

COURT OF APPEALS
DIVISION II

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STATE OF WASHINGTON
BY  DEPUTY

NO. 4077-9-II

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION TWO

STATE OF WASHINGTON,

Respondent,

v.

MICHAEL PIERCE

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR JEFFERSON COUNTY

The Honorable Craddock Verser, Judge

OPENING BRIEF OF APPELLANT

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A. ASSIGNMENT OF ERROR

1. The trial court erred when it denied the defense motion for a change of venue, violating Mr. Pierce's state and federal constitutional right to a fair trial by an impartial jury.
2. The trial court erred when the jury selection process was fraught with error, resulting in a violation of Mr. Pierce's state and federal constitutional right to a fair trial and impartial jury.
3. Mr. Pierce's state and federal constitutional right to a fair trial was violated because of the misconduct committed by the prosecution.
4. The intentional withholding and untimely disclosure of ER 404(b) evidence by the prosecution violated Mr. Pierce's state and federal constitutional right to a fair trial.
5. The trial court erred when it permitted prejudicial evidence to be admitted in the trial in violation of Mr. Pierce's state and federal constitutional right to a fair trial.
6. Mr. Pierce's state and federal right to a fair trial was violated when the trial court denied a mistrial after being provided with undisputed proof that the jury reached its verdict based on evidence not supported by the record.
7. Mr. Pierce's state and federal constitutional right to a fair trial was violated when the trial court failed to remove after learning that counsel's agency had an actual conflict of interest because it previously represented a key state witness and potential other suspect twenty-eight times.
8. The trial court erred when it failed to suppress statements pursuant CrR 3.1.
9. Cumulative error denied Mr. Pierce a fair trial.

B. ISSUES PERTAINING TO ASSIGNMENT OF ERROR

1. Did the trial court err for denying a change of venue when there was ample evidence that the nature, extent, and relentlessness of the media attention had a profound impact on the close community of Jefferson County? Assignment of Error 1.
2. Did the trial court err for denying a change of venue in spite of the care exercised and because of the difficulty encountered in the jury selection process, particularly when coupled with the reality that nearly every juror was familiar with and affected by the publicity, the process could not assure a fair trial? Assignment of Error 1.
3. Was the right to a fair trial by an impartial jury violated when the trial court changed the jury selection process from individual *voir dire* to general questioning allowing questions and answers about jury bias, case familiarity, and opinions of guilt to be expressed in front of other jurors thus contaminating the entire jury pool? Assignment of Error 2.
4. Was the right to a fair trial by an impartial jury compromised because the trial court denied the defense motion for cause challenge of a specific juror? Assignment of Error 2.
5. Was the right to a fair trial by an impartial jury jeopardized when the court informed the jury that the death penalty was not a sentencing concern in this non-capital case? Assignment of Error 2.
6. Was the right to a fair trial violated when the prosecution told the jurors that rendering a guilty verdict would be a fulfillment of their oath, bring satisfaction to the prosecution and victims' family, and provide justice to the victims? Assignment of Error 3.
7. Was the right to a fair trial violated when the jurors were told that the prosecution was brought on behalf of the victims and the case had nothing to do with the defendant? Assignment of Error 3.
8. Was the right to a fair trial violated because the prosecutor invoked community fear by asking the jury to consider the nightmare of being murdered in their home? Assignment of Error 3.

9. Was the right to a fair trial violated when the prosecutor appealed to the passion of the jurors by asking them to put themselves in the place of the victims as they were being murdered? Assignment of Error 3.
10. Was the right to a fair trial violated when the prosecution invented outrageous statements and threats by the defendant, and merciful pleas by the victims, when arguing its personal opinion of what happened at the residence during the incident? Assignment of Error 3.
11. Was the right to remain silent violated because the prosecution attributed incriminating statements to the defendant when the defendant did not testify and there was nothing in the record to support the alleged statement were said? Assignment of Error 3.
12. Was the prosecution's intentional withholding of crucial evidence from the defense for two weeks and until after the trial began a violation of its duty to timely disclose discovery and unfairly prejudicial to the right to a fair trial? Assignment of Error 4.
13. Did the trial court err when it failed to conduct a preliminary determination of whether the untimely prejudicial "bad act" evidence was established by a preponderance of the evidence? Assignment of Error 5.
14. Did the trial court err by concluding that the untimely prejudicial "bad act" evidence was admissible to establish motive? Assignment of Error 5.
15. Did the trial court err by denying a motion for a new trial when it was presented with undisputed evidence that the jurors' verdict was reached after considering prejudicial evidence contrary to, and absent from, the record? Assignment of Error 6.
16. Did the trial court err in denying the existence of a conflict of interest and removing counsel even though the defense attorney's agency had previously represented a key state witness and potential other suspect twenty-eight times? Assignment of Error 7.
17. Did the trial court err in failing to suppress statements in violation

of CrR 3.1 even though the defendant requested an attorney but was never provided access to the means to contact one? Assignment of Error 8.

