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NO. 68661-5-I

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

COURT OF APPEALS DIV I
STATE OF WASHINGTON
2013 MAY 30 PM 3:08

STATE OF WASHINGTON,

Respondent,

v.

PARAMJIT SINGH BASRA,

Appellant.

RESPONSE TO STATEMENT OF ADDITIONAL GROUNDS

DANIEL T. SATTERBERG
King County Prosecuting Attorney

TOMÁS A. GAHAN
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. Whether double jeopardy, same course of criminal conduct or unit of prosecution doctrines were violated where the defendant was convicted of first and second degree murder for the same act, but the second degree murder charge was vacated at sentencing.

2. Whether the defendant's spontaneous and voluntary statements to police officers were properly admitted.

3. Whether Basra waived any issue to a perceived ER 612 violation by failing to object at trial.

4. Whether Basra waived a claim of attorney conflict by failing to raise the claim at trial and whether, if he did raise it, the trial judge acted within its discretion by denying the claim.

5. Whether Basra's attorney represented him effectively by fully investigating Basra's mental health claims and relying on them for his defense.

6. Whether the State was vindictive by amending the information.

7. Whether the State's closing argument was appropriate and whether Basra waived any issue by failing to object at trial.

8. Whether Basra's right to testify was preserved where he was asked only a few questions by his attorney and testified through an interpreter.

9. Whether there was any cumulative error where there was no actual error.

10. Whether the period of community custody set at Basra's sentencing should have been a range between 24 and 36 months in accord with the Superior Court Criminal Rules.

B. STATEMENT OF THE CASE

1. PROCEDURAL FACTS.

The defendant, Paramjit Singh Basra, was charged with murder in the first degree in count I and, in the alternative, felony murder in the second degree in count II. CP 8-9. The State alleged that Basra murdered his wife, first by strangling her manually, then by using a ligature. Basra was convicted of both counts after a jury trial. CP 126. He was sentenced to the low end of the standard range, 240 months. CP 126. Count II was vacated. CP 124.

2. SUBSTANTIVE FACTS.

The State relies on the substantive facts portion of its Brief of Respondent.

C. ARGUMENT

1. BASRA WAS CONVICTED OF TWO CRIMES FOR THE SAME ACT BUT THE LESSER COUNT WAS VACATED, PRECLUDING ANY DOUBLE JEOPARDY, SAME COURSE OF CRIMINAL CONDUCT OR "UNIT OF PROSECUTION" VIOLATION.

Basra contends that his conviction violated double jeopardy, unlawfully charged two separate crimes for a single act, and violated the "unit of prosecution" for murder because he was convicted of both "First and Second Degree Murder in the single death" of his wife. Basra's S.A.G. at 3. But the second degree murder conviction was vacated, so Basra stands convicted of only one murder charge, rendering his arguments meritless.

In State v. Womac, 160 Wn.2d 643, 160 P.3d 40 (2007), Washington's Supreme Court ruled on the issue of double jeopardy where the same act of murder is charged as separate crimes. Womac was convicted by jury of count I, homicide by abuse, count II, second degree felony murder, and count III, first degree assault, all for the same death. Id. at 647. While the sentencing court did not impose sentences on counts II and III, it failed to vacate the convictions. Id. at 648. Because Womac's three convictions constituted the same offense for purposes of double

jeopardy, the court found that the proper remedy was to vacate the lesser convictions, counts II and III. Id. at 659-60.

As Womac illustrates, the remedy in this situation is to vacate the lesser conviction, which is precisely what Basra's sentencing judge did, leaving only the first degree murder conviction. CP 124. Because count II was vacated, Basra's other arguments, challenging the unit of prosecution for murder and claiming that the jury should have been instructed on "separate acts," are similarly meritless – ultimately he was only convicted of and sentenced on one crime.

Basra also argues that the legislature intended for facts such as these to be charged only as murder in the second degree under the assault prong because the State did not prove "premeditation." The sufficiency of the State's premeditation evidence has been addressed in the Brief of Respondent; the jury here found Basra guilty of murder in the first degree under the statute, and he was sentenced accordingly. This issue is without merit.

2. BASRA'S STATEMENTS TO THE POLICE WERE SPONTANEOUS AND VOLUNTARY, RENDERING THEM ADMISSIBLE EVEN THOUGH THEY WERE MADE PRE-MIRANDA.

Basra argues that the trial court erred in admitting his pre-Miranda[1] statements to police because he did not have an interpreter with him when he made those statements, and therefore did not understand his rights. But the statements Basra challenges were spontaneous, voluntary statements made by Basra; Miranda, therefore, did not apply.

a. Relevant Facts.

Officer Michael Hauser testified during the pretrial Criminal Rule (CrR) 3.5 hearing that he arrived at Basra's house in response to a 911 call on July 25, 2009, at about 6:40 A.M. 2RP 20-22.[2] Shortly afterward, Hauser was joined by Officer Orvis, and together they approached the home and announced their presence. 2RP 24-25. Eventually, Basra opened the door and stepped outside, and Hauser immediately handcuffed him. 2RP 25-27. As Hauser was handcuffing Basra, Basra turned and, unsolicited, said, "The problem is, I killed my wife, she's in the room to the right."

