711602-8

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NO. 71162-8-I

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

STATE OF WASHINGTON,

Respondent,

v.

MARTIN DAVID PIETZ, JR.,

Appellant.

APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE MICHAEL HAYDEN

BRIEF OF RESPONDENT

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A. ISSUES PRESENTED

1. Whether the jury was properly instructed regarding reasonable doubt and the burden of proof that the State had to meet in order to return a verdict of guilty.
2. Whether the trial court excused an ill juror in open court, thereby protecting the defendant's right to a public trial.
3. Whether the trial court properly admitted evidence of the defendant's serial womanizing, of the victim's concern about the defendant's infidelity, and of the efforts of friends and family to contact the victim after her disappearance.

B. STATEMENT OF THE CASE

1. PROCEDURAL FACTS

The appellant, Martin David Pietz, Jr., was charged by amended information with the crime of murder in the second degree for causing the death of his wife, Nicole, on January 27-28, 2006. CP 10. The crime was charged in the alternative, under the felony murder and intentional murder prongs provided in RCW 9A.32.050. CP 10.

By jury verdict rendered on October 14, 2013, Pietz was found guilty as charged. CP 321.

2. SUBSTANTIVE FACTS

On the evening of January 28, 2006, Nicole Pietz (hereinafter referred to as Nicole) and her husband, the respondent, Martin David Pietz, Jr., (hereinafter referred to as Pietz), were scheduled to have dinner with Ellen and Jason Jackowski at the Jackowskis' Bothell condominium. 5RP 127-28, 133.[1] Pietz arrived directly from his workplace, but Nicole did not show up. 5RP 134. Ellen Jackowski had phoned Nicole twice that day, but had not been able to reach her. 5RP 136.

Pietz said that he would go to the condominium he shared with Nicole in Lynnwood to see if she was home. 5RP 136. A short time later he called the Jackowskis and said that Nicole was not at home. 5RP 136. When the Jackowskis showed up at the Pietz condominium, Pietz told them that a bottle of prescription pain medication in Nicole's bathroom was empty, and told Ellen that the prescription was for 56 pills. 5RP 137.

At 10:20 p.m. that night, Pietz called 911 from his home to report Nicole as a "missing person." 5RP 158-60. Snohomish

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[1] The verbatim report of proceeding consists of 17 volumes, referred to in this brief as follows: 1RP (9/9/2013); 2RP (9/10/2013); 3RP (9/11/2013); 4RP (9/12/2013); 5RP (9/16/2013); 6RP (9/17/2013); 7RP (9/18/2013); 8RP (9/19/2013 and 11/7/2013); 9RP (9/30/2013)' 10RP (10/1/2013); 11RP (10/2/2013); 12RP (10/3/2013); 13RP (10/7/2013); 14RP (10/8/2013); 15RP (10/9/2013); 16RP (10/14/2013); 17RP (10/29/2013).

County Sheriff's Office (SCSO) Deputy William Binkley phoned Pietz in response, and Pietz told him that he had not seen Nicole since the night before when he had come home from work and that she had been gone when he had woken up the next morning. 5RP 160. That morning Nicole had been scheduled to attend a very important event: her eight year sobriety birthday at her AA meeting. 5RP 26-27. She never showed up. 5RP 30. Pietz also make a point of telling Binkley said that some of Nicole's medication was missing, and that her purse and car were gone. 5RP 160. He told Dep. Binkley that Nicole had abused medication in the past, and that he was concerned that she had relapsed. 5RP 160. Pietz initially denied that he had argued with Nicole the previous evening, but then equivocated, and stated that it was possible. 5RP 161.

Nicole's mother and stepfather travelled to the Lynnwood condominium from their home in Arizona on January 29, 2006, after receiving a call from Pietz. 5RP 199. Upon their arrival, Pietz also showed them the empty prescription bottle. 5RP 202-03.

Nicole had developed a dependence on pain medication as a high school student after being prescribed a drug used to treat pain associated with endometriosis (painful shedding of uterine

lining, causing cramps). 5RP 50-51. Nicole had recovered with the help of family, friends, and AA, and had maintained uninterrupted sobriety for the eight years leading up to her death. 5RP 52. Nicole's sister, Tonia Zurcher last spoke to Nicole on January 26, 2006, and had no reason to believe that Nicole had relapsed.

Carolyn Waymack was Nicole's primary care physician. 14RP 114. Nicole visited Waymack in November 2005 for a back injury. 14RP 117-18. Waymack diagnosed nerve damage in Nicole's lumbar region, and prescribed oxycodone to her. 14RP 120-21. Waymack was aware of Nicole's years-earlier problems with drug dependency, but, over the ensuing months of treatment, saw no signs that Nicole had relapsed; indeed, at her last visit to her doctor's office, on January 26, 2006, Nicole reported improvement, and expressed her hope that she could reduce the dosage that Waymack had prescribed. 14RP 135, 138.

When Nicole's parents arrived at the Pietz condo, Pietz also took them into Nicole's bathroom and showed them her wedding ring; Pietz explained to them that the couple had taken to not wearing their rings every day. 5RP 202. He also added, unprompted, that Nicole had recently started wearing her dental

device outside the home. 5RP 202-03. Pietz also said that he did not believe that any of Nicole's clothes were missing. 5RP 202-03.

SCSO Det. Brad Pince was assigned to follow up on Pietz's January 28th missing persons report. 8RP 15. Det. Pince met with Pietz, who reported that his marriage with Nicole was very sound, with no problems. 8RP 16. However, in the course of investigating Nicole's death, detectives from the Snohomish and King County's Sheriff's Offices learned much more about the nature of Pietz's relationship with Nicole that contradicted Pietz's assertion.

Tony Twitchell, a coworker of Nicole's, reported that he spoke to Nicole in her training room when he went to check on her at the end of the work day on January 27, 2006, the night before she was reported missing. 5RP 75-76. She appeared to have been crying. 5RP 76. Nicole told Twitchell that she knew that her husband was having an affair, and seemed dumbfounded and upset by her belief. 5RP 76-78, 80. Nicole did not show up for work the following Monday, and Twitchell never saw her again. 5RP 79.

