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STATE OF WASHINGTON

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**COURT OF APPEALS, DIVISION II  
STATE OF WASHINGTON**

STATE OF WASHINGTON, RESPONDENT

v.

JAMES KEVIN PITTS, APPELLANT

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Appeal from the Superior Court of Pierce County  
The Honorable Frederick W. Fleming

No. 04-1-02023-1

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**BRIEF OF RESPONDENT**

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GERALD A. HORNE  
Prosecuting Attorney

By  
P. GRACE KINGMAN  
Deputy Prosecuting Attorney  
WSB # 16717

930 Tacoma Avenue South  
Room 946  
Tacoma, WA 98402  
PH: (253) 798-7400

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A. ISSUES PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR.

1. Did defendant's alcohol use render his confession involuntary and thus inadmissible where defendant is a conditioned drinker who showed no signs whatsoever of being intoxicated when he made his statement to police? (Appellant's Assignment of Error #'s 4-10.)
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5. Is defendant entitled to relief under the cumulative error doctrine where there defendant has failed to show any prejudicial error? (Assignment of Error #12.)

B. STATEMENT OF THE CASE.

1. Procedure

The State charged defendant with second degree murder on April 22, 2004, in connection with the drowning of his wife on April 21, 2004. CP 1-3. On May 13, 2004, the State filed an amended information charging defendant with first degree murder. CP 5-7.

The trial court conducted a 3.5 hearing and heard testimony from seven witnesses on January 10, 11, 26, 27, and March 1, 2005. RP 97, 136, 244, SRP<sup>1</sup> 30, 58, 334, and 379. On March 1, 2005, the trial court ruled that defendant's statements to law enforcement officers were admissible. RP 282-287. The court entered its written Findings of Fact and Conclusions of Law for 3.5 Hearing on August 25, 2005. CP 591-610, RP 2194-2251.

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<sup>1</sup> After defendant's brief was filed, the verbatim report of proceedings was supplemented by three additional volumes. These volumes are dated January 10, 11, and 26, 2005. They were not assigned volume numbers, but are paginated sequentially from 1 through 502. They will be cited herein as SRP followed by page number.

The jury returned a verdict of guilty of first degree murder. CP 513, RP 2187. The trial court sentenced defendant to 240 months, the low end of the standard range. CP 515-526.

Defendant filed a timely notice of appeal. CP 537.

## 2. Facts

On April 21, 2004, defendant killed his wife, Tara Pitts, by drowning her in the bathtub of their residence. RP 1380-82. Tara was 28 years old at the time. RP 773. She and defendant had a son, Joseph, who was almost 10 years old at the time of the murder. RP 775.

Defendant enlisted in the U.S. Army in the summer of 1995. RP 1201. From March 2003 to February 2004, defendant was deployed to Iraq with his construction company. RP 1199. Defendant's mission in Iraq was construction projects. RP 1122. He was never involved in direct combat, nor did ever fire his weapon. RP 1123, 1210, and 1389.

While in Iraq, defendant began an adulterous affair with a soldier in his squad, Jacqueline Besio. RP 830. When they returned to Ft. Lewis from Iraq, defendant and Ms. Besio continued their relationship. RP 834. Ms. Besio and her husband lived in the same apartment complex as defendant and his wife, Tara. RP 835. Ms. Besio observed no change in defendant's demeanor once they returned from Iraq. RP 855. The weekend before the murder, defendant spent two nights in a row with Ms. Besio. RP 1315.

While at Fort Lewis, Ms. Besio wrote love letters to defendant. RP 841. Tara Pitts found the letters and turned them in to defendant's military command at Fort Lewis. RP 863-870. Defendant was angered by this, fearing a dishonorable discharge for an adulterous affair with one of his subordinates. RP 800, 1316. Defendant told police he decided to go AWOL (absent without leave). He was so angry with Tara, he flew to Ohio instead of killing her. RP 1066, 1314. While in Ohio, defendant called Ms. Besio many times. RP 872. He also talked to Tara on the telephone, and was overheard telling her that he should kill her. RP 803. Tara talked him into coming home, but he was still angry with her because she was trying to "burn" him. RP 1067.

On the day of the murder, Tara kept saying, "I'm sorry I brought you back," and "I can't make this work." RP 1378-79. She said over and over how sorry she was. Id. Per defendant, Tara nagged him about his affair with Ms. Besio. RP 1071. She followed him into the bathroom where he was running a bath to relax<sup>2</sup>. RP 1071. Defendant said that they had sexual relations. RP 1378. They had oral sex, vaginal sex, and anal sex, in that order. 1071-72. They were on the bathroom floor. RP 1320. Before Tara turned around, defendant grabbed her head and forced her head under water, holding her there until she stopped kicking. RP 1072,

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<sup>2</sup> Defendant's brother and son both testified that defendant took showers, not baths. RP 780, 803. Defendant was 5'11", 200 lbs. RP1284. The bathtub he claims to have filled to bathe in measured less than 4'11" long by 2'4" wide. RP 952.

1320, 1379. Defendant said he probably shouldn't have killed her that way. RP 1321. Defendant was very matter-of-fact when he talked about killing his wife. RP 1074.

Defendant moved his wife's corpse to the bedroom. RP 1327. He then made arrangements for a neighbor to meet his son after school and take him to the neighbor's apartment. RP 1029.

Defendant phoned Ms. Besio and asked her to come by his apartment "for one last kiss." RP 877. She declined. Id.

At about 1:00 p.m. on the day of the murder, defendant went to the Fort Lewis Bowling Center. RP 1262. There, he ordered a hamburger and a pitcher of beer. RP 1264. Defendant bowled and conversed with another patron. RP 1262. He was calm, relaxed and did not appear to be intoxicated. RP 1263-64.

While still at the bowling alley, defendant called Fort Lewis and turned himself in for killing his wife. SRP 36-37. Criminal investigations officers arrived and took defendant into custody at approximately 3:30 p.m. RP 1277. Defendant was calm and did not appear to be under the influence of intoxicants. RP 1281-82.

Army CID agents delivered defendant to Pierce County Sheriff's Office detectives around 5:00 p.m. RP 1307. The detectives had discovered Tara's body earlier in the day. RP 1302

Detectives Jiminez and Hall read defendant his Miranda rights which he stated he understood and agreed to waive. RP 146, 1307-10.

Defendant was extremely cooperative with the detectives. RP 164, 1074. Defendant made a full confession. Ex #1. He admitted that he drowned Tara in the bathtub of their residence. RP 1320. He admitted to the affair with Ms. Besio and that he went to Ohio instead of killing Tara for turning the letters over to his commanding officers. RP 1314. When defendant spoke about Tara, he still seemed very angry with her. RP 1074. However, when he spoke of Ms. Besio, he was more at ease and happy. Id.

Defendant was booked into the Pierce County Jail. RP 975. Defendant used the phone to call Ms. Besio at 11:00 p.m. RP 976, 877.

During jury selection on April 4, 2005, the jury panel was asked by the judicial assistant to step out of the courtroom during a break. RP 524. Some of the jurors wondered aloud why they were being made to leave the courtroom. Id. Juror #4 speculated that it was because defendant would be brought into the courtroom in handcuffs. Id. None of the jurors, including Juror #4, saw defendant in handcuffs and only a few jurors could have heard Juror #4 make that comment. RP 526-27. Defendant moved for a mistrial. RP 525. The trial court denied the motion. RP 526.

On April 6, 2005, during a break, corrections officers escorted defendant down the hallway to use the restroom. RP 847. Defendant was in handcuffs. Id. There was a misunderstanding between the judicial assistant and the corrections officers who believed that the jurors were to be held in the jury room. RP 848. On the way down the hall, the officers

observed one of the jurors. RP 847-48. Defendant used the restroom and on the way back to the courtroom, officers observed jurors just outside the courtroom. RP 848. They used an alternate route to avoid any jurors, however, as the officer turned a round, he saw two jurors returning from their break. RP 848. Defendant moved for mistrial. RP 851. The trial court denied this motion. RP 853. The court twice offered to read a curative instruction of defendant's choosing. RP 851, 853. Defendant declined. RP 853.