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[1] Miranda v. Arizona, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966).

[2] This brief will refer to the Verbatim Report of Proceedings as follows: 1RP (12/9/11, 1/27/12); 2RP (2/1/12); 3RP (2/2/12); 4RP (2/6/12); 5RP (2/7/12, 2/8/12); and consecutively paginated 6RP (2/8/12, 2/9/12, 2/13/12, 2/14/12, 2/15/12, 2/16/12, 2/21/12).

2RP 27. While Basra had an accent, Hauser testified that he had no difficulty understanding him. 2RP 27-28.

Detective Williams testified that he arrived on the scene shortly afterward, took custody of Basra, and searched him for weapons. 2RP 45. Williams asked Basra who was inside the house, and Basra responded that his wife and two children were still inside. 2RP 45. As Williams escorted Basra to his patrol car, Basra, again unsolicited, said that he had "family problems" and then added, "I killed my wife." 2RP 46.

After hearing this, Williams read Basra his Miranda rights from a department-issued rights card, and asked Basra if he understood; Basra said that he did not, so Williams re-read the rights, this time more slowly. 2RP 47. After the second reading, Basra still indicated that he did not "really" understand his rights. 2RP 48. Williams asked Basra what his native language was, and Basra told him that he spoke Punjabi, so Williams continued walking Basra to the patrol car in the hopes of securing a Punjabi interpreter on the language line. 2RP 49. As they walked to the car, Basra, unprompted, told the detective, "She has problems with men so I killed her." 2RP 50-51.

When asked by the prosecutor during the CrR 3.5 hearing whether Williams had "asked any questions or done anything to get the defendant to make those... comments about family problems," Williams answered, "no." 2RP 51.

Once inside the patrol car, Williams secured a language line interpreter, and through a Punjabi interpreter, Williams advised Basra that he was being audio and video recorded, and re-read him his Miranda rights. 2RP 51-52. This time Basra indicated that he understood his rights and requested an attorney. Other than to inform Basra that he had been arrested for murder, this was the end of their exchange.

During argument, the State conceded that Basra was in custody when he made his statements to Williams, but argued that Basra's statements to Hauser and Williams were spontaneous and voluntary and therefore outside of the Miranda waiver requirement. 2RP 55-56. Basra's attorney countered that the statements were responses to a police officer "conducting an interrogation." 2RP 58-60. The State replied that not a single question or comment by police preceded any of Basra's incriminating statements. 2RP 63.

The trial court ruled that when Basra made his statement to Hauser, he was detained, but not yet "in custody" because the

officers did not even know what they were investigating: "I am satisfied that the statement made by Mr. Basra to Officer Hauser that, 'I killed my wife, she's in the room to the right' was not custodial and it was not subject to any interrogation on behalf of the officers... It was in fact voluntary and spontaneous." 2RP 66.

The trial judge also ruled that once Basra was turned over to Williams, Basra was in custody, but that the admissions made by Basra "were not subject to interrogation in [terms] of the case authority and Miranda." 2RP 67. The court said that the statements were unsolicited and that Basra "chose to make" them; "based on all of the objective circumstances they were not the subject of custodial interrogation and were in fact spontaneous and voluntary." 2RP 67. The court signed findings of fact and conclusions of law that mirrored its oral findings and conclusions. CP 117-21.

b. The Statements Were Spontaneous And Voluntary.

The State may not use statements stemming from a custodial interrogation of a defendant unless the defendant is first informed of his constitutional rights. Miranda v. Arizona, 384 U.S. 436. The need to inform a defendant of his right to counsel and

right to remain silent applies only where the defendant is in custody and is being interrogated; when a defendant's statements are not made in response to police questions, those statements are spontaneous and therefore outside of the Miranda warning requirement. State v. Peerson, 62 Wn. App. 755, 772-73, 816 P.2d 43 (1991). A spontaneous statement made to an arresting officer that is not the product of interrogation is voluntary and similarly outside of Miranda. State v. Ortiz, 104 Wn.2d 479, 484, 706 P.2d 1069 (1985). A trial court's determination whether a defendant's statement was subject to Miranda is factual and is reviewed under a "clearly erroneous" standard; a reviewing court will not overturn the lower court's findings unless the reviewing court is "left with a definite and firm conviction that a mistake has been committed." State v. Denney, 152 Wn. App. 665, 671, 218 P.3d 633 (2009).

Basra's statements were not the result of a custodial interrogation – he volunteered the information with no prompting whatsoever. CP 117-21. While Basra complains that he should have had an interpreter so he could have understood his rights, he made all but the last statements before his rights had even been read to him. CP 117-21. Before his statement that his wife had "problems with men," so he "killed her," Williams attempted to read

Basra his rights, but Basra said that he did not understand. 2RP 50-51. There can be no reasonable argument that the mere effort to read Basra his rights somehow triggered an interrogation, where the detective did not ask any questions and Basra volunteered the information in English.