Pietz had married Nicole in April 2002. 5RP 52. During their engagement, Pietz started a romantic relationship with Sabrina

Strieck, a young receptionist at another branch of the chain of gyms for which he worked. 6RP 83-85. Pietz would visit Strieck at her apartment, where they would kiss and share details of their lives. 6RP 90-91. Pietz told Strieck of his misgivings regarding his upcoming marriage to Nicole, but complained that it was "too late to back out of it." 6RP 87.

Pietz broke off the relationship with Strieck prior to his wedding, after Nicole became suspicious of her. 6RP 97-99. However, Pietz resumed contact with Strieck after he married Nicole, and his relationship with Strieck became sexual. 6RP 103. Strieck hoped that Pietz would leave Nicole for her, but ended things with Pietz when she realized that he had no plans to divorce Nicole. 6RP 105.

A number of other women also testified to the jury about their relationships with the then-married Pietz. Samantha Duffy was at a bar with Pietz and other friends in 2003 when he offered to drive her home. 6RP 124-25. Once they arrived, Duffy invited Pietz inside, and they had consensual sex. 6RP 125.

Julie Hansen-Freeman told the jury that she would typically go out for drinks with Pietz and others in 2003, and that, on one occasion, she, Pietz, and a female colleague began kissing each

other at a bar. 6RP 131-33. Pietz would often complain to Hansen-Freeman that his wife, a recovering addict, would not go out with him to social events, and would criticize his drinking habits. 6RP 134-35.

Renee Stewart exercised at the gym where Pietz worked in 2003, and became friends with him and others who worked at or also exercised there. 6RP 141-43. The group would often go out to nightclubs together; at these events, Pietz would complain to Stewart about his wife's inhibitions, and how he wanted her to "loosen up." 6RP 144. He told Stewart that Nicole claimed to be an alcoholic, but she was only saying so in order to "get attention." 6RP 143.

Detectives also learned that Pietz secretly gave Nicole, a recovering addict, Ecstasy without her knowledge. 6RP 149. During one outing to a nightclub in 2003 or 2004, at which Nicole was present, members of this circle of friends, including Stewart and Pietz, decided to ingest Ecstasy, an illegal party drug that lowers inhibitions. 6RP 147-48, 158. Pietz told Stewart that he intended to "spike" Nicole's soft drink by surreptitiously mixing a dose of Ecstasy into it, and later confirmed that he had indeed done so. 6RP 149.

Stewart noticed that Nicole, after drinking the adulterated drink, became "more sexual" with people. 6RP 150. Stewart went with Nicole, Pietz, and others into a "VIP room" of the club and engaged in acts of group sex. 6RP 152, 156-58.

Andrea Seachord met Pietz a few weeks before Nicole's disappearance, while she was exercising at Pietz's gym. 11RP 194. Pietz asked Seachord out and gave her his phone number, although she did not follow up on his proposition. 11RP 197.

A co-worker of Pietz's, Troy Wageman, explained to the jury that he went out to lunch with Pietz about two weeks after Nicole's body had been discovered. 6RP 200-01. During their conversation, Pietz surprised Wageman by asking if it was "too soon" for him to ask a woman out on a date. 6RP 201. Wageman suggested to Pietz that perhaps it was, in fact, too soon. 6RP 201.

Jordan Cox worked with Nicole at Cingular Wireless, where they both served as trainers for call center employees. 5RP 92-93. Cox told the jury that he learned of Nicole's disappearance when she did not report to work on January 30, 2006; he was surprised, because she had e-mailed him on the evening of January 27th, shortly after 9:00 p.m., to tell him that she was looking forward to a meeting that they had scheduled for the week of the 30th. 5RP 97-

98, 100. Nicole was also planning on hosting a party for the upcoming Super Bowl in early February. 5RP 97.

In the ten days that Nicole was missing, friends and family filled her voice mail with 40 emotional messages on her phone, asking where she was and expressing concern about her well-being. 5RP 73-79. Her husband, Pietz, called her four times on Saturday, January 28th (three of those prior to him being aware she was missing), but after calling 911 that evening around 10:00 p.m., he never called her phone again attempting to find out where she was or if she was okay. 11 RP 51-52, 55.

On February 6, 2006, David Wagner was walking in a wooded area near his home in Burien when he noticed a cloud of flies. 8RP 6. He looked down, and saw Nicole's lifeless, naked body. 8RP 6.

King County forensic pathologist Brian Mazrim responded to the scene in Burien, and found that Nicole's body was no longer in rigor mortis. 13RP 132-33. Based on the condition of her corpse, Dr. Mazrim determined that Nicole had likely been dead for a week. 13RP 136.

Inside Nicole's mouth was a plastic dental device fitted to her upper jaw. 13RP 140. Nicole had bruises on her face caused by

blunt force, as well as on her elbows, thighs, knee, and pelvis. 13RP 151-55. Dr. Mazrim also found deep bruises to Nicole's neck muscles and hemorrhaging on both sides of her throat. 13RP 156. These neck injuries, along with petechial hemorrhaging in Nicole's eyes, were indicative of strangulation. 13RP 159, 165-66. There was no evidence that a ligature had been used, and Dr. Mazrim concluded that Nicole had died due to manual strangulation. 13RP 167, 171. Dr. Mazrim explained that it takes three to four minutes for a person to expire when she is being manually strangled. 13RP 171.

Zurcher, Nicole's sister, stated that Nicole had worn a night guard in her mouth since high school, but never wore it out of the house or at any other occasions where she might have to talk, because it caused Nicole to lisp. 5RP 50.

Very close friends of Nicole's confirmed that Nicole never wore her dental device outside her home, and that she always wore her wedding ring, other than when she removed it to soak in cleaning solution at night. 5RP 19-20; 6RP 46. Her wedding ring was not found on her body but was found at home soaking in cleaning solution. 5RP 31.

