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A. STATEMENT OF THE ISSUES

1. Considering the evidence in the light most favorable to the prosecution, whether a rational trier of fact could have found it proved beyond a reasonable doubt that the defendant committed a premeditated murder, and therefore was guilty of murder in the first degree.

2. Whether the trial court's instruction to the jury on the subject of premeditation was a correct statement of the law and not misleading.

3. Whether the trial court committed error in concluding at the CrR 3.5 hearing that the defendant's admissions at the hospital and at the jail were voluntarily made after a knowing, intelligent and voluntary waiver of Miranda rights.

4. Whether the trial court abused its discretion in admitting Exhibit 14 into evidence at the trial.

5. Whether the defendant's trial counsel rendered ineffective assistance of counsel by acknowledging at the trial that there was no evidentiary basis for the jury to be instructed on the defense of voluntary intoxication.

6. Whether the defendant's trial counsel rendered ineffective assistance by failing to request a limiting instruction with regard to statements of the defendant admitted pursuant to ER 404(b).

7. Whether cumulative error denied the defendant a fair trial in this case.

B. STATEMENT OF THE CASE

As of April 12, 2005, the defendant, Timothy Engh, was married to Brenda Engh. However, they were separated at that time. Trial RP 211, 346. During mid-March, 2005, the defendant had moved in with his uncle, Steven Engh, who lived in Bonney Lake, Washington. Trial RP 345.

Brenda had two daughters. The oldest, Ashley, was 9 or 10 years old as of April, 2005. The youngest, Lilly, was only 7 months old at that time. Trial RP 57, 209-210. Lilly was the defendant's biological daughter but Ashley was not. As of April 12th, Ashley was visiting in Alaska with her father. Trial RP 210. Brenda worked full-time, and so during the day Lilly was cared for by Brenda's mother and stepfather, Pat and David Beckett. Trial RP 218.

In January and February, 2005, the defendant had worked as a security officer at St. Peter Hospital. Trial RP 382-383. Toward the end of this period, the defendant had referred to his marital problems in a conversation with two other

security officers, Keith Durussel and Sam Carruth. The defendant expressed concern that his wife was having an affair with another man. He stated that if he found out she was cheating on him, he would shoot her. Trial RP 372, 387.

On the evening of April 9, 2005, Kelly Hughes had dinner with the defendant. He told her that he was glad his marriage was over, and that he hated his wife more than anything. Trial RP 459, 462.

On April 10, 2005, the defendant spoke to Stephanie Davies about his wife. He expressed bitterness toward his wife as he talked about the fact that they were separated. Trial RP 446. The defendant stated that he wanted to have custody of his daughter. Trial RP 448. A little later that same day, Davies heard the defendant remark that his wife was a "bitch" and that he was going to kill her. When Davies demanded to know if he was serious, he responded that he would not actually do that. Trial RP 449.

On April 11, 2005, William Couch spoke with

the defendant at a restaurant in the early afternoon. The defendant talked to Couch about problems he was having with his wife concerning custody of his child. Couch advised him to let the legal system handle the matter. The defendant responded that he was going to take care of the problem himself. He further threatened to "take her out". Trial RP 480-483.

Kelly Hughes met up with Couch and the defendant at the restaurant that day. The defendant expressed anger toward his wife, referring to how much he hated her, and that his wife "ruins everything". Trial RP 466-468.

The next morning, on April 12, 2005, Brenda Engh dropped her daughter off with her mother and stepfather, and went on to work at a location in Tacoma. Trial RP 210, 505. Brenda was in a good mood that day. She was planning to meet with the defendant, and expected that he was going to sign papers agreeing to Brenda having full custody of Lilly. Trial RP 506, 510-511.

At approximately three o'clock that

afternoon, the defendant met with Loreen Parkerson at a tavern. Trial RP 515-516. He had on jeans and a western shirt. Trial RP 516. The defendant had a beer, and spoke with frustration about his pending divorce. He claimed that a lawyer had told him he had a good case to get custody of his daughter. He also stated that he was going to see his wife later that day, but that he would be taking a .38 firearm with him for protection, fearing his wife might have someone there waiting for him. Trial RP 517-518. He added that his wife had sealed her fate, and that he had sealed his as well. Trial RP 518. The defendant and Parkerson spent about 40 minutes together, and then the defendant drove away. Trial RP 519.

Harvey Engh was the defendant's grandfather. He lived next to the residence of Steven Engh, where the defendant was staying. Trial RP 345, 353. Harvey owned a handgun, a five-shot .38 caliber Rossi, which he kept loaded with four cartridges at his home. Trial RP 354. The defendant was allowed to freely go in and out of

Harvey's home. Trial RP 354. Prior to contacting Brenda on April 12th, the defendant took this gun from the residence of Harvey Engh without Harvey's knowledge or permission. Trial RP 288, 354.

On April 12th, Brenda asked her mother to bring Lilly back over to Brenda's residence in Yelm after Brenda got home from work. Pat and David Beckett brought the child over to Brenda's house at about 5 that afternoon. Brenda asked the Becketts to stay because she expected the defendant to come about 5:30 p.m. to sign the custody papers. Trial RP 218-220.

Meanwhile, at 4:50 p.m., the defendant arrived at the Puerto Vallarta Restaurant and Bar in Yelm. Trial RP 602-603. He was now wearing blue coveralls such as a mechanic might wear. Trial RP 526. The defendant sat at the bar and ordered a beer and then a shot of Wild Turkey. He then had a shot of a drink with the name "liquid cocaine". He also ordered a second beer, but did not finish it. Trial RP 527-528, 531-532. The bartender noted that the defendant seemed tense

and was looking at the clock a lot. However, he did not appear to be intoxicated. Trial RP 528, 540-541. The bartender later recalled that the defendant had remarked that Ted Bundy once sat in a place like that before he committed his first "crime" or "murder", the bartender not remembering which of those two words the defendant had used. Trial RP 529.

