71034-6

71034-6

NO. 71034-6-I

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

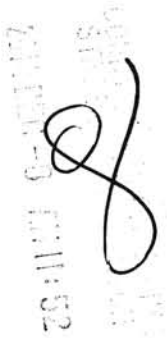
STATE OF WASHINGTON,

Respondent,

v.

Robert Allan Baker,

Appellant.



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

The Honorable Alan R. Hancock, Judge
Superior Court Cause No. 12-1-00127-9

BRIEF OF RESPONDENT

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I. STATEMENT OF THE ISSUES

1. A person is in custody for purposes of Miranda protections only when subject to the restraints associated with formal arrest. Here when the defendant was questioned, he was not placed under arrest, handcuffed, threatened, subject to any booking procedures, or subject to overly aggressive questioning. Was the Court correct in ruling that none of the defendant's statements were custodial?

2. The victim of first degree murder was assaulted by her husband while she was in bed asleep. Further, the victim had two distinct groups of injuries inflicted by the defendant, including a penetrating hammer strike injury to the skull and injuries due to ligature strangulation. The jury found, beyond a reasonable doubt, that the victim was particularly vulnerable or incapable of resistance when she was murdered, an aggravating circumstance under RCW 9.94A.535. Was the jury's finding supported by the record, when construing all evidence in a light most favorable to the State?

3. When ineffective assistance of counsel is raised on appeal, the reviewing court may only consider facts within the record. Can the defendant show that counsel's silence at sentencing was not a legitimate strategy and, if so, that the defendant was actually prejudiced based only on the record on appeal?

II. STATEMENT OF THE CASE

Prior to her murder, the victim Kathie Baker lived on a secluded 13 acre property with her husband, the defendant Robert Allan Baker (Al) at 875 Silver Cloud Lane, Greenbank, Washington. 1 RP 78–79, 1 RP 10, 16, 2 RP 432.

The couple had married in 2007, in Colorado. 2 RP 279, 5 RP 775. They later moved to Whidbey Island, Washington where Kathie telecommuted for her employment with Raytheon Corporation. 2 RP 264, 2 RP 279. In June 2011, Kathie and Mr. Baker opened a pizza restaurant together in Freeland, Washington named Harbor Pizzeria. 2 RP 393–394. Kathie and the defendant both worked at Harbor Pizzeria most days for at least part of the day. 2 RP 373-374.

Kathie and Mr. Baker had both worked at the Antarctic science station. 5 RP 813, 5 RP 815. Kathie quit going to Antarctica roughly ten years previously, but the defendant continued to work in Antarctica for an

average of three or four months a year up until February of 2012. 5 RP 816.

On his final trip to Antarctica in 2011 – 2012, Mr. Baker initiated a romantic pursuit of another woman, Liza Schuldt of Seward, Alaska, including holding hands, watching movies and kissing. 5 RP 816 - 818.

When both the defendant and Ms. Schuldt had returned to the United States in February, 2012, Baker initiated contact with Ms. Schuldt. 5 RP 819. Mr. Baker told Ms. Schuldt that he and Kathie were having difficulties in their relationship. 5 RP 820–822. Later, Mr. Baker stated he and Kathie were separated and/or had never actually married and that Kathie had moved back to Colorado. 5 RP 823–825, Exhibit 387.[1]

Mr. Baker made two secret trips to Alaska to visit Ms. Schuldt in the Spring of 2012 prior to Kathie's murder. 5 RP 830, 846. The second trip occurred just one week prior to Kathie's disappearance. 1 RP 10 – 12, 5 RP 846, 6 RP 1024. A friend visiting for a week in late May described the relationship between Kathie and the defendant as "perfectly fine".[2] 1 RP 12.

The defendant's romantic pursuit of Ms. Schuldt also included sending her at least one greeting card a day, frequent emails, and phone

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[1] As per RAP 9.6(a), Respondent filed a Supplemental Designation of Exhibits on December 5, 2014.

[2] The visitor also described the house as "perfect" with no carpet stains. 1 RP 12 – 13.

calls. 5 RP 820–821, 824, 6 RP 959–960. These written communications never mentioned the defendant's wife, Kathie, except only to indicate that the defendant's relationship with Kathie was over. 5 RP 822–826, 828-829, Exhibit 388. Mr. Baker often spoke of his love for Ms. Schuldt and his hope and desire to spend the rest of his life with her including having her move in with him. 5 RP 825, 803, 832–836, 846, 853, Exhibit 395.

Kathie was last seen alive on June 2, 2012, at the Harbor Pizzeria restaurant. 3 RP 376-379. Mr. Baker and his wife Kathie were celebrating the restaurant's one year anniversary with the employees and patrons. 3 RP 376-379. Kathie and the defendant seemed very loving at the party, so much so that one of the employees took a photograph of the two together eating cake. 3 RP 379, 3 RP 401, Exhibit 260.

The last time anyone spoke to Kathie was the night of Saturday, June 2, 2012. 3 RP 381–382, 388, 3 RP 403-406. At 10:00 p.m., an employee, Sausha Braunson, phoned the Baker residence and spoke with Baker and Kathie. 3 RP 381-382. Another employee, Ashley Christie, also called the Baker's home that night at 10:30 pm. 3 RP 404. Ms. Christie spoke directly with the defendant but Kathie was part of the conversation in the background. 3 RP 404-405. Ms. Christie called back a second time at 11:00 pm and spoke only to the defendant who stated that he and Kathie were in bed and not to call again. 3 RP 406.

The following morning, June 3, 2012, Sausha Braunson arrived at the Harbor Pizzeria at 9:00 a.m. and found Baker already there looking "dirty" and like he had been up all night. 3 RP 383. Later that day, Baker called Ashley Christie around 12:00 pm (while she was at home on her day off) and stated that he was taking Kathie to SeaTac airport because she had to go to Denver for a business trip. 3 RP 406–407.

Video surveillance obtained after Baker's arrest recorded him arriving alone in his red pickup at 4:20 pm on June 3, 2012, at the Clinton Ferry Terminal. 5 RP 751–754, 761. Baker took the 4:30 pm ferry to Mukilteo and drove off the ferry alone. 5 RP 751–754, 761. Video also showed the defendant took the Mukilteo to Clinton ferry at 8:50 pm on June 3, 2012, this time with a female passenger, Liza Schuldt. 5 RP 756–762, 854.

Kathie's coworker, Ray Dunham, attempted to contact Kathie from Colorado on June 4th, 5th, 6th and 7th, 2012. 3 RP 268. Mr. Dunham's last communication with Kathie had been on Friday, June 1, 2012, when she texted, among other things, that she was having lunch with her "hubby." 3 RP 270–272.

On Wednesday, June 7, 2012, another Raytheon employee phoned the Harbor Pizzeria to inquire about Kathie and was told that Kathie was in Colorado working that week. 3 RP 268–269. Mr. Dunham knew that

Kathie was not in Colorado working and contacted Raytheon management. 3 RP 270. Raytheon security contacted the Island County Sheriff's Office on June 7, 2012. 3 RP 275–276.

On Wednesday, June 7, 2012, Lieutenant Evan Tingstad and Deputy Leif Haugen of the Island County Sheriff's Office were dispatched for a welfare check to the Baker residence. 4 RP 512, 8-16-2013 RP 25. Baker was first contacted by the mailbox while he was driving into his driveway at roughly 4:45 pm. 1 RP 15–16, 5 RP 513, 8/16/13 RP 26. Baker stated that Kathie was not home but was in Denver for work and had left on Saturday, June 2, 2012. 4 RP 514–515, 8/16/13 RP 27. Baker then continued to the parking area of his home where the conversation with the deputies continued. 8/16/13 RP 28–29, 4 RP 516–520. Baker confirmed that he dropped his wife off at Southwest Airlines at the SeaTac airport on Saturday, June 2, 2012, and that there had been no communication between the two since. 4 RP 517, 1 RP 23. The deputies noticed the silhouette of a female in the house. 4 RP 519, 8/16/13 RP 30. Baker stated that the female was a mutual friend from Alaska and also that his wife knew she was staying there and was fine with it. 4 RP 519. Lt. Tingstad obtained Kathie's cell phone number from the defendant, called and left a voicemail for Kathie. 4 RP 518–519, 8/16/13 RP 29 – 30. The

entire contact with deputies on June 7, 2012, was about 12 minutes. 8/16/13 RP 29.[3]

The following day, June 8, 2012, Baker was contacted in the afternoon by Detective Laura Price at Harbor Pizzeria. 1 RP 199–200, 4/16/13 RP 10–11. Detective Price had been requested to assist in locating Kathie. 1 RP 195–196. 4/16/13 RP 9 – 12. Mr. Baker was with Liza Schuldt but agreed to speak with Detective Price at the nearby precinct. 1 RP 199–201, 4/16/13 R 9–12. Baker and Det. Price drove separately. 8/16/12 RP 12.

