

59228-9

59228-9

NO. 59228-9-I

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

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STATE OF WASHINGTON,

Respondent,

v.

JOEL ZELLMER,

Appellant.

FILED  
COURT OF APPEALS DIV I  
STATE OF WASHINGTON  
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APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE CATHERINE SHAFFER

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**BRIEF OF RESPONDENT**

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DANIEL T. SATTERBERG  
King County Prosecuting Attorney

DAVID M. SEAVER  
Senior Deputy Prosecuting Attorney  
Attorneys for Respondent

King County Prosecuting Attorney  
W554 King County Courthouse  
516 3rd Avenue  
Seattle, Washington 98104  
(206) 296-9650

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**A. ISSUES PRESENTED**

1. A court may properly issue a search warrant when it is presented with sufficient facts to allow it to reasonably conclude that a crime has been committed and that evidence of that crime will be found at a particular location. The warrant must also describe the categories of items to be seized with sufficient particularity to allow the police to identify the items sought with reasonable certainty. Here, the police presented an affidavit that described the apparent circumstances of a child's drowning, as reported by the defendant, and abundantly established that they were wholly inconsistent with her history and behavior. The affidavit extensively documented the defendant's multiple motives and opportunity to commit the murder of the child by drowning, and the lengthy preparation he had undertaken in order to succeed without exposure. The warrant described specific categories of items that were plainly and obviously connected with the crimes under investigation. Did the trial court properly grant the search warrant?

2. The State cannot be deemed to have violated a defendant's right to confidentiality in his communications with his attorneys unless it is shown that the State deliberately intruded into such communications. At trial, the defendant repeatedly asserted, without any proof, that the State had encroached into his conversations with his attorneys. The trial

court uniformly rejected his accusations as entirely groundless. On appeal, the defendant does not demonstrate in any way that the trial court erred. Under the circumstances, should the defendant's claim of a violation of his right to confidentiality be rejected?

3. The closure of a courtroom infringes on a defendant's constitutional right to a public trial only when the courtroom is completely and purposefully closed so that no one may enter or leave. The exclusion of a single spectator does not amount to such a closure, but is a matter of the trial court's exercise of its discretion in managing courtroom operations. Here, the trial court excluded a minor child of a witness from observing the proceedings until his father testified, in order to ensure that the father's testimony could not be tainted by exposure to the testimony of several witnesses before him. Given that the trial court excluded only one individual, on reasonable grounds, did the court exercise its discretion in a manner that did not infringe on the defendant's right to a public trial?

4. A defendant's constitutional right to be present is not infringed when the trial court confers with counsel on legal matters that do not require the resolution of disputed facts. Here, the trial court consulted with the State and defense counsel about an inquiry from the deliberating jury on a purely legal issue. No resolution of facts in dispute occurred.

Did the trial court properly respond to the inquiry in a manner that did not jeopardize the defendant's right to be present?

5. Evidence of a defendant's prior acts to prove a common scheme or plan is admissible if the evidence evinces an overarching plan in which the prior acts or events are causally related to the charged offense. Admission of such evidence is reviewed for abuse of discretion. Here, the defendant was charged with a murder-by-drowning of a romantic partner's small child when that child had been left alone in his care, and shortly after he had insured the child's life for a substantial sum. The trial court admitted evidence of harm that had come to the young children of other romantic partners of the defendant when they were left in his care; the incidents involved the attempt to fraudulently obtain insurance proceeds or drowning. Did the trial court reasonably exercise its discretion in admitting that evidence as proof of the defendant's years-long preparation and planning to harm the small child of a romantic partner via drowning in order to fraudulently obtain insurance proceeds?

6. An expert witness may testify at trial if his specialized knowledge will assist the trier of fact to understand the evidence. The decision to admit expert testimony is within the trial court's discretion. In this case, the trial court allowed a professional tracker with decades of experience in searching for easily-overlooked evidence of a person's

presence and movement at a location to testify about his detailed review of fine details of the crime scene. Did the trial court properly admit the tracker's testimony?

7. A defendant who alleges improper argument on the part of the prosecutor must establish both the impropriety and its prejudicial effect. Here, the defendant fails to show that the prosecutor's references to the victim's family were appeals to the jury's passions and prejudices, and does not demonstrate that his remarks likely affected the outcome of the trial. Does the defendant fail to establish reversible prosecutorial misconduct?

8. The use of an instruction that calls for jury unanimity before it can answer "no" on a special verdict form is reversible error only if the defendant can demonstrate within reasonable probability that the outcome of his trial would have been materially different had the error not occurred. In this case, without ever expressing any confusion about the court's instructions, and having been repeatedly instructed that it could only answer "yes" on a special verdict form if all twelve jurors were unanimous, the jury returned a "yes" answer. The individual jurors were polled, and every juror confirmed that the verdict was his or her personal belief. Was the use of an instruction that told the jurors they needed to be unanimous in order to answer "no" harmless under these circumstances?

**B. STATEMENT OF THE CASE**

**1. PROCEDURAL FACTS**

**a. Issuance Of Search Warrant And Resultant Litigation**

On December 6, 2005, King County Superior Court Judge Brian Gain issued a search warrant for the home of Joel Zellmer, upon an application submitted by King County Sheriff's Office Detective Sue Peters. 1CP 1-7.<sup>1</sup> The warrant was executed on December 6<sup>th</sup> and the following day, a return was filed with the superior court. 1CP 8-11. Zellmer moved for a return of his property pursuant to CrR 2.3(e) on August 10, 2006. 1CP 46-173. On November 21, 2006, Judge Gain issued an agreed order that largely denied Zellmer's motion but which required segregation of potentially privileged materials for review by a special master. 1CP 203-05.

**b. Criminal Charges**

By information filed on June 6, 2007, Zellmer was charged with one count each of murder in the first degree, murder in the second degree, and theft in the first degree. 2CP 1-2. The information was amended several times. At the time of trial, the final amended information included

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<sup>1</sup> The State's brief comprises a response to the two appeals filed by Zellmer, COA Nos. 59228-9-I and 65701-1-I. For efficiency's sake, the State will refer to the clerk's papers designated under COA No. 59228-9-I as "1CP" and those designated under COA No. 65701-1-I as "2CP." The warrant is available to this Court as 1CP 5-7.

the original charges, along with two additional counts of first-degree theft. 2CP 2247-49. The final amended information also alleged the existence of aggravating factors -- the victim's particular vulnerability and the status of the crime as a major economic offense due to a high degree of sophistication and abuse of trust -- as to the charge of first-degree murder, and the existence of the aggravating factor of particular vulnerability as to the charge of second-degree murder. 2CP 2247-48. The originally-filed charge of first-degree theft also was amended to include an aggravating circumstance as a major economic offense. 2CP 2248.

On January 29, 2010, the trial court granted Zellmer's motion to sever the murder charges from the theft counts. 2CP 262. The parties proceeded to trial on the murder charges on March 1, 2010. By jury verdict rendered on April 28, 2010, Zellmer was convicted of second-degree murder, along with the aggravating factor of the victim's particular vulnerability. 2CP 2415-16. The jury did not reach a verdict as to first-degree murder. 2CP 2412.

On June 18, 2010, the trial court imposed an exceptional sentence of 600 months of imprisonment. 2CP 2438-48. Upon the State's motion, the trial court dismissed without prejudice the outstanding theft counts on August 20, 2010. 2CP 2463-64.

## 2. SUBSTANTIVE FACTS

Shortly after 6:15 p.m. on December 3, 2003, emergency personnel responded to Zellmer's home in a rural, heavily-wooded, unincorporated area of Kent in response to a 911 call, placed by Zellmer's then-eight-year-old son, Dakota, of a drowning involving a three-year-old child.

30RP 141.<sup>2</sup> Kent Fire Department personnel were the first to arrive at the scene and found Zellmer kneeling over a child, three-year-old Ashley McLellan, lying on the living room floor. 30RP 149-51. Zellmer immediately rose and moved away from Ashley, who appeared white, waxy, and soaking wet. 30RP 151-52. She was wearing a shirt, leggings, and socks. 30RP 153. Firefighters could not locate a pulse or any respiratory activity and began CPR and other emergency measures. 30RP 153-54.

King County paramedics arrived roughly ten minutes later and assumed primary care for Ashley. 31RP 79-80. They began advanced life support on the girl, whose body temperature was 79 degrees Fahrenheit. 31RP 85. Through the use of chemicals and a defibrillator, the medics were able to produce a slight response from Ashley, but nothing self-sustaining. 31RP 88-89.

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<sup>2</sup> See Appendix A for identification of volume numbers of verbatim report of proceedings and corresponding "RP" designation.

While the paramedics were treating Ashley, Kent Fire Department (KFD) Captain John Willits spoke to Zellmer. 31RP 48. Zellmer's demeanor was calm as he told Willits that Ashley had drowned in his outdoor swimming pool. 31RP 49. Zellmer directed Willits to the pool, which was reached by walking roughly 60 feet from the kitchen across a back deck, down two sets of stairs, and to the end of a concrete path in an area surrounded by heavy vegetation.<sup>3</sup> 31RP 49-50; 38RP 186. The backyard was so dark that Willits could not see the pool from the deck, the deck surface was quite slippery, and it was cold outside. 31RP 49-50.

Willits returned to the house and asked Zellmer what had happened. 31RP 51. Zellmer said that he had played a videotaped movie in the family room downstairs for Dakota and Ashley and then went to his upstairs bedroom to take a nap. 31RP 51. Zellmer stated that when he awakened, he returned to the family room to find Ashley missing. 31RP 51. He said that he went back upstairs, through the kitchen, and out onto the deck. 31RP 51. He found Ashley floating in the deep end of the pool, the area of the pool furthest from the home. 31RP 51. Using a stick, he pulled her to the water's edge, lifted her out, and carried her to the living room. 31RP 51.

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<sup>3</sup> Aerial photographs of the scene, taken in daylight, were admitted into evidence at trial (38RP 218-20) and were included in the certification for determination of probable cause and available at 2CP 4-5.

Zellmer told Willits that Ashley must have decided to eat the remnants of a cake that had been left with other garbage on the back deck and then, worried that she was going to be in trouble, walked down to the pool to wash her hands and had accidentally fallen in. 31RP 52. During the entire time that emergency responders were at Zellmer's home, he never asked Willits or his colleagues if Ashley was going to survive. 30RP 157; 31RP 55, 149. The firefighters and medics who had opportunity to note Zellmer's demeanor described him as calm and seemingly emotionless. 31RP 41, 48, 151.

Sergeant Jesse Babauta of the King County Sheriff's Office (KCSO) also responded to Zellmer's home, arriving at 6:20 p.m. 31RP 169-70. He spoke to Zellmer, who identified himself as a former reserve officer for the Carnation Police Department. 31RP 173. Zellmer told Babauta that he had taken a nap and left his son in charge of Ashley. 31RP 172. Shortly after, his son awakened him and said that Ashley wasn't in her upstairs bedroom. 31RP 172. Looking for her, Zellmer noticed that a cake box on the back deck had been opened. 31RP 172-73. Venturing outside, he found Ashley in the pool. 31RP 173.

Babauta testified that he felt sorry for a person whom he believed was a fellow officer. 31RP 173. He also testified that, as Zellmer offered his account, he began to cry. 31RP 173.

Babauta walked out to the pool. 31RP 174. It was damp outside, and the air temperature was 39 degrees F, while the pool's water temperature was 41 degrees F. 31RP 170, 210. Babauta needed a flashlight in order to see. 31RP 174. He found a number of cake crumbs along the path from the deck to the pool. 31RP 174. He, too, found the deck to be extremely slippery. 31RP 189.<sup>4</sup>

At roughly the same time as Sgt. Babauta's arrival, Ashley's mother, Stacey Ferguson, arrived at the house. 31RP 55, 171. She was extremely frantic and emotional. 31RP 55, 150. A KFD public information officer transported Zellmer and Ms. Ferguson to Harborview Medical Center, where the medics were taking Ashley. 31RP 152. The officer testified that Ms. Ferguson was crying during the entire trip, but had no conversation with Zellmer. 31RP 162.

KCSO Detective Christina Bartlett responded to Harborview in order to speak with Ashley's family. 32RP 42. She spoke with Zellmer, Ms. Ferguson, and Zellmer's parents there, and then she met with Zellmer the following day at Children's Hospital, where Ashley had been moved and where she remained on artificial life support. 32RP 42, 45, 165-67. At Children's, Zellmer complained to Det. Bartlett that he felt he was

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<sup>4</sup> A fellow KCSO officer, Deputy David Cissna, testified that he slipped and fell while going down the stairs to the pool. 32RP 16-17.

being "shut out" by Ms. Ferguson and her parents. 32RP 44. Zellmer told the detective that he had thought that "this would bring them closer together." 32RP 45. He also refused to give consent to Det. Bartlett for Sheriff's Office personnel to enter and search his home. 32RP 45. Though Zellmer seemed to cry on occasion while speaking to Det. Bartlett, his tears appeared inconsistent with his otherwise flat, inscrutable affect. 32RP 84.

Stacey Ferguson testified that she had met Zellmer at a bar in May 2003. 32RP 89-90. At a party held at his home roughly two weeks after they began dating, Zellmer proposed to Ms. Ferguson before a crowd of other guests. 32RP 90-91. Ms. Ferguson accepted the proposal to avoid embarrassing Zellmer. 32RP 91.

Ms. Ferguson's dating relationship with Zellmer was volatile and tumultuous, and she frequently considered backing out of the upcoming marriage. 32RP 95. However, she had become pregnant with Zellmer's child in mid-July 2003. 32RP 95. Ms. Ferguson married Zellmer on September 6, 2003, in a sudden elopement to Idaho. 32RP 89, 100-01.

Although Ms. Ferguson's daughter, Ashley, initially liked Zellmer, she quickly began to appear uncomfortable around him. 32RP 96. Zellmer often told Ms. Ferguson that she was very overprotective of

Ashley, and complained that she "had her head up Ashley's ass."

32RP 99. On one occasion in June 2003, Ms. Ferguson noticed some scrapes and a bruise on Ashley's face. 32RP 96. Ashley explained that Zellmer had pushed her. 32RP 97. Ms. Ferguson asked Zellmer about the incident, and he denied any involvement. 32RP 97-98. Zellmer later complained to Ms. Ferguson's friend, Karen Peterson, that Ashley was a "lying little bitch." 35RP 169.

Near the time of the September 2003 wedding, Zellmer broached the subject of obtaining an insurance policy on Ashley's life. 32RP 101. Zellmer explained that it was a worthwhile investment for Ashley, and that such a policy would have been of value to his family when his sister was killed by a drunk driver in her teens and his parents had been forced to continue working to make ends meet, instead of taking time off to grieve. 32RP 101-02. However, throughout his relationship with Ms. Ferguson, Zellmer was unemployed. 32RP 92. Though he initially told Ms. Ferguson that he was a semi-retired day trader and former fireman and police officer, later in their relationship she learned that Zellmer was collecting workers' compensation benefits from the Washington

Department of Labor and Industries (L&I). 32RP 93. Zellmer, nevertheless, seemed to have normal physical capabilities.<sup>5</sup> 32RP 94.

