

NO. 55217-1-I

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

STATE OF WASHINGTON,

Respondent,

v.

GLEN SEBASTIAN BURNS AND
ATIF AHMAD RAFAY,

Appellants.

APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE CHARLES MERTEL

STATE'S RESPONSE TO RAFAY'S STATEMENT OF
ADDITIONAL GROUNDS FOR REVIEW

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A. ISSUES

1. Whether Atif Rafay has failed to show that the dismissal of juror Donna Perry violated his constitutional rights to a fair and impartial jury and to due process of law.
2. Whether the trial court acted within its discretion when it denied Rafay's motion to dismiss juror Patricia Passig.
3. Whether the trial court properly found that the defendants' admissions during the undercover RCMP operation were voluntarily made, and thus admissible.
4. Whether Rafay has failed to show that he received ineffective assistance of counsel.
5. Whether the defendants' admissions, which the trial court found were voluntary, were not unfairly prejudicial.
6. Whether sufficient evidence supports Rafay's convictions for aggravated murder in the first degree.

B. STATEMENT OF THE CASE

The relevant facts are set forth in the Consolidated Brief of Respondent, filed on November 25, 2008. Additional relevant facts are set forth below in the pertinent argument sections.

C. ARGUMENT

1. THE TRIAL COURT'S DISMISSAL OF JUROR DONNA PERRY DID NOT VIOLATE RAFAY'S CONSTITUTIONAL RIGHTS.

In their opening briefs, the defendants argued that the trial court abused its discretion in dismissing Juror No. 4, Donna Perry, during the course of the trial. The State has fully responded to this claim. See Consolidated Brief of Respondent at 176-201.

In his Statement of Additional Grounds ("SAG"), Rafay raises the issue again, but makes a new argument; he claims that the trial court's dismissal of Perry violated his constitutional rights to a fair and impartial jury and to due process of law. However, the authority cited by Rafay concerns the dismissal of *deliberating* holdout jurors. Because a holdout juror's views may stem from his or her evaluation of the sufficiency of the evidence, constitutional concerns are implicated when the court dismisses such a juror.

Here, Perry was not a deliberating juror, and her dismissal does not raise constitutional concerns. Moreover, her dismissal was not due to her evaluation of the evidence, but because she slept during testimony, stated that she would do anything to get off the jury, did not follow the court's instructions, and lied to the judge. Rafay's constitutional claims are without merit.

Rafay's argument relies primarily on State v. Elmore, 155 Wn.2d 758, 123 P.3d 72 (2005). In Elmore, after two days of deliberations, two jurors communicated in writing to the judge that they believed another juror was refusing to convict under any view of the facts and was refusing to follow the law. The trial judge questioned the juror, who denied refusing to follow the law, and then dismissed the juror.

The Washington Supreme Court reversed, observing that the dismissal of a juror "stemming from [the] juror's doubts about the sufficiency of the evidence would violate the right to a unanimous jury verdict." Id. at 771. The court also noted that the dismissal of a holdout juror risked violating the right to an impartial jury because it may appear that the trial court is reconstituting the jury in order to reach a certain result. Id. at 772.

The court concluded that "where a deliberating juror is accused of refusing to follow the law, that juror cannot be dismissed when there is any reasonable possibility that his or her views stem from an evaluation of the sufficiency of the evidence." Id. at 778. However, the court emphasized that this rule "is applicable only in the rare case where a juror is accused of engaging in nullification, refusing to deliberate, or refusing to follow the law." Id.

Similarly, the federal cases cited by Rafay also concern deliberating jurors. See United States v. Brown, 823 F.2d 591 (D.C. Cir. 1987) (reversing the trial court's dismissal of a deliberating juror who, after five weeks of deliberations, asked to be discharged because he could not follow the law); Peek v. Kemp, 784 F.2d 1479 (11th Cir. 1986) (holding that the dismissal of a deliberating juror due to illness did not violate the defendant's Sixth Amendment right to a fair, impartial and representative jury, nor the defendant's due process rights).

After Elmore, the Washington Supreme Court reaffirmed that the holding of that case was limited to cases where a deliberating juror is accused of nullification, refusing to deliberate, or refusing to follow the law. State v. Depaz, 165 Wn.2d 842, 853, 204 P.3d 217 (2009). The court further recognized that, prior to deliberations, "the juror's conduct can manifest an inability to serve even before deliberations have begun" and offered as an example, "such as where a juror is accused of sleeping during the trial." Id. at 857.

Here, Perry was not a deliberating juror. When she was dismissed on April 14, 2004, the State was still presenting evidence as part of its case-in-chief. 128RP 161-64. The jury did not begin

deliberations until over one month later (May 20, 2004). 150RP
193. The rule in Elmore does not apply.

In addition, Perry was not dismissed due to her refusal to follow the law or her doubts about the State's evidence. Instead, the court dismissed her after finding that she (1) had been inattentive and slept through portions of the trial, (2) removed her notes from the courtroom in violation of the court's repeated instructions, (3) expressed her desire to do anything to get off the jury, and (4) lied to the court when she was asked about these subjects. See Consolidated Brief of Respondent at 188-89. In Depaz, the Washington Supreme Court acknowledged that sleeping alone would justify a trial court's dismissal of a juror. Here, Perry not only slept, but she failed to be honest with the judge when questioned about her behavior.

