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STATE OF WASHINGTON  
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NO. 34535-8-II  
IN THE COURT OF APPEALS  
FOR THE STATE OF WASHINGTON  
DIVISION II

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STATE OF WASHINGTON

Respondent,

v.

TIMOTHY D. ENGH

Appellant.

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ON APPEAL FROM THE  
SUPERIOR COURT OF THURSTON COUNTY

Before the Honorable Richard A. Strophy, Judge

OPENING BRIEF OF APPELLANT

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## TABLE OF CONTENTS

	<u>Page</u>
A. ASSIGNMENTS OF ERROR .....	1
B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR .....	5
C. STATEMENT OF THE CASE.....	8
1. <u>Procedural history:</u> .....	8
2. <u>Substantive facts:</u> .....	10
a. Overview .....	10
b. Background .....	12
c. Testimony pertaining to the issue of premeditation .....	13
3. <u>The Shooting:</u> .....	17
4. <u>After the shooting:</u> .....	19
5. <u>Tim Engh’s Statements to law enforcement:</u> .....	20
6. <u>Testimony regarding Mr. Engh’s intoxication         following the shooting:</u> .....	22
7. <u>Photographs:</u> .....	22
8. <u>Suppression hearing:</u> .....	22
9. <u>Jury instructions:</u> .....	31
10. <u>Verdict:</u> .....	32

11.	<b><u>Sentencing:</u></b> .....	32
D.	<b>ARGUMENT</b> .....	33
1.	<b><u>THE EVIDENCE OF PREMEDITATION WAS INSUFFICIENT TO SUPPORT A CONVICTION FOR FIRST-DEGREE MURDER.</u></b> .....	33
a.	<b><u>The State bears the burden of proving each of the essential elements of the charged offense beyond a reasonable doubt.</u></b> .....	33
b.	<b><u>The State failed to carry its burden of proving beyond a reasonable doubt Mr. Engh acted with premeditation.</u></b> .....	36
i.	<b>Premeditation requires proof of prior deliberation.</b> .....	36
ii.	<b>The State proved only that Mr. Engh’s act was impulsive and/or spontaneous but not premeditated.</b> .....	37
c.	<b><u>This Court must reverse and remand with Instructions to dismiss the conviction.</u></b> .....	39
2.	<b><u>THE TRIAL COURT ERRED IN ISSUING THE INSTRUCTION DEFINING PREMEDITATION.</u></b> .....	40
a.	<b><u>The Trial Court’s Instruction Denied Engh Due Process.</u></b> .....	40
i.	<b><u>The Court’s Instruction Created Ambiguity Regarding both the Nature of the Deliberation that Must Precede the Formation of an Intent to Kill and the Amount of Time in which a Design to Kill is Formed.</u></b> .....	41

b.	<u>Engh is Entitled to Relief</u> .....	44
3.	<u>MR. ENGH'S CONFESSION WAS INVOLUNTARY AND THEREFORE, IT SHOULD HAVE BEEN SUPPRESSED</u> .....	45
a.	<u>Standard of Review</u> .....	45
b.	<u>Totality of Circumstances Test</u> .....	46
c.	<u>The statement taken at the Thurston County Jail should also be suppressed</u> .....	50
d.	<u>The Effort in Admitting Appellant's Confession Requires Reversal of His Conviction</u> .....	51
e.	<u>The Error in Admitting Howe's Confession Requires Reversal of His Convictions</u> .....	52
4.	<u>THE TRIAL COURT ERRED IN ADMITTING PHOTOGRAPHS THAT HAD NO PROBATIVE VALUE OTHER THAN THOSE TO PROVE THAT MS. ENGH DIED, AND WHERE THOSE PHOTOGRAPHS HAD TREMENDOUS PREJUDICIAL IMPACT. ADMISSION OF PHOTOS OF MS. ENGH VIOLATED MR. ENGH'S FOURTEENTH AMENDMENT RIGHT TO DUE PROCESS AND A FAIR TRIAL</u> .....	51
a.	<u>The evidentiary rulings of the trial court violated Mr. Engh's right to due process</u> .....	52
b.	<u>The photographs of the victim were inflammatory, unnecessary, wasted valuable judicial resources, and were erroneously admitted</u> .....	54

5.	<u>THE TRIAL COURT COMMITTED REVERSIBLE ERROR WHEN IT FAILED TO INSTRUCT THE JURY ON VOLUNTARY INTOXICATION.</u>	57
6.	<u>MR. ENGH WAS DENIED EFFECTIVE ASSISTANT OF COUNSEL WHEN HIS TRIAL ATTORNEY WITHDREW HIS REQUEST FOR JURY INSTRUCTIONS ON INVOLUNTARY INTOXICATION.</u>	60
7.	<u>TRIAL COUNSEL'S FAILURE TO PROPOSE A LIMITING INSTRUCION DENIED MR. ENGH EFFECTIVE ASSISTANCE OF COUNSEL.</u>	63
8.	<u>CUMULATIVE ERROR DENIED MR. ENGH A FAIR TRIAL.</u>	66
E.	CONCLUSION	67
F.	APPENDIX	A-1 through B-1

**TABLE OF AUTHORITIES**

<b><u>WASHINGTON CASES</u></b>	<b><u>Page</u></b>
<i>State v. Aaron</i> , 57 Wn. App. 277, 878 P.2d 949 (1990) .....	65
<i>State v. Adams</i> , 76 Wn.2d 650, 458 P.2d 558 (1969).....	55
<i>State v. Benn</i> , 120 Wn.2d 631, 845 P.2d 289.....	64
<i>State v. Bingham</i> , 105 Wn.2d 820, 719 P.2d 109 (1986).....	35, 37
<i>State v. Bolen</i> , 142 Wash. 653, 254 P. 445 (1927) .....	37
<i>State v. Brett</i> , 126 Wn.2d 136, 892 P.2d 29 (1995) .....	55
<i>State v. Brooks</i> , 97 Wn.2d 873, 651 P.2d 217 (1982).....	34, 35, 36
<i>State v. Carter</i> , 56 Wn. App. 217, 783 P.2d 589 (1989).....	61
<i>State v. Castellanos</i> , 132 Wn.2d 94, 935 P.2d 1353 (1997) .....	53
<i>State v. Chapin</i> , 118 Wn.2d 681, 826 P.2d 194 (1992) .....	33
<i>State v. Clerk</i> , 143 Wn.2d 731, 24 P.3d 1006 (2001) .....	57
<i>State v. Coates</i> , 107 Wn.2d 882, 735 P.2d 64 (1987).....	58
<i>State v. Coe</i> , 101 Wn.2d 772, 684 P.2d 668 (1984).....	67
<i>State v. Commodore</i> , 38 Wn. App. 244, 684 P.2d 1364 (1984) .....	35
<i>State v. Cook</i> , 131 Wn. App. 845, 129 P.3d 834 (2006).....	63
<i>State v. Crediford</i> , 130 Wn.2d 747, 927 P.2d 1129 (1996) .....	39
<i>State v. Crenshaw</i> , 98 Wn.2d 789, 659 P.2d 488 (1983).....	55
<i>State v. DeVries</i> , 149 Wn.2d 842, 72 P.3d 748 (2003).....	63
<i>State v. Dixon</i> , 37 Wn. App. 867, 684 P.2d 725 (1984) .....	56
<i>State v. Donald</i> , 68 Wn. App. 543, 844 P.2d 447 (1993) .....	65
<i>State v. Gabryschak</i> , 83 Wn. App. 249, 921 P.2d 549 (1996).....	57, 59
<i>State v. Gallegos</i> , 65 Wn. App. 230, 828 P.2d 37 (1992).....	57
<i>State v. Gentry</i> , 125 Wn.2d 570, 888 P.2d 1105 (1995).....	36, 37, 41, 42

<i>State v. Green</i> , 94 Wn.2d 216, 616 P.2d 628 (1980) .....	34
<i>State v. Griffing</i> , 45 Wn. App. 369, 725 P.2d 445 (1988) .....	54
<i>State v. Guloy</i> , 104 Wn.2d 412, 705 P.2d 1182 (1985) .....	52
<i>State v. Hamlet</i> , 133 Wn.2d 314, 944 P.2d 1026 (1997) .....	53
<i>State v. Harper</i> , 64 Wn. App. 283, 823 P.2d 1137 (1992) .....	61
<i>State v. Hoffman</i> , 116 Wn.2d 51, 804 P.2d 577 (1991) .....	35
<i>State v. Huelett</i> , 92 Wn.2d 967, 603 P.2d 1258 (1979) .....	53
<i>State v. Johnson</i> , 40 Wn. App. 371, 699 P.2d 221 (1985) .....	65
<i>State v. Jones</i> , 95 Wn.2d 616, 628 P.2d 472 (1981) .....	57
<i>State v. Kendrick</i> , 47 Wn. App. 620, 739 P.2d 1079 (1987) .....	55
<i>State v. Kruger</i> , 116 Wn. App. 685, 67 P.3d 1147 (2003) .....	57
<i>State v. Lane</i> , 112 Wn.2d 464, 771 P.2d 1150 (1989) .....	36
<i>State v. Lanning</i> , 5 Wn. App. 426, 487 P.2d 785, 792 (1971) .....	46
<i>State v. LeFaber</i> , 128 Wn.2d 896, 913 P.2d 369 (1996) .....	40, 41, 45
<i>State v. Luoma</i> , 88 Wn.2d 28, 558 P.2d 756 (1977) .....	37
<i>State v. Mak</i> , 105 Wn.2d 692, 718 P.2d 407 (1985) .....	61
<i>State v. Mark</i> , 94 Wn.2d 520, 618 P.2d 73 (1980) .....	57
<i>State v. Markle</i> , 118 Wn.2d 424, 823 P.2d 1101 (1992) .....	53
<i>State v. Neslund</i> , 50 Wn. App. 531, 749 P.2d 727 (1989) .....	37
<i>State v. Ng</i> , 110 Wn.2d 32, 750 P.2d 632 (1988) .....	52
<i>State v. Ollens</i> , 107 Wn.2d 848, 733 P.2d 984 (1987) .....	35
<i>State v. Ortiz</i> , 119 Wn.2d 294, 831 P.2d 1060 (1992) .....	36
<i>State v. Pirtle</i> , 127 Wn.2d 628, 902 P.2d 245 (1995) .....	35, 36, 37, 38
<i>State v. Pitts</i> , 62 Wn.2d 294, 382 P.2d 508 2963) .....	65
<i>State v. Prater</i> , 77 Wn.2d 526, 463 P.2d 640 (1970) .....	44, 48
<i>State v. Rice</i> , 110 Wn.2d 577, 757 P.2d 889 (1988) .....	44

<i>State v. Roberts</i> , 88 Wn.2d 337, 562 P.2d 1259 (1977).....	40
<i>State v. Robinson</i> , 73 Wn. App. 851, 872 P.2d 43 (1994) .....	33
<i>State v. Roth</i> , 30 Wn. App. 740, 637 P.2d 1013 (1981).....	46
<i>State v. Rupe</i> , 101 Wn.2d 664, 683 P.2d 571 (1984).....	47, 48, 51
<i>State v. Rutten</i> , 13 Wash. 203, 43 Pac. 30 (1895).....	44
<i>State v. Salinas</i> , 119 Wn.2d 192, 829 P.2d 1068 (1992) .....	34
<i>State v. Sardenia</i> , 42 Wn. App. 533, 713 P.2d 122 (1986).....	61
<i>State v. Sargent</i> , 111 Wn.2d 641, 762 P.2d 1127 (1988).....	55
<i>State v. Sargent</i> , 40 Wn. App. 340, 698 P.2d 598 (1985).....	55
<i>State v. Shirley</i> , 60 Wn.2d 277, 373 P.2d 777 (1962).....	43, 44
<i>State v. Terrovona</i> , 105 Wn.2d 632, 716 P.2d 295 (1986) .....	50
<i>State v. Thomas</i> , 109 Wn.2d 222, 743 P.2d 816 (1987) .....	61, 63, 64
<i>State v. Vannoy</i> , 25 Wn. App. 464, 610 P.2d 380 (1980).....	46
<i>State v. Wanrow</i> , 88 Wn.2d 221, 559 P.2d 548 (1977).....	41

**UNITED STATES CASES**

**Page**

<i>Apprendi v. New Jersey</i> , 530 U.S. 466, 120 S. Ct. 2348, 147 L. Ed. 2d 435 (2000) .....	34
<i>Arizona v. Fulminante</i> , 499 U.S. 279, 111 S. Ct. 1246, 113 L. Ed. 2d 302 (1991).....	52
<i>Austin v. United States</i> , 382 F.2d 129, 136 (D.C. Cir. 1967).....	35
<i>Burks v. United States</i> , 437 U.S. 1, 98 S. Ct. 2141, 57 L. Ed. 2d 1 (1978).....	40
<i>Clewis v. Texas</i> , 386 U.S. 707, 87 S. Ct. 1338, 18 L. Ed. 2d 423 (1967).....	46
<i>Culcombe v. Connecticut</i> , 367 U.S. 568, 81 S. Ct. 1860, 6 L. Ed. 2d 1037 (1990).....	47, 51
<i>Estelle v. McGuire</i> , 502 U.S. 62, 112 S. Ct. 475, 116 L. Ed. 2d 385 (1991).....	57