Very soon after this initial conversation about life insurance and after the wedding, Zellmer invited an insurance agent to his home, where he obtained a \$200,000 policy on Ashley's life, as well as policies for Ms. Ferguson and his own children, Dakota and teenaged son Levi. 32RP 105-06. Ms. Ferguson did not pay much attention to the process, and simply signed documents when Zellmer told her to. 32RP 105-06. The insurance agent, Kameron Wagar, first met Zellmer in 2001, when he asked her to sell him a policy on the life of his grandmother, who was suffering from cancer at the time. 34RP 168-69. Ms. Wagar explained that she could not do so, because a person cannot buy an insurance policy on someone's life unless the buyer has an "insurable interest" in that person's life, as a parent would have in his child's life, whereas a non-parent would not. 34RP 169, 176.

Ms. Ferguson's relationship with Zellmer continued to deteriorate after the wedding. 32RP 122. She would often take Ashley with her and

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<sup>5</sup> Zellmer's years-long collection of L&I benefits was the subject of one of the severed counts of first-degree theft in this cause number, and had been the subject of extensive investigation by L&I investigators. 2CP 9-11. Ms. Ferguson testified that Zellmer had shown her an Independent Medical Examination book he owned, which he was using in order to determine how he could receive lifetime benefits from L&I for purported work-related injuries or conditions. 32RP 123-24. Zellmer told Ms. Ferguson that he had a physician "in his back pocket" who would write anything that Zellmer wanted him to write. 32RP 124.

move back to her parents' house during the time leading up to Ashley's drowning. 32RP 122. During arguments, Zellmer threatened to obtain custody of their unborn child through his knowledge of the legal system, as he had done with his other children. 32RP 137. Ms. Ferguson told Zellmer that she would report him to L&I for fraudulently collecting benefits if he did so. 32RP 137. Zellmer responded by warning Ms. Ferguson, "You never mess with a man's money." 32RP 137. When Ms. Ferguson asked Zellmer if he was threatening her, he repeated the statement.<sup>6</sup> 32RP 137-38.

Around Thanksgiving 2003, Ms. Ferguson moved back to her parents' home again. 32RP 138. However, she and Ashley soon after returned to Zellmer at his request. 32RP 138. On the morning of December 3<sup>rd</sup>, Ashley had a high temperature and could not go to her everyday child care provider. 32RP 150. Ms. Ferguson stayed home with Ashley in the morning to care for her, but was called in the afternoon to the chiropractic office where she worked and, reluctantly and against Ashley's wishes, left Ashley alone in Zellmer's care. 32RP 152-53. Zellmer spoke to Ms. Ferguson by phone at least twice that afternoon; he

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<sup>6</sup> At the time of his relationship with Ms. Ferguson, Zellmer was receiving \$3,216.93 in monthly benefits from L&I. 39RP 96. If he succeeded in obtaining a permanent pension from L&I, he would be entitled to lifetime monthly benefits of \$3,568.88, tax-free. 39RP 97.

told Ms. Ferguson he was tired and planned on napping. 32RP 156. At approximately 6:15 p.m., he again called Ms. Ferguson and told her she needed to come home immediately. 32RP 159.

Ashley McLellan died at Children's Hospital on December 5, 2003, after her mother was informed that Ashley was brain dead and that there was no chance of recovery. 33RP 26. Zellmer was not with Ms. Ferguson, having left Children's the previous day and never returning. 35RP 30. Dr. Richard Harruff of the King County Medical Examiner's Office performed Ashley's autopsy on December 6, 2003, and determined the cause of death as anoxic encephalopathy, or fatal brain damage due to lack of oxygen. 36RP 33. Ashley weighed 46 pounds and was 39 inches tall at the time of her death. 36RP 33.

On December 5, after Ashley had passed away, Ms. Ferguson was rushed to her own doctor's office due to concerns for her health as well as her unborn child's. 33RP 27-28. The following day, Ms. Ferguson asked her parents to retrieve some of her and Ashley's belongings from Zellmer's home. 33RP 28-29. Her parents, Steve and Sue Ferguson, drove to Zellmer's home and found the exterior gate to his driveway locked. 32RP 32. Steve phoned Zellmer from outside the gate, informed him of Ashley's death, and asked to come inside to collect some items for Ms. Ferguson. 35RP 32. Zellmer agreed to let Ms. Ferguson's parents in,

though, during their conversation inside his home, Zellmer said that he was initially disinclined to let them, their daughter, or the police inside his house. 35RP 38.

Steve asked Zellmer to tell him what had happened to Ashley. 35RP 35. Zellmer erupted and angrily accused Steve of calling him a liar. 35RP 35. After Steve explained that he was sincere and had simply not had the opportunity over the past few days to find out what had led to Ashley's drowning, Zellmer explained that Ashley had been resting and watching a movie when he had taken a nap. 35RP 36. When Zellmer awoke, he went downstairs to build a fire and asked Dakota to check on his new step-sister. 35RP 36. Zellmer told Steve that when Dakota returned and said he could not find Ashley, Zellmer noticed the kitchen door was opened, went outside, and found Ashley floating in the pool. 35RP 36.

Zellmer asked the Fergusons when their daughter would return to his home, and Sue replied that she was not sure. 35RP 121. He also asked for the return of the blanket that Ashley had been wrapped in when she was transported to Harborview. 35RP 121. As Sue and Steve left, they took Stacey's car, which she had driven to Zellmer's home, and in which she had left the keys in the ignition in her haste to go inside. 33RP 36-37.

Her key to Zellmer's front door was no longer on her key ring. 33RP 36-37.

Though Ms. Ferguson had decided by December 5, 2003, to end her relationship with Zellmer altogether, he continued to call her for several weeks. In one voicemail, Zellmer told Ms. Ferguson that he thought "this would bring us closer together." 33RP 34. In another message, Zellmer noted that 30 days had elapsed since Ashley's death, and that Ms. Ferguson should "be over this by now" and return to his home. 35RP 42. Ultimately, Zellmer packed up Ms. Ferguson's and some of Ashley's belongings,<sup>7</sup> placed the boxes in a rented trailer, and called Steve Ferguson to remove the trailer. 35RP 42.

Over the ensuing years, Zellmer's account of the night of December 3, 2003, continued to vary in a number of regards. He told one of the State's witnesses that he had been at home with his older son, waiting for his younger son to return from school, when he had fallen asleep; awakening and unable to find Ashley, he had gone outside and found her in the pool. 38RP 119. He told another witness that he had been outside, chopping wood, and had left Ashley in the care of his two sons when she wandered outside and fell into his pool. 38RP 147. To

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<sup>7</sup> In mid-December 2003, Zellmer appeared at a Kent fire station to donate a bag of stuffed animals that, he said, belonged to his stepdaughter, who had passed away a week earlier. 34RP 18-19.

another witness, and in a sworn declaration in a civil proceeding, he said that he was busily building a fire when Ashley drowned. 38RP 160; 40RP 142. In another sworn declaration, Zellmer said he was cooking dinner when Ashley had looked through a sliding glass door to see a half-eaten birthday cake on the deck, and had fallen into the pool while she was attempting to eat the remains. 40RP 151-52. Zellmer told one acquaintance that he had been doing laundry when Ashley drowned. 40RP 87.

The actions that Zellmer attributed to Ashley -- venturing out into a cold, dark night on her own and walking a distance to a chilly pool in the woods -- was wholly inconsistent with Ashley's behavior and history, according to her family and friends. Ashley was a timid girl who was deeply afraid of the dark, requiring multiple night lights in order to sleep, and refusing to enter a darkened room until someone else first turned on a light. 32RP 119; 34RP 79; 35RP 14-15, 186, 212; 42RP 124-26, 129. She clung to her caregivers, and had never wandered off on her own, always preferring to be near others. 34RP 80; 35RP 16, 105, 184-85, 227; 42RP 130; 44RP 132. Ashley hated the cold, never independently chose to wash her hands, did not know how to swim, and was afraid of bodies of water. 32RP 121; 34RP 80, 121; 35RP 17-18, 106, 189-92. At no time

had Ashley ever expressed any interest in going outside while at Zellmer's home. 32RP 121-22; 43RP 114.

Dakota Zellmer testified in Zellmer's case-in-chief. He stated that on the night of December 3<sup>rd</sup>, he was in the family room playing a video game while Ashley was in her bedroom watching a videotape. 44RP 126. He returned to Ashley's room and, at her request, rewound the videotape so she could again watch the movie. 44RP 126. He returned to his video game downstairs, focused on winning and with the volume turned up on the t.v.. 44RP 133. When he came back later to check on her again, Ashley was not in her room. 44RP 126. Dakota went to his father's room, where Zellmer appeared to be asleep, though Dakota was unsure.<sup>8</sup> 44RP 126-27. At Zellmer's direction, Dakota continued to look for Ashley. 44RP 127. Entering the kitchen, he found the sliding door to the deck open. 44RP 127. He called for his father and Zellmer went outside, returning with Ashley's body. 44RP 128.

Dakota testified that the movie he had re-played for Ashley was an hour in length, and that at least an hour passed before he returned to Ashley's room to find her missing. 44RP 133, 138. Dr. Harruff testified

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<sup>8</sup> Cell phone records establish that Zellmer placed calls to Ms. Ferguson at 5:54 p.m. and 5:55 p.m., shortly before Dakota "awakened" him. 41RP 177. His next call was at 6:13 p.m., during which he told her to rush home immediately. 32RP 158; 41RP 177.

that fatal brain damage occurs if a person is deprived of oxygen for four minutes. 36RP 100-01.

Ms. Ferguson filed for divorce from Zellmer in early February 2004. 33RP 35. During the divorce proceedings, Zellmer sought 50% of the proceeds from the insurance policy on Ashley's life. 38RP 199. Zellmer later altered his claim, seeking that all proceeds be placed in a trust fund to be created for his and Ms. Ferguson's child. 38RP 201, 229.

This was not the first time that Zellmer had sought proceeds from an insurance company for harm suffered by a small child of a young romantic partner, after the child had been left alone with him. In 1990, Zellmer married Stacey Komendant after a speedy courtship that began when she was well into her pregnancy of a child she had conceived with another man. 36RP 107-09. Zellmer and Ms. Komendant were wed shortly after Ms. Komendant's son, Mitchel, was born. 36RP 111. Ms. Komendant and Zellmer moved into a home in Pacific, and Ms. Komendant brought her car with her into the marriage. 36RP 112-13. Zellmer participated in obtaining insurance for Ms. Komendant's car. 36RP 114.

Ms. Komendant worked full-time, while Zellmer was unemployed during their brief marriage and would watch Mitchel during the work week. 36RP 114-15. Ms. Komendant's parents, Joan and Lloyd, would

care for Mitchel on weekends. 36RP 115. Mitchel was a happy, healthy baby. 36RP 191, 200. However, on one Saturday in September 1990, Joan and Lloyd noticed that Mitchel was unusually fussy and did not want to be held; Ms. Komendant observed this change in Mitchel's behavior as well when she picked him up the following day. 36RP 192, 200. By the following Tuesday, Ms. Komendant took Mitchel to Valley Medical Center, accompanied by Zellmer, who insisted that x-rays be taken of Mitchel's legs. 36RP 140. Zellmer told the treating physician that he had been driving, with Mitchel in the back seat, when he had been rear-ended by another vehicle. 41RP 59. Zellmer said that when he checked Mitchel after the collision, he had shifted in his child car seat. 41RP 59. Zellmer stated that Mitchel had been irritable ever since. 41RP 59. The x-rays that were taken showed no fractures; the treating physician believed that Mitchel may have not been feeling well due to a viral syndrome, and told Ms. Komendant that her son would feel better soon. 36RP 140; 38RP 19.

Two days later, with Mitchel's condition not improving, Ms. Komendant and Zellmer returned to Valley Medical Center with Mitchel. 36RP 140. New x-rays were taken and revealed fractures of both of Mitchel's tibia. 36RP 18. Casts were placed on both of Mitchel's legs. 36RP 142. On a follow-up visit the following week, Zellmer told Mitchel's physician that Mitchel was injured when a briefcase that was on

the rear shelf of the car fell on the child's legs when the car had been struck. 36RP 21. The treating physician testified that he would have expected to see bruises on Mitchel's legs if that were the case, and would have noted the bruising in his charts, but saw no notation in his records of that fact. 36RP 35.

Ms. Komendant testified that after they had returned from the hospital following the taking of the second set of x-rays, she witnessed Zellmer scratching the rear bumper of her car to make it appear as if it had been struck. 36RP 142, 160. Washington State Patrol Trooper Ronald Tuggle testified that he received a telephonic report from Zellmer in the period intervening between Mitchel's first and second trips to Valley Medical. 37RP 41. Zellmer reported that, three days earlier, he had been rear-ended by another vehicle, which had fled the scene. 37RP 41, 43-44. Zellmer reported that he was unable to provide much information about the other car, and that his "son" had suffered arm and leg injuries. 37RP 43-44. Zellmer claimed that his vehicle had sustained \$3,000 in damage. 37RP 41.

Ms. Komendant testified that she largely ended her relationship with Zellmer after this incident, though she would occasionally get back together with him at his request. 36RP 147. She ended the relationship

permanently around Christmas 1990, and took Mitchel and her car with her. 36RP 148.

Zellmer retained attorney Joe Wickersham in January 1991 to represent him in a claim against Viking Insurance, the company that provided the auto insurance policy on Ms. Komendant's car. 36RP 203-04. Mr. Wickersham continued to negotiate with Viking through March 1991. 36RP 208. Mr. Wickersham testified that he tried to settle the claim for the policy limit of \$25,000, and that the general practice for injuries such as Mitchel's is to place the funds into a blocked account to which only a court-appointed guardian would have access, for Mitchel's benefit. 36RP 210-12. However, Zellmer requested that he be given control of the funds to invest as he wished. 36RP 212-13.

When Ms. Komendant learned of Zellmer's insurance claim, she wrote a letter to Viking, stating that the alleged vehicular accident was fictitious, and no payout was ever made. 36RP 145.

Nor was this the first time that a small child of a romantic partner had come to harm in a pool when the child had been left in Zellmer's control. In 2000, Kelly Clauson Rauch began a dating relationship with Zellmer. 34RP 29-31. At the time, Ms. Rauch had a son, ten-month-old Kyle. 34RP 30. The relationship between Ms. Clauson and Zellmer grew

rapidly, and she would spend time with Zellmer most days of the week.

34RP 31.