Rafay's argument suggests that all of the complaints about Perry came from a questionable source – juror Passig.¹ In fact, on February 24, 2004, a group of six jurors sent a note to the court

¹ Rafay also claims that the prosecutors had been "anxious" to remove Perry for months. However, the State moved to excuse Perry only after repeated complaints about her from other jurors and after the prosecutors and the trial judge had observed her not paying attention. See Consolidated Brief of Respondent at 176-80.

complaining about Perry's distracting behavior. CP 3019; 99RP 228. The trial judge later made an effort to watch her for several days and observed "an absolute lack of attention." 100RP 80. Two weeks later, a jail guard and a detective noted that Perry was sleeping through testimony. 106RP 7-8. When the matter finally came to a head and the court inquired of the jurors individually, many jurors, in addition to Passig, reported that Perry was sleeping, not paying attention at trial, writing personal notes, and had expressed a strong desire to get off the jury. 128RP 27-29, 37, 53-54, 56, 59-61, 65-66, 78, 80-83. The trial court acted well within its discretion in excusing Perry.

2. THE TRIAL COURT PROPERLY DENIED RAFAY'S MOTION TO DISMISS JUROR PASSIG.

In a new issue, Rafay argues that the trial court should have dismissed juror Patricia Passig; Rafay claims that Passig lied to the court about juror Perry. Given that multiple jurors confirmed Passig's representations about Perry, this claim is meritless. The trial court acted well within its discretion in denying Rafay's motion to dismiss Passig.

After the trial court dismissed juror Perry, Rafay's counsel moved to excuse six additional jurors. 128RP 171-72. After the court denied that motion, Rafay's counsel then asked the court to dismiss juror Patricia Passig on the basis that she "was in fact inaccurate and was stirring up the issues in the jury room." 128RP 173. The court denied the motion. Id.

This Court reviews a trial court's decision whether to excuse a juror for abuse of discretion. Elmore, 155 Wn.2d at 768-69; State v. Jorden, 103 Wn. App. 221, 226, 11 P.3d 866 (2000), rev. denied, 143 Wn.2d 1015 (2001). "A trial court abuses its discretion when its decision is manifestly unreasonable or exercised on untenable grounds or for untenable reasons." State v. Lord, 161 Wn.2d 276, 283-84, 165 P.3d 1251 (2007).

Rafay argues that the court should have dismissed Passig; he claims that Passig falsely represented that Perry was writing letters in court. However, contrary to Rafay's claim, multiple other jurors also stated that Perry was writing letters in court, and several jurors reported that they saw her ripping multiple pages out of her notebook and folding them up. 128RP 55-56, 60-61, 67-68, 76-78, 80-82. Consistent with these observations, more than 20 pages

are missing and unaccounted for in Perry's notebooks. See Consolidated Brief of Respondent at 197.

Rafay also claims that Passig was untruthful when, two months before Perry's dismissal, she sent the court a note expressing concern that Perry, upset over the temperature in the courtroom, had been overheard talking to her husband on the telephone and commenting that she would fight "her battles during deliberation." CP 3011; 97RP 6-7. At the time that Passig reported the remark, the trial court declined to conduct any investigation into it. 97RP 12-14. However, two months later, Perry acknowledged having a conversation with her husband about the temperature in the courthouse and that he advised her to "pick her battles." 128RP 94-95. Accordingly, the record does not support Rafay's claim that Passig was untruthful when she reported the comment.

The trial court acted well within its discretion in denying Rafay's motion to dismiss juror Passig.

3. THE TRIAL COURT PROPERLY ADMITTED THE DEFENDANTS' ADMISSIONS.

Rafay argues that the trial court did not, and could not under the facts of this case, find that the defendants' admissions to the

murders of the Rafay family were voluntarily made. The record refutes both of these contentions.²

Both the Fifth Amendment to the United States Constitution and article I, section 9 of the Washington State Constitution protect against self-incrimination. U.S. Const. amend. V; Const. art. I, § 9. These protections are coextensive. State v. Unga, 165 Wn.2d 95, 100, 196 P.3d 645 (2008). The admission of an involuntary confession at trial violates both provisions. Id.

Coercive police activity is a necessary prerequisite to a finding that a confession was not voluntary. Id. (citing Colorado v. Connelly, 479 U.S. 157, 167, 107 S. Ct. 515, 93 L. Ed. 2d 473 (1986)). Coercion includes both threats and promises. State v. Nelson, 108 Wn. App. 918, 924, 33 P.3d 419 (2001), rev. denied, 145 Wn.2d 1026 (2002). The mere fact that police lie to a suspect, thereby exaggerating the evidence against him, does not render a confession involuntary. Frazier v. Cupp, 394 U.S. 731, 737-39, 89 S. Ct. 1420, 22 L. Ed. 2d 684 (1969); State v. Burkins, 94 Wn. App. 677, 695, 973 P.2d 15, rev. denied, 138 Wn.2d 1014 (1999).

² The State incorporates by reference its arguments in support of voluntariness made in the Consolidated Brief of Respondent at 128-52.