As the trial court found after hearing from the police officer witnesses, Basra's statements were made voluntarily and spontaneously, and therefore were not subject to Miranda. The findings of fact are consistent with the transcript of the testimony, and Basra's Statement of Additional Grounds has presented nothing that should leave this Court "with a definite and firm conviction that a mistake has been committed." Denney, 152 Wn. App. at 671. The trial court's admission of Basra's spontaneous and voluntary statements preserved his constitutional rights. The statements were properly admitted.

In section six of his Statement of Additional Grounds, Basra states that his Sixth Amendment right to counsel was violated because he was not given counsel immediately after requesting it. An attorney, Basra argues, would have advised him not to make any statements to police. But there is no record of any statements made by Basra following his request for an attorney, and the State

did not attempt to elicit any such statements during the trial, so the argument does not apply to the facts of this case, and should not be considered. This issue is meritless.

3. THE PROSECUTOR USED WRITINGS TO REFRESH THE MEMORY OF WITNESSES UNDER ER 612, AND BASRA NEVER OBJECTED TO THIS USE OF ER 612; ANY CHALLENGE WAS WAIVED.

Basra contends that the prosecutor at trial improperly "coached" State witnesses by permitting them to refresh their recollections by looking at police reports during their testimony. But Basra never provides support for the purported "coaching," and where the record does reflect the prosecutor's attempts to refresh a witness' memory, it is done in accord with the evidence rule. Because Basra did not object at trial, the issue is waived altogether.

Evidence Rule (ER) 612 permits a witness to use a writing to refresh his or her memory for the purposes of testifying while testifying. ER 612; State v. Little, 57 Wn.2d 516, 358 P.2d 120 (1961). The rule permits a lawyer to refresh a witness' memory with a writing once it has been established that the witness does not remember something. ER 612. An issue not raised before the trial court may generally not be raised for the first time on appeal.

See RAP 2.5(a)[3]; State v. Moen, 129 Wn.2d 535, 543, 919 P.2d 69 (1996).

Addressing Statements of Additional Grounds for Review, RAP 10.10(c) states that:

> reference to the record and citation to authorities are not necessary or required, but the appellate court *will not consider a defendant/appellant's statement of additional grounds for review if it does not inform the court of the nature and occurrence of alleged errors...* ***the appellate court is not obligated to search the record in support of claims made...***

(emphasis added).

In Section 5 of his Statement of Additional Grounds, Basra appears to quote extensively from the record, providing what he cites are examples of the prosecutor's misuse of ER 612 to refresh the recollection of a witness. Basra's S.A.G. at 14-16. But the record in this case consisted of six different volumes and was well

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[3] RAP 2.5 (a) reads as follows:

> Errors Raised for First Time on Review. The appellate court may refuse to review any claim of error which was not raised in the trial court. However, a party may raise the following claimed errors for the first time in the appellate court: (1) lack of trial court jurisdiction, (2) failure to establish facts upon which relief can be granted, and (3) manifest error affecting a constitutional right. A party or the court may raise at any time the question of appellate court jurisdiction. A party may present a ground for affirming a trial court decision which was not presented to the trial court if the record has been sufficiently developed to fairly consider the ground. A party may raise a claim of error which was not raised by the party in the trial court if another party on the same side of the case has raised the claim of error in the trial court.

over one thousand pages – Basra's briefing fails to cite to any one example in particular that actually supports his challenge. Because volume 6 of the record captured most of the actual trial testimony, the presumption is that his blank cites refer to volume six, but many of the page numbers he cites do not correspond to any of his quotes. For example, Basra cites the phrases "According to my report" at "RP at 27," "Refresh your memory" at RP 40 and "Look at your report" at "RP at 46" – none of these quotes can be found on those page numbers under volume 6.

But where Basra's citations to the record *do* permit review of the issue he raises, the prosecutor generally adheres to ER 612, which requires the following conditions: 1) the witness states his or her memory is exhausted and requires refreshing, and 2) the writing must cause the witness to actually recall the response to the question. State v. Huelett, 92 Wn.2d 967, 603 P.2d 1258 (1979). In one exchange loosely cited by Basra, the prosecutor asked Basra's daughter if, in the moments leading up to the murder, her mother said anything in response to Basra saying that he was "looking for his wallet." 6RP 303. The daughter responded, "I don't remember." 6RP 303. The prosecutor then handed the daughter a copy of her statement to police and asked her to read it silently to

herself, before asking her, "Does that refresh your memory as what your mother said in response to your father saying he was looking for his wallet?" The daughter answered, "yes," and proceeded to answer the question. While cited as an example of "coaching" by Basra in his Statement of Additional Grounds, the prosecutor's approach here was in harmony with the requirements of ER 612.

Most dispositive, however, is the fact that Basra never objected to any of the prosecutor's efforts to refresh a witness' memory, whether improper or otherwise. Because he failed to preserve this issue for appeal under RAP 2.5, it should not be addressed by this court. This issue has no merit.