Nicole's car was found at a commercial parking lot near the University of Washington campus in Seattle, on February 22, 2006. 7RP 178-79. An employee of the parking lot testified that he had noticed the car on February 7, but acknowledged that it may have been there long before he first paid attention to it. 8RP 24, 28.

Forensic examination of Nicole's car resulted in recovery of fingerprints left by Pietz, including from the interior driver's side door handle and the gear shift knob. 9RP 36, 55, 62. No prints left by Nicole were found. 9RP 50. In addition, the position of the driver's seat, at the time of the vehicle's recovery, was moved too far back for someone of Nicole's height to drive from. 8RP 107-08; 9RP 194-97. Pietz is six inches taller than Nicole. 9RP 197.

At Nicole's funeral, Pietz approached Nicole's mother. 5RP 220. He put his arms around her and said, "I didn't think you would take it so hard." 5RP 220.

Co-workers of Pietz's told the jury that Pietz had been actively seeking promotions within his company shortly before Nicole's death, but had experienced rejection he'd found upsetting, because he needed more money. 6RP 189, 204-05; 10RP 125-26. At Nicole's funeral, her supervisor approached Pietz to express her condolences. 11RP 180. Pietz thanked her, and then immediately

asked her what he needed to do in order to claim the proceeds of Nicole's employer-provided life insurance policy. 11RP 181. Pietz submitted his claim, on March 22, 2006, for the full proceeds of $38,000.00). 11RP 87.

Pietz reported to police that the last outgoing call made from Nicole's cell phone was to the gym where he worked, on January 28th at 11:50 a.m., but that he had not spoken to his wife at that time. 8RP 17. This information was confirmed by cell records. 11RP 53.

Based on the time clock at Pietz's work and video footage, detectives determined that Pietz had left his workplace in downtown Seattle shortly after 11:00 p.m. on the night of January 27, 2006, and returned there at 9:02 a.m. the following morning. 10RP 172-74, 176. They also discovered, through information gathered from cell phone towers, that the January 28, 2006, the phone call that was made to Pietz's gym from Nicole's phone had been connected off of a tower that was 188 yards from the gym. 11RP 91-92. That is, the call from Nicole's phone was initiated from an area very close to Pietz's location. 11RP 88.

Footage from the gym's surveillance cameras showed Pietz leaving the gym's front desk two minutes before Nicole's cell phone

placed a call to the front desk and an employee is seen answering the phone and putting the receiver back down. 10RP 186-89. The employee, Christina Knutson, then picks up the receiver again but quickly disconnects. 10RP 190-91.

Before the jury, Knutson identified herself on the surveillance footage, and, though she could not recall the routine event depicted, explained that it was not unusual to answer a ringing phone and then place the caller on hold while finishing another task, before returning to the call. 10RP 199, 202, 204. Knutson also explained that shortly after Nicole's death, and before Pietz resigned in March 2006, he had remarked about the attractiveness of a female customer, and had asked Knutson to get her phone number for him. 10RP 207-08.

Pietz did not testify in his own defense. 14RP 154. His primary witness was Dr. Waymack, Nicole's personal physician, who testified about her treatment of Nicole's back injury and her provision of prescription medication. 14RP 112-48. In his closing argument, defense counsel argued that the State failed to prove that his client was responsible for Nicole's death by strangulation, and suggested that the key to her death lay in the missing prescription pills. 15RP 141.

Despite Pietz's assertion of an empty oxycodone bottle belonging to Nicole, toxicology examination following the discovery of Nicole's body revealed an extremely low presence of oxycodone in Nicole's bloodstream, far below what a forensic scientist would expect to find in someone who had either been a long-term abuser of that drug or who had recently ingested a large amount of the drug. 13RP 182-85. In addition, forensic scientists examined the contents of Nicole's stomach, and found those partially-digested contents to be consistent with a meal that Nicole ordered at a fast-food restaurant near her Lynnwood home in the early evening of Friday, January 27, 2006. 13RP 42-44, 63-73. The State argued that this evidence, along with the night guard being found in Nicole's mouth and the wedding ring being found in the cleaning solution, supported that Nicole had been killed in her own home and had never left the next morning as Pietz had told police. 15 RP 51-57.

C. ARGUMENT

1. THE JURY WAS PROPERLY INSTRUCTED THAT IT COULD CONVICT PIETZ ONLY IF IT FOUND EVERY ELEMENT OF THE CHARGED OFFENSE PROVED BEYOND A REASONABLE DOUBT.

Pietz contends that his conviction must be reversed due to the wording of the final paragraph in the trial court's Instruction No. 10:

> To convict the defendant of the crime of Murder in the Second Degree, each of the following elements must be proved beyond a reasonable doubt:
>
> (1) That on or about January 27, 2006 through January 28, 2006, the defendant:
>   (a) Was committing or attempting to commit the crime of Assault in the Second Degree;
>   (b) Caused the death of Nicole Pietz in the course of and in furtherance of such crime or in immediate flight from such crime; and
>   (c) That Nicole Pietz was not a participant in the crime;
>
> OR
>
> (2) That on or about January 27, 2006 through January 28, 2006, the defendant:
>   (a) Acted with intent to cause the death of Nicole Pietz; and
>   (b) That Nicole Pietz died as a result of defendant's acts;
>
> AND
>
> (3) That any of these acts occurred in the State of Washington.
>
> If you find from the evidence that elements (1)(a), (b) and (c), or (2)(a) and (b), and element (3) have been proved beyond a reasonable doubt, then it will be your verdict to return a verdict of guilty. Elements (1)(a), (b), and (c) and (2)(a) and (b) are alternatives and only one need be proved. In order to find the

> defendant guilty you must unanimously agree that either (1)(a), (b), and (c) or (2)(a) and (b) have been proved. You are not required to unanimously agree which of either (1)(a), (b) and (c) or (2)(a) and (b) has been proved.
>
> On the other hand, if, after weighing all of the evidence, you have a reasonable doubt as to elements (1)(a), (b) and (c) and (2)(a) and (b), and element (3), then it will be your duty to return a verdict of not guilty.