At the time, Zellmer was living in a Kent home equipped with an outdoor hot tub that could be reached from a door in Zellmer's bedroom.

34RP 31-31; 37RP 58. On one occasion, Ms. Clauson left Kyle, who was still only crawling, with Zellmer in the bedroom after telling Zellmer that she was going to the kitchen, located at the opposite end of the house, to fix dinner. 34RP 32-33, 34-35.

Later, then-four-year-old Dakota came into the kitchen and told Ms. Clauson that Zellmer needed her, and that Kyle had been swimming in the pool. 34RP 34. Ms. Clauson, confused because the home only had a hot tub, went to the bedroom and found Kyle lying on the floor, soaking wet and with a bluish pallor. 34RP 34. Zellmer was simply standing and looking at Kyle, providing no aid. 34RP 34. He told Ms. Clauson that Kyle had fallen into the hot tub, and that he had pulled the infant out as he was sinking to the bottom. 34RP 34.

Ms. Clauson tried to pick her baby up, but Zellmer initially told her not to, stating that Kyle would cough up the water. 34RP 35. After a few agonizing minutes, Zellmer finally relented, and Ms. Clauson patted her child's back until he recovered. 34RP 35. She noticed that the hard cover on the hot tub was ajar by about 12 to 18 inches. 34RP 35. The cover was

made of heavy plastic, weighing between 50 and 80 pounds, and covered the entire surface of a tub that could be accessed only by climbing a step approximately 18 inches high. 37RP 59, 61, 69-70. Ms. Clauson accepted Zellmer's explanation, however, and continued to date him for several months, before she ended the relationship. 34RP 38, 53-54.

Michelle Barnett Mertell began dating Zellmer in 2002, after meeting him at a bar. 38RP 60. At the time, Ms. Mertell's daughter, Madison, was four years old. 38RP 58. The relationship between Ms. Mertell and Zellmer rapidly matured, and Zellmer broached the subject of marriage quickly. 38RP 60. At one point, Zellmer told Ms. Mertell that he was planning to meet with his insurance agent, and wanted to obtain policies for her and her daughter. 38RP 64. When Ms. Mertell responded that she watched television shows involving murders committed for insurance money, and jokingly asked Zellmer if he was planning on "knocking" her and Madison "off," Zellmer became very defensive. 38RP 65.

Ms. Mertell was employed during her relationship with Zellmer, but he was not. 38RP 62. Ms. Mertell would leave Madison in Zellmer's care on occasion. 38RP 66. In one instance, she returned to Zellmer's

home<sup>9</sup> and noticed that Madison was not wearing the same clothes she had been wearing earlier in the day. 38RP 68. Zellmer ordered Madison to explain what had happened, and Madison stated that she had fallen into Zellmer's pool, and that Zellmer had saved her. 38RP 68. Zellmer then told Ms. Mertell that he had directed Madison to clean up the backyard, and that Madison had fallen into the pool while trying to retrieve a pair of goggles, while Zellmer was elsewhere in the yard. 38RP 68-69. Zellmer said that he had pulled Madison out by her hair; her boots were still at the bottom of the pool. 38RP 69. Ms. Mertell ended the romantic nature of the relationship shortly afterward, but remained friendly with Zellmer. 38RP 72.

Two other women, Misty Teran and Anna Hohn-Herbert, explained in the State's case-in-chief that they too had been wooed by Zellmer when they were young single mothers with small children, in mid-2003 and mid-2004, respectively. 38RP 92-93, 143-44. In both relationships, Zellmer quickly raised the possibility of marriage, suggested obtaining life insurance policies for their children, and repeatedly offered to babysit those children. 38RP 95-96, 97, 99-100, 148-50.

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<sup>9</sup> By this time, Zellmer had purchased the home where Ashley later drowned. 38RP 60.

**C. ARGUMENT**

In this consolidated appeal, Zellmer challenges the issuance of a search warrant by the King County Superior Court in 2005 that allowed investigators to search his home and seize evidence that was relevant to its investigation of homicide and attempted insurance fraud. He also asserts that the State infringed his right to confidential communication with counsel, both those attorneys who represented him at his criminal trial and other lawyers with whom he had communicated in the past. He argues that his rights to be present and to a public trial were violated when the trial court excluded one spectator, the minor child of a witness who was waiting outside the courtroom to testify, and when the court answered a question from the deliberating jury after consulting with his attorneys and the State. He asserts that the trial court improperly admitted evidence of prior acts and events in his life as probative of his preparation and planning to execute a common scheme, and erroneously allowed an expert tracker to testify about his observations of the crime scene. Zellmer also argues that the State committed misconduct in closing argument by mentioning that a just outcome for the victim and her family was, due to the evidence presented to the jury, a guilty verdict. Finally, he contends that his exceptional sentence must be vacated due to a faulty instruction given to the jury, and that the trial court's post-verdict unsealing of various

court records was improper because the trial court applied inapplicable law when considering the State's motion to unseal.

Each of Zellmer's arguments is without merit, as will be described in detail infra. The search warrant was supported by probable cause and provided sufficient guidance to the executing investigators. The State never infringed on Zellmer's right to privately speak with his attorneys, and took abundant measures to avoid even accidental exposure to privileged materials. The exclusion of one spectator from an open courtroom was a proper exercise of the trial court's discretion, and neither that exercise nor the court's treatment of a purely legal question raised by the deliberating jury violated Zellmer's rights to be present and to a public trial. The evidence of Zellmer's prior acts and experiences was highly probative of a long-standing plan he had developed which resulted in the victim's death, and the expert tracker's special expertise allowed him to provide helpful information to the jury about certain relevant evidence that would likely have otherwise been overlooked. The prosecutor did not, as the trial court noted, improperly appeal to the jurors' passions or prejudices, but asked them to render a just verdict based on the evidence presented to them. The jury's special finding of an aggravating circumstance was not the product of confusion over a challenged instruction regarding unanimity, but the product of each juror's individual

determination based on his or her assessment of the evidence. Lastly, the trial court applied the appropriate legal analysis when it agreed to unseal a number of court records.

**1. THE 2005 KING COUNTY SEARCH WARRANT WAS SUPPORTED BY PROBABLE CAUSE AND WAS NOT OVERBROAD**

Zellmer contests the legality of the search warrant obtained by KCSO detectives in December 2005 to search his home. He contends that the warrant was not supported by probable cause and that it provided insufficient particularity, in terms of the items to be seized, to pass constitutional muster. Because of the complicated history of the litigation of this issue in superior court, the State presents the following summary.

In August 2006, Zellmer moved for a return of property seized the previous December by KCSO investigators, under CrR 2.3(e), a corollary to CrR 3.6, used when criminal charges have not yet been filed against the owner of the property that has been searched. 1CP 46-173. In his motion, Zellmer asserted that the property must be returned because the search warrant affidavit submitted by KCSO Detective Sue Peters lacked probable cause, and the warrant itself was unconstitutionally overbroad. 1CP 46-54. On November 22, 2006, Judge Gain denied Zellmer's motion, holding that the warrant was supported by probable cause. Furthermore, while the court found that the seizure of specifically-identified items

exceeded the scope of the warrant and were required to be returned, the court did not find the warrant to lack sufficient particularity. 1CP 203-05. Zellmer appealed Judge Gain's ruling to this Court under COA No. 59228-9-I, and filed his opening brief in mid-May 2007.

After charges were filed in June 2007, Zellmer again contested the legality of the 2005 search warrant on the same bases (as well as others), now proceeding under CrR 3.6 in the trial court. 2CP 468-72. After several days of testimony between August 17 and August 24, 2009, the trial court reached the same determination as Judge Gain had three years earlier.<sup>10</sup>

It should also be noted that little examination was conducted, and little use made, of the seized materials. Zellmer asserted privilege almost immediately after the December 2005 execution of warrants obtained by KCSO and Labor and Industries, and the State refrained from close examination of any seized evidence pending disposition of Zellmer's claims. 2RP 31, 10RP 182-83, 11RP 93-94. A special master was appointed by Judge Gain during consideration of the CrR 2.3(e) motion,

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<sup>10</sup> It appears that Zellmer's attorney for his post-conviction appeal is simply adopting the arguments presented in the opening brief challenging the CrR 2.3(e) ruling (COA 59228-9-I). See Brief of Appellant, COA 65701-1-I, at p. 24. Although Zellmer asked the trial court, under CrR 3.6, to suppress evidence seized from his home in 2005, he does not challenge the trial court's CrR 3.6 findings and conclusions, located at 2CP 1066-69, which include the conclusions that the 2005 affidavit was supported by probable cause and was sufficiently particularized. It is unclear what Zellmer's post-conviction appellate lawyer wants.

and later by the trial court, to consider claims of privilege that Zellmer raised with regard to seized evidence. 1CP 201-02; 1RP 11-13. The State did not contest the special master's findings of privilege in most regards – and did not prevail in its challenges to findings it disagreed with – and privileged evidence was either returned to Zellmer or suppressed as evidence. 1CP 203-04, 2CP 970-72. Resolution of this issue took years to conclude, and the State proceeded to trial without having ever scrutinized the seized evidence. 24RP 56, 67-68. Ultimately, only one item was introduced at trial that was seized pursuant to any search warrant obtained in the investigation of this matter -- a medical handbook that Zellmer kept at his home. 37RP 99-100. The existence of that handbook, and the use to which Zellmer put it, was independently described to the jury, well before the actual book was admitted into evidence during the case detective's testimony, by Stacey Ferguson from her own memory of conversations with him during their relationship. 32RP 123-24.

Under the circumstances, it is difficult to see what effective relief this Court could grant Zellmer were it to agree with his claims now. Nevertheless, in an abundance of caution, the State will respond to his arguments.

**a. Probable Cause**

An affidavit in support of a search warrant must contain sufficient facts to lead a reasonable person to conclude there is a probability that the defendant was involved in criminal activity and that evidence of the crime may be found at a certain location. State v. Jackson, 150 Wn.2d 251, 264, 76 P.3d 217 (2003). Probable cause requires only a probability of criminal activity and not a prima facie showing of guilt. State v. Cherry, 61 Wn. App. 301, 304, 810 P.2d 940 (1991); see also State v. Fore, 56 Wn. App. 339, 344, 783 P.2d 626 (1989) (observing that probable cause "is not negated merely because it is possible to imagine an innocent explanation" for certain events). The affidavit is evaluated in a commonsense, rather than hypertechnical, manner, and any doubts are resolved in favor of the warrant. Jackson, 150 Wn.2d at 265. Reasonableness is the key. State v. Patterson, 83 Wn.2d 49, 52, 515 P.2d 496 (1973). A judge's decision to issue a warrant is reviewed for abuse of discretion, and great deference is accorded to that decision. Jackson, 150 Wn.2d at 265.

Zellmer first asserts that probable cause is absent in Det. Peters' affidavit because her initial description of the events on the night of Ashley's drowning is not merely innocuous, but wholly consistent with his account of that evening. See Brief of Appellant, COA No. 59228-9-I, at 9,

16-17. His argument misses the mark entirely. Det. Peters' initial description was not intended as a portrayal of a readily apparent crime scene.<sup>11</sup> Instead, when seen in the overall context of the affidavit, it was meant to show at minimum a hastily arranged cover-up to an impulsive murder, or, at worst, a carefully designed staging constructed to avoid detection of a preplanned homicide. The purportedly innocuous portrayal merely serves as the introduction to an affidavit that goes on to articulate the abundance of facts that demolish the facade and reveal the true nature of the events at Zellmer's home that night.

Zellmer next contends that information obtained in 2005 from emergency personnel who responded to Zellmer's home on December 3, 2003, should be wholly disregarded because the responders' accounts are "stale" due to the passage of time. See Brief of Appellant, COA No. 59228-9-I, at 17-18. Zellmer misunderstands the concept of staleness as it applies to search warrant jurisprudence. The determination of staleness does not depend on a mathematical calculation of the age of a witness's memory, but is instead a commonsense test of determining if the facts are sufficient to justify a court's conclusion that the property sought is still on

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<sup>11</sup> The warrant is available to this Court as ICP 5-7. The affidavit was not entered as a stand-alone record into the King County Superior Court Clerk's electronic court records system for ill-explained reasons (the electronic system indicates that the affidavit is "unscannable") but is available as an appendix to the motion that Zellmer filed for a return of his property, at ICP 100-48.

the person or premises to be searched. State v. Bohannon, 62 Wn. App. 462, 470, 814 P.2d 694 (1991); see also State v. Hett, 31 Wn. App. 849, 852, 644 P.2d 1187 (1982) (noting that "[t]abulation of intervening days" is not the final determinant of probable cause, but just one factor to be considered with all other circumstances). Zellmer does not argue that the police lacked reason to believe that the evidence they sought would be found in his home two years after Ashley's drowning. Such an argument would lack merit, insofar as Zellmer continued to reside in the same home and had no workplace or other places where he would maintain records and correspondence. Also, it is understandable that a scene such as the one they found on December 3, 2003, would leave a significant impression on the emergency personnel who treated three-year-old Ashley on Zellmer's living room floor and investigated the event. Witnessing a child's death is hard to forget. Nor are the first responders' observations of Zellmer's behavior and appearance, despite Zellmer's suggestion, speculative as to his guilt, but simple facts that, in light of other information gathered by Det. Peters and her colleagues, suggest a dissonance between Zellmer's account of Ashley's drowning, and the likelihood of criminal agency.

Zellmer next asserts that Det. Peters' explanation of injuries suffered by other unrelated children left in his care should not have been

considered by Judge Gain when determining probable cause, because the injuries they sustained are different in nature and/or severity from Ashley's death by drowning. For this argument, Zellmer relies on case law concerning the admissibility of prior bad acts under ER 404(b). See Brief of Appellant, COA No. 59228-9-I, at 19-20. However, affidavits of probable cause need not meet the standards governing admissibility of evidence at trial. State v. Grenning, 142 Wn. App. 518, 534, 174 P.3d 706 (2008). The State engages in an extended discussion of the relevance of Zellmer's injuring of other children infra, in its response to his challenge of the trial court's ER 404(b) ruling. For purposes of responding to the instant subject, the State notes that the description in Det. Peters' affidavit of alarming injuries to other children, if reasonably seen as something other than astonishing coincidence, was relevant in discounting Zellmer's account that Ashley died as a result of accident.

Zellmer cites to this Court's ruling in Zellmer v. Zellmer, 132 Wn. App. 674, 133 P.3d 948 (2006), rev'd, 164 Wn.2d 147, 188 P.3d 497 (2008), for the proposition that the injuries sustained by other children left in his care is irrelevant, as a matter of settled law, to a determination of his guilt for intentionally causing Ashley's death. In fact, this Court's discussion of that subject, as well as the merits of insuring a small child's life for \$200,000.00, is dicta. The sole issue before this Court in that civil

appeal was whether Zellmer could take advantage of the doctrine of parental immunity as a stepfather in a wrongful death action predicated on negligence. See Zellmer v. Zellmer, 132 Wn. App. at 677. This Court's conclusion -- that any stepparent was automatically entitled to the protection of that doctrine solely by virtue of marriage to the deceased/injured child's biological parent -- was later reversed by the state supreme court. See Zellmer v. Zellmer, 164 Wn.2d at 166-67 (remanding to the trial court with instruction to analyze the history and interaction between Zellmer and Ashley to determine whether a true parent-child relationship existed).

