SUPREME COURT NO. 92563-1
COA NO. 71162-8-I

IN THE SUPREME COURT OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

MARTIN DAVID PIETZ,

Petitioner.

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

The Honorable Michael C. Hayden, Judge

PETITION FOR REVIEW

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RULES, STATUTES AND OTHER AUTHORITIES

A. IDENTITY OF PETITIONER

Martin David Pietz asks this Court to accept review of the Court of Appeals decision designated in Part B of this petition.

B. COURT OF APPEALS DECISION

Pietz requests review of the decision in State v. Martin David Pietz, Court of Appeals No. 71162-8-I (slip op. filed October 12, 2015), attached as appendix A.

C. ISSUES PRESENTED FOR REVIEW

1. Whether the "to convict" instruction that misdescribes the burden of proof constitutes structural error?

2. Whether Pietz's right to a public trial was violated where a sitting juror was released from service outside of open court?

3. Whether the trial court erred in admitting evidence of Pietz's womanizing and spiking his wife's drink under ER 404(b) because such evidence was inadmissible to prove motive and any probative value was outweighed by its unfair prejudicial effect?

4. Whether the trial court erred in admitting the wife's statement that she knew her husband was having an affair because the victim's state of mind was not relevant to a material issue at trial?

5. Whether the trial court erred in admitting voicemail messages from the wife's family and friends because their prejudicial effect outweighed probative value?

6. Whether cumulative error consisting of the above evidentiary errors violated the due process right to a fair trial?

D. STATEMENT OF THE CASE

1. Pre-trial

The State charged Pietz with second degree murder of his wife, Nicole Pietz. CP 10. A major issue was whether allegations of Pietz's extramarital affairs, sexual interest in other women, and an attempt to loosen his wife's sexual inhibitions by spiking her drink at a club should be admitted under ER 404(b). CP 25-42, 50-51, 377-89. Over defense objection, the court admitted such evidence on the theory that Pietz's marital dissatisfaction provided a motive for the killing. 1RP 62-70, 89-95, 109, 111; 2RP 24-25; 3RP 5-12; 4RP 33-36; 6RP 4, 11-14; 11RP 120-22.

2. Trial evidence

On the night of January 28, 2006, Pietz reported his wife was missing. 5RP 158. He told the responding officer that she had been asleep when he got home the night before, but when he woke up that morning she was gone and she was not there when he got home from work. 5RP 160. Nicole was experiencing severe back pain and was prescribed pain pills at

the time. 5RP 21, 52-53, 74, 130-31; 14RP 132. Pietz explained that Nicole had been in Alcoholics Anonymous (AA) for dependence on pain medication, but she had been sober for eight years and was expected to celebrate a sobriety anniversary on the day she was reported missing. 5RP 20-21, 24-27, 51. She left her wedding ring behind; her medication, purse and car were gone. 5RP 160. He was afraid she had relapsed into medication abuse. 5RP 160. Pietz told Nicole's mother and stepfather about the missing medication and showed them her wedding ring, explaining that the couple had taken to not wearing their rings every day. 5RP 55-57, 66, 202. He also mentioned Nicole had recently started wearing her retainer outside the home on occasion. 5RP 202-03. Pietz sent out an email asking for help in locating Nicole. 5RP 31, 145; 6RP 48-49. During the time she was missing, friends and family filled her voicemail with over forty messages expressing concern and asking her to contact them. 5RP 30, 101-02, 134-35, 140, 208.

Nine days later, on February 6, Nicole's body was found. 6RP 24-30; 8RP 5-8. Nicole's dental retainer was in her mouth. 13RP 140. She had bruises on her face caused by blunt force, as well as bruising on her neck and other parts of her body. 13RP 151-55. The cause of Nicole's death was asphyxia due to manual strangulation. 13RP 171. Upon being told his wife's body had been found, Pietz appeared upset, began to sob

and hold onto his father, went into a fetal position, and then excused himself, saying he was going to be sick to his stomach. 7RP 116, 139, 175.

The trial court's ER 404(b) ruling allowed the jury to hear a number of sordid details about Pietz's alleged womanizing. Pietz and Nicole were married in April 2002. 5RP 52. One of Pietz's former co-workers, Ms. Strieck, testified the two had a romantic relationship from 2001 to 2003. 6RP 82-83, 91-93, 101-03, 105-07, 115. They had sex one time. 6RP 103-04, 115-16. Ms. Duffy testified that she met Pietz in 2003 when she worked at Chang's restaurant, where Pietz was a regular customer. 6RP 122-23. They had sex after the two had been out drinking with others. 6RP 125, 127-29. Ms. Hansen testified she meet Pietz at Chang's in 2003. 6RP 131. She kissed him and another woman at a bar one night, goofing around drunk. 6RP 133-34, 136.

Ms. Stewart exercised at a gym where Pietz worked in 2003. 6RP 141, 158, 162. He propositioned her for a threesome. 6RP 142. She was uninterested. 6RP 142-43. He told her that he ended up having a threesome with someone else, but would rather do it with her. 6RP 157.

Stewart hung out at a nightclub with Pietz and others from the gym on three occasions. 6RP 143, 145. According to Stewart, prior to one outing to the nightclub, Pietz told her that he planned to put ecstasy in Nicole's drink. 6RP 147. That night she saw Pietz give Nicole a Red Bull.

6RP 149-50. Nicole drank it and became "more sexual" with people. 6RP 150. She kissed another woman and performed oral sex on Pietz, where everyone could see, while the other woman stroked her hair. 6RP 151-52, 167. According to Stewart, Pietz later told her that he put Ecstasy in Nicole's Red Bull. 6RP 149. The next time at the club, Stewart again saw Pietz give Nicole a Red Bull, and she became more intimate with friends but not overtly sexual. 6RP 158-59, 175.

Five or six weeks before Nicole's disappearance, Pietz asked a customer from the gym to go out for coffee and gave her his phone number. 11RP 194-97. She did not take him up on the coffee invitation and did not call him. 11RP 197. Over defense objection, the court allowed Nicole's co-worker to testify that, on January 27, Nicole was upset and told him "I know that David is having an affair". 1RP 72-80; 5RP 72-76; CP 52. A few weeks after her death, Pietz asked a co-worker if he thought it was too soon to date. 6RP 200-01, 215, 218.