CP 312-33. Pietz asserts that the concluding paragraph of this instruction amounts to structural error necessitating automatic reversal because it fails to make sufficiently clear that the jury need not have reasonable doubt about every element of the charged crime in order to acquit. Brief of Appellant, at 18-21.

Pietz's argument should be rejected. The State recognizes that the language in the challenged paragraph could have been more carefully worded so as to explain that the jury was obligated to acquit only if it had a reasonable doubt as to *both* of the alternatives, felony and intentional murder, and not merely one. However, the unclear language here did not so "thoroughly infect the entire trial process" as to amount to structural error and, because the jury was properly instructed as to both the definition of reasonable doubt and the State's burden of proof with regard to every

element of the charged crime, the faulty wording, under the circumstances, was harmless.

A trial court's instructions must inform the jury that the State bears the burden of proving every essential element of a criminal offense beyond a reasonable doubt. State v. Pirtle, 127 Wn.2d 628, 656, 904 P.2d 245 (1995); see also In re Winship, 397 U.S. 358, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970). This court reviews a challenged jury instruction *de novo*. State v. Brett, 126 Wn.2d 136, 171, 892 P.2d 29 (1995). Although no particular wording is required, the reviewing court must be assured that there is no reasonable likelihood that the challenged instruction allowed conviction based on proof less than the In re Winship standard. See State v. Castle, 86 Wn. App. 48, 54, 935 P.2d 656 (1997); State v. Coe, 101 Wn.2d 772, 787, 684 P.2d 668 (1984).

Here, the jury was repeatedly advised by the trial court of the meaning of proof beyond reasonable doubt and the State's heavy burden in that regard. The trial court's Instruction No. 3 defined reasonable doubt in accordance with well-established law, articulated clearly the presumption of innocence accorded to the defendant, and explained that,

as the plaintiff, the State "has the burden of proving each element of the crime beyond a reasonable doubt." CP 305. In the to-convict instruction (Instruction No. 10), the trial court began by emphasizing that the jury could convict only if it found that "*each* of the following elements" had been proved beyond a reasonable doubt, and then, after listing those elements, again informed the jury that it must return a guilty verdict only if it was satisfied by the evidence that the elements had been sufficiently proved. CP 312 (emphasis added).

This case can thus be distinguished from situations in which the jury was wholly mistaken about the fundamental definition of reasonable doubt or about the apportionment of responsibility at trial between plaintiff and defendant. See, e.g., Cage v. Louisiana, 498 U.S. 39, 40, 111 S. Ct. 328, 112 L. Ed. 2d 339 (1990) (faulting instruction, which described reasonable doubt as one "that would give rise to a grave uncertainty," as requiring a higher degree of doubt than that required by Winship). When a jury is misled about the very concept of reasonable doubt, the error "vitiates *all* the jury's findings," and harmless error analysis would amount to mere

speculation as to what a jury would have done had it understood its proper task as fact-finder. Sullivan v. Louisiana, 508 U.S. 275, 281, 113 S. Ct. 2078, 124 L. Ed. 2d 182 (1993).

However, where, as here, a particular flaw in a trial court's instructions with regard to reasonable doubt is mitigated by the "halo effect" of other language that properly defines and sets forth the State's burden, reversal for constitutional error is unwarranted. See Victor v. Nebraska, 511 U.S. 1, 22-23, 114 S. Ct. 1239, 127 L. Ed. 2d 583 (1994) (holding that where the trial court's instructions, taken as a whole, correctly convey the concepts of reasonable doubt and the State's burden of proof to the jury, "there can be no reasonable likelihood that the jurors applied those instructions in a way that violated the Constitution."); see generally Robert C. Power, Reasonable and Other Doubts: The Problem of Jury Instructions, 67 Tenn. L. Rev. 45, 92-97 (1999) (describing dozens of cases in which reviewing courts engaged in such balancing tests). In such circumstances, a flaw in an otherwise proper set of instructions is analyzed to determine whether, beyond a reasonable doubt, the jury

verdict would have been the same without the error. State v. Brown, 147 Wn.2d 330, 341, 58 P.3d 889 (2002); see also State v. Lundy, 162 Wn. App. 865, 872, 256 P.3d 466 (2011) (applying harmless error analysis following use of a reasonable doubt instruction that deviated from state supreme court rulings on the subject).

The admittedly unclear language in the concluding paragraph of Instruction No. 10 was certainly harmless. Pietz asserts that the injury created by this flaw was that it may have led the jury to believe that it needed to hold a reasonable doubt as to every element of the charged offense, as opposed to just one, in order to acquit. It must be emphasized that, at trial, Pietz did not contest any elements other than the identity of the culprit. In other words, the evidence that someone intentionally killed Nicole by deliberately strangling her, in Washington, was unchallenged and more than minimally satisfied the State's burden of proof. To find prejudice, this Court would therefore need to conclude that the jury, despite doubting that Pietz was responsible for his wife's death, nevertheless convicted him because it had no such doubts about all of the

other elements of the charged crime, and mistakenly believed that this was what the final paragraph of the to-convict instruction required. Such a conclusion is absurd. A juror with even the most elementary understanding of the trial process understands that his or her role, first and foremost, is to decide whether the accused was involved in the charged criminal act.