<i>In re Winship</i> , 397 U.S. 358, 90 S. Ct. 1068, 15 L. Ed. 2d 368 (1970) .....	34
<i>Jackson v. Virginia</i> , 443 U.S. 307, 99 S. Ct. 2781, 61 L. Ed. 2d 560 (1979).....	34
<i>Jurek v. Estelle</i> , 593 F.2d 672, 679 (5 <sup>th</sup> Cir. 1979).....	46, 50
<i>Mak v. Blodgett</i> , 970 F.2d 614 (9 <sup>th</sup> Cir. 1992) .....	67
<i>Mincey v. Arizona</i> , 437 U.S. 385, 401, 98 S. Ct. 2408, 47 L. Ed. 2d 290 (1978).....	47
<i>Miranda v. Arizona</i> , 34 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966).....	24, 48, 49, 50
<i>Mullaney v. Wilbur</i> , 421 U.S. 684, 95 S. Ct. 1881, 44 L. Ed. 2d 508 (1975).....	40
<i>North Carolina v. Butler</i> , 441 U.S. 369, 99 S. Ct. 1755, 60 L. Ed. 2d 286 (1978).....	46
<i>People v. Velasquez</i> , 162 Cal. Rptr. 306, 606 P.2d 341, 347 (1980).....	36
<i>Pulley v. Harris</i> , 465 U.S. 37, 104 S. Ct. 871, 79 L. Ed. 2d 29 (1984) .....	57
<i>Schneekloth v. Bustamonte</i> , 412 U.S. 218, 93 S. Ct. 2041, 36 L. Ed. 2d 854 (1973).....	47
<i>State v. Williams</i> , 285 N.W.2d 248 (Iowa 1979) .....	36
<i>Strickland v. Washington</i> , 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984).....	56, 61, 64
<i>United States v. Pearson</i> , 746 F.2d 789, (11 <sup>th</sup> Cir. 1984).....	67
<i>United States v. Peterson</i> , 509 F.2d 408, (D.C. Cir. 1974).....	35, 67
<i>United States v. Preciado-Cordobas</i> , 981 F.2d 1206 (11 <sup>th</sup> Cir. 1993).....	67
<i>Vance v. Bordenkercher</i> , 692 F.2d 978 (4 <sup>th</sup> Cir. 1982).....	49

**REVISED CODE OF WASHINGTON**

	<b><u>Page</u></b>
RCW 9A.32.020(1).....	36
RCW 9A.32.030(1)(a) .....	9, 34
RCW 9A.36.011(1).....	59
RCW 9A.36.021(1)(c) .....	59

RCW 9A.36.050 .....	9
RCW 9A.42.070 .....	9
RCW 9A.56.310 .....	9

**CONSTITUTIONAL PROVISIONS**

**Page**

U.S. Const. amend. V.....	40, 45
U.S. Const. amend. VI .....	1
U.S. Const. amend. XIV .....	1, 5, 40, 45, 57, 61, 64
Wash. Const. art. I, § 3.....	40
Wash. Const. art. I, § 22.....	64

**COURT RULES**

**Page**

CR 3.5 .....	1
ER 105 .....	65
ER 402 .....	7
ER 403 .....	7, 53, 54, 55
ER 404(b).....	5, 8, 63, 64

**A. ASSIGNMENTS OF ERROR**

1. Appellant Tim Engh's Sixth and Fourteenth Amendment rights to a fair trial and due process were violated when the State failed to prove beyond a reasonable doubt he acted with premeditation.

2. The trial court's instruction defining "premeditation" was ambiguous and permitted the jury to find the crime was premeditated on a legally erroneous basis, thereby denying the Appellant his state and federal constitutional right to due process of law.

3. The trial court erred in denying the Appellant's Criminal Rule 3.5 motion to suppress statements allegedly made to law enforcement on April 13 and 14, 2005.

4. The trial court erred by entering the following Findings of Fact pertaining to the CrR 3.5 hearing:

10. At approximately 5:30 p.m., nearly seven hours after admission into the hospital, Detective Haller introduced himself and Detective Rompa. The defendant was awake and responsive. Detective Haller asked Mr. Engh if he knew why he was there; in response, the defendant nodded his head up and down. Detective Haller asked Mr. Engh if he thought what he had done was wrong; Mr. Engh again nodded his head up and down.

11. Detective Rompa had checked with hospital staff before Detective Haller began talking to the defendant to verify that the defendant was not under the influence of any medication; hospital staff verified

that the defendant was not under the influence of any drugs or medication.

12. Detective Rompa observed that when Detective Haller began speaking to the defendant that the defendant was alert and focused; the defendant tracked and answered questions appropriately.
13. Detective Haller waited approximately thirty additional minutes and then read the defendant his *Miranda* warnings which Mr. Engh stated that he understood and waived; Mr. Engh did not, at any time, request a lawyer.
14. Detective Haller again asked the defendant if he knew why law enforcement was there; Mr. Engh replied that he did. Detective Haller asked him if he thought what we had done was wrong; he stated that he thought it was wrong.
15. Mr. Engh stated that he had gone to his wife's residence to give up his parenting rights. He stated that only his wife and baby were present at the house; he said that his in-laws had left already.
16. Detective Haller asked him what happened to Brenda; Mr. Engh would not answer, saying that he could not tell the detective right then. Mr. Engh also did not answer why he left his infant daughter lying out in the cold.
17. Upon questioning regarding the stolen firearm, Mr. Engh did say that had hidden the gun at his Uncle Casper's residence in Orting under a wood pallet. Mr. Engh stated that the firearm belonged to his grandfather and that he took it without permission on April 12<sup>th</sup>.

18. Detective Haller, near the end of the interview, stated that he had to ask Mr. Engh a very critical question; Mr. Engh hesitated and said, "Don't ask that question just yet; I just can't answer it yet." Detective Haller stopped the interview at that point. Mr. Engh was next transported to the Thurston County Jail.

...

20. They asked if Mr. Engh would be willing to give a taped statement; he stated he would give a taped statement.

21. Detective Haller read Mr. Engh his *Miranda* warnings again which he stated that he understood and waived. Mr. Engh did not request a lawyer at any time.

22. During this interview, the defendant stated that he shot his wife Brenda with a revolver that he had taken from his grandfather's residence. He said that he drove to his Uncle Casper's residence in Orting where he hid the firearm under a wood pallet. Mr. Engh further stated that he did not know if his daughter had been injured and could not explain why he did not check her after the shooting.

23. Both Detective Haller and Detective Rompa made no threats or promises to the defendant during any of their contacts with him.

24. Both Detective Haller and Detective Rompa stated that the defendant never requested an attorney.

25. Both Detective Haller and Detective Rompa stated that the defendant never invoked his right to remain silent.

27. The testimony of Detective Haller was very credible.

28. The testimony of Detective Rompa was very credible.

5. The trial court erred by entering the following Conclusions of

Law pertaining to the CrR 3.5 hearing:

1. The Court holds that the defendant's post-*Miranda* admissions at the hospital on April 13, 2005, and the Thurston County Jail on April 14, 2005, were made voluntarily after he was accurately informed of his *Miranda* warnings and after a knowing, voluntary, and intelligent waiver of those rights, which he never rescinded.
2. The Court finds that both waivers of the *Miranda* warnings at the hospital and at the jail were knowing, voluntary, and intelligent based on the particular facts and circumstances surrounding this case, including the background, experience, and conduct of the accused. The totality of the evidence, which was undisputed, clearly demonstrates that the defendant was not under the influence of anything that affected his ability to make decisions.
3. The Court finds specifically that the defendant, during the post-*Miranda* statement at the hospital, demonstrated an ability to discriminate between what questions he would answer and what questions he would not answer.
4. The Court holds that the two questions posed to the defendant and defendant's non-verbal answers to these two questions before the advisement of the *Miranda* warnings at the hospital on April 13, 2005 were voluntary; further, the court specifically finds that this brief interaction between the defendant and Detective Haller did not taint the subsequent posts-*Miranda* statements as the questions and the "nodding" responses were ambiguous and did not give

law enforcement any incriminating information.

5. The Court holds that all statements made by the defendant post-*Miranda* were properly obtained and admissible at trial.

6. The Appellant's Fourteenth Amendment right to due process was violated when the court allowed into evidence a photograph, over defense objection, that was more prejudicial than probative, in violation of Evidence Rule 403, which led the jury to convict the Appellant on the basis of inflamed passions and emotion.

7. Failure to provide a voluntary intoxication instruction deprived the Appellant of a fair trial.

8. Failure to propose a voluntary intoxication instruction deprived the Appellant of his right to effective assistance of counsel.

9. Failure to propose a limiting instruction for evidence of the Appellant's prior acts or misdeeds admitted pursuant to ER 404(b) denied him effective assistance of counsel.

10. The cumulative error of the acts of law enforcement, errors committed by the trial court, and errors committed by counsel prejudiced the Appellant and materially affected the outcome at the trial.

## **B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR**

1. The Fourteenth Amendment's Due Process Clause requires the

State to prove every element of the offense beyond a reasonable doubt. Premeditation is an essential element of first degree murder. Where in its best light the State's evidence established only the Mr. Engh killed his wife in an impulsive or spontaneous act, did the trial court err and deprive Mr. Engh due process by entering convictions for first degree murder? Assignment of Error No. 1.

2. An accused person has the due process right to jury instructions that accurately state the law and make the relevant standard manifestly apparent to the jury. Ambiguous instructions on an essential element of the crime require reversal of the conviction without regard to the sufficiency of the evidence. In order to find premeditation, the jury must find the deliberate formation of and reflection upon the intent to take a human life. The instruction issued by the court permitted the jury to find premeditated intent if it found *any deliberation* preceded the formation of the intent to take a human life, without requiring the deliberation to be linked to that specific intent. Did the court's issuance of the erroneous instruction require reversal of Mr. Engh's conviction for first degree murder? Assignment of Error No. 2.

3. Did the trial court err in denying the Appellant's motion to suppress his statements where Mr. Engh was questioned at the hospital after he had attempted suicide, had ingested an unknown amount of drugs or

alcohol that required that the hospital personnel administer charcoal in order to induce vomiting, and where Mr. Engh did vomit, and where he appeared distraught? Assignments of Error No. 3, 4 and 5.

4. Did the trial court err in denying the defense motion to suppress statements made to law enforcement where Mr. Engh was questioned on two occasions, the first at the hospital, and the second the following day, in the Thurston County Jail? Assignments of Error No. 3, 4 and 5.

5. The admission of unnecessary and inflammatory photographs of may deny a defendant his right to a fair trial under the Fourteenth Amendment Due Process Clause and may also violate Evidence Rule 402 and 403. Where the trial court admitted a photograph of the victim that was unnecessary and unduly prejudicial, in light of the fact there was no challenge to the victim's identity, did the court err and deny Mr. Engh a fair trial? Assignment of Error No. 6.

6. Did the trial court err it failed to provide a voluntary intoxication instruction, where the offenses alleged include an intent element, and where there was substantial evidence that Mr. Engh was consistently, progressively consuming alcohol on the day of the murder? Assignment of Error No. 7.

7. Did trial counsel's failure to propound a voluntary intoxication instruction fall below an objective level of representation and prejudice Mr. Engh? Assignment of Error No. 8.

8. ER 404(b) prohibits the admission of evidence of other acts to prove propensity to commit the charged crime. Because of the strong potential to engender prejudice, evidence admitted for another purpose under ER 404(b) must be relevant to prove an essential element of the crime charged. If the court was not required to give a limiting instruction unless requested by defense counsel, did counsel's failure to request a limiting instruction regarding testimony of Mr. Engh's statements regarding his marriage and alleged hatred of his wife, and his alleged threats to kill her, deny Mr. Engh effective representation? Assignments of Error No. 9.

9. Did the cumulative errors cumulatively deny Mr. Engh a fair trial? Assignment of Error No. 10.

## **C. STATEMENT OF THE CASE<sup>1</sup>**

### **1. Procedural history:**

A jury convicted Tim Engh of premeditated first degree murder/domestic violence while armed with a firearm, as charged in the second amended information filed by the State in Thurston County Superior

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<sup>1</sup>This Statement of the Case addresses the facts related to the issues presented in accord with

Court on May 9, 2005, contrary to RCW 9A.32.030(1)(a).<sup>2</sup> CP at 14-15, 95.

The jury also convicted Mr. Engh of possession of a stolen firearm, contrary to RCW 9A.56.310, reckless endangerment/domestic violence, contrary to RCW 9A.36.050, and second degree abandonment of a dependant person, contrary to RCW 9A.42.070. CP at 97, 98, 99.

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RAP 10.3(a)(4).

<sup>2</sup>9A.32.030. Murder in the first degree

(1) A person is guilty of murder in the first degree when:

(a) With a premeditated intent to cause the death of another person, he or she causes the death of such person or of a third person; or

(b) Under circumstances manifesting an extreme indifference to human life, he or she engages in conduct which creates a grave risk of death to any person, and thereby causes the death of a person; or

(c) He or she commits or attempts to commit the crime of either (1) robbery in the first or second degree, (2) rape in the first or second degree, (3) burglary in the first degree, (4) arson in the first or second degree, or (5) kidnapping in the first or second degree, and in the course of or in furtherance of such crime or in immediate flight therefrom, he or she, or another participant, causes the death of a person other than one of the participants: Except that in any prosecution under this subdivision (1)(c) in which the defendant was not the only participant in the underlying crime, if established by the defendant by a preponderance of the evidence, it is a defense that the defendant:

(i) Did not commit the homicidal act or in any way solicit, request, command, importune, cause, or aid the commission thereof; and

(ii) Was not armed with a deadly weapon, or any instrument, article, or substance readily capable of causing death or serious physical injury; and

(iii) Had no reasonable grounds to believe that any other participant was armed with such a weapon, instrument, article, or substance; and

(iv) Had no reasonable grounds to believe that any other participant intended to engage in conduct likely to result in death or serious physical injury.

(2) Murder in the first degree is a class A felony.