At trial, defendant did not contest that he drowned his wife in the bathtub of their residence. The defense presented evidence that defendant's ability to form the specific intent required was impaired. RP 1510-11, 1663, 1743. The first defense expert diagnosed defendant with an "extreme emotional disturbance". RP 1510. The second defense expert diagnosed "major depression." RP 1652. The third defense expert diagnosed "major depressive disorder." RP 1741. Defense and prosecution experts agreed that defendant was not suffering from any form of post-traumatic stress disorder. RP 1588, 1694, 1785, 1857.

The jury returned a verdict of guilty as charged. RP 2187.

C. ARGUMENT.

1. THE TRIAL COURT PROPERLY ADMITTED DEFENDANT'S CONFESSION AS VOLUNTARY WHERE, ALTHOUGH DEFENDANT HAD BEEN DRINKING, HE SHOWED NO SIGNS WHATSOEVER OF BEING INTOXICATED WHEN HE MADE HIS STATEMENT TO POLICE.

Under Miranda v. Arizona,<sup>3</sup> a confession is voluntary, and therefore admissible, if made after the defendant has been advised concerning rights and the defendant then knowingly, voluntarily, and intelligently waives those rights. A confession is coerced "if based on the totality of the circumstances the defendant's will was overborne." State v. Burkins, 94 Wn. App. 677, 694, 973 P.2d 15 (1999) (citing State v. Broadaway, 133 Wn.2d 118, 132, 942 P.2d 363 (1997), review denied, 138 Wn.2d 1014, 989 P.2d 1142 (1999)). Some of the pertinent circumstances include whether the confession "was extracted by any sort of threats, violence, or direct or implied promises, however slight." State v. Riley, 17 Wn. App. 732, 735, 565 P.2d 105 (1977). The court also considers "the condition of the defendant, the defendant's mental abilities, and the conduct of the police." Broadaway, 133 Wn.2d at 132 (citing State v. Rupe, 101 Wn.2d 664, 678-79, 683 P.2d 571 (1984)).

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<sup>3</sup> Miranda v. Arizona, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694, 10 A.L.R.3d 974 (1966).

When a trial court determines a confession is voluntary, that determination is not disturbed on appeal if there is substantial evidence in the record from which the trial court could have found the confession was voluntary by a preponderance of the evidence. State v. Ng, 110 Wn.2d 32, 37, 750 P.2d 632 (1988).

“Intoxication alone does not, as a matter of law, render a defendant’s custodial statements involuntary and thus inadmissible.” State v. Turner, 31 Wn. App. 843, 845-846, 644 P.2d 1224 (1982)(statements made during heroin withdrawal admissible where defendant was advised of rights, appeared rational, and jail physician saw no need for medical treatment), review denied, 97 Wn.2d 1029 (1982); State v. Alferez, 37 Wn. App. 508, 510; 681 P.2d 859 (1984)(statements made subsequent to defendant’s arrest for driving while intoxicated, and a breathalyzer reading of .12, held admissible where defendant advised of rights, functioned well when stopped, followed orders, and did not request an attorney or an interpreter). When a defendant claims that he confessed while intoxicated, a court may still admit a confession that was the product of “a rational intellect and free will.” State v. Gregory, 79 Wn.2d 637, 642, 488 P.2d 757 (1971)(statements made after defendant received several dosages of demerol and codeine held admissible where defendant advised of rights, freely and unhesitatingly answered questions, and refused to answer further questions when confronted with the accusation that he was lying),

overruled on other grounds by State v. Rogers, 83 Wn.2d 553, 520 P.2d 159 (1974).

In State v. Booth, 75 Wn.2d 92; 449 P.2d 107 (1968), the defendant and his wife were seen drinking in several bars one evening. Later that night, Booth drove to a bar and announced that he had just shot his wife. Booth drank two double alcoholic beverages, while waiting for the police to arrive. He was arrested and transported to the police station. Law enforcement went to the defendant's residence and located his wife's body. Booth was brought from the drunk tank to the chief's office where his rights were explained to him. He confessed to killing his wife. During the course of the conversation, about 3:09 a.m., Booth took a breathalyzer test which registered .16. State v. Booth, at 93-94. The court held the statements admissible because Booth was advised of his rights, did not request counsel, and was readily willing to talk. The court further determined that there were no threats, force or threats of force, nor any evidence of promises or inducements made to Booth. While the court determined that Booth had been drinking, it held that he was not intoxicated to the point where it would be unfair to talk to him. Booth, at 95.

In the instant case, there is no question defendant consumed alcohol throughout the day on April 21, 2004. Defendant's confession, however, was the product of a rational intellect and free will. After killing his wife, defendant went to the bowling alley. SRP 61. At 2:50 p.m., the

defendant called First Sergeant Mario Powers and confessed to killing his wife. SRP 36-37. The phone call lasted approximately five minutes. SRP 41. Defendant was serious, clear, and concise during the conversation with Powers. SRP 37-38. Defendant was coherent, he was not slurring his words, and did not sound as if he was under the influence of alcohol. SRP

At 3:40 p.m., Agents Rasmussen and Brannon with the 44th Military police contacted defendant at the bowling alley. SRP 62. Upon contacting defendant, Agent Rasmussen described defendant as appearing calm and relaxed. SRP 66. When asked for his identification, defendant had no trouble retrieving his identification. Id. According to Agent Rasmussen, defendant did not appear to be under the influence of alcohol, did not smell of intoxicants, and did not slur his words. SRP 67-68. Agent Rasmussen observed that defendant had no trouble walking and was coherent. SRP 68. According to Agent Brannon, defendant did not appear to be under the influence of alcohol, did not smell of intoxicants, did not have bloodshot or watery eyes, and did not stumble, in any manner, when he walked. RP 107-08. According to Agent Brannon, defendant, who was wearing bowling shoes, showed no emotion and acted like he didn't care during the contact. Id.

Shortly before 5:00 p.m., defendant was turned over to Detective John Jimenez, at the Pierce County Sheriff's Department, Lakewood precinct. RP 141. Detective Richard Hall was also present. RP 143.

According to the detectives, defendant did not appear to be under the influence of alcohol or drugs during the contact. RP 162, SRP 347. Defendant did not smell of intoxicants, nor did he have bloodshot, watery eyes. RP 165, SRP 67-68. Defendant did not slur his words and he appeared coherent and rational throughout the interview. Id. Defendant was calm and very matter of fact in his demeanor and statements. RP 163, SRP 348. Defendant was articulate and gave narrative, detailed, and descriptive answers to questions. RP 163, SRP 344.

Defendant's ability to describe in detail his conduct supports the conclusion that he was not too intoxicated to understand and waive his Miranda rights. Further, defendant was reluctant to provide the detectives with the name of his girlfriend, and only did so after further prompting by the detectives. RP 148, 343. This defensive action on the part of defendant supports the view that he was in full possession of his mental faculties during the questioning. Further, defendant's noticeable demeanor change when he spoke about Tara Pitts versus his girlfriend Jacqueline Besio also supports this view.

Defendant has a history of drinking heavily from the time he was a teenager and on into his adult life. RP 177. There is no question that the defendant has a high tolerance to alcohol. RP 255. The persons who witnessed the defendant on the day in question provide the best evidence of his orientation, coherency, and ability to understand and follow instructions.

Here, defendant's challenge to the findings of fact is insufficient. An appellate court reviews only those findings to which error has been assigned; unchallenged findings of fact are verities upon appeal. State v. Hill, 123 Wn.2d 641, 644, 647, 870 P.2d 313 (1994). As to challenged factual findings, the court reviews the record to see if there is substantial evidence to support the challenged facts; if there is, then those findings are also binding upon the appellate court. Id. Substantial evidence exists when there is a sufficient quantity of evidence to persuade a fair-minded, rational person of the truth of the finding. Hill, at 644. Credibility determinations are for the trier of fact and are not subject to appellate review. State v. Camarillo, 115 Wn.2d 60, 71, 794 P.2d 850 (1990). The trial court's conclusions of law are reviewed de novo. State v. Mendez, 137 Wn.2d 208, 214, 970 P.2d 722 (1999).