3. Outcome and appeal

The jury returned a guilty verdict and the court sentenced Pietz to 220 months in prison. CP 321, 343. On appeal, Pietz raised the issues that form the basis for the present petition for review. Amended Brief of Appellant at 1-2, 15-55; Reply Brief at 1-17. The Court of Appeals rejected these arguments and affirmed. Slip op. at 1.

E. ARGUMENT WHY REVIEW SHOULD BE ACCEPTED

1. WHETHER IT IS STRUCTURAL ERROR FOR A "TO CONVICT" INSTRUCTION TO NOT HOLD THE STATE TO ITS BURDEN OF PROOF IS A SIGNIFICANT QUESTION OF CONSTITUTIONAL LAW.

The "to convict" instruction for second degree murder is defective because it fails to make manifestly apparent that (1) the jury must acquit if the State fails to prove any one element of its case beyond a reasonable doubt; and (2) the jury must find each element of the State's case proven beyond a reasonable doubt in order to convict. The Court of Appeals subjected the erroneous instruction to harmless error analysis. Slip op. at 7-10. Whether the instruction qualifies as structural error is a significant question of constitutional law under RAP 13.4(b)(3).

The "to convict" instruction provides:

> To convict the defendant of the crime of Murder in the Second Degree, each of the following elements of the crime 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 proven beyond a reasonable doubt, then it will be your duty 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) has 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 312-13 (Instruction 10).

Due process requires the prosecution to prove every element of an offense beyond a reasonable doubt. In re Winship, 397 U.S. 358, 364, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970); U.S. Const. Amend. XIV; Wash. Const. Art. I, § 3. A conviction "cannot stand if the jury was instructed in a manner that would relieve the State of this burden." State v. Cronin, 142 Wn.2d 568, 580, 14 P.3d 752 (2000). In this regard, jury instructions must make the relevant legal standard manifestly apparent to the average juror.

State v. Smith, 174 Wn. App. 359, 368, 298 P.3d 785, review denied, 178 Wn.2d 1008, 308 P.3d 643 (2013).

The "to convict" instruction tells the jury that the elements under (1)(a)-(c) and (2)(a)-(b) are "alternatives" and "only one need be proved." CP 312. The "to convict" instruction is flawed because it could be construed as directing the jury to acquit Pietz only if it had a reasonable doubt as to multiple elements in each of the alternative means as opposed to only one element in each of the alternative means. The instruction here fails to clearly convey the simple idea that there is a duty to acquit if there is a reasonable doubt as to any one element.

Further, the jury received only one instruction on its duty to return a verdict of not guilty and the language in that instruction is flawed: "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 313. Use of the conjunctive "and" tells the jury that it has a duty to return a "not guilty" verdict only if it has a reasonable doubt as to each of the three elements of the first alternative means (1(a), (b) and (c)) and each of the two elements of the second alternative means (2(a) and (b)).

The Court of Appeals believed the erroneous instruction did not affect the outcome by looking at the instructions as a whole, including a

separate instruction that the State had the burden of proving each element. Slip op. at 9. General language about the State's burden of proving each element of the crime does not reform the specific, infirm language directed at when the jury must return a verdict of not guilty. "Language that merely contradicts and does not explain a constitutionally infirm instruction will not suffice to absolve the infirmity." Francis v. Franklin, 471 U.S. 307, 322, 105 S. Ct. 1965, 85 L. Ed. 2d 344 (1985). Internally inconsistent instructions do not meet the requirement of manifest clarity. State v. Irons, 101 Wn. App. 544, 552-53, 4 P.3d 174 (2000).

The Court of Appeals held the erroneous instruction was not structural error by essentially engaging in a harmless error analysis, parsing out which elements were contested at trial. Slip op. at 9-10. The Court of Appeals concluded the instructional error was not structural because it "fail[ed] to see how it affected the verdict in this case." Slip op. at 10. But structural errors defy harmless error review because they are "defects in the constitution of the trial mechanism." Arizona v. Fulminante, 499 U.S. 279, 309-10, 111 S. Ct. 1246, 113 L. Ed. 2d 302 (1991). Jury instruction that misdescribes the burden of proof is a structural error that taints the entire proceeding, but its specific prejudicial consequences are "necessarily unquantifiable and indeterminate."

Sullivan v. Louisiana, 508 U.S. 275, 281-82, 113 S. Ct. 2078, 124 L. Ed. 2d 182 (1993).

The Kansas Supreme Court's decision in Miller v. State, 298 Kan. 921, 318 P.3d 155 (Kan. 2014) is instructive. In Miller, the jury received the following instruction: "The test you must use in determining whether the defendant is guilty or not guilty is this: If you have a reasonable doubt as to the truth of *each* of the claims required to be proved by the State, you must find the defendant not guilty. If you have no reasonable doubt as to the truth of any of the claims required to be proved by the State, you should find the defendant guilty." Miller, 298 Kan. at 923, 925 (emphasis added). Substitution of the word "each" for the word "any" in the first instance "effectively told the jury it could acquit Miller only if it had a reasonable doubt as to all of the elements the State was required to prove — rather than acquitting him if it had a reasonable doubt as to any single element." Id. at 923. "A literal reading of the erroneous instruction tells the jury it must acquit Miller only if it has a reasonable doubt as to each element of the charged offense." Id. at 937. This instruction constituted structural error because, as in Sullivan, it was "unclear whether the verdict was procured despite the jury not being convinced of his guilt to the constitutionally required degree of certainty." Id. at 938.

The same type of instructional error is present in Pietz's case. In both cases, the faulty instruction told jurors that it could acquit the defendant if it had a reasonable doubt as to all of the elements the State was required to prove — rather than acquitting him if it had a reasonable doubt as to any single element.

2. WHETHER PIETZ'S RIGHT TO A PUBLIC TRIAL WAS VIOLATED WHEN A SITTING JUROR WAS RELEASED FROM SERVICE OUTSIDE OF OPEN COURT PRESENTS A SIGNIFICANT QUESTION OF CONSTITUTIONAL LAW.