The defendant spoke at length about his marital problems with another man at the bar named Monico Abeyta. The defendant appeared to be upset and angry. Trial RP 547, 562-567. Another patron at the bar, Bern Kriester, listened to the conversation. At one point, Kriester heard the defendant ask whether he should kill his wife. Abeyta responded that the defendant should take legal action instead and should not do anything stupid. Trial RP 548-549. Neither Abeyta nor Kriester noted any sign that the defendant was intoxicated. Trial RP 550, 566. The defendant left the bar at 6 o'clock that evening. Trial RP 607.

When the defendant had not shown up at Brenda's house as of 6 p.m., the Becktolds decided he was not coming that evening, and so went home. However, before they left, they warned Brenda not to let the defendant in if he showed up and to call 911. Trial RP 211-212. At the time they left, neither Brenda nor the defendant had signed the custody papers. Trial RP 216, 221.

Shortly after she got home from work at 6:30 p.m., Allyson Padrick took her young niece out for a bike ride. Trial RP 113-114. They lived near the location of Brenda Engh's residence, and as they passed by that residence Padrick observed that the door to the residence was open, and she could hear a baby crying. Trial RP 115. Padrick saw something on the ground near the driveway, which she assumed was a scarecrow. Trial RP 115.

Padrick and her niece rode on. When they came back that way a little later, Padrick realized the baby was still crying. She then saw that the baby was lying in the arm of what was not a scarecrow, but rather a woman who was not

moving. Padrick went to a nearby residence and called 911. Trial RP 116.

Yelm Police Officer Joel Turner was dispatched to investigate at approximately 7:30 that evening. When he arrived at the residence, it was still daylight out, but was very cold. Trial RP 25-28, 50. Turner observed the body of Brenda Engh lying on the ground near the driveway. He baby was lying on her left shoulder. Trial RP 28-31.

Other police officers responded to assist. Thurston County Sheriff's Deputy David Claridge checked Brenda's body for a pulse, but did not find any. She appeared to be deceased. Trial RP 48. The baby was very cold and was crying hysterically. Claridge put the baby into the back of his patrol car and turned on the heat within the vehicle as high as possible. Trial RP 49-51. Both Claridge and Turner entered the residence and searched throughout, but found no one inside. Trial RP 52-53. There was no indication of a struggle having taken place within the residence.

Trial RP 39. The custody papers were on the kitchen table, and were now signed. Trial RP 61.

Paramedics arrived and confirmed that Brenda Engh was dead. Trial RP 75-77. The medics then treated the baby with heat packs, eventually transporting the child to St. Peter Hospital. The baby had no injuries other than possible hypothermia. Trial RP 82-85. Eventually, the child was transferred to the custody of the Becktolds. Trial RP 60.

Forensic Pathologist Dr. Emmanuel Lacsina performed an autopsy on Brenda Engh on April 13, 2005. She was declared the victim of a homicide and determined to have died from internal bleeding resulting from four gunshot wounds. Trial RP 651, 664. Three of the gunshots had entered the front of Brenda's abdomen. There were no deposits of gun powder around these entry wounds, and the bullets exited the body. These factors indicated that the muzzle of the gun was more than 24 inches away from Brenda at the time the shots were fired, but not a great deal further than that. Trial RP

651-652. All three shots to the abdomen were at a slightly upward angle, and so were likely fired in rapid succession. None of these three shots would have resulted in immediate death. Trial RP 658-660, 663.

The other shot was to the front of Brenda's neck. Soot deposits and stippling around the entry wound indicated that the muzzle of the gun was approximately 6-7 inches from Brenda at the time the shot was fired. Trial RP 649-650. While the trajectory of this gunshot was like the others in that it was front to back, it was unlike the others in that the trajectory of this shot was downwards through Brenda's body. The bullet struck the carotid artery, causing massive bleeding, and so was the most serious of the injuries. The bullet was found sticking out of the exit wound. Trial RP 657-658, 663.

Three of the bullets fired into Brenda's body were recovered during the autopsy. Trial RP 654. On April 15, 2005, a fourth bullet was found at the scene of Brenda's death. Her father, Robert

Peck, went to Brenda's residence on that day. He noticed blood on the grass, and when he looked more closely, saw a bullet partially embedded in the ground. Trial RP 202-205. He contacted the Yelm Police Department. Officer Stacy Fields went to that location and took custody of the bullet for evidence purposes. Trial RP 226-228.

On the evening of April 12, 2005, the defendant came to the residence of his uncle, Casper Engh. He had on blue jeans and a western-style shirt. The defendant told Casper that he had shot his wife. He appeared somber when he said that, and not intoxicated. Then the defendant retracted his statement, saying he did not really do that. He told Casper that he had signed papers releasing his custody rights to Lilly. Trial RP 104-105, 109.

The defendant was allowed to stay the night at Casper's residence. Casper woke him at 4:30 the next morning because Casper and his wife were leaving for work. Trial RP 104, 107.

At approximately 5:10 a.m., the defendant

showed up at the residence of Steven Engh. He was still wearing the jeans and western-style shirt. He seemed calm. The defendant told Steven that he had signed away his parental rights regarding Lilly. He then went into his bedroom and closed the door. Trial RP 347-348.

Previous to this, Steven had been visited by Thurston County Sheriff's Detective David Haller, who was the lead officer investigating Brenda's death. Haller had been looking for the defendant. Trial RP 260. When the defendant showed up at Steven's residence, Steven reported this to Haller. Trial RP 348.

With the help of the Pierce County SWAT team, the defendant was removed from the residence of Steven Engh by police at about 10:30 that morning. He was unconscious and so was rushed to a hospital. Trial RP 266-267. He had apparently taken some unknown amount of medications and alcoholic beverages. Trial RP 297. Detective Haller and Yelm Police Detective Matt Rompa followed the ambulance to the hospital, and stayed

with the defendant after he was brought into the emergency department for treatment. Trial RP 267. While there, the defendant vomited substances he had previously ingested. 1-23-06 Hearing RP 19.

Once the defendant was stabilized, he was moved to a hospital room. He vomited a few more times there, and gradually settled down. Haller and Rompa remained with the defendant the whole time. 1-23-06 Hearing RP 19-20.