In applying the above law to the case now on appeal, the court should treat the findings of fact as verities. Defendant has assigned error to seven of the findings of fact pertaining to the 3.5 hearing. There is no argument in the brief, however, as to how these findings are unsupported by the evidence. In Henderson Homes, Inc v. City of Bothell, 124 Wn.2d 240, 877 P.2d 176 (1994), the Supreme Court was faced with an appellant who assigned error to the findings of fact but did not argue how the findings were not supported by substantial evidence; made no cites to the record to support its assignments; and cited no authority. The court held that under these circumstances, the assignments of error to the findings

were without legal consequence and that the findings must be taken as verities.

It is elementary that the lack of argument, lack of citation to the record, and lack of any authorities preclude consideration of those assignments. The findings are verities.

Henderson, 124 Wn.2d at 244; see also State v. Jacobson, 92 Wn. App. 958, 964 n.1, 965 P.2d 1140 (1998).

Because defendant has failed to support his assignment of error to the trial court's findings of fact with argument, citations to the record, and citations to authority, this court should treat the assignments as being without legal consequence. The findings should be considered as verities upon appeal.

Because of the importance of the challenged findings, the State provides the following citations to the record, in addition to the above summary of the facts, to demonstrate that the findings are supported by substantial evidence.

Finding of Fact #9, that defendant was coherent throughout the contact with Agent Rasmussen, is supported by the record at SRP 68.

Finding of Fact #40, that defendant was coherent throughout his contact with the detectives, is supported by the record at RP 165, SRP 348.

Finding of Fact #43, that there was no indication defendant was impaired during his contact with Detective Hall, is supported in the record at SRP 347-48.

Finding of Fact #46, that defendant was in full possession of his mental faculties during questioning by detectives, is supported in the record at RP 148, 162-163, 165, 176, SRP 339, 344, 347-49.

Finding of Fact # 47, that defendant was coherent throughout his contact with Deputy Olson, is supported in the record at 385-386.

Finding of Fact #54, that defendant's ability to make a knowing and intelligent choice with regard to his Miranda rights was not impaired, is supported in the record as set forth in the facts above. He showed no signs of being under the influence, he understood his rights, he gave a very detailed, descriptive statement about events leading up to the murder, the murder itself, and events after the murder. He was coherent and cooperative.

Defendant claims that the above findings are not supported by the evidence only because Dr. Larson, the defense expert, gave a differing opinion. Brief of Appellant ("BOA") at 32-33. However, credibility determinations and the weight to be given to testimony is not subject to appellate review. See State v. Camarillo, 115 Wn.2d at 71.

The trial court had ample evidence to support its findings and conclusions. The statements were properly admitted.

2. DEFENDANT FAILED TO MEET HIS BURDEN OF SHOWING PREJUDICE WHERE DEFENDANT (1) WAS NOT SHACKLED DURING THE TRIAL, (2) ANY VIEW OF DEFENDANT SHACKLED WAS OUTSIDE THE COURTROOM, BRIEF AND INADVERTENT AND (3) DEFENDANT REFUSED A CURATIVE INSTRUCTION.

Federal and state constitutions entitle a criminal defendant to appear at trial free from shackles, except in extraordinary circumstances. State v. Finch, 137 Wn.2d 792, 842-43, 975 P.2d 967 (1999). This right derives from the implicit constitutional right to a fair trial and presumption of innocence. Id. at 844. There is a danger that the presumption of innocence is destroyed if jurors observe the defendant in shackles. Id. Shackles may raise an inference in the minds of jurors that the defendant is a dangerous person who is predisposed to commit violent crimes. Id. at 845.

The trial court may permit the defendant to be shackled *during the trial* only when shackling is necessary to prevent injury to those present in the courtroom, to prevent disorderly conduct at trial, or to prevent an escape. State v. Damon, 144 Wn.2d 686, 691, P.3d 418 (2001). The trial court may order the defendant to be shackled only following a hearing and the entry of findings that justify the use of restraints. Id. at 691-92.

A substantive claim of unconstitutional shackling is subject to the harmless error analysis. Davis at 694. However, when a jury's view of a

defendant in shackles is brief or inadvertent, the defendant must make an affirmative showing of prejudice. State v. Elmore, 139 Wn.2d 250, 273, 985 P.2d 289 (1999). The burden for curing such a defect is placed on defendant. Id. at 274. Where defendant fails to request a curative instruction regarding a shackling incident (removal of shackles outside courtroom viewed by some jurors), trial court's denial of defendant's motion for a new trial based on alleged prejudice therefrom was proper. State v. Gosser, 33 Wn. App. 428, 656 P.2d 514 (1982)(cited with approval in State v. Elmore, 139 Wn.2d at 274).

In the instant case, defendant was not shackled *during trial*. On April 5, 2005, prospective Juror #4 speculated that defendant was being brought into the courtroom in handcuffs. RP 524-527. The record does not show that any jurors actually heard this remark, although there were a few who could have heard it. Id. On April 6, 2005, the next day, three jurors saw the defendant wearing handcuffs while he was in the hallway being escorted to a restroom break. RP 847-853. This is analogous to Gosser because the jurors' view of defendant in shackles was both brief and inadvertent. Furthermore, only three jurors saw this. This situation is quite different from cases cited by defense where a defendant was restrained **during trial** and the entire jury viewed the defendant shackled day after day.

Here, defense counsel moved for a mistrial, refusing the trial court's offer of a curative instruction. RP 851-53. Under Gosser, the trial

court's denial of the motion for mistrial was proper because there is no evidence in the record that the incident prejudiced the minds of the jurors, nor did defendant accept the offer of a curative instruction.

In re PRP of Davis, 152 Wn.2d 647, 101 P.3d 1 (2004), a death penalty case, addresses the shackling issue. Davis was seen in shackles by only one juror on two occasions, brief glimpses both times, during the guilt phase of the trial. Id. at 704. No jurors saw Davis in shackles during the penalty phase. Id. The Washington Supreme Court upheld Davis' conviction, but ordered a new trial in the penalty phase. Id. at 705. The Davis court noted shackling was much more prejudicial in the penalty phase because the jury is to decide future dangerousness of a defendant. Id. at 705, quoting State v. Finch, 137 Wn.2d at 863. A defendant in shackles communicates to the jury that the defendant is viewed as dangerous by the judge and therefore has a greater possible impact on the jury in making the sentencing decision.

The case at bar can be distinguished from cases cited by defendant. Here, defendant was not shackled during the trial, merely during transportation to and from the courtroom. Therefore, Gosser applies. Additionally, there was properly admitted evidence before the jury that defendant was booked into the Pierce County Jail. Jurors heard testimony about defendant calling his lover, Ms. Besio, from the jail shortly after he was booked. RP 977. For the few, if any, jurors that briefly saw defendant in handcuffs in the hallway, this testimony was cumulative.

Thus, defendant has failed to demonstrate any prejudice in the minds of the jurors who may have seen defendant.

Similarly, defendant has failed to meet his burden in demonstrating prejudice by the fact that a juror speculated aloud about defendant being brought into the courtroom in handcuffs. During that incident, none of the jurors saw defendant in handcuffs. The record is silent as to whether any other jurors actually heard prospective Juror #4 make that comment. More importantly, prospective Juror #4 was the subject of defendant's first peremptory challenge, so he did not even serve on this jury. CP 613. (See Appendix A, Peremptory Challenges.) Thus, the only person who for sure heard the remark was not even on the jury panel. Therefore, defendant is unable to demonstrate prejudice.