Moreover, Zellmer fails to establish that the facts contained in Det. Peters' affidavit are entirely identical to those presented in the wrongful death action initiated by Ashley's mother and father. The wrongful death action was dismissed, on parental immunity grounds, on December 17, 2004, nearly a year before Det. Peters sought her search warrant. 2CP 260-61. It should not be presumed from Zellmer's bare assertion that the evidence presented in the civil matter is the same in all regards to that described in the search warrant application, particularly in light of the fact that (a) Judge Gain presided over both the civil action and consideration of Det. Peters' affidavit, and (b) KCSO reopened its

investigation of Ashley's death in February 2005, at the request of the King County Prosecutor's Office.<sup>12</sup>

Zellmer also contends that Det. Peters' discussion of other episodes of insurance fraud that he committed, against private insurers as well as the Washington Department of Labor and Industries' Worker Compensation Fund, were irrelevant to a determination of probable cause because they were not sufficiently similar to Ashley's drowning or discussed in comprehensive detail. See Brief of Appellant, COA No. 59228-9-I, at 21-24. Again, he relies on case law concerning admission of other bad acts under ER 404(b), an evidentiary rule that does not apply to judicial consideration of search warrants. In terms of simple relevance, Zellmer's history of attempts to defraud deep-pocketed insurers demonstrated his ability to navigate the insurance process, and was germane to the question of whether Ashley was murdered in a manner that could be explained away as an accident, an event that would generate a huge insurance payout for him.

Finally, Zellmer attacks the relevance of the stated belief of Ashley's relatives that she was a timid girl who was afraid of the dark and

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<sup>12</sup> Indeed, Ashley's mother sought, while her civil appeal was awaiting oral argument before this Court, to supplement the record with new information obtained by police. This Court denied her request to consider new evidence. Zellmer v. Zellmer, 132 Wn. App. at 685 n.28.

highly unlikely to wander far from the security of her house and the adults inside. See Brief of Appellant, COA No. 59228-9-I, at 26-27. He contends that Ashley's character was immaterial because Det. Peters posited, at the conclusion of her affidavit, the possibility that Ashley was murdered when the Defendant found her eating a cake that was "either in the kitchen or right outside the back door" and took her, in a fit of rage, down to his pool and drowned her. 1CP 147. First, this suggestion by the detective in no way diminishes the significance of Ashley's fear of the dark, as the pool was far from the back door in a poorly illuminated backyard<sup>13</sup> and an improbable location for her to venture to on her own, as Zellmer had theorized on the night of her drowning. Second, Det. Peters' proposal was only one suggestion she propounded:

Your affiant believes probable cause exists to believe that Joel Zellmer deliberately or negligently caused the death of Ashley McLellan on December 3, 2003 motivated by his uncontrollable anger over Ashley's getting into the birthday cake, his dislike of Ashley McLellan, his desire to eliminate competition for Stacey Zellmer's attention and the insurance proceeds of \$200,000 from Ashley's life insurance policy.

1CP 147.

In sum, Det. Peters' affidavit established key facts for a determination of probable cause, including the following:

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<sup>13</sup> See 2CP 4-5.

- Zellmer faced enormous financial stress in December 2003.
- He displayed a pattern of fraudulent behavior regarding his finances, including attempted insurance fraud and submission of unfounded claims to the State of Washington in pursuit of workers' compensation insurance payments.
- He obtained a substantial life insurance policy on Ashley's life shortly before her death despite his glaring lack of liquidity.
- Zellmer's relationship with Ashley and her mother was strife-ridden and included incidents of domestic violence.
- Zellmer believed that Ashley interfered with his ability to have a successful relationship with her mother.
- He had harmed the young children of former girlfriends while they were left alone in his care and, in at least one instance, sought to use the child's injuries to defraud an insurer.
- Zellmer's explanation for Ashley's drowning was inconsistent with her character and behavior as observed by those who knew her best.
- Zellmer was not employed outside his home and conducted all of his affairs from his home.

In light of all of this information, and under the deferential standard that this Court applies when reviewing a magistrate's finding of probable cause to issue a search warrant, there is no basis for a reversal of Judge Gain's conclusion that a warrant would be signed.

**b. Overbreadth**

Zellmer also asserts that the 2005 search warrant issued by Judge Gain was unlawful because it authorized investigators to search for and seize the following categories of evidence:

- A. All financial records of Joel Zellmer for the time-period: 2002, 2003, and 2004. Financial records such as, but not limited to: bank statements, credit card records, mortgage statements, gambling receipts, bank checks, life-insurance documents, etc.
- B. Any writings or documents pertaining to the relationship between Joel Zellmer, Stacey Zellmer, and Ashley McLellan.
- C. Documents showing dominion and control of residence.

1CP 3.

A search warrant must be sufficiently definite so that the investigators executing it can identify the property sought with reasonable certainty. State v. Stenson, 132 Wn.2d 668, 692, 940 P.2d 1239 (1997). The degree of specificity required varies according to the circumstances and the type of items involved. Id. As with a determination of probable cause, an examination of a search warrant for particularity is to be conducted in a commonsense, practical manner. Id.

Zellmer asserts that the above-listed categories were not described with suitable particularity to comport with constitutional requirements.

See Brief of Appellant, COA No. 59228-9-I, at 28-29. However, the fact that a warrant lists broad classifications, such as financial records or certain kinds of correspondence, does not necessarily result in unconstitutional overbreadth. See Stenson, 132 Wn.2d at 692. As the Stenson court noted:

[W]here the precise identity of items sought cannot be determined when the warrant is issued, a generic or general description of items will be sufficient if probable cause is shown and a more specific description is impossible.

Id. In other words, a description is valid if it is as specific as the circumstances and nature of the crimes under investigation permit. Id.

In this case, the issuing court reasonably concluded that probable cause existed to believe that Zellmer murdered Ashley McLellan for a variety of reasons, including a desire for life insurance proceeds to remedy his financial distress, and as a means to improve his relationship with Ashley's mother by removing a perceived rival for her attention.

Zellmer is incorrect when he claims that this search warrant provided no limits on the search. In fact, the police were limited, in Category A, to specific financial records for the relevant period of time in question, i.e., the period immediately preceding Zellmer's relationship with Ashley's mother through the period immediately after Ashley's death. Category B placed a strict limit on the search for correspondence and other

writings pertaining to two individuals: Ashley and her mother.

Category C accounts for the simple fact that Zellmer was not the only occupant of his home, and evidence of dominion and control of the property would establish that documents which did not on their face bear Zellmer's name likely belonged to him. Moreover, a search for items that would fall within Category C would, one can reasonably presume, require no more comprehensive a search into areas of the home than the police would already be conducting in order to find evidence falling within Categories A and B.

Unlike the situation in State v. Riley, 121 Wn.2d 22, 26, 846 P.3d 1365 (1993), in which a search warrant improperly allowed police to search for "any fruits, instrumentalities, and/or evidence of a crime," here the investigators were specifically limited by their own affidavit to a search for "evidence of a pattern of insurance fraud and financial dealings in the form of bank statements, credit card records, mortgage statements, gambling receipts" and other specific items. 1CP 148. The 2005 warrant did not amount to a proscribed "general warrant."

Nor can it plausibly be claimed that the manner in which the warrant was executed demonstrates it was overbroad. A search for documentary evidence necessarily calls for some perusal of records not listed in the warrant, and this does not render the warrant unconstitutional.

Andresen v. Maryland, 427 U.S. 463, 482 n.11, 96 S. Ct. 2737, 49 L. Ed. 2d 627 (1976), cited in Stenson, 132 Wn.2d at 694-95. As the Andresen court held, investigators must take care, due to the likelihood of coming across documents outside the scope of the warrant, to assure that their search is conducted in a manner that minimizes unwarranted intrusions upon privacy.<sup>14</sup> Id.

Here, as has been amply established through repeated consideration by both the issuing court and the trial court, the police and the State took abundant measures to avoid exposure to privileged materials and items of non-evidentiary value from the inception of their review of the seized evidence. See 1CP 28-30, 33-36 (affidavits by DPA Marilyn Brenneman and KCSO Dets. Sue Peters and John Pavlovich in response to CrR 2.3(e) motion); 1CP 179-85 (affidavit by DPA Marilyn Brenneman in supplemental response to CrR 2.3(e) motion); 1CP 204 (issuing court's appointment of special master to determine claims of privilege and order returning non-evidentiary items to Zellmer); 2CP 1068 (trial court's

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<sup>14</sup> Zellmer argues that the purportedly limitless search of his computers demonstrates the illegal overbreadth of the King County Superior Court warrant. See Brief of Appellant, COA No. 59228-9-I, at 33. However, the computers were seized in December 2005 by investigators with the Department of Labor and Industries who were operating under their own warrant, which they obtained from the Thurston County Superior Court. 1CP 93-96. The validity of the Thurston County search warrant was not the subject of the CrR 2.3(e) motion before King County Superior Court Judge Gain; only the 2005 King County warrant was. 1CP 203-05. The Thurston County warrant, and the manner in which it was executed, are not properly before this Court for use in assessing the legality of the King County warrant.

conclusions, following multi-day hearing, that the 2005 King County warrant and its execution were sufficiently particularized); 24RP 56-67 (trial court denial of motion to dismiss for improper State intrusion into Zellmer's relationship with various attorneys). Zellmer provides no basis for this Court to reject the lower courts' several well-considered determinations of this claim.

Finally, Zellmer contends that the circumstances here are akin to a warrant and search obtained and conducted by federal investigators that were subsequently deemed unconstitutional by the U.S. District Court for Maryland in United States v. Srivastava, 444 F. Supp. 2d 385 (D. Md. 2006). However, in 2008, the district court's opinion was reversed in its entirety by the Fourth Circuit. See United States v. Srivastava, 540 F.3d 277 (4<sup>th</sup> Cir. 2008). The appellate court's opinion, though in no way binding on this Court, is well worth reading, as the Fourth Circuit engaged in a substantial discussion of the unique characteristics of a search for evidence of fraud and a long-term plan, as was present in the instant matter, where the State had probable cause to believe that Zellmer, after consideration and experimentation over the course of years, murdered an unrelated child in order to, at least in part, defraud her life insurance company. The Fourth Circuit observed:

[I]n the context of a fraud investigation, the relevant evidence will in many instances be fragmentary, discovered in bits and pieces, and thus difficult to identify or secure. Standing alone, a particular document may appear innocuous or entirely innocent, and yet be an important piece of the jigsaw puzzle that investigators must assemble. The complexity of a fraud scheme, however, should not be permitted to confer some advantage on the suspected wrongdoer.

Srivastava, 540 F.3d at 291.

**c. Franks Hearing**

Zellmer asserts that Judge Gain erred by failing, during his consideration of the CrR 2.3(e) motion, to hold a hearing, pursuant to Franks v. Delaware, 438 U.S. 154, 98 S. Ct. 2674, 57 L. Ed. 2d 667 (1978), to determine whether Det. Peters deliberately or recklessly included misstatements in her affidavit. See Brief of Appellant, COA No. 59228-9-I, at 46-48. A defendant must request such a hearing in order to have one conducted. State v. Vickers, 148 Wn.2d 91, 114, 59 P.3d 58 (2002). Zellmer did not do so. 1CP 46-53 (Zellmer's Motion to Return Property). He cannot now appeal the denial of a ruling he did not ask the issuing court to make, absent a showing of manifest constitutional error that Zellmer makes no attempt to demonstrate. See RAP 2.5(a); State v. McFarland, 127 Wn.2d 322, 332-33, 899 P.2d 1251 (1995).

Furthermore, a request for a Franks hearing was later presented to the trial court as a component of Zellmer's CrR 3.6 motion, and was

denied after consideration of briefing and oral argument. 2CP 1056-57. Similarly, although it does not appear from the record that an evidentiary hearing was either requested or conducted in response to Zellmer's CrR 2.3(e) motion, a lengthy hearing *was* conducted in response to Zellmer's CrR 3.6 motion, which closely tracked the arguments made in the pre-filing motion.<sup>15</sup> Under these circumstances, there is no relief that this Court can grant that Zellmer has not already obtained.

**2. THE STATE DID NOT INTRUDE INTO THE DEFENDANT'S RELATIONSHIP WITH HIS COUNSEL**

Zellmer correctly recites well-established case law that forbids the State from jeopardizing a defendant's right to effective representation of counsel by deliberately intruding into private attorney-client communications. See, e.g., State v. Garza, 99 Wn. App. 291, 296, 994 P.2d 868 (2000). Such an intrusion, as Zellmer points out, violates a defendant's right to counsel and to due process. State v. Cory, 62 Wn.2d 371, 374-75, 382 P.2d 1019 (1963).

His claim nevertheless fails due to an absence of any facts showing that the State interfered with his rights in this regard. He cannot demonstrate that the State intentionally gained access to his relationship

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<sup>15</sup> The CrR 3.6 hearing occurred over several days and is transcribed as volumes 9RP through 12RP.

with his criminal defense attorneys by learning that he had been in communication with a fellow inmate at King County Jail, nor does he show that the State purposefully encroached into past communications he had had with a variety of attorneys well before the filing of the criminal case. His claims should be rejected.

**a. Jailhouse Informant**

Zellmer begins his claim by asserting that the State intentionally intruded into his relationship with his criminal defense attorneys when Detectives Peters and Pavlovich responded to requests made by one of his fellow inmates, Kevin Olson, in December 2008 and January and February 2009. Olson wished to discuss conversations he'd had with Zellmer at the King County Jail. Though Zellmer moved to prohibit Olson from *testifying* in the State's case, on the ground that he had obtained information from Zellmer as an agent carrying out sinister designs by the State,<sup>16</sup> he did not seek to have his *charges dismissed* on that basis. Instead, he raises this argument for the first time on appeal. He may do so only if he can demonstrate manifest constitutional error. See McFarland, 127 Wn.2d at 332-33. Zellmer must not only identify a constitutional error but also "show how, in the context of the trial, the alleged error

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<sup>16</sup> Supp 2CP \_\_ (sub no. 388, Defense Motion to Exclude Testimony of Jailhouse Informant).

actually affected the defendant's rights; it is this showing of actual prejudice that makes the error 'manifest,' allowing appellate review." Id. at 333.