At about 5 p.m., the detectives checked with medical personnel at the hospital and learned that the defendant had not ingested anything like a narcotic that would impair the defendant's ability to communicate clearly. 1-23-05 Hearing RP 20-21. Haller waited until 5:30 p.m. and then introduced himself to the defendant. Haller asked if the defendant knew why Haller was there, and the defendant nodded his head. Haller then asked if he knew that what he had done was wrong, and the defendant again nodded. 1-23-06 Hearing RP 21. The defendant's arms and legs were restrained to the bed at this time. 1-23-06 Hearing RP 32-33.

The defendant then turned his head away and closed his eyes, and so Haller waited an additional half-hour. Haller then informed the defendant of his Miranda rights by reading those from a card. The defendant appeared alert and watched Haller as that was being done. The defendant did not voice any questions about his rights and stated he understood them. The defendant also stated he was willing to talk to Haller. 1-23-06 Hearing 22-23.

Haller proceeded to question the defendant. During this questioning, the defendant never asked for the assistance of an attorney, nor did he ask that the questioning cease. A few times, when asked questions concerning how Brenda had died, the defendant stated that he did not want to talk about that subject at that time. 1-23-06 Hearing RP 24-26.

The defendant admitted having been at Brenda's residence and having signed the custody papers. He also acknowledged he and his wife had gotten into an argument while he was there. He

also said that afterwards he went to his Uncle Casper's residence and hid the gun he had taken without permission from his grandfather's residence. He stated that he had gone to Steven's residence after Casper went to work. Trial RP 271-272; 1-23-06 Hearing RP 25-26.

Eventually that evening, the defendant was released from the hospital and was transferred in custody to the Thurston County Jail. The detectives then went to the residence of Casper Engh. Casper gave them permission to search his property for the gun. However, the officers were not able to locate the gun at that time. Trial RP 277-279.

On the morning of April 13, 2005, Haller and Rompa went to the Thurston County Jail to conduct a second interview with the defendant. The defendant agreed to provide a taped statement. 1-23-06 Hearing RP 28. He was again informed of his Miranda rights and again stated he understood those rights and wished to waive them. 1-23-06 Hearing RP 28-29.

During the taped interview that followed, the defendant never asked that the questioning cease, nor did he request the assistance of an attorney. He did not display any confusion regarding the questions. 1-23-06 Hearing RP 29-30.

The defendant admitted he had shot Brenda. Trial RP 286. He claimed he arrived around 5:30 p.m. to sign the papers releasing his custody rights. He acknowledged he had brought the gun there, but said it was because he was fearful his wife might have co-workers there to beat him up. He stated that he had been drinking alcohol at home and at a Mexican restaurant before going over there. Trial RP 288-290.

The defendant claimed that after he had signed the paperwork, he and Brenda had gone outside so he could gather some of his belongings. Brenda brought the baby outside. He then said that he blacked out, and that the next thing he remembered was that he was driving to his Uncle Casper's residence. Trial RP 290-291.

After this, Thurston County Sheriff's

Detective Kurt Rinkel received information from Haller concerning additional details provided by the defendant regarding where the defendant had hidden the gun. With that additional information, Rinkel went to the residence of Casper Engh and searched for the weapon. He found it under a large pile of wooden pallets. Trial RP 315. It was the gun belonging to Harvey Engh. Trial RP 355. Rinkel also found there a cordless phone receiver which had been missing from Brenda's residence since her death. Trial RP 319. However, while police investigators searched the places where the defendant was known to have been after he left Brenda's residence on April 12th, they were unable to locate the coveralls he was wearing when he left the Puerto Vallarta bar at 6 that evening. Trial RP 615-616.

Washington State Patrol Crime Laboratory Forensic Scientist Evan Thompson, an expert ballistics analyst, examined the gun recovered from Casper Engh's property and the three bullets recovered during the autopsy. Trial RP 419-421.

He found that the gun was operable and in good condition. Thompson also confirmed through testing that two of the three bullets recovered had been fired from the .38 revolver belonging to Harvey Engh. The markings on the third bullet were consistent with having been fired from that gun, but there were not enough specific markings for Thompson to conclude that with certainty. Trial RP 426-429.

On April 18, 2005, the defendant was charged by Information in Thurston County Superior Court Cause No. 05-1-00655-6 with Count I: Murder in the Second Degree, Domestic Violence, While Armed with a Firearm, and Count II: Possession of a Stolen Firearm. CP 10-11. On April 20, 2005, a First Amended Information was filed which changed Count I to murder in the first degree, by way of premeditated murder, while armed with a firearm. CP 12-13. Then, on May 9, 2005, a Second Amended Information was filed which charged as follows: Count I, Murder in the First Degree, Domestic Violence, While Armed with a Firearm; Count II,

Possession of a Stolen Firearm; Count III, Reckless Endangerment, Domestic Violence; and Count IV, Abandonment of a Dependent Person in the Second Degree, Domestic Violence. CP 14-15.

On January 23, 2006, a CrR 3.5 hearing was held before the Honorable Judge Richard Strophy concerning the admissibility of statements made by the defendant to detectives at the hospital on April 13, 2005 and his taped statement at the Thurston County Jail on April 14, 2005. The State conceded that the defendant's initial few responses to Detective Haller at the hospital, before Miranda warnings were given, were made while the defendant was in custody, given the restraints he was in, but that the responses were voluntary. The State did not seek to admit those responses, which consisted of the defendant nodding his head to two questions by Haller. However, the State sought to admit all those statements of the defendant at the hospital made after Miranda rights were given, and admission of the defendant's taped statement the next day. 1-

23-06 Hearing RP 11, 69.

At the conclusion of this hearing, the Court ruled that the defendant knowingly, voluntarily, and intelligently waived his Miranda rights both at the hospital and at the jail, and never rescinded those waivers. The court further found that the defendant's initial responses to Haller before Miranda warnings were made voluntarily and did not taint the later, post-Miranda statements. The court therefore ruled that the post-Miranda statements were admissible. 1-23-06 Hearing RP 75-86. The court's written findings of fact and conclusions of law for this hearing were entered on March 9, 2006. CP 119-124.