Trial court Judge Richard Strophy imposed a standard range sentence of 347 months for Count I, and an additional 60 months as a firearm enhancement. CP at 111-18. The court imposed 17 months for Count II, twelve months for Count III, and twelve months for Count IV, to be served concurrently to Count I. CP at 114. Timely notice of this appeal followed. CP at 125-133. RP (Sentencing) at 39.

**2. Substantive facts:**

**a. Overview**

On the evening of April 12, 2005, members of law enforcement found the body of Brenda Engh in front of her house near Yelm, Washington. RP at 24, 25. She had been shot. Her seven month old daughter L.E. was on top of her, cold but unharmed. RP at 30, 47. Papers pertaining to the custody of L.E., the daughter of Tim Engh, were located in the kitchen of Ms. Engh's house. RP at 256. Tim Engh and Brenda Engh had separated in March, 2005. After discovery of the body, police went to the home of Steven Engh, the uncle of Tim Engh, where Tim Engh was living. Tim was not home at the time, but returned to the house at approximately 5:10 a.m. the morning of April 13. Police entered the house and found Tim Engh with cuts on his wrists—subsequently described as “superficial.” The police also found

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evidence that Tim Engh had consumed drugs and alcohol. He was transported to Good Samaritan Hospital in Puyallup. Later on April 13, at the hospital, he made a statement to law enforcement that he gotten a handgun from his grandfather and that he had hidden the gun on his Uncle Casper's property near Orting. He was arrested and taken to the Thurston County Jail, where he was interrogated a second time. Mr. Engh did not testify at trial, but he indicated in his second statement to law enforcement police, made at approximately 8:45 a.m., that he shot Brenda Engh. He stated that after signing documents prepared by Ms. Engh relinquishing custody of his daughter to her at her house, they both walked outside. He stated that his daughter was inside the house at the time of the shooting. He stated that he blacked out after he had signed the custody papers and that he did not act with premeditation.

Several witnesses testified that Tim Engh discussed his marital difficulties in the days prior to the shooting. Two witnesses testified that he threatened to shoot her if she was having an affair. One witness stated that he asked whether he should shoot her. Other witnesses stated that Mr. Engh expressed that he was angry with her, that he hated her, and that he threatened to kill her.

Tim Engh went to two bars prior to going to her house, and consumed

over four drinks, including two beers, an unfinished beer, one shot of Wild Turkey, and a mixed drink.

A handgun identified as belonging to Mr. Engh's grandfather was recovered from the property in Orting following statements that Mr. Engh made to police.

Following jury selection and pre-trial motions on February 6, 2006, and trial began February 7.

**b. Background**

Tim Engh was married to Brenda Engh. Mr. Engh is the father of L.E. He worked as security guard at St. Peter's hospital in February and March, 2005. RP at 367. He was fired from St. Peter's due to missing work or coming in late. RP at 380.

Tim and Brenda Engh separated in March, 2005, and moved in with his uncle Steven Engh in mid-March, 2005. RP at 350. He got a job as a landscaper with Steven Engh. RP at 346. Tim Engh did not go to work on April 12, 2005, stating that he had a stomachache. RP at 346. Steven Engh went to work and did not see Tim Engh again until 5:10 a.m. on April 13. Law enforcement had come to Steven Engh's house earlier in the morning on April 13 looking for Tim Engh. RP at 247.

Tim Engh was expected to arrive at Brenda Engh's house at 5:30 p.m.

to sign papers prepared by Ms. Engh regarding L.E.'s custody on April 12, but had not appeared by 6:00 p.m. RP at 210-11, 220. Brenda's stepfather, David Bechtold, and her mother Pat Bechtold, were at the house, but left at 6:00 p.m. RP at 211, 221. Mr. Bechtold tried to reach her later that night, and then went to her house. RP at 212.

**c. Testimony pertaining to the contested issue of premeditation**

Keith duRussell, a former coworker of Tim Engh's at Providence St. Peter's Hospital, testified that about two weeks before he was fired from his employment at the hospital, Mr. Engh started talking to him about marital issues, stating that Mr. Engh seemed "a little upset." RP at 372. He stated that Mr. Engh told him that Brenda Engh had been spending a lot of time with a neighbor, and that if he found out that she was cheating on him, he was going to shoot her. RP at 372, 373, 379-80. Sam Carruth, another former co-worker at St. Peter's, also testified to the conversation. RP at 387, 391-92.

Stephanie Davies testified that on April 10, 2005, she was working as a waitress/bartender at Babalouie's, a restaurant in Bonney Lake. RP at 445. She stated that she saw Tim Engh at the restaurant that evening, and that he said he was separated from his wife and that his wife was going to turn custody of their daughter over to him. RP at 448. She stated that apparently

an hour and a half after they talked, she saw him again later playing darts with three other people in an area located at the back of the bar. RP at 449-50. She stated that he was making comments “like, [‘]Well, my wife’s a bitch, and I’m just going to kill her[‘]” RP at 450, 456. She confronted him about the comments and he said that he would not really do that. RP at 450, 456. Ms. Davies dated Mr. Engh for two to three months four or five years prior to the incident she described at Babalouie’s. RP at 454.

Kelly Hughes testified that on April 9, 2005, she had dinner with Tim at Steven Engh’s house. She knew Tim Engh through her job at Dollarwise Check Cashing and Payday Loan Centers in Bonney Lake, where he was a customer. RP at 458. She stated that during dinner, Tim seemed upset, “a little aggravated at points” regarding his wife and behaving “like when you talk about somebody you don’t like.” RP at 460.

She stated that Tim left a voicemail message for her on April 10 that he loved her. RP at 464. On April 11 she received a telephone call from a friend named William Couch, who invited her to meet him and Tim Engh at New Peking, a bar in Bonney Lake. RP at 465. she went to the bar and sat down between Mr. Couch and Tim, and when Mr. Couch left to run an

errand,<sup>3</sup> she told him that she was not interested in relationship with him, that she was dating someone, and that his message that he loved her “pretty much had weirded me out.” RP at 466-67. She stated that she learned that he was separated, not divorced. RP at 467. She testified that after told him that she was not interested, he slammed down his beer and said “This is because I’m still married, isn’t it?” When she responded that it “had a lot to do with it,” he said “God, that fucking bitch ruins everything” and “I hate her more than I’ve hated anybody. That fucking bitch ruins everything.” RP at 468. She testified that she left to use the restroom, and when she returned, he said “I’m going to do something stupid.” RP at 468-69. When asked what he meant, he said “I’m going to blow my brains out with a .38 Special.” RP at 469.

William Couch testified that Mr. Engh said that he was having marital problems. RP at 480. He advised him to handle the matter by going through the legal system, and stated that Mr. Engh told him that he was going “to take care of the problem himself.” RP at 481.

Loreen Parkerson, a former co-worker of Tim Engh’s, testified that Mr. Engh stopped by work at Fred Meyers’ in Bonney Lake on April 12 and invited him to have a drink at Babalouie’s after work. RP at 515. They met

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<sup>3</sup> William couch, a security officer at New Peking, testified that he is a causal acquaintance of Mr. Engh. RP at 480.

at approximately 3:00 p.m. RP at 516. Mr. Engh had a beer. RP at 517. Mr. Parkerson testified that Engh was talking about his martial situation and that he was frustrated. RP at 517. He stated that Engh said:

he was going down there to see her after he got done with us, and he was going to take a gun because of the fact he wasn't sure if she had had—she may have somebody waiting for him, that he kind of feared for his life, so he was taking a gun with him.

RP at 517.

He also stated that Mr. Engh said that he was not sure in the future whether he “would be in another state, another job or in the ground.” RP at 520.

Lisa Landaker, a waitress at Puerto Vallarta in Yelm, testified that on April 12, she saw Mr. Engh in the bar with two other customers. RP at 525. She stated that he ordered an Ice House beer, and also ordered a shot of Wild Turkey. RP at 527-28. She said that he stated either that “Ted Bundy sat in a place like this before he committed his first crime” or he said “Ted Bundy sat in a place like this before he committed his first murder” RP at 529. She stated that he ordered a second Ice House, which he did not finish. RP at 531, 536. He then ordered a “liquid cocaine,” which Ms. Landaker stated is Bacardi 151 rum, Jagermeister, and another ingredient she could not recall, served in a shot glass. RP at 532. She stated that he left between 4:30 and

6:00 p.m. RP at 532.

Bernd Kriesten, a general contractor, testified that he and a friend, Monica Abeyta, were at the Puerto Vallarta, a restaurant. He testified that Tim Engh came into the bar and sat near them. RP at 546. Tim Engh started talking with Mr. Abeyta, but he “pretty much stayed out of the conversation with him.” RP at 547. He stated that Tim Engh discussed problems he was having with his marriage and that he “appeared to be upset, angry.” RP at 547. He stated that at point he heard him ask “[s]hould I kill her?” RP at 548, 554. Mr. Abeyta testified that he was with Mr. Kriesten at the bar on April 12, 2005 at approximately 4:30 a.m. When Mr. Abeyta went to the restroom, a man he identified as Tim Engh approached him. RP at 559. After Mr. Kriesten returned from the restroom, Mr. Engh discussed his marital problems. RP at 562. He stated that Mr. Engh ordered drinks during the conversation. RP at 563. He stated that Mr. Engh did not show physical characteristics of someone who has had too much to drink. RP at 566.

**3. The shooting:**

Law enforcement received a report on April 12, 2005, of a baby lying on the top of a body or scarecrow in the yard of a house at 14747 Berry Valley Road near Yelm, Washington. RP at 24, 25. Exhibits 11 and 12.

When police arrived, they discovered a baby lying on the left shoulder of the woman's body. RP at 30, 47. The baby—L.E.—was placed in a patrol car and taken to St. Peter's hospital. RP at 34, 57, 59. Exhibit 6. The baby, who was seven months old, was "freezing" cold and "crying hysterically" when law enforcement arrived. RP at 49, 57, 58, 74. The woman, later identified as Brenda Engh, was determined to be deceased. RP at 36, 48-49, 75-76. She had trauma to her neck. RP at 75, 253. She also had wounds in her abdomen. RP at 254.

Three bullets were recovered during the autopsy. RP at 171, 187, Exhibits 75,76, 77. Another bullet was later recovered from the ground where Ms. Engh's body was lying. RP at 174, 203. Exhibit 81. Evan Thomas of the Washington State Patrol Crime Laboratory testified that the bullets entered as Exhibits 75 and 77 were fired from the weapon entered as Exhibit 80. RP at 427, 428. He testified that the first bullet, denoted as Exhibit 76, "has the same class characteristic as test shots" fired from Exhibit 80, but "lacks sufficient individual characteristics to make identification." RP at 427.

After obtaining a search warrant, law enforcement found paperwork inside the residence on a kitchen table pertaining to custody of L.E. RP at 256. The paperwork was signed by Tim Engh and dated April 12, 2005. RP

at 256.

Forensic pathologist Emmanuel Lacsina performed an autopsy on Brenda Engh on April 13. RP at 644. He testified that the barrel of the gun was six to eight inches from Ms. Engh's neck when the shot was fired. RP at 650. Exhibit 57, 58. Ms. Engh sustained three gunshot wounds to her abdomen. RP at 651. Mr. Lacsina testified that the weapon was beyond 18 to 24 inches away from her, possible 20 to 25 inches away from her. RP at 652. The cause of her death was internal bleeding due to multiple gunshot wounds. RP at 664.

**4. After the shooting:**

Tim Engh's uncle, Casper Engh, testified that Tim came to his house near Orting the evening of April 12 and said that he had shot his wife. RP at 104. He then stated that he did not really kill her, but signed his custodial rights regarding L.E. over to her. RP at 109. After hearing a news report regarding a homicide in Yelm on his way to work the following morning, Casper Engh contacted police from work. RP at 108.

Steven Engh testified that Tim returned to the house at 5:10 a.m. on April 13, and told him that he had signed away his parental rights to L.E. RP at 347. He then went to his bedroom and closed the door. RP at 348.

A gun was found under a large pile of wooden pallets on Casper

Eng's property after Tim Eng spoke to police. RP at 315-318. Exhibits 48 and 80. A cordless telephone was also located with the gun. RP at 321. Exhibit 79.

Tim Eng's grandfather, Harvey Eng, lives next door to Steven Eng. RP at 353. He stated that discovered that a .38 Rossi handgun that he owned was missing. RP at 354. He looked for the weapon after he learned that a gun had been used in the homicide. RP at 354. He identified Exhibit 80 as his handgun. RP at 355.

Det. Haller went to Steven Eng's house in Bonney Lake early in the morning of April 13. RP at 260. Tim Eng lived there, but law enforcement was not able to locate him at that time. RP at 261.

Tim Eng was later found at Steven's house early on April 13. RP at 326-330. After police entered the house, he was found unconscious or semi-conscious with his wrists cut. RP at 267, 297. He was taken to the hospital, and subsequently placed under arrest. RP at 276.

**5. Tim Eng's statements to law enforcement:**

Det. Haller subsequently was notified that Tim Eng had arrived at Steven's house. RP at 266. Law enforcement found him in the house, unconscious. RP at 267. He was taken to Good Samaritan Hospital in Puyallup and administered charcoal to induce vomiting. RP at 267-68. He

had “superficial wounds” on each of his wrists. RP at 268. Det. Haller testified that at the hospital, Tim Engh nodded his head in the affirmative that he thought what he had done was wrong and that he knew why the police were there at the hospital. RP at 271. He stated that he was at his wife’s house in order to sign away his parental rights. RP at 271. He stated that he had signed the papers. RP at 272. He testified that Tim Engh told him that he had gotten a gun from his grandfather’s house, which is located next to Steven’s house. RP at 274. He stated that he obtained the gun without his grandfather’s permission. RP at 274. He testified that Tim Engh told him that he had hidden the gun under a pallet on his uncle Casper Engh’s property near Orting. RP at 275. Tim Engh was placed under arrest. RP at 276.