There has been no showing of such harm here. After lengthy oral argument and review of transcripts of Olson's conversations with the investigators,<sup>17</sup> the trial court concluded that Olson acted on his own, and chastised defense counsel for making spurious accusations against the State. 23RP 96-97. The trial court allowed Olson to testify about the discussions he had with Zellmer before he first reached out to the detectives in December 2008. 23RP 107. The trial court excluded evidence of subsequent conversations, not because the State encouraged Olson to invade the privacy of Zellmer's attorney-client relationship, but out of a sense that it needed to exercise "supervisory control" as a magistrate and discourage Olson from engaging in conversation with fellow inmates. 23RP 107-08.

The trial court's expressions of concern about the detectives' relationship with Olson, highlighted in Zellmer's post-conviction brief, must be assessed in light of the court's repeated pronouncements that the

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<sup>17</sup> The transcriptions of Olsen's interviews with the detectives are available to this Court as appendices to the already-designated State's Motion for Video Deposition, and are located at 2CP 2567-2632.

detectives did nothing wrong with regard to Olson's interaction with

Zellmer:

- "I'm not at all concerned that Mr. Seaver, Ms. Brennehan, Detective Peters, or Detective Pavlovich, or for that matter anyone involved in law enforcement in this case, has engaged in any misconduct. I don't believe that there was any effort to interfere in Mr. Zellmer's attorney/client relationship." 23RP 97.
- "So I want everybody on the law enforcement side here to know that as far as this Court's concerned, you all have a clean bill of health." 23RP 98.
- "There's nothing in this record to indicate that [law enforcement] put Mr. Olsen [sic] with Mr. Zellmer, was looking for Mr. Olsen to gather any information from Mr. Zellmer...or otherwise engaged in improper behavior with regard to Mr. Olsen...." 23RP 103.
- "I'm especially not finding that the government deliberately solicited [any disclosures]. In fact, I'm finding it to the contrary, that the government did not deliberately solicit them." 23RP 108.

Zellmer's ability to establish a manifest constitutional error is further hamstrung by the simple fact that his disclosures to Olson were relatively benign. Indeed, the State elected not to call Olson as a witness at the trial. Other than extremely hedged admissions of his responsibility for Ashley's death, Zellmer appears to have spent much of his time with Olson complaining about jail conditions and his treatment by guards and fellow inmates. His discussion with Olson regarding trial strategy was limited to one exchange, prior to Olson's January 2009 conversation with

the detectives, in which Zellmer described his lawyers' belief that the seizure of privileged materials during the execution of search warrants would benefit him in court. 2CP 2594-95. This, of course, was an issue that the State had been aware of since the days following the warrant service at Zellmer's home in December 2005, as the CrR 2.3(e) litigation evidences. Zellmer cannot show that his trial was affected by Olson's conduct in a manner that impinged on his constitutional rights.

**b. Purported Intrusion Into Communications Between Zellmer And His Attorneys**

Under well-settled case law, the State is forbidden, at risk of having its charges against a defendant dismissed, from engaging in "purposeful, wrongful intrusion into attorney-client privilege...." State v. Webbe, 122 Wn. App. 683, 697, 94 P.3d 994 (2004). At trial, Zellmer failed to prove the repeated, scurrilous, and unsubstantiated accusations that the State took part in unlawful activities against him. He fails yet again in his appeal.

The State has already addressed, supra, at p. 30, the measures it took immediately after execution of the 2005 search warrant to prevent exposure to potentially privileged communications between Zellmer and his myriad civil attorneys, which included providing the seized materials to Zellmer's criminal defense attorneys for review and the sealing of those

items considered to be privileged by those attorneys for assessment by a special master appointed by Judge Gain and retained by the trial court. As also described supra, at p. 30, the State engaged in only the most cursory examination of the seized evidence at the outset, and segregated those items that were immediately recognizable as being privileged. Those materials, and other items that were also claimed to be privileged by Zellmer's lawyers, were sealed and provided to the special master. As the State noted in its response to Zellmer's motion to dismiss for purported violation of his attorney-client privilege, the State never examined these materials, arguably privileged or readily recognizable, since the initial categorization effort, beyond a look at a brief e-mail, not immediately recognizable as an attorney-client communication,<sup>18</sup> discovered by a forensic specialist who was examining computers seized by the Department of Labor and Industries pursuant to its warrant. 2CP 1763. The State then explained to the trial court that it had no intention of examining the materials in preparation for trial, because its case was in no

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<sup>18</sup> The State initially challenged the special master's conclusion that certain of Zellmer's writings were privileged, not because the writings (e.g., calendar entries and notes to himself) were readily recognizable as attorney-client communications, but because Zellmer, apparently, said they were, though he provided no corroboration, such as any form of confirmation from his attorneys. 6RP 3-6. As the State pointed out at that hearing, it was in a difficult position to contest the special master's conclusions because it had never seen the writings and could not speak to their content. 6RP 5-6. The State ultimately abandoned its challenge to the special master's ruling for expediency's sake in order to bring the case to trial. 22RP 134.

way dependent on Zellmer's own words other than those he stated to the State's witnesses. 2CP 1763.

Zellmer also seeks dismissal because the State learned of a statement that he made, describing the circumstances of Ashley's death, to a claims examiner employed by Zellmer's home insurance provider, which had dispatched the examiner prior to determining whether it would pay for Zellmer's representation in the civil wrongful death action brought by Ashley's mother shortly after her death. The State disputed the assertion that this was a privileged communication between an attorney and his client, and described the evidentiary value of Zellmer's statement as being the fact that Zellmer's story was different than other descriptions he had given of the night of December 3, 2005, to other witnesses. 2CP 5-7, 37.

Although the trial court disagreed with the State regarding the (debatably) privileged nature of Zellmer's statement to the insurance adjuster, the court denied Zellmer's demand for dismissal of the State's case due to any "intrusions" into his right to confidentiality. 24RP 48-69. The trial court noted the absence of any authority for Zellmer's seeming suggestion that an individual can be considered immune from execution of a search warrant simply because he has had civil attorneys in the past, and that the police took ample care to avoid scrutinizing any potentially privileged communications they found in Zellmer's house. 24RP 54-57.

The court also found that sufficient care was taken in the examination of Zellmer's computers, and that Zellmer had utterly failed to demonstrate that any information he had conveyed to his civil attorneys was of any relevance to the State. 24RP 67. As to the statement made to his homeowner's insurance company's employee, the court found that the only potential relevance was in the inconsistency of that account with others Zellmer had given, which were inconsistent among themselves. 24RP 67. Finally, the court held that Zellmer had failed to show that the State had seen *any* privileged materials other than one e-mail and the insurance company's record. 24RP 67-69.

Zellmer has provided no basis for this Court to reverse the trial court's decision. The Connecticut case upon which he relies, State v. Lenarz, 301 Conn. 417, 22 A.3d 536 (Conn. 2011), is readily distinguishable on its facts. In Lenarz, execution of a search warrant at the defendant's home resulted in the seizure of "voluminous written materials containing detailed discussions of the defendant's trial strategy...." Lenarz, 301 Conn. at 420. The materials were provided to the assigned prosecutor, who read through all of them and agreed that they included strategic considerations, though he contended that his violation of privilege was not willful. Id. at 422. The state supreme court held that the prosecutor's intrusion into privileged communications so "irreversibly

tainted" the fairness of the proceedings that the only appropriate remedy was dismissal. Id. at 419.

Here, Zellmer is unable to show an intrusion that is even remotely similar in scope or content. The trial court reasonably concluded that the State and its investigators took all appropriate care when dealing with potentially privileged materials, and that they learned nothing not already known through extremely limited exposure to two brief statements made by Zellmer, neither of which contained trial strategy in any form. Nor is this matter in any way akin to obvious cases of misconduct in this state that necessitated dismissal. See State v. Cory, 62 Wn.2d 371, 382 P.2d 1019 (1963) (involving State's placement of a hidden microphone in jail conference room where attorneys met with incarcerated clients); State v. Granacki, 90 Wn. App. 598, 959 P.2d 667 (1998) (concerning a case detective, seated with prosecutor during trial, who looked over defense counsel's notes during court recess). Reversal cannot reasonably be warranted here.

**3. ZELLMER WAS NOT DEPRIVED OF HIS RIGHT TO A PUBLIC TRIAL BECAUSE A WITNESS'S CHILD WAS EXCLUDED FROM THE COURTROOM**

Zellmer next contends that his conviction must be reversed because the trial court temporarily excluded a teenaged child from

watching the trial while his father was waiting outside the courtroom to testify. The minor was the son of Joe Wickersham, an attorney who had represented Zellmer in his claim against a former romantic partner's auto insurance carrier for injuries to his partner's child. Mr. Wickersham arrived early for his testimony, and three other witnesses were scheduled to appear before him. Pursuant to the court's earlier exclusion of witnesses under ER 615, Mr. Wickersham waited outside the courtroom until it was turn to testify. Wickersham's son, who had accompanied him to the courthouse, entered the courtroom alone to watch the proceedings, but was asked to leave by the court's bailiff. During a recess, the trial court explained that it had asked Wickersham's son to leave both because the subject matter was disturbing and as a protective measure, to ensure that the minor did not relate to Mr. Wickersham what he had heard other witnesses testify to. 36RP 176-77.

Zellmer did not object to the trial court's ruling, but now argues that the exclusion infringed on his federal and state constitutional rights to a public trial. In framing his argument, Zellmer regrettably misreads controlling case law. His claim should be denied.

The exclusion of a single spectator from a trial, as was the case here, is "simply not a closure" of the courtroom, jeopardizing a defendant's, and the public's, right to a public trial. State v. Lormor, 172

Wn.2d 85, 93, 257 P.3d 624 (2011). In reaching that conclusion, the Lormor court reviewed the lengthy history of jurisprudence concerning the principle of open proceedings and the steps that a judge must take before a courtroom can be sealed from public view. As the court observed, however, "[t]hese rules come into play when the public is fully excluded from proceedings within in a courtroom." Id. at 92. A closure occurs "when the courtroom is *completely and purposefully closed so that no one may enter and no one may leave*" during trial or other proceedings traditionally open to spectators. Id. at 93 (emphasis added).

When the trial court excludes one individual and the proceedings remain otherwise open, its decision is "a matter of courtroom operations, where the trial court judge possesses broad discretion," and is reviewed for an abuse of discretion. Id. at 93-94. Such a decision will be reversed only if it is manifestly unreasonable or based upon untenable grounds or reasons. Id. at 94. The Lormor court equated this situation to the discretion exercised by a court under ER 615, which allows it, sua sponte, to exclude witnesses so that they cannot hear the testimony of other witnesses. Id. at 94.

Here, the trial court explained that, in large measure, it excluded the minor child of a witness in order to ensure that the witness would not hear others' testimony before the witness's own turn in the courtroom, due

to the possibility that his child would lack sufficient self-control.

36RP 177. The witness did not testify until late in the afternoon, after three other individuals had taken the stand. 36RP 180-203. In essence, the trial court was protectively enforcing its earlier order to exclude witnesses pursuant to ER 615. 20RP 41.

Even if the likelihood of the witness's testimony becoming tainted was not inevitable, the trial court was not manifestly unreasonable or without any justification whatsoever in exercising caution. Nor, in fact, would it appear that reversal would be required if the trial court had excluded the child solely as an in loco parentis measure to protect him from exposure to disturbing subject matter. Because the exclusion of one spectator "is not a court closure and does not implicate a defendant's right to a public trial," reversal would be warranted only if Zellmer were able to establish that it constituted an error to which he did not object, yet was so grave that it materially affected the outcome of his trial. He makes no attempt to do so here, instead casting the trial court's decision as a structural error, and resting solely on an interpretation of Lormor that is at odds with the plain language of that decision.

**4. THE TRIAL COURT DID NOT ERR WHEN ANSWERING A LEGAL QUESTION FROM THE DELIBERATING JURY AFTER CONSULTING WITH COUNSEL.**

After several days of deliberations, the jury sent a written inquiry to the trial court, asking whether manslaughter in the first degree was an offense they could consider, and, if so, what the elements of that offense were. 2CP 2419. The trial court conferred with counsel for the State and for Zellmer by conference call, and responded to the jurors in writing, informing them that first-degree manslaughter was not an offense they could consider. 2CP 2420; 2CP 362. The clerk's minutes show no objection by defense counsel to this process. 2CP 362. Nor did Zellmer object once all parties returned to court. 48RP 2. Zellmer now contends that the trial court's treatment of the jury's written inquiry amounts to structural error requiring reversal due to violations of his federal and state constitutional rights to be present and to a public trial. See Brief of Appellant, COA No. 65701-1-I, at 44-47. His argument is contrary to both federal and Washington law, and should be rejected.

**a. Right To Be Present**

The United States Supreme Court has recognized that the right of a defendant to be present at his trial is grounded in the Sixth Amendment's Confrontation Clause and the Due Process Clauses of the Fifth and Fourteenth Amendments. United States v. Gagnon, 470 U.S. 522, 526, 105 S. Ct. 1482, 84 L. Ed. 2d 486 (1985) (observing that one must be present during evidentiary stages of trial if one is to confront and cross-examine one's accusers); Snyder v. Massachusetts, 291 U.S. 97, 105-06, 54 S. Ct. 330, 78 L. Ed. 674 (1934) (noting that a defendant's due process right to be present extends beyond evidentiary phases to encompass any stage in which "his presence has a relation, reasonably substantial, to the fullness of his opportunity to defend against the charge."). Article I, section 22, of the Washington Constitution similarly provides that a criminal defendant has the right to "appear and defend in person...[and] to meet the witnesses against him face to face." See In re Personal Restraint Petition of Lord, 123 Wn.2d 296, 306, 868 P.2d 835 (1994) (holding that the core of the right to be present is the right to be present when evidence is presented).

The right to be present is not absolute. Where, as here, a defendant's absence occurs at a hearing in which no evidence is presented against him and no facts are disputed, his presence is required by due

process considerations "to the extent that a fair and just hearing would be thwarted by his absence, and to that extent only." Snyder, 291 U.S. at 107-08. A defendant need not be present when "his presence would be useless, or the benefit but a shadow." Id. at 106-07; see generally Christopher Bello, Annotation, Right of Accused to be Present at Suppression Hearing or at Other Hearing or Conference Between Court and Attorneys Concerning Evidentiary Questions, 23 A.L.R. 4<sup>th</sup> 955 (1983).

Washington courts recognize that there are many phases of a criminal trial in which the defendant's presence would be "but a shadow." In In re Personal Restraint Petition of Benn, 134 Wn.2d 868, 920, 952 P.2d 116 (1998), for example, the state supreme court refused to find error where the defendant had been absent from a hearing on a continuance motion. The court recognized that the defendant's absence did not affect his opportunity to defend against the charge, and that the hearing involved no presentation of evidence, nor did it concern the admissibility of evidence or the availability of a defense or theory of the case. Id. Because nothing of any significance to the defendant's ability to defend himself occurred at the hearing, his presence was not required. Id. Similarly, a defendant's right to be present is not infringed when the trial court confers with counsel on legal matters that do not require the

resolution of disputed facts. In re Personal Restraint Petition of Lord, 123 Wn.2d 296, 306-07, 868 P.2d 835, clarified on other grounds, 123 Wn.2d 737, cert. denied, 513 U.S. 849 (1994).