Pietz's reliance on State v. Smith, 174 Wn. App. 359, 298 P.3d 785 (2013), is misplaced. In Smith, the jury was improperly informed that it had no duty to return an acquittal if it had a reasonable doubt. Rather, the jury was instructed that it "should" return a verdict of not guilty. Smith, 174 Wn. App. at 363. Division Three noted that one of the key reasons that some errors are presumptively prejudicial (and thus structural) is because of the "difficulty of assessing the effect of the error." Smith, 174 Wn. App. at 368-69, citing United States v. Gonzalez-Lopez, 548 U.S. 140, 149 n.4, 126 S. Ct. 2557, 165 L. Ed. 2d 409 (2006). The appellate court, observing that the term "should" is more akin to a suggestion than a command as required by law, and noting that the jury at Smith's trial had complained to the trial court about its inability to

reach a unanimous verdict before it ultimately convicted him,[2] reasonably surmised that those jurors with doubts about Smith's guilt may have concluded from the faulty instructions that they were not required to acquit him if they did not want to. Id. at 369. It was in this context that Division Three cited to Sullivan v. Louisiana for the proposition that a faulty reasonable doubt instruction constitutes structural error. Id. at 368-69.

Here, in contrast, there was no dispute as to any element of the charged offense other than Pietz's status as the responsible actor, and the jury was repeatedly instructed that it could convict Pietz only if it found that the State had proved every element of the crime, including his culpability, proved beyond a reasonable doubt. It is dubious to suggest that this jury convicted him, despite questioning his involvement, due to a single instance of faulty language regarding the number of elements it needed to doubt before it could return a verdict of not guilty. This case, unlike Smith, presents precisely the circumstances under which harmless error analysis is feasible and the conclusion of such analysis

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[2] The jury rendered its verdict after being allowed to watch a videotape of the defendant's interview by police. During the viewing, the jury was allowed to watch portions of the video that had not been admitted into evidence during the trial. Smith, 174 Wn. App. at 364.

logically indisputable. The evidence of Pietz's responsibility was overwhelming, and the jury's verdict reflected this fact.

Finally, Pietz also challenges other language in Instruction No. 10 which, he asserts, would have allowed the jury to find him guilty if only one element among the elements identified in the instruction as (1)(a), (1)(b), (1(c), (2)(a), and 2(b) were proved beyond a reasonable doubt. See Brief of Appellant, at 19. Pietz's argument in support of this assertion is short and somewhat unclear, and it is difficult to understand precisely.[3] In any event, it is hard to accept the logic of Pietz's position, inasmuch as he seems to suggest that the jury could have read this instruction to allow it to convict Pietz if it, for instance, found *only* that the State proved beyond a reasonable doubt that Nicole was not a participant in the crime (element (1)(c)), and yet remained unconvinced as to all of the other elements. Such a ludicrous proposition was never argued to the jury by the State, which, in fact, took some care in its initial closing remarks to explain the purpose and meaning of Instruction

[3] Pietz asserts that "[t]he instruction could be read to mean elements 1(a)-(c) and 2(a)-(b) are alternatives and only one element need be proved." Brief of Appellant, at 19.

No. 10 in accurate detail. 15RP 32-33. And it bears repeating that the jury was recurrently reminded that it could find Pietz guilty only if it decided that the State had met its burden of proof as to *each* element of the charged crime. CP 305, 312. Moreover, the jury never indicated any confusion as to these instructions.

2. PIETZ WAS NOT DEPRIVED OF HIS RIGHT TO A PUBLIC TRIAL.

Pietz next contends that he was deprived of his right under the federal and state constitutions to a public trial when the trial court excused a very ill juror from jury service during the evidentiary stage of the proceedings. He argues that an e-mail sent by the trial court's bailiff to the parties, prior to the commencement of that day's proceedings, informing them of the juror's current condition and explaining that "she has been released from jury service this morning" amounted to memorialization of an order by the trial court that took place outside of the courtroom. Brief of Appellant, at 21.

Pietz's argument is without merit. The trial judge took pains to explain to the parties that his bailiff neither had the authority to excuse any juror nor had she been directed to carry out his order to excuse this one. In actuality, the excusal of the juror took place in

open court, with the parties present. No infringement on Pietz's right to a public trial occurred.

Not every interaction between the court, counsel, and the defendant will implicate the right to a public trial. State v. Sublett, 176 Wn.2d 58, 71, 292 P.3d 715 (2012). Before determining whether a violation of a defendant's public trial right occurred, a reviewing court must consider "whether the proceeding at issue implicates the public trial right, thereby constituting a closure at all." Id. at 71. Whether a defendant's right to a public trial has been violated is a question of law to be reviewed *de novo* on appeal. State v. Wilson, 174 Wn. App. 328, 334, 298 P.3d 148 (2013).

Here, Pietz relies on an e-mail sent to the parties by the trial court's bailiff before the resumption of trial on the morning of October 7, 2013, which stated the following:

> Counsel,
> Juror #1 called and let the court know she is ill and can no longer come to court. She has been released from jury service this morning.
> Thank you.
>
> Teri Bush
> Bailiff to the Honorable Michael C. Hayden....

CP 522. The bailiff sent the communication from her own e-mail address. CP 522.

Once trial commenced that morning, the trial judge provided a fuller explanation of what had transpired:

> THE COURT: Be seated. Counsel, I think you have been informed that juror number one has been having some health issues during trial, and nevertheless continued to come in everyday. I am informed this morning by my bailiff that [this juror] called in, and couldn't even get out of bed this morning, because of a systemic health problem she has. So my judgment, we will proceed without her, but she will be excused.

13RP 4. Neither party objected or otherwise commented, and the trial day proceeded thereafter.

The following day, defense counsel decided to contest the prior day's release of the ill juror, now asserting that the juror had been excused outside of open court. 14RP 5. The trial court corrected defense counsel, and explained that defense counsel misunderstood the bailiff's e-mail communication:

> THE COURT: That wasn't an email from me. That was an email from Teri. I had not excused [the juror] at that point. I did not complete excusing her until after I brought it up in open court, so if your issue is the open court issue, it's not accurate.
>
> MR. OFFENBECHER: That is the issue we are raising, your Honor.
>
> THE COURT: Well, that's not accurate because I brought it up in open court. I told you folks that she, in fact, had called in ill, and it was my intent to excuse her. I did it in open court.