4. BASRA NEVER MOVED TO DISCHARGE JOHNSON; HE CANNOT NOW CLAIM THAT HIS ATTORNEY SHOULD HAVE BEEN DISCHARGED. THE COURT ACTED WITHIN ITS DISCRETION BY NOT DISCHARGING BASRA'S ATTORNEY.

Basra contends that the trial court violated his right to a fair trial by not finding a conflict between Basra and his trial attorney, but there is no record of Basra, or his trial counsel, ever raising an issue of conflict. His trial attorneys were the fourth set assigned to represent Basra, and the issue was not preserved.

a. Relevant Facts.

Basra was originally represented by public defense attorneys Debra Redford and John Randolph but soon hired private attorneys Richard Hansen and Ariella Wagonfeld to represent him. CP 136-39. Nearly one year after Hansen's firm was retained, Hansen made a motion to withdraw, citing an "irreconcilable conflict of interest" with Basra. CP 140. In his declaration, Hansen memorialized the efforts he had taken to represent Basra, including meeting with members of his family and community, meeting multiple times with Basra himself, reviewing discovery, retaining mental health experts and obtaining detailed evaluations supporting mental health defenses, and negotiating with the State prosecutor. CP 144-48. Hansen stated that Basra had threatened him with a malpractice suit and demanded the return of his retainer; Hansen said that Basra's behavior created such a conflict that it had become "ethically inappropriate" for Hansen to continue representing Basra and "would also seriously undermine any disposition of the case, whether through plea negotiations or a trial." CP 146-48. On December 2, 2010, the presiding court permitted Hansen and his co-counsel to withdraw, citing a

"breakdown in communication." CP 141-42. On December 7, 2010, Basra filed a bar complaint against Hansen. CP 159.

Public defenders Randolph and Redford were again appointed to represent Basra. CP 149-52. On March 6, 2011, Basra wrote a letter to the presiding judge saying that he had "issues" with his new attorneys. CP 153-58. Four months later, Randolph and Redford asked to withdraw from Basra's case due to "a breakdown in communications," and the motion was granted on June 9, 2011. CP 165. Another public defender from a separate agency, Edwin Aralica, was appointed. CP 168, 181. On September 28, 2011, Basra wrote a letter to the presiding judge saying the following: "[My] attorney is not willing to do anything on my behalf. This is a major conflict. At this time your honor I am asking for new counsel that will work effectively on my case.... I pray to you for help to appoint to me effective counsel that will file very important pre-trial motions into the court on my behalf." Sub. CP 170-71.

On that same day, Basra wrote another letter indicating that he would be moving to dismiss his case based on "speedy trial violations." CP 173-75. On October 3, 2011, Basra's motion to discharge his attorney was denied by the presiding judge. CP 177.

On October 19, 2011, however, the court granted a motion to withdraw by Aralica, finding an "inability to communicate and possible RPC violation." CP 181. On October 20, 2011, Timothy Johnson, who was to become Basra's attorney at trial, filed his notice of appearance. CP 182-83.

During pretrial hearings, Basra handed the trial judge a letter which was returned apparently unfiled, but its contents were discussed on the record. 2RP 38. Basra's attorney summarized Basra's concerns in the letter, saying:

> Mr. Basra has some very strong ideas, some very certain ideas about how he would like certain aspects of his legal defense to proceed. Procedurally it's just not possible for us to do them, but also it's, of course, discretionary, issues that are left to us to decide if we want to pursue them, and we've declined to for various reasons that I certainly don't need to go into. But it's that particular point that we are at a bit of a standstill on at this point. And I think the court may know historically the procedural background on the case. This is Mr. Basra's – now it's an older case, over two years old... and Mr. Basra has had a number of prior defense counsels. And we've had our rough patches. Things have been a little difficult sometimes, but I think for the most part we've been able to get along.

2RP 39-40. The trial judge responded by saying, "We've had a number of attorneys in this case, and we need to proceed to trial." 2RP 40.

Basra's attorney asked the court whether it had any concerns regarding Basra's representation and the court said that it had "no concerns," and was satisfied that Johnson could present Basra's defense "in the best manner possible." 2RP 40. After some discussion with Basra, Johnson again addressed the court:

> Your Honor, I apologize, we are at a bit of an impasse, and the situation is that Mr. Basra has strong feelings about how yesterday's [CrR 3.5] suppression hearing regarding his statements went. He just has a strong – he disagrees with a lot of the testimony that the officers gave and has other ideas about what should have been or other things that might matter. All I'm trying to say is that my ability to represent Mr. Basra is being impeded by the fact that I have tried to explain to him that the proceeding is over, we made our best showing, and we made our decisions, and the rulings have been made, but Mr. Basra is not going to accept that and move on with what we need to start executing with regard to the other parts of the case. So if the court – I mean, is the court inclined to go ahead and indicate that ... that is the correct analysis and that is where we need to go...