The following morning, at the Thurston County Jail, Tim made a taped statement. RP at 280. He stated that he had shot Brenda. RP at 280, 286. He stated that he had gone to her house to relinquish his parental right by signing papers she had prepared. RP at 286-87. He stated that he had the gun because Brenda had told him in the past that she was going to have co-workers beat him up, and had it for his protection. RP at 288, 311. He stated that he had been drinking alcohol at a restaurant in Yelm prior to the shooting, and had consumed alcohol at his uncle’s house as well. RP at 289. He stated that he signed the papers, then they went outside the house together,

and that he blacked out after that. RP at 290-91. He stated that L.E. was inside the house in the kitchen during this time. RP at 290. A transcription of the statement was entered as Exhibit 85.

**6. Testimony regarding Mr. Engh's intoxication following the shooting:**

Police found at Tim Engh's residence in Bonney Lake a bottle of Everclear, beer cans, a bottle of daytime cold medicine, a bottle of extra strength pain reliever, a bottle of a prescription medicine called Diclofenac, and a bottle of a prescription medicine called hydromorphone. RP at 297. Tim was given charcoal at the hospital in order to induce vomiting. RP at 299.

**7. Photographs:**

Defense Counsel objected to the admission of Identifications 6 and 7—photos of L.E. shortly after she was discovered on April 12. RP at 7-8. The court admitted Identification 6. RP at 9. Counsel also objected to admission of Identification 14, which showed Brenda Engh's upper torso. The court denied the motion and admitted the photograph. RP at 11. Other photographs of Ms. Engh's wounds were admitted without defense objection. Exhibits 14-18.

**8. Suppression hearing:**

Tim Engh made statements to law enforcement on April 13, 2005 at the Good Samaritan Hospital in Puyallup. Tim also gave a statement to police on April 14, 2005 at the Thurston County Jail. The defense moved to suppress his statements pursuant to Criminal Rule 3.5. The motion was heard by Judge Strophy on January 23, 2006.

Det. David Haller, a detective with the Thurston County Sheriff's Officer, was dispatched to a house on Berry Valley Road SE in Yelm, on April 12, 2005, where Brenda Engh's body had been discovered. RP (Suppression) at 14-15. On a kitchen table inside the residence, he found a document regarding parental rights regarding their daughter, with Tim Engh's signature on it, dated April 12. RP (Suppression) at 16. Det. Haller and other members of law enforcement went to a house at Bonny Lake and contacted Steven Engh, who said that Tim Engh lived there. RP (Suppression) at 17. Tim was not there, but later he received a telephone call that Tim was at Steven's house. When he arrived, he learned that Tim was "semi-conscious" and needed hospitalization. RP (Suppression) at 17-18. He was transported to Good Samaritan Hospital where he was administered charcoal to induce vomiting. RP (Suppression) at 33. He vomited several times due to the charcoal. RP (Suppression) at 50. He had cuts on his

wrists in an apparent suicide attempt, and he had apparently consumed Everclear and beer, and drugs, including Diclofenac and Hydormorphone. RP (Suppression) at 19, 33, 34, 39, 49, 50. Police remained with him at the hospital, and after about seven hours, Det. Haller testified that he asked him if he know he was there and whether he was there and whether he know what was wrong. RP (Suppression) at 21, 50. He stated that Tim responded by nodding his head. RP (Suppression) at 21. Det. Haller agreed that Tim was possibly feeling suicidal and was distraught at the time or earlier in the day. RP (Suppression) at 39.

Tim was read his *Miranda*<sup>4</sup> warnings about a half hour later. RP (Suppression) at 22, 56. Det. Haller testified that Engh waived his rights and agreed to talked to Haller. RP (Suppression) at 22-23. Tim told that he had taken a gun without permission from his grandfather, who lived next door to Steven. RP (Suppression) at 26. He stated that he had hidden the gun underneath a pallet on his uncle Casper's property near Orting. RP (Suppression) at 25, 60. When asked about his wife and L.E., he said he could not talk about it. RP (Suppression) at 24, 58, 59. He stated that he was "very drunk" and had been drinking "211, 20 ounce." RP (Suppression)

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<sup>4</sup> *Miranda v. Arizona*, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966).

at 25, 26.

Tim was then transported to the Thurston County Jail. RP (Suppression) at 60. On the morning of April 14, Det. Haller, along with Det. Matt Rompa of the Yelm police Department, re-Mirandized him at the jail. RP (Suppression) at 27-28, 60, 61. He agreed to waive his rights and did not ask for an attorney. RP (Suppression) at 61. He admitted to shooting Brenda Engh. RP (Suppression) at 29.

The State requested the admission of the post-*Miranda* statements at the hospital and jail. RP (Suppression) at 69. The defense argued that the statements were not knowingly, intelligently and voluntarily made due the coercive nature of the interrogation at Good Samaritan Hospital, Tim's consumption of alcohol and drugs, his restraint to a hospital bed, and his suicide attempt. RP (Suppression) at 72-74.

The court denied the motion to suppress the statements to law enforcement, and found that initially nodding responses to Det. Haller made at the hospital were made voluntarily and did not "taint" his subsequent verbal statements to police. RP (Suppression) at 75-86. The following findings of fact and conclusions of law were entered March 9, 2006:

#### FINDINGS OF FACT

1. Detective David Haller of the Thurston County

Sheriff's Office and Detective Matt Rompa of the Yelm Police Department came into the presence of the defendant on April 13, 2005 at Good Samaritan hospital.

2. The detectives were investigating the murder of the defendant's wife, Brenda Engh, and the abandonment of L.E., the infant daughter of the defendant and Brenda Engh; these crimes occurred on April 12, 2005, in Yelm, Washington.
3. Law enforcement learned that Brenda Engh's parents had earlier been at Brenda's residence in Yelm waiting for Timothy Engh to arrive to sign over custody rights of Lily Engh. Mr. Timothy Engh was supposed to arrive by 5:30 p.m.; Brenda's parents wanted to be present fearing there would be problems with Mr. Timothy Engh. When the defendant had not arrived by 5:50 p.m., they left Brenda at her residence with her baby daughter L.J.E. (9-7-04). Law enforcement learned from Brenda's parents that the child custody forms had been unsigned when they had left her house at approximately 5:50 p.m., but the forms were sign by both Brenda and the defendant when law enforcement arrived at Brenda's house and discovered her body and the baby at approximately 7:20 p.m. Law enforcement continued to investigate the case and they attempted to locate Mr. Timothy Engh.
4. Law enforcement learned from Casper Engh, on of the defendant's uncle's that the defendant had told him that the defendant had shot Brenda Engh; this conversation happened on the night of April 12 at Casper Engh's residence in Orting, Washington.
5. On April 13, 2005, law enforcement located the defendant's vehicle at his Uncle Steve Engh's residence in Bonney Lake, Washington. The area was

secured by law enforcement and a search warrant was requested and obtained for the person of Timothy Engh. The SWAT Team served the warrant and located that defendant on the bedroom floor of the Bonney Lake residence. The defendant appeared to be unconscious and his wrists had had superficial cuts on them; there was an empty bottle of Dayquil next to him as well as an empty bottle of pain killers. The defendant was transported to Good Samaritan Hospital in Puyallup at approximately 10:45 a.m.

6. On April 13, 2005, at approximately 10:45 a.m., Detective Haller and Detective Rompa followed the ambulance to the hospital and monitored the defendant's status throughout the day.
7. The detectives both observed as the medical staff tended to the defendant; they observed as medical personnel injected a charcoal solution into the defendant to absorb any pills he may have taken when he was at his uncle's residence. An IV was started which was used to re-hydrate Mr. Engh as he was being treated. Mr. Engh's wrists were cleansed and repaired; and, as the wounds were superficial, he was given no medications. Detective Haller observed Mr. Engh vomit several times, expelling the charcoal that he been administered to him.
8. Hospital staff requested law enforcement restrain the defendant in 4-point restraints and the detectives followed this request; the defendant could not move any appreciable degree.
9. The detectives observed that throughout the day, the defendant could communicate with the medical staff; they observed that he used verbal and non-verbal forms of communication.
10. At approximately 5:30 p.m., nearly seven hours after

admission into the hospital, Detective Haller introduced himself and Detective Rompa. The defendant was awake and responsive. Detective Haller asked Mr. Engh if he knew why he was there; in response, the defendant nodded his head up and down. Detective Haller asked Mr. Engh if he thought what he had done was wrong; Mr. Engh again nodded his head up and down.

11. Detective Rompa had checked with hospital staff before Detective Haller began talking to the defendant to verify that the defendant was not under the influence of any medication; hospital staff verified that the defendant was not under the influence of any drugs or medication.
12. Detective Rompa observed that when Detective Haller began speaking to the defendant that the defendant was alert and focused; the defendant tracked and answered questions appropriately.
13. Detective Haller waited approximately thirty additional minutes and then read the defendant his *Miranda* warnings which Mr. Engh stated that he understood and waived; Mr. Engh did not, at any time, request a lawyer.
14. Detective Haller again asked the defendant if he knew why law enforcement was there; Mr. Engh replied that he did. Detective Haller asked him if he thought what we had done was wrong; he stated that he thought it was wrong.
15. Mr. Engh stated that he had gone to his wife's residence to give up his parenting rights. He stated that only his wife and baby were present at the house; he said that his in-laws had left already.
16. Detective Haller asked him what happened to Brenda;

Mr. Engh would not answer, saying that he could not tell the detective right then. Mr. Engh also did not answer why he left his infant daughter lying out in the cold.

17. Upon questioning regarding the stolen firearm, Mr. Engh did say that had hidden the gun at his Uncle Casper's residence in Orting under a wood pallet. Mr. Engh stated that the firearm belonged to his grandfather and that he took it without permission on April 12<sup>th</sup>.
18. Detective Haller, near the end of the interview, stated that he had to ask Mr. Engh a very critical question; Mr. Engh hesitated and said, "Don't ask that question just yet; I just can't answer it yet." Detective Haller stopped the interview at that point. Mr. Engh was next transported to the Thurston County Jail.
19. On April 14, at approximately 8:45 a.m., Detective Haller and Detective Rompa went to the Thurston County Jail and contacted Mr. Engh.
20. They asked if Mr. Engh would be willing to give a taped statement; he stated he would give a taped statement.
21. Detective Haller read Mr. Engh his *Miranda* warnings again which he stated that he understood and waived. Mr. Engh did not request a lawyer at any time.
22. During this interview, the defendant stated that he shot his wife Brenda with a revolver that he had taken from his grandfather's residence. He said that he drove to his Uncle Casper's residence in Orting where he hid the firearm under a wood pallet. Mr. Engh further stated that he did not know if his daughter had been injured and could not explain why he did not check her after the shooting.

23. Both Detective Haller and Detective Rompa made no threats or promises to the defendant during any of their contacts with him.
24. Both Detective Haller and Detective Rompa stated that the defendant never requested an attorney.
26. Both Detective Haller and Detective Rompa stated that the defendant never invoked his right to remain silent.
27. Only Detective Haller and Detective Rompa testified at the CrR 3.5 hearing.
27. The testimony of Detective Haller was very credible.
28. The testimony of Detective Rompa was very credible.

#### CONCLUSIONS OF LAW

1. The Court holds that the defendant's post-*Miranda* admissions at the hospital on April 13, 1002, and the Thurston County Jail on April 14, 2005, were made voluntarily after he was accurately informed of his *Miranda* warnings and after a knowing, voluntary, and intelligent waiver of those rights, which he never rescinded.
2. The Court finds that both waivers of the *Miranda* warnings at the hospital and at the jail were knowing, voluntary, and intelligent based on the particular facts and circumstances surrounding this case, including the background, experience, and conduct of the accused. The totality of the evidence, which was undisputed, clearly demonstrates that the defendant was not under the influence of anything that affected his ability to make decisions.

3. The Court finds specifically that the defendant, during the post-*Miranda* statement at the hospital, demonstrated an ability to discriminate between what questions he would answer and what questions he would not answer.
4. The Court holds that the two questions posed to the defendant and defendant's non-verbal answers to these two questions before the advisement of the *Miranda* warnings at the hospital on April 13, 2005 were voluntary; further, the court specifically finds that this brief interaction between the defendant and Detective Haller did not taint the subsequent post-*Miranda* statements as the questions and the "nodding" responses were ambiguous and did not give law enforcement any incriminating information.
5. The Court holds that all statements made by the defendant post-*Miranda* were properly obtained and admissible at trial.

CP at 119-124. Appendix A-1 through A-6.

**9. Jury instructions:**

At the conclusion of the trial, defense counsel conceded that that the testimony did not support an instruction for voluntary intoxication because there was no testimony that alcohol consumption "inhibited the defendant's ability to control either his body functions or to walk or have a significant effect on him." RP at 686-87. The court ruled that the testimony "does not establish that the defendant's physical capability was affected to any significant degree at all, nor did it establish that his ability to form intent or

think about such intent was impaired, which is a requisite for the instruction.”

RP at 687.

The court gave instructions for murder in the second degree. Instruction 13 and 14. CP at 66-94. The court gave the following instruction regarding premeditation:

INSTRUCTION NO. 11

Premeditated means thought over beforehand. When a person, after any deliberation, forms an intent to take 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 at 78. Appendix B-1.

Neither counsel noted an exception to instructions not given or objected to instructions given. RP (2.21.06) at 4.

**10. Verdict:**

The jury found Tim Engh guilty of first degree murder, possession of a stolen firearm, reckless endangerment, and second degree abandonment of a child. By special verdict, the jury found Counts I, III and IV were committed against a family or household member. CP 102, 103, 103. The jury also found Count I was committed while Tim was armed with a firearm. CP at 100.