Pietz has the right to a public trial. Presley v. Georgia, 558 U.S. 209, 212-13, 130 S. Ct. 721, 175 L. Ed. 2d 675 (2010); State v. Wise, 176 Wn.2d 1, 9, 288 P.3d 1113 (2012); U.S. Const. amend VI; Wash. Const. art I, § 22. Pietz argued this right was violated when a sitting juror was released from service by the bailiff outside of open court. The Court of Appeals disagreed on the ground that the juror was excused in open court. Slip op. at 11. The Court of Appeals did not reach the issue of whether releasing a sitting juror outside of open court implicates the public trial right under the experience and logic test. The public trial issue raises a significant question of constitutional law under RAP 13.4(b)(3).

The court's bailiff sent an email to counsel for both parties at 8:20 a.m. on October 7, stating: "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." CP 522. At 8:24, the prosecutor, asked "So does Juror #5 then replace her?" CP 522. The bailiff replied, "We would await the outcome of trial to see how many we still have, but I do believe jury [sic] #5 is the first alternate." CP 522. Once trial resumed, the judge stated: "I am informed this morning by my bailiff that [juror number one] 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. Defense counsel objected the following day and moved for a mistrial, arguing the juror was excused outside of open court without the analysis required by State v. Bone-Club, 128 Wn.2d 254, 906 P.2d 325 (1995). 14RP 5-7. The judge denied the motion, stating he excused the juror in open court and the bailiff had no authority to do it. 14RP 5-7.

The Court of Appeals claimed the record shows the judge excused the juror in open court. Slip op. at 11. But the email shows the juror was released before the parties addressed the issue in open court. CP 522. The judge's formal excusal of the juror, after the juror had already been released, is a matter of form, not substance. A bailiff, as an agent of the court, can effect a public trial violation. See Watters v. State, 328 Md. 38, 42-43, 49-50, 612 A.2d 1288 (Md. 1992) (in holding sheriff's exclusion of public during jury selection violated right to public trial, recognizing it

was immaterial that "the defendant was denied a constitutional right by a State official other than the judge") (quoting Parker v. Gladden, 385 U.S. 363, 364, 87 S. Ct. 468, 17 L. Ed. 2d 420 (1966)). The bailiff's release of the juror via email occurred outside of open court. See State v. Irby, 170 Wn.2d 874, 883-84, 246 P.3d 796 (2011) (excusal of jurors via email should have happened in the courtroom).

The Court of Appeals stated "any possible error that resulted from removing the juror was harmless." Slip op. at 12. But violation of the public trial right is structural error. Wise, 176 Wn.2d at 6, 13-14.

Although the Court of Appeals did not reach the issue, removal of a sitting juror outside of open court implicates the public trial right under the experience and logic test set forth in State v. Sublett, 176 Wn.2d 58, 73, 292 P.3d 715 (2012). Experience shows sitting jurors are not released from service outside of open court. See, e.g., State v. Hansen, 69 Wn. App. 750, 758-59, 762, 850 P.2d 571 (1993) (decision to stipulate to excusal of ill juror made on record); State v. Jorden, 103 Wn. App. 221, 225-26, 11 P.3d 866 (2000), review denied, 143 Wn.2d 1015, 22 P.3d 803 (2001) (court released sleepy, inattentive juror after hearing on the record in open court). The logic prong is satisfied because public oversight helps ensure that a juror will not be removed for improper or inadequate reasons and contributes to the appearance of fairness. See Wise, 176 Wn.2d at 6

(the public nature of trials is a check on the judicial system, providing for accountability and transparency); cf. State v. Turpin, __Wn. App.__, __P.3d__, 2015 WL 6447744 (slip op. filed Oct. 26, 2015) (excusal of sitting juror on ground of illness does not implicate public trial right; petition for review forthcoming).

3. IMPROPER ADMISSION OF PRIOR BAD ACT EVIDENCE, HIS WIFE'S OUT OF COURT STATEMENT ABOUT AN AFFAIR, AND VOICEMAIL MESSAGES LEFT FOR HIS WIFE DENIED PIETZ A FAIR TRIAL.

a. Evidence of Pietz's womanizing and sexual behavior was inadmissible to prove motive under ER 403 and ER 404(b).

Over defense objection, the court admitted the following evidence on the theory that Pietz's marital dissatisfaction provided a motive for the 2006 murder: (1) Pietz had a relationship with a woman while he was engaged to Nicole and had sex with her during the marriage in 2002 or 2003; (2) in 2003, Pietz had a one night stand with a woman; (3) in 2003, Pietz kissed a woman; (4) in 2003, Pietz surreptitiously spiked Nicole's drink at a nightclub with Ecstasy on two occasions, the first time resulting in Nicole performing a public sex act on him; (5) in 2003, Pietz asked a woman about forming a threesome; (6) before Nicole's death, Pietz invited a woman out for coffee; (7) Pietz expressed interest in other women (8) a few weeks after Nicole's body was found, Pietz asked a co-worker if was

too soon to date. 1RP 62-70, 89-95, 109, 111; 2RP 24-25; 3RP 5-12; 4RP 33-36; 6RP 4, 11-14; 11RP 120-22; CP 25-42, 50-51.

It has been over 40 years since a published appellate decision has addressed the admissibility of marital infidelity evidence. State v. Messinger, 8 Wn. App. 829, 835, 509 P.2d 382 (1973). The issue is one of substantial public importance under RAP 13.4(b)(4). Such evidence, due to its emotional nature, has a marked capacity to warp the outcome of a homicide trial. It is time for the Supreme Court to set forth the parameters for when this inflammatory evidence can be properly admitted.