2RP 41-42. The court responded by saying that "the rulings have been made, yes," and proceeded to the next matter. 2RP 42.

b. No Conflict Was Raised And If It Was, The Court Acted Within Its Discretion.

An issue not raised before the trial court may generally not be raised for the first time on appeal. See RAP 2.5(a); Moen, 129 Wn.2d at 543. A defendant who is represented at public expense

does not have an absolute Sixth Amendment right to choose a particular attorney. State v. DeWeese, 117 Wn.2d 369, 375-76, 816 P.2d 1 (1991). Where a defendant raises the issue of a conflict with his attorney, the decision whether to grant a request for new counsel is a matter within the court's discretion. State v. Thompson, 169 Wn. App. 436, 457, 290 P.3d 996 (2012), review denied, 176 Wn.2d 1023 (2013). To warrant substitution of counsel, a defendant must show good cause beyond merely having lost confidence in his attorney – the communication breakdown must be such that the attorney is unable to present an adequate defense. Id. A disagreement over defense theories and strategy does not create an irreconcilable conflict entitling a defendant to substitute counsel. State v. Stenson, 132 Wn.2d 668, 734-35, 940 P.2d 1239 (1997).

Here, while Basra certainly sought to discharge many of his attorneys, Basra cites to nowhere in the record where he actually sought to discharge Johnson. The "CP" cites he relies on in Section 7 of his briefing refer to jury instructions and are inapplicable to his claims, and the February 2, 2012 report of proceedings he cites captures only a discussion about a disagreement between Basra and his attorney without any indicator

of a motion to withdraw or discharge. 2RP 29-42. Basra's lawyer said he was at an "impasse," but in the context of his statement to the court, it is clear that he was merely looking for the trial judge's help in clarifying to Basra that the prior motion had been ruled on, and that it was time to move on to the next issue. 2RP 41-42. Because Basra's argument is unsupported by the record and he never preserved the issue for appeal, this Court need not address the issue.

Even if this Court considers the issue somehow preserved by Johnson's statement that he and Basra were at an "impasse," the trial court acted within its discretion in denying any motion and proceeding to trial. 2RP 41-42.

In State v. Thompson, the court assigned new counsel to the defendant because Thompson refused to cooperate with his attorneys. 169 Wn. App. at 448. But Thompson also refused to cooperate with his *new* attorney after disagreeing with him over trial strategy, and began to threaten him. Id. at 448-49. This Court found that the "conflict and communication breakdown were attributable entirely to Thompson and could not be reasonably expected to resolve with substitution of counsel"; the trial court

therefore "did not abuse its discretion by denying Thompson's motions." Id. at 463.

Here, as is evidenced by Basra's numerous other "conflicts" with his other attorneys, any conflict that may have existed between Basra and Johnson was entirely of Basra's own creation, and there is no reason to believe that any other attorney would have satisfied Basra. Further, the reason stated for their "impasse" was a difference of opinion in strategy and a reluctance to move past the court's prior rulings – neither of these created a real conflict that would have justified substituting yet another new attorney to represent Basra. This is especially true in light of Basra's motion to dismiss because of a speedy trial violation; any substitution of counsel would have extended his time in custody even further. CP 174-75.

Basra never raised the issue of a conflict with Johnson on the record, his cites to the record do not support his arguments, he did not preserve the issue for appeal, and there is no reason to think that another attorney would have been any more successful in his or her efforts to represent Basra. This issue is meritless.

whether or not Mr. Basra suffered with a mental illness" when he murdered his wife. 6RP 516. After meeting Basra for an extensive evaluation, reviewing a transcript of the 911 call, transcripts of witness' statements to defense investigators and police, police reports, "stacks" of pages of Basra's medical records, scene diagrams and photographs, and a medical evaluation by the State's forensic psychologist, Dr. Gollogly concluded that Basra had a "diminished capacity as to what happened when he assaulted his wife." 6RP 520-43, 672-73.

The court's instructions to the jury included an instruction regarding the potential effects of mental illness on the requisite mens rea for the crimes charged: "Evidence of mental illness or disorder may be taken into consideration in determining whether the defendant had the capacity to form "premeditation" and "intent." CP 74, 75.

During closing argument, attorney Johnson relied extensively on Basra's mental health issues, telling the jury that Basra's mental illness interfered with his "ability to form intent" when he strangled his wife: "...his heart's going, his hands are shaking... clearly, Mr. Basra, not able to control his judgment, chose to fight... There was something wrong with his judgment,

there was something wrong with his perception... Because his brain was ill, there was nothing there to stop him." 6RP 956, 959-60.

Johnson also spent much of his closing argument talking about Dr. Gollogly's opinions, and contrasting them with those of the State's mental health expert, emphasizing the meetings Dr. Gollogly had with Basra, Gollogly's neutrality, and the thoroughness of Gollogly's work in diagnosing Basra. 6RP 971-75. Dr. Gollogly had testified that he had spoken with a psychologist from the jail who had treated Basra while in custody, and Johnson reminded the jury how the jail medical records also supported his diminished capacity defense. 6RP 977-78. Johnson summarized his defense by saying, "The big issue is going to be: Do I accept that Mr. Basra suffered with mental illness at the time?" 6RP 978. The last 15 pages of transcript of Johnson's closing argument deal almost entirely with Basra's mental defense. 6RP 128-43.

b. Basra's Mental Health Was Thoroughly Investigated And Extensively Relied Upon.