This case proceeded to a jury trial during the period from February 8, 2006 through February 21, 2006. The defendant was convicted on all counts. In addition, he was found to have been armed with a firearm at the time of the commission of murder in the first degree. 2-21-06 Trial RP 89-94.

A sentencing hearing took place on March 9, 2006. For the crime of first-degree murder, the court imposed a standard range sentence of 347 months plus the 60-month firearm enhancement, for a total of 407 months in prison. Penalties for the other crimes committed were ordered to run concurrent with that sentence. CP 111-118.

C. ARGUMENT

1. Considering the evidence in the light most favorable to the prosecution, a rational trier of fact could have found it proved beyond a reasonable doubt that the defendant committed a premeditated murder, and therefore was guilty of murder in the first degree.

In this case, the jury found it proved beyond a reasonable doubt that the defendant had committed murder both intentionally and with premeditation. On appeal, the defendant contends that the evidence was not sufficient to support the jury's verdict. Specifically, the defendant argues the evidence was insufficient to prove premeditation.

The evidence is sufficient to support a conviction if, viewed in the light most favorable

to the State, it is enough to permit a rational trier of fact to find the essential elements of the crime beyond a reasonable doubt. State v. Joy, 121 Wn.2d 333, 338, 851 P.2d 654 (1993); State v. Green, 94 Wn.2d 216, 221, 616 P.2d 628 (1980). A claim of insufficiency requires that all reasonable inferences from the evidence be drawn in favor of the State and interpreted most strongly against the defendant. State v. Salinas, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). Credibility determinations are for the trier of fact and are not subject to review. State v. Camarillo, 115 Wn.2d 60, 71, 794 P.2d 850 (1990). It is also the function of the fact finder, and not the appellate court, to discount theories which are determined to be unreasonable in the light of the evidence. State v. Bencivenga, 137 Wn.2d 703, 709, 974 P.2d 832 (1999). Circumstantial evidence is accorded equal weight with direct evidence. State v. Delmarter, 94 Wn.2d 634, 638, 618 P.2d 99 (1980).

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. State v. Hoffman, 116 Wn.2d 51, 82-83, 804 P.2d 577 (1991). Premeditation can be shown by evidence of motive, prior threats, statements indicating premeditation, multiple shots fired with a break in time, and the planned presence of a weapon at the scene. Hoffman, 116 Wn.2d at 83-84; State v. Pirtle, 127 Wn.2d 628, 644, 904 P.2d 245 (1995). There was evidence of all these indicators of premeditation in this case.

The defendant argues there was no evidence of a motive. However, three days before the murder the defendant told Kelly Hughes that he hated his wife "more than anything". Trial RP 462. The next day, he again referred to his wife in speaking to Hughes, stating, "God, that fucking bitch ruins everything". Trial RP 468. The defendant went on to state that he was contemplating suicide as a result. Trial RP 469.

The defendant's hatred for Brenda Engh, and his belief that she had ruined everything for him, certainly provided the defendant with a motive to murder his wife.

There was evidence of prior threats in this case. In February, the defendant had told Keith Durussel and Sam Curruth that he was convinced his wife was having an affair, and that if he found out she was cheating on him he would shoot her. Trial RP 372, 387.

On April 10th, the defendant told Stephanie Davies that his wife was a bitch and he was going to kill her. While he then stated he would never actually do that, given the later events, the jury could reasonably have concluded that this threat had been a serious one.

There were other statements evidencing premeditation. On April 11th, the defendant stated to William Couch that his wife was causing him a lot of problems in the divorce, such as the custody issue, and he was going to handle the matter himself, and to do that he was going to

"take her out". Trial RP 481.

Within a few hours of Brenda's death, the defendant remarked to Lisa Landaker, as he sat in the Puerto Vallarta bar, that Ted Bundy had sat in a place like that before he committed his first "crime" or "murder", Landacker could not remember which of those two words the defendant had used. Trial RP 529. Around that same time, the defendant spoke to Monico Abeyta about his problems with his wife, and at one point asked if he should kill his wife. Trial RP 547-548.

Harvey Engh kept his .38 caliber revolver loaded with four cartridges, which is the same number of shots the defendant fired into the body of Brenda Engh. Trial RP 354. Three of the shots were probably fired in rapid succession into her abdomen, and so do not alone necessarily indicate premeditation. But the fourth shot, whether it was before or after the other three, reflects at least a short break in time. That shot was fired at a distance of 6 to 7 inches, while the other shots were fired from more than

two feet away. That shot was to the neck and at a downward angle, while the other shots were to the abdomen and at an upward angle. Trial RP 649-660. These multiple shots with a significant break in time were evidence of some deliberation regarding the decision to kill. See State v. Rehak, 67 Wn. App. 157, 164, 834 P.2d 651 (1992).

The evidence showed that the defendant purposely brought the gun to Brenda's house, where he used it to kill her. He took the gun without permission from the residence of his grandfather, Harvey Engh. Trial RP 288, 354. He admitted to Detective Haller that he then purposely chose to bring the gun to Brenda's residence on the evening of April 14, 2005, although he claimed that he did this for his own protection. Trial RP 288. However, it was for the trier of fact to determine the credibility of this statement. Given the other evidence that the defendant contemplated killing his wife prior to the evening of April 12th, as discussed above, a reasonable juror could have concluded that the

defendant's true purpose in taking the gun to Brenda's house was to use the gun to kill her. Evidence that the defendant purposely brought the weapon to the scene of the murder would itself be sufficient evidence for a jury to find premeditation. State v. Massey, 60 Wn. App. 131, 145, 803 P.2d 340 (1990).

Based on all the factors discussed above, there was sufficient evidence for a rational trier of fact to find that the State had proved beyond a reasonable doubt that the murder of Brenda Engh by the defendant was not only intentional, but was also premeditated.

2. The trial court's instruction to the jury on the subject of premeditation was a correct statement of the law and was not misleading.

The trial court instructed the jury in the following manner concerning the requirement that the State prove premeditation as an element of first-degree murder.

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.