The conference call between the trial court and both parties here, akin to an in-chambers conference, was not a critical stage of the proceedings that required the jury's presence. It involved only the purely legal issue of determining whether to provide an additional instruction that was neither legally appropriate nor sought by either party.<sup>19</sup> See 2CP 2178-97, 2292-99, 2345-55, 2361-80 (Defendant's Proposed Instructions); 2CP 263-93, 364-68. This conclusion is buttressed by the fact that the relevant court rule, CrR 6.15, provides that the trial court must consult with the *parties*, and not the defendant personally, upon receiving an inquiry from the jury, and may respond to the inquiry either in open court or *in writing*. The constitutionality of this rule has been upheld so long as trial courts obey the requirement to notify counsel and no oral communication was made by the court directly to the jury. See State v. Jury, 19 Wn. App. 256, 270, 576 P.2d 1302, rev. denied, 90 Wn.2d 1006 (1978); compare Rogers v. United States, 422 U.S. 35, 95 S. Ct. 2091, 45 L. Ed. 2d. 1 (1975) (condemning the trial court's decision to respond to

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<sup>19</sup> Division Two of the Washington Court of Appeals reached this conclusion under a similar set of facts. See State v. Sublett, 156 Wn. App. 161, 182-83, 231 P.3d 231, rev. granted, 170 Wn.2d 1016 (2010).

jury inquiry without consulting counsel in contravention of relevant federal rule of criminal procedure).

Zellmer makes no attempt to demonstrate injury from the asserted violation. That such an error may be harmless, rather than presumptively prejudicial, is a matter of controlling law for this court. See State v. Caliguri, 99 Wn.2d 501, 508-09, 664 P.2d 466 (1983); In re Lord, 123 Wn.2d at 306-07. Moreover, because Zellmer did not object to the court's procedure for answering the jury's question, he cannot seek relief on appeal absent a showing of manifest error. See RAP 2.5(a); McFarland, 127 Wn.2d at 332-33.

Rather than explain how his absence affected the outcome of the case, Zellmer instead criticizes the Caliguri court's reasoning. This Court does not have the authority to overrule the supreme court. State v. Gore, 101 Wn.2d 481, 487, 681 P.2d 227 (1984). Nor should this court feel any temptation to overrule, as the cases relied upon by Zellmer involve significant facts not present here. See Linbeck v. State, 1 Wash. 336, 25 P. 452 (1890) (disapproving, without citation to any constitutional provisions or other law, of trial court that responded to jury inquiry by orally explaining the meaning of specific instructions); State v. Wroth, 15 Wash. 621, 47 P. 106 (1896) (involving trial court that engaged in in-person ex parte contact with deliberating jury and *later* informed

counsel); State v. Beaudin, 76 Wash. 306, 136 P. 137 (1913) (finding error where trial court responded to inquiry by reading new instructions in open court without the defendant present).

Without any convincing authority for his proposition that his presence was required during the trial court's purely legal reply to the jury's written inquiry, and without any argument explaining how his absence from that event affected his trial, Zellmer fails to demonstrate reversible error. His claim should be rejected.

**b. Public Trial**

Zellmer mentions, in passing, that the trial court's response to the jury's inquiry violated his constitutional right to a public trial as well as his right to be present. However, he provides no authority in support of the barest of arguments. This court need not consider assignments of error that are neither adequately addressed nor bolstered by any authority. State v. Gentry, 125 Wn.2d 570, 610, 888 P.2d 1105 (1995); RAP 10.3(a)(6).

Should this court elect to address this purported violation nonetheless, Division Two's discussion in Sublett is of great assistance. In that decision, the court of appeals noted that although it is recognized that the public trial right applies to all evidentiary phases of trial and other "adversary proceedings," it does not apply to hearings on "purely ministerial or legal issues that do not require the resolution of disputed

facts." Sublett, 156 Wn. App. at 181 (citations omitted). In Sublett, the trial court received a question from the jury asking for clarification of an instruction defining accomplice liability. Id. at 178. After consulting with counsel in chambers, the court responded in writing, advising the jury to re-read its instructions and offering no other guidance. Id.

Under the circumstances, the appellate court found no infringement on the defendant's or public's right to open proceedings. The court pointed to a long line of cases recognizing that jury questions regarding instructions are a component of jury deliberations, which have not, historically, been treated as a public part of a trial. Sublett, 156 Wn. App. at 182, citing, inter alia, Clark v. United States, 289 U.S. 1, 12-13, 53 S. Ct. 465, 77 L. Ed. 993 (1933). The Sublett court also observed that CrR 6.15 expressly provides that the trial court may respond to questions in writing. Id. Because the jury's question raised a purely legal issue arising in the course of its deliberations which did not require resolution of facts in dispute, the trial court did not err in the fashion by which it responded. Id.

Similar circumstances are present here. The jury's inquiry arose during its deliberations, rather than during the evidentiary stage of the proceedings. Its question raised a legal issue that was not dependent on a determination of a factual dispute, and the court's answer – after

consultation with counsel – was effectively neutral, providing no new information to the jury and essentially returning the jurors to their original packet of instructions. In addition, the jury's inquiry and the court's response were filed with the superior court clerk and are part of the public record. Zellmer has presented no valid basis on which this court should find a constitutional violation.

**5. THE TRIAL COURT PROPERLY ADMITTED EVIDENCE OF HARM SUFFERED BY OTHER CHILDREN LEFT IN ZELLMER'S CARE**

Following a lengthy pre-trial hearing, the trial court ruled that the State could present evidence of other instances in which the children of young women with whom Zellmer had engaged in whirlwind romances had been injured while left alone in his care. The trial court agreed that the evidence was relevant to prove the existence of a common scheme or plan, and that the probative value of the evidence outweighed the risk of unfair prejudice. 16RP 57-61, 114-16, 129-32.

The facts, as presented at the pre-trial hearing, concern three events. The first involved Mitchel Komendant, the son of nineteen-year-old Stacey Komendant, who married Zellmer in 1990, following a very brief courtship and shortly after Mitchel's birth. 2CP 1106. When Mitchel was four months old, he suffered two broken legs after being left in Zellmer's care while Ms. Komendant went to work. 2CP 1106. The

injuries occurred only weeks after Zellmer convinced Ms. Komendant to increase her car insurance policy to include hit-and-run coverage.

2CP 1106. Zellmer convinced Ms. Komendant to take Mitchel to the emergency room when he seemed unusually fussy, and Mitchel's legs were x-rayed. 16RP 46, 49. Zellmer told the treating physicians that Mitchel must have been injured when he was an occupant in a car -- Ms. Komendant's vehicle -- that Zellmer had been driving when it was rear-ended by another vehicle that then fled the scene. 16RP 46.

Ms. Komendant later watched Zellmer scrape the rear bumper of her car with a razor, to make it appear as if it had been damaged in a collision.

2CP 1106. He also pursued the maximum payout allowed under Ms. Komendant's policy for hit-and-run collisions, even though it was readily apparent that no such collision had taken place, and even after Ms. Komendant ended their relationship and took her car, and her son, with her. 2CP 1106-07. His attempt to defraud Ms. Komendant's insurance company failed when she provided it with a declaration stating that there was no car accident. 2CP 1107.

The second episode involved Kyle Clauson, the infant son of Kelly Clauson, a young mother whom Zellmer had begun dating in March 2000. 16RP 97. That April, Ms. Clauson left her son, who was less than a year old and was still in the crawling stage of his development, in Zellmer's

bedroom while she went to the kitchen to prepare dinner. 16RP 97. Minutes later, Zellmer's son, Dakota, called for Ms. Clauson to return to Zellmer's bedroom. 16RP 98. When she arrived, she found Kyle lying on the floor, dripping wet and with a bluish pallor; Zellmer was providing no aid and prevented her from picking him up. 16RP 98. Zellmer explained that he had found Kyle in a hot tub that was accessible from Zellmer's bedroom's exterior doorway, and that he must have crawled into it while Zellmer was distracted. 16RP 98. Ms. Clauson was skeptical, because she remembered that the hot tub had been covered by a heavy top that day, but she accepted Zellmer's account. 16RP 98.

The third event concerned Madison Barnett, the three-year-old daughter of Michelle Barnett, to whom Zellmer proposed marriage very shortly after they began a dating relationship in 2002. 16RP 123. Zellmer also suggested to Ms. Barnett that they should obtain life insurance policies for her and for Madison after they wed. 2CP 1107. One day, in December 2002, Ms. Barnett returned to Zellmer's home after leaving Madison in his care while she went to work. 16RP 123. Upon her arrival, she found Madison to appear withdrawn. 16RP 124. At Zellmer's insistence, Madison then told her mother that she had fallen into Zellmer's pool and that he had rescued her. 16RP 124. Zellmer explained that he had been in his backyard, chopping wood, when Madison fell into the

pool, and he had pulled her out by her hair. 16RP 124. Ms. Barnett accepted Zellmer's explanation.<sup>20</sup>

Zellmer contends that admission of evidence of these events violated ER 404(b) and necessitates reversal of his conviction. Evidence of prior bad acts is admissible under ER 404(b) if it satisfies two distinct criteria. First, the evidence must be logically relevant to a material issue before the jury. Evidence is relevant if (1) the identified fact for which the evidence is admitted is of consequence to the action, and (2) the evidence tends to make the existence of that fact more or less probable. ER 402; see also State v. Saltarelli, 98 Wn.2d 358, 362-63, 655 P.2d 697 (1982); State v. Mutchler, 53 Wn. App. 898, 901, 771 P.2d 1168 (1989). Second, if the evidence is relevant, its probative value must outweigh its potential for unfair prejudice. Saltarelli, 98 Wn.2d at 362. A trial court's admission of evidence under ER 404(b) is reviewed for abuse of discretion. State v. Hernandez, 99 Wn. App. 312, 322, 997 P.2d 923 (1999). Admission of evidence in violation of ER 404(b) does not raise an issue of constitutional magnitude. State v. Jackson, 102 Wn.2d 689, 695, 689 P.2d 76 (1984).

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<sup>20</sup> The State also sought to admit evidence that, shortly after the pool incident, Ms. Barnett discovered a hand-shaped bruise on Madison's buttock after she had again been left alone with Zellmer. 16RP 1107-08. Ms. Barnett ended the romantic relationship with Zellmer shortly after. 16RP 126.

As this Court explained in State v. Lough, 70 Wn. App. 302, 853 P.2d 920, aff'd, 125 Wn.2d 847, 889 P.2d 487 (1995), there are two categories of evidence that may be sufficient to form a common scheme or plan: (1) evidence of a single plan used to commit separate, but very similar crimes, and (2) evidence of multiple acts or events that constitute parts of a larger, overarching criminal plan in which the prior acts are causally related to the charged offense. Lough, 70 Wn. App. at 302. In this case, the trial court made clear in its extensively articulated ruling that it was admitting evidence of the events involving Mitchel Komendant, Kyle Clauson, and Madison Barnett as probative of Zellmer's preparation in carrying out an overarching scheme or plan to fabricate the cause of harm to an unrelated child in order, at least in part, to obtain insurance proceeds. 16RP 58-60,113-115, 16RP 129-31.

In Lough, this Court identified a number of "commonsense questions" to keep in mind when determining whether prior events show a common scheme as opposed to a mere proclivity to commit crime. Id. at 319. Those questions include: whether the crimes involved forethought, so that prior experience with preplanned crimes would benefit the defendant later, when he committed the charged offense; whether evidence exists of a repetitive, conscious effort to orchestrate events in order to avoid exposure; whether an unusual technique was involved; and whether

there are sufficient features in common from which the fact finder could determine that the prior and current incidents were the work of a single mastermind. Id. at 319-20. Or, as the supreme court noted when affirming this Court's opinion:

To establish common design or plan, for the purposes of ER 404(b), the evidence of prior conduct must demonstrate not merely similarity in results, but such occurrence of common features that the various acts are naturally to be explained as caused by a general plan of which the charged crime and the prior misconduct are the individual manifestations.

State v. Lough, 125 Wn.2d 847, 860, 889 P.2d 487 (1995) (also observing that "when similar acts have been performed repeatedly over a period of years, the passage of time serves to prove, rather than disprove, the existence of a plan.").

The events involving Mitchel, Kyle, and Madison share numerous commonalities with Ashley's drowning. Each involved a fast-moving romance between Zellmer and a young single mother, with Zellmer swiftly seeking to take on a caretaking role with the woman's very small child. In each instance, the child suffered harm while left alone in Zellmer's care. Others, at least initially, accepted Zellmer's explanation as to the cause of that harm. In Mitchel's case, Zellmer attempted, with temporary success, to use the child's injury to seek financial gain by defrauding an insurance company. In Kyle's and Madison's cases,

Zellmer's pools were involved, and he had the opportunity to gauge each mother's willingness to believe that her child could wander on his/her own into a water hazard, even in December (as in Madison's episode) or even when it otherwise seemed unlikely that the child would independently go to the body of water (as in Kyle's). These steps in Zellmer's criminal "education" culminated in the murder of an unrelated child whose mother he had swiftly romanced, whose life he had insured for \$200,000, and who, when left alone with him, had purportedly wandered into a pool on a cold December night despite a fear of the dark and of water.

The trial court exercised substantial care in imposing limits on the State's ability to use this evidence. Because the State could not definitively disprove Zellmer's explanation for Madison's submersion in his pool in December 2002, the trial court prohibited the State from suggesting it was anything other than an accident. 16RP 131. The State was allowed only to argue that the incident provided an opportunity for Zellmer to see how Madison's mother would react to learning of such an unusual event. 16RP 130. The trial court excluded evidence of other injuries suffered by unrelated children left in Zellmer's care, including burns to Kyle and bruises to Madison, because they lacked sufficient commonality to the circumstances of Ashley's death and would simply paint him as abusive, or due to insufficient proof that Zellmer was

responsible. 16RP 121, 132. The court provided limiting instructions regarding the admissible events both immediately prior to the introduction of the evidence through the State's witnesses, and again in the final instructions given to the jury. 34RP 32; 36RP 126; 2CP 2390 (court's instructions to jury).

This Court's discussion in Lough bears repeating here:

A criminal design, scheme or plan most often must be proved by conduct and logical inference, for rarely will there be express declarations by a defendant directly evidencing such plan. [Citation omitted] Repetition and commonality of features, until a threshold of improbability is reached, are irrelevant, for they may be based on coincidence or they may tend to establish only propensity.... It is the task of the trial court, subject to appellate review, to make the threshold determination: has there been sufficient repetition and are there a sufficient number of common features and are those common features of sufficient complexity to lead to a logical inference that all of the acts in issue, including the acts being tried, if done, are but separate manifestations of the same overarching plan, scheme or design.