The standard for admission set forth in Camm v. State, 812 N.E.2d 1127 (Ind. Ct. App.), review denied, 822 N.E.2d 980 (2004) and Lesley v. State, 606 So.2d 1084 (Miss. 1992) should be adopted in Washington. In a spousal homicide case, "evidence of a defendant's extramarital affairs should be accompanied by evidence that such activities had precipitated violence or threats between the defendant and victim in the past, or that the defendant was involved in an extramarital relationship at the time of the completed or contemplated homicide." Camm, 812 N.E.2d at 1133. Otherwise, the probative force of such affairs as proof of motive to murder the spouse is outweighed by its prejudicial effect. Id. at 1135. Lesley held it was more prejudicial than probative to use extramarital affair evidence to show that the adulterer "had a motive for killing her husband because

she was unhappy in her marriage and had a reason for wanting to 'get rid' of her husband. The only effect of such testimony was to show the jury that she was a 'bad woman.'" Lesley, 606 So.2d at 1090.

In Pietz's case, there is no evidence that Pietz's sexual interest in others precipitated violence or threats between himself and Nicole in the past. And there is no substantive evidence that Pietz was involved in an extramarital affair at the time of Nicole's death. The salient factors present in Camm and Lesley are present in Pietz's case: no violence precipitated by extramarital activity in the past, no ongoing affair at the time of the murder, and the affairs that did occur were remote in time. Any link between the womanizing behavior and the death is too attenuated to justify admission of this highly inflammatory evidence.

b. Evidence that Pietz spiked his wife's drink in 2003 was inadmissible under ER 403 and ER 404(b).

Over defense objection, the trial court admitted evidence that Pietz spiked his wife's drink for sexual purposes on the theory that it showed "he was willing to harm his wife in order to satisfy his own urges." 3RP 12. That is indistinguishable from admitting it to show Pietz was the kind of person who would harm his wife to satisfy his urges. "ER 404(b) is a categorical bar to admission of evidence for the purpose of proving a person's character and showing that the person acted in conformity with

that character." State v. Gresham, 173 Wn.2d 405, 420, 269 P.3d 207 (2012). Further, the acts of spiking took place in 2003, not any time close to Nicole's death. 6RP 141-52, 158-59, 162. The court acknowledged admissibility was a "close call." 3RP 11. Doubtful cases under ER 404(b) should be resolved in favor of the defendant. State v. Thang, 145 Wn.2d 630, 643, 41 P.3d 1159 (2002).

Evidence that Pietz spiked his wife's drink when she was a recovering addict in order to pleasure himself was extremely inflammatory. The court expressed its disgust at sentencing, calling the act "particularly appalling." 8RP 150-51. The jury could be expected to react in the same manner. The drink spiking evidence caused unfair prejudice because it was more likely to arouse an emotional response than a rational decision by the jury and promoted an undue tendency to suggest a decision on an improper basis. Cronin, 142 Wn.2d at 584.

c. The trial court erred in admitting the victim's out-of-court statement that she believed Pietz was having an affair.

Over defense objection, the court allowed Nicole's co-worker to testify that on January 27 Nicole told him "I know that David is having an affair." 1RP 72-80; 5RP 72-76; CP 52. The court admitted the testimony on the theory that it showed Nicole was angry about "this long-standing extra marital relationship," which provided "a very fertile ground for them

to have a pretty hot argument on." 1RP 94. The Court of Appeals found no problem with this reasoning. Slip op. at 17. But "[i]n 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." State v. Parr, 93 Wn.2d 95, 103, 606 P.2d 263 (1980). Pietz did not make the victim's state of mind relevant by claiming self-defense or accident or otherwise seeking to exploit her state of mind in aid of a defense. Further, ER 803(a)(3) "permits statements reporting the declarant's state of mind, but does not permit statements reporting the conduct of another which might have induced that state of mind." Parr, 93 Wn.2d at 104.

Moreover, the court's ruling rests on speculation that Nicole's state of mind led her to get into an argument with Pietz later that night. There is no evidence that such an argument occurred, as Nicole made no statement of her intention to confront Pietz. Cf. State v. Terrovona, 105 Wn.2d 632, 641-42, 716 P.2d 295 (1986) (decedent's statements to another of his intention to meet the defendant shortly before he was murdered "were admissible to infer that he acted according to those intentions, and that he acted with the person he mentioned," distinguishing Parr on the ground that "the State is not relying on past incidents to prove the defendant's subsequent conduct."). The Court of Appeals decision on this matter conflicts with Parr, warranting review under RAP 13.4(b)(1).

d. The trial court erred in admitting all of the voice messages and in declining to grant a mistrial after their full prejudicial effect became manifest.

Over defense objection, the trial court admitted evidence of the numerous voicemails left on Nicole's phone from other people wondering where she was and expressing their worry about her. 11RP 59-67; Ex. 85. After spectators cried during their playback, counsel moved for a mistrial. 12RP 4-7. The judge admitted the evidence because time of death was at issue, and denied the motion for mistrial because he could not prevent displays of emotion. 11RP 565-67; 12RP 6-7.

Any probative value of the voicemails was outweighed by the prejudicial effect under ER 403. Without listening to the actual voicemails, the jury already had heard testimony that friends and family called Nicole and received no response. 5RP 30, 101-02, 134-35, 140, 208. In light of the other evidence presented at trial that went to the timing of the death, the voice messages themselves were of little probative value. The messages from friends and family expressing worry and begging her to come home were emotionally explosive. The evidence was unfairly prejudicial because it was of "scant or cumulative probative force, dragged in by the heels for the sake of its prejudicial effect." Carson v. Fine, 123 Wn.2d 206, 223, 867 P.2d 610 (1994) (quoting United States v. Roark, 753 F.2d 991, 994 (11th Cir. 1985)). The court erred in admitting

the evidence under ER 403 and in declining to grant a mistrial after the palpable effect of the evidence reached its emotional zenith.

e. Cumulative error violated the due process right to a fair trial.

Every criminal defendant has the constitutional due process right to a fair trial. State v. Davenport, 100 Wn.2d 757, 762, 675 P.2d 1213 (1984); U.S. Const. Amend. XIV; Wash. Const. art. 1, § 3. Under the cumulative error doctrine, a defendant is entitled to a new trial when it is reasonably probable that errors, even though individually not reversible error, cumulatively produce an unfair trial by affecting the outcome. State v. Coe, 101 Wn.2d 772, 788-89, 684 P.2d 668 (1984); Parle v. Runnels, 505 F.3d 922, 928 (9th Cir. 2007). As discussed in section E.3., supra, an accumulation of errors produced an unfair trial.