18. Did the cumulative error violate Mr. Pierce's right to a fair trial? Assignment of Error 9.

C. SUMMARY OF THE ARGUMENT

Whether Mr. Pierce could receive a fair trial was questionable from the beginning. It became dubious as the publicity mounted and the initial request for a change of venue was denied. By trial's end the flawed jury selection process, the misconduct by the prosecution, the improper admission of prejudicial evidence, and the undisputed irregularity in the jury verdict, provided little doubt that these errors – individually and collectively - resulted in a thorough repudiation of Mr. Pierce's state and federal right to a fair trial.

Even though the media attention surrounding the case - including articles about the investigation, the deep community affection for the victims, the defendant's criminal history, and the expense to the county for Mr. Pierce's defense - was extensive, continuous and relentless; the trial court denied the defense's motion to move the trial from Jefferson County. Instead, the court hoped that Mr. Pierce's right to a fair and impartial jury could still be accomplished through jury selection.

The plethora of errors during jury selection did nothing to secure a

fair trial. Whatever cares the trial court initially exercised to empanel a fair and impartial jury was wholly destroyed by the time a jury was selected. Because the trial court refused to permit the exploration of the jurors' biases, opinions, and knowledge about the case be done individually, comments like "he's guilty as hell", "what I saw in the papers was real hard evidence", unless "you produce the mysterious [other suspect] and he admits to everything . . . [Mr. Pierce] is guilty", and numerous other jurors expressing an opinion that Mr. Pierce was guilty were voiced during general *voir dire*, resulting in a complete contamination of the jury pool.

With this backdrop, jurors were empanelled. Whatever resemblance of a fair trial that still remained was thoroughly quashed by numerous acts of prosecutorial misconduct. The prosecutor committed misconduct when: (a) it tethered the jury's oath and justice for the victims to a conviction; (b) it shifted the burden of proof to the defense by telling jurors to "hold them to it" and to question why the defense "didn't explain away" an alleged fact; (c) it informed the jurors that the prosecution was brought "on behalf" of the victims and the case had "nothing to do with" the defendant; (d) it invoked community fear and inflamed jury passion by telling the jurors to place themselves in the victims' "nightmare" and imagine being murdered in their own home; and (e) it invented

outrageously inflammatory statements and improper inferences found nowhere in the record.

A fair trial was further jeopardized as the prosecution intentionally withheld evidence that a state's witness claimed, for the first time, that Mr. Pierce sought the witness's assistance in obtaining drugs, and then argued the desire for drugs was the motive for the murders. The prosecution does not dispute that it withheld the information for two weeks and after the trial began, but justifies the late disclosure because they were too busy. As a result, the defense was unable to question jurors about potential biases regarding drugs, unable to discuss the alleged fact during opening statement and unable to cross-examine witnesses that had testified prior to the disclosure.

Compounding the untimely disclosure was the trial court's admission of the prejudicial evidence without an initial examination of its reliability. The witness's numerous inconsistencies, motive to fabricate, and unsubstantiated assertions squarely questioned whether the purported act occurred. Furthermore, this state witness, who was also a potential other suspect, had been previously represented by defense counsel's agency nearly thirty times. This atmosphere of a conflict of interest was insufficiently explored even though the witness's credibility was critical to the state's case and the jury's verdict.

The unfairness of the trial was completely evident at trial's end. After the verdict, the court was presented with undisputed evidence that the jurors considered a significant fact that was not in the record. A critical issue at trial, and the thrust of the state's case, was whether Mr. Pierce committed arson in an attempt to conceal the homicides. Therefore, evidence that suggested he smelled like gasoline the night of the incident was crucial to a conviction; in particular because state witnesses testified about the presence of accelerants at the house and because there was no physical or direct evidence that Mr. Pierce was at the residence. And according to the jurors, it was a "damning piece of evidence" for them to consider testimony that Mr. Pierce asked the night of the incident whether he smelled like gasoline. It is undisputed; however, that Mr. Pierce never made any such statement. Consequently, jurors considered a damaging fact that was contrary to, and not supported by, the evidence - resulting in an irregularity in the proceedings that materially affected Mr. Pierce's right to a fair trial.