When the State seeks to admit statements of the accused as evidence at trial, it bears the burden of proving the voluntariness of those statements by a preponderance of the evidence. State v. Braun, 82 Wn.2d 157, 162, 509 P.2d 742 (1973) (citing Lego v. Twomey, 404 U.S. 477, 489, 92 S. Ct. 619, 30 L. Ed. 2d 618 (1972)). The test for voluntariness looks to whether a confession was the product of an essentially free and unconstrained choice. Schneckloth v. Bustamonte, 412 U.S. 218, 225, 93 S. Ct. 2041, 36 L. Ed. 2d 854 (1973).

In determining whether a defendant's will was overborne, courts should assess the totality of the circumstances, including both the character of the accused and the details of the interrogation. Id. at 226; Burkins, 94 Wn. App. at 694. Potentially relevant circumstances include: the length, location and continuity of the interrogation; the defendant's maturity, education, physical condition and mental health; and whether police advised the defendant of the rights to remain silent and to have counsel present during custodial interrogation.³ Unga, 165 Wn.2d at 101.

³ This case does not involve a custodial interrogation. However, most cases that assess the voluntariness of a confession arise out of custodial interrogation.

Rafay contends that the undercover Royal Canadian Mounted Police ("RCMP") officers employed both threats and inducements to obtain the defendants' admissions. The State has already responded in some detail to Rafay's claims that he and Burns confessed to the murders out of fear. See Consolidated Brief of Respondent at 141-47. In short, even after many of the statements from Al and Gary⁴ that Rafay claims inspired such fear in himself and his friend Burns, Burns continued to seek contact with Al and Gary, and continued to express a desire to work with them. See Consolidated Brief of Respondent at 142-46. These voluntary contacts continued long after Burns's alleged attempts to "extricate himself from further involvement with Al" on May 6, 1995. SAG at 45; see Consolidated Brief of Respondent at 144-45. And in spite of the alleged threats and the fear that they allegedly engendered, Burns continued to resist Al's suggestions that Burns tell him what had happened in Bellevue. See, e.g., Ex. 546 at 65, 94-96, 142-43; Ex. 541 at 85-87, 101-05, 121-26, 129-30.

⁴ Al Haslett and Gary Shinkaruk were the undercover RCMP officers to whom the defendants admitted murdering the Rafay family. 115RP 21-22; Ex. 542 at 21; Ex. 543 at 56. The defendants knew them as simply "Al" and "Gary." 143RP 101, 114.

Nor did Rafay seem especially intimidated when he finally met with Gary and Al on July 19, 1995, months into Burns's association with the undercover RCMP officers. Rather than respond to Al's question as to why he killed his family with a simple "We did it for the money" (in keeping with Rafay's claim that he was just playing along out of fear), Rafay seemed to draw on his background in philosophy⁵ to expound on his reasons:

It was necessary to I guess um, achieve what I wanted to achieve in this life. It was I think of it as a sacrifice I think of it as um, I guess um, a sort of injustice in the world that basically, basically forced me or, and Sebastian, to uh, have to do the thing.

Ex. 543 at 56.

And try as Rafay may to explain away the defendants' casual demeanor as they recounted the murders to Gary and Al (SAG at 47, 49), and their laughter as they described how Basma (Rafay's autistic sister) fought for her life, the videotapes tell a tale of two casual murderers who are rather proud of what they have done. The claim of coercion through fear is not supported by this record.

Rafay also claims coercion through inducement. He relies especially on Al's promise that he could have evidence destroyed, if

⁵ Rafay studied English and film during his first year at Cornell, "after being disappointed with philosophy." Ex. 543 at 66.

only Burns would tell him what happened in Bellevue so that Al would know exactly what to look for. In support of his claim, Rafay points to the fact that the defendants confessed to the murders only after seeing a fake Bellevue Police Department ("BPD") memo describing evidence allegedly gathered against them. SAG at 28. Again, the record does not support coercion.

The totality-of-the-circumstances test applies to a question of coercion by express or implied promise. Unga, 165 Wn.2d at 101. A promise by law enforcement does not necessarily render a confession involuntary, but is one factor to be considered. Id. To find that a defendant's will was overborne by a promise, there must be a direct causal relationship between the promise and the confession. Id. at 101-02.

Rafay seems to assume that, because Burns decided to confess after Al offered to destroy the evidence listed on the fake BPD memo, the confession was necessarily coerced by the promise. SAG at 38. The requisite causal connection is not merely "but for" causation, however; the court does not simply ask whether the confession would have been made if not for the promise. Id. at 102 (citing Miller v. Fenton, 796 F.2d 598, 604 (3d Cir. 1986); Arizona v. Fulminante, 499 U.S. 279, 285, 111 S. Ct. 1246,

113 L. Ed. 2d 302 (1991)). The question is whether, in spite of the promise, the suspect was able to make an autonomous, rational decision to inculcate himself. Unga, 165 Wn.2d at 102. "[S]o long as [the] decision is a product of the suspect's own balancing of competing considerations, the confession is voluntary." Unga, 165 Wn.2d at 102 (quoting Miller, 796 F.2d at 605).