Court's Instruction to the Jury No. 11 in CP 66-94. This instruction is identical to Washington Patter Jury Instruction (WPIC) 26.01.01, which has been repeatedly held by the Washington Supreme Court to be an accurate statement of the law and not misleading. State v. Clark, 143 Wn.2d 731, 770-771, 24 P.3d 1006 (2001); In re Personal Restraint of Lord, 123 Wn.2d 296, 317, 868 P.2d 835 (1994); State v. Benn, 120 Wn.2d 631, 657-658, 845 P.2d 289 (1993); State v. Rice, 110 Wn.2d 577, 602-604, 757 P.2d 889 (1988). Nevertheless, the defendant in the present cause argues on appeal that the instruction was misleading.

First, he claims that the instruction failed to adequately distinguish between premeditation and intent. However, this precise claim was rejected by the State Supreme Court in State v. Brown, 132 Wn.2d 529, 604-607, 940 P.2d 546 (1997). In Brown, the court gave an instruction

on premeditation identical to the one used in this case, and provided an additional instruction defining "intent" and an instruction setting forth all the elements of first-degree murder, including the separate elements of intent and premeditation, just as was done in the present case. The State Supreme Court ruled that this set of instructions adequately followed the law in distinguishing between "premeditation" and "intent". Brown, 132 Wn.2d at 604-607.

Next, the defendant contends that the phrase "after any deliberation" in the instruction on premeditation could have misled jurors into believing that deliberation by the defendant on any subject could have formed the basis for a finding of premeditated murder. However, this claim takes the phrase out of context, whereas the adequacy of a jury instruction must be determined by considering the instruction as a whole. Brown, 132 Wn.2d at 605. When the phrase is considered in the context of the entire instruction, it is clear that any juror would

understand that the deliberation referred to pertains to the taking of a human life.

For example, the entire sentence in which the phrase was present read as follows:

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.

Court's Instruction to the Jury No. 11 in CP 66-94. Thus, any juror would understand that the instruction referred to a deliberation about taking the life of another person which then resulted in a decision to kill, and that the resulting act of murder would still be premeditated even if it occurred immediately after that decision was made.

Furthermore, the instruction ended by stating:

The law requires some time, however long or short, in which a design to kill is deliberately formed.

Court's Instruction to the Jury No. 11 in CP 66-94. This again referred to the thinking process whereby deliberation on the subject of killing

another person took place and then concluded with the formation of a design or plan to commit the murder.

If a jury instruction, read as a whole, can be readily understood and not be misleading to the ordinary mind, the instruction is sufficiently clear. State v. Foster, 91 Wn.2d 466, 480, 589 P.2d 789 (1979). Thus, the instruction provided to the jury on the subject of premeditation in this case was proper and unambiguous.

3. The trial court's findings of fact for the CrR 3.5 hearing were supported by substantial evidence, and those findings supported the court's conclusion that the defendant's admissions at the hospital and at the jail were voluntarily made after a knowing, intelligent, and voluntary waiver of Miranda rights.

The defendant made admissions to law enforcement both at the hospital and at the Thurston County Jail the next morning. In each instance, the defendant was informed of his Miranda rights and chose to waive those rights. At the CrR 3.5 hearing, the court found that the defendant made his admissions voluntarily and that

he waived his constitutional rights with regard to making a statement knowingly, voluntarily, and intelligently. CP 123-124. The court entered written findings of fact and conclusions of law with regard to this hearing. CP 119-124.

On appeal, the defendant does not dispute that the defendant was adequately informed of his Miranda rights before he was questioned concerning the admissions which were testified to at the trial. However, he apparently does challenge the court's conclusion that these rights were voluntarily waived and the conclusion that the subsequent statements were voluntarily made. The court's findings of fact which are challenged must be upheld if they are supported by substantial evidence, which is evidence sufficient to persuade a rational, fair-minded person as to the truth of the finding. State v. Mendez, 137 Wn.2d 208, 214, 970 P.2d 722 (1999). If the findings of fact are supported by substantial evidence, then the trial court's legal conclusions will be upheld if those conclusions are supported by the findings of fact.

State v. Vickers, 148 Wn.2d 91, 116, 59 P.3d 58 (2002).

The voluntariness of admissions made by a defendant is determined from the totality of the circumstances concerning the defendant's statements. State v. Ortiz, 104 Wn.2d 479, 484, 706 P.2d 1069 (1985). A confession is voluntary if it was not coerced; that is, if the defendant's will was not overborne. State v. Broadaway, 133 Wn.2d 118, 132, 942 P.2d 363 (1997). In this regard, the court considers both the condition of the defendant and the conduct of the police. Broadaway, 133 Wn.2d at 132.

The defendant contends in Appellants' Brief that he was under the influence of an unknown amount of substances and alcohol when he made his admissions at the hospital. No evidence is cited to support this contention. The court did not find that this was the case and the evidence does not support the defendant's contention.

There was no evidence of what the defendant did or did not actually consume on the morning of

April 13, 2005. In the vicinity of where police found the defendant at the residence of Steven Engh, there was an empty bottle of Everclear, an empty bottle of Equate daytime cold medicine, an empty bottle of Equate extra-strength pain reliever, an empty prescription bottle of diclofenac, and empty prescription bottle of hydromorphone, and some beer cans. There were also white pills of some kind on the floor. 1-23-06 Hearing RP 33-34. While his state of unconsciousness indicated he had taken some sort of overdose, the specific nature of that overdose is unknown.

The defendant was rushed to the hospital at about 10:30 that morning. 1-23-06 Hearing RP 18, 49. Medical personnel at the hospital injected a charcoal solution into the defendant to absorb substances in his stomach. The defendant then vomited those substances while in the Emergency Department. He was later transferred to a hospital room where he vomited these substances several more times. 1-23-06 Hearing RP 19-20.

At approximately 5 p.m. that day, Detective Haller consulted with the nurse monitoring the defendant's condition and learned that the defendant did not have anything in his system that would likely impair his mental processes. 1-23-05 Hearing RP 21. It was approximately an hour after that when Haller advised the defendant of his Miranda rights and questioned him. 1-23-05 Hearing RP 21-22.