It is abundantly clear that the right to a fair trial was not delivered in this case.

D. STATEMENT OF THE CASE

On March 18, 2009, at approximately 7:00 or 7:20 p.m., Tyler Ingalls, was driving south-bound on Highway 101 in Jefferson County

when he noticed a bizarre light coming from a residence on Boulton Road. RP (3/11/10) 982.¹ He drove up to the house, parked in the driveway and called 911. A house was on fire.²

Shortly after, at around 8:30 p.m., Willie Kneopfle, an Assistant Chief with Discovery Bay Fire Department, was paged and was the first person from the fire department to arrive at the scene. RP (3/11/10) 1010 – 1014. Once clear, the fire fighters gained entrance into the residence and discovered two individuals lying on the floor. RP (3/11/10) 1023 – 1024; 1065 – 1066. The house belonged to Pat and Janice Yarr.

News of the fire and the deaths of Mr. and Mrs. Yarr immediately spread throughout Jefferson County's 30,000 residents. It was, as one paper described, a "community tragedy." CP 212. The media described the Yarrs as a loving and caring couple, who had "deep roots" in Jefferson County and "in a community such as this, this family touched so many lives. It's awful." *Id.* Nearly 700 people attended their memorial service, including a truck convoy of 100 timber trucks escorted by the local police. CP 212; RP (2/17/10) 219.

¹ Because there are duplicate Volume numbers for the Verbatim Report of the Proceedings, they will be cited by the date of the hearing and page of the transcripts (i.e., RP (3/3/10) 1 -5); the Clerk's Papers will be referred to as "CP".

² Mr. Ingalls later acknowledged the time may have been 8:20 p.m., not 7:20 p.m. RP (3/11/10) 988.

Ten days later, Mr. Michael Pierce was arrested. RP (3/17/10). On the day of his arraignment, the police blocked off streets in Jefferson County leading to the courthouse because of the large crowd attending the court hearing. CP 212. After a change of venue motion was denied, the court summoned seventy (70) prospective jurors to Jefferson County Superior Court on March 8, 2010. RP (3/8/10) 538. Opening statements were given two days later. RP (3/10/10) 900 – 921. Testimony and evidence was completed on the afternoon of March 24, 2010, followed immediately by closing argument. RP (3/24/10) 980 – 1018; 1020 – 1085. On March 26, 2010, the jury found Mr. Pierce guilty. RP (3/26/10) 1- 16; CP 317 – 333.³

1. The Trial and Evidence.⁴

Ms. Pam Roberts testified that on March 18, 2009, around 7:00 p.m., she closed up the building to the Youth Intervention Program and began driving on Highway 101. RP (3/17/10) 52. As she turned a bend, she saw a man walking southbound on the highway. *Id.* at 56. She recalled it was about 7:45 p.m. *Id.*

Ms. Roberts described the man as the “biggest man” she’d ever seen, wearing a large black coat, a “hoodie”, approximate age between 28

³ The jury found Mr. Pierce not guilty of aggravated first degree murder, but guilty of all other counts, including felony murder in the first degree. RP (3/26/10) 1- 16; CP 317 – 333.

⁴ Facts supporting specific assignment of errors are set out in the legal argument section of the brief.

– 35 years old, and about 5’11 to 6’2 in height. *Id.* at 59 – 68. She also recalled seeing the man pull his black hoodie sweater over his face. *Id.* Although she suspected the person’s car was broken down, she didn’t see any cars parked. *Id.* She didn’t report anything to the police until the following day, when she learned about the fire. *Id.*

Her testimony was different from others who testified about Mr. Pierce’s clothing the night of March 18, 2009. For instance, Ms. Roberts testified that the man she saw was not wearing a cap and that his jacket was waist length with lettering or writing on the jacket; at the time she reported the incident she did not provide any details about age, height or weight. *Id.* at 69 – 71. Nor did Ms. Roberts ever identify Mr. Pierce as the person she saw walking the night of March 18, 2009. *Id.*

Deputy Brian Tracer testified that he was contacted and informed of the fire at approximately 11:00 p.m. and that he arrived at the house about fifty minutes later to secure the scene. RP (3/11/10) 1072 – 1077. The next morning he prepared and obtained a search warrant to enter the residence. *Id.* at 1077 – 1078. When law enforcement re-entered the charred residence, they searched the house, took photographs, collected evidence, and removed the victims. *Id.* at 1079; 1085. Based on the floor samples, flammable liquids found near a doorway and apparent gas under the deceased, arson was suspected. *Id.* at 1109; RP (3/15/10) 1130 – 1159.