Baker now stated that he took Kathie to the airport on Sunday, June 3, 2012. 1 RP 202. Further, that they took the 10:00 or 10:30 am ferry from Clinton to Mukilteo, arriving at Sea-Tac at 1:00 or 1:30 pm. 1 RP 202–203, 4/16/13 RP 13–14.

Det. Price suspected that Kathie had left Baker and had possibly made a large withdrawal. 4/16/13 RP 14–15, 1 RP 207–209. She and Baker looked at some of the couple's joint bank accounts on the computer at the precinct but when Baker indicated that he could not remember some of the passwords, he agreed to go to his residence with Det. Price to retrieve the passwords and continue. *Id.* Mr. Baker, Ms. Schuldt,

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[3] Deputy Haugen later confirmed with Raytheon that Kathie was not in Denver. 1 RP 20–21. Further, Deputy Haugen contacted the Port of Seattle and learned that Kathie had not flown out of SeaTac recently. 1 RP 23–24.

Detective Price, and Deputy Haugen arrived at the Baker residence at 3:30 to 4:30 pm. 1 RP 209, 4/16/13 RP 15. The defendant drove his own vehicle. *Id.*

Upon being invited into the house, Detective Price observed it was neat and clean but for a large stain on the living room carpet. 1 RP 210, Exhibits 5, 7. Baker explained that the stain was from one of the dogs dragging its butt on the carpet. 1 RP 210–211.

Meanwhile, Deputy Haugen spoke with Ms. Schuldt outside regarding Kathie's whereabouts. 1 RP 30. Ms. Schuldt appeared confused and stated to the deputy that: "You know she lives in Colorado." *Id.* Deputy Haugen entered the residence and asked Baker how long Kathie had been living in Colorado. 1 RP 31–32. Mr. Baker stated since March, 2012. *Id.* Baker indicated he had not stated this prior because he was embarrassed. 1 RP 214–215.

Det. Price asked Baker if she could look around and check the residence to see if Kathie was in the house. 1 RP 216–217, 8/16/13 RP 16–17. Baker was informed of his right to refuse to allow the officers to look around the house and/or could limit the search. 8/16/13 RP 17. Baker agreed and led the way. *Id.* A red carpet stain was observed in the master bedroom partially concealed by a pillow. 1 RP 217–218, Exhibit 24. Baker explained that the dogs poop on the carpet a lot and that one of

the dogs had a sore paw that was bleeding. 1 RP 219. Detective Price inspected the two dogs at the residence and neither was bleeding or had sores. 1 RP 220–221.

When Deputy Haugen entered the guest bedroom upstairs, Baker requested that he stay out of that room as that was where Ms. Schuldt was staying. 1 RP 35. Deputy Haugen complied. *Id.*

Lt. Tingstad, who had since arrived, took over the conversation with Mr. Baker, asking him to go through the last two weeks with "specific clarity" so they could try and find Kathie. 4 RP 429–430. Baker explained that he took Kathie to SeaTac airport on Sunday, June 3, 2012, and dropped her off at Southwest Airlines for her flight to Denver. 4 RP 530–531. He then, shortly thereafter, picked up Ms. Schuldt who had flown in from Alaska. 4 RP 532. Then the defendant explained that Kathie had moved out and was living in Denver but the defendant did not respond to questions about why Kathie's two dogs were in the house and her car was in the garage. 4 RP 536, 539–540.

Lt. Tingstad observed what appeared to be faint drag marks in the kitchen and also the garage where the marks led to an outside door. 4 RP 540–542. In the garage laundry room, Lt. Tingstad observed a white comforter in a deep sink with a red stain. 4 RP 543.

Lt. Tingstad and Baker exited the house and stood on the parking pad of the garage. 4/16/13 RP 34–35. Mr. Baker was then advised of his *Miranda* rights. 4/16/13 RP 35–36. Lt. Tingstad stated at the CrR 3.5 hearing that the reason he read Mr. Baker his rights at that time were: "I was concerned that there was a violent act in the home and that we may now be investigating a criminal offense and I wanted to ask some direct questions." 4/16/13 RP 35. Lt. Tingstad also testified that Mr. Baker was not in custody at that time. *Id.*

After being informed of his *Miranda* rights, Baker initially agreed to speak. 4/16/13 RP 36. Lt. Tingstad asked Baker to explain the blood on the comforter. *Id.* The defendant then stated: "I don't think I want to answer any more questions." 4/16/13 RP 37. Lt. Tingstad did not ask Baker any more questions. *Id.* This occurred at 6:30 pm. 4/16/13 RP 40. Baker was told that the house was being seized while Lt. Tingstad applied for a search warrant. 4/16/13 RP 37. Baker was not allowed back in the house but no other constraints were placed on him. 4/16/13 RP 38. Baker was not told that he could not leave, he was not told he was under arrest, he was not handcuffed, he was not put in a patrol car, he was not threatened or promised anything. 4/16/13 RP 38–39.

Approximately three hours later, Baker was told he would have to leave the property. 4/16/13 RP 39. Baker had stood by his pickup for

approximately three hours.[4] *Id.* Lt. Tingstad offered to retrieve the defendant's identification, a credit card and jacket, which were provided. *Id.* The defendant left the property in a taxi. 4/16/13 RP 39–40. Baker was not told where to go but he stated he would stay at the Pizzeria. *Id.*

A search warrant was granted for the Baker residence and property on June 9, 2012. 2 RP 312. A body, wrapped in a blue tarp, tied with bungee cords and rope, was located in a wooded ravine near the residence. 1 RP 79–81, 3 RP 459-465, Exhibit 280. The body had been concealed with carpet pieces, cut vegetation, a rain poncho and a welcome mat. 3 RP 444–459, 1 RP 89, Exhibit 295.

On June 9, 2012, Lt. Tingstad and Deputy Haugen attempted to find the defendant at Harbor Pizzaria, but he was not there. 4 RP 546, 4/16/13 RP 41. Lt. Tingstad decided to check the local motel in Freeland. 4 RP 547. Upon arrival, he discovered that Baker was staying at the motel. *Id.* Deputy Haugen knocked on the door to Baker's room just before noon. 4 RP 547, 4/16/13 RP 41. Baker opened the door and the deputies indicated that they still needed to figure out where Kathie was and would the defendant "mind talking with us." 4/16/13 RP 42. Mr. Baker indicated "okay" and went back inside the room to finish getting

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[4] At the CrR 3.5 hearing, Lt. Tingstad explained "we basically didn't do anything with Mr. Baker. He stood by his truck for about three hours." 8/16/13 RP 38.

dressed. *Id.* When Baker came out he was patted down for officer safety and given a ride to the south precinct. 4/16/13 RP 63[5]. Baker was not handcuffed, was not under arrest, no threats or promises were made, and was not told that he had to come with the officers. 4/16/13 RP 64.