Should this Court find that the jurors' possible viewing of defendant shackled was not brief and inadvertent or that defendant was not required to seek a jury instruction under Gosser and Elmore, this Court must apply the harmless error analysis. Davis at 694. In so doing, the court evaluates whether the evidence against the defendant is so overwhelming that no rational conclusion other than guilt can be reached. Id. Here, defendant fully confessed to killing his wife. His confession was detailed and he accepted full responsibility. RP 1056-1096, 1301-1382. The defense mental health experts provided no more than vague diagnoses of depression that "impaired" defendant's ability to form the requisite intent. RP 1510, 1652, 1741. There was convincing evidence

that defendant acted with purpose, fully intending the results of his actions before, after, and during the killing: (1) He thought of killing Tara days before the actual murder and fled to Ohio instead of killing her. RP 1066, 1314. (2) He had a motive to kill her: He was very angry with her for turning him into his superiors and he was having an affair with another woman. RP 863-70, 1066, 1316, 1379. (3) He went to see his son at school and brought him candy before turning himself in. RP 1272-73. (4) He made after school arrangements for his son because he would be arrested and his son's mother was dead. RP 1029. (5) He attempted to see his lover, Ms. Besio, for "one last kiss". RP 877. (6) He went to the bowling alley for one last meal as a free man before turning himself in. RP 1262-64. These were not the actions of someone who could not plan or intend the consequences of his acts. Defendant himself told police that what he did was wrong and that there was no mental defense or excuse and that a mental defense would be "all that little psycho stuff". RP 1382. Overall, the evidence against defendant was overwhelming such that guilt was the only rational conclusion that could be reached. Error, if any, was harmless.

3. THE PROSECUTOR'S QUESTION TO DEFENSE EXPERT REGARDING DEFENDANT'S PRIOR PSYCHIATRIC HOSPITALIZATION WAS NOT PROSECUTORIAL MISCONDUCT BECAUSE THE PROSECUTOR ACTED IN GOOD FAITH, THE QUESTION WAS PROPER, AND IT DID NOT DENY DEFENDANT A FAIR TRIAL.

a. Facts relevant to the prosecutor's question regarding defendant's prior psychiatric hospitalization.

Defendant had a prior psychiatric hospitalization at the Cleveland Clinic in 1989. Those records contain information that defendant reported an incident where he tried to kill a black man with a knife. RP 1812. Defendant reported that it would be worth life in prison had he succeeded with the killing and that he would wake up with a smile on his face every day. Id.

At trial, defendant called three expert witnesses to testify about his mental state at the time of the murder and whether his ability to form the requisite intent was impaired. The first expert was psychologist Dr. Kolbell. RP 1468. Dr. Kolbell testified that in evaluating defendant's mental state, he reviewed psychological records of defendant, including "mental health reports and psychiatric records related to his prior psychiatric hospitalizations." RP 1472, 1473.

On cross-examination of Dr. Kolbell, the prosecutor established that there were multiple psychiatric hospitalizations of defendant close in

time. RP 1526. Dr. Kolbell testified that on the first or second hospitalization defendant went to the Cleveland Clinic. RP 1526. Dr. Kolbell read the record from the Cleveland Clinic as part of his evaluation of defendant. 1473, 1526. The prosecutor asked about each psychiatric hospitalization, one-by-one. RP 1526-27. After the first two, she asked: "And then there was a third occasion, and this was on October 18, 1989, correct, where the defendant was admitted because he tried to kill a black man?" RP 1527. **Before the witness answered the question**, defense counsel objected and asked the trial court to strike the question. RP 1528. The jury was excused. When they returned, the trial court instructed them to disregard the last question asked by the State. RP 1543.

Outside the presence of the jury, the prosecutor argued that the evidence was admissible (1) to attack the basis of the expert's opinion and (2) to rebut testimony by the witness that defendant's history consisted of only minor skirmishes with the law. RP 1529, 1534. Dr. Kolbell admitted he testified that he was told that defendant had had only minor skirmishes with the law. RP 1535. The trial court initially overruled the objection because Dr. Kolbell had reviewed this information as part of defendant's mental health history and this was one of the reasons for defendant being hospitalized. RP 1530. The court then decided to sustain the objection and not allow the evidence, finding it was too prejudicial. RP 1538. When the prosecutor argued that the defense opened the door, the court

said, "I know, I know..." RP 1538. Defendant's motion for a mistrial was denied. RP 1539.

Dr. Kolbell later testified that "it was important to me to understand whether [defendant] had thought about killing anybody in the past..." RP 1543-44. He then went on to state that defendant had admitted to him wanting to kill on two or three occasions. These incidents involved another American soldier, an Iraqi civilian, and someone who accused him of sexual harassment. RP 1544-45. There was no objection to this testimony. Id.

Outside the presence of the jury, to make an offer of proof, the prosecutor asked Dr. Kolbell about the Cleveland Clinic records. RP 1608. Dr. Kolbell testified that he relied on the Cleveland Clinic records in arriving at his conclusion that defendant suffered from major depressive disorder and personality disorder. Id.

Defendant elicited testimony from another of his experts, Dr. Whitehill, regarding the Cleveland Clinic. RP 1801. Dr. Whitehill refers to the '89 admission at age 16. RP 1801. Without reference to any underlying facts, Dr. Whitehill opines that defendant was so psychologically disabled at that time that a reasonable inference may be made that his capacity to deliberate was significantly impaired. Id. Here, the defense opened the door to this subject matter and the facts on which this opinion is based. ER 705. However, presumably based on the court's

prior ruling, the prosecutor did not inquire into defendant's statement about trying to kill the black man.

Outside the presence of the jury, the State's expert, Dr. Marquez, testified that the information that defendant attempted to kill the black man is relevant to Dr. Marquez's expert opinion because it gives a sense of whether the possibility exists that defendant could have re-enacted that type of thinking in and around the time of the alleged crime. RP 1812-13. Dr. Marquez testified that it also can show a pattern of how defendant responds to people who anger him and that he had the capacity to form intent. RP 1812. It "gives one insight into the way of an act and what the consequences might be for that act." RP 1815.

- b. Defendant cannot meet his burden of showing prosecutorial misconduct because (1) the prosecutor acted in good faith and (2) her question was proper and did not deprive defendant of a fair trial.

To prevail on a claim of prosecutorial misconduct, the burden is on the defendant to show (1) that the prosecutor did not act in good faith and (2) that the conduct complained of was both improper and so prejudicial as to deny the defendant a fair trial. State v. Manthie, 39 Wn. App. 815, 820, 696 P.2d 33 (1985), State v. Weekly, 41 Wn.2d 727, 252 P.2d 246 (1952); State v. Wilson, 29 Wn. App. 895, 626 P.2d 998 (1981). The granting of a new trial on the basis of prosecutorial misconduct is a matter of the trial court's discretion, and a new trial should be granted only when there is

substantial likelihood that such misconduct, considered in terms of its cumulative effect, may have affected the jury's verdict. Manthie, 39 Wn. App. at 820, citing State v. Torres, 16 Wn. App. 254, 554 P.2d 1069 (1976). Generally, the trial court is the best suited to determine the prejudice of a statement. State v. Lewis, 130 Wn.2d 700, 707, 927 P.2d 235 (1996). The trial court's denial of a motion for mistrial is reviewed for abuse of discretion. Id.

The defendant bears the burden of establishing that the prosecutor's remarks were improper and that they were prejudicial. State v. Graham, 59 Wn. App. 418, 426, 798 P.2d 314 (1990); citing State v. Mak, 105 Wn.2d 692, 726, 718 P.2d 407 (1986). If the prosecutor's misconduct is so flagrant that no instruction can cure it, a new trial is the mandatory remedy. State v. Belgarde, 110 Wn.2d 504, 508, 755 P.2d 174 (1988).

**i. The prosecutor acted in good faith when she asked a question that was factually true and relevant to the witness' expert opinion.**

Defendant argues the prosecutor's question is was barred by ER 404(b) and that to ask such a question constituted prosecutorial misconduct. However, ER 404(b) does not apply to the cross-examination of an expert witness regarding the basis for the expert's opinion. ER 404(b) only applies to prior misconduct offered as substantive evidence, not evidence offered for impeachment. State v. Wilson, 60 Wn. App. 887,

891-92, 808 P.2d 754, review denied, 117 Wn.2d 1010, 816 P.2d 1224 (1991).