**11. Sentencing:**

The matter came on for sentencing on March 9, 2006. Tim asked for the maximum sentence. RP (Sentencing) at 28-30. Mr. Engh received a standard range concurrent sentence on the convictions for first degree murder, possession of a stolen firearm, reckless endangerment, and second degree abandonment of a child, with a firearm enhancement on Count I, for a total of 407 months. CP at 111-18.

**D. ARGUMENT**

**1. THE EVIDENCE OF PREMEDITATION WAS INSUFFICIENT TO SUPPORT A CONVICTION FOR FIRST-DEGREE MURDER.**

Mr. Engh's first-degree murder conviction should be reversed, and the charge dismissed, because there was insufficient evidence of premeditation. A conviction should be reversed for insufficient evidence where no rational trier of fact, after viewing the evidence in the light most favorable to the State, could have found the essential elements of the crime beyond a reasonable doubt. *State v. Chapin*, 118 Wn.2d 681, 826 P.2d 194 (1992); *State v. Robinson*, 73 Wn. App. 851, 872 P.2d 43 (1994). Because the evidence here was insufficient to prove premeditation, the conviction should be reversed.

**b. The State bears the burden of proving each**

**of the essential elements of the charged  
offense beyond a reasonable doubt.**

In every criminal case, the State is required to prove, as a matter of due process, every element of the crime charged beyond a reasonable doubt. *In re Winship*, 397 U.S. 358, 90 S. Ct. 1068, 15 L. Ed. 2d 368 (1970); U.S. Const. amend XIV. *Apprendi v. New Jersey*, 530 U.S. 466, 471, 120 S. Ct. 2348, 147 L. Ed. 2d 435 (2000). Premeditation is an element of the type of first-degree murder charged in this case. RCW 9A.32.030(1)(a).

The standard of review for an appellate challenge to the sufficiency of the evidence is whether any rational juror, after viewing the evidence in a light most favorable to the State, could have found the essential element of the crime beyond a reasonable doubt. *Jackson v. Virginia*, 443 U.S. 307, 319, 99 S. Ct. 2781, 61 L. Ed. 2d 560 (1979); *State v. Green*, 94 Wn.2d 216, 221, 616 P.2d 628 (1980). A challenge to the sufficiency of evidence admits the truth of the State's evidence and all reasonable inferences that can be drawn therefrom. *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992).

First degree murder requires the defendant act "with premeditated intent to cause the death of another person; ..." RCW 9A.32.030(1)(a). Premeditation distinguishes first from second degree murder. *State v. Brooks*, 97 Wn.2d 873, 651 P.2d 217 (1982).

Premeditation, as distinct from intent to kill, requires “the deliberate formation of and reflection upon the intent to take a human life,” and must involve the “mental process of thinking beforehand, deliberation, reflection, weighing or reasoning for a period of time, however short.” *State v. Hoffman*, 116 Wn.2d 51, 82, 804 P.2d 577 (1991); *State v. Ollens*, 107 Wn.2d 848, 850, 733 P.2d 984 (1987); *State v. Brooks*, 97 Wn.2d 873, 876, 651 P.2d 217 (1982); *State v. Pirtle*, 127 Wn.2d 628, 644, 902 P.2d 245 (1995). A “mere opportunity to deliberate is not sufficient to support a finding of premeditation.” *Id.*

“[P]remeditation cannot simply be inferred from the intent to kill.” *State v. Commodore*, 38 Wn. App. 244, 247, 684 P.2d 1364, *rev. denied* 103 Wn.2d 1005 (1984). As the court noted in *Commodore*, “intent” and “premeditation” are separate elements each of which must be proved by the State; “intent” involves only “acting with the objective or purpose to accomplish a result which constitutes a crime,” while premeditation requires “the mental process of thinking beforehand,” deliberating and reflecting. *Commodore*, 38 Wn. App. at 247 (voluntary intoxication can prevent the defendant from premeditating even where it does not prevent him from forming the intent to kill). Nor can premeditation be inferred from the fact that the defendant had the opportunity to deliberate. *State v. Bingham*, 105

Wn.2d 820, 827, 719 P.2d 109 (1986). “[T]he crux of the issue of premeditation and deliberation is . . . whether the defendant sis engage in the process of reflection and meditation.” *Austin v. United States*, 382 F.2d 129, 136 (D.C. Cir. 1967); *accord United States v. Peterson*, 509 F.2d 408, 412 (D.C. Cir. 1974); *People v. Velasquez*, 162 Cal. Rptr. 306, 606 P.2d 341, 347 (1980); *State v. Williams*, 285 N.W.2d 248 (Iowa 1979).

b. **The State failed to carry its burden of proving beyond a reasonable doubt Mr. Engh acted with premeditation.**

i. **Premeditation requires proof of prior deliberation.**

Premeditation must involve “more than a moment in point of time,” but a mere opportunity to deliberate is not sufficient to support a finding of premeditation. RCW 9A.32.020(1); *State v. Pirtle*, 127 Wn.2d 628, 644, 904 P.2d 245, *cert. denied* 518 U.S. 1026 (1995). Rather, premeditation is “the deliberate formation of and reflection upon the intent to take a human life” and involves “the mental process of thinking beforehand, deliberation, reflection, weighing or reasoning for a period of time, however short.” *Pirtle*, 127 Wn.2d at 644, *quoting State v. Gentry*, 125 Wn.2d 570, 597-98, 888 P.2d 1105, *certified denied*, 516 U.W. 843 (1995); *State v. Ortiz*, 119 Wn.2d 294, 312, 831 P.2d 1060 (1992).

Intent to kill and premeditation are not the same; they are separate elements of first degree murder. *State v. Brooks*, 97 Wn.2d 873, 876, 651 P.2d 217 (1982). The State bears the burden of proving beyond a reasonable doubt that the defendant premeditated the offense. *State v. Lane*, 112 Wn.2d 464, 473, 771 P.2d 1150 (1989). “Premeditation” can be proven by circumstantial evidence where the “inferences drawn by the jury are reasonable and evidence supporting the jury’s verdict is substantial.” *State v. Neslund*, 50 Wn. App. 531, 749 P.2d 727, *rev. denied*, 110 Wn.2d 1025 (1989); *Pirtle*, 127 Wn.2d at 643; *Gentry*, 125 Wn.2d at 597.

Murders resulting from an impulsive or spontaneous act are not premeditated. *State v. Luoma*, 88 Wn.2d 28, 34, 558 P.2d 756 (1977). Where there is evidence that a killing occurred in the heat of passion, however, it is possible to find the absence of premeditation but the presence of intent. *State v. Bolen*, 142 Wash. 653, 666, 254 P. 445 (1927).

In *State v. Bingham*, 105 Wn.2d 820, 719 P.2d 109 (1986), approximately three to five minutes passed while the defendant manually strangled the victim. The court held that the mere lapse of time in which a killing occurred showed only an opportunity to deliberate and not actual deliberation. Thus, premeditation requires proof of actual deliberation. *Id.*

Mr. Engh submits the State failed to provide sufficient proof he

premeditated before killing his wife.

**ii. The State proved only that Mr. Engh's act was impulsive and/or spontaneous but not premeditated.**

In assessing whether the State met its burden of proving beyond a reasonable doubt Mr. Engh acted with premeditation, four characteristics of murder “are particularly relevant to establish premeditation: motive, procurement of a weapon, stealth, and the method of killing.” *Pirtle*, 127 Wn.2d at 644. The second and third factors can be further combined as evidence of planning. *Id.*

Regarding motive, Mr. Engh had no motive to kill his wife. The State attributed his desire to be with other woman such as Kelly Hughes as a motive, and cited his alleged statements that “that fucking bitch ruins everything” and “I hate her more than I’ve hated anybody” to support its argument. The State's claim of motive makes no sense, however. Mr. Engh had already separated from his wife. Moreover, if women such as Ms. Hughes found the fact of his marriage to be an impediment, Mr. Engh could easily remedy it by obtaining a divorce. There simply was no credible evidence of a motive presented by the State.

Equally supportive of a lack of premeditation in this case, there was no evidence of thoughtful planning by Mr. Engh. In committing the murder,

there was no stealth by Mr. Engh; he shot her in the front yard. Although there was evidence Mr. Engh obtained what ended up being the murder weapon earlier in the day, and that he put on a jumpsuit or mechanic's suit prior to the shooting, the bulk of the remaining evidence supported the inference that Mr. Engh's act of shooting the victim was impulsive or spontaneous.

Here, the State proved the murder was committed while Mr. Engh was in a rage, probably for reasons related to the custody of L.E. and his separation from Brenda, and resulted in the death of Brenda. The State failed to prove the murder was committed with premeditation.

c. **This Court must reverse and remand with Instructions to dismiss the conviction.**

Viewing all of evidence that was properly admitted in this case in a light most favorable to the State, there was insufficient evidence of premeditation because no rational trier of fact would have found beyond a reasonable doubt that Mr. Engh engaged in the process of reflection and meditation, and actually deliberated before firing the gun at Brenda. The evidence viewed in the light most favorable to the State is insufficient to prove beyond a reasonable doubt that Tim premeditated Brenda's death.

Since there was insufficient evidence to support the conviction, this

Court must reverse the conviction with instructions to dismiss. To do otherwise would violate double jeopardy. *State v. Crediford*, 130 Wn.2d 747, 760-61, 927 P.2d 1129 (1996) (the Double Jeopardy Clause of the United States Constitution “forbids a second trial for the purpose of affording the prosecution another opportunity to supply evidence which it failed to muster in the first proceeding.”), *quoting Burks v. United States*, 437 U.S. 1, 9, 98 S. Ct. 2141, 57 L. Ed. 2d 1 (1978).

2. **THE TRIAL COURT ERRED IN ISSUING THE INSTRUCTION DEFINING PREMEDITATION.**

The court issued the standard WPIC instruction, which reads:

Premeditated means thought over beforehand. When a person, after any deliberation, forms an intent to take 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 time. The law requires some time, however long or short, in which a design to kill is deliberately formed.

WPIC 26.01.01; Instruction No. 11; CP at 78. Appenidix B-1.

a. **The Trial Court’s Instruction Denied Mr. Engh Due Process.**

A criminal defendant has the due process right to instructions that clearly and accurately charge the jury regarding the law to be applied in a given case. U.S. Const. amends V, XIV; Const. art. I, § 3; *Mullaney v. Wilbur*, 421 U.S. 684, 95 S. Ct. 1881, 44 L. Ed. 2d 508 (1975); *State v.*

*Roberts*, 88 Wn.2d 337, 562 P.2d 1259 (1977). The standard for clarity in jury instructions is higher than for statutes; which a court can resolve an ambiguously-worded statute through statutory construction, “a jury lacks such interpretive tools and thus requires a manifestly clear instruction.” *State v. LeFaber*, 128 Wn.2d 896, 902, 913 P.2d 369 (1996). Instructions that relieve the State of its burden or fail to correctly inform the jury of an essential ingredient of the crime prejudicially deny a defendant due process of law. “A legally erroneous instruction cannot be saved by the test for sufficiency.” *Id.* at 903 (citing *State v. Wanrow*, 88 Wn.2d 221, 237, 559 P.2d 548 (1977)).

In *LeFaber*, the trial court issued an instruction on self-defense that permitted two interpretations, one which accurate and one which was erroneous. In holding the instruction denied the defendant due process of the law, the Washington Supreme Court remarked, “the offending sentence lacks a grammatical signal compelling [the correct] interpretation over the alternative, conflicting, and erroneous reading.” *LeFaber* 128 Wn.2d at 902-03.

- ii. **The Court’s Instruction Created Ambiguity Regarding both the Nature of the Deliberation that Must Precede the Formation of an Intent to Kill and the Amount of Time in which a Design to Kill is Formed.**

Premeditation requires proof of a “deliberate formation of an reflection upon the intent to take a human life.” *State v. Townsend*, 142 Wn.2d 838, 848, 15 P.3d 145 (2001) (quoting *State v. Gentry*, 125 Wn.2d 570, 597-98, 888 P.2d 1105 (1995) (internal citations omitted)). A premeditated murder thus requires not only thinking over beforehand,” but that the deliberation be specifically on the taking of human life. *Townsend*, 142 Wn.2d at 848; *Gentry*, 125 Wn.2d at 597-98.

The first sentence of WPIC 26.01.01 defines “premeditation” as “thought over beforehand” without narrowing this deliberative process to premeditation specifically on the taking of a human life. The succeeding sentence heightens this ambiguity by providing, “When a person, *after any deliberation*, forms an intent to take a human life, the killing may follow immediately after formation of the settled purpose and it will still be premeditated.” WPIC 26.01.01 (emphasis added). According to this definition, a person charged with premeditated murder may deliberate about something other than the taking of human life before forming the intent to kill, and that person could still be convicted. For example, the evidence could establish the defendant deliberated about his or her hostility toward the victim, about his or her desire to harm the victim or about something entirely

unrelated to the charged offense but under the “any deliberation” language, the defendant would be as culpable as someone who formed a specific design to kill prior to executing the crime.

The last sentence does nothing to alleviate the potential confusion to jurors, in that it only indicates that “The law requires some time, *however long or short*, in which a design to kill is deliberately formed.” WPIC 26.01.01 (emphasis added). The WPIC which defines “intent” provides, “A person acts with intent or intentionally when acting with the objective or purpose to accomplish a result which constitutes a crime.” WPIC 10.01. There is no significant difference between this instruction and the definition of premeditation, as under WPIC 26.01.01, the defendant can deliberate for an instant and still be guilty of first-degree murder.