Looking at the circumstances of the "interrogation" in this case, it was neither lengthy nor continuous. The conversations that Burns had with Al and Gary were not contained in some hours-long interrogation, but were spread out over several months. And the conversations took place, not in some 8-by-10-foot interrogation room, but in various hotel rooms to which both defendants freely traveled, and which they were free to leave at any time.

Focusing next on the defendants' personal characteristics, they were both young adults, living on their own. Both were apparently in good physical and mental health. And both were relatively well-educated, Burns having completed a year at a community college, and Rafay having completed a year at Cornell University.

The remaining factor, whether police had advised the defendants of the right to remain silent and to have counsel present

during custodial interrogation, is inapposite under the circumstances of this case. Since the defendants met with Al and Gary of their own volition, the right to remain silent was hardly at issue. And since they were masters of their own time between these meetings, the defendants had the opportunity to consult with an attorney at any time, had they wished to do so.⁶

Taking these circumstances into account, it is clear that the defendants' wills were not overborne. Throughout his interactions with Al and Gary, Burns was constantly calculating his own best interests (and, by extension, Rafay's). Early on, Burns hinted that he would like evidence destroyed in Bellevue. On May 6, 1995, Burns told Al that he was "not content to live my life with Detectives in Bellevue um, on my case." Ex. 546 at 66. Burns said that he did not want to have to worry about "whether or not I can go to the States, or whether I can travel to this country or that country or whatever. And whatever would be necessary to ensure that aum, that I, don't have to worry about that." Ex. 546 at 78. Burns finally told Al that if Burns knew what evidence linked him to the murders,

⁶ The defendants had a lawyer available to them, apparently as a result of a malicious mischief charge. See Ex. 543 at 48; Ex. 546 at 64.

he would "pay whatever it costs" to "have it removed." Ex. 546 at 102.

While Burns also hinted at involvement in the murders, he was for a long time unwilling to risk giving Al any details.⁷ But when finally confronted with what he thought might be fatally damning evidence against him (the fake BPD memo), Burns recalculated the costs and benefits, and made a free and unconstrained choice – that his best interest lay in getting Al's help with his goal of destroying the evidence, even if that required finally making explicit admissions to the murders.

Nor is there evidence that Rafay's will was overborne, certainly not by Al's promise to destroy evidence. Rafay, it is clear, was simply following Burns's lead. When Al told Rafay that Rafay could trust him, Rafay responded: "I know that now, I know that now because Sebastian trusts you and if Sebastian trusts you that's . . . cool." Ex. 543 at 53.

⁷ "Well I didn't say that I did it." Ex. 546 at 96. "[O]bviously anytime [anything?] I say can potentially . . . end my life." Ex. 541 at 87. "[T]here's really no gain in talkin' about that." Ex. 541 at 103. "Well you're the one that is saying that I did." Ex. 546 at 143. "Okay well, so don't ask me that question. You know what I mean like, you understand?" Ex. 541 at 124. "Well, put yourself in this scenario. Think of uh how you would feel about things and then, and then that might indicate to you . . ." Ex. 541 at 129.

Taking into account all of the relevant circumstances, it is clear that both defendants retained the ability to make a rational choice that they believed was in their own best interests. Their admissions to the murders were voluntary, and were properly admitted at trial.

Rafay's reliance on Fulminante, 499 U.S. 279, for his claim of coercion is misplaced.⁸ The critical distinction, for purposes of determining voluntariness, is that Fulminante was *in prison*; thus, his freedom to leave, to avoid potential danger, or to consult with a lawyer was severely curtailed. A bare majority of five justices, while finding that Fulminante's admissions were coerced under these circumstances, nevertheless noted that the question of coercion was a "close one" even in that case. Fulminante, 499 U.S. at 287.

Rafay focuses much of his argument on an attempt to show that the trial court used an incorrect standard (the so-called "silver platter" doctrine) in assessing whether the defendants' confessions

⁸ The State discussed and distinguished Fulminante in the Consolidated Brief of Respondent at 149-51.

should be admitted.⁹ To the contrary, the trial court's findings confirm that the court properly applied the voluntariness standard in assessing admissibility:

The defendants['] statements and admissions to undercover RCMP officers during the course of the undercover scenarios were not the product of coercion or duress and their admission into evidence will not violate the defendants' due process rights, right to counsel or right against self incrimination guaranteed by the State and Federal Constitutions. The statements at issue were made in a non-custodial setting. The defendants were free to leave or not leave. The defendants were free to speak or not speak. The defendants were free to consult their Canadian counsel or not as they chose.

CP 2811.

Rafay's claim that the trial court simply adopted the findings of the Canadian court as to voluntariness should also be rejected. SAG 30-37. Rafay relies on the court's statement in its Findings of Fact and Conclusions of Law that it "agrees with the Canadian courts and finds the same" (i.e., no coercion) (CP 2808), while ignoring the findings quoted above. Moreover, at the conclusion of a lengthy hearing under CrR 3.5 at which the defendants chose not

⁹ The extensive discussion of the "silver platter" doctrine was warranted, as it applied to the wiretaps themselves (i.e., the electronic interception and recording of the defendants' communications), which were authorized pursuant to Canadian law. The trial court's findings fully support its conclusion that the wiretaps were carried out wholly and independently by Canadian police, in full compliance with Canadian law. CP 2803-13.

to testify (11RP 28; 37RP 3), the trial judge carefully summarized the evidence upon which he had relied:

Thirdly, and I think significantly for any reviewing court, weeks of sworn testimony was admitted in this process, giving this court the opportunity to weigh credibility of witnesses, listen and view videotapes and the RCMP operations, undercover operations scenarios, and the opportunity to listen and view not only to what was said, but to how it was said and the demeanor of the participants in those scenarios.