Once at the south precinct, Baker, Lt. Tingstad, and Deputy Haugen sat down in the conference room and Baker was asked if they could talk about his wife, to which he agreed. 4/16/13 RP 42. Lt. Tingstad read Baker his *Miranda* rights off a standard printed form. 4/16/13 RP 43. Mr. Baker initialed each paragraph indicating that the right had been read to him. 4/16/13 RP 45, Exhibit 35. Prior to signing the waiver of rights form, Baker asked if he decided to talk, could he then exercise his rights at a later time if he wanted to. *Id.* Lt. Tingstad explained that he could, and also pointed out the portion of the rights form that states "you can decide to exercise these rights at any time." 4/16/13 RP 46. Baker then signed the waiver of rights form. *Id.*

Lt. Tingstad indicated that he would like to get a written statement from Baker and asked if Baker would rather write his own statement or have Lt. Tingstad write the statement under Baker's direction. *Id.* Baker chose to write his own statement. *Id.* Lt. Tingstad told Baker he would not hover over his shoulder and that he and Deputy Haugen would be in

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[5] Baker had taken a taxi the night before.

the break room and if he needed anything to give him a call. 4/16/13 RP 47. No one else was in the room with Baker as he filled out the statement and the door was open. *Id.*

Baker wrote his statement alone for approximately 20 minutes, then called out that he was done. 4/16/13 RP 48. Lt. Tingstad read the statement and asked follow up clarification questions and wrote the questions and answers on the form which Baker initialed. 4/16/13 RP 48–51, Exhibit 368. Other questions were asked and answered which were not written down on the form.[6] 4/16/13 RP 48–49.

After a little more than an hour since beginning the written statement, Baker stated that he did not want to answer any more questions and was then placed under arrest. 4/16/13 RP 52–53.

The Washington State Patrol Crime Scene Response Team began their analysis of the residence in the master bedroom which was very neat and clean with a made bed. 1 RP 90–92, Exhibit 265. Carpet runners on the floor next to Kathie's side of the bed covered large saturation blood stains. 1 RP 96-108, Exhibits 35, 268, 272. The stains were diluted indicating an attempt to clean the stains had been made. 1 RP 98 – 108. Some were patterned from a carpet cleaner. *Id,* Exhibit 35.

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[6] Baker now indicated that he and Kathie "talked" the week before Ms. Schuldt came to visit and that Kathie decided to leave (end the relationship) so Baker stayed in the shop that week and noticed Kathie was gone on June 3, 2012. Exhibit 368. At trial, Baker testified that the written statement was not true. 6 RP 1022-1026.

A 20 inch by 3 inch bloodstain of her own blood flowed down Kathie's nightstand. 1 RP 113–115, 3 RP 324-329, 6 RP 940-941, 1027, Exhibit 41. A saturation blood stain was discovered on the mattress cover on the corner of the bed next to Kathie's nightstand. 1 RP 123, 6 RP 1027, Exhibit 58. Underneath the mattress pad, between the pad and the mattress was a washcloth. 1 RP 124, 6 RP 1027, Exhibits 51, 60, 61. The staining on the mattress was directly adjacent to the nightstand blood stain and the carpet blood stain beneath the nightstand. 1 RP 126, Exhibit 58.

The staining on the mattress, the washcloth, and the mattress cover indicated that the bed has been made after the mattress had been saturated with blood. 1 RP 130. A 1.5 inch blood pool was also located on the bed frame beneath the mattress in the same corner of the bed. 1 RP 145–146, Exhibit 73.

Other blood stains in the house showed that Kathie's body had been drug from the direction of the bedroom through the house, down the stairs to the garage, through the garage and out the man door, and then outside. 1 RP 131–144, 147–150, Exhibit 75. In the garage was a mop in a bucket of bloody water. 1 RP 150–151, Exhibit 97. In the deep sink in the garage was a comforter with a saturation blood stain in the corner. 1 RP 152–158, Exhibit 26. Use of Leuco Crystal Violet (LCV) which reacts with blood and turns it purple showed stains that had been cleaned and

were not visible prior to application of the LCV. 1 RP 134-144, Exhibit 88.[7]

In a trash can in the garage a ballpeen hammer was found. 1 RP 166–167, Exhibit 276, 278. The hammer had hairs on the flat head. 1 RP 169–170, Exhibit 279. A Bissell carpet cleaner was also located in the garage contained a red/brown liquid which tested positive for blood. 1 RP 170–171, 4 RP 656.

Dr. Sigmund Menchel, a forensic pathologist performed the autopsy with the assistance of Dr. Robert Bishop, the Island County Coroner. 4 RP 482, 577, 581. The body was identified as Kathie Baker. 4 RP 485-486. After the tarp was removed, which had been secured with ropes and bungee cords around the neck and ankles, Dr. Menchel observed a white metal wedding ring on Kathie's finger, as well as considerable sand on the body. 4 RP 584. The wedding ring was later matched to an engagement ring found in Mr. Baker's nightstand. 5 RP 714-715. Fingernail clippings and a sexual assault kit were negative for assault. 4 RP 584. Kathie wore a bloody green and white striped blouse, black shorts with an elastic waistband and panties. 4 RP 598–599. The shorts were pulled down to Kathie's knees and her panties were partially rolled

[7] DNA testing showed blood recovered from kitchen floor grout, the nightstand, the garage floor, and the hammer head to be Kathie's. 6 RP 932, 941-947. No DNA could be recovered from the carpets due to cleaning. *Id.*

down, exposing part of her pubic area and her body was covered with sand.[8] 4 RP 599, Exhibit 320.

Dr. Menchel observed that Kathie had suffered a head injury and observed two curved lacerations caused by blunt force trauma to her parietal scalp indicating at least two blows. 4 RP 601. Even before opening Kathie's head Dr. Menchel observed in the open wound, "fragments of bone and brain tissue visible." 4 RP 601, Exhibits 327, 340.

Dr. Menchel observed a 'punched out, circular hole in the skull just beneath those two lacerations which measured one and seven sixteenths of an inch'. 4 RP 602, Exhibit 254. Kathie had fragments of bone which had been pushed into her brain, a fracture at the base of the skull, subdural hemorrhage, contusions of the brain and partial laceration of a part the brain. 4 RP 602.

Dr. Menchel testified that no signs of a struggle or sexual assault were observed. 4 RP 605. Likewise, Dr. Bishop testified there were no defensive wounds observed at all. 4 RP 501.

In addition to the head injury, Kathie had deep ligature furrows around her neck. 4 RP 608, Exhibits 328, 329. The neck injuries were the result of a ligature such as a rope or bungee cord compressing the neck

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[8] Dr. Bishop, the Island County Coroner, testified this was consistent with being drug. 4 RP 506.

with considerable force. 4 RP 608-611. Also observed was a fracture of the cartilage of the neck, considerable hemorrhaging in the voice box, large amounts of blood in the whites of Kathie's eyes, and broken blood vessels in the gums, all consistent with ligature strangulation. 4 RP 616-623. Dr. Menchel testified that Kathie would have to have been alive when strangled for those blood vessels to have burst. 4 RP 621–622. Dr. Menchel testified that such hemorrhaging would not be caused by blunt force trauma but by neck compression while alive. *Id.*

Dr. Menchel observed hemorrhaging around the hole in Kathie's skull. 4 RP 627–628. The hemorrhage indicated that Kathie was also alive when struck in the head. 4 RP 628.

Dr. Menchel testified that the hammer located in the trash could have caused the injury and, further, he could think of no other instrument besides a hammer which could cause the skull injury. 4 RP 632. DNA testing showed Kathie's blood on the hammer head and the defendant's DNA on the hammer handle. 6 RP 934-937

The cause of death was indicated as blunt force trauma and ligature strangulation. 4 RP 634. Kathie was alive when struck with the hammer and also alive when strangled, so it is unknown which occurred first. 4 RP 621-633. There was no indication that the hammer blow was instantly fatal. 4 RP 636.

Kathie's purse was discovered in the upstairs closet of the home with her wallet, keys, driver's license, credit cards, check book, date book, passport, and other personal effects. 5 RP 764-775, Exhibit 214. Kathie's cell phone was located in an upstairs desk. 6 RP 897. Cell phone analysis of Baker's and Kathie's cell phones showed four calls from Kathie's phone to Baker's phone on June 2, 2012, and nine calls from Baker to Kathie on June 2, 2012. 6 RP 896. No calls were made from Kathie's phone after June 2nd and no calls were made to Kathie's phone from Baker after June 2, 2012. 6 RP 896-900.

III. ARGUMENT

A. The Trial Court Properly Ruled the Defendant's Statements to Police Were Non-Custodial on June 9, 2012, and Admissible.

1. The defendant was not subject to the constraints associated with formal arrest and was therefore not in custody when any of the statements to police were made and the statements were properly admitted.