The applicable rule here is ER 705. ER 705 provides that although an expert need not disclose the basis for his or her opinion before giving that opinion, he or she "may in any event be required to disclose the underlying facts or data on cross-examination." ER 705. Thus, it gives the party who opposes an expert the right to cross-examine concerning anything the expert has relied on. The underlying theories are (1) that the proponent may not present an expert while at the same time shielding the bases of the expert's opinions from the opponent's cross-examination; and (2) that when the proponent presents an expert, he or she waives unfair prejudice arising from those bases. If the proponent wishes not to do this, he may have the expert not rely on those bases (assuming such bases are not necessary to the formation of the opinion), or he may refrain from calling the expert. Comment to 2000 amendments to FRE 703 (although 2000 amendments restrict proponent's ability to present otherwise inadmissible facts through expert, they do not restrict "the presentation of underlying expert facts or data when offered by an adverse party.").

The Washington Supreme Court confirmed this view in State v. Furman, 122 Wn.2d 440, 858 P.2d 1092 (1993). It said:

Dr. Halpern testified that he read the report and relied on the sexual history, at least to some extent, in reaching some of his conclusions. An expert may be required to disclose the facts or data underlying his opinions. ER 705.

**Otherwise inadmissible evidence may be admissible** to explain the expert's opinion or to permit the jury to determine what weight it should be given.

Id. at 452-53 [Emphasis added].

Defendant claims that records from the psychiatric hospitalization in 1989 “had very little relevance” to the issues. BOA at 23. However, in this case, three experts, including Dr. Kolbell testified before the jury that they relied on defendant’s entire history, including his prior psychiatric hospitalization at the Cleveland Clinic. RP 1472, 1473, 1487, 1526, 1801, 1812, 1848, 2010. Dr. Kolbell specifically testified that in rendering his opinion: “[I]t was important to me to understand whether he [defendant] had thought about killing anybody in the past...” RP 1543. That is the exact information the prosecutor was seeking. So while defendant now claims it is irrelevant, his own expert testified otherwise.

Additionally, defendant’s experts were rendering the opinion that defendant could not form the intent to commit premeditated murder. The fact that in 1989 defendant had homicidal ideations, when circumstances that the experts claimed pushed him over the edge in the present case were absent, tends to impeach the opinion of the expert(s). Dr. Marquez testified that other instances of homicidal ideation can show that defendant had the capacity to form the intent. RP 1812-1813. Thus, the specific information contained in the clinic’s records was relevant and the prosecutor acted in good faith by asking Dr. Kolbell about the report

regarding an incident where defendant indicated he tried to kill another man.<sup>4</sup>

In his brief, defendant claims that "... the prosecutor attempted to introduce evidence regarding Mr. Pitts' prior psychiatric hospitalizations." BOA at 22. This is misleading because, it was *defendant* who first elicited testimony that defendant had had prior psychiatric hospitalizations:

"I reviewed mental health reports that were prepared in relation to this case, I reviewed mental health reports and **psychiatric records related to his prior psychiatric hospitalizations.**"

RP 1437 (direct examination of Dr. Kolbell) [emphasis added]. In her question, the prosecutor was following up on the records already referred to by the witness during direct examination. This could not have been a surprise to the defense.

In addition to this being a proper cross-examination question for an expert witness, defendant had opened the door to this evidence. The trial court agreed that the door had been opened. RP 1538. Thus, there was no bad faith on the part of the prosecutor.

Typically, evidence that the defendant committed other crimes, even if relevant, cannot be admitted unless the trial court finds that its

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<sup>4</sup> The record reflects that there were no African Americans on the jury. RP 1818. Because defendant's intended stabbing victim was an African American, jurors of this race may be more prejudiced by this remark than other jurors, which was not a factor here.

probative value outweighs its prejudicial effect. State v. Saltarelli, 98 Wn.2d 358, 361, 655 P.2d 697 (1982). But the defendant's own testimony can open the door to the introduction of such evidence. In State v. Gefeller, 76 Wn.2d 449, 458 P.2d 17 (1969), the Supreme Court explained what it means to "open the door":

It would be a curious rule of evidence which allowed one party to bring up a subject, drop it at a point where it might appear advantageous to him, and then bar the other party from all further inquiries about it. Rules of evidence are designed to aid in establishing the truth. To close the door after receiving only a part of the evidence not only leaves the matter suspended in air at a point markedly advantageous to the party who opened the door, but might well limit the proof to half-truths. Thus, it is a sound general rule that, when a party opens up a subject of inquiry on direct or cross-examination, he contemplates that the rules will permit cross-examination or redirect examination, as the case may be, within the scope of the examination in which the subject matter was first introduced.

Id. at 455. The Rules of Evidence do not supersede this "open door" doctrine. State v. Brush, 32 Wn. App. 445, 451, 648 P.2d 897 (1982). See State v. Avendano-Lopez, 79 Wn. App. 706, 716, 904 P.2d 324 (1995).

During the defense case, defense expert Dr. Kolbell testified that his opinion was derived from the study of defendant's records, including the Cleveland Clinic. Therefore, the prosecutor's question was in good faith and proper.

**ii. Defendant cannot meet his burden of showing that the question was so prejudicial that it denied him of a fair trial.**

Even if this Court were to find the prosecutor's question to be in bad faith, defendant has not met the second prong of his burden by showing that the question was so prejudicial that it denied defendant of a fair trial.

In State v. Ray, 116 Wn.2d 531, 806 P.2d 1220 (1991), Ray was convicted of first degree incest. The Supreme Court held that the prosecutor improperly asked if the child victim was removed from Ray's home for sexual abuse. Id. at 550. The Supreme Court upheld the trial court's denial of motion for mistrial, noting:

The trial court, when it sustained Ray's objection, recognized that the question was improper. After it sustained Ray's objection, however, the trial court also promptly instructed the jury to disregard the question. [Citation omitted.] In these circumstances, the prosecutor's question, although improper, did not "so [taint] the entire proceeding" that it denied Ray a fair trial and warranted the declaration of a mistrial. State v. Hopson, 113 Wn.2d 273, 284, 778 P.2d 1014 (1989).

Ray at 550.

As in Ray, the jury here was promptly instructed by the trial court to disregard the question. RP 1543. The jury was excused directly after the objection for a short time and was instructed to disregard the question

immediately upon their return. RP 1528, 1543. Defendant seems to suggest that this precluded the curative instruction from being prompt. BOA at 26. However, it certainly was prompt because the question was the last thing the jury heard before being excused and the question being stricken the first thing they heard after returning. It was not as if the jury heard any additional testimony, took any breaks, or even heard the answer to the question before the court's instruction was given. The length of time between the asking of the question and the curative instruction was only a matter of minutes. See RP 1538-1543. The curative instruction was given by the trial as soon as practical. This was prompt.

Defendant argues that the court's instruction did not "expressly" tell the jury what evidence to disregard. BOA at 24. This argument is without merit. First, the jury heard a question, they were excused after an objection, when they returned, they were told to disregard the last question. There can be no issue as to what they were to disregard. The trial court did not articulate any evidence to be disregarded, because there was no "evidence". There was merely a question. Second, had the trial court repeated the question and then told the jury to disregard it, it would only have reinforced the question that the court wanted them to banish from their minds.