37RP 3-4. Had the court been inclined to do no more than rubber-stamp the Canadian court's findings, such lengthy and detailed consideration of the undercover operation and the defendants' admissions would hardly have been necessary.

Rafay also contends that the trial court improperly left to the jury the question of whether the statements were coerced. He relies on a comment the court made in rejecting the proposed testimony of Dr. Leo: "[T]hat is the final analysis and question for this jury to decide, number one, if it's a confession, and, number two, was it voluntary or was it coerced?" SAG at 36 (quoting from 63RP 65). Rafay's argument ignores the trial court's explicit findings for admissibility purposes, based on weeks of listening to testimony and viewing videotapes, that the defendants' admissions were "not the product of coercion or duress." CP 2811. Moreover,

once the trial court had admitted the confessions, the defendants raised the only defense possible – they argued *to the jury* that their confessions to the murders were coerced by threats and intimidation, and were not true. This defense was raised by Burns in his trial testimony (143RP 101-03) and by counsel in closing argument (150RP 11-15). The trial court thus properly characterized this jury issue.

Finally, Rafay complains that his trial counsel was ineffective in that she argued only the "silver platter" doctrine, thus misleading the court as to the correct standard. This is not correct. In fact, while much of the argument on the suppression motion was devoted to the "silver platter" doctrine (36RP 86-111),¹⁰ it was Rafay's attorney who made the argument that the statements were coerced: "So the area that I'm going to focus on that hasn't been addressed by anybody up to this point today is my position that there was a violation of the Fifth and Fourteenth Amendments, a due process violation. Basically, these statements were involuntarily made and coerced." 36RP 127. Counsel went on to compare the facts of Fulminante, supra, just as Rafay does here.

¹⁰ The "silver platter" doctrine was relevant to whether the taped statements should be suppressed under Washington's privacy act. See 36RP 86.

36RP 128-30; SAG at 50-51. Counsel was not ineffective in making all available arguments.

4. RAFAY HAS FAILED TO ESTABLISH THAT HE RECEIVED INEFFECTIVE ASSISTANCE OF COUNSEL.

Rafay claims that he received ineffective assistance of counsel. He complains that his attorneys did not recall a witness and did not object to statements made by Burns's counsel. A review of the pertinent facts reveals that these claims are meritless.¹¹

To prevail on a claim of ineffective assistance of counsel, Rafay must show that "(1) defense counsel's representation was deficient, i.e., it fell below an objective standard of reasonableness based on consideration of all the circumstances, and (2) defense counsel's deficient representation prejudiced the defendant, i.e., there is a reasonable probability that, except for counsel's unprofessional errors, the result of the proceeding would have been different." State v. McFarland, 127 Wn.2d 322, 334-35, 899 P.2d 1251 (1995); Strickland v. Washington, 466 U.S. 668, 687, 104

¹¹ Rafay's additional claims of ineffective assistance of counsel are discussed in §§ C.3, supra, and C.5, infra.

S. Ct. 2052, 80 L. Ed. 2d 674 (1984). If either element of the test is not satisfied, the inquiry ends. State v. Kylo, 166 Wn.2d 856, 862, 215 P.3d 177 (2009).

With respect to deficient performance, the court must begin with "a strong presumption counsel's representation was effective," and must base its determination on the entire record below. McFarland, 127 Wn.2d at 335. "[T]his presumption will only be overcome by a clear showing of incompetence." State v. Varga, 151 Wn.2d 179, 199, 86 P.3d 139 (2004). Rafay has failed to show that his attorney acted deficiently.

a. The Decision Not To Recall Mark Sidell.

Rafay complains that his attorney did not recall Mark Sidell as a witness. However, the record establishes that Rafay's attorneys made a tactical decision not to recall Sidell, and this strategic decision cannot support a claim of ineffective assistance of counsel.

Mark Sidell, a neighbor of the Rafays, testified that on the night of the murders, he heard hollow pounding sounds during the evening. 71RP 65-66. Sidell's best estimate of the time was between 9:10 and 9:20 p.m., although he stated that he was not

carefully looking at his watch. 71RP 61, 66. Defense counsel for both defendants cross-examined Sidell extensively. 71RP 97-155. During cross-examination, Sidell acknowledged that he had originally told the police that he heard sounds around 9:40 or 9:45 p.m. 71RP 108.

After he testified, Sidell sent an e-mail to the prosecutors, which they gave to the defendants' attorneys. 81RP 4. After this development was placed on the record, the trial judge suggested that Sidell might have to be brought back to be questioned about material in the e-mail. 81RP 15. Rafay's trial counsel disagreed and responded that the e-mail contained nothing new:

Freitas: I just want to say for the record, Your Honor, that there's nothing new in that statement. That is exactly what [Sidell] said in his first statement that the state has and the second statement he talked about the running.... This is not new information to the state. The only thing new is that he had this typed document that he created.... None of it is new.

