NO. 319407-III

COURT OF APPEALS, DIVISION III
OF THE STATE OF WASHINGTON

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THE STATE OF WASHINGTON, Respondent

v.

GRANT WAYNE SCANTLING, Appellant

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APPEAL FROM THE SUPERIOR COURT
FOR BENTON COUNTY

NO. 13-1-00336-1

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# BRIEF OF RESPONDENT

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## II. STATEMENT OF FACTS

On March 22, 2013, the defendant went to Anne Marie Krebs's home located at 520 E. 8th Place, Kennewick, Washington. (RP 09/09/2013 at 231-33). The defendant threw a cinder block through the sliding glass door of Ms. Krebs's bedroom where she was sleeping with

her three children. (RP 09/09/2013 at 231-32). He entered through the residence's broken sliding glass door and then held a firearm to Ms. Krebs's head. (RP 09/09/2013 at 232-33). He closed his free hand around her neck. (RP 09/09/2013 at 233). Both the muzzle of the firearm and his hand were pressed with enough force to leave prominent red marks on her forehead and neck. (RP 09/09/2013 at 234). The defendant told Ms. Krebs, "You're not going to take my kids. This wouldn't have happened if you would have let me see my kids." (RP 09/09/2013 at 133).

Franklin Palmer and Michael Billado, who were also residing in the residence at this time, heard a commotion coming from Ms. Krebs's bedroom and went to see what was going on. (RP 09/09/2013 at 132). While the two were walking down the hallway toward the bedroom, the defendant fired the handgun he was carrying at them, striking Mr. Palmer. (RP 09/09/2013 at 134). Mr. Billado fled the residence while the defendant approached Mr. Palmer and fired two more rounds at close range, which ultimately caused the death of Mr. Palmer. (RP 09/09/2013 at 85-93, 135). Ms. Krebs watched the defendant shoot Mr. Palmer. (RP 09/09/2013 at 235). Ms. Krebs followed the defendant out of her bedroom and into the living room. (RP 09/09/2013 at 241). The defendant slammed Ms. Krebs into the wall, knocking the flat screen television down. *Id.* The defendant then put the gun against his head. *Id.* The

defendant told Ms. Krebs that he had two bullets left, one for her and one for him. *Id.* The defendant then left the residence and Ms. Krebs called 911. (RP 09/09/2013 at 241-42).

Mr. Billado had remained in the area after fleeing the residence. (RP 09/09/2013 at 138). He observed the defendant driving away from the residence. *Id.* The defendant fired another round from his handgun and yelled, "That's what happens when you fuck with someone's wife." (RP 09/09/2013 at 139). The defendant returned to Spokane where he was arrested by the Spokane Police Department. (RP 09/06/2013 at 362).

After the defendant's arrest, police searched the Spokane residence in which the defendant was residing, pursuant to a search warrant. (CP 28). They found several letters and notes written by the defendant. (RP 08/28/2013 at 37). These letters and notes contained numerous violent threats toward Ms. Krebs, including: "3-19-13 She pulled the curtains so I couldn't even see them. They didn't see me. What did she tell them? Michael saw me. Not my babies. What a cunt!!!!! You bitch I'm gonna kill you for <u>that</u>"; "The Demon is loose"; "If I fail, Ann will never learn that you can't treat me that way, and get away with it. And she will go about her way full of pride, saying 'serves him right' lose NO, Not This Time Bitch Options: 1. Off Myself 2. Set things right I choose #2 RUN Rabbit Run"; "She could have prevented this day by letting me hug my

children"; "A cunt is as a cunt does. I apologize to everyone (but Ann) for the pain + heartache that this day is going to cause. I'm already gonna burn in hell. God have mercy on me." (Exhibit 20). The other letters and notes are similar in content. (Exhibits 20, 21). The defendant filed a motion to exclude the letters on the basis of an alleged violation of the Fourth Amendment. (RP 08/28/2013 at 34). This motion was denied. (RP 08/28/2013 at 51).