During cross-examination of a defense witness in State v. Copeland, 130 Wn.2d 244, 922 P.2d 1304 (1996), the prosecutor asked the witness, a fellow inmate of Copeland, about his prior conviction for assault: “You beat her [the victim] black and blue and you burned her abdomen with a cigar, didn’t you?” Id. at 284. The court found this question improper under ER 609 which limits the evidence to the fact of the conviction. Id. The court noted that the giving of a curative instruction does not end the inquiry if the misconduct is so flagrant that no instruction can cure it. Id. While the Copeland court noted that “[t]he prosecutor’s question was a deliberate attempt to influence the jury’s perception of [the witness] and his testimony”, and constitutes prosecutorial misconduct” the court did not find that it required reversal. Id. at 285. The court evaluated the testimony and the circumstances and concluded:

Further, the single question occurred during a lengthy trial; the trial court immediately sustained the defense objection to it and instructed the jury to disregard it. The jury is presumed to follow instructions to disregard improper evidence. State v. Russell, 125 Wn.2d 24, 84, 882 P.2d 747 (1994), *cert. denied*, 131 L. Ed. 2d 1005, 115 S. Ct. 2004 (1995). [The witness] never answered the question. In light of all the circumstances, the error resulting from the improper question was cured by the court's instruction. *See id* [sic] 125 Wn.2d 24, at 84-85.

State v. Copeland, 130 Wn.2d at 285.

The instant case is similar to Copeland. Here, the alleged misconduct was also a single question asked during a lengthy trial. The prosecutor did not repeat the question and did not again raise the subject matter with any other witness or during closing argument. Here, the trial court, after briefly excusing the jury, sustained the defense objection to the question. Similar to Copeland, the jury was instructed to disregard the question. The jury here is presumed to follow the court's instructions. State v. Russell at 84. Further, the witness, Dr. Kolbell, did not answer the question, just as the witness in Copeland did not answer the question.

Here, other instances of defendant's homicidal ideation were admitted into evidence without objection. RP 1544-46. Defendant had thoughts about killing other American soldiers in Iraq when they angered him, as well as killing someone in the military who accused him of sexual harassment. Id. These thoughts were in the recent past. In contrast, the question asked by the prosecutor involved an incident that took place in defendant's adolescence in 1989. The fact that it was so long ago would tend to lessen the prejudice. Additionally, this question was merely cumulative to other homicidal ideation by defendant. See State v. Green, 43 Wn.2d 102, 110, 260 P.2d 343 (1953)(items found in potentially invalid search of Green's room were cumulative of other properly

admitted exhibits and therefore their admission could not have been prejudicial to Green).

Juries are presumed to follow the court's instructions. State v. Russell at 84. Here, the jury was **specifically** instructed by the trial court to disregard the prosecutor's last question. RP 1543. The jury was also **generally** so instructed: "You will disregard any evidence that was not admitted or that was stricken by the court." CP 488 (Court's Instructions to the Jury).

Because the prosecutor acted in good faith, the question was proper, and it was not so prejudicial that it denied defendant of a fair trial, defendant's claim of prosecutorial conduct fails. The trial court did not err by denying defendant's motion for a mistrial based on the mere asking of this question.

#### 4. THE PROSECUTORS DID NOT COMMIT MISCONDUCT IN CLOSING ARGUMENT.

As discussed above, a defendant claiming prosecutorial misconduct bears the burden of demonstrating that the remarks or conduct was improper and that it prejudiced the defense. State v. Mak, 105 Wn.2d 692, 726, 718 P.2d 407, cert. denied, 479 U.S. 995, 107 S. Ct. 599, 93 L.Ed.2d 599 (1986); State v. Binkin, 79 Wn. App. 284, 902 P.2d 673 (1995), review denied, 128 Wn.2d 1015 (1996). Improper comments are not deemed prejudicial unless "there is a *substantial likelihood* the

misconduct affected the jury's verdict." State v. McKenzie, 157 Wn.2d 44, 52, \_\_\_ P.3d \_\_\_ (2006)(quoting State v. Brown 132 Wn.2d 529, 561, 940 P.2d 546 (1997)) [italics in original]. If a curative instruction could have cured the error and the defense failed to request one, then reversal is not required. Binkin, at 293-294. Where the defendant did not object or request a curative instruction, the error is considered waived unless the court finds that the remark was "so flagrant and ill-intentioned that it evinces an enduring and resulting prejudice that could not have been neutralized by an admonition to the jury." Id.

To prove that a prosecutor's actions constitute misconduct, the defendant must show that the prosecutor did not act in good faith and the prosecutor's actions were improper. State v. Manthie, 39 Wn. App. 815, 820, 696 P.2d 33 (1985)(citing State v. Weekly, 41 Wn.2d 727, 252 P.2d 246 (1952)).

In determining whether prosecutorial misconduct warrants the grant of a mistrial, the court must ask whether the remarks, when viewed against the background of all the evidence, so tainted the trial that there is a substantial likelihood the defendant did not receive a fair trial. State v. Russell, 125 Wn.2d 24, 85, 882 P.2d 747 (1994); State v. Weber, 99 Wn.2d 158, 164-65, 659 P.2d 1102 (1983). In deciding whether a trial irregularity warrants a new trial, the court considers: (1) the seriousness of the irregularity; (2) whether the statement was cumulative of evidence properly admitted; and (3) whether the irregularity could have been cured

by an instruction. State v. Crane, 116 Wn.2d 315, 332-33, 804 P.2d 10 (1991). The trial court is in the best position to assess the impact of irregularities. See State v. Mak, 105 Wn.2d 692, 701, 718 P.2d 407 (1986). The court will disturb the trial court's exercise of discretion only when no reasonable judge would have reached the same conclusion. State v. Hopson, 113 Wn.2d 273, 284, 778 P.2d 1014 (1989).

First, defendant claims that the prosecutor committed misconduct by asking the jury to “place themselves in the position of the victim.”

BOA at 34. The prosecutor stated:

That was 20 seconds. And it felt like a lifetime. You only imagine what Tara experienced. **That shows an intent to kill her.** It took that long for her to die.

Tara Pitts’ death was not an accident. It was an **intentional killing.**

RP 2060 [Emphasis added]. Contrary to defendant’s assertion to this Court, the prosecutor did not ask the jury to place themselves in the position of the victim. She was very clearly demonstrating how much time defendant had to think about and intend what he was doing while Tara’s life was leaving her body. It did not happen in an instance. And Tara struggled. The fact that defendant showed his wife no mercy during these long seconds proves his intent that she die. Moreover, the prosecutor expressly directed her comment to defendant’s intent. Id. This is appropriate argument based on the evidence and the defense of lack of ability to intend the act.

The defense did not object to this line of argument during the prosecutor's closing, but merely moved for a mistrial at the end of the argument. Defendant did not seek a curative instruction. Therefore, defendant must show that the remark was so flagrant and ill-intentioned that the prejudicial effect could not have been cured by an instruction. State v. McKenzie, 157 Wn.2d at 52. A curative instruction will often cure any prejudice that has resulted from an alleged impropriety. See State v. McNallie, 64 Wn. App. 101, 111, 823 P.2d 1122 (1992), aff'd, 120 Wn.2d 925, 846 P.2d 1358 (1993).

In denying the motion for mistrial, the trial court stated:

[T]he State took 20 seconds off of a watch where there was no argument as [sic] being an argument of time and moments of time. The way I thought it was argued, to moments in time for premeditation, and I think that's argument. And so a moment in time was utilized by the State with a watch is not a mistrial factor.

RP 2098.

In deciding a motion for mistrial, the trial court applies the same standard as an appellate court reviewing such claims. State v. McKenzie, 157 Wn.2d at 52. Generally, the trial court is in the best suited to determine the prejudice of a statement. State v. Lewis, 130 Wn.2d 700, 707, 927 P.2d 235 (1996). The trial court's denial of a motion for mistrial is reviewed for abuse of discretion. Id.

In State v. Borboa, 157 Wn.2d 108, 135 P.3d 469 (2006), a recent Washington Supreme Court decision, Borboa claimed that the prosecutor

made an improper “golden rule” argument when he stated, “Just think of if you were—on your face just walking around, your face looks totally different now, that’s a disfigurement of your face, and it’s significant.” Id. at 123. The court explained:

A "golden rule" argument is an argument that "urg[es] the jurors to place themselves in the position of one of the parties to the litigation, or to grant a party the recovery they would wish themselves if they were in the same position" and is improper. Adkins v. Aluminum Co. of Am., 110 Wn.2d 128, 139, 750 P.2d 1257, 756 P.2d 142 (1988) (quoting JACOB A. STEIN, CLOSING ARGUMENT § 60, at 159 (1985)).