81RP 16.

Rafay now claims that his attorneys acted deficiently in not recalling Sidell as a witness. Rafay has not shown that his attorneys' deliberate decision not to recall Sidell was deficient performance. It is well-settled that defense counsel's decision whether or not to call a witness generally falls within trial strategy

and will not support a claim of ineffective assistance of counsel. State v. Thomas, 109 Wn.2d 222, 230, 743 P.2d 816 (1987); State v. Watkins, 136 Wn. App. 240, 248, 148 P.3d 1112 (2006), rev. denied, 161 Wn.2d 1028 (2007). The presumption of counsel's competence can be overcome by a showing that counsel failed to conduct appropriate investigations. Thomas, 109 Wn.2d at 230.

Rafay does not and cannot claim that his attorneys failed to do an adequate investigation. His attorneys cross-examined Sidell at length. 81RP 141-55. They reviewed Sidell's e-mail, concluded that it contained nothing new, and made a tactical decision to not recall him as a witness. Rafay has not shown that this constituted deficient performance.

Nor has Rafay shown prejudice. The e-mail is apparently not in the record; therefore, Rafay's claims about its contents are not supported by any citation to the record. If Rafay wishes to bring a claim of ineffective assistance of counsel based upon matters outside the appellate record, he must do so by means of a personal restraint petition. McFarland, 127 Wn.2d at 338. Based upon the existing record, Rafay has not established that, had his attorneys recalled Sidell as a witness, there is a reasonable probability that the result of the trial would have been different.

b. The Failure To Object To Burns's Counsel's Closing Argument.

Rafay complains that his attorneys should have objected during Burns's counsel's closing argument. The decision whether to object is a question of trial tactics, and only in egregious circumstances will the failure to object constitute ineffective assistance of counsel. Given that the argument in question was consistent with Rafay's defense, he has not shown that his attorney acted deficiently by not objecting.

During closing argument, Burns's counsel, Jeff Robinson, argued that Rafay's neighbors had heard the murders sometime between 9:45 and 9:56 p.m. 150RP 56-60. Robinson stated that, according to the testimony, sunset on the day of the murders was at 9:05 p.m. and twilight was at 9:44 p.m. 150RP 58. He noted that one neighbor thought the time was "9:56, 12 minutes after twilight, or just as it's starting to get dark." Id.

On appeal, Rafay complains that his counsel should have objected because on the day in question twilight *ended* at 9:44 p.m., and therefore it was dark by that time.

At the outset, Rafay fails to cite to anything in the record establishing the difference between twilight and the end of twilight,

let alone the times for those events on the day in question. Without such testimony, it is not clear how his attorney could have posed an objection that Robinson was misrepresenting the evidence.

Moreover, the decision whether to object is a classic example of trial tactics, and only in egregious circumstances will the failure to object constitute ineffective assistance of counsel. State v. Kolesnik, 146 Wn. App. 790, 801, 192 P.3d 937 (2008), rev. denied, 165 Wn.2d 1050 (2009). Rafay's counsel did not object because Robinson's argument was consistent with Rafay's alibi defense. Rafay and Burns had strategic reasons for suggesting that it was not completely dark at 9:44 p.m. In closing argument, Rafay's attorney argued that neighbor Mark Sidell had heard the pounding sounds at 9:44 p.m. 149RP 133-37. During his testimony, Sidell testified that when he heard the sounds, "the sun was starting to go down and it was starting to get darker and darker, but it was not completely pitch dark at that point." 71RP 66. Therefore, it was consistent with Rafay's defense to suggest that it was not completely dark at that time. Given this defense, Rafay has not shown that his attorney acted deficiently in not objecting to Robinson's remarks.

Rafay has also failed to establish prejudice – i.e., that there is a reasonable probability that, had his attorney objected, the result of the trial would have been different. Had an objection been made, it is highly likely that the trial court would not have corrected any statement, but would simply have told the jury that it was up to them to recall the testimony. See, e.g., 150RP 137 (court's response to defense objection that State was misstating the testimony in closing argument). This claim is without merit.

c. Informing The Jury That The Defendants Were In Custody.

Rafay next complains that his attorney failed to object when Burns's attorney informed the jury that the defendants were in custody. Informing the jurors of the defendants' custody status was a reasonable tactical decision, and Rafay's attorneys could have, as a matter of sound trial strategy, agreed with that tactic.

During voir dire, Burns's counsel, Jeff Robinson, noted that there were three corrections officers in the courtroom and asked if anyone would be surprised to know that Burns and Rafay were in custody. 59RP 77-78. Robinson then asked whether the fact that they were in custody would "make anybody in this room think, you

know what, they are more probably guilty than not, based on that factor?" 59RP 78-79. After one juror apparently raised her hand, Robinson asked her whether she could bail out of jail on three counts of aggravated murder in the first degree, and the juror responded that she could not. RP 79. All of the jurors then agreed that the fact that the defendants were in custody should have nothing to do with the final verdicts in the case. 59RP 79-80.