The Fifth Amendment protects an individual from compulsive self-incrimination.[9] The Washington Constitution's analogous provision, Article 1, Section 9, is coextensive with the federal constitution. *State v.*

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[9] "No person... shall be compelled in any criminal case to be a witness against himself...." U.S. Const. Amend. V.

Templeton, 148 Wn.2d 193, 59 P.3d 632 (2002); *State v. Bledsoe*, 33 Wn.App. 720, 658 P.2d 674 (1983).

Miranda warnings were designed to protect a suspect from making incriminating statements while in police custody. *State v. Lorenz,* 152 Wn.2d 22, 36, 93 P.3d 133 (2004), citing *State v. Harris,* 106 Wn.2d 784, 789, 725 P.2d 975 (1986). *Miranda* warnings are only required when a person is in custody and being interrogated by a state agent. *State v. Post,* 118 Wn.2d 596, 605, 826 P.2d 172 (1992).

The threshold questions that must be answered before determining whether *Miranda* compliance is necessary, is whether the defendant's statement is the product of interrogation that occurred in a custodial setting. "Custody" for *Miranda* purposes is narrowly circumscribed and requires formal arrest or requires that a person's freedom of action or movement be curtailed to a degree associated with formal arrest. *State v. Harris*, 106 Wn.2d 784, 725 P.2d 975 (1986), *cert denied* 40 U.S. 940 (1987), *State v. Post,* 118 Wn.2d 596, 606, 826 P.2d 172 (1992), *citations omitted.* The determination is an objective test--whether a reasonable person in a suspect's position would have felt that his or her freedom was curtailed to the degree associated with a formal arrest. *State v. Heritage,* 152 Wn.2d 210, 218, 95 P.3d 345 (2004)(citing *Berkemer v. McCarty*, 468 U.S. 420, 441-42, 104 S.Ct. 3138, 82 L.Ed.2d 317 (1984)).

a) The trial court's CrR 3.5 Findings of Fact 5, 15, 19, and 28 are supported by substantial evidence.

In reviewing the trial court's decision after a CrR 3.5 hearing this Court must determine if the findings of fact are supported by substantial evidence and whether those findings support the conclusions of law. *State v. Broadaway,* 133 Wn.2d 118, 130-131, 942 P.2d 363 (1997). "Substantial evidence exists where there is a sufficient quantity of evidence in the record to persuade a fair minded, rational person of the truth of the finding." *State v. Piatnitsky,* 170 Wn.App 195, 221, 282 P.3d 1184 (2012), quoting *State v. Hill,* 123 Wn.2d 641, 644, 870 P.2d 313 (1994). A *de novo* determination is then made to determine if the trial court made proper conclusions of law from those findings. *State v. Armenta,* 132 Wn.2d 1, 9, 948 P.2d 1280 (1997). Credibility determinations are for the trial court and will not be disturbed on appeal. *State v. O'Neil*, 126 Wn.App 395, 409, 109 P.3d 429 (2005).

The trial court's findings of fact are supported by substantial evidence. At no time on June 8, 2012, or June 9, 2012, was the defendant in custody until he was formally arrested. No further questions were asked after the formal arrest.

The initial conversation with Baker on June 8, 2012, with Det. Price lasted approximately one half hour and was conducted in a

conference room with the door open. 4/16/13 RP 13-14. He was under no particular suspicion at the time. *Id.*

Mr. Baker then agreed to meet Det. Price at his residence, and drove his own vehicle home with Ms. Schuldt. 4/16/13 RP 14-15. Baker gathered up some laptops and brought them to the kitchen where they looked at information and continued to discuss Kathie's disappearance. 8/16/13 RP 15-16.

Baker consented to a search of the house after he was told he could refuse or limit the search. 8/16/13 RP 16-17. He agreed and began leading Det. Price through the house. *Id.* At one point he did limit the search and Det. Price and Deputy Haugen abided. 8/16/13 RP 17-18. Eventually, Lt. Tingstad, who arrived after Det. Price, believing he was now "investigating a criminal offense," read Mr. Baker his *Miranda* rights. 8/16/13 RP 35. When Mr. Baker stated he didn't want to answer any more questions, the questioning stopped. 8/16/13 RP 36-37. Mr. Baker was not arrested, he was simply told he could not go back in the house while deputies applied for a warrant. 8/16/13 RP 37-38. He eventually left the property in a taxi.[10] 8/16/13 RP 39-40.

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[10] Baker states Lt. Tingstad ordered Deputy Haugen to "guard" Baker. App Br. 6. This is incorrect, as Lt. Tingstad testified that he asked Haugen to "keep an eye on Mr. Baker from an officer safety standpoint." 8/16/13 RP 37.

No threats or promises were made to Baker on June 8, 2012. 8/16/13 RP 18, 35. Baker appeared to understand the questions. *Id.* He was not handcuffed, placed in a patrol car, told he was under arrest. 8/16/13 RP 38-39. Mr. Baker was with the deputies as they looked through the house and even gave orders not to look in Ms. Schultz's room

Because Baker was not in custody, Lt. Tingstad was not required to inform Baker of his *Miranda* rights but did so out of an abundance of caution believing he might be investigating a murder.

Nearly 18 hours after Mr. Baker rode away in a taxi, and nearly 21 hours since Lt. Tingstad's last question, Mr. Baker was re-contacted at a motel room at noon the following day. 8/16/13 RP 41-42. The deputies asked if he would mind speaking to them and he agreed. 8/16/13 RP 41-42. As he had no vehicle, he was given a ride, un-handcuffed, as a passenger. 8/16/13 RP 63. He was offered water or coffee and sat in a conference room. 8/16/13 RP 43. No booking procedures were performed. 8/16/13 RP 42-54. Baker was not handcuffed. 8/16/13 RP 53. Mr. Baker was provided with a *Miranda* waiver form which Baker and Lt. Tingstad read. 8/16/13 RP 43. Baker asked clarifying questions regarding his rights which Lt. Tingstad answered and he agreed to make a statement. 8/16/13 RP 45-46. He was given a choice of writing a statement or having Lt. Tingstad write what Baker told him. 8/16/13 RP

46-47. He was left alone in the conference room writing a statement with the door open until he said he was done approximately 20 minutes after Baker began. 8/16/13 RP 47-48. It cannot be said that Baker was being interrogated as he filled out a statement form by himself.

Lt. Tingstad attempted to clarify Mr. Baker's written statement writing questions and answers all of which Baker initialed. 8/16/13 RP 48-51. Further questions were asked and Mr. Baker was only arrested when he stated he did not want to answer any more questions. 8/16/13 RP 53. The entire contact at the precinct was approximately one hour. 8/16/13 RP 52. No threats or promises were made to Baker and he appeared to understand both the waiver and the questions. 8/16/13 RP 52-53.

Substantial evidence exists to support the trial courts findings that Baker was not in custody until he was formally arrested at the end of questioning on June 9, 2012.

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B. In The Alternative, If The Defendant Was In Custody, The Defendant's Invocation Of His Right To Remain Silent Was Scrupulously Honored By Law Enforcement And Therefore Statements Made By The Defendant After He Later Waived His Right To Remain Silent Were Properly Admissible.[11]

The rule in *Miranda* requires that "interrogation must cease" once a defendant who is in custody has received warnings and indicates that he wishes to remain silent. *Michigan v. Mosley*, 423 U.S. 96, at 100-101 (1975). However, the requirement that interrogation cease does not "create a per se proscription of indefinite duration upon any further questioning by any police officer on any subject once the person in custody has indicated a desire to remain silent." 423 U.S. at 102-103. In *Mosley*, "the admissibility of statements obtained after the person in custody has decided to remain silent depends under *Miranda* on whether his 'right to cut off questioning' was 'scrupulously honored.'" 423 U.S. at 104.

The police in *Mosley* "immediately ceased the (initial) interrogation, resumed questioning only after the passage of a significant period of time and the provision of a fresh set of warnings, and restricted the second interrogation to a crime that had not been the subject of the

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[11] The trial court made alternative conclusions of law (7, 8, and 9), concluding that in the alternative, if the defendant did invoke his rights on June 8, 2012, his invocation was scrupulously honored by stopping questioning, passage of a cooling off period and the providing of a fresh set of *Miranda* warnings.

earlier interrogation." 423 U.S. at 106. Under those circumstances, the Court observed, it could not be said that "the police failed to honor the decision of a person in custody to cut off questioning, either by refusing to discontinue the interrogation upon request or by persisting in repeated efforts to wear down his resistance and make him change his mind." 423 U.S. at 105-106.