Lough, 70 Wn. App. at 322-23. The trial court here carefully and thoroughly executed the required analysis demanded by Lough, and concluded that the three incidents involving unrelated young children constituted steps in the development and carrying out of the plan that resulted in Ashley's death. There was no abuse of discretion.

**6. THE TRIAL COURT PROPERLY ADMITTED THE TESTIMONY OF A PROFESSIONAL TRACKER**

Zellmer contends that the trial court erroneously permitted the State to call Joel Hardin, a professional tracker, as a witness in its case-in-chief. See Brief of Appellant, COA No. 65701-1-I at 58-64. Zellmer asserts that Hardin should not have been allowed to testify about his analysis of crime scene photographs taken by responding investigators on the night of Ashley's drowning because he lacked sufficient qualifications and because his testimony was not helpful to the jury. See Brief of Appellant, COA No. 65701-1-I, at 61-64. His claim should be rejected.

The decision to admit a witness's testimony, either as expert or lay opinion, is within the discretion of the trial court. State v. Ortiz, 119 Wn.2d 294, 309-10, 831 P.2d 1060 (1992). The opinion of a lay witness is admissible if his opinion is rationally based on the perception of the witness and helpful to a clear understanding of his testimony or the determination of a fact in issue. ER 701. Expert testimony is admissible if "specialized knowledge" will assist the trier of fact to understand the evidence or to determine a fact in issue, so long as the expert witness is qualified by knowledge, skill, and experience. ER 702.

Challenges to Mr. Hardin's qualification to offer opinion testimony have been presented to Washington's appellate courts before, and

uniformly rejected. See State v. Ortiz, 119 Wn.2d at 308-311; State v. Groth, 163 Wn. App. 548, 562-64, 261 P.3d 183 (2011), rev. denied, 173 Wn.2d 1076 (2012). In its 1992 decision, the Ortiz court listed Mr. Hardin's extensive training and experience, including his participation in a national search and rescue organization that required between eight and ten thousand hours of experience in order to be deemed qualified, and his work with the U.S. Border Patrol, U.S. Marshal's Office, and Federal Bureau of Investigation. Ortiz, 119 Wn.2d at 310. The supreme court further noted that Mr. Hardin's expert knowledge was not based on novel scientific procedures but on practical experience and acquired knowledge, obviating the need for a Frye<sup>21</sup> hearing as a prerequisite to admission of his testimony. Id. at 311.

Zellmer offers this Court no reason to depart from the Ortiz court's conclusions. Mr. Hardin has continued to work, and acquire additional experience and knowledge, as a professional tracker throughout the nearly two decades that have followed issuance of the Ortiz decision. 41RP 82. The only distinction that Zellmer attempts to identify between Mr. Hardin's ability to testify in Ortiz's trial and in the instant matter is that, here, he was forced to rely on photographs rather than conduct an in-person examination of a fresh scene. This Court has specifically held

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<sup>21</sup> Frye v. United States, 293 F. 1013 (D.C. Cir. 1923).

that this is a distinction without a difference in terms of admissibility under ER 702, but merely something that the jury can consider when deciding how much weight to give to Mr. Hardin's testimony. Groth, 163 Wn. App. at 563-64.

Zellmer also contends that Mr. Hardin's testimony should have been excluded because it was unhelpful to the jury's determination of facts at issue. Such testimony is helpful to the jury if it concerns matters beyond the common knowledge of the average layperson and is not misleading. Groth, 163 Wn. App. at 564. Courts generally interpret "possible helpfulness" broadly and will favor admissibility in doubtful cases. Id. (citations omitted).

Tracking is a highly specialized discipline involving the detection of discoverable evidence of a person's presence and movement through a particular area at a certain time. Groth, 163 Wn. App. 563. Here, Mr. Hardin was able to use his extensive knowledge to examine physical evidence and photographs of the path that Ashley McLellan would have taken had she ventured outside on the night of December 3, 2003, to eat cake that had been left on a deck with other garbage and then travelled down to a pool to wash her hands, as Zellmer had suggested to first responders. Through his review of the materials available to him, he concluded that he could find no sign of Ashley's presence on the deck or

the path to the pool. 41RP 105-14. Mr. Hardin's decades-long experience in looking for easily-overlooked signs of a person's presence and movement led him to further conclude that none of the cake debris scattered along the path appeared to have once been manipulated by a child's hands. 41RP 108-10.

Mr. Hardin's testimony was probative in a number of regards. His close investigation of fine details provided the jury with far more information about what the crime scene photographs depicted than would be apparent to a non-expert, including the police officers who were personally present at the scene. His findings could reasonably be seen by the jury as a basis to question the veracity of Zellmer's explanation to police.

Mr. Hardin's testimony was firmly challenged by defense counsel both on cross-examination and through the testimony of William Bodziak, a shoe- and tire-impression expert called in the defense case-in-chief. The jury thus had ample basis for evaluating Mr. Hardin's determinations. Under all of these circumstances, the trial court was not manifestly unreasonable in allowing Mr. Hardin to testify.

Finally, Zellmer asks for his conviction to be reversed because Kathleen Decker, another experienced tracker called as a rebuttal witness by the State, mentioned the fact that she worked on a team with

Mr. Hardin and a third tracker, Sharon Ward, in the examination of the scene photographs and available physical evidence, and that the three of them agreed with the conclusions that Mr. Hardin had testified to.

41RP 38.<sup>22</sup> Zellmer asserts that Ms. Decker's reference to Ms. Ward's concurrence violated the prohibition against introduction of hearsay evidence to such a grave extent that reversal is the appropriate remedy.

Assuming arguendo that Ms. Decker's reference to Ms. Ward's concurrence was a Confrontation Clause<sup>23</sup> violation, it was not objected to, and is therefore the basis for reversal only if Zellmer demonstrates manifest constitutional error. McFarland, 127 Wn.2d at 332-33. He is unable to meet his burden here. A single remark regarding a third tracker's agreement about the inability to find signs of a person's presence is hardly akin to the circumstances presented in the case Zellmer relies upon, Bullcoming v. New Mexico, \_\_\_ U.S. \_\_\_, 131 S. Ct. 2705, 180 L. Ed. 2d 610 (2011), in which a crime laboratory supervisor who had no personal involvement in an underling's analysis of the defendant's blood alcohol testified about the positive test results in place of the underling at

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<sup>22</sup> 41RP 38 contains the sole statement by Ms. Decker that expressly identifies Ms. Ward as being in agreement with Mr. Hardin's and Ms. Decker's conclusions. The subsequent statements highlighted by Zellmer in his opening brief include Ms. Decker's use of the word "we," but these statements were made in response to questions asking her for her own conclusions based on her individual assessment of the evidence. See 41RP 42, 43.

<sup>23</sup> U.S. Const., Amend. VI.

the defendant's trial for the crime of aggravated driving while under the influence. Bullcoming, 131 S. Ct. at 2707. The State's case here was not nearly as dependent on the testimony of the trackers as the prosecution's case was on crime lab results in Bullcoming. Both Mr. Hardin and Ms. Decker readily acknowledged the limitations of photographic evidence, and their conclusions were subjected to lengthy criticism by Zellmer's expert. 41RP 97 (testimony of Hardin); 46RP 41 (testimony of Decker); 45RP 51-58 (testimony of William Bodziak).

In addition, the defense expert, Mr. Bodziak, agreed that it cannot be determined from the photographs whether Ashley walked on the back deck. 45RP 58. Given Mr. Bodziak's testimony on this particular issue, it is fairly absurd to suggest that Ms. Decker's reference to Ms. Ward's concurrence was anything more than harmless error. See State v. Wicker, 66 Wn. App. 409, 414, 832 P.2d 127 (1992) (holding that an error which results in violation of the defendant's confrontation rights may be harmless so long as the reviewing court can conclude beyond a reasonable doubt that any reasonable jury would have reached the same result if the error had not occurred).

**7. THE PROSECUTOR DID NOT COMMIT REVERSIBLE ERROR IN CLOSING ARGUMENT**

Zellmer contends that the deputy prosecutor committed misconduct by referring to Ashley's family in his initial closing remarks. See Brief of Appellant, COA No. 65701-1-I, at 70-74. He asserts that these references amounted to overly dramatic, impermissible appeals to the jurors' sympathy that so prejudiced him that reversal is required. See Brief of Appellant, COA No. 65701-1-I, at 74-75. His claim is without merit.

During his initial closing argument, the deputy prosecutor explained that he intended to spend the vast majority of his time discussing the evidence establishing Zellmer's guilt, separating it into three categories: information about Ashley McLellan, evidence about the circumstances present on the night of her drowning, and evidence about Zellmer. 47RP 16. With regard to Ashley's capabilities, and the likelihood that she would have independently ventured to the pool, the prosecutor asked the jury to consider re-viewing videotapes made of Ashley shortly before she died, and of a photograph taken of her at the medical examiner's office, so that the jurors could remind themselves during their deliberations of her mobility and physical development. 47RP 17. The prosecutor mentioned that he was not going to play those

videos or show the photograph in his closing argument to avoid upsetting members of Ashley's family who were in attendance in the courtroom.

47RP 17.

Continuing his discussion of Ashley's personality and characteristics, which were relevant to the key issue of whether her drowning was the accidental outcome of an independent nighttime excursion, the deputy prosecutor noted that the most compelling evidence came from those the members of her family and their longtime friends, i.e., those who loved her and would therefore know her best. 47RP 17-18.<sup>24</sup> The prosecutor then reminded the jurors that those individuals had spoken of Ashley's sociability and reluctance to be alone, her fear of the dark, and her fear of water. 47RP 18.

At the conclusion of his initial argument, following a summation of all of the evidence pointing to Zellmer's responsibility for Ashley's death, the deputy prosecutor told the jury that Zellmer, by virtue of being charged with a crime, was entitled to a fair trial and to have his guilt proved beyond a reasonable doubt to an impartial jury. 47RP 43. The prosecutor argued to the jury, over defense counsel's objection, that

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<sup>24</sup> In his case-in-chief, Zellmer attempted to elicit testimony from several witnesses, primarily members of his own family, in an effort to depict Ashley as far more outgoing and adventurous than her family described in their testimony. 42RP 168; 43RP 105-05, 113; 43RP 159-61; 45RP 34-35.

Zellmer had received what was obliged to him, and stated that the evidence had proved his guilt, and that Ashley and the members of her family were now entitled to a just outcome in the form of a guilty verdict. 47RP 44-47. The deputy prosecutor mentioned, following overruled objection, that Zellmer, as the evidence had established, had taken Ashley's future from her and caused a lasting impact on her parents and grandparents. 47RP 45-46.

A defendant who alleges improper argument on the part of the prosecutor must establish both the impropriety and its prejudicial effect. State v. Russell, 125 Wn.2d 24, 85, 882 P.2d 747 (1994). The allegedly improper arguments must be reviewed in the context of the total argument, the issues and evidence in the case, and the court's instructions to the jury. Russell, 125 Wn.2d at 85-86. To be entitled to reversal, the defendant must demonstrate a substantial likelihood that the misconduct affected the jury's verdict. State v. Reed, 102 Wn.2d 140, 145, 684 P.2d 699 (1984).

As to the first two statements challenged here, Zellmer made no objection, so they would constitute reversible error only if the remarks were so flagrant and ill-intentioned that a curative instruction could not have obviated the resultant prejudice. See State v. Ziegler, 114 Wn.2d 533, 540, 789 P.2d 79 (1990). It is difficult to see how the prosecutor's passing mention that, out of respect for Ashley's family, he was talking

about the videotapes of Ashley rather than simply showing them, amounted to the type of inflammatory rhetoric that would justify reversal. Nor can it reasonably be posited under the circumstances, that an instruction, had one been requested, reminding the jurors to decide the case on the evidence before them could not have successfully diminished the risk, if any, that they would let their emotions overcome their ability to reason.

Similarly, the prosecutor's suggestion to the jury that the loving members of Ashley's family were the witnesses most likely to know her best does not pose even the most minimal risk of causing an emotional response that could cloud the jurors' rational skills. There is certainly no valid reason to believe that this remark constituted a flagrant and ill-intentioned effort to improperly sway the jury.

The portions of the prosecutor's final remarks to which defense counsel objected must be seen in the larger context of his argument. The prosecutor, as mentioned supra, began his conclusion by reminding the jury that Zellmer was entitled to justice by holding a trial in which his guilt must be proved beyond a reasonable doubt to an unbiased jury of his peers. The prosecutor then stated that the evidence did, in fact, establish Zellmer's guilt. He then briefly described the consequences of Zellmer's act on Ashley and her family and argued that a just outcome, based on the

evidence, was a guilty verdict to which Ashley and her family were entitled. 47RP 44-47.

The prosecutor's call for a finding of guilt on the basis of the evidence presented, and his contention that such a result would be a just outcome to an event that caused so much damage, cannot convincingly be depicted as an attempt to overcome an absence of evidence by appealing to jurors' knee-jerk prejudices and sympathies. When the prosecutor finished, the court reminded the jury that the purpose of the trial was to assess whether the State had proved its case. 47RP 47. After the jury then retired for the morning recess, the court explained that it provided that reminder in an "excess of caution" and that it did not feel that the State was appealing to passion or prejudice, which was why it had overruled defense counsel's objections at the time. 47RP 49.

The trial court's assessment of the challenged remarks carries considerable weight. See State v. Luvene, 127 Wn.2d 690, 701, 903 P.2d 960 (1995) (holding that "the trial court is in the best position to most effectively determine if prosecutorial misconduct prejudiced a defendant's right to a fair trial."). Furthermore, the court's final instructions to the jury explained that the jury must make its decision on the evidence, which was limited to the testimony of witnesses, stipulations, and exhibits, and that the arguments of counsel were not themselves evidence. 2CP 2382-83.

The instructions also notified the jurors that they must not let emotions, sympathies, or prejudices control their rational thought processes, and must decide the case solely on the facts before them. 2CP 2384.

Jurors are presumed to follow a court's instructions,<sup>25</sup> and Zellmer's attempt to show that the jurors were so overcome by inflammatory rhetoric that they were unable to do so is unavailing. He makes little attempt to demonstrate the likelihood that the prosecutor's conclusory remarks affected the jury's verdict, and the probability of such prejudice is remote. The State's case was not dependent on the jury's feelings about Ashley's family. The strength of the State's evidence rested on the facts of Ashley's behavior and development, the characteristics present on Zellmer's property on the night of her drowning, and Zellmer's motives, preparation, and opportunity.