The decision to disclose that Burns and Rafay were in custody was obviously a considered decision, and Rafay's attorneys' decision not to object was an equally considered one. This Court has observed that "a reasonable juror would know that a defendant in a first degree murder trial was not likely to be released pending trial unless he paid a substantial amount of bail, regardless of whether he was later found to be innocent." State v. Mullin-Coston, 115 Wn. App. 679, 693, 64 P.3d 40 (2003), aff'd, 152 Wn.2d 107, 95 P.3d 321 (2004). Given the nature of the charges and the presence of corrections officers in the courtroom, defense counsel could make the legitimate tactical decision that it was appropriate to discuss the defendants' custody status in order to obtain the jurors' assurance that it would not influence their verdict.

In addition, the United States Supreme Court has observed that "it is not an uncommon defense tactic to produce the defendant in jail clothes in the hope of eliciting sympathy from the jury."

Estelle v. Williams, 425 U.S. 501, 508, 96 S. Ct. 1691, 48 L. Ed. 2d

126 (1976). During the trial, Robinson elicited testimony from

Burns that Burns had been in custody for nearly nine years.

143RP 149. In closing argument, Robinson then argued that

Burns's long period in custody had affected his communication

skills and his demeanor while testifying. 150RP 16-18. The record

makes clear that counsel had a strategic reason for informing the

jury of the defendants' custody status.

Finally, Rafay makes no attempt to establish a reasonable probability that, had his attorney objected during voir dire, the results of the trial would have been different. Given that a reasonably observant juror would have noticed the corrections officers in the courtroom and would have assumed that defendants charged with aggravated first-degree murder were unlikely to be released, Rafay cannot show prejudice. This claim is without merit.

5. THE DEFENDANTS' ADMISSIONS TO THE UNDERCOVER RCMP OFFICERS WERE NOT INADMISSIBLE UNDER ER 403.

Rafay contends that the defendants' confessions should have been excluded pursuant to ER 403 as more prejudicial than probative.¹² He cites to nothing in the record that shows that such an objection was made below. He has thus waived this claim. Moreover, even if the claim is examined on its merits, it fails.

Errors not raised in the trial court will not generally be reviewed for the first time on appeal. RAP 2.5(a). Courts will make an exception for a "manifest error affecting a constitutional right." RAP 2.5(a)(3). An error under ER 403 is not of constitutional magnitude and cannot be raised for the first time on appeal. State v. Elmore, 139 Wn.2d 250, 283, 985 P.2d 289 (1999).

Even if Rafay's claims were addressed on their merits, they would fail. Rafay first cites a study concluding that people typically perform at no better than chance levels in separating truth from falsehood. Saul M. Kassin & Gisli H. Gudjonsson, *True Crimes, False Confessions*, Scientific American: Mind, Vol. 16, No. 2 (2005) at 24-31. From this, he extrapolates that confessions should not be

¹² Under ER 403, relevant evidence may be excluded if its probative value is "substantially outweighed by the danger of unfair prejudice."

admitted at trial unless they contain so-called "holdback" evidence or are consistent with known facts. SAG at 58.

The State will not recount in this response all of the ways in which the defendants' admissions *were* consistent with the physical evidence in this case. Even if the confessions were *not* strongly corroborated by the available evidence, there is no support for the proposition that a voluntary confession in such circumstances is inherently more prejudicial than probative. Once the trial court has determined, under the totality of the circumstances, that a confession was voluntarily given, our system of justice leaves it to the jury, not the flip of a coin, to determine what weight to give to the confession in reaching a determination as to guilt or innocence.

The Kassin and Gudjonsson article cited by Rafay provokes several criticisms. First, like most of the studies submitted in this appeal (and unlike the facts of this case), the article focuses on custodial interrogations. *Id.* at 29 ("Proponents of the Reid technique advise interrogators to conduct the questioning in a small, barely furnished, soundproof room."), 31 (one factor in risk of false confessions is "time in custody and interrogation").

Moreover, the article relies on the oft-cited 1996 experiment involving college students "falsely accused" of crashing a computer

by hitting a key that they were told was off-limits; when an alleged witness said that she had seen the students hit the forbidden key, many even signed confessions and fabricated "false memories" to support their guilt. Id. at 29. It is inconceivable that one would seriously try to apply these results to a confession in a murder case. It is self-evident that the stakes are vastly different. More importantly, it is not hard to imagine that many of the students who "falsely confessed" honestly believed that they might have hit the key by accident, without noticing their mistake. The same can hardly be said for the brutal murders of three people.

Finally, in proposing reforms designed to minimize the danger of incorrectly assessing reliability, the authors propose exactly what was done in this case: "To assess any given confession accurately, police, judges, lawyers and juries should have access to *a videotaped record of the interrogation that produced it.* Id. at 31 (italics added).¹³

Rafay next complains that Al and Gary's alleged criminal connections unfairly "reflected on the character of the defendants."

¹³ Notably, this 2005 article says nothing about a "camera bias" allegedly caused by focusing only on the person being interrogated. See Rafay's final argument, infra.