Mosley did not limit the admissibility of custodial statements to those situations in which the renewed questioning concerned a "crime that had not been the subject of the earlier interrogation." 423 U.S. at 106. Rather, the key to admissibility under *Mosley* is the absence of evidence of "attempted persuasion" -- either in the form of a refusal to discontinue questioning or of efforts to wear down the suspect's resistance through repeated efforts at interrogation – to "induce (a defendant) not to invoke his right to remain silent." *Jackson v. Wyrick*, 730 F.2d 1177, 1180 (8th Cir.), cert. denied, 469 U.S. 849 (1984). Under the analysis prescribed by the Court in *Mosley*, "it is not decisive that the interrogations covered the same crime," since that factor, standing alone, is relatively unimportant in assessing whether untoward persuasion to break the defendant's resistance has been exerted. *Kelly v. Lynaugh*, 862 F.2d 1126, 1131 (5th Cir. 1988).

The United States courts of appeals have consistently found custodial statements to be admissible under *Mosley* even when the

questioning pertained to the same offense that was the subject of an earlier interrogation session at which the defendant invoked his right to silence. See *United States v. Hsu*, 852 F.2d 407, 409-412 (9th Cir. 1988); *Jackson v. Dugger*, 837 F.2d 1469, 1471-1472 (11th Cir.), cert. denied, 108 S. Ct. 2005 (1988); *Hill v. Kemp*, 833 F.2d 927, 929 (11th Cir. 1987); *Grooms v. Keeney*, 826 F.2d 883, 885-886 (9th Cir. 1987); *Jackson v. Wyrick*, 730 F.2d at 1179-1180; *United States v. Bosby*, 675 F.2d 1174, 1181-1182 (5th Cir. 1982). As these courts have stated, it is more significant to the *Mosley* analysis that there has been a "cooling off period," *Hill v. Kemp*, 833 F.2d at 929, or that a "fresh set of warnings" have been given, *United States v. Hsu*, 852 F.2d at 411, than that the two interrogations pertain to different crimes.

Washington courts follow the above reasoning. In *State v. Robbins*, 15 Wn.App 108, 547 P.2d 108 (1976), a suspect was arrested on a Friday and taken to the police station where the suspect signed a *Miranda* waiver but then invoked her right to remain silent by refusing to answer any questions. *Id,* at 109. Baker was then taken to jail. *Id.* No further questions were asked of the defendant until the following Monday when the same officer contacted the defendant at the jail and again informed her of her *Miranda* warnings. *Id.* The suspect signed a *Miranda* rights waiver and wrote and signed a confession. *Id.* The defendant

challenged the trial court finding that the confession was admissible under *Miranda v. Arizona*. The trial court finding was upheld on appeal with the court explaining that police immediately cut off questioning on Friday when the defendant refused to answer questions and there was no evidence that the police usurped her free will in the intervening two days at the jail prior to fresh *Miranda* warnings being given. *Id* at 110. The court found that the defendant's right to cut off questioning was scrupulously honored and that: "Nothing in the record even suggests that the questioning sessions held on Friday and Monday constituted a situation in which Robbins was denied her right to remain silent because the police refused to take 'no' for and answer." *Id* at 110-111.

In the case at bar, the trial court properly held in its alternative conclusions of law, that if Baker did invoke his right to remain silent on June 8, 2012, it was scrupulously honored and his waiver of his right to remain silent the following day was knowingly, intelligently and voluntarily made after a substantial cooling off period wherein the defendant was not in custody. For instance, once Baker indicated that he did not want to answer any more questions, all questioning terminated. 8/16/13 RP 37. Importantly, unlike any of the above cases, Mr. Baker was not placed in custody and eventually left the crime scene in a taxi. 8/16/13 RP 39-40. Apparently, Baker spent the night at a local hotel,

where he was eventually re-contacted by Lt. Tingstad and Deputy Haugen the following day. 8/16/13 RP 40-41, 4 RP 546-547.

Baker was provided with fresh *Miranda* warnings. 8/16/13 RP 45-46. *Id.* Lastly, there was a nearly 21 hour break between the defendant's assertion on June 8, 2012, that he did not want to answer any more questions and the fresh set of *Miranda* warnings on June 9, 2012.[12]

Importantly, unlike the cases cited above, Baker was not placed or held in custody in the intervening period between asserting his right to remain silent and re-contact the following day. He was free to go anywhere except for inside his residence. He was not subject to the restraints associated with formal arrest. Further, it cannot be said that the police overbore his will and would not take "no" for an answer when he left the scene with a credit card and identification in a taxi and apparently spent the night at a motel. His right to remain silent was scrupulously honored as required under *Mosley*. Baker was provided fresh *Miranda* warnings on June 9, 2012. The verbal and written statements made by Mr. Baker on June 9, 2012, were properly ruled to be admissible under *Mosley* in the courts alternative conclusions of law.

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[12] At trial the defendant admitted he was not under any pressure to answer questions. 6 RP 1025.

The defendant cites to *Edwards v. Arizona*, 451 U.S. 477, 485, 101 S. Ct. 1880, 68 L.Ed.2d 378 (1981), to argue that police cannot resume questioning about the same criminal investigation unless initiated by the accused. *Edwards* is not applicable to the case at bar. In *Edwards*, the accused requested an attorney at which time questioning ceased. *Id* at 477. However, without making an attorney available, police resumed questioning at the jail. *Id.* *Edwards* held that if a suspect requested counsel he could not be re-interviewed absent either initiation by the suspect or counsel being made available. *Edwards,* 451 U.S. at 484 – 485.

At no time did the defendant assert his right to counsel. As the court in *Mosley* recognized, if an accused asserts only a right to remain silent and not a right to counsel, police may resume questioning after a cooling off period and fresh set of *Miranda* warnings. *Mosley,* 423 U.S. 105 – 106.

1. In the Alternative, if the Defendant's Statements Made on June 9, 2012, Were Improperly Admitted, the Admission Constituted Harmless Error.

"Harmless error analysis applies to erroneous admissions of statements made in violation of *Miranda.*" *State v. Nysta*, 168 Wn.App 30, 43, 275 P.3 1162 (2012) *citations omitted.* A constitutional error is harmless if the reviewing court is satisfied beyond a reasonable doubt that

any reasonable jury would have reached the same verdict without the error. *State v. Guloy*, 104 Wn.2d 412, 425, 705 P.2d 1182 (1985).

There was overwhelming evidence of the defendant's guilt absent his statements on June 9, 2012. Baker was the only one to have a motive to kill Kathie. He was enthralled with another woman who arrived the day after Kathie was last seen. Ms. Schuldt had been told that Kathie now lived in Colorado and that the defendant and Kathie had divorced. The murder weapon was found in the trash at the defendant's residence with his DNA on the handle. Baker was sleeping in a bedroom and bed which were saturated with Kathie's blood and had told an employee that he was taking Kathie to the airport which was proved false by the video from the ferry terminal.

2. Article I, Section 9 provides no greater protection than provided by the federal constitution.

Baker argues that Article I, Section 9 of the Washington State Constitution is more protective of the right to remain silent than the 5th Amendment of the United States Constitution. The defendant is incorrect. It is well settled in that the protections offered by the two provisions are the same.

The Washington Constitution's own provision against self-incrimination provides no greater protection than the federal constitution;

the Washington Supreme Court has held that it "'envisions the same guarantee as that provided in the federal constitution.'" *State v. Mecca Twin Theater and Film Exch., Inc.,* 82 Wn.2d 87, 91, 507 P.2d 1165 (1973)(quoting *State v. Moore,* 79 Wn.2d 51, 57, 483 P.2d 630 (1971); *In re Pers. Restraint of Ecklund,* 139 Wn.2d 166, 176, 985 P.2d 342 (1999)(the federal and state constitution provisions "are given the same interpretation"), *State v. Terry,* 181 Wn.App 880, 889, 328 P.3d 932 (2014)(Washington's provision against self-incrimination provides no greater protection than the federal constitution.)