Id. n.4. Defendant seems to be asserting a “golden rule” argument here. BOA at 34. In Borboa, the court noted that the remark was made in the context of attempting to prove that the element of “substantial bodily harm” was met for the crime of assault of a child in the second degree. The Borboa court found that this remark was not misconduct. Further, the Borboa court questioned the applicability of the “golden rule” to criminal cases:

Additionally, we are not convinced that the prohibition on "golden rule" arguments applies in the criminal context and none of the cases cited by Borboa support that proposition. See United States v. Gaspard, 744 F.2d 438 (5th Cir. 1984) (prosecuting attorney's statement that the jury was a victim was not plain error); State v. Sowards, 147 Ariz. 185, 192, 709 P.2d 542 (1984) (prosecuting attorney's statement to place "oneself in the role of the victims" was "harmless in view of the overwhelming proof of guilt"). The third case cited by Borboa, People v. Fields, discusses only improper "appeals to the sympathy or passions of the jury," which is likely the more appropriate argument in the criminal

context. 35 Cal.3d 329, 362, 673 P.2d 680, 197 Cal.Rptr. 803 (1983). Regardless of the proper way to frame the argument, we are not convinced that the prosecuting attorney's statement constituted misconduct that resulted in enduring prejudice.

State v. Borboa, 157 Wn.2d at 124 n.5.

Here the trial court did not abuse its discretion. The trial judge evaluated the defense objection and noted that when the statement was made to the jury, he thought it referred to premeditation, which the record bears out. If that is how the comment struck the trial judge, that is likely how the jury interpreted it as well. The comment was proper and the trial court did not err by denying the motion for mistrial.

Next, defendant claims that during rebuttal argument the prosecutor engaged in a “personal attack” in his response to defense counsel’s ridicule of witness Janice Thorp. BOA at 37-38. During closing argument, defense counsel made reference to his cross-examination of State’s witness, Janice Thorp, a clerk at 7-11 store where defendant bought beer soon after killing his wife. RP 2131. Ms. Thorp testified to defendant’s demeanor at the time. During cross-examination, recross-examination, and in closing, defense counsel attempted to discredit her. RP 1252-1254-1256-1261. In closing, he seemed to brag about how he demeaned Ms. Thorp, stating, “...we had a lot of fun at her expense.” RP 2131. This invited the jury to devalue her as a witness and to give her testimony no weight. In rebuttal, the prosecutor responded:

Defendant went on quite a bit about Janice Thorp. She was the woman who was working at the 7-eleven. Defense counsel said, and I'm quoting here, "**We had a lot of fun at her expense.**" Do you remember that, when Janice Thorp testified? We had a lot of fun at her expense defense counsel said. **Did that strike you as fun, the way he cross-examined her, or was that an embarrassment to our system? What did Janice Thorp do to deserve such disrespect?** She is just someone who came into this court and told the truth the best she could. The defendant stood out in her mind because she saw him on the news the next night and she thought back and then, wow, he didn't seem nervous. Why did that stick in her mind he didn't seem nervous? Because the next night she sees him on the news for murder and that struck her as interesting, so she conveyed that to you as best she could. Not a hugely important witness, but a small piece of the puzzle. And there's nothing she did other than come in here and tell you the truth as best she could.

RP 2139-40 [emphasis added]. The prosecutor was attempting to bring the jury to see Ms. Thorp as a witness who is deserving of respect and discouraging them from adopting defense counsel's ridicule of her. Ms. Thorp's testimony showed that defendant intended the death of his wife as he showed no emotion after such a terrible deed. This was not a personal attack on defense counsel in light of the entire closing arguments. It was a fair response to defense counsel's argument.

Defendant did not object to this at the time, he did not seek a curative instruction, nor did he move for a mistrial on this ground. On this topic, the Washington Supreme Court has stated:

We have consistently held that unless prosecutorial conduct is flagrant and ill-intentioned, and the prejudice resulting there from so marked and enduring that corrective

instructions or admonitions could not neutralize its effect, **any objection to such conduct is waived by failure to make an adequate timely objection and request a curative instruction.** Thus, in order for an appellate court to consider an alleged error in the State's closing argument, the defendant must ordinarily move for a mistrial or request a curative instruction. The absence of a motion for mistrial at the time of the argument strongly suggests to a court that the argument or event in question did not appear critically prejudicial to an appellant in the context of the trial. Moreover, "[c]ounsel may not remain silent, speculating upon a favorable verdict, and then, when it is adverse, use the claimed misconduct as a life preserver on a motion for new trial or on appeal."

State v. Swan, 114 Wn.2d 613, 661, 790 P.2d 610 (1990)(citing Jones v. Hogan, 56 Wn.2d 23, 27, 351 P.2d 153 (1960); State v. Atkinson, 19 Wn. App. 107, 111, 575 P.2d 240, review denied, 90 Wn.2d 1013 (1978)) [emphasis added, footnotes omitted].

Defendant has not demonstrated how this remark is improper, or how it "was designed to appeal to the prejudices of the jury", nor has he demonstrated enduring prejudice that only a new trial could cure.

Thirdly, defendant claims the prosecutor improperly appealed to the passions of the jury by asking the jury to do justice for the victim, her family, and the community, and not to compromise by convicting defendant of a lesser offense. BOA 37-39. Defendant merely states that this appealed to the passions of the jury, but does not articulate how, nor does he provide any analysis or authority. Id.

It is difficult to respond to such a bold claim. However, this Court must look at the prejudicial effect, if any, of a prosecutor's comment, not by looking at the comment in isolation, but by placing the remarks "in the context of the total argument, the issues in the case, the evidence addressed in the argument, and the instructions given to the jury." State v. McKenzie, 157 Wn.2d at 52 (quoting State v. Brown, 132 Wn.2d 529, 561, 940 P.2d 546 (1977)).

In this case, the issue was whether defendant formed the intent to commit first degree murder. Defendant did not dispute that he killed Tara Pitts. RP 2134. In the prosecutor's main closing, Ms. Farina emphasized the acts that proved defendant did form the requisite intent. RP 2060. She also argued motive, opportunity, and means, coupled with defendant's confession. RP 2046-50. Regarding the in-life photograph of Tara Pitts, the prosecutor specifically reminded the jury not to base its verdict on sympathy, "because you must base your decision on the facts that have been presented to you in the courtroom..." RP 2090.

In a lengthy rebuttal, Mr. Lindquist responded to defense counsel's statements about some of the State's witnesses. Mr. Lindquist argued the lack of credibility of defense expert witnesses, he pointed out the undisputed facts of the case, he pointed out inconsistencies in defendant's various statements, and discussed that all of those facts add up to defendant murdering Tara, just as he had admitted to detectives. RP 2136-62. After such a long discussion about the facts, the prosecutor then

indicated that a verdict of a lesser would be an “unjustified compromise because it’s not based on the truth of what happened.” RP 2170. He again tells the jury that the only appropriate verdict “is a verdict that reflects the truth.” Id. Clearly, the prosecutor was basing his argument on the evidence and inferences to be drawn therefrom. It was not improper.

In State v. Brown, the prosecutor referred to a lesser included offense as a “compromise”. 132 wn.2d at 564:

The defendant does not deserve a compromise. You should not negotiate with Cal Brown. You should not even think about negotiating with Cal Brown. Cal Brown didn't allow Holly Washa to negotiate with him. She didn't get to negotiate for her life. She didn't get to negotiate for her money. She didn't get to negotiate for her dignity.

You should refuse any thought of negotiating with Cal Brown.