> MR. OFFENBECHER: Very well, your Honor. Our position –
>
> THE COURT: Our bailiff – let me say, my bailiff has no authority to excuse a juror. She can only notify me of the condition of a juror. I'm the one who excuses the juror after I brought it up to counsel in open court...

14RP 5-6. The trial court then noted that it saw no reason to conduct a Bone-Club[4] analysis because the actual excusal occurred in open court. 14RP 7.

Despite the trial court's clear explanation of the details of its excusal of the juror, Pietz continues to maintain in this appeal that he was deprived of his public trial right. His argument appears to be grounded on either or both of two propositions: (1) that the trial court was lying to the parties about what had transpired, and/or (2) that the bailiff possessed the authority to excuse the juror and had exercised that authority outside of open court. See Brief of Appellant, at 21 (condemning the "trial court's subsequent attempt to rewrite history") and at 26 (arguing that "even if the bailiff released the juror outside of open court without the trial court's blessing, a public trial violation still occurred.").

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[4] State v. Bone-Club, 128 Wn.2d 254, 258-59, 906 P.2d 325 (1995) (setting forth a five-factor test a court must undertake when deciding whether to close a courtroom).

As to the first proposition, Pietz presents no evidence or argument to support his condemnation of the trial court's credibility. He relies solely on the language of the bailiff's e-mail to the parties, despite the trial court's efforts to correct any risk of misinterpretation. Pietz's bare accusation should be rejected outright.

Regarding the second proposition, the trial court properly noted that it is only the court, and not any administrative staff, that holds the power to release a juror from service. CrR 6.5 provides that "[i]f at any time before submission of the case to the jury a juror is found unable to perform the duties the court shall order the juror discharged...." The bailiff had no more authority to excuse the juror than the clerk, the parties, or any member of the public. In other words, even if, for the sake of argument, the bailiff subjectively believed she had released Juror No. 1 from her duties, her action carried no official weight. To attach the constitutional right to a public trial to her meaningless action is to reach too far.

Pietz provides no relevant authority for his contention. His discussion of Watters v. State, 328 Md. 38, 612 A.2d 1288 (Md. 1992) is inapposite, as that case involved a deputy sheriff who, without knowledge of the court or the parties, stood outside the

courtroom during jury selection and allowed only prospective jurors, witnesses, and staff to enter, while prohibiting all others. Watters, 328 Md. at 42. That is, a state actor literally (and physically) closed proceedings from the public for an entire morning – the closure of court events actually occurred. In this case, in contrast, the public was not excluded from any true judicial action or proceedings, because Juror No. 1 was not excused until the trial day commenced in open court.

The other case relied on by Pietz, State v. Wilson, 174 Wn. App. 328, 332, 298 P.3d 148 (2013), is equally unfitting, because it concerned the administrative excusal of *prospective* jurors who had not yet even been brought into the courtroom for voir dire, rather than members of an already empanelled jury. Wilson, 174 Wn. App. at 332. Division Two concluded that such action does not implicate a defendant's public trial right, because CrR 6.3, which governs the pool from which prospective jurors for a particular case should be selected, expressly contemplates that some potential jurors had already been administratively excused. Wilson, 174 Wn.2d at 342-43. That is, the Wilson court recognized that court administrative personnel do, in fact, possess the authority in the earliest stage of jury composition to excuse jurors.

The Wilson court had no need to address a situation such as the one present here, where trial has already commenced. In such circumstances, CrR 6.5 controls, and authority is vested solely in the court, but neither a bailiff nor any other administrative personnel, to discharge a juror who is unable to perform her duties.

Pietz fails to demonstrate that his right to a public trial was implicated, much less infringed. His claim should therefore be rejected.

3. THE TRIAL COURT PROPERLY ADMITTED EVIDENCE OF PIETZ'S PAST CONDUCT, OTHERS' EFFORTS TO LOCATE NICOLE, AND NICOLE'S STATE OF MIND ON THE DAY OF HER MURDER.

Finally, Pietz challenges the trial court's decisions to allow the State to present specific items of evidence to the jury. First, he contends that the jury should not have been allowed to learn of Pietz's dissatisfaction with his marriage to Nicole, as expressed by his sexual affairs, serial womanizing, and efforts he undertook to "loosen" Nicole up by spiking her soft drinks with Ecstasy while they were out with friends. Pietz, relying on out-of-state case law, contends that this evidence was improperly admitted because it did not include prior acts of violence and, as such, was not probative of his guilt for murder.

Second, Pietz asserts that the trial court should have prohibited the State from eliciting testimony from a coworker of Nicole's who saw her in tears on the afternoon before her murder; when the colleague asked Nicole why she was upset, she told him, "I know that David is having an affair." 5RP 76. Pietz objected, unsuccessfully, by pretrial motion to the admission of Nicole's statement on relevance and hearsay grounds. 1RP 72-75. The trial court disagreed with Pietz that the State was offering Nicole's statement for the truth of the matter asserted, i.e., that, in fact, her husband was cheating on her. 1RP 76, 79. Rather, the court held that her non-hearsay statement was relevant and admissible because it was what Nicole believed, whether or not it was true, and could have led to an argument later that evening with her husband that ended in great violence. 1RP 76-77.

Lastly, Pietz criticizes the trial court's decision to allow the State to play for the jury a series of voicemails left by Nicole's friends, coworkers, and family at the number of Nicole's cell phone following her disappearance. Pietz asserts that any probative value in this evidence was outweighed by the risk of unfair prejudice, as it would only create sympathy for Nicole while providing little of

substance with regard to the decisions the jury would ultimately be required to make.

Each of Pietz's claims should be rejected. Washington courts have long recognized that a defendant's prior interactions with a murder victim are extraordinarily probative as to the defendant's motive, particularly in a domestic circumstance. Also, Nicole's statement to her coworker was especially relevant in providing context to her possible interaction with her husband on the last day of her life. Finally, the relevance of the voicemails left on Nicole's phone in the days following her disappearance was created by Pietz's own efforts at that time to avoid exposure, and by his attempt at trial to place responsibility on another for Nicole's death at a time inconsistent with the State's theory.