C. There Was Sufficient Evidence To Support A Jury's Unanimous Finding That Kathie Baker Was Particularly Vulnerable Or Incapable Of Resistance When She Was Murdered.

A challenge to the sufficiency of evidence supporting an aggravating circumstance is reviewed under the same "sufficiency of the evidence" standard that applies to challenges to guilty verdicts. *State v. Chanthabouly*, 164 Wn.App. 104, 142-43, 262 P.3d 144, 163-64 (2011) *review denied,* 173 Wn.2d 1018, 272 P.3d 247 (2012)(citing *State v. Stubbs*, 170 Wn.2d 117, 123, 240 P.3d 143 (2010)). Under that standard, a court is to review the evidence in the light most favorable to the State to determine whether any rational trier of fact could have found the presence of aggravating circumstances beyond a reasonable doubt. *Chanthabouly,*

164 Wn.App at 143. (citing *State v. Yates,* 161 Wn.2d 714, 752, 168 P.3d 359 (2007)). "A claim of insufficiency admits the truth of the State's evidence and all inferences that reasonably can be drawn therefrom." *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). Circumstantial evidence and direct evidence are equally reliable. *State v. Moles*, 130 Wn.App 461, 465, 123 P.3d 132 (2005). The reviewing Court defers to the jury on issues of conflicting testimony, credibility of witnesses, and the persuasiveness of the evidence. *State v. Thomas*, 150 Wn.2d 821, 874-875, 83 P.3d 970 (2004).

1. Kathie Baker was Particularly Vulnerable or Incapable of Resistance.

The evidence in this case showed that Kathie Baker was attacked at her home in her bed while she slept. The murder was committed by a person she trusted and loved, her husband. Kathie was also unaware that her husband was infatuated with another woman who was flying in the following day. Mr. Baker had booked Lisa Schuldt's plane tickets believing his wife would be out of town during Schuldt's stay. 6 RP 1014.

The evidence showed that Kathie was struck in the head with a hammer while in bed, punching out a 1.5 inch hole. She was alive when struck with the hammer. Kathie was also strangled with a ligature with enough force to cause a fracture in her neck, massive hemorrhaging of

blood vessels, and deep furrows in her neck. Kathie was also alive when strangled with the ligature. The blood from her head wound seeped into the mattress, flowed down the nightstand, and soaked the carpet. Blood stains in other parts of the home showed Kathie was drug outside and concealed. Kathie had no defensive wounds and she was dressed in a nightshirt and shorts. When the defendant spoke to an employee at 11:00 p.m. on June 2, 2012, he stated that he and Kathie were in bed and not to call again.

Viewing the evidence in the light most favorable to the State, a rational trier of fact could have found that Kathie was particularly vulnerable as the evidence indicates she was in bed asleep when initially attacked with the first weapon. She was certainly subdued by the initial attack be it with a hammer or the ligature. Kathie would have been incapable of resisting the second attack as she either had been strangle severely, or had a hole in her skull when it commenced. The fact that Kathie had no defensive wounds is powerful evidence that she was asleep during the initial attack. Even if Kathie was not asleep during the initial attack, the attack left her defenseless against the second attack which killed her.

Defendant cites *State v. Barnett,* 104 Wn.App 191, 194, 16 P.3d 74 (2001), to support defendant's argument that Kathie was not particularly

vulnerable. The facts of *Barnett* are distinguishable to the case at bar. The trial court found that the 17 year old victim was vulnerable because her age and also the fact that the defendant waited until she was home alone prior to breaking into that house. *Id* at 202. The Appellate court reversed, holding that being 17 does not make one particularly vulnerable. *Id* at 203. Evidenced by the fact that the victim led the defendant on a "lengthy chase." *Id* at 204. Also, the victim was able to avoid the defendant's attempt to stab her and eventually escaped. *Id.* Lastly, she "was not incapacitated by the attack and thereby rendered vulnerable." *Id.* In the case at bar, Kathie was rendered utterly vulnerable to the second attack by the first, be it the hammer blows or the strangulation.

In *State v. Hicks*, 61 Wn.App. 923, 931, 812 P.2d 893, 897 (1991), the court rejected the defendant's contention that a rape victim could not be found particularly vulnerable because she was asleep when attacked. The court stated that, "because she was attacked as she slept, she was quickly rendered incapable of attempting to resist as compared to other rape victims who are awake and could, in some way, resist." *Id.*

As in *Hicks,* Kathie was in bed when attacked. Unlike *Hicks,* Kathie could not testify that she was asleep when attacked but the evidence strongly indicates that she was. The only blood flow in the house (blood affected by gravity) was on Kathie's nightstand. Also the

corner of the mattress directly next to the nightstand was saturated with blood. Further, there was no evidence of defensive wounds which shows that Kathie was caught unaware and immediately rendered incapable of resistance. The rest of the blood found at the scene was on the floor or carpet.

In *State v. Gordon*, 172 Wn.2d 671, 680, 260 P.3d 884, 888 (2011), the victim was outnumbered three to one when the beating that killed him commenced. The Supreme Court upheld the jury finding that he was particularly vulnerable. Leaving a woman stranded after a rape may justify a conclusion she was particularly vulnerable. *State v. Altum,* 47 Wn.App. 495, 502-03, 735 P.2d 1356, *review denied*, 108 Wn.2d 1024 (1987), *overruled on other grounds by State v. Parker,* 132 Wn.2d 182, 937 P.2d 575 (1997). The Supreme Court has also recognized that a vehicular assault victim can be particularly vulnerable where the victim was relatively defenseless. *State v. Nordby,* 106 Wn.2d 514, 518, 723 P.2d 1117 (1986).

The common thread in these cases is whether the conditions provided additional advantage to the defendant in accomplishing his criminal act. One can hardly imagine circumstances that would make one any more vulnerable than those faced by Kathie. What chance does a sleeping spouse have against a murderous husband. Likewise, what

chance did she have to resist being strangled to death after suffering a punctured skull, or in the alternative, what chance did she have to escape the hammer blows after being strangled to the point of a fractured neck. Kathie had no chance to resist.

Since the circumstances which accounted for Kathie Baker's vulnerability were not inherent in the crime of first degree murder, she was, by definition, more vulnerable than a typical victim of first degree murder. *See, e.g. State v. Chadderton*, 119 Wn.2d 390, 396, 832 P.2d 481, 484 (1992)("[F]actors inherent in the crime… may not be relied upon to justify an exceptional sentence, whereas factors not inherent in the crime may justify a sentence enhancement even where the trial court relied on them in establishing the elements of the particular crime").

2. Victim's Vulnerability Was a Substantial Factor in the Commission of the Crime.

For a victim's vulnerability to be a substantial factor in the commission of the crime as required to justify an exceptional sentence based on particular vulnerability, the victim's disability or condition must have rendered the victim more vulnerable to the particular offense than a non-disabled victim would have been. *State v. Mitchell*, 149 Wn.App 716, 724, 205 P.3d 920 (2009).

As Kathie slept, she was certainly more vulnerable than she had been awake. Further, there was substantial evidence that Kathie was already incapacitated when the attack that killed her occurred. The defendant has either broken her skull or broken her neck in the first of the two attacks. Either way, she was rendered more vulnerable to murder than a non-disabled victim would have been, therefore her vulnerability was a substantial factor in the commission of the crime.

3. The Aggravating Circumstance Cannot Be Challenged Based On The Due Process Vagueness Doctrine

Baker's assertion that a discretionary sentencing statute may be challenged as unconstitutionally vague has been rejected by the Washington Supreme Court. This Court must also reject the claim.

A criminal statute may be challenged as being "void for vagueness" under the Fourteenth Amendment to the United States Constitution and article I, section 3 of the Washington Constitution. The Washington Supreme Court, in *State v. Baldwin*, held that sentencing guidelines do not create a liberty interest protected by the Due Process Clause. Sentencing guidelines are "intended only to structure discretionary decisions affecting sentences; they do not specify that a particular sentence must be imposed. Since nothing in these guideline statutes requires a certain outcome, the statutes create no constitutionally

protectable liberty interest." *State v. Baldwin*, 150 Wn.2d 448, 461, 78 P.3d 1005, 1012 (2003).