F. CONCLUSION

For the reasons stated, Pietz requests that this Court grant review.

DATED this 16th day of November 2015.

Respectfully submitted,

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APPENDIX A

IN THE COURT OF APPEALS FOR THE STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent, v. MARTIN DAVID PIETZ, Appellant.	)	No. 71162-8-I
	)	DIVISION ONE
	)	UNPUBLISHED OPINION
	)	FILED: October 12, 2015

SPEARMAN, C.J. — Martin David Pietz was convicted of murder in the second degree for killing his wife. Pietz appeals his conviction, arguing that the trial court erred by (1) admitting evidence of prior bad acts in violation of ER 403 and ER 404(b); (2) giving a to convict instruction that did not make the legal standard manifestly clear; and (3) releasing an empanelled juror outside of open court. We find no error and affirm.

FACTS

At 10:20 p.m. on January 28, 2006, Pietz reported his wife, Nicole Pietz, as a "missing person." Verbatim Report of Proceedings (VRP) (9/16/13) at158. He told the responding officer that she had been asleep when he got home the night before, but when he woke up that morning she was gone and she wasn't there when he got home from work. He explained that Nicole had been in

Alcoholics Anonymous (AA) for dependence on pain medication, but she had been sober for eight years and was expected to celebrate a sobriety anniversary on the day she was reported missing. Pietz also told police that some of Nicole's medication was missing and he was worried that she had relapsed.

Pietz told Nicole's mother and stepfather about the missing medication and showed them her wedding ring, explaining that the couple had taken to not wearing their rings every day. He also told them that Nicole had recently started wearing her retainer outside of the home.

Nine days later, on February 6, 2006, Nicole's body was found. During the time she was missing, friends and family filled her voice mail with over forty messages expressing concern and asking her to contact them. Nicole was found wearing a plastic dental device that had been fitted to her mouth. She had bruises on her face caused by blunt force, along with bruises on her elbows, thighs, knees, and pelvis. Her neck muscles were deeply bruised, and there was evidence of hemorrhaging on both sides of her throat and in her eyes, indicative of strangulation. The medical examiner concluded that the cause of Nicole's death was asphyxia due to manual strangulation.

The State charged Pietz with second degree murder. Over Pietz's objection, the trial court admitted evidence of his extramarital affairs, his sexual interest in other women, and an attempt to loosen his wife's sexual inhibitions by spiking her drink at a club. The trial court heard testimony from one of Pietz's former co-workers with whom he had a romantic relationship from 2001 to 2003. Two other woman testified that they met Pietz in 2003, and they had either

kissed or slept with him after going out drinking. One woman testified that Pietz would often complain that his wife would not go out with him to social events and criticized his drinking.

Renee Stewart exercised at the gym where Pietz worked in 2003. She testified that she, Pietz, and others who worked at the gym, would often go to a nightclub together. According to Stewart, prior to one outing to the nightclub, Pietz told her that he planned to put ecstasy in Nicole's drink. That night she saw Pietz give his wife a Red Bull. Stewart testified that after drinking it, Nicole became "more sexual" with people. VRP (9/17/13) at 149. Pietz later confirmed to Stewart that he had, in fact, put ecstasy in Nicole's Red Bull. The next time at the club, Stewart saw Pietz bring his wife a Red Bull again, and witnessed a change in Nicole that "wasn't overtly sexual but ... more the intimacy (sic) amongst friends. . . ." VRP (9/17/13) at 158-59.

There was also testimony that several weeks before Nicole's disappearance, Pietz asked a customer from the gym to go out for coffee and gave her his phone number. And a few weeks after her death, Pietz asked a co-worker if he thought it was too soon to date. Nicole's co-worker testified that on January 27, 2006, the day before she went missing, Nicole was upset and told him that she "kn[ew] that David [was] having an affair." VRP (9/16/13) at 76.

Near the end of the trial, October 7, 2013, Juror 1 called chambers and spoke with the trial judge's bailiff. The bailiff then notified counsel via email that "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." Clerk's Papers (CP) at 522. Once trial resumed, the judge stated on the record:

> "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 (sic) I am informed this morning by my bailiff that [juror number one] 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." VRP (10/7/13) at 4.

Pietz did not object until the following day, when he argued that the juror "was excused not in open court without a Bone-Club analysis"[1] and moved for a mistrial. VRP (10/8/13) at 6. The trial court denied the motion.

The jury received a number of written instructions, including No. 10, which read as follows:

> To convict the defendant of the crime of Murder in the Second Degree, each of the following elements of the crime 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

[1] State v. Bone-Club, 128 Wn.2d 254, 906 P.2d 325 (1995).

(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 duty 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) has 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 at 312-13.

The jury was also given Instruction No. 3, which read as follows:

The defendant has entered a plea of not guilty. That plea puts in issue every element of the crime charged. The State is the plaintiff and has the burden of proving each element of the crime beyond a reasonable doubt. The defendant has no burden of proving that a reasonable doubt exists as to these elements.

A defendant is presumed innocent. This presumption continues throughout the entire trial unless during your deliberations you find it has been overcome by the evidence beyond a reasonable doubt.

A reasonable doubt is one for which a reason exists and may arise from the evidence or lack of evidence. It is such a doubt as would exist in the mind of a reasonable person after fully, fairly, and carefully considering all of the evidence or lack of evidence. If, from such consideration, you have an abiding belief in the truth of the charge, you are satisfied beyond a reasonable doubt.

CP at 305.

The jury returned a guilty verdict. The court imposed 220 months of confinement. Pietz appeals.

DISCUSSION

The "To Convict" Instruction

Pietz argues that his conviction must be reversed because the "to convict" instruction relieved the State of its burden to prove all of the elements of murder in the second degree. He also argues the instruction suggests that a jury has a duty to acquit only if it finds reasonable doubt as to all of the elements, not just one. The State argues that any lack of clarity in the to convict instruction was mitigated by the other instructions, and any error was harmless.