A trial court's evidentiary rulings are reviewed for abuse of discretion. State v. Stenson, 132 Wn.2d 668, 701, 940 P.2d 1239 (1997). A trial court abuses its discretion only when its exercise of judgment is manifestly unreasonable, or based upon untenable grounds or reasons. State v. Powell, 126 Wn.2d 244, 258, 893 P.2d 615 (1995).

a. Evidence of Pietz's dissatisfaction with Nicole was properly admitted under ER 404(b).

As described supra, Pietz contends that the trial court should not have allowed the State to present evidence, pursuant to ER 404(b), that he had engaged in a number of extramarital affairs, and attempted to commence others, during his three-year marriage to Nicole, and that he surreptitiously placed an illicit drug in a soft drink that Nicole imbibed in a underhand effort to lower her sexual inhibitions, which resulted in her performing a public sex act on him while under the influence. He also argues that the State should not have been permitted to present evidence that, a few weeks after Nicole's funeral, he asked a colleague if it was "too soon" to start dating again. 6RP 201.

Evidence of other acts is admissible under ER 404(b) if it satisfies two distinct criteria. First, the evidence must be logically relevant to a material issue before the jury. Evidence is relevant if (1) the identified fact for which the evidence is admitted is of consequence to the trial, and (2) the evidence tends to make the existence of that fact more or less probable. ER 402; see also State v. Saltarelli, 98 Wn.2d 358, 362-63, 655 P.2d 697 (1982).

Second, if the evidence is relevant, its probative value must outweigh its potential for unfair prejudice. Saltarelli, 98 Wn.2d at 362.

Evidence of other bad acts is inadmissible if used only to prove criminal propensity. See ER 404(b). By contrast, when such evidence is logically relevant to a material issue distinct from propensity, such as proof of motive, the evidence is admissible, subject to the balancing test described in ER 403. Saltarelli, 98 Wn.2d at 362.

Washington courts have historically admitted evidence of marital unhappiness and "ill-feeling" in spousal murder trials to prove motive. Powell, 126 Wn.2d at 259-60. The Powell court noted that establishing motive – the impulse and desire that induces criminal action on the part of the accused – is often necessary in cases where, as in the instant matter, only circumstantial proof of guilt exists. Id. at 260; see also State v. Athan, 160 Wn.2d 354, 382, 158 P.3d 27 (2007).

The instant case relied wholly on circumstantial evidence as to the identity of Nicole's killer. The proof of Pietz's genuine unhappiness with Nicole and with being tied to her is unmistakably relevant to establishing his motive to rid himself of her. Evidence

that Pietz had routinely strayed from Nicole, and had even risked undermining her sustained efforts at sobriety to satisfy his sexual fantasies, demonstrated that his was not a happy marriage, and that this unhappiness was neither new nor ephemeral. His question to a colleague, shortly after Nicole's funeral, about whether it was "too soon" to begin dating again, further demonstrated his alienation from his murdered wife, and the jury could reasonably conclude that these feelings predated her death.

Pietz does not contest that the trial court's decision here comports with the established precedent set forth in Washington by the state supreme court in cases such as Powell, Stenson, and Athan. As such, it cannot fairly be said that the trial court somehow abused its discretion by adhering to controlling case law.

Instead, he criticizes Washington's approach to evidence of marital dissatisfaction by citing to the decisions of out-of-state courts in which those courts held that such proof should be admitted only if it is accompanied by evidence of prior physical violence or of an extramarital affair that was ongoing at the time of the victim's death. See Brief of Appellant, at 36-40, citing to Camm v. State, 812 N.E.2d 1127, 1131 (Ind. Ct. App. 2004), and Lesley v. State, 606 So.2d 1084 (Miss. 1992).

First, it must be noted that Pietz gave his phone number to Andrea Seachord and asked her out on a date only a few weeks before Nicole's death. 11RP 195. Furthermore, given that Pietz's marriage to Nicole began in April 2002 and ended in her death less than four years later, it is not as if *any* of Pietz's affairs (consummated or not) or his reprehensible efforts to arouse his wife through the use of illegal drugs was particularly remote to the date of her murder.

Regardless, the State respectfully submits that the Indiana and Mississippi courts go too far when they suggest that, in the absence of past physical violence, evidence of marital unhappiness and straying lacks probative value or creates too high a risk of unfair prejudice. Absent proof of the quality of the relationship between the accused and the victim, a jury would have not merely an incomplete understanding of the context surrounding the victim's death, but an inaccurate one. And as this Court undoubtedly has seen, many acts of extreme violence are, rather than the culmination of a long history of lesser brutality, the sudden transformation into physical force of long-standing resentment and unhappiness. Finally, it gives jurors too little credit to presume that they will convict a defendant of the most serious crime in the

absence of adequate proof simply because they disapprove of his attitude toward his marital vows.

b. Nicole's statement was not admitted for the truth of the matter asserted and was relevant regardless.

On appeal, Pietz appears to recognize that whether Nicole's statement to her colleague – "I know that David is having an affair" – is true or not is immaterial insofar as the prohibition on hearsay is concerned. First, this is so because, as the trial court noted, the statement was not being offered to prove that Pietz was having an affair, but only that his wife believed that to be the case. 1RP 76, 79. Moreover, if Nicole's statement can be construed as admissible only if it was an accurate statement of her belief, it was not barred by ER 801 through the provision of ER 803(a)(3) which permits the admission of a declarant's statement of her then-existing state of mind.

Accordingly, Pietz challenges only the trial court's decision that Nicole's statement was relevant to a material issue before the jury. Brief of Appellant, at 46-48. The trial court found this to be the case because it provided a basis on which the jury could reasonably infer that Nicole may have confronted Pietz later that night, causing a row that concluded in her death at his hands. 1RP

73-74, 79-80. As such, Nicole's statement directly touched on the question of the identity of her killer.