During the time Haller communicated with the defendant, he was alert, attentive, responsive, displayed no confusion, and had no difficulty indicating which specific questions he did not wish to answer. 1-23-06 Hearing RP 22-26, 54-60.

The evidence presented at the CrR 3.5 hearing, as summarized above, provides no support for the contention that the defendant was under the influence of any substance when he was questioned. The evidence does support the trial court's findings that the defendant was awake, responsive, alert, focused, tracking questions asked, and answering appropriately during the

interview at the hospital, and that hospital personnel had verified the defendant was not under the influence of any drugs or medication. Findings of Fact Nos. 10, 11 and 12 in CP 119-124. These findings, in turn, supported the court's conclusion that the totality of the evidence demonstrated the defendant was not under the influence of anything affecting his ability to make decisions when he was questioned. Of particular significance is the fact that when the defendant had no wish to answer a particular question he said so, indicating that there was no coercion present. Conclusion of Law No. 2 in CP 119-124.

The defendant argues that the police in this case took no special precautions to insure that the defendant's admissions were knowing, intelligent, and voluntary. That is not an accurate statement. The officers waited until late in the day to try and question the defendant. They then first checked with hospital personnel to verify that the defendant's physical condition did

not suggest a problem with mental clarity. Haller then waited a half-hour before addressing the defendant. When he did so, the defendant responded, but then turned his head away, and so Haller then waited an additional half hour. 1-23-06 Hearing RP 18-22.

Haller then advised the defendant of his Miranda rights. He used a gentle manner in questioning the defendant. No threats or promises were used to induce the defendant to answer questions. 1-23-06 Hearing RP 22-26.

These circumstances fully support the trial court's conclusion that the defendant's statements at the hospital were voluntarily made.

As regards the defendant's statements at the jail the next morning, while the defendant contends there was an insufficient showing of voluntariness, he fails to identify a single aspect of this interview that provided the slightest indication of coercion. The defendant was again informed of his Miranda rights, again had no questions in regard to those rights, again

stated he understood then, and again expressed a desire to waive those rights and speak to the detectives. 1-23-06 Hearing RP 27-29, 61-62.

The defendant consented to a taped statement, answered questions forthrightly, and displayed no confusion. While the defendant claims on appeal that he was distraught and suicidal when questioned, there were no significant displays of emotion during this interview and no indication the defendant had any difficulty tracking what he was being asked.

The totality of the circumstances with regard to this second interview support the court's conclusion that the defendant's admissions at that time were also voluntarily made.

4. Since Exhibit 14 had probative value in regard to the charge of reckless endangerment, the trial court did not abuse its discretion in admitting that photograph into evidence at the trial.

On appeal, the defendant argues it was error for the court to admit Exhibit 14 into evidence at the trial. Exhibit 14 was a photograph of the upper portion of Brenda Engh's body in the

position it was found after she died. At trial, the defendant objected to the admission of this photo. However, given the charge of reckless endangerment in this case, which alleged that the defendant had created a substantial risk of death or serious injury to the baby, the prosecutor pointed out that this photograph showed the position of Brenda's left arm, which is the arm she was holding her baby in when she was shot. The photo showed how her arm had flung outward as she collapsed to the ground. Trial RP 11.

Accurate photographic representations are admissible if their probative value outweighs their prejudicial effect. State v. Crenshaw, 98 Wn.2d 789, 806, 659 P.2d 488 (1983). The prosecution is allowed to present photographic evidence to prove every element of a crime charged. State v. Gentry, 125 Wn.2d 570, 609, 888 P.2d 1105 (1995). The balancing of probative value against prejudicial effect is left to the discretion of the trial court and is reviewed only for an abuse of discretion. Id. at 609.

The defendant argues that the court abused its discretion in determining that the probative value of Exhibit 14 outweighed its prejudicial effect because premeditation, rather than the identity of the victim and her cause of death, was the contested issue with regard to the murder charge. However, this argument ignores the existence of other charges against this defendant and the reasons given by the State for seeking admission of this exhibit. The defense contested the State's claim that Brenda was holding her baby when she was shot, and argued that the State lacked evidence to support that claim. Trial RP 70-71. The State had the right to present evidence illustrating the details of its theory of the case. The court did not abuse its discretion in acknowledging the probative value of Exhibit 14, and that its probative value outweighed any prejudicial effect.

Even if the admission of this photograph had been error, it would have been non-constitutional error, and while a defendant has a right to a fair

trial, he does not have a constitutional right to an error-free trial. State v. Reed, 102 Wn.2d 140, 145, 684 P.2d 699 (1984). Consequently, a non-constitutional error would be harmless unless there was a substantial likelihood that the error influenced the outcome of the trial. State v. Casteneda-Perez, 61 Wn. App. 354, 363, 810 P.2d 74 (1991). The defendant has argued on appeal that he did not contest at trial the fact that he had intentionally murdered his wife by firing four gunshots into her body, and that the only contested issue as to the murder charge was premeditation. On that basis, there is no reasonable way Exhibit 14 could have had such inflammatory effect as to improperly influence the result of this trial.

The defendant appears to argue that an erroneous evidentiary ruling is a constitutional error because it violates due process. However, neither of the cases cited by the defendant support that contention.

In Estelle v. McGuire, 502 U.S. 62, 70, 112

S.Ct. 475, 116 L.Ed.2d 385 (1991), the Supreme Court determined that certain evidence was not erroneously admitted at trial, and therefore chose not to address the issue of whether the erroneous admission of irrelevant evidence could be a violation of due process.

In Pulley v. Harris, 465 U.S. 37, 104 S.Ct. 871, 79 L.Ed.2d 29 (1984), Harris argued that his right to due process under the federal Constitution was violated by a failure of the California Supreme Court to follow California law when that court refused to conduct a proportionality review with regard to death penalty proceeding. The Supreme Court bypassed the issue of whether an error of state law could amount to a violation of due process under the federal Constitution, finding that Harris had failed to show there was any error. Pulley v. Harris, 465 U.S. at 41.