When a defense counsel in a serious case knows about mental health issues that are relevant to forming an informed defense theory, the counsel has a duty to conduct an investigation

into the issue and, if necessary, retain experts to testify accordingly. In re Pers. Restraint of Davis, 152 Wn.2d 647, 732, 101 P.3d 1 (2004). Failure to do so can give rise to an ineffective assistance of counsel claim. In re Pers. Restraint of Brett, 142 Wn.2d 868, 873, 880, 16 P.3d 601 (2001). A reviewing court will not consider an issue on direct appeal that relies on facts outside of the record. State v. McFarland, 127 Wn.2d 322, 338 n.5, 899 P.2d 1251 (1995).

To claim that Basra's defense attorney failed to investigate his mental health issues is not consistent with the record, which reveals that Basra was evaluated by two separate mental health experts for the defense and one State's expert, and that Johnson made Basra's mental health issue central to his defense at trial. Basra's defense attorney at trial provided extensive testimony regarding Basra's mental health defense. In what occupies over 150 pages of transcribed testimony, Dr. Gollogly testified about Basra's upbringing, his culture, his health, his symptoms, his depression and panic attacks, his anxiety, and ultimately, Basra's inability to "form the requisite intent to commit the crime charged." 6RP 520-683.

Basra makes much of a perceived failure by Johnson to introduce specific evidence of his mental health issues at trial, specifically a "blood test" and evidence of "homeopathic medicine found at his home,[4]" but this argument relies on matters outside the record that cannot be properly addressed in an appeal, and should be disregarded by this Court. See State v. McFarland, 127 Wn.2d at 338 n.5. This issue is without merit.

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[4] Basra claims that the State "attempted to present into trial the mental health issues of this Appellant, addressing medical personel [sic] regarding self treatment and 'Homeo-pathic medication' found in defendant's home" but was "blocked" by Basra's defense attorney. Basra's S.A.G at 25. Basra cites to "RP 672" for this statement, but 6RP 672 (volume 6 is the only transcript volume that has over 600 pages) has nothing to do with this quote. Before Basra's daughter testified, the prosecutor mentioned that Basra had a "supply of homeopathic medicines" that he would use to "self-medicate," and that none of the "psychologists who evaluated Mr. Basra attribute use of that as to being any of the cause [sic] of what their diagnosis may be." 6RP 84. After Johnson assured the court that he had no intention of "going into that whatsoever," the prosecutor formally moved to exclude any mention of the homeopathic medicines, and Johnson agreed. 6RP 84. There is one more mention of the word "homeopathic" in all of volume 6, where Johnson tells Dr. Gollogly, outside the presence of the jury, that he will not be asking him about "the homeopathic" [sic]. 4RP 508. Nowhere in the record is there a suggestion that the homeopathic medicines could somehow have contributed to Basra's defense. The trial judge does mention Basra's request that his "blood test" be admitted after both parties rested, referencing a letter the court received from Basra:

> [Basra] has a concern about Dr. Hall not being asked about some blood tests, which are TSH blood tests, which is thyroid stimulating hormone tests, and that there was a difference in August and September 2010.
>
> Although I'm satisfied it is of concern medically to Mr. Basra, it has nothing of any relevance to do with this particular case.

6RP 1012.

6. THE AMENDED INFORMATION WAS NOT VINDICTIVE.

Basra contends that the prosecutor acted with "evil, deliberate intent" by amending the charges against him prior to trial, and that the arraignment prior to trial was untimely. Basra's S.A.G. at 33. But the State had probable cause to charge murder in the first degree, and Basra had long been on notice that the State would charge him with murder in the first degree at trial.

a. Relevant Facts.

In the information filed on July 29, 2009, Basra was charged with attempted murder in the second degree (his wife was hospitalized but had not yet died). CP 1, 3. In the first amended information, filed on August 4, 2009, after Basra's wife had died, Basra was charged with murder in the second degree. CP 189-90. Prior to trial, Basra was charged with murder in the first degree and murder in the second degree for the same act; the information was filed on January 9, 2012. CP 7-8.

Hansen submitted a declaration to the court in support of his motion to withdraw where he memorialized Basra's negotiations with the State. CP 144-48. In that declaration, Hansen said that he first submitted an evaluation by a defense mental health expert to

the prosecutor, but "the State was still not convinced to offer a plea disposition for any charge less than Murder in the Second Degree, and threatened to raise the charge to Murder in the First Degree, based upon premeditation in the course of the strangulation, if the Defendant did not plead guilty to Murder in the Second Degree." CP145.