**8. THE TRIAL COURT'S INSTRUCTION REGARDING THE SPECIAL VERDICT FORM DID NOT CONSTITUTE REVERSIBLE ERROR**

The trial court's special verdict instruction, mirroring the pattern instruction in common use in Washington court in April 2010,<sup>26</sup> explained to the jury that it must be unanimous to return a "yes" or "no" answer on

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<sup>25</sup> State v. Johnson, 124 Wn.2d 57, 77, 873 P.2d 514 (1994).

<sup>26</sup> At the time of Zellmer's trial, this instruction was available on the official Washington state courts website, maintained by the Administrative Office of the Courts, at <http://www.courts.wa.gov/index.cfm?fa=home.contentDisplay&location=PatternJuryInstructions>.

the special verdict form regarding whether Zellmer knew or should have known that the victim was particularly vulnerable or incapable of resistance due to extreme youth. 2CP 2411. Defense counsel objected to the final sentence of the instruction, which required unanimity in order to answer "no." 45RP 132. The trial court overruled the objection:

If the jury unanimously agreed that the state has not proved one or both of the allegations, then they have to answer no. If jury [sic] can't figure it out then they're hung on the allegation. That's how I read it. That's usually what they tell us. So that's why I think I'm going to leave it as it stands and note the defense objection.

45RP 132.<sup>27</sup>

The jury answered "yes" on the special verdict form. After the verdict forms were read in open court, the trial court polled the jury to ensure that the decisions were the product of each individual juror and of the jury as a whole. 48RP 3-6. On the basis of the jury's special verdict finding and the trial court's legal analysis, the court, on June 18, 2010, imposed an exceptional sentence of 600 months. 49RP 42-50; 2CP 2438-48.

Zellmer asserts that his sentence must be vacated by this Court and the matter remanded for resentencing pursuant to State v. Bashaw, 169

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<sup>27</sup> The trial court's reference to "both of the allegations" was due to the fact that the State alleged multiple aggravators with regard to the substantive offense of first-degree murder. 2CP 2247-48.

Wn.2d 133, 234 P.3d 195 (2010). In the Bashaw opinion, issued on July 1, 2010, the state supreme court held that a jury cannot be deadlocked as to an aggravating factor presented in a special verdict form. That is, if eleven jurors believe that the State proved the existence of the aggravator beyond a reasonable doubt, but the twelfth juror disagreed, the jury must answer "no" on the special verdict form and thereby forever acquit the defendant of the aggravating circumstance, and it is error for the trial court to instruct otherwise. Bashaw, 169 Wn.2d at 147.

**a. Bashaw Was Wrongly Decided**

The State respectfully disagrees with the state supreme court's decision in Bashaw in this regard, but recognizes that this Court is bound to follow the higher court's precedent. The reasoning underlying the outcome in Bashaw is before the supreme court for examination again in the consolidated cases of State v. Nunez and State v. Ryan, Supreme Court No. 85789-0, for which oral argument was held on January 12, 2012. The State addresses its concerns regarding Bashaw to preserve the issue for potential review by the supreme court.

Other than Bashaw and the single earlier decision that the Bashaw court relied on for its far-reaching conclusion, State v. Goldberg, 149 Wn.2d 888, 72 P.3d 1083 (2003), the State is unaware of any authority, nationwide, supporting a rule that the court can require a deadlocked jury

to answer "no" on a special verdict form for an aggravating circumstance. Aggravating circumstances were created by the state legislature, and there is no suggestion anywhere in the Sentencing Reform Act (SRA), codified at Chapter 9.94A of the Revised Code of Washington, that anything other than a unanimous verdict is required. Given that the fixing of legal punishments for criminal offenses is a legislative function,<sup>28</sup> it is for the legislature, and not the courts, to allow for acquittal based upon a non-unanimous jury decision. While the courts may recommend or identify needed changes, they must wait for the legislature to act. See, e.g., State v. Pillatos, 159 Wn.2d 459, 469-70, 150 P.3d 1130 (2007) (holding that court could not, absent statutory authority, empanel juries to determine the existence of aggravating circumstances).

The lack of any authority supporting the Bashaw court's rule of non-unanimity for special verdicts is striking, given that special verdicts have been presented to jurors in criminal cases for nearly a century. Well before the enactment of the SRA, juries rendered special verdicts in criminal cases. See, e.g., State v. Burnett, 144 Wash. 598, 599, 258 P. 484 (1927) (involving special finding that defendant had prior conviction for unlawful possession of intoxicating liquor). Since the SRA was enacted, the legislature has created numerous sentencing enhancements, all

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<sup>28</sup> State v. Ammons, 105 Wn.2d 175, 180, 713 P.2d 719, 718 P.2d 796 (1986).

requiring special verdicts by the jury. More recently, as a result of Blakely v. Washington, 542 U.S. 296, 123 S. Ct. 2531, 159 L. Ed. 2d 403 (2004), the legislature revised the SRA to provide for jury verdicts for numerous aggravating circumstances. RCW 9.94A.537(3) expressly provides that the jury's decision on an aggravating circumstance must be unanimous, and does not condition the need for unanimity on whether the answer is "yes" or "no."

The pattern jury instructions used for the past decades did not instruct the jury to answer "no" if they were deadlocked on a special verdict. Given that the standard concluding instruction given in every criminal case, WPIC 151.00, states that "[b]ecause this is a criminal case, each of you must agree for you to render a verdict," a reasonable juror could, reading the instructions together, believe that unanimity was required for any answer to a special verdict.<sup>29</sup> 2CP 2410.

The Bashaw court's reliance on Goldberg was ill-considered. The only authorities cited by the Goldberg court for the proposition that jury unanimity was not required for a "no" answer on a special verdict form were a court rule, CrR 6.16, and the jury instruction in that case, which was unclear as to the need for unanimity. Goldberg, 149 Wn.2d at 894.

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<sup>29</sup> This instruction was provided to the jury in the instant matter. 2CP 2410.

According to the Goldberg court, CrR 6.16(a)(3) authorizes a trial court "when a jury is deadlocked on a general verdict...to instruct the jury to continue deliberations," but that this subsection did not refer to special verdicts. Goldberg, 149 Wn.2d at 894. It is entirely unclear how the language of that subsection led to the court's conclusion. CrR 6.16(a)(3)<sup>30</sup> provides:

(3) Poll of Jurors. When a verdict or special finding is returned and before it is recorded, the jury shall be polled at the request of any party or upon the court's own motion. If at the conclusion of the poll, all of the jurors do not concur, the jury may be directed to retire for further deliberations or may be discharged by the court.

The plain language of CrR 6.16(a)(3) suggests the very opposite of the interpretation given to it by the Goldberg court; the rule expressly authorizes the trial court to, in its discretion, ask the jury to retire for further deliberations on a special finding. Courts are bound to accord meaning, if possible, to *every* word in a statute or court rule. See State v. Lundquist, 60 Wn.2d 397, 403, 374 P.2d 246 (1962).

The Goldberg court's only other source of authority was the written instruction initially provided to the jury in that case, which was unclear

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<sup>30</sup> CrR 6.16 was amended in 2009, after Goldberg was decided. However, the amendments did not change the language cited above, which has been in the rule since it was enacted, but added new provisions for use when a defendant pleads insanity. 4A Karl B. Tegland, Washington Practice: Rules Practice, CrR 6.16, at 78 (7<sup>th</sup> ed., 2011 Pocket Part).

due to the fact that it specifically required unanimity for a "yes" answer, but stated, "If you have a reasonable doubt as to the question, you must answer 'no.'" Id. at 893. A jury instruction does not *create* law. It is meant to *reflect* the current law, and is only as valid as the existing case law and statutes that support it. See, e.g., State v. Cronin, 142 Wn.2d 568, 579, 14 P.3d 752 (2000) (holding that pattern jury instruction defining accomplice liability was inconsistent with law).

In sum, the Goldberg court cited no authority for the proposition that the jury must be instructed to answer "no" when the jurors are deadlocked on a special verdict for an aggravating circumstance, other than a court rule it misread and a jury instruction whose influence reached only to the exit door from the trial courtroom. The Bashaw court cited no authority other than Goldberg. There is no legal basis to treat the unanimity requirement for special verdicts any differently than for general verdicts.

**b. Any Error Was Harmless**

This Court is currently split on the question of whether the language of the instruction used here, which was ruled erroneous in Bashaw, amounts to constitutional error. See State v. Ryan, 160 Wn. App. 944, 948-49, 252 P.3d 895, rev. granted, 172 Wn.2d 1004 (2011) (finding constitutional error); State v. Morgan, 163 Wn. App. 341, 351-52,

As Justice Madsen noted in her powerful dissent in the Bashaw decision, it is unreasonable to assume from a "yes" answer to a special verdict that the jury was somehow forced into a conclusion it would not have otherwise reached absent a faulty unanimity instruction. Justice Madsen noted, "We certainly do not infer from a unanimous verdict on guilt that the jury was coerced or improperly influenced by an instruction on unanimity. Why does the majority doubt the unanimous ["yes" answer on the special verdict form] here?" Bashaw, 169 Wn.2d at 151 (Madsen, J., dissenting).

The proposition that the outcome of the jury's deliberation on the aggravator would have been different with a Bashaw-tailored instruction is wholly speculative. It does not accord with the fact the jury never expressed confusion about the special verdict form or related instructions, or about what to do, in general, in case they were deadlocked. It does not accord with the polling of the individual jurors, in which each said that the verdicts in the case were his or her own decision. It does not accord with the presumption that the jury followed two instructions each requiring unanimity in order to arrive at a "yes" answer. It does not justify vacating Zellmer's appropriate sentence for murdering a small child under some of the cruelest circumstances imaginable.

**9. THE TRIAL COURT GRANTED THE STATE'S MOTION TO UNSEAL RECORDS PURSUANT TO APPROPRIATE AUTHORITY**

Finally, Zellmer argues that the trial court erroneously granted the State's post-trial motion to unseal several dozen court records. Zellmer contends that the trial court reached its decision by relying on a body of case law -- Seattle Times Co. v. Ishikawa<sup>33</sup> and its progeny -- that was deemed inapplicable to the issue of unsealing defense motions for court-authorized public funding by the state supreme court's January 2011 decision in Yakima County v. Yakima Herald Republic, 170 Wn.2d 775, 246 P.3d 768 (2011). In its Herald Republic decision, the supreme court ruled that the unsealing of this specific category of sealed motions and orders should be determined with reference to GR 15(e) rather than by applying the multi-factor test promulgated in Ishikawa. Herald Republic, 170 Wn.2d at 781.

It is true that when the trial court initially considered the State's request in the instant matter, in December 2010, it did so with reference to Ishikawa. 52RP 66-76. However, the court stayed the effect of its decision to unseal records so that defense counsel could closely review the records at issue and make requests for specific redactions. 52RP 76-77.

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<sup>33</sup> 97 Wn.2d 30, 640 P.2d 716 (1982).

Before defense counsel's deadline fell, the Herald Republic opinion was issued, and Zellmer moved for reconsideration of the trial court's December 2010 ruling in light of the new law. 2CP 369-73. In its response, the State recognized the effect of Herald Republic, and asked the trial court to unseal the relevant records pursuant to GR 15(e) and the principles announced in the supreme court's January 2011 decision. 2CP 408-13. On March 16, 2011, the trial court denied Zellmer's motion, on the ground that unsealing was warranted pursuant to GR 15(e). 2CP 415.

It appears that, regrettably, counsel for Zellmer on appeal overlooked this stage of the trial court's treatment of the State's motion to unseal court records when preparing her brief. As a result, Zellmer does not challenge the trial court's March 2011 ruling with argument or by citation to authority. This court should decline to address this issue under these circumstances. See RAP 10.3(a)(5), (6); Cowiche Canyon Conservancy v. Bosley, 118 Wn.2d 801, 809, 828 P.2d 549 (1992).<sup>34</sup>

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<sup>34</sup> If this Court grants leave to Zellmer to amend or supplement his brief to address the trial court's final judgment on this issue, the State requests opportunity to respond.

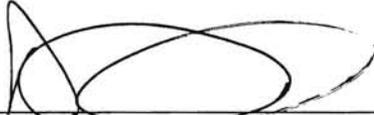
**D. CONCLUSION**

For the foregoing reasons, the State respectfully asks this Court to affirm Zellmer's conviction for second-degree murder with the aggravating circumstance of his victim's particular vulnerability, and uphold his exceptional sentence.

DATED this 11 day of May, 2012.

Respectfully submitted,

DANIEL T. SATTERBERG  
King County Prosecuting Attorney

By:   
DAVID M. SEEVER, WSBA #30390  
Senior Deputy Prosecuting Attorney  
Attorneys for Respondent  
Office WSBA #91002

## APPENDIX A

The Verbatim Report of Proceedings consists of 52 volumes, identified in this brief as follows:

<b>RP #</b>	<b>HEARING DATE(S)</b>
1RP	6/2/2008
2RP	7/29/08
3RP	12/15/08
4RP	1/23/09
5RP	3/13/09
6RP	3/27/09
7RP	4/17/09
8RP	5/18/09
9RP	8/17/09
10RP	8/18/09
11RP	8/20/09
12RP	8/24/09, 10/2/09
13RP	9/4/09
14RP	9/22/09
15RP	10/23/09
16RP	11/13/09, 12/11/09
17RP	12/16/09, 1/8/10, 1/28/10
18RP	1/29/10
19RP	2/5/10
20RP	2/11/10, 2/25/10
21RP	2/19/10
22RP	3/1/10, 3/2/10
23RP	3/8/10
24RP	3/9/10
25RP	3/10/10
26RP	3/11/10
27RP	3/15/10
28RP	3/16/10
29RP	3/17/10
30RP	3/18/10
31RP	3/22/10
32RP	3/23/10
33RP	3/24/10
34RP	3/25/10

35RP	3/31/10
36RP	4/1/10
37RP	4/2/10
38RP	4/5/10
39RP	4/6/10
40RP	4/7/10
41RP	4/8/10
42RP	4/12/10
43RP	4/13/10
44RP	4/15/10
45RP	4/20/10
46RP	4/21/10
47RP	4/22/10, 4/23/10, 4/29/10
48RP	4/28/10
49RP	6/18/10
50RP	7/9/10
51RP	8/20/10
52RP	12/8/10

Certificate of Service by Mail

Today I deposited in the mail of the United States of America, postage prepaid, a properly stamped and addressed envelope directed to Sheryl G. McCloud, the attorney for the appellant, at 710 Cherry St., Seattle, WA 98104, and to Nancy Collins, the attorney for the appellant, at Washington Appellate Project, 701 Melbourne Tower, 1511 Third Ave., Seattle, WA 98101, containing a copy of the Brief of Respondent, in STATE V. JOEL ZELLMER, Cause No. 59228-9-1, in the Court of Appeals, Division I, for the State of Washington.

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

  
\_\_\_\_\_  
Name  
Done in Seattle, Washington

05/11/2012  
\_\_\_\_\_  
Date