In any event, it is also the case here that there was no error in the admission of Exhibit 14. It was reasonable for the court to conclude, in

the exercise of its discretion, that this photograph had substantial probative value with regard to one of the charges against the defendant.

5. There was no evidence in this trial indicating that the defendant was so intoxicated as to either be unable to premeditate the killing of Brenda Engh, or to be unable to form an intent to cause her death, and therefore defendant's trial counsel did not render ineffective assistance by acknowledging that there was no evidentiary basis for a jury instruction concerning the defense of voluntary intoxication.

At the end of the presentation of evidence in this case, counsel for the defendant acknowledged to the court that there was no evidence that the alcohol the defendant had consumed on April 12, 2005, had a significant effect upon him, and therefore chose not to request that the court instruct the jury on the defense of voluntary intoxication. The court agreed, and did not present such an instruction. Trial RP 685-687; 2-21-06 Trial RP 4; Court's Instructions to the Jury in CP 66-94. On appeal, the defendant contends that the court erred in not giving an instruction to the jury on the defense of voluntary

intoxication.

The doctrine of invited error prohibits a party from setting up an error at trial and then complaining of it on appeal. State v. Pam, 101 Wn.2d 507, 511, 680 P.2d 762 (1984). For example, it is invited error for a party to propose a jury instruction and then claim on appeal that it was error for the court to give that instruction. State v. Henderson, 114 Wn.2d 867, 870-871, 792 P.2d 514 (1990). It is surely as much invited error when, as in this case, a party argues to the court that there is no basis for the giving of a certain instruction, and then complains on appeal that the court erred in finding no basis for that instruction. Therefore, under the doctrine of invited error, the defendant's argument that the court erred in not giving a voluntary intoxication instruction should not be considered on appeal.

However, the defendant has also argued that defense counsel rendered ineffective assistance of counsel when he acknowledged to the court that there was no evidentiary basis for an instruction

on the intoxication defense. Such an argument is not foreclosed by the doctrine of invited error. State v. Studd, 137 Wn.2d 533, 550-551, 973 P.2d 1049 (1999). Nevertheless, given the evidence in this case, counsel's actions did not constitute ineffective assistance.

To demonstrate ineffective assistance of counsel, a defendant must show: (1) that defense counsel's performance was deficient, in that it fell below an objective standard of reasonableness based on a consideration of all the circumstances; and (2) that defense counsel's performance prejudiced the defendant because there is a reasonable probability that, except for counsel's errors, the result of the proceeding would have been different. State v. McFarland, 127 Wn.2d 322, 334-335, 899 P.2d 1251 (1995). When considering a claim of ineffective assistance, the court must engage in a strong presumption that counsel's representation was effective. McFarland, 127 Wn.2d at 335. To satisfy his burden to prove ineffective assistance, the

defendant must show that, based on the trial record, there is an absence of any legitimate strategic or tactical reason for the challenged conduct of trial counsel. Id. at 336.

A jury instruction is appropriate if, when read as a whole, it properly informs the jury of the applicable law, allows the parties to argue their theories of the case, and is supported by substantial evidence. State v. Clausing, 147 Wn.2d 620, 626, 56 P.3d 550 (2002); State v. Riley, 137 Wn.2d 904, 908 n.1, 909, 976 P.2d 624 (1999). A voluntary intoxication defense allows the jury to consider whether the defendant was unable to form a particular mental state that is an essential element of a crime because of intoxication. State v. Coates, 107 Wn.2d 882, 889, 735 P.2d 64 (1987). Therefore, a criminal defendant is entitled to a jury instruction on the defense of voluntary intoxication if: (1) the crime charged has as an element a particular mental state; (2) there is substantial evidence of drinking; and (3) there is substantial evidence

that the drinking effected the ability of the defendant to have the required mental state. State v. Gabryschak, 83 Wn. App. 249, 252, 921 P.2d 549 (1996). Even if there is evidence of some intoxication, there may still lack a basis for this instruction, since a person may be intoxicated and yet still able to form the required mental state. Therefore, there must be evidence of intoxication to a degree that interfered with that ability. Gabryschak, 83 Wn. App. at 254.

In the present case, the State did have the obligation to prove that the defendant premeditated the murder and intentionally killed his wife. There was evidence the defendant had consumed alcohol before he went to his wife's residence on April 12, 2005. Therefore, the first two requirements for a voluntary intoxication defense instruction were met here. However, the third requirement was not met in this case. There was no evidence at trial that the defendant was at all intoxicated prior to or at the time he killed

Brenda Engh on April 12th, much less that he had a level of intoxication sufficient to prevent him from having the required mental state of premeditation or intent.

Detective Haller testified the defendant told him he had been drinking at home and then at a Mexican restaurant in Yelm before contacting Brenda on April 12th. The defendant also stated his memory was blacked out as to what happened when he and Brenda were outside her residence, although he also told Haller that he shot her. Trial RP 289-291.

The defendant arrived at the Puerto Vallarta bar at 4:50 p.m. and left at 6 that evening. Trial RP 603, 607. Thus, this would have been just shortly before he contacted Brenda at her residence. The defendant ordered two beers but did not finish the second one, had a shot of Wild Turkey, and then a shot of an alcoholic drink referred to as "liquid cocaine". Trial RP 527-528, 531-532. The bartender, Lisa Landaker, did not observe the defendant display any signs of

intoxication while at that bar. Trial RP 528, 540-541.

During this same period of time, the defendant engaged in an extended discussion with Monico Abeyta at the bar. However, Abeyta did not see the defendant display any sign of intoxication. Trial RP 566. Another patron at the bar, Bern Kriester, observed the defendant and listened to his discussion with Abeyta. Kriester also did not detect any indication that the defendant was intoxicated. Trial RP 550-551.

The defendant told Haller that he had driven to the residence of Casper Engh after he shot Brenda. Trial RP 291. Casper Engh testified that the defendant came to his residence on the evening of April 12, 2005. Casper stated that the defendant was not intoxicated at that time. Trial RP 105.