Medical examiners identified the two bodies found in the residence as Mr. Pat Yarr and Mrs. Janice Yarr. The medical examiners also testified that neither died due to the fire, but “homicide could not be excluded.” *Id.* at 1357 – 1358; 1373.

The Washington State Patrol Crime Lab (WSPCL), the Alcohol, Tobacco, and Firearms (ATF), the Federal Bureau of Investigation (FBI), were called in to assist the local police with the investigation. *Id.* During their investigation, they recovered bullets, skull fragments, spent casings, tissue, and two rifles. *Id.* at 1184 – 1195; 1098; 1205; 1214 - 1226.⁵

Det. Apeland testified that a few days after the incident he obtained search warrants for the Yarr’s bank accounts with Bank of America and U.S. Bank in Quilcene. RP (3/16/10) 1430 – 1432. While serving the search warrant, the officers reviewed a surveillance video that depicted an individual making an automatic transaction from one of the accounts at approximately 8:10 p.m. on March 18th, 2001.⁶ *Id.*

The officer testified that he had a “hunch” that the person in the video was the defendant, Michael Pierce. RP (3/16/10) 1433. The officer obtained a photograph of Mr. Pierce from the Department of Licensing

⁵ The officers were told that the Yarrs also owned a 25.06 rifle, but no such weapon was found. RP (3/15/10) 1196.

⁶ The date and time on the surveillance camera indicated 3/18/01 at 20:09:21. According to Detective Apeland, he learned from a bank employee that the year indicated on the recorder was off and no one knew how to recalibrate it.

and conducted a visual comparison between the DOL photo and the video. *Id.* Det. Apeland testified that he reached the conclusion the person on the video was Mr. Pierce. *Id.* at 1436.

Officers testified that they received information that on March 18, 2009, at approximately 6:30 p.m., a large man wearing a hat and black jacket entered Henry Hardware store in Port Townsend, Washington. RP (3/17/10) 202 – 225. According to the cashier, the man inquired about and eventually selected a pellet gun. *Id.* The man left the store with the pellet gun and some pellets without paying. *Id.*

A few weeks later, a co-worker at the hardware store was reading a local newspaper that also had a photograph of the man accused of killing the Yarrs. RP (3/17/10) 223. The co-worker showed the photograph to the cashier who thought the person might be the same man that came in the store for the pellet gun. *Id.* The police were called and took possession of the surveillance camera from the store. *Id.*

Based on the bank surveillance camera, Mr. Pierce was arrested on March 28, 2009, for the crime of second degree theft. RP (3/17/10) 96. Mr. Pierce was taken to the Sheriff's Office and interrogated by Detectives Nole and Apeland. RP (3/17/10) 96; RP (2/17/10) 222 – 238.⁷ After

⁷ Detective Nole basically testified about the same events during a pre-trial hearing held on February 17, 2010, while addressing the defense motion to suppress statements. RP (2/17/10) 222 – 238.

acknowledging his *Miranda*⁸ rights, Mr. Pierce told the officers that he didn't know why he had been arrested. RP (3/17/10) 100. The officers confronted Mr. Pierce, stating that his picture was seen on the bank surveillance camera, to which Mr. Pierce said that he didn't do anything. RP (3/17/10) 102; RP (2/17/10) 226. The detectives then switched the focus of the interrogation to directly accusing Mr. Pierce of killing the Yarrs and igniting the house on fire. RP (3/17/10) 108; RP (2/17/10) 227. The officer testified that Mr. Pierce responded he "wanted an attorney" if he was being accused of murder. RP (2/17/10) 227. The officers also testified that once Mr. Pierce requested an attorney, the interrogation ceased and the detectives called for the jailer to transport Mr. Pierce to the Jefferson County Jail. RP (3/17/10) 108; RP (2/17/10) 227 - 228.

It was testified that later in the evening, Mr. Pierce requested to talk to the detectives. RP (2/17/10) 243 - 245; RP (3/17/10) 134. According to the detective's testimony, Mr. Pierce requested immunity for the theft charges in return he would tell the detective the name of the person who committed the murders. RP (2/17/10) 249 - 254; RP (3/17/10) 147 - 156. The detective testified that Mr. Pierce told them that the shooter was "Mr. B", who Detective Apeland ultimately concluded was a local resident named Tommy Boyd. RP (3/17/10) 161. According to the

⁸ *Miranda v. Arizona*, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966).

detective's testimony, because Mr. Pierce expressed fear of retaliation and being murdered, he asked the detective for protection. RP (3/17/10) 178. The interview concluded and Mr. Pierce was transported back to the Jefferson County Jail.