The defendant was interviewed by detectives with the Kennewick Police Department on March 22, 2013. (CP 177-95). During the interview, the defendant made numerous admissions. These admissions included blaming Mr. Palmer for the failure of his relationship with Ms. Krebs (CP 179); that in his view, Mr. Palmer had no business being in Ms. Krebs's household (CP 180); his anger with Ms. Krebs (CP 182); that he had assaulted Mr. Palmer based upon his relationship with Ms. Krebs (CP 185); and that he knew police officers were looking for him (CP 188). However, the defendant also indicated he wished to speak to a lawyer, though the specifics of his request were unclear to the officers, and attempts to clarify the request were made more difficult as the defendant continued to speak about his relationship with Ms. Krebs. (CP 179-82). In the end, through prompting, the officers determined that the defendant

was willing to speak about things other than the murder that morning. (CP 183).

The State and the defense reached an agreement based upon that arguably unequivocal invocation of the right to counsel. It was stipulated that the first four pages of the transcript of the interview, as well as the accompanying audio and videotape, were to be considered admissible, while the remainder of the interview was excluded from the trial. (RP 07/10/2013 at 8). No portions of the interview that were not admissible based upon that negotiated agreement were placed before the finder of fact.

Prior to the murder, the defendant had traveled from the residence where he was residing in Spokane, on March 19, 2013, to the residence of Ms. Ann Krebs. (RP 09/06/2013 at 288). Ann Krebs and the defendant had previously been in a romantic relationship for six years. (RP 09/09/2013 at 224). Ms. Krebs and the defendant have two children in common. *Id.* Ms. Krebs ended their relationship around Thanksgiving of 2012. (RP 09/09/2013 at 226). When the defendant arrived at the residence, Ms. Krebs refused him entry into the home and slammed the door. (RP 09/09/2013 at 243). Mr. Franklin Palmer was residing at the residence with Ms. Krebs and was present when this act occurred. (RP 09/09/2013 at 229).

During the trial, the State moved to admit the evidence of a prior assault of Mr. Palmer by the defendant. (RP 08/28/2013 at 70-71; RP 09/09/2013 at 156). The assault, and the events leading up to it, may be summarized thusly. In December of 2012, Ann Krebs and the defendant met at the defendant's parents' house in an attempt to reconcile. (RP 09/09/2013 at 250). During a discussion regarding reconciliation, Ms. Krebs disclosed to the defendant that shortly after she terminated their relationship in November, she had sexual relations with Franklin Palmer. *Id.* The defendant became enraged by this statement and told Ms. Krebs that he was going to "kick his butt." *Id.* The defendant then left Ms. Krebs at his parents' residence and went to Ms. Krebs's residence where Mr. Palmer was staying. (RP 09/09/2013 at 174). Once at the residence, the defendant assaulted Mr. Palmer by striking him with his fist. (RP 09/09/2013 at 176). This assault was witnessed by Michael Billado, who was also present in the residence. *Id.*

The State had three grounds under which it argued that that evidence was admissible. The first was that it was relevant to show motive: the defendant's animosity toward Mr. Palmer. (RP 09/09/2013 at 156). Second was that the defendant had "opened the door" to inquiring into the matter. *Id.* The defendant's cross-examination went into Mr. Billado's perception of events and attempted to paint this issue as

primarily a custody dispute. (RP 09/09/2013 at 145). The State argued that it was allowed to clarify this slanted perception and put in front of the jury the prior assault. (RP 09/09/2013 at 157). Finally, the State also indicated that the evidence was admissible to rebut the claim of self-defense. *Id.* The defendant indicates he did not argue self-defense. (App. Brief at 5). While the defendant did not ultimately request a self-defense instruction at the close of trial, at that point in time the defendant had filed paperwork regarding a self-defense argument and had not disavowed that argument. (RP 09/09/2013 at 170-173). Furthermore, the defense had actively argued for the admission of highly prejudicial evidence, Mr. Palmer's alleged use of amphetamines and methamphetamines, based upon that exact same self-defense argument. (RP 09/09/2013 at 63-64).

At trial, during the cross-examination of Ms. Krebs, the defendant's counsel highlighted specific periods of time and asked about the contents of text messages exchanged between Ms. Krebs and the defendant. (RP 09/09/2013 at 246). In doing so, they created the false impression that the defendant had not threatened Mr. Palmer. (RP 09/09/2013 at 248). The State requested permission to inquire into threats the defendant had made against Mr. Palmer in other mediums, specifically a face to face conversation, based upon the argument that the defendant

had "opened the door." *Id.* The court granted permission and the evidence was admitted. (RP 09/09/2013 at 249).