The Washington Supreme Court has held that an instruction which provided, “It is not necessary for an appreciable period of time to elapse for premeditation to exist...” was reversible error because it obliterated the distinction between first-and-second-degree murder. *State v. Shirley*, 60 Wn.2d 277, 277, 373 P.2d 777 (1962). The *Shirley* Court discussed the historical precedent for an instruction which clearly differentiates between intent and premeditation and requires the jury find actual deliberation, as distinguished from “malice aforethought”:

While no great amount of time necessarily intervenes between the intention to kill and the act of killing, yet under our statute there must be time enough to deliberate, and no deliberation can be instantaneous; in fact, the idea of deliberation is the distinguishing idea between murder in the first and second degree, and the instructions of the court which we have quoted give exactly that which would be necessary to define murder in the second degree, because the intention to kill must be in the mind of the slayer, and he must do it purposely and maliciously; consequently the act of killing must be preceded by the purpose to kill, and it must be a malicious purpose, and that purpose may be formed instantaneously, or as expressed by the learned court below, 'as instantaneous as the successive thoughts of the mind,' and under the old definition of murder, viz, the unlawful killing of any subject whatsoever through malice aforethought, that would be a proper instruction in regard to murder; but our statute has changed the law in this respect, and has introduced the element of deliberation, and deliberation means to weigh in the mind, to consider the reasons for and against, and consider maturely, to reflect upon, -- and while it may be difficult to determine just how short a time it will require for the mind to deliberate, yet, if any effect is to be given to the statute which makes a difference between murder in the first and second degree, the language used by the learned court is too broad.

*Shirley*, 60 Wn.2d at 279, (citing, *inter alia*, *State v. Rutten*, 13 Wash. 203, 212, 43 Pac. 30 (1895)).

It is true that since *Shirley*, the Washington Supreme Court has found WPIC 26.01.01 does not impermissibly render "premeditation" synonymous with "intent." *State v. Rice*, 110 Wn.2d 577, 757 P.2d 889 (1988), *cert denied*, 491 U.S. 910 (1989). However, the *Rice* Court's assessment of this issues does not indicate the Court was presented with ambiguity in the

instruction's language regarding the nature of the deliberation that must precede the murderous act, and therefore the *Rice* opinion is not dispositive here.

**b. Mr. Engh is Entitled to Relief.**

As did the Court in *LeFaber*, this Court should reject any effort to impart a harmless error analysis to the erroneous instruction: "Before addressing whether an instruction sufficed to allow a party to argue its theory of the case, the must first decide the instruction accurately stated the law without misleading the jury." *LeFaber*, 128 Wn.2d 903. As in *LeFaber*, the ambiguity in the instruction issued here had a grave potential to mislead the jury. This Court should reverse the conviction obtained.

**3. MR. ENGH'S CONFESSION WAS INVOLUNTARY AND THEREFORE, IT SHOULD HAVE BEEN SUPPRESSED.**

When Tim Engh confessed, he was apparently under the influence of an unknown amount of substances and alcohol. He had cut his wrists in a suicide attempt. He was semi-conscious when police entered Steven Engh's house. At least one officer thought Mr. Engh might die. The police knew Mr. Engh was suicidal and possibly under the influence of drugs and alcohol.

Despite that knowledge, they dealt with him as they would any normal adult suspect. They took no special precautions to insure that any confession given

would be knowing, intelligent and voluntary.

Under these circumstances, Tim's confession was not voluntary and should have been suppressed. U.S. Const. amends. V and XIV.

**a. Standard of Review.**

Involuntary confessions are inadmissible. All confessions are presumed involuntary. The State has a heavy burden in overcoming this presumption. *North Carolina v. Butler*, 441 U.S. 369, 373, 99 S. Ct. 1755, 60 L. Ed. 2d 286 (1978); *State v. Sargent*, 111 Wn.2d 641, 648, 762 P.2d 1127 (1988).

In reviewing the question of voluntariness, the appellate court must make an independent examination of the whole record. *Clewis v. Texas*, 386 U.S. 707, 708, 87 S. Ct. 1338, 18 L. Ed. 2d 423 (1967); *State v. Roth*, 30 Wn. App. 740, 746, 637 P.2d 1013 (1981). A trial court's determination that a confession was voluntary will be upheld on appeal only when there is substantial evidence in the record from which the trial court could find voluntariness by a preponderance of evidence. *State v. Vannoy*, 25 Wn. App. 464, 467, 610 P.2d 380 (1980), *decision after remand on other grounds*, 27 Wn.App. 527, 618 P.2d 1340 (1980). *See al*, *State v. Lanning*, 5 Wn. App. 426, 431, 487 P.2d 785, 792 (1971) (voluntariness a question of law); *Jurek v. Estelle*, 593 F.2d 672, 679 (5<sup>th</sup> Cir. 1979) (appellate court must carefully

scrutinize circumstances surrounding confessions).

**b. Totality of Circumstances Test.**

No simple definition of “voluntariness” exists for purposes of determining the admissibility of confessions. Voluntariness cannot be taken literally to mean a “knowing” choice. If such were the case, even confessions made under brutal treatment would be admissible as they represent a knowing choice of alternatives. Nor can voluntary be taken to incorporate a “but for” test. If such were the case virtually no confession would be voluntary, because very few people give incriminating statements in the absence of official action of some kind. *Schneckloth v. Bustamonte*, 412 U.S. 218, 224, 93 S. Ct. 2041, 36 L. Ed. 2d 854 (1973).

Instead, “voluntariness” reflects an accommodation of the complex values implicated in police questioning of a suspect. The acknowledged need for police questioning as a tool of effective law enforcement is balanced with society’s deep felt belief that the criminal law cannot be used as an instrument of unfairness, and that the possibility of unfair police tactics poses a real and serious threat to civilized notions of justice. *Id.*, at 206-207.

The ultimate test remains that has been the only clearly established test in Anglo-American courts for 200 years: Is the confession the product of an essentially free and unconstrained choice by its maker? If it is the

confession may be used against him. If it is not, if his will have been overborne and his capacity for self-determination critically impaired, the use of his confession offends due process. *Culcombe v. Connecticut*, 367 U.S. 568, 602, 81 S. Ct. 1860, 6 L. Ed. 2d 1037 (1990). *See also, State v. Rupe*, 101 Wn.2d664, 679, 683 P.2d 571 (1984) (to be voluntary a confession must be the product of a rational intellect and a free will).

In determining voluntariness, “all the circumstances of the interrogation” must be evaluated. *Mincey v. Ariona*, 437 U.S. 385, 401, 98 S. Ct. 2408, 2416, 47 L. Ed. 2d 290 (1978); *State v. Rupe*, 101 Wn.2d at 679; *State v. Wolfer*, 39 Wn. App. 287, 290, 693 P.2d 154 (1984). The mere fact that *Miranda* warnings were read to the suspect does not prove that a subsequent confession was voluntary. *State v. Prater*, 77 Wn.2d 526, 463 P.2d 640 (1970). Likewise, the mere fact that a suspect signed a rights form does not prove a subsequent confession voluntary. *Miranda v. Arizona*, 384 U.S. at 492. Rather, the “totality of the circumstances” must be considered.

The totality of the circumstances test requires consideration of all pertinent factors. The common thread in every case considering the voluntariness of confessions is the goal of ensuring that the “engine of the criminal law is not be use to overreach individuals who stand helpless against it.” *Culcombe v. Connecticut*, 367 U.S. at 581. In each case, the prevailing

concern is to guard against misuse of criminal investigatory power to obtain confessions from those unable to exercise their fundamental rights to silence and counsel either because of ignorance or because of other acts by state against which effectively overbear the will to exercise those rights.

Simple recitation of *Miranda* warnings is not sufficient to guarantee a subsequent knowing and intelligent waiver of constitutional rights. Rather there must be an effective appraisal of the constitutional rights, taking into account the suspect's capacity for understanding. *Miranda v. Arizona*, 384 U.S. at 467 (accused must be adequately and effectively apprised of his rights). Courts uniformly require that the totality of the circumstances test be applied in light of the special circumstances and vulnerabilities of the particular defendant. *Vance v. Bordenkercher*, 692 F.2d 978, 982-986 (4<sup>th</sup> Cir. 1982) (Ervin, J., dissenting) (when the defendant is developmentally disabled without benefit of counsel, the police must take special precautions to ensure that any waiver is voluntary);

In this case, the police clearly know of Mr. Engh's mental state—that he was distraught and suicidal. They knew that a large amount of intoxicants had been found at the house and that the hospital staff had induced vomiting.

However, absolutely no special precautions were taken to insure that any confession would be voluntary: no effort was made to reduce the legal

terminology of the *Miranda* warnings to more simple terms; no explanation of constitutional rights was given beyond more recitation of *Miranda* warnings.

Applying the totality of the circumstances test, taking into account Howe's serious impairment, his confession was not voluntary and should have been suppressed.

c. **The statement taken at the Thurston County Jail should also be also suppressed.**

Similarly, the trial court erred in denying the motion to suppress statements obtained by law enforcement at the Thurston County Jail the morning of April 14.

As noted *supra*, if an interrogation continues without the presence of an attorney and a statement is taken, a heavy burden rests on the State to show that the individual knowingly and intelligently waived his privilege against self-incrimination and his right to retain an appointed counsel. *Miranda*, 384 U.S. at 475. Valid waiver may be either expressly made or implied when the record reveals that the "defendant understood his rights and volunteered information after reaching such an understanding." *State v. Terrovona*, 105 Wn.2d 632, 646, 716 P.2d 295 (1986). The totality of the circumstances test requires consideration of *all* pertinent factors. These

include a suspect's mental illness; age; whether any promises, no matter how slight, were made; whether the interrogation was custodial; how long questioning continued; and whether the questioning occurred during normal day time hours or late at night when the suspect was tired.<sup>5</sup> The common thread in cases considering voluntariness of confessions is an overarching concern with ensuring that the "engine of the criminal law is not be used to overreach individuals who stand helpless against it." *Culcombe v. Connecticut* 367 U.S. 568, 581, 81 S. Ct. 1860, 6 L. Ed. 2d 1037 (1960). See also *State v. Rupe*, 101 Wn.2d at 679 to be voluntary a confession must be the product of rational intellect and free will).

The police detectives engaged in active overreaching by questioning Mr. Engh the morning after the hospital interrogation. There is no showing that Tim was in a different or improved mental state, whether the substances he had apparently ingested on April 12 or April 13 were still present in his system, and whether he was still affected by the same. Not one of these circumstances support an inference that the Appellant's "answers were freely and voluntarily made without duress, promise, or threat with a full understanding of his constitutional rights" so that waiver may be implied.

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<sup>5</sup> *Jurek v. Estelle*, 593 F.2d at 672 (confession by low IQ suspect made at 1:15 a.m. was involuntary).

*Terrovona, supra*, at 646-47.

d. **The Effort in Admitting Mr. Engh's Statements Requires Reversal of His Conviction.**

The erroneous admission of the Appellant's confession in this case was not harmless beyond a reasonable doubt. The erroneous admission of appellant's confession cannot be harmless. *State v. Ng*, 110 Wn.2d 32, 37, 750 P.2d 632 (1988).

e. **The Error in Admitting Mr. Engh's Statements Requires Reversal of His Convictions.**

In *Arizona v. Fulminante*, 499 U.S. 279, 306, 111 S. Ct. 1246, 1263, 113 L. Ed. 2d 302 (1991), the Supreme Court held that admission of an involuntary confession is subject to "harmless error" analysis. In *State v. Guloy*, 104 Wn.2d 412, 425-26, 705 P.2d 1182 (1985), *cert. denied*, 475 U.S. 1020 (1986), the Washington Supreme Court adopted the "overwhelming untainted evidence" standard in harmless error analysis. In order to determine whether the admission of Mr. Engh's statement in the instant case constituted harmless error, this Court must look only at the untainted evidence to determine if it is so overwhelming it necessarily leads to a finding of guilt.

4. **THE TRIAL COURT ERRED IN ADMITTING A**

**PHOTOGRAPH THAT HAD NO PROBATIVE VALUE OTHER THAN THOSE TO PROVE THAT MS. ENGH DIED, AND WHERE THAT PHOTOGRAPH HAD SUBSTANTIAL PREJUDICIAL IMPACT. ADMISSION OF PHOTO OF MS. ENGH VIOLATED MR. ENGH'S FOURTEENTH AMENDMENT RIGHT TO DUE PROCESS AND A FAIR TRIAL.**

**b. The evidentiary rulings of the trial court violated Mr. Engh's right to due process.**

Admissibility of evidence is generally within the sound discretion of the trial court and its decisions will not be reversed absent abuse of that discretion. *State v. Hamlet*, 133 Wn.2d 314, 324, 944 P.2d 1026 (1997) (*citing State v. Markle*, 118 Wn.2d 424, 438, 823 P.2d 1101 (1992)). An abuse of discretion occurs only when no reasonable person should take the view adopted by the trial court. *State v. Castellanos*, 132 Wn.2d 94, 97, 935 P.2d 1353 (1997) (*citing State v. Huelett*, 92 Wn.2d 967, 969, 603 P.2d 1258 (1979)).

It is significant no one questioned the identity of Ms. Engh, nor was there denial regarding the cause of death. Equally as important is the prejudicial and cumulative nature of the photos under ER 403.

ER 403 provides:

Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair

prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

ER 403 is concerned with “unfair prejudice” that is more likely to arouse an emotional response than a rational decision among jurors. Prejudice occurs when the evidence is confusing, or misleading, or otherwise not equally probative. In this case, the redundant admission of Exhibit 14, which demonstrated the upper torso of Ms. Engh, aroused the passions of the jury to the extent that they could have easily been misled or confused by being forced to merely find that Ms. Engh had been shot, failing to consider Mr. Engh’s state of mind at the time of the shooting. Looking at the evidence in this case, and the admission of the photograph, the photo was no doubt heart-wrenching. The jury also heard the cumulative testimony of several witnesses who testified to the nature of the gunshot wounds in great detail and Ms. Engh’s autopsy.