Jefferson County Jail Superintendent, Steve Richmond, testified that on April 3, 2009, Mr. Pierce said to him: "I didn't shoot those people. I couldn't do something like that and I'm devastated by what I saw. I have nightmares and it scares me." RP (2/17/10) 278. Mr. Richmond also testified that Mr. Pierce expressed fear that the actual shooter was going to get him (Mr. Pierce). RP (2/17/10) 280 - 281.

Search warrants were obtained for places that Mr. Pierce resided, for vehicles that he drove, for his school and bank records. Deputy Joe Nole testified that he went to Sequim, Washington, to search a mobile home that Mr. Pierce shared with his girlfriend, Tiffany Rondeau. RP (3/15/10) 1233 - 1240. According to the deputy, after concluding their search, which produced nothing of evidentiary value, a neighbor said that he observed Mr. Pierce throwing a garbage bag into the dumpster. *Id.* The officers retrieved the bag from the dumpster and found a t-shirt and pair of socks in the bag. Both were soaking wet. *Id.* The officer testified that the shirt did not match the shirt worn by the man in either the bank or the hardware store video. RP (3/18/10) 375. Believing the items had

evidentiary value the officers collected and ultimately sent them to the Washington State Crime Lab for testing. Nothing of any evidentiary value was recovered during the search of Mr. Pierce's mother's house, where he at times resided.

Search warrants were also retained for three vehicles: a white Honda owned by his girlfriend, Ms. Tiffany Rondeau, a Dodge Stealth, owned by his mother, Ms. Ila Rettig, and a Jeep Cherokee, owned by Mr. Pierce. RP (3/18/10) 300. The officers testified they recovered a set of knives, a receipt dated March 18, 2009, from QFC, a piggy bank, and a newspaper while they were searching the white Honda. RP (3/18/10) 1240; RP (3/18/10) 308 – 320.

Exactly who the knife set belonged to was a matter of dispute during trial. It was testified that upon being shown the set of knives, the Yarr's daughters were taken aback and gasped that they belonged to their mother. RP (3/18/10) 320 – 322; 435 - 452. Other witnesses, however, disputed this fact. Ms. Ila Rettig testified that she recognized the block of knives as being the same set given to her by the brother of a man she was caring for. RP (3/22/10) 536 – 543; 556. Ms. Rettig also testified that she gave the knives to Tiffany Rondeau. *Id.* Ms. Rondeau corroborated this fact, explaining that Ms. Rettig gave the knives to her about six months prior and they remained in her car ever since. RP (3/22/10) 603 – 610.

Ms. Rondeau testified that when she received her car back she noticed on the property receipt that the knife block was taken. *Id.* She thought it bizarre for the officers to take the knife set. *Id.* However, upon seeing a newspaper article stating that the Yarr's daughters had identified the knife set, Ms. Rondeau testified that she realized the mistake and attempted to contact the detective. *Id.* She also testified that she tried to reach the detective no less than five times, but never received a return call. *Id.* at 610 – 611.

Richard Merrill also testified regarding the knife set. RP (3/22/10) 648 – 659. Mr. Merrill's brother was the individual who reportedly gave a set of similar looking knives to Mr. Rettig. *Id.* He testified that the knife set in evidence appeared to be similar to the one owned by his brother. *Id.* He testified further that when his brother died, the knife set was not included in the boxes of his brother's belongings, thus supporting the testimony that his brother gave the set to Ms. Rettig. *Id.*

The officers testified they were assisted by an "arson canine" while conducting their searches. RP (3/18/10) 372. The canine smelled the area for any gas or accelerants, but never gave a "hit." *Id.* There were no traces of blood, no gun casings, no weapon, any soot, any hat or jacket, no fingerprints, or anything resembling gas or accelerants discovered during any of the searches. RP (3/15/10) 1249 – 1259; RP (3/18/10) 362 – 373.

Officers also obtained a search warrant to search Mr. Tommy Boyd's property and to obtain his DNA. RP (3/17/10) 160 – 163. Nothing was recovered during the search of his residence. *Id.* However, the defense investigator, Mr. Greg Walsh, testified that when he visited Mr. Boyd's residence, he observed gas containers and a shotgun. RP (3/23/10) 815 - 826.