According to his declaration, after Hansen retained another expert, Dr. Gollogly, and submitted his notes and evaluation to the prosecutor on October 13, 2010, the prosecutor indicated to Hansen that he "may be willing to offer First Degree Manslaughter with an agreed high end sentence." CP 145-46. Hansen spent two hours personally meeting with Basra on November 9, 2010 to "discuss all of his options." CP 146. Hansen writes in his declaration that, at the November 9, 2010 meeting and even at those meetings that "preceded it," Basra "expressed dissatisfaction with the tentative plea offer." Hansen was attempting to negotiate. CP 146.

b. Basra Freely Rejected Negotiations And Had Notice Of The Amendment.

Prosecutors are vested with great discretion in determining how and when to file criminal charges. State v. Lewis, 115 Wn.2d

294, 299, 797 P.2d 1141 (1990); Deal v. United States, 508 U.S. 129, 134 n.2, 113 S. Ct. 1993, 124 L. Ed. 2d 44 (1993). Prosecutorial action is vindictive when it is designed to penalize a defendant for exercising his constitutional rights. State v. Korum, 157 Wn.2d 614, 627, 141 P.3d 13 (2006). There is no violation of due process if "the accused is free to accept or reject the prosecution's offer" and "the prosecutor has probable cause to believe that the accused committed an offense defined by statute." Bordenkircher v. Hayes, 434 U.S. 357, 363-64, 98 S. Ct. 663, 54 L. Ed. 2d 604 (1978).

Basra's contention that the State was vindictive in its charging is unsupported by case law. In State v. Korum, under facts that were much more suggestive of prosecutorial vindictiveness than those presented here, the Washington Supreme Court held that there was insufficient evidence to give rise to a presumption of prosecutorial vindictiveness, let alone a finding of actual vindictiveness. 157 Wn.2d at 636. In that case, the defendant initially pleaded guilty and received a sentence of 135 months. Id. at 621. In exchange for that plea agreement, the State agreed to amend its information to reduce the substantive charges and further agreed not to file additional charges for other crimes it

was concurrently investigating. Id. at 620-21. After the defendant successfully moved to withdraw his guilty plea, the State amended the information to charge a total of 32 counts and firearm enhancements. Id. at 621. The jury convicted Korum of 30 of those counts, and the trial court imposed a sentence ten times greater than his original plea sentence recommendation under the plea agreement. Id. at 622.

The Court of Appeals in Korum found prosecutorial vindictiveness and dismissed the charges added after the defendant withdrew the guilty plea. Id. But the Supreme Court disagreed and reversed the Court of Appeals, holding that the addition of the charges did not support a finding of prosecutorial vindictiveness. Id. at 620. As part of that holding, the Supreme Court noted that the "mere filing of additional or more serious charges after the withdrawal of a plea agreement, without proving additional facts, does not give rise to a presumption of vindictiveness." Id. at 631. The court also noted:

> [N]either Korum nor the Court of Appeals ever contended that the prosecutor lacked probable cause for the additional charges, or that the added charges exceeded the 16 additional charges that the prosecutor had promised to file if Korum did not plead guilty.... We conclude that the increased number and the consequent severity of the collective charges

> cause the discrepancy in the sentences, not prosecutorial vindictiveness.

Id. at 632-33.

Here, while the State arraigned Basra on the murder in the first degree charge less than a month before trial, it is evident that Basra was on notice of this amendment at least since November 9, 2010, over a year before trial began, and had rejected it. CP 146. This is far more favorable to Basra than the facts in Korum were to Korum, and even those facts were not found to support a finding of vindictiveness.

The State here had probable cause to proceed on murder in both the first and second degrees, and Basra's personal "dissatisfaction" with the State's contemplated offer led him to reject a reduction in exchange for accepting some responsibility for his wife's murder. CP 144-47. The prosecutor was merely following through on his promise to Basra made many months earlier, that the charges would be amended to murder in the first degree at trial; there are no facts to indicate prosecutorial vindictiveness, and this issue is meritless.

7. THE PROSECUTOR'S CLOSING WAS APPROPRIATE AND THERE WAS NO OBJECTION.

Basra claims that the prosecutor committed misconduct in closing argument when he argued that Basra was guilty of both murder in the first degree and murder in the second degree,[5] and by giving an improper "fill in the blank argument." Basra's S.A.G. at 35-36. But count II was charged as an alternative to count I, so the prosecutor's argument asking the jury to find Basra guilty of both charges (and moving to vacate one thereafter), was appropriate. Basra does not provide a quote for his alleged "fill in the blank" argument, and his cite to "RP 909," assuming it refers to "6RP 909," provides no indications of such an argument, nor has the State found it elsewhere in the record. This issue is meritless.

8. BASRA'S RIGHT TO TESTIFY WAS PRESERVED.

Basra claims that he was prevented from testifying because his attorney asked him only few questions and he spoke through an interpreter. Basra now claims that, at trial, he wanted to speak to the jury without an interpreter so that they could hear his broken English, and infer something about his statements made to police

[5] Basra quotes the prosecutor's final words in rebuttal: "I made it to the last paper. It is as it seems, the defendant ... in anger and with premeditated intent, and because of that he is guilty of murder in the first degree and he's also guilty of felony murder in the second degree." 6RP 1009.

based on his broken English. Basra's S.A.G. at 44. But selecting questions to ask Basra during his testimony was part of Johnson's trial strategy and the record does not reflect Basra's desire to testify in English nor to have Johnson ask him any additional questions.