SAG at 59. This claim is hard to maintain in light of Burns's multiple statements indicating his own desire to be involved in the criminal world. See, e.g., 123RP 171 (Burns told Gary that he and his friends wanted to make big money, and were willing to do anything), 182 (Burns told Gary that he and his friends would do anything if the price was right and they thought they could get away with it); 127RP 101-02 (Burns told Al about his shoplifting schemes; he talked about stealing cars and getting into big money); Ex. 546 at 46 (Burns tells Gary that he "wouldn't mind . . . moving drugs or whatever" and that "conscience . . . is not the issue here").

Lest these comments be dismissed as mere puffery, meant only to impress Gary and Al, Burns made similar comments to his friend Jimmy Miyoshi during their money-laundering trips to Victoria. See, e.g., Ex. 540 (transcript 5) at 3 ("[I]t was pretty fucking easy, this is the world of crime. . . . It's so cool. This has been the coolest thing ever I couldn't ask for anymore . . . "); Ex. 541 at 31 ("we could be doing major things with them, like a couple years").

Finally Rafay now complains that he suffered prejudice from the very videotaping that the "false confession" experts have for years demanded. In support of this claim, Rafay cites studies

purporting to show that videotapes focusing on the suspect rather than on the interrogator bias the viewer in favor of finding that the statements were voluntary. Both of these cited articles were published in 2006; Burns's and Rafay's statements were videotaped in 1995 and their trial took place in 2004. Earlier studies (including the 2005 Kassin and Gudjonsson article that Rafay attached to his SAG) recommend videotaping as the answer to the "false confession" problem, and make no mention of specific camera focus. See studies and cases cited in Consolidated Brief of Respondent at 253-57.

The "remedy" for false confessions has thus become a "moving target" for police, prosecutors, and the courts. Today's wisdom will be contradicted by tomorrow's. But what matters is what was known at the time the statements were made, and at the time of trial when the court made its decisions.¹⁴

¹⁴ If Rafay wishes to expand the record to include new theories on which to base his claim of involuntariness, he may do so in a personal restraint petition.

Nor can Rafay show ineffective assistance of counsel on this record. The latest theory on "false confessions" is a moving target for defense counsel as well. And for all of the reasons set out above, a motion to suppress the confessions under ER 403 would not have succeeded.

6. SUFFICIENT EVIDENCE SUPPORTS RAFAY'S CONVICTIONS.

In a brief one-page argument, Rafay argues that there is insufficient evidence to support his convictions. In a challenge to the sufficiency of the evidence, the court views the evidence in the light most favorable to the State. "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). Evidence is sufficient to support a conviction if any rational trier of fact could have found the essential elements of the charged crime proved beyond a reasonable doubt.

State v. Hosier, 157 Wn.2d 1, 8, 133 P.3d 936 (2006). The appellate court defers to the trier of fact on issues of conflicting testimony, credibility of witnesses, and the persuasiveness of the evidence. State v. Walton, 64 Wn. App. 410, 415-16, 824 P.2d 533, rev. denied, 119 Wn.2d 1011 (1992).

The facts supporting Rafay's convictions are set forth in detail in the Consolidated Brief of Respondent. Rafay admitted to his involvement in the murders on videotape. Jimmy Miyoshi reluctantly admitted that he knew about the defendants' homicidal plans. Contrary to the defendants' insistence that they had been duped and pressured into falsely confessing to crimes that they did not commit, Burns was taped discussing the murders with Miyoshi when no undercover agent was present. The physical evidence at the scene revealed that the murderer had felt sufficiently comfortable in the house to take a shower after committing the murders. Viewing the evidence in the light most favorable to the State, there was overwhelming evidence of Rafay's guilt.

D. CONCLUSION

For all of the foregoing reasons, the State respectfully asks this Court to affirm Rafay's convictions for Aggravated Murder in the First Degree.

DATED this 21st day of June, 2010.

Respectfully submitted,

DANIEL T. SATTERBERG
King County Prosecuting Attorney

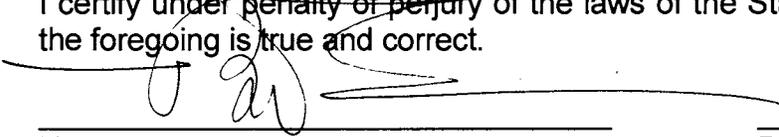
By: Deborah A. Dwyer
DEBORAH A. DWYER, WSBA #18887
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By: Brian M. McDonald
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Today I deposited in the mail of the United States of America, postage prepaid, a properly stamped and addressed envelope directed to **David B. Koch**, the attorney for the appellant, at **Nielsen, Broman & Koch, PLLC**, 1908 East Madison, Seattle, WA 98122, containing a copy of the **State's Response to Rafay's Statement of Additional Grounds for Review**, in **STATE v. ATIF RAFAY**, Cause No. **55217-1-I**, in the Court of Appeals for the State of Washington, Division I.

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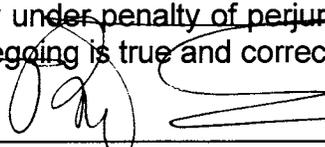
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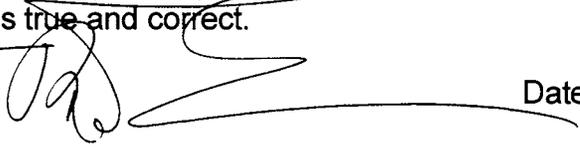
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