The state called Mr. Boyd at trial. RP (3/22/10) 674 – 732. Mr. Boyd testified that he met Mr. Pierce while they were both in jail. *Id.* at 676. According to Mr. Boyd, he was sitting at his house watching a DVD with Mike Donahue and Mike McCone the evening of March 18, 2009, when Mr. Pierce showed up around 9:50 p.m. *Id.* at 678 – 679; 720. Mr. Boyd indicated that the others were drinking beer, but not him as he “doesn't drink beer”; although there was a large supply of empty beer cans depicted in photographs of his residence. RP (3/22/10) 685; 704. Moreover, he did acknowledge drinking whiskey. RP (3/22/10) 685. Mr. Boyd testified that Mr. Pierce showed up wearing a cap and a new “Carhart” jacket. *Id.* at 691. Over defense objection, Mr. Boyd was permitted to testify that Mr. Pierce asked him whether he could hook him up with some methamphetamine. *Id.* at 694 – 696. Mr. Boyd agreed on cross-examination that he never told the officers or defense investigator that Mr. Pierce requested methamphetamine, and was saying it for the first

time a year later while on the stand. *Id.* at 701 – 703. Mr. Boyd also testified that he made a phone call to try to find drugs for Mr. Pierce, but the phone records obtained via a search warrant established that no phone call was made. *Id.* at 720. Mr. Boyd was also unable to recall the phone number he called. *Id.* Mr. Boyd also did not remember calling Mr. Pierce’s mother (who testified that she did receive a call from him (RP (3/18/10) 555)) the evening of March 18, 2009; even though his phone records demonstrated that he had. RP (3/22/10) 724.

Mr. Boyd acknowledged that he did have gas cans on his property, a “Molotov cocktail” in his refrigerator, and a handful of easily accessible unleaded white gas bottles. *Id.* at 718 – 719. He also agreed that no one could account for his whereabouts during the time the Yarr’s residence caught on fire. RP (3/22/10) 732.

Mr. Donahue testified that he was at Mr. Boyd’s residence and that Mr. Pierce showed up sometime between 7:00 – 9:00 p.m., wearing “cleaner clothes” and smelling like he just took a shower. RP (3/22/10) 743 – 747. According to Mr. Donahue, Mr. Pierce was only there for about a half hour to an hour. *Id.* at 751. Neither testified that Mr. Pierce smelled like gasoline; was acting funny, bizarre or anxious; or any specifics about the alleged drug transaction, such as quantity or price. *Id.* Nor was there testimony that Mr. Pierce made any reference to having

money for the drugs. *Id.*

Two medical examiners testified that Pat and Janice Yarr died from a blunt force to the head and died before the house caught fire. RP (3/16/10) 1341 – 1373. Employees of the Washington State Patrol Crime Lab testified about items that were tested. RP (3/16/10) 1291 – 1325. One witness testified that the fired bullets found in the house were consistent with a .25 caliber rifle. RP (3/16/10) 1314 – 1317. Mr. Greg Frank, another member of the Washington State Patrol Crime Lab, testified about the items tested, including DNA from metal fragments found in the house, the knife block, tennis shoes, t-shirt, and socks. RP (3/16/10) 1291 – 1304. According to Mr. Franks, the DNA from the metal fragments belonged to Mr. James Yarr. *Id.* at 1298. There was no DNA found at the house that matched Mr. Pierce.

The testimony also established there was no blood of either the victims or Mr. Pierce found on the tennis shoes, t-shirt, socks or knife block. *Id.* at 1301 – 1304. Nor was there any of the Yarrs' DNA found on either the knife block or the knives themselves. *Id.* at 1306 – 1307. The members of the crime lab also testified that there was no gasoline or accelerant found on any of the items recovered from Mr. Pierce. *Id.*

Mr. Pierce was found guilty of murder and arson.

2. Post-Verdict.

At trial, Michael Donahue, a state witness, testified that “he asked me if he smelled like gas.” RP (3/22/10) 764. After the verdict, a juror explained the impact of this statement to a news reporter as: “Michael Pierce asked Donahue if Michael Pierce smelled like gas. That’s a damning piece of evidence right there.” CP 346, attachment 8.

It is undisputed that Mr. Pierce never made any such comment and that the jurors mistakenly interpreted the testimony. Because of this irregularity, the defense filed a *Motion for a New Trial* that included a signed declaration by the witness:

I, Michael Donahue, declare as follows:

By way