The defendant was found guilty of Aggravated Murder in the First Degree and Burglary in the First Degree. (CP 144-46). Cost and fees were imposed. (CP 150, 156).

## III. ARGUMENT

### 1. The trial court properly admitted the defendant's prior assault of Mr. Palmer under three independent bases.

#### A. The assault was admissible as evidence of intent and motive.

ER 404(b) states as follows:

> Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

"Before admitting ER 404(b) evidence, a trial court 'must (1) find by a preponderance of the evidence that the misconduct occurred, (2) identify the purpose for which the evidence is sought to be introduced, (3) determine whether the evidence is relevant to prove an element of the crime charged, and (4) weigh the probative value against the prejudicial effect.' " *State v. Foxhoven*, 161 Wn.2d 168, 175, 163 P.3d 786 (2007) (quoting *State v. Thang*, 145 Wn.2d 630, 642, 41 P.3d 1159 (2002)). The

defendant alleges that the trial court failed to conduct this analysis, stating that the trial court did not determine if the evidence is relevant to prove any element of the crime charged, nor did it weigh the probative value of the evidence against any prejudice. (App. Brief at 13). However, there is no evidence that such is the case. The court did not enter written findings of fact and conclusions of law in the matter, and no further request for such was made. Both the State and the defendant's briefing explicitly referenced the *Foxhoven* factors. (CP 39, 44). The court had all of that information before it when it chose to allow in the testimony. (RP 09/09/2013 at 169, 172). A review of the record shows that all four factors were met.

When it comes to the first fact, there is absolutely no doubt that the assault occurred. Mr. Billado testified to its existence, the defendant provided no information to challenge it, and the defendant had admitted to committing the assault in a previously given statement. (CP 185; RP 09/09/2013 at 161-63). The defendant claims that Mr. Billado did not testify as to a reason for the confrontation between Mr. Palmer and the defendant. (App. Brief at 13). The State disagrees. Mr. Billado testified the defendant said "You want to fuck with my wife" or "sleep with my wife," and ordered Mr. Palmer out of "his" house twice during the confrontation. (RP 09/09/2013 at 163). The defendant's cross-

examination focused on the fact that his previous deposition omitted that fact, but the fact that a defendant's testimony on the stand is more detailed than that in a deposition is not, inherently, a reason to distrust it. (RP 09/09/2013 at 165).

With regard to the second factor, the State sought to introduce the assault and the threats to prove the defendant's motive and intent in attacking Ms. Krebs and killing Mr. Palmer. (CP 40). Motive and intent are two of the expressly listed purposes which are not barred by the ER 404(b) exception. The evidence the State sought to introduce showed that the defendant was not just aware of Ms. Krebs's relationship with Mr. Palmer, but the degree to which that incensed the defendant, causing him to become violent, assaulting Mr. Palmer, and threatening the exact actions which he took in the instant case. *Id.* No other evidence could have given the finder of fact a clearer picture of the defendant's state of mind, and his motivations and intentions in entering Ms. Krebs's household, and shooting Mr. Palmer. "Motive, for purposes of the admissibility of evidence under ER 404(b), goes beyond gain and can demonstrate an impulse, desire, or any other moving power which causes an individual to act. Evidence of a hostile relationship between the defendant and the victim has been held admissible in murder trials to show motive." *State v. Baker*, 162 Wn. App. 468, 473-74, 259 P.3d 270 (2011).

Turning to the third factor, the evidence is probative to the elements of both of the crimes the defendant is charged with. With regard to the charge of Aggravated Murder in the First Degree, the State needed to show that the defendant not only acted with intent, but that he acted with premeditation. RCW 9A.32.030(1)(a). For the charge of Burglary in the First Degree, the State needed to show that the defendant entered Ms. Krebs's residence while armed with a firearm and intending to commit a crime therein. RCW 9A.52.020(1). The State in both charged acts needed to show not only what the defendant did, but his state of mind as he did it, and with regard to the murder charge, the acts leading up to it.

> "It is undoubtedly the rule that evidence of quarrels between the victim and the defendant preceding a crime, and evidence of threats by the defendant, are probative upon the question of the defendant's intent...." Evidence of previous disputes or quarrels between the accused and the deceased is generally admissible in murder cases, particularly where malice or premeditation is at issue. "Such evidence tends to show the relationship of the parties and their feelings one toward the other, and often bears directly upon the state of mind of the accused with consequent bearing upon the question of malice and premeditation."

*State v. Powell*, 126 Wn.2d 244, 261-62, 893 P.2d 615 (1995) (citations omitted).

The final factor is the demonstration that the probative value of the evidence sought to be admitted outweighs the prejudice. The courts have

held that this type of evidence is generally found to be highly probative with regard to the defendant's motive and intent, especially in cases like this, where premeditation is one of the elements the State must prove. At the point in time where the court made this ruling, the defendant continued to weigh defenses of general denial, or in the alternative, self-defense. (RP 09/09/2013 at 170). This puts at issue every element of the crime, and the evidence the State seeks to admit is the single best way to show the defendant's intentions when he left Spokane and drove to Kennewick with a loaded firearm in his vehicle. The probative value clearly outweighed any possible prejudice. The defendant argues that the failure to state the motive for the assault of Mr. Palmer dissipated all probative value. (App. Brief at 14). The State addressed the argument above, but it will note that even if Mr. Billado had not testified to the reason for the assault, the evidence would still be admissible. "Evidence of a hostile relationship between the defendant and the victim has been held admissible in murder trials to show motive." *Baker*, 162 Wn. App. at 474. Whatever the motive for the assaults, the fact that they occurred demonstrates that a hostile relationship existed, and as such, it is admissible.

### B. The assault was admissible as the defendant "opened the door" to it.

"Opening the door" is a rule of evidence sourcing from notions of fairness, equity, and the fundamental purposes of the court. *State v. Gallagher*, 112 Wn. App. 601, 610, 51 P.3d 100 (2002); *State v. Gefeller*, 76 Wn.2d 449, 455, 458 P.2d 17 (1969).

> It would be a curious rule of evidence which allowed one party to bring up a subject, drop it at a point where it might appear advantageous to him, and then bar the other party from all further inquiries about it. Rules of evidence are designed to aid in establishing the truth. To close the door after receiving only a part of the evidence not only leaves the matter suspended in air at a point markedly advantageous to the party who opened the door, but might well limit the proof to half-truths. Thus, it is a sound general rule that, when a party opens up a subject of inquiry on direct or cross-examination, he contemplates that the rules will permit cross-examination or redirect examination, as the case may be, within the scope of the examination in which the subject matter was first introduced.

*Gefeller*, 76 Wn.2d at 455.

In the instant case, the defendant specifically sought to introduce evidence that the defendant was angry at Ms. Krebs for electing to move to Detroit. He asked a question directly to that effect, giving rise to the inference that his only motive in coming to Ms. Krebs's home that morning was anger over the kids being taken away. (RP 09/09/2013 at 145). He raised the subject matter of the defendant's motive, and presented it in a manner that "left the matter suspended in air in a manner

advantageous to the party who opened the door." The State was thus entitled to present all the evidence on the subject matter of the defendant's motive for the burglary and murder, therefore. In this instance, this consisted of a prior assault, demonstrating the hostile relationship between Mr. Palmer and the defendant, the source of which was the defendant's belief that Mr. Palmer and Ms. Krebs were in a romantic relationship.

The best analogy is *State v. Gallagher*. 112 Wn. App. at 610. In that case, a defendant had successfully suppressed the discovery of methamphetamine in his home, in a case involving manufacture of methamphetamine. *Id.* at 606-07. However, the defendant attempted to paint a false picture at trial, using repeated questions to make it seem that there were no drug-related items found in the home. *Id.* The Court properly allowed the State to introduce the methamphetamine in order to rebut that false impression. *Id.* Similarly, in the instant case, the defendant attempted to create a false impression that there was no pre-existing animosity between Mr. Palmer and the defendant, and that the defendant's actions that day were centered around the removal of the kids. The State was entitled to introduce evidence giving a clearer picture of the nature of that hostile relationship, and make clear for the jury what the actual motivations behind the defendant's conduct were.

**2. The defendant "opened the door" to evidence of prior threats toward Mr. Palmer.**

The State discussed the "opened the door" rule above, and will not repeat itself. In the instant case, the defendant specifically elicited testimony about threats to Mr. Palmer. In fact, the defendant's attorney elected to emphasize this fact for the jury. "[N]one of the texts that he sent you were threatening Frank in any way?" (RP 09/09/2013 at 246). "None of them said, 'I'm going to kill Frank?' " *Id.* Based upon this line of questioning, the State requested to be able to introduce testimony of other threats made toward Mr. Palmer by the defendant. (RP 09/09/2013 at 247). The defendant claims that the scope of the defendant's question was specifically limited to those text messages, and thus that was all they "opened the door" to. (App. Brief at 17). In other words, all they "opened the door" to was further discussions about threats *in text messages*. However, *Gallagher* stands in direct opposition to that. 112 Wn. App. at 610. There, the defense elicited testimony only about objects that were not in the home. *Id.* If the doctrine was as limited as the defendant claims it was, *Gallagher* would have been fundamentally incorrect. There, as here, what was being sought to be introduced was not simply evidence to contradict what had been elicited, but additional testimony which would clarify the false impression the defendant deliberately creates. As *Berg*

says, "This is the long-recognized rule that when a party opens up a subject of inquiry, that party 'contemplates that the rules will permit cross-examination or redirect examination ... within the scope of the examination in which the subject matter was first introduced.' " *State v. Berg*, 147 Wn. App. 923, 939, 198 P.3d 529 (2008).

Here, the defendant sought specifically to create the impression that there were no prior threats to Mr. Palmer, and to give the jury a false impression about the nature of their relationship. He did so by specifically limiting his questioning to a point in time and manner where no threats had been made. Nevertheless, the subject of inquiry was the nature of Mr. Palmer and the defendant's relationship. That was the only relevance that line of questioning had. The defendant did not threaten any number of people in text messages. That alone isn't relevant, and as a result, it wasn't the subject matter the question was intending to reach. The relevance here was the light the defendant's lack of so-called threats shed upon the nature of his relationship with Mr. Palmer, and thus his state of mind when the defendant killed him. That was the subject of inquiry. The defendant sought to create a false impression, which the State clarified. It is accurate to state that the defendant did not threaten Mr. Palmer via text message. However, it is far more complete to state that, while he did not threaten Mr. Palmer via text message, he did do so in person.

### 3. It was not ineffective to fail to object to the admission of the letters.

The defendant claims that his attorney was ineffective for failing to object to the admission of the letters as irrelevant, or, in the alternative, more prejudicial then probative. (App. Brief at 18). From the outset, it is important to note that the defendant's entire argument is hinged on the letters as they relate to the murder of Mr. Palmer. However, the defendant was not simply on trial for the murder of Franklin Palmer. He was also on trial for the Burglary in the First Degree of Ann Marie Krebs's home. (CP 3). The evidence of the letters, informing the jury of the defendant's state of mind when he unlawfully entered Ms. Krebs's home, was directly relevant to that charge. "A person is guilty of burglary in the first degree if, with intent to commit a crime against a person or property therein, he or she enters or remains unlawfully in a building and if, in entering or while in the building or in immediate flight therefrom, the actor or another participant in the crime (a) is armed with a deadly weapon, or (b) assaults any person." RCW 9A.52.020(1)(a) and (b). The State had to prove that the defendant entered Ms. Krebs's home with the intent of committing a crime against someone inside, or some property inside. The defendant's writings give the jury the clearest possible view of the defendant's intent imaginable.

The letters were incredibly relevant to the crime of Burglary in the First Degree. As a result, they could not have been excluded from the trial. The defendant claims that the evidence portrayed the defendant as a violent person. (App. Brief at 21). The defendant had already been portrayed in that light. He had threatened to attack Mr. Palmer on multiple occasions. (*E.g.* RP 09/09/2013 at 250). He had physically assaulted Mr. Palmer on an earlier occasion. (RP 09/09/2013 at 162-63). He had broken into his ex-fiancée's home, closed his hand around her neck, pushed a firearm up against her head, and screamed at her. (RP 09/09/2013 at 233-34). He had done this while his children were watching. (RP 09/09/2013 at 229). Finally, he had shot Mr. Palmer not once, but twice, walking up to Mr. Palmer at close range to make sure the second bullet finished him off. (RP 09/09/2013 at 146, 235-36). The prejudice of additional evidence of a violent nature is thus minimal. Compared to the overwhelming probative value of the evidence in regards to his state of mind in going to Ms. Krebs's house on that day, it was in no way ineffective to elect not to challenge the admission of the letters.

**4. There was no prosecutorial misconduct.**

The defendant argues that multiple statements made by the State during opening and closing constituted misconduct. (App. Brief at 26). The defendant argues not only misconduct, but misconduct so flagrant and

ill-intentioned that no curative instruction, no matter how powerfully worded, could have cleansed it. *State v. Calvin*, 316 P.3d 496, 504 (Wash. Ct. App. 2013), *as amended on reconsideration* (October 22, 2013). The State will address each allegedly illegal statement in turn.

The first statement was reference to justice in the opening and closing statements. In the opening statement, the argument was, "And we'll hear the evidence that will give you the tools to come back with a verdict that will give justice to Franklin Palmer and give justice to our community." (RP 09/05/2013 at 255). In the closing argument: "This trial is seeking justice for Mr. Palmer, for our community, and to hold the defendant accountable." (RP 09/11/2013 at 410). "Urging the jury to render a just verdict that is supported by evidence is not misconduct. Moreover, courts frequently state that a criminal trial's purpose is a search for truth and justice." *State v. Curtiss*, 161 Wn. App. 673, 701, 250 P.3d 496 (2011). The State was not arguing that the defendant should be convicted against the evidence. The State urged the jury to find the defendant guilty, a just verdict and one that was supported by the evidence. There was no misconduct in doing so, certainly not conduct so flagrant and ill-intentioned that no curative instruction could have fixed it.

The defendant also takes issue with the State referring to some of the pictures as "sad, gruesome pictures." (App. Brief at 25). The fact is

that that statement was made in the context of apologizing. There was no incensing rhetoric. Putting the statement in its context makes it clear what purpose it was to serve. ". . . I appreciate your word at the time that you're not going to hold it against us for showing you these sad, gruesome pictures." (RP 09/11/2013 at 396). The State did not argue "Look at the sad, gruesome scene the defendant created!" It was apologizing to the jury for presenting something so disquieting, that an ordinary individual would find upsetting. While emotions may have been aroused, they were aroused by the pictures the State had shown and entered earlier in the case. The State's characterization of the pictures as sad and gruesome was nothing more than an honest and accurate assessment of what they were.

As to the argument that the statement "What message is the defendant giving to his kids" was an attempt to inflame the passions of the jury, the State was attempting to defuse an argument the defendant had set up throughout the trial, that the defendant was just a harried man, who, after being denied seeing his children, snapped. (*E.g.* RP 09/09/2013 at 145). The State clearly expected the closing statement to be in line with that argument, given the amount of foundation the defense had laid for it. The State was responding to allegations made by the defense during the State's case in chief. Furthermore, the State would suggest that there is very little difference here than the remarks in *Berube*. *State v. Berube*,

171 Wn. App. 103, 119, 286 P.3d 402 (2012), *review denied*, 178 Wn.2d 1002, 308 P.3d 642 (2013).

> How sad is it that a mother and a son would go for 13 years without seeing each other? And how happy his mother must have been when he came to see her. And how disappointed must she have been when she learned that he came because he was running from the law?

*Id.* As the court in *Berube* stated, "[n]othing of that sort occurred here. The prosecutor used no inflammatory language and introduced no hearsay or new evidence. Berube's mother testified she loved her son, and it was not an unreasonable inference that she would be saddened and disappointed by the circumstances." *Id.* Without something more, references to the harm the defendant caused members of his family, be they his mother or his children, are not sufficient to find prosecutorial misconduct.

The final argument that the defendant makes is that the State improperly vouched for a witness's credibility by stating "And you saw M.B. M.B. was not on the stand lying. If you talk about any kid that is nervous and not taking sides but just wants to tell the truth, that's M.B." (RP 09/11/2013 at 404) (minor victim's name redacted). "[T]here is a distinction between the individual opinion of the prosecuting attorney, as an independent fact, and an opinion based upon or deduced from the testimony in the case." *State v. McKenzie*, 157 Wn.2d 44, 53, 134 P.3d 221 (2005).

> But we will not find prejudicial error unless it is " 'clear and unmistakable that counsel is not arguing an inference from the evidence, but is expressing a personal opinion.' " Here, the prosecutor made the "truth of the matter" statement at the end of closing argument, after discussing the State's evidence. When viewed in context of the prosecutor's entire argument, it indicated only an inference from the State's evidence, not a clear statement of personal opinion.

*State v. Emery*, 161 Wn. App. 172, 192-93, 253 P.3d 413 (2011), *aff'd*, 174 Wn.2d 741, 278 P.3d 653 (2012) (citations omitted). The State was urging the jury to find M.B.'s testimony credible, based upon the facts he testified to during the trial. The State did not provide any indication that it was the State's own belief that it was pushing the jury to adopt. Rather, it came in the middle of an accounting of why the jury could trust M.B.'s testimony. It was an inference the State argued the jury should adopt, based upon the evidence presented.

Furthermore, the Court has considered the issue of improper vouching like this before:

> The State's comment that, "Law enforcement did a great job investigating this case" may have encouraged the jury to infer that law enforcement is credible; but, no party objected. In the context of the total argument, issues of the case, evidence, and jury instructions—even if this comment was improper—Morgan and Parker cannot show that the State's single remark was so flagrant and ill-intentioned that it evinced an incurable, enduring and resulting prejudice. The court instructed the jury that it was the sole credibility judge of each witness and that the attorneys' statements were not evidence. Furthermore, the State informed the jury

> that it was to make all credibility determinations. Thus, Morgan and Parker did not preserve this issue.

*State v. Embry*, 171 Wn. App. 714, 753, 287 P.3d 648 (2012) *review denied*, 177 Wn.2d 1005, 300 P.3d 416 (2013).

There, as here, the defendant did not take any steps to preserve this issue for review. The jury was informed that they were the sole judges of credibility. (CP 112-13). "Juries are presumed to have followed the trial court's instructions, absent evidence proving the contrary." *State v. Kirkman*, 159 Wn.2d 918, 928, 155 P.3d 125 (2007). In the absence of any indications such did not happen, the jury should be presumed to have taken the instruction to heart, and judged M.B.'s credibility, as they were instructed to.

Finally, even if this Court were to find some improper bolstering, the defendant cannot show any prejudice from it. "In a prosecutorial misconduct claim, the defendant bears the burden of proving that the prosecutor's conduct was both improper and prejudicial." *State v. Emery*, 174 Wn.2d 741, 756, 278 P.3d 653 (2012). M.B.'s credibility was never in doubt. The defendant admitted to everything to which M.B. testified. As his counsel put it: "Grant Scantling is absolutelly [sic] guilty. On March 22nd of 2013, he did a number of horrible, horrible things. . . . Grant is guilty of burglary in the first degree. . . . Grant is also guilty of

murder. He is. He is absolutely guilty of murder." (RP 09/11/2012 at 411). The defendant elected to concede everything to which M.B. could testify. His defense was that there was no premeditation, and that, therefore, the defendant was only guilty of Murder in the Second Degree. (RP 09/11/2013 at 412-13). M.B. didn't and couldn't testify to the defendant's mental state. Given that the sole element the defendant wished to keep in contention was something M.B. offered no testimony on, the State fails to see how any alleged bolstering of his testimony in closing could have possibly had an effect on the outcome of the trial.

**5. The defendant's argument about the award of costs is not ripe.**

Any argument about the defendant's indigent status cannot be considered ripe. The defendant provides no indication that he has ever faced any kind of sanction, or that the State of Washington has ever tried to collect on his Legal Financial Obligations. No documents indicate that there has been any action by the State to collect on these Legal Financial Obligations. The defendant suffers no injury from the imposition of costs and fees until the State attempts to collect on them. As such, only then would the defendant be entitled to a protest about his indigent status. The Court has stated as such: "If in the future repayment will impose a manifest hardship on defendant, or if he is unable, through no fault of his

own, to repay, the statute allows for remission of the costs award." *State v. Blank,* 131 Wn.2d. 230, 253, 930 P.2d 1213 (1997).

*State v. Ziegenfuss* is illustrative. 118 Wn. App. 110, 113, 74 P.3d 1205 (2003). In *State v. Ziegenfuss*, an inmate protested the Department of Corrections' procedure for imposing sanctions upon those who fail to pay their Legal Financial Obligations. *Id.* at 112. The Court stated, in answer to her claims: "Ziegenfuss has not failed to pay the VPA [Victim Penalty Assessment], nor has she been incarcerated or otherwise sanctioned for violating the terms of her community custody. As yet, therefore, she has suffered no harm, and her challenge to the constitutionality of the process in DOC community custody violation hearings is premature." *Id.* at 113.

Another illustrative case is *State v. Crook.* 146 Wn. App. 24, 189 P.3d 811 (2008). There, the defendant appealed an order denying his motion to alleviate him of his financial obligations. *Id.* at 26. The Court's response was: "Inquiry into the defendant's ability to pay is appropriate only when the State enforces collection under the judgment or imposes sanctions for nonpayment; a defendant's indigent status at the time of sentencing does not bar an award of costs." *Id.* at 27.

The defendant has suffered no harm as a result of the imposition of costs. When the State attempts to collect such from him, he will be given

a chance to be heard, and make arguments about his ability to pay. The Court has made it clear: "There is no reason at this time to deny the State's cost request based upon speculation about future circumstances." *Blank*, 131 Wn.2d at 253. When the State attempts to collect, then let him claim indigence. The court will be able to make a determination based upon the best possible evidence.

**6. The defendant is not an "aggrieved party" as per RAP 3.1, in terms of his Legal Financial Obligations.**

RAP 3.1 states: "Only an aggrieved party may seek review by the appellate court." The defendant is not an aggrieved party. "We have defined 'aggrieved party' as one whose personal right or pecuniary interests have been affected." *State v. Taylor*, 150 Wn.2d 599, 604, 80 P.3d 605 (2003). The courts of this state have stated an individual against whom costs have been assessed, but on which no actions have been taken, is not aggrieved for the purposes of RAP 3.1. *State v. Smits*, 152 Wn. App. 514, 525, 216 P.3d 1097 (2009). The reasons for this are apparent. No pecuniary interests have been impacted by the simple fact that the State has assessed costs the defendant. If and when the State attempts to collect upon the defendant's Legal Financial Obligations, he will then be an aggrieved party, able to petition the court for protection from collection orders.

The simple assessment of costs is not enough to convert a party without a grievance to an aggrieved party. *Id.* While the defendant may not like the fact that costs have been assessed against him, "[a]n aggrieved party is not one whose feelings have been hurt or one who is disappointed over a certain result." *Taylor*, 150 Wn.2d at 603. The only point at which the defendant may challenge the collection of costs despite his indigent status is when the State attempts to collect from him.

**7. The defendant waived the issue when he did not raise it before the trial court.**

Finally, the defendant failed to raise the issue of his ability to pay his legal financial obligations before the court at sentencing. (RP 09/19/2013). RAP 2.5(a) gives the appellate court the ability to refuse to consider errors not raised before the trial court, provided the errors complained of are not of the following categories: "(1) lack of trial court jurisdiction, (2) failure to establish facts upon which relief can be granted, and (3) manifest error affecting a constitutional right." RAP 2.5(a). "But having come to the conclusion that ability to pay LFOs is not an issue that defendants overlook—it is one that they reasonably waive—we view this as precisely the sort of issue we should decline to consider for the first time on appeal. . . . If a trial court fails to consider ability to pay or enters

an unsupported finding, it is not constitutional error." *State v. Duncan*, ___ Wn. App. ___, 327 P.3d 699 (2014).

The defendant here stands in similar shoes to Mr. Duncan. He elected not to raise his ability to pay his Legal Financial Obligations before the trial court at his sentencing. There is no evidence, whatsoever, that differentiates the two cases, except the fact that the defendant has been sentenced to Life Without Parole, which, in effect, removes the possibility of prejudice. The defendant will never face the State's attempts to collect from him, because he will never be released from jail, absent some intercession from the legislature, governor, or the courts. The Court should decline to address the Legal Financial Obligations for the first time in this instance as well.

## IV. CONCLUSION

The defendant has failed to identify any errors which require remand. Based upon that failure, the State asks this honorable Court to affirm the trial court's decision on all grounds.

**RESPECTFULLY SUBMITTED** this 22nd day of July, 2014.

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## CERTIFICATE OF SERVICE

I certify under penalty of perjury under the laws of the State of Washington that on this day I served, in the manner indicated below, a true and correct copy of the foregoing document as follows:

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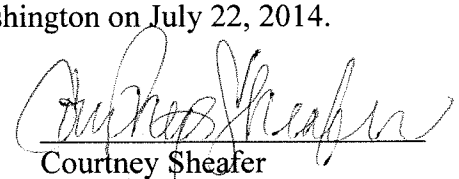

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