We review jury instructions de novo in the context of the instructions as a whole. State v. Jackman, 156 Wn.2d 736, 743, 132 P.3d 136 (2006). Jury instructions must make the relevant legal standard manifestly apparent to the average juror. State v. Borsheim, 140 Wn. App. 357, 366, 165 P.3d 417 (2007) (citing State v. Watkins, 136 Wn. App. 240, 241, 148 P.3d 1112 (2006)). The requirements of due process usually are met when the jury is informed of all the elements of an offense and instructed that unless each element is established beyond a reasonable doubt, the defendant must be acquitted. State v. Scott, 110 Wn.2d 682, 690, 757 P.2d 492 (1988). It is reversible error to instruct the jury in a manner relieving the State of its burden. State v. Bennett, 161 Wn.2d 303, 307, 165 P.3d 1241 (2007).

Pietz assigns error to that part of the to convict instruction that reads "[e]lements (1)(a), (b), and (c) and (2)(a) and (b) are alternatives and only one need be proved." CP at 305. He claims that "the 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. In other words, the jury could have read the instruction to mean that it was required to convict if the State had only proved one out of the five listed elements.

Pietz also argues that Instruction 10 could have been read to require acquittal only if the jury found reasonable doubt as to all of the sub-elements of both options. The instruction states "if, ... 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 312-313. He argues that the use of the conjunction "and" "tells the jury that it has a duty to return a 'not guilty' verdict only if it has a reasonable doubt as to each of the three elements of the first alternative means (1(a), (b) and (c)) and each of the two elements of the second alternative means (2(a) and (b))." Reply Br. at 4.

The State concedes that the instructions were unclear, so we consider only whether the error requires reversal. A jury instruction that misstates the law such that it relieves the State of its burden to prove every element of the crime charged affects a constitutional right and therefore is subject to the rigorous constitutional harmless error standard. State v. Thomas, 150 Wn.2d 821, 844-45, 83 P.3d 970 (2004). For a constitutional error, the State bears the burden of proving that the error is harmless beyond a reasonable doubt. State v. Lynch, 178 Wn.2d 487, 494, 309 P.3d 482 (2013).

Pietz argues that the failure to properly instruct the jury on reasonable doubt is structural error requiring reversal without resort to harmless error analysis. He cites Sullivan v. Louisiana, 508 U.S. 275, 281-82, 113 S.Ct. 2078,

124 L.Ed.2d 182 (1993); Miller v. State, 298 Kan. 921, 923, 318 P.3d 155 (2014); and State v. Smith, 174 Wn. App. 359, 298 P.3d 785 (2013) to support his argument. Each of these cases is easily distinguishable. In Sullivan, the jury was given a written definition of reasonable doubt that was identical to one held unconstitutional in Cage v. Louisiana, 498 U.S. 39, 41, 111 S.Ct. 328, 112 L.Ed.2d 339 (1990) (disapproved of on other grounds by Estelle v. McGuire, 502 U.S. 62, 112 S.Ct. 475, 116 L.Ed.2d 385 (1991)). The definition "equated a reasonable doubt with a 'grave uncertainty' and an 'actual substantial doubt,' and stated that what was required was a 'moral certainty' that the defendant was guilty." Cage, 498 U.S. at 41.

The other two cases involved substitutions of words that potentially reduced the State's burden of proof or changed the obligation to acquit a defendant. In Smith, the jury was instructed that if it had a reasonable doubt it "should" return a verdict of not guilty, instead of that it had a "duty" to do so as set forth in 11 WASHINGTON PRACTICE: WASHINGTON PATTERN JURY INSTRUCTIONS: CRIMINAL 4.21 (3d ed. 2008) (ELEMENTS OF THE CRIME); Smith, 174 Wn. App. at 363. We observed that at one point, the jury was deadlocked and we could not discern how unanimity was finally reached. But one possible reason was that "jurors concluded from the court's instructions that while jurors with lingering doubts *should* return a verdict of not guilty, they did not have to." Id. at 369. Thus, we held the erroneous instruction was structural error which necessitated reversal, because of "the difficulty of assessing the effect of the error." Id. at 368-9 (quoting State v. Wise, 176 Wn.2d 1, 14 n.7, 288 P.3d 1113 (2012) (quoting

Gonzalez v. Lopez, 548 U.S. 140, 149 n.4, 126 S. Ct. 2557, 165 L.Ed.2d 409 (2006)).

Similarly, in Miller the court found that an instruction that described the test as "reasonable doubt as to the truth of each of the claims required to be proved by the State," instead of "reasonable doubt as to the truth of any of the claims" was structural error. Miller, 298 Kan. at 930. The Miller court found that "[a] jury instruction that a jury is reasonably likely to have applied in a way that could produce a guilty verdict despite reasonable doubt is per se prejudicial." Miller, 318 P.3d at 935.

Unlike in Smith or Miller, here there was no reasonable possibility that the jury applied the instruction in a way that compromised Pietz's right to a verdict of not guilty except upon a jury concluding that each element of the charged crime was proved beyond a reasonable doubt. Pietz contends the jury may have understood the instruction to require a guilty verdict even if it had, for example, a reasonable doubt as to all of the sub-elements except that Nicole was killed in Washington State. Or, he suggests that the jury may have understood that it was required to find him guilty even if the State proved only one element of the crime beyond a reasonable doubt, for example, that Nicole was not a participant in the crime. But when the court's instructions are viewed as a whole, neither of these readings of the instruction is even remotely feasible. Instruction No. 3, the "reasonable doubt" instruction, in particular, explained to the jury the State's "burden of proving each element of the crime beyond a reasonable doubt." CP

305 (emphasis added.) And Pietz has identified nothing in the record that suggests the jurors were confused about the instruction.

In addition, as the State points out, at trial the only element in contention was the identity of Nicole's killer. The evidence that someone intentionally killed Nicole by deliberately strangling her, in Washington was undisputed. Thus, even if we were to assume the jury read the instruction as Pietz suggests, the error would only have affected the verdict if the jury somehow found reasonable doubt about the undisputed elements.

