr. Wolter indicated he had been arrested a week prior and that the matter had been resolved that day when she recanted.

Officers then attempted to get more information about the dog story. Defendant mentioned Richard Gardner was a witness to the accident, but couldn't provide contact information for him. He described where Mr. Gardner lived and worked so that they could contact him. At this point, officers were involved in three parallel investigations. Officers were attempting to verify statements about the blood, completing a DUI investigation and attempting to determine the status of an out of state warrant. They determined that there was a warrant, first thought to be from South Carolina, but Mr. Wolter indicated he had never been to South Carolina. The Officers were attempting to verify if the warrant was in fact for Mr. Wolter. It was later determined that the warrant was out of the state of Wisconsin, where Mr. Wolter had been. There were identifying marks Mr. Wolter had that matched the person sought in the warrant from Wisconsin.

6. Three separate investigations were going and during that time the officers were talking with Mr. Wolter and receiving information similar to the initial explanation about the blood. They didn't advise him of his Constitutional rights at that time. Or prior to this stage.

7. Approximately 40 to 45 minutes into the stop they verified the warrant, and confirmed he was the person in the warrant, arrested him on the warrant, and advised him on the scene of his Constitutional rights. He indicated at the scene that he understood his Constitutional rights. Mr. Wolter waived his Constitutional Rights and agreed to speak to officers. He continued to speak to the officers and made additional statements at the scene. and answer questions

8. Mr. Wolter was then taken to Camas Police Department and placed in an interview room. Prior to being placed in the interview room, the defendant made spontaneous statements to Officer Brie Brock. The statements to Officer Brock were not in response to any questions by Officer Brock. In his statement to Officer Brock, the defendant

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again gave the information about a dog dying as the cause for the blood on Wolter. Mr. Wolter was eventually interrogated by Officers Creager & Ringo. The interview room was equipped with recording equipment. Prior to speaking with the officers in the interview room, Det. Ringo advised Mr. Wolter of his rights again. He said he understood them and agreed to speak with them. He also agreed to have a recording made. He made statements at the time, mostly saying the same thing that he said out at the scene.

9. During the recorded interview, Detective Ringo talked to Mr. Wolter about the need to take blood samples and take his clothes to process them for a possible crime scene investigation. In response, Mr. Wolter said if the detectives wanted to take samples, they would need a warrant and would want to have an attorney present while the detectives took samples. After that statement, Detective Ringo clarified that Mr. Wolter was saying he would want an attorney in the event samples were taken and Mr. Wolter, in response to Det. Ringo's statements, indicated that he was still willing to speak to the officers without an attorney present; that he only wanted an attorney in the event that they were going to the formal process of obtaining a warrant and seizing samples from him or his clothes. With that clarification, there were a few more minutes of conversation between the officers and Mr. Wolter and at that point he invoked his right to counsel and the questioning ceased.

10. As to all the statements Mr. Wolter made, there are no disputed facts.

CONCLUSIONS OF LAW

On the basis of the foregoing findings of fact and the record and file herein, the Court makes the following conclusions of law:

1. All of the statements that Mr. Wolter made were voluntary in the sense that he was competent on that date, clear that he was tracking what was going on, understood what was being asked of him and responded with responses that were appropriate. He did not appear to be impaired by alcohol, drugs or fatigue to the point where he could not understand what was going on. There is no evidence that he was tricked or coerced or

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deceived into making any of the statements that he made. All of his statements to law enforcement on May 26, 2011 were voluntary.

2. The first statements that he made were the statements in response to Officer Hausinger's questions about whether or not he was alright and what happened to cause him to have blood on his body. Those questions were appropriate community caretaking questions. Any officer faced with a person who appeared to have been injured or bleeding would ask them if they were alright and what had happened to cause them to be covered with blood. The court would not expect them to give Constitutional rights at this point in the contact with Mr. Wolter. The community caretaking function allows them to make that sort of inquiry.
3. The second set of questions, at the scene, prior to the advisement of Miranda rights, was also appropriate because they were questions that were being asked in the course of a Terry investigation. The officers did not have probable cause believe at ~~the~~ that point that Mr. Wolter had engaged in illegal activity because they had no evidence that a crime had, in fact, occurred. Mr. Wolter provided them with an explanation which, although suspicious, it was plausible and they were taking steps to try and confirm or deny the explanation. They were engaged in an investigatory detention of Mr. Wolter to determine whether his explanation could be confirmed. In this case, there is no evidence of the officers attempting to evade Miranda, while already having probable cause, unlike the cases cited by defense at this hearing. All the defendant's statements to officers at the scene of the traffic stop are admissible.
4. Once they formally arrested Mr. Wolter for the warrant, they advised him properly of his Miranda rights both at the scene and at the Camas Police Department. He understood his rights and voluntarily spoke to the officers and provided the same information he had been providing.
5. Once he raised the need for a lawyer, the officer appropriately clarified with him that he was not asking to stop the questioning, or asking to have an attorney present at that time, but rather sometime in the future.
6. When he finally affirmatively requested an attorney they stopped questioning.

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7. All statements to Brie Brock Bieber were spontaneous and in any event were post Miranda.
8. His written statement was post Miranda and voluntary and is admissible.
9. All statements made by Mr. Wolter to law enforcement in this mater prior to the time when he affirmatively requested counsel and officers terminated the interrogation of Mr. Wolter were made voluntarily and are admissible, for purpose of CrR 3.5 and unless otherwise found inadmissible by order of the court.

ORDER

Pursuant to CrR 3.5, the defendant's statements on May 26, 2011, are admissible as substantive evidence in the prosecution's case.

DONE IN OPEN COURT this 15 day of February, 2013.

SUPERIOR COURT JUDGE

Presented by:

Anthony F. Golik WSBA #25172
Prosecuting Attorney,

Copy received, ~~notice of presentation waived~~ and approved for entry by:

Therese Lavallee, WSBA # 16350
Attorney for Defendant

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IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION TWO

STATE OF WASHINGTON,	)	
	)	
Respondent,	)	
	)	NO. 45041-1-II
v.	)	
	)	
DENNIS WOLTER,	)	
	)	
Appellant.	)	

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