The extent of the wounds was not the issue before the jury. The issue was whether the State could prove beyond a reasonable doubt that Mr. Engh with premeditated intent, caused the death of Ms. Engh. The photos misled the jury as to its mission.

- b. The photograph of the victim was inflammatory, unnecessary, wasted valuable judicial resources, and were

**erroneously admitted.**

Evidence, albeit relevant, may nevertheless be excluded where its probative value is substantially outweighed by the danger of unfair prejudice to the defendant. ER 403; *Pirtle*, 127 Wn.2d at 653. Gruesome or inflammatory photographs should be admitted only “if their probative value outweighs their prejudicial effect.” *State v. Griffing*, 45 Wn. App. 369, 372, 725 P.2d 445, *review denied*, 107 Wn.2d 1015 (1986); ER 403.

Prosecutors are not given *carte blanche* to introduce every piece of admissible evidence where that evidence is inflammatory and unnecessary *State v. Crenshaw*, 98 Wn.2d 789, 807, 659 P.2d 488 (1983). The courts look unfavorably upon the needless introduction of unnecessarily cumulative, gruesome photographs. *State v. Brett*, 126 Wn.2d 136, 160, 892 P.2d 29 (1995). The court abuses its discretion in admitting photographs where other less inflammatory evidence is available to support proof of the elements of the crime. *State v. Sargent*, 40 Wn. App. 340, 348, 698 P.2d 598 (1985), *reversed on other grounds*, *State v. Sargent*, 111 Wn.2d 641, 762 P.2d 1127 (1988).

The Washington Supreme Court in *State v. Adams*, noted that “gruesome photographs designed primarily or solely to arouse the passions of

the jury and to prejudice the defendant are not admissible.” 76 Wn.2d 650, 656, 458 P.2d 558 (1969), *reversed on other grounds*, 403 U.S. 947, 29 L. Ed. 2d 855, 91 S. Ct. 2273 (1971). Here, that is exactly what the State did.

There was no need to introduce these pictures to establish death. Death was not a disputed issue. *State v. Kendrick*, 47 Wn. App. 620, 628, 739 P.2d 1079, *review denied*, 108 Wn.2d 1024 (1987) (court should consider whether the fact of consequence for which the evidence is offered is being disputed). Even if death was a disputed issue, the picture was unnecessary to prove that death.

Non-constitutional error is prejudicial if within reasonable probabilities, the error affected the outcome of the case. *State v. Dixon*, 37 Wn. App. 867, 875, 684 P.2d 725 (1984). Mr. Engh is not required to prove that the admission of the pictures more likely than not altered the outcome in the case. A “reasonable probability” only requires a probability sufficient to undermine confidence in the outcome. *Strickland v. Washington*, 466 U.S. 668, 698, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984).

Here, the defense did not challenge the identity of the victim, the cause of death, or the physical features of the victim, yet the court admitted the photograph over the defense objection. As a consequence, the admission of the photograph was unnecessary, wasted valuable judicial resources, was

inflammatory, and the prejudice to Mr. Engh outweighed any probative value. As such the court erroneously admitted the photographs.

Erroneous evidentiary rulings violate due process by depriving the defendant of a fundamentally fair trial. U.S. Const. amend. XIV; *Estelle v. McGuire*, 502 U.S. 62, 112 S. Ct. 475, 116 L. Ed. 2d 385 (1991); *Pulley v. Harris*, 465 U.S. 37, 41, 104 S. Ct. 871, 79 L. Ed. 2d 29 (1984). The trial court's rulings allowing photograph of the victim violated Mr. Engh's right to due process.

5. **THE TRIAL COURT COMMITTED REVERSIBLE ERROR WHEN IT FAILED TO INSTRUCT THE JURY ON VOLUNTARY INTOXICATION.**

Initially, the defense contemplated a voluntary intoxication instruction. Believing that, as a matter of law, the intoxication instruction could not be included, defense counsel later erroneously conceded the issue and did not proffer an instruction.

Settled law in Washington provides that the test for sufficiency of jury instructions is whether "they permit each party to argue his theory of the case, are not misleading, and when read as a whole, properly inform the trier of fact of the applicable law." *State v. Clerk*, 143 Wn.2d 731, 771, 24 P.3d 1006

(2001); citing *State v. Mark*, 94 Wn.2d 520, 526, 618 P.2d 73 (1980).

A defendant is entitled to a voluntary intoxication instruction when (1) the crime charged includes a mental state, (2) substantial evidence of drinking exists, and (3) evidence exists that the drinking affected the defendant's ability to form the requisite intent or mental state. *State v. Gallegos*, 65 Wn. App. 230, 238, 828 P.2d 37 (1992). The evidence must reasonably connect the defendant's intoxication with the asserted inability to form the required level of culpability to commit the crime charged. *State v. Gabryschak*, 83 Wn. App. 249, 252-53, 921 P.2d 549 (1996).

"Diminished capacity from intoxication is not a true 'defense.'" *State v. Kruger*, 116 Wn. App. 685, 692, 67 P.3d 1147 (2003), quoting *State v. Coates*, 107 Wn.2d 882, 891-92, 735 P.2d 64 (1987). Rather, "[e]vidence of intoxication may bear upon whether the defendant acted with requisite mental state.'" *State v. Kruger*, 116 Wn. App. at 692, quoting *State v. Coates*, 107 Wn.2d at 892.

In *State v. Jones*, 95 Wn.2d 616, 628 P.2d 472 (1981) our State Supreme Court considered the following evidence in determining whether an intoxication instruction was required in a homicide case:

Appellant testified repeatedly that he had been drinking beer and had drunk "nine or eleven" beers in the afternoon before the incident. [citation omitted.] A witness who talked to

appellant in the decedent's apartment an hour before the incident noted "[t]he whites of his eyes were red and his eyes were glassy. His speech was slurred." [citation omitted.] After his apprehension soon after the commission of the crime, appellant was placed for a time in the "drunk tank" at the police station.

*Jones*, at 622. In reviewing this evidence, the court in *Jones* stated that "[w]e think it plain the evidence was sufficient for the court to give the intoxication instruction." *Jones*, at 623.

Moreover, evidence of drinking and intoxication need not be introduced by the defense. In *State v. Gabryschak*, 83 Wn. App. 249, 253, 921 P.2d 549 (1996), the court stated:

[A] defendant may exercise his or her right to refrain from testifying at trial and to rest at the close of the State's case without presenting defense testimony, and still be entitled to a voluntary intoxication instruction, so long as the evidence presented by the State and elicited by the defense during cross-examination of the State's witnesses contains substantial evidence of the defendant's drinking and of the effects of the alcohol on the defendant's mind *or* body. (Emphasis added.)

First and second degree assault require proof of the mental state of intent. RCW 9A.36.011(1), RCW 9A.36.021(1)(c). It was reversible error to fail to give a voluntary intoxication instruction in a first and second degree assault case where evidence was introduced that the defendant had been drinking heavily during the day the crime was committed.

In the case at bar, numerous witnesses testified that Mr. Engh was drinking the afternoon of April 12 at two different bars. The alcohol consumption included beer, mixed drinks including what a witness called “liquid cocaine.”

The evidence presented at trial was uncontroverted that Mr. Engh was drinking significantly, and for an extended period of time.

Furthermore, evidence was produced from which the jury could infer that Mr. Engh was so intoxicated that it affected his ability to form the necessary *mens rea*.

The weight to be accorded such evidence is for the jury to determine under proper jury instructions. This was evidence from which *the jury* could conclude that Mr. Engh’s state of intoxication affected his ability to form the necessary mental intent required for the crimes. Failure to provide the jury an intoxication instruction allowed the State to satisfy the mental intent element without giving the jury the opportunity to consider the applicable law.

The failure to provide Mr. Engh’s jury with a voluntary intoxication instruction deprived him of a fair trial.

6. **MR. ENGH WAS DENIED EFFECTIVE ASSISTANT OF COUNSEL WHEN HIS TRIAL ATTORNEY WITHDREW HIS REQUEST FOR**

**JURY INSTRUCTIONS ON INVOLUNTARY  
INTOXICATION.**

Evidence concerning Mr. Engh's alcohol consumption was clearly presented. A voluntary intoxication was merited.

The right to effective assistance of counsel is guaranteed by Washington's State Constitution at Const. art. I, § 22 (amend. 10). It is guaranteed by the Six Amendment to the United States Constitution, and applied to the states through amend. XIV, § 1. The test in Washington for effective assistance of counsel has two parts. It was adopted from the United States Supreme Court's decision in *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984).

First, it must be shown that the attorney's conduct fell below an objective standard of reasonableness. Second, the deficient conduct of the attorney must have prejudiced the defendant. *State v. Harper*, 64 Wn. App. 283, 823 P.2d 1137 (1992). Prejudice occurs if it can be shown that, but for the attorney's conduct the outcome of the proceeding would have been different. *State v. Thomas*, 109 Wn.2d 222, 743 P.2d 816 (1987). There is a presumption that the assistance was effective. *State v. Sardenia*, 42 Wn. App. 533, 713 P.2d 122, review denied, 105 Wn.2d 1013 (1986). Moreover, conduct that can be characterized as legitimate trial tactics or strategy does

not support a claim of ineffective assistance of counsel. *State v. Carter*, 56 Wn. App. 217, 783 P.2d 589 (1989); *State v. Mak*, 105 Wn.2d 692, 718 P.2d 407, cert denied, 479 U.S.

In Mr. Engh's case, trial counsel's performance fell below an objective standard of reasonableness. By conceding the issue of requesting the intoxication instruction, trial counsel failed to protect Mr. Engh's right to a fair trial.

The failure to propose proper jury instructions and object to the lack of instruction(s) prejudiced Mr. Engh. To establish prejudice, Mr. Engh need only show a "reasonable probability" that, but for counsel's error, the result of the trial would have been different. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Strickland*, 466 U.S. at 693-94.

The State may allege that Mr. Engh's trial counsel made a strategic or tactical choice to reject the defense of voluntary intoxication. Such an argument is not supported by the record, however. Trial counsel clearly indicated that he wanted the instruction, but did not believe Mr. Engh was entitled to it as a matter law.

The failure of Mr. Engh's counsel to request the instructions should not prevent this court from reaching the issue of whether the absence of the

instructions, warrants a new trial. Only two possibilities exist: (1) The proposed instructions were correct, in which case, should have been given; or (2) Mr. Engh's counsel failed to propose correct instructions, in which case he did not receive effective assistance of counsel. *State v. Thomas* 109 Wn.2d 222, 231, 743 P.2d 816 (1987). In either instance, a constitutional issue is present, and this Court has the authority to reach the issue for the purpose of achieving substantial justice.

7. **TRIAL COUNSEL'S FAILURE TO PROPOSE A LIMITING INSTRUCCION DENIED MR. ENGH EFFECTIVE ASSISTANCE OF COUNSEL**

Several statements pertaining to the issue of premeditation were admitted by the court. Other statements and testimony regarding Mr. Engh's alleged behavior were found to be inadmissible by the trial court judge.

The defense requested no instruction limiting the jury's use of this testimony. While ER 404(b) prohibits evidence of prior acts to prove the defendant's propensity to commit the charged crime, evidence of prior acts may be admitted for other, limited purposes. *State v. Cook*, 131 Wn. App. 845, 849, 129 P.3d 834 (2006); ER 404(b). Evidence admitted under ER 404(b), must not only serve a legitimate purpose and be relevant to an element of the crime charged, but on balance, the probative value to the

evidence must outweigh its prejudicial effect. *State v. DeVries*, 149 Wn.2d 842, 848, 72 P.3d 748 (2003).

The trial court has discretion to admit evidence of prior acts when the balancing test is satisfied, provided the court gives an adequate limiting instruction. *State v. Cook*, 131 Wn. App. at 853. The instruction must allow the jury to use the evidence in assessing the witness's state of mind at the time of the acts, while restricting the jury from using the evidence to show the defendant's propensity to commit the charged act. *Id.* Without an adequate limiting instruction, it is error to admit evidence of his bad acts under ER 404(b).

Defense counsel's failure to propose a limiting instruction in this case constitutes ineffective assistance of counsel.

The federal and state constitutions guarantee criminal defendants the right to effective representation. U.S. Const. amend. VI; Const. art. I, § 22. A defendant is denied this right when his attorney's conduct "(1) falls below a minimum objective standard of reasonable attorney conduct and (2) there is a probability that the outcome would be different but for the attorney's conduct." *State v. Benn*, 120 Wn.2d 631, 663, 845 P.2d 289 (citing *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 1052, 80 L. Ed. 2d 674 (1984)), *cert. denied*, 510 U.S. 944 (1994).

The Washington Supreme Court has recognized that counsel may be ineffective for failing to propose a jury instruction. *State v. Thomas*, 109 Wn.2d 222, 226, 743 P.2d 816 (1987) (counsel was ineffective in failing to propose an instruction that would have allowed counsel to argue that defendant's intoxication negated *mens rea* element of felony flight). Here, counsel was ineffective in failing to propose a limiting instruction.

When the trial court admits evidence which is otherwise inadmissible for a limited purpose, a limiting instruction is both "proper and necessary." *State v. Johnson*, 40 Wn. App. 371, 377, 699 P.2d 221 (1985) (citing *State v. Pitts*, 62 Wn.2d 294, 297, 382 P.2d 508 2963)). *See also* ER 105 (court is obligated to give proper limiting instruction when requested.) "[I]t is of vital importance that counsel have the benefit of the instruction to stress to the jury that the testimony was admitted only for a limited purpose and may not be considered as evidence of the defendant's guilt." *State v. Aaron*, 57 Wn. App. 277, 281, 878 P.2d 949 (1990).