Although the to-convict instruction was not a model of clarity, we fail to see how it affected the verdict in this case. It neither relieved the State of its burden to prove every element beyond a reasonable doubt nor permitted the jury to find Pietz guilty without finding the evidence sufficient on each element of the crime. Accordingly, we reject Pietz's claim of structural error. We also conclude beyond a reasonable doubt that any error in the instruction was harmless because we can discern no way in which the error contributed to the outcome of the trial. Thomas, 150 Wn.2d at 845. The evidence against Pietz, while circumstantial, was substantial and compelling.

Public Trial

Pietz argues that his constitutional right to a public trial was violated because a sitting juror was released from service by the bailiff. The Sixth Amendment and article I, section 22 of the Washington Constitution guarantee a criminal defendant's right to a public trial. U.S. Const. amend. VI; Wash. Const. art. I, § 22; State v. Bone-Club, 128 Wn.2d 254, 261–62, 906 P.2d 325 (1995).

Whether a defendant's constitutional right to a public trial has been violated is a question of law that is reviewed de novo. State v. Wilson, 174 Wn. App. 328, 334, 298 P.3d 148 (2013). A reviewing court must first determine if "the proceeding at issue implicates the public trial right, thereby constituting a closure at all." State v. Sublett, 176 Wn.2d 71, 292 P.3d 715 (2012). The appellant must show that a closure occurred in the first place. State v. Koss, 181 Wn.2d 493, 503, 334 P.3d 1042 (2014).

Pietz cites to Watters v. State, 328 Md.38, 42, 612 A.2d 1258 (1992) and State v. Irby, 170 Wn.2d 874, 878, 246 P.3d 796 (2011), to support his argument that the bailiff excused the juror improperly via e-mail. In Watters, a deputy sheriff excluded the public and press from voir dire and jury selection. Pietz cites Watters to show that the public's trial right can be violated by a person other than a judicial officer. In Irby, the court held that an e-mail agreement among counsel and the judge to release jurors outside of the defendant's presence violated his right to a public trial.

But here, Pietz has not shown that Juror 1 was actually excused outside of open court via e-mail to the parties or by the bailiff's phone conversation. On the contrary, the record shows that the juror was excused in open court, with no objection. In response to Pietz's motion the following day, the trial court pointed out that he dismissed the juror in open court and with regard to the notion that his bailiff excused the juror, the judge noted:

> ... 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.

VRP (10/8/13) at 6.[2]

Furthermore, any possible error that resulted from removing the juror was harmless. The only feasible course of action was to excuse Juror 1 and seat an alternate juror. Pietz fails to even suggest what other course of action was available to the trial court. Under these circumstances, there is not even a remote possibility that the juror's removal had any effect on the outcome of Pietz's case.

Evidentiary Rulings

Pietz also argues that the trial court erred by admitting evidence of his extramarital affairs and interest in other women shortly before and after Nicole's death. He argues that the evidence was inadmissible under ER 404(b) and its unfair prejudicial effect outweighed any probative value. The State argues that the trial court properly admitted evidence of the affairs as proof of motive.

The test for admitting evidence under ER 404(b) requires the trial court to (1) find by a preponderance of 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. Thang, 145 Wn.2d 630, 642, 41 P.3d 1159 (2002). A trial court's decision to

[2] CrR 6.5 vests authority with the trial court to discharge a juror who is unable to perform his or her duties. Pietz implies that the judge exercised this authority through the bailiff and that her email to the parties is confirmation that the discharge did not occur in open court. He argues that the judge's statement that he excused the juror in open court was disingenuous and "a concerted effort to create a record that would make the issue appeal-proof." Reply Brief of Appellant at 9. We decline to even consider this argument because Pietz offers no facts in support of this dubious claim.

admit evidence under ER 404(b) will be reversed only for abuse of discretion. State v. Wade, 138 Wn.2d 460, 463–64, 979 P.2d 850 (1999). A court abuses its discretion only when its decision is manifestly unreasonable or based on untenable grounds. Id. at 464 (citing State ex rel. Carroll v. Junker, 79 Wn.2d 12, 482 P.2d 775 (1971)). In a doubtful case, the evidence should be excluded. Smith, 106 Wn.2d at 776.

Proof of motive is a proper basis for the admission of prior acts under ER 404(b). State v. Benn, 120 Wn.2d 631, 653, 845 P.2d 289 (1993); State v. Terrovona, 105 Wn.2d 632, 650, 716 P.2d 295 (1986). Motive is defined as "the moving course, the impulse, the desire that induces criminal action on part of the accused. . . ." State v. Powell, 126 Wn.2d 244, 260, 893 P.2d 615 (1995) (quoting Black's Law Dictionary 1014 (6th rev. ed.1990)). Motive is well recognized in murder cases as evidence of intent, premeditation, or purpose. State v. Halstien, 122 Wn.2d 109, 119, 857 P.2d 270 (1993).

Under State v. Messinger, 8 Wn. App. 829, 835, 509 P.2d 382 (1973) "[e]vidence of marital disharmony and infidelity may be relevant and material and be admissible if there exists some causal relationship or natural connection between the misconduct and the criminal act with which the accused stands charged." (Citing State v. Gaines, 144 Wash. 446, 258 P. 508 (1927)). In that case the court admitted unspecified evidence of marital infidelity known to and committed by both parties, along with the fact that the parties had consulted an attorney regarding a divorce a week prior to the incident. Id. The evidence was considered relevant and material to the issue of motive; "[i]n cases where there is

no proof of who committed the criminal act, proof of motive is important, and often decisive." Id. (Citing State v. Barton, 198 Wash. 268, 277-79, 88 P.2d 385 (1939)). Here, the case relied wholly on circumstantial evidence as to the identity of Nicole's killer. The State argues that evidence of adultery shows "Pietz's genuine unhappiness with Nicole and with being tied to her. . . ." Br. of Respondent at 34.