On appeal, the defendant makes the claim that there was sufficient evidence at the trial for the jury to infer that the defendant was so intoxicated that it affected his ability to

premeditate the murder or to have intentionally killed his wife. However, he does not identify a single piece of evidence supporting this claim other than the fact that the defendant had been drinking. It is readily apparent that there was no evidence at this trial to support such an inference. The defendant's trial counsel appropriately acknowledged that fact, and so did not render ineffective assistance.

6. While claiming that defendant's trial counsel rendered ineffective assistance by failing to request a limiting instruction with regard to a number of his statements admitted pursuant to ER 404(b), the defendant has failed to show that defense counsel did not have a legitimate tactical reason for not requesting such an instruction, and has not shown that there is a reasonable probability the outcome of the trial would have been different had a limiting instruction been given, and so there has been no showing of ineffective assistance of counsel.

As set forth in the Statement of the Case above, witnesses at the trial of this cause testified to a series of statements by the defendant which either directly evidenced deliberation on his part concerning whether to kill his wife, or reflected feelings of hatred and anger towards his wife which were evidence of the

defendant's motive to kill. Such evidence was admissible under ER 404(b). When ER 404 (b) evidence is admitted, the trial court should instruct the jury with regard to the limited purpose of such evidence. State v. Salterelli, 98 Wn.2d 358, 362, 655 P.2d 697 (1982). Such a limiting instruction was not given in this case, but it was not requested by defendant's trial counsel.

The request for such a limiting instruction must be made by the party seeking to have the benefit of that instruction. State v. Hess, 86 Wn.2d 51, 52, 541 P.2d 1222 (1975). A party's failure to request such a limiting instruction waives any error or unfair prejudice that may have been cured by such an instruction. State v. Ramirez, 62 Wn. App. 301, 305-306, 814 P.2d 227 (1991).

On appeal, the defendant contends that his trial counsel rendered ineffective assistance by not requesting a limiting instruction with regard to these statements made by the defendant in the

days preceding the death of Brenda Engh. The defendant's burden of proof in regard to a claim of ineffective assistance was discussed in the previous section of this Brief, and is incorporated here by reference.

As previously noted, the defendant's burden includes showing the absence of any legitimate strategic or tactical reason for defense counsel's failure to request a limiting instruction. See McFarland, 127 Wn.2d at 336. In this regard, the defendant must overcome the presumption that defense counsel's decision not to request a limiting instruction was a tactical decision made to avoid highlighting this evidence. State v. Barragan, 102 Wn. App. 754, 762, 9 P.3d 942 (2000); State v. Donald, 68 Wn. App. 543, 551, 844 P.2d 447 (1993).

The combination of statements by the defendant expressing his hatred for his wife, together with specific statements that he was going to kill her or questioning whether he should kill her, constituted very strong evidence of

premeditation in this case, either directly or by showing a motive for contemplating causing her death. A limiting instruction would have highlighted the significance of this evidence even more. Thus, it was reasonable for defense counsel to avoid the use of such an instruction in this case. Counsel's decision was not ineffective assistance.

In addition, there is no showing on appeal of a reasonable probability that the outcome at trial would have been different if a limiting instruction had been given. The only claim the defendant makes in this regard is that the jury could have considered the defendant's expressions of hatred or anger toward his wife as direct evidence of premeditation rather than as motive for such premeditation. However, any juror would reason that these statements were evidence of premeditation precisely because they showed the defendant's motive to kill. There is no reason to believe that the jurors would have viewed the significance of this evidenced any differently

with a limiting instruction.

7. Since there was no prejudicial error committed in this case, there is no basis for reversal of the defendant's convictions on the basis of cumulative error.

On appeal, the defendant contends that cumulative error deprived him of a fair trial in this case. The application of the cumulative error doctrine is limited to cases where there have been several trial errors that standing alone may not be sufficient to justify reversal, but when combined deny a defendant a fair trial. State v. Greiff, 141 Wn.2d 910, 929, 10 P.3d 390 (2000). However, as discussed above, the defendant has failed to identify any instance in this case in which prejudicial error occurred, and therefore there was no cumulative error. See State v. Stevens, 58 Wn. App. 478, 498, 794 P.2d 38 (1990).

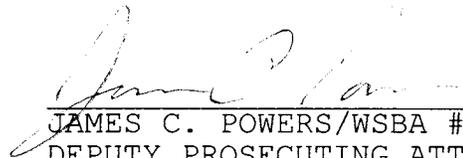
D. CONCLUSION

Based on the arguments set forth above, the State respectfully requests that this court find that evidence was properly admitted by the trial court in this case, the jury was properly

instructed, and the defendant's trial counsel rendered effective assistance, and therefore affirm the defendant's convictions in the present cause.

DATED this 18th day of December, 2006.

Respectfully submitted,



JAMES C. POWERS/WSBA #12791
DEPUTY PROSECUTING ATTORNEY

IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,)	
Respondent)	DECLARATION OF
)	MAILING
v.)	
)	
TIMOTHY D. ENGH,)	
Appellant)	

STATE OF WASHINGTON)	
)	ss.
COUNTY OF THURSTON)	

FILED
COURT OF APPEALS
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STATE OF WASHINGTON
BY *[Signature]*
DEPUTY

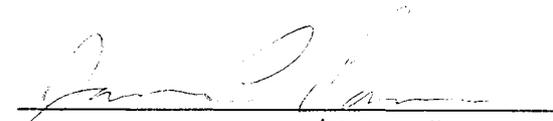
James C. Powers declares and affirms:

I am a Senior Deputy Prosecuting Attorney in the Office of Prosecuting Attorney of Thurston County; that on the 18th day of December, 2006, I caused to be mailed to appellant's attorney, PETER B. TILLER, a copy of the Respondent's Brief and Motion to Allow Filing Over-length Respondent's Brief, addressing said envelope as follows:

Peter B. Tiller
Attorney at Law
P.O. Box 58
Centralia, WA 98531-0058

I certify (or declare) under penalty of perjury
under the laws of the State of Washington that
the foregoing is true and correct to the best of
my knowledge.

DATED this 18th day of December, 2006 at Olympia,
WA.



James C. Powers/WSBA #12791
Senior Deputy Prosecuting Attorney