Id. at 564. The Brown court held:

The trial court did not abuse its discretion in denying the defense motion for a mistrial. The prosecuting attorney's statements were not improper. "In closing argument a prosecuting attorney has wide latitude in drawing and expressing reasonable inferences from the evidence." [State v. Gentry, 125 Wash.2d at 641.] Both statements complained of were reasonably supported by evidence admitted in trial... [T]here was substantial evidence to support the prosecuting attorney's argument to the jury that the lesser included offense of second degree murder would not be appropriate in Appellant's case. **Counsel's description of the lesser included offense as a "compromise," while overly simplistic, did not constitute misconduct.** Both statements were fair comments on the evidence. Any prejudicial effect was minimized by the court's instruction to the jury.

State v. Brown, 132 Wn.2d at 565 [emphasis added]. The jury instruction referred to was the general instruction that advising the jury that the arguments of counsel are not testimony or evidence. Id.

In the present case, the jury was also provided with such an instruction. Instruction #1 read in part:

The attorneys' remarks, statements and arguments are intended to help you understand the evidence and apply the law. They are not evidence. **Disregard any remark, statement or argument that is not supported by the evidence or the law as stated by the court.**

CP 489 (Court's Instructions to the Jury) (Emphasis added).

The fact that Mr. Lindquist referred to how the murder of one woman, Tara Pitts, affected others (a boy lost his mother, a mother lost her child) is not misconduct. It can be proper argument for a prosecutor to refer to the nature of the crime and the effect on the victims. State v. Borboa, 157 Wn.2d at 123 (prosecutor's reference to the "horrible" nature of the crime and the effect on its victims not misconduct). "A prosecutor is not muted because the acts committed arouse natural indignation." Id. (quoting State v. Fleetwood, 75 Wn.2d 80, 84, 448 P.2d 502 (1968)).

The trial court, who saw and heard the proceedings was in the best position to rule on defendant's motion for mistrial. See State v. Wilson 71 Wn.2d 895, 899, 431 P.2d 221 (1967). Defendant has failed to meet his burden because he cannot show that (1) the argument was misconduct or

(2) that defendant was prejudiced thereby. The trial court did not abuse its discretion in denying the motion for mistrial.

Lastly, defendant complains that the prosecutor misstated the law in rebuttal argument. BOA at 40. The prosecutor argued:

...even the paid witness Kolbell admits defendant never lost the ability to deliberate. Kolbell put out there that was reduced or impaired, but not ever lost. Which means the defendant had the ability to commit first degree murder.

RP 2144-45. Defense counsel objected on the basis that that was a misstatement of the law. The trial court overruled the objection. RP 2145. After rebuttal argument, defense counsel moved for a mistrial on several other grounds, but did not state the above argument as one of his reasons. Therefore, defendant must now meet the higher burden of showing that the remark was flagrant and ill-intentioned and resulted in enduring prejudice. See State v. Swan, 114 Wn.2d 613, 661, 790 P.2d 610 (1990).

Again, defendant has provided this Court with no analysis or authority to support his position. See BOA at 40. Defendant relies on State v. Estill, 80 Wn.2d 196, 492 P.2d 1037 (1972) (prosecutor's misstatement of law in closing harmless beyond a reasonable doubt because there was evidence in the record to allow jury to convict absent any misstatement and jury had written instructions that accurately stated the law). Defendant also relies on Instruction #12, which reads:

Premeditated means thought over beforehand. When a person, after any deliberation, forms an intent to take a human life, the killing may follow immediately after the

formation of the settled purpose and it will still be premeditated. Premeditation must involve more than a moment in point of time. The law requires some time, however long or short, in which a design to kill is deliberately formed.

CP 100. Defendant fails to articulate how the prosecutor's argument misstates the law as set forth in this instruction. Even if some error exists, it is harmless beyond a reasonable doubt because (1) the court's instruction clearly and accurately set forth, in writing, the definition of premeditated and (2) there was overwhelming evidence in the trial that defendant did premeditate killing Tara with thoughts of wanting to kill her and going to Ohio instead, his motive for killing her, the length of time that it took her to die by his chosen method, etc. Additionally, defendant himself admitted there was no mental defense for him, that what he did was wrong and there is no excuse; he took a life he was not allowed to take. RP 1381-82. Defendant's claim fails.

5. DEFENDANT IS NOT ENTITLED TO RELIEF  
UNDER THE CUMULATIVE ERROR  
DOCTRINE.

Under the cumulative error doctrine, a defendant may be entitled to a new trial or reversal where errors cumulatively produced a trial that is fundamentally unfair. In re Lord, 123 Wn.2d 296, 332, 868 P.2d 835 (1994). This doctrine is employed where "the combined effect of an accumulation of errors ... may well require a new trial." State v. Badda, 63 Wn.2d 176, 183, 385 P.2d 859 (1963). The defendant bears the burden

of proving an accumulation of errors of sufficient magnitude that retrial is necessary. Lord, 123 Wn.2d at 332. Where no prejudicial error is shown to have occurred, cumulative error cannot be said to have deprived the defendant of a fair trial. State v. Stevens, 58 Wn. App. 478, 498, 794 P.2d 38 (1990). As argued above, there was no error in the proceedings below. Assuming, arguendo, that error occurred, it was not of such magnitude as to warrant a retrial or reversal. Defendants' claims under the cumulative error doctrine thus fail.

D. CONCLUSION.

For the foregoing reasons, the State respectfully requests this Court of affirm defendant's conviction.

DATED: July 31, 2006.

GERALD A. HORNE  
Pierce County  
Prosecuting Attorney

*P. Grace Kingman by K. Proctor*  
P. GRACE KINGMAN 14811  
Deputy Prosecuting Attorney  
WSB # 16717

Certificate of Service:

The undersigned certifies that on this day she delivered by U.S. mail or ABC-LMI delivery to the attorney of record for the appellant and appellant c/o his attorney true and correct copies of the document to which this certificate is attached. This statement is certified to be true and correct under penalty of perjury of the laws of the State of Washington. Signed at Tacoma, Washington, on the date below.

7/29/06 *[Signature]*  
Date Signature

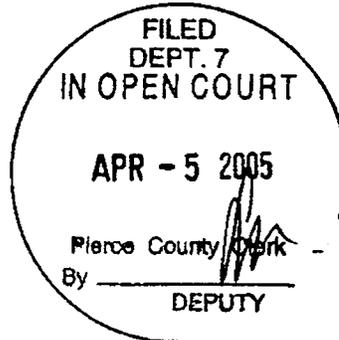
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## **APPENDIX “A”**

*Peremptory Challenges, Filed April 5, 2005*



04-1-02023-1 22928057 PCS 04-25-05



IN THE SUPERIOR COURT OF WASHINGTON, COUNTY OF PIERCE

STATE OF WASHINGTON,  
Plaintiff,

Case No. 04-1-02023-1

PEREMPTORY CHALLENGES

vs.  
PITTS, JAMES KEVIN,  
Defendant.

PLAINTIFF:

DEFENDANT:

- 1. # 3 SHAWNA MARTIN JEAN
- 2. #33 Dorothy Cline
- 3. # 35 MAMA KANE
- 4. # 48 Laura Taylor-Anderman
- 5. # 42 DON RICHARDSON
- 6. # 19 Stephen Gore
- 7. # 34 John Nelson
- 8. # 18 CHRISTINE YOUNG
- 9. # 31 MATTHEW AMENOT

- 1. # 4 NELSEN, SILAS E
- 2. # 15 KEISER, THOMAS
- 3. # 9 STAHLHUT, WILLIAM
- 4. # 43 KUKLISH, STEVE
- 5. # 17 ANDERSON, IVONNA
- 6. # 5 KIDWELL, CLAYTON
- 7. # 27 PETERSON, GAYLEN
- 8. # 2 BENNETT, LEILANI
- 9. # 52 WARNER, DOUGLAS.

DATED this 5 day of April, 2005.

*[Signature]*  
DAWN FARINA  
Attorney for Plaintiff  
WSBA # 18333

*[Signature]*  
SVERRE STAURSET  
Attorney for Defendant  
WSBA# 8996

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