Baker argues that post-*Blakely v. Washington,* 542 U.S. 296, 124 S.Ct. 2531, 159 L.Ed. 403 (2004) "aggravating circumstances operate as elements of a higher offense which must be found by a jury beyond a reasonable doubt, the due process vagueness inquiry must apply." App. Br. At 35. His argument is not supported by the language in *Baldwin*, and the recent Supreme Court decision in *State v. Duncalf*, 177 Wn.2d 289, 300 P.3d 352, 355 (2013). None of the cases relied upon by Baker stand for the proposition that the Due Process Clause creates a liberty interest in sentencing enhancement factors in non-death cases. The cases he cites concerned only the question of whether the facts that authorized a sentence in excess of the statutory maximum must be determined by a judge or jury.

The rationale behind *Baldwin* continues to be sound, even when examined under the light of *Blakely, Apprendi*[13], and their progeny.

A vagueness analysis encompasses two due process concerns. First, criminal statutes must be specific enough that citizens have fair notice of what conduct is proscribed. Second, laws must provide ascertainable standards of guilt to protect against arbitrary arrest and

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[13] *Apprendi v. New Jersey*, 530 U.S. 466, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000).

prosecution. *State v. Baldwin*, 150 Wn.2d 448, 458, 78 P.3d 1005, 1011 (2003)(citing *Papachristou v. City of Jacksonville,* 405 U.S. 156, 168, 92 S.Ct. 839, 31 L.Ed.2d 110 (1972); *City of Spokane v. Douglass,* 115 Wn.2d 171, 178, 795 P.2d 693 (1990)). Both prongs of the vagueness doctrine focus on laws that prohibit or require conduct. *State v. Baldwin*, 150 Wn.2d 448, 458, 78 P.3d 1005, 1011 (2003)(citing *United States v. Wivell,* 893 F.2d 156, 159 (8th Cir.1990)).

Division II of this Court recently articulated the *Baldwin* rule:

> The *Baldwin* court stated that "the due process considerations that underlie the void-for-vagueness doctrine" did not apply to these sentencing guideline statutes because these statutes did not (1) define conduct, (2) allow for arbitrary arrest and criminal prosecution, (3) inform the public of penalties attached to criminal conduct, or (4) vary the legislatively imposed maximum and minimum penalties for any crime. Because nothing in these guideline statutes "require[d] a certain outcome," they did not create a constitutionally protectable liberty interest.

State v. Chanthabouly, 164 Wn.App. 104, 141-42, 262 P.3d 144, 163 (2011) *review denied,* 173 Wn.2d 1018, 272 P.3d 247 (2012)(internal citations to *Baldwin* omitted).

Most recently, the Washington Supreme Court rejected a request to reconsider *Baldwin*. *State v. Duncalf*, 177 Wn.2d 289, 300 P.3d 352, 355 (2013)("We find it unnecessary to address the broad question of whether

Baldwin survives *Blakely*."). The Court went on to note that, even if a Due Process vagueness challenge were permissible, the aggravating factor of injuries that substantially exceeded the level of harm necessary to commit the offense would not have been found to be vague. *Id.* at 355-56.

The *Baldwin* factors cited above still apply to the aggravating factor of victim vulnerability, and the Court should reject the challenge.

a) Even if this discretionary sentencing statute implicated due process concerns, subjecting it to a vagueness challenge, Baker has not met his burden to show it is vague beyond a reasonable doubt.

A statute is void for vagueness if it "fails to define the offense with sufficient precision that a person of ordinary intelligence can understand it, or it does not provide standards sufficiently specific to prevent arbitrary enforcement." *State v. Eckblad,* 152 Wn.2d 515, 518, 98 P.3d 1184 (2004) (citing *City of Spokane v. Douglass,* 115 Wn.2d 171, 178, 795 P.2d 693 (1990)). The test for vagueness is whether a person of reasonable understanding is required to guess at the meaning of the statute. *State v. Branch,* 129 Wn.2d 635, 648, 919 P.2d 1228 (1996). A vagueness challenge, unless it implicates the First Amendment, is considered on an "as applied" basis. *Holder v. Humanitarian Law Project,* 561 U.S. 1, 130 S.Ct. 2705, 2719, 177 L.Ed.2d 355 (2010).

A statute is presumed to be constitutional, and the person challenging a statute on vagueness grounds has the heavy burden of proving vagueness beyond a reasonable doubt. *State v. Coria*, 120 Wn.2d 156, 163, 839 P.2d 890, 894-95 (1992)(citing *Spokane v. Douglass,* 115 Wn.2d 171, 178, 795 P.2d 693 (1990)). The challenger must show, beyond a reasonable doubt, that either (1) the statute does not define the criminal offense with sufficient definiteness that ordinary people can understand what conduct is proscribed, or (2) the statute does not provide ascertainable standards of guilt to protect against arbitrary enforcement. *Douglass,* at 178.

A statute is unconstitutional if it " 'forbids conduct in terms so vague that persons of common intelligence must guess at its meaning and differ as to its application.' " *Douglass,* at 179, 795 P.2d 693 (quoting *Burien Bark Supply v. King Cy.,* 106 Wn.2d 868, 871, 725 P.2d 994 (1986)). This test does not demand "impossible standards of specificity or absolute agreement", and permits some amount of imprecision in the language of a statute. *Douglass,* 115 Wn.2d at 179, 795 P.2d 693.

Baker is expecting impossible standards of specificity when he concludes that a jury must know what a typical murder victim looks like or how vulnerable that person might be. Jurors are expected to be engaged citizens, who are familiar with the general nature of crime and punishment

through the mass media. *See, State v. Briggs*, 55 Wn.App. 44, 58, 776 P.2d 1347, 1355 (1989). Indeed, much of the broadcast, print, and internet media are devoted to reporting, often with grisly detail, the facts and circumstances surrounding criminal acts. A person of reasonable intelligence and awareness in modern society could answer that question without having to guess at its meaning.

Here, as discussed above, the jury has a concrete standard by which to begin its analysis of the aggravating circumstance: the trial court's definition of murder in the first degree. Where the aggravating circumstance does not inhere in the definition of first degree murder, as in this case, a jury has a basis to then apply its collective wisdom and experience to the question of whether Kathie Baker was more vulnerable than a typical victim and whether it was a substantial factor in accomplishing the murder.

Kathie Baker was not gunned down in a drive by shooting. She was not murdered in a public place. She was not stabbed or beaten to death during the course of a fight. She was not murdered as a result of some act she committed that upset Mr. Baker. Kathie Baker was murdered under circumstances that made her more likely to be killed, less likely to avoid being killed, and that created insurmountable advantages to Robert Baker to ensure his murderous plan to get rid of Kathie would be

successful. A person of ordinary intelligence could understand that, murdering someone under those circumstances would expose him to an exceptional sentence.

4. If the Matter is Remanded for a New Sentencing Hearing, The Hearing Should be Before the Trial Judge.

An imposition of an improper exceptional sentence does not normally justify a substitution of the trial judge on remand for sentencing. *See*, *State v. Ha'mim,* 132 Wn.2d 834, 940 P.2d 633 (1997), (reversed and remanded for trial court to consider potential mitigating factor). *See, State v. Law*, 154 Wn2d 85, 110 P.3d 717 (2005), (reversed and remanded for sentencing based on improperly imposed exceptional sentence). *See, State v. Dunaway*, 109 Wn.2d 207, 743 P.2d 1237 (1987)(remanded to trial court for resentencing when two of three stated reason for exceptional sentence invalidated).

Baker cites *City of Seattle v. Clewis,* 159 Wn.App 842, 851, 247 P.3d 449 (2011), for his contention that the sentencing judge's involvement in this case for resentencing would create an appearance of unfairness. App. Br. 38. In *Clewis*, the trial judge took on the role of prosecutor when he ordered the prosecution to issue a material witness warrant but later recused himself from the case making the issue moot. *Id*, at 851. This appellate court did opine that assuming the judge did create

the appearance of bias against *Clewis* by advocating steps for the prosecutor to take, the remedy would be recusal for a trial before a different judge. *Id*, at 851. Nothing in the record in Mr. Baker's case show that the trial judge in any way advocated for the State. If the matter is remanded for sentencing it should be before the trial judge.