Because a limiting instruction was proper and necessary, counsel's failure to request one constitutes deficient performance.

Counsel's deficient performance cannot be excused as trial strategy. Where evidence would have gone unnoticed by the jury of the evidence would be more harmful than helpful. *See e.g., State v. Donald*, 68 Wn. App.

543, 551, 844 P.2d 447, *review denied*, 121 Wn.2d 1024 (1993).

Defense counsel knew the harmful testimony regarding his threats to his wife, his alleged hatred of her, would not go unnoticed. Counsel's failure to ensure that the jury understood there was only one legitimate use for the evidence could not be part of a legitimate trial strategy.

As discussed above, the absence of an appropriate limiting instruction created the very real possibility that the jury based its verdict on Mr. Engh's complaints about his marriage, his belief that his wife was always ruining things, as evident of a motive rather than evidence that he actually premeditated the murder. Here is a reasonable probability that counsel's deficient performance affected the outcome of the trial in that the jury could have found that the state did not prove premeditation, and Mr. Engh was denied effective assistance of counsel.

8. **CUMULATIVE ERROR DENIED MR. ENGH A FAIR TRIAL.**

The combined effects of error may require a new trial, even when those errors individually might not require reversal. *State v. Coe*, 101 Wn.2d 772, 789, 684 P.2d 668 (1984); *United States v. Preciado-Cordobas*, 981 F.2d 1206, 1215 n.8 (11<sup>th</sup> Cir. 1993). Reversal is required where the cumulative effect of several errors is so prejudicial as to deny the Appellant a

fair trial. *Mak v. Blodgett*, 970 F.2d 614 (9<sup>th</sup> Cir. 1992); *United States v. Pearson*, 746 F.2d 789, 796 (11<sup>th</sup> Cir. 1984). In this case, the cumulative effect of the trial courts errors, in conjunction with the instances of ineffective assistance cited *supra* produced an unmistakable series of errors that prejudiced the Appellant and materially affected the outcome of the trial.

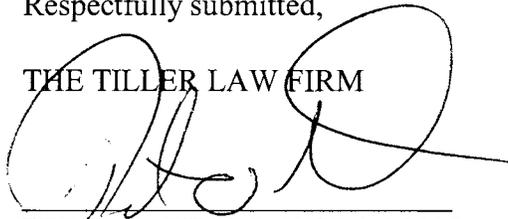
**E. CONCLUSION**

For the foregoing reasons, the Appellant respectfully requests that this Court reverse his convictions.

DATED: September 29, 2006.

Respectfully submitted,

THE TILLER LAW FIRM

A handwritten signature in black ink, appearing to read 'Peter B. Tiller', is written over a horizontal line. The signature is fluid and cursive, with a long horizontal stroke extending to the right.

PETER B. TILLER-WSBA 20835  
Of Attorneys for Appellant

A



- 1 2. The detectives were investigating the murder of the defendant's wife, Brenda Engh, and the  
2 abandonment of L.E., the infant daughter of the defendant and Brenda Engh; these crimes occurred  
3 on April 12, 2005, in Yelm, Washington.  
4
- 5 3. Law enforcement learned that Brenda Engh's parents had earlier been at Brenda's residence in Yelm  
6 waiting for Timothy Engh to arrive to sign over custody rights of Lily Engh. Mr. Timothy Engh was  
7 supposed to arrive by 5:30 p.m.; Brenda's parents wanted to be present fearing there would be  
8 problems with Mr. Timothy Engh. When the defendant had not arrived by 5:50 p.m., they left  
9 Brenda at her residence with her baby daughter L.J.E. (9-7-04). Law enforcement learned from  
10 Brenda's parents that the child custody forms had been unsigned when they had left her house at  
11 approximately 5:50 p.m., but the forms were signed by both Brenda and the defendant when law  
12 enforcement arrived at Brenda's house and discovered her body and the baby at approximately 7:20  
13 p.m. Law enforcement continued to investigate the case and they attempted to locate Mr. Timothy  
14 Engh.  
15
- 16 4. Law enforcement learned from Casper Engh, one of the defendant's uncles, that the defendant had  
17 told him that the defendant had shot Brenda Engh; this conversation happened on the night of April  
18 12 at Casper Engh's residence in Orting, Washington.  
19
- 20 5. On April 13, 2005, law enforcement located the defendant's vehicle at his Uncle Steve Engh's  
21 residence in Bonney Lake, Washington. The area was secured by law enforcement and a search  
22 warrant was requested and obtained for the person of Timothy Engh. The SWAT Team served the  
23 warrant and located that defendant on the bedroom floor of the Bonney Lake residence. The  
24 defendant appeared to be unconscious and his wrists had had superficial cuts on them; there was an  
25 empty bottle of Dayquil next to him as well as an empty bottle of pain killers. The defendant was  
26 transported to Good Samaritan Hospital in Puyallup at approximately 10:45 a.m.

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- 1 6. On April 13, 2005, at approximately 10:45 a.m., Detective Haller and Detective Rompa followed the  
2 ambulance to the hospital and monitored the defendant's status throughout the day.
- 3 7. The detectives both observed as the medical staff tended to the defendant; they observed as medical  
4 personnel injected a charcoal solution into the defendant to absorb any pills he may have taken when  
5 he was at his uncle's residence. An IV was started which was used to re-hydrate Mr. Engh as he was  
6 being treated. Mr. Engh's wrists were cleansed and repaired; and, as the wounds were superficial, he  
7 was given no medications. Detective Haller observed Mr. Engh vomit several times, expelling the  
8 charcoal that he been administered to him.
- 9 8. Hospital staff requested that law enforcement restrain the defendant in 4-point restraints and the  
10 detectives followed this request; the defendant could not move to any appreciable degree.
- 11 9. The detectives observed that throughout the day, the defendant could communicate with the medical  
12 staff; they observed that he used verbal and non-verbal forms of communication.
- 13 10. At approximately 5:30 p.m., nearly seven hours after admission into the hospital, Detective Haller  
14 introduced himself and Detective Rompa. The defendant was awake and responsive. Detective  
15 Haller asked Mr. Engh if he knew why he was there; in response, the defendant nodded his head up  
16 and down. Detective Haller asked Mr. Engh if he thought what he had done was wrong; Mr. Engh  
17 again nodded his head up and down.
- 18 11. Detective Rompa had checked with hospital staff before Detective Haller began talking to the  
19 defendant to verify that the defendant was not under the influence of any medication; hospital staff  
20 verified that the defendant was not under the influence of any drugs or medication.
- 21 12. Detective Rompa observed that when Detective Haller began speaking to the defendant that the  
22 defendant was alert and focused; the defendant tracked and answered questions appropriately.
- 23 13. Detective Haller waited approximately thirty additional minutes and then read the defendant his

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1        *Miranda* warnings which Mr. Engh stated that he understood and waived; Mr. Engh did not, at any  
2        time, request a lawyer.

3  
4        14. Detective Haller again asked the defendant if he knew why law enforcement was there; Mr. Engh  
5        replied that he did. Detective Haller asked him if he thought what we had done was wrong; he stated  
6        that he thought it was wrong.

7        15. Mr. Engh stated that he had gone to his wife's residence to give up his parenting rights. He stated  
8        that only his wife and baby were present at the house; he said that his in-laws had left already.

9        16. Detective Haller asked him what happened to Brenda; Mr. Engh would not answer, saying that he  
10       could not tell the detective right then. Mr. Engh also did not answer why he left his infant daughter  
11       lying out in the cold.

12  
13       17. Upon questioning regarding the stolen firearm, Mr. Engh did say that he had hidden the gun at his  
14       Uncle Casper's residence in Orting under a wood pallet. Mr. Engh stated that the firearm belonged  
15       to his grandfather and that he took it without permission on April 12<sup>th</sup>.

16       18. Detective Haller, near the end of the interview, stated that he had to ask Mr. Engh a very critical  
17       question; Mr. Engh hesitated and said, "Don't ask that question just yet; I just can't answer it yet."  
18       Detective Haller stopped the interview at that point. Mr. Engh was next transported to the Thurston  
19       County Jail.

20  
21       19. On April 14, at approximately 8:45 a.m., Detective Haller and Detective Rompa went to the  
22       Thurston County Jail and contacted Mr. Engh.

23       20. They asked if Mr. Engh would be willing to give a taped statement; he stated he would give a taped  
24       statement.

25  
26       21. Detective Haller read Mr. Engh his *Miranda* warnings again which he stated that he understood and  
waived. Mr. Engh did not request a lawyer at any time.

- 1 22. During this interview, the defendant stated that he shot his wife Brenda with a revolver that he had  
2 taken from his grandfather's residence. He said that he drove to his Uncle Casper's residence in  
3 Orting where he hid the firearm under a wood pallet. Mr. Engh further stated that he did not know if  
4 his daughter had been injured and could not explain why he did not check her after the shooting.  
5
- 6 23. Both Detective Haller and Detective Rompa made no threats or promises to the defendant during any  
7 of their contacts with him.
- 8 24. Both Detective Haller and Detective Rompa stated that the defendant never requested an attorney.
- 9 25. Both Detective Haller and Detective Rompa stated that the defendant never invoked his right to  
10 remain silent.
- 11 26. Only Detective Haller and Detective Rompa testified at the CrR 3.5 hearing.
- 12 27. The testimony of Detective Haller was very credible.
- 13 28. The testimony of Detective Rompa was very credible.
- 14
- 15
- 16

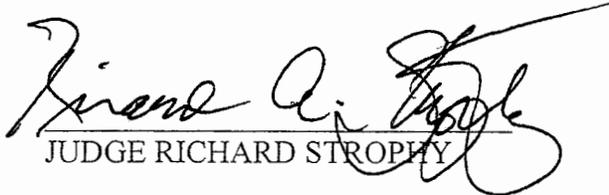
17 CONCLUSIONS OF LAW

- 18 1. The Court holds that the defendant's post-*Miranda* admissions at the hospital on April 13, 2005, and  
19 the Thurston County Jail on April 14, 2005, were made voluntarily after he was accurately informed  
20 of his *Miranda* warnings and after a knowing, voluntary, and intelligent waiver of those rights, which  
21 he never rescinded.
- 22 2. The Court finds that both waivers of the *Miranda* warnings at the hospital and at the jail were  
23 knowing, voluntary, and intelligent based on the particular facts and circumstances surrounding this  
24 case, including the background, experience, and conduct of the accused. The totality of the evidence,  
25 which was undisputed, clearly demonstrates that the defendant was not under the influence of  
26 anything that affected his ability to make decisions.

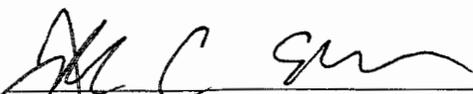
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- 1 3. The Court finds specifically that the defendant, during the post-*Miranda* statement at the hospital,  
2 demonstrated an ability to discriminate between what questions he would answer and what questions  
3 he would not answer. The Court finds that the defendant made rational decisions.  
4  
5 4. The Court holds that the two questions posed to the defendant and the defendant's non-verbal  
6 answers to these two questions before the advisement of the *Miranda* warnings at the hospital on  
7 April 13, 2005 were voluntary; further, the court specifically finds that this brief interaction between  
8 the defendant and Detective Haller did not taint the subsequent post- *Miranda* statements as the  
9 questions and the "nodding" responses were ambiguous and did not give law enforcement any  
10 incriminating information.  
11  
12 5. The Court holds that all statements made by the defendant post-*Miranda* were properly obtained and  
13 admissible at trial.

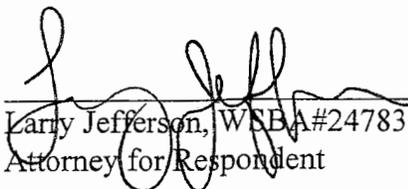
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JUDGE RICHARD STROPHY

Presented by:

  
John C. Skinder, WSBA #26224  
Deputy Prosecuting Attorney

Approved for Entry:

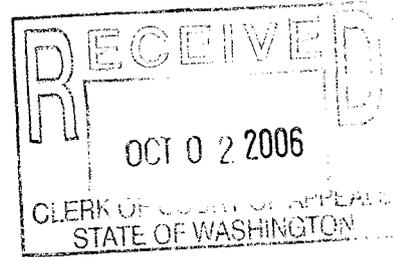
  
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**B**

INSTRUCTION NO. 11

Premeditated means thought over beforehand. When a person, after any deliberation, forms an intent to take 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.



IN THE COURT OF APPEALS  
STATE OF WASHINGTON  
DIVISION II

STATE OF WASHINGTON,

Respondent,

vs.

TIMOTHY D. ENGH,

Appellant.

COURT OF APPEALS NO.  
34535-8-II

CERTIFICATE OF MAILING

The undersigned attorney for the Appellant hereby certifies that the original and one copy of Appellant's Opening Brief and Motion for Leave to File Overlength Brief were mailed by first class mail to the Court of Appeals, Division 2, and copies were mailed to Timothy D. Engh, Appellant, and James C. Powers, Thurston County Deputy Prosecuting Attorney, by first class mail, postage pre-paid on Friday, September 29, 2006, at the Centralia, Washington post office addressed as follows:

CERTIFICATE OF  
MAILING

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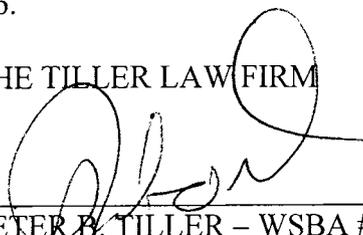
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Dated: September 29, 2006.

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