Pietz cites two cases from other jurisdictions to support his argument that evidence of extramarital affairs are only relevant if they are combined with evidence of violence of current conduct that would show motive. In Camm v. State, 812 N.E.2d 1127 (Ind. 2004) the Indiana supreme court excluded evidence of extensive extramarital affairs as more prejudicial than probative. The court reasoned that

> to be admissible, evidence of a defendant's extramarital affairs should be accompanied by evidence that such activities had precipitated violence or threats between the defendant and victim in the past, or that the defendant was involved in an extramarital relationship at the time of the completed or contemplated homicide. The admissibility of such evidence may be further constrained by concerns of chronological remoteness, insufficient proof of the extrinsic act, or the general concern that the unfair prejudicial effect of certain evidence might substantially outweigh its probative value in a particular case. Id. at 1133.

In that case, there was no evidence of a violent or hostile relationship, that the defendant ever threatened his wife with harm, or that he was involved in an extramarital relationship at the time of her murder. Id. Similarly, in Lesley v. State, 606 So.2d 1084 (Miss. 1992), a Mississippi court excluded evidence of earlier affairs, because they occurred years before both her current affair and the

planned murder of her husband. The court found that the earlier incidents were not part of any chain of events leading to the planned murder. Id. at 1090. The defendant's alleged adultery did not make it more likely than not that she committed conspiracy to commit murder. Id. Following the reasoning in those cases, Pietz argues that the evidence of his affairs were too remote in time and had no connection to any possible motive to harm his wife.

The evidence admitted consisted of affairs dating back to 2003 and some more recent flirtations, including testimony about Pietz being interested in dating a few weeks after Nicole's body was discovered. Taking all of the evidence into consideration, the trial court found that "[t]he State ha[d] a continuing pattern that would suggest that the defendant had a long-standing dissatisfaction with their sexual relations in his marriage, and that had been going on from before the marriage, and there is an inference it went on all the way through the marriage up to the date of the death of his wife." VRP (9/9/13) at 90-91. The trial court observed that if the evidence had only consisted of old affairs, without a continuing pattern, it would have excluded it under ER 403. Id. at 91. But it found that the evidence was relevant to establishing motive because Pietz "was not happy with his wife, and sought out lots of other folks. To have it happen, he perhaps manipulated his wife to change that relationship, and it just wasn't satisfactory," and "[t]hey argued about it, apparently." Id. at 91. Because the trial court properly balanced the probative value and prejudicial effect of the evidence, its admission was not an abuse discretion.

Pietz argues that the admission of evidence that Pietz secretly spiked his wife's drink with ecstasy was irrelevant and highly prejudicial. The trial court found the evidence to be relevant because "the witnesses assert[ed] he did it against his wife's will, without her knowledge. . . . If that's true, it would suggest that ... he was willing to harm his wife in order to get what he wanted." VRP (9/11/13) at 10-11. Pietz argues that this evidence is not probative because it is "[d]oubtless there are many spouses dissatisfied with their marital sex lives and seek, through various means, to spice things up," and that such dissatisfaction cannot be equated to a motive for murder. Reply Br. at 13. But here, there was no mere effort to "spice things up." According to the testimony, Pietz was well aware of his wife's substance abuse issues and surreptitiously gave her an illegal controlled substance in order to conform her sexual behavior to his wishes. Under these circumstances, there was no abuse of discretion in admitting this evidence.

Pietz next assigns error to the trial court's admission of testimony that Nicole knew about her husband's affair because her state of mind was not relevant to a material issue at trial. Pietz argues that the trial court's reason for admitting such statements rests on speculation, because there was no expressed intention to confront Pietz that night. The trial court admitted the testimony, because it pertained to "whether she suspected it, and was angry about it. On the day in question was she angry that he had been having this long-standing extra marital relationship? And if she was, then that provides a very

fertile ground for them to have a pretty hot argument on." VRP (9/9/13) at 94. We find no error in the trial court's reasoning.[3]

Finally, Pietz argues that the trial court erred when it admitted evidence of the voicemails left on Nicole's phone. Pietz contends that any probative value of the voicemail was greatly outweighed by the prejudicial effect. The trial court found that Pietz's defense was based on the theory that Nicole was still alive at some period on Saturday, January 28, 2006, there was "certainly relevance to the fact she continue[d] to receive pleading voicemails from her friends asking her to call them." VRP (10/2/13) at 65. The court found that because the phone messages indicated "a fairly strong inference that if she was alive she certainly wasn't picking up her cell phone. And given the fact that we all know we're tied at the hip to our cell phones these days, that's unlikely." Id. Another inference was that "she was no longer alive to return those phone calls," and that "that in and of itself is sufficient to say it's admissible regardless of the fact that they were all from other people rather than your client and there being an inference your client should have been included." Id. We find that the trial court acted within its discretion when it admitted evidence of the voicemails.

[3] In his statement of additional grounds, Pietz assigns error to the trial court's admission of evidence of Nicole telling her co-worker that she knew Pietz was having an affair. He argues that such evidence should have been excluded because it was inadmissible character and propensity evidence. He also argues that evidence of his acts of infidelity should have been excluded under ER 403 and ER 404(b). Because Pietz has not set forth any arguments that were not raised by his counsel in the main brief, we do not address them separately.

Affirm.

Spearman, C.J.

WE CONCUR:

Cox, J.

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON	)	
	)	
Respondent,	)	
	)	SUPREME COURT NO. _____
v.	)	COA NO. 71162-8-I
	)	
MARTIN PIETZ,	)	
	)	
Petitioner.	)	

DECLARATION OF SERVICE

I, PATRICK MAYOVSKY, DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOLLOWING IS TRUE AND CORRECT:

THAT ON THE 10TH DAY OF NOVEMBER, 2015, I CAUSED A TRUE AND CORRECT COPY OF THE **PETITION FOR REVIEW** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

[X] MARTIN PIETZ 370510
STAFFORD CREEK CORRECTIONS CENTER
191 CONSTANTINE WAY
ABERDEEN, WA 98520

SIGNED IN SEATTLE WASHINGTON, THIS 10TH DAY OF NOVEMBER, 2015.

X Patrick Mayovsky

NIELSEN, BROMAN & KOCH, PLLC

November 10, 2015 - 4:00 PM

Transmittal Letter

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Court of Appeals Case Number: 71162-8

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