D. The Defendant Cannot Show Based on the Record That he Received Ineffective Assistance of Counsel at Sentencing.

"When an ineffective assistance claim is raised on appeal, the reviewing court may consider only facts within the record." *State v. Grier*, 171 Wn.2d 17, 29, 246 P.3d 1260 (2011), citing, *State v. McFarland*, 127 Wn.2d 322, 335, 899 P.2d 1251 (1995). "As a general rule, appellate courts will not consider issues raised for the first time on appeal." *State v. McFarland*, 127 Wn.2d 322, 332–33, 899 P.2d 1251 (1995). However, the court may review a claim of error raised for the first time on appeal where it constitutes a "manifest error affecting a constitutional right." RAP 2.5(a)(3). The error must be both of constitutional magnitude and "manifest." *State v. O'Hara*, 167 Wn.2d 91, 99, 217 P.3d 756 (2009). In order to show the error is manifest, the defendant must identify a constitutional error and show how, in the context of the trial, the alleged error actually affected the defendant's rights; it is this showing of actual prejudice that makes the error manifest.

McFarland, 127 Wn.2d at 333. "'If the facts necessary to adjudicate the claimed error are not in the record on appeal, no actual prejudice is shown and the error is not manifest.' " *State v. Fenwick*, 164 Wn.App. 392, 400, 264 P.3d 284 (2011) (internal quotation marks omitted) (quoting *O'Hara*, 167 Wn.2d at 99), review denied, 173 Wn.2d 1021 (2012).

To prove ineffective assistance of counsel, a defendant bears the burden to show, based on the record at trial, that counsel's performance was deficient, and further that the defendant was prejudiced by counsel's deficient performance. *Grier*, 171 Wn.2d at 32-34, *Strickland v. Washington*, 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed. 674 (1984). Counsel's performance is deficient only if it falls below an objective standard of reasonableness. *Grier*, 171 Wn.2d at 33.

Because of the "deference afforded to decisions of defense counsel in the course of representation," there exists a " '[s]trong presumption that counsel's performance was reasonable.' " *Grier*, 171 Wn.2d at 33 (quoting *State v. Kyllo*, 166 Wn.2d 856, 862, 215 P.3d 177 (2009)). To rebut the presumption, the defendant bears the heavy burden to show that there exists no conceivable legitimate trial strategy or tactic to explain counsel's performance. *Grier*, 171 Wn.2d at 33.

If the defendant can meet the burden showing deficient performance, he then must establish prejudice by showing that " 'there is a

reasonable probability that, but for counsel's deficient performance, the outcome of the proceedings would have been different.' " *Grier*, 171 Wn.2d at 34 (quoting *Kyllo*, 166 Wn.2d at 862). " 'A reasonable probability is a probability sufficient to undermine confidence in the outcome.' " *Grier*, 171 Wn.2d at 34 (quoting *Strickland*, 466 U.S. at 694). Failure to demonstrate both prongs of the test defeats a defendant's ineffective assistance of counsel argument on appeal. *Grier*, 171 Wn.2d at 33.

Baker cannot meet the first prong, with the facts on the record, that his attorney's silence at the sentencing hearing was not a valid trial tactic. The Court had heard extensively from Mr. Baker shortly before the sentencing hearing when he testified at length during the trial. 6 RP 951-1028. Baker's lengthy testimony included information regarding his background and career. 6 RP 951-963. However, Baker also testified extensively about how he was a liar and how he lied to the police and to both his wife Kathie and Ms. Shuldt and told yet another version of events. 6 RP 965-966, 984-987, 997, 1001-1010, 1014-1017, 1021-1026. Baker also admitted to sleeping in the bed with Kathie's blood in it and flowing down the nightstand. 6 RP 1027-1028. The jury took little time to convict Mr. Baker, coming back with a verdict the same day closing arguments were made. 7 RP 1121. The judge inquired whether the

parties were agreeable to holding sentencing the following day. 7 RP 1131. There was no objection from the defendant or counsel. 7 RP 1131-1132.

At the sentencing hearing the prosecutor's arguments were brief. 8 RP 1136-1138. Multiple loved ones of Kathie made lengthy emotional statements. 8 RP 1139-1147. The judge's comments at sentencing indicate that any attempted mitigation by the defense would have potentially backfired;

> "(t)he Court is appalled by what the defendant has done, and it is difficult to understand how any person could do what he did. Not only did he murder Kathie Hill[14] in the most violent manner, he lied to Liza Schuldt about the situation. He had lied to Kathie Hill leading up to the crime. He lied to the police. And as the jury necessarily determined, he shamelessly lied and perjured himself in this court." 8 RP 1158.

After Baker's extensive testimony at trial and the overwhelming evidence of guilt, silence at sentencing was a valid strategy so as to not inflame the judge and potentially incur a more lengthy sentence. There is no doubt that the defendant did receive a lengthy sentence, however, in assessing counsel's performance, every effort must be made to eliminate the distorting effects of hindsight. *Grier*, 171 Wn.2d at 34.

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[14] The trial judge referred to Kathie by her maiden name of Hill at sentencing 8 RP 1153.

Mr. Baker was of course informed of his right of allocution by the Court and asked if he would like to make a statement to which he declined. 8 RP 1151-1152. Further, Mr. Pacher who represented Baker during the trial agreed that a sentencing hearing one day after the verdict was appropriate. 7 RP 1131. Lastly, neither Baker nor his attorney asked for a continuance of sentencing, either in regard to it being held the day after trial or in regard to the fact that Mr. Pacher was not the attorney who represented the defendant at sentencing. 8 RP 1150. These facts are evidence that the tactic was to be silent at sentencing.

Baker argues that Mr. Montoya who represented him at the sentencing had indicated earlier in the trial that "he would certainly not be up to speed." App. Br. 42, 2 RP 226-228. However, Mr. Montoya's statement was in regard to going forward with the trial on a day that Mr. Pacher was unexpectedly unavailable due to illness. 2 RP 226-228. Baker does not mention that Mr. Montoya's statement was made more than a week prior to the sentencing hearing. 8 RP 1134. The record on appeal does not indicate that Mr. Montoya did not in the intervening time period "get up to speed" or otherwise prepare to represent Mr. Baker. Likewise, there is nothing in the record to show that it was not planned to have Mr. Montoya represent Mr. Baker at sentencing. What is clear from the record on appeal is that that neither Mr. Montoya or Mr. Baker requested a

continuance of the sentencing hearing which indicates that Mr. Montoya was prepared for sentencing.

Baker argues that objections should have been made to the "unsupported" arguments of the prosecutor. App. Br. 44. Specifically, statements that Baker had previous convictions in California for various sex offenses. Baker mistakenly argues that this information was used in imposing the exceptional sentence and that Mr. Montoya should have objected. App. Br. 45. Baker ignores the fact that the most viable reason for not objecting to the prior convictions is that the prosecutor could in fact prove the prior convictions. Further, Baker is in error when he argues that the trial judge based the imposition of the exceptional sentence on anything beyond the jury's finding that Kathie was particularly vulnerable or incapable of resistance, which is contrary to the Findings of Fact and Conclusions of Law entered as an appendix to the Judgment and Sentence as well as the judge's statements on the record at sentencing. CP 3-14, 8 RP 1153-1160. The trial judge imposed the exceptional sentence based not on any arguments of the prosecutor but based on the jury finding that Kathie was particularly vulnerable or incapable of resistance and the court's decision that there were substantial and compelling reasons to impose an exceptional sentence based on the facts at trial. 8 RP 1153-

1154, 1158-1159. Lastly, Baker cannot show if his attorney's performance at sentencing was deficient that he was prejudiced.

IV. CONCLUSION

The defendant's conviction and sentence should be affirmed. The defendant was not in custody when he made statements to the police and those statements were properly admitted. Further, there was sufficient evidence for a jury to find that Kathie was particularly vulnerable or incapable of resistance. Lastly, the defendant cannot show based on the appellate record that he received ineffective assistance of counsel at sentencing and was thereby prejudiced.

Respectfully submitted this 5th day of December, 2014.

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