Basra testified through an interpreter, but was asked only about the color of his turban and the State had no questions for cross examination that were within the scope of that limited direct examination.[6] 6RP 685-88.

Whether and how to question a witness falls within the parameters of legitimate trial strategy and tactics. See In re Pers. Restraint of Stenson, 142 Wn.2d 710, 735, 16 P.3d 1 (2001); State v. Gallagher, 112 Wn. App. 601, 612, 51 P.3d 100 (2002), review denied, 148 Wn.2d 1023 (2003). A defendant who wants to testify "may do so 'by insisting on testifying, speaking to the court, or discharging his lawyer.'" United States v. Pino-Noriega, 189 F.3d 1089, 1095 (9th Cir.1999) (quoting United States v. Joelson, 7 F.3d 174, 177 (9th Cir.1993)); State v. King, 24 Wn. App. 495, 499, 601

[6] The trial judge provided some insight into the question of the color of the turban by referring to one of Basra's letters to the court at the close of trial. 6RP 1011. The judge said that one of the complaints in the letter referred to Basra's disagreement about the police testimony regarding the color of Basra's turban at the time of his arrest: "I am satisfied he testified to the discrepancies in what colors the turbans were. But I am satisfied, for Mr. Basra's information, that that goes to the weight of the evidence, and certainly would not result in suppressing any testimony of the officers." 6RP 1011.

P.2d 982 (1979). In the present context, the defendant is denied his right to testify only if "his attorney actually prevented him from testifying in his own behalf." King, 24 Wn. App. at 499.

The presumption for a reviewing court is strongly in favor of effective performance of trial counsel. Strickland v. Washington, 466 U.S. 668, 669, 1045 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). Here, Basra took the stand and testified; he was never denied that right. 6RP 683-88. The extent of the questions and the decision to not have Basra speak in English fall within the parameters of trial strategy, and Basra provides no argument or authority to undermine the presumption that his attorney acted in his interests. Basra's argument that having permitted the jury to hear his spoken English would have somehow made a difference at trial is difficult to accept, especially because the police officers had already testified that Basra's English was indeed accented. 6RP 27-28. This argument is without merit.

9. THERE WAS NO ERROR, THEREFORE THERE WAS NO CUMULATIVE ERROR.

Basra claims that the doctrine of cumulative error warrants reversal here. But the application of that doctrine is limited to

instances when there have been several trial errors that, standing alone, may not be sufficient to justify reversal but when combined may deny a defendant a fair trial. See, e.g., State v. Coe, 101 Wn.2d 772, 789, 684 P.2d 668 (1984). Here, Basra points to no actual errors during trial, so there can be no such accumulation.

10. THE PERIOD OF COMMUNITY CUSTODY SHOULD BE CORRECTED.

Basra argues that his community custody sentence was erroneous; he is correct, and his judgment and sentence should be corrected to reflect the correct community custody range.

At Basra's sentencing on April 20, 2012, the Court incorrectly ordered 36 months of community custody for a "sex offense," instead of a "serious violent offense." CP 127. On June 26, 2012, the Court signed an "Order Correcting Scrivener's Error on the Judgment and Sentence" and ordered that the 36 month period of community custody be served for a "serious violent offense" and not a sex offense. CP 191-92. But because the crime was committed prior to July 26, 2009, the Court should have imposed a *range* of community custody between 24 and 36

months.[7] This Court should remand only to correct the term of community custody.

D. CONCLUSION

For the foregoing reasons, the State asks this Court to affirm Basra's conviction.

DATED this 30 day of May, 2013.

Respectfully submitted,

DANIEL T. SATTERBERG
King County Prosecuting Attorney

By: _____
TOMÁS A. GAHAN, WSBA #32779
Senior Deputy Prosecuting Attorney
Attorneys for Respondent
Office WSBA #91002

[7] "For offenses committed after July 1, 2000 but prior to July 26, 2009, the court may impose a community custody range as follows: for serious violent offenses, 24 to 36 months; for crimes against persons, 9 to 12 months; for offenses under 69.50 and 69.52, 9 to 12 months." Superior Court Criminal Rules 4.2.

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 THOMAS KUMMEROW, the attorney for the appellant, at Washington Appellate Project, 701 Melbourne Tower, 1511 Third Avenue, Seattle, WA 98101, containing a copy of the STATE'S RESPONSE TO APPELLANT'S STATEMENT OF ADDITIONAL GROUNDS in STATE V. PARAMJIT SINGH BASRA, Cause No. 6661-5 -I, in the Court of Appeals, Division I, for the State of Washington.

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

Dated this 30 day of May, 2013

Name
Done in Seattle, Washington