Pietz asserts that a victim's declaration regarding her state of mind is relevant only if the defendant puts it at issue. Brief of Appellant, citing State v. Parr, 93 Wn.2d 95, 606 P.2d 263 (1980). Pietz construes Parr too narrowly; in fact, the Parr court held that in "a homicide case, if there is no defense which brings into issue the state of mind of the deceased, evidence of fears or other emotions is ordinarily not relevant." Parr, 93 Wn.2d at 103.

Parr is easily distinguished here. First, the State did not seek to introduce a statement from Nicole describing any emotions she was experiencing. Rather, the statement at issue concerned her suspicion that Pietz was being unfaithful to her. And, as the trial court noted, Nicole's concern was relevant insofar as the jury could reasonably infer that she may have been motivated to confront Pietz about it that night, causing an argument within the timeframe in which, the State alleged, he strangled her. As such, Nicole's statement provided insight into possible future action she might take, and implicated Pietz's subsequent conduct. Washington courts have readily upheld trial courts' exercises of discretion in such contexts. See State v. Terrovona, 105 Wn.2d

632, 640-41, 716 P.2d 295 (1986); State v. Bernson, 40 Wn. App. 729, 738-39, 700 P.2d 758 (1985).

Pietz acknowledged to investigators and coworkers that he and Nicole had quarreled on the night of January 27-28, 2006, and that this may have accounted for her voluntary disappearance. 5RP 161; 6RP 197-98. However, he did not go into the specifics of the disagreement. The jury was entitled to know that, prior to the argument that Pietz vaguely identified, his wife believed he was having an extramarital affair. Simply put, there are inevitable, routine, and mundane disagreements between spouses, and then there are arguments regarding highly personal and vital issues that are far more likely to result in raised emotions and, possibly, violence.

Nicole's expression of her concern made it more probable that her contact with Pietz at their home on the night of January 27-28 fell into the latter category. It thus made it more likely that Pietz was involved in her death, and that she had not responded to a minor tiff by departing on a drug "bender" that ended in her demise at another's hands, as Pietz suggested to investigators and, ultimately, to the jury.

c. The trial court properly admitted evidence of voice messages left on Nicole's voicemail by concerned family and friends.

Lastly, Pietz maintains that the trial court should have prohibited the State from introducing into evidence a collection of messages left on Nicole's voicemail by concerned family members and friends on January 28-31, 2006, following her disappearance. He asserts that the messages lacked significant probative value, and that any such value was outweighed by the risk of unfair prejudice. His claim should be rejected.

Pietz objected at trial to the trial court's decision to allow the jury to hear the content of these messages, as opposed to merely learning that they had been left on Nicole's voicemail. 11RP 60. He contended that the State's sole purpose in offering these recordings was to generate sympathy toward the victim. The trial court overruled Pietz's objection, observing that it was Pietz who had put into contention the timing of Nicole's death when he suggested to investigators that she had left their home voluntarily on the morning of January 28, in order to satisfy her addiction to painkillers. 11RP 65-67. The trial court noted that the plaintive tenor of several of the voice messages could allow the jury to reasonably infer that, if Nicole were still alive at the time they were

left, she would have returned the callers' messages to reassure them of her safety and whereabouts. 11RP 65-67.

The trial court did not abuse its discretion. The State's theory of the case, as presented to the jury and as alleged in the charging document and to-convict instructions, was that Pietz strangled Nicole to death at some point between the time he left his workplace on the night of January 27, 2006, and the morning of January 28, when he returned to work. Pietz told investigators that Nicole had called his workplace from her cell phone on the late morning of January 28th. 8RP 17. He suggested, to police and to those closest to Nicole, that her disappearance might have been due to a relapse, pointing to an empty bottle of painkillers he found in her bathroom, and posited that she had left to abuse or sell drugs on the street. 5RP 31, 56-57, 139, 160, 207, 218. At trial, defense counsel repeatedly sought to contest investigators' technical efforts to determine, as closely as possible, the date of Nicole's death, and to emphasize that Nicole could have perished days after Pietz claimed to have last seen her. 7RP 157-58; 13RP 45-46, 174-76.

In other words, the competing theories offered by the State and by defense counsel required the jury to determine with some precision the timing of Nicole's murder. The voicemail messages

left in the days following Nicole's "disappearance" are key to that determination, particularly because Pietz attempted to convince others that Nicole still had her phone with her. Obviously, if Nicole were still alive, it is more likely than not that she would have, at some point, responded to the increasingly concerned messages of her family, friends, and coworkers. The jury could logically infer that the reason she did not respond was because she was already dead, and had never left her condominium alive following her interaction with Pietz on the night of January 27-28. The probative value of the messages is readily apparent.

In contrast, Pietz's claims of unfair prejudice are meretricious. This Court should be loath to accept the proposition that the jury's verdict was in any way dependent on an improper appeal to sympathy. The messages do not portray Pietz in a bad light, or mention him in any significant way. They do not touch on his culpability. The jury would have felt pity for Nicole's family and friends after hearing these voice messages even if the jurors did not believe that Pietz was responsible for her death.

D. CONCLUSION

For the foregoing reasons, the State respectfully asks this Court to affirm Pietz's conviction for second-degree murder.

DATED this day of February, 2015.

RESPECTFULLY submitted,

DANIEL T. SATTERBERG
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By: ______________________

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Certificate of Service by Electronic Mail

Today I directed electronic mail addressed to Casey Grannis, the attorney for the appellant, at Grannisc@nwattorney.net, containing a copy of the Brief of Respondent, in State v. Martin David Pietz, Jr., Cause No. 71162-8, in the Court of Appeals, Division I, for the State of Washington.

I certify under penalty of perjury of the laws of the State of Washington that the foregoing is true and correct.

Dated this 27th day of February, 2015.

U Brame

Name:
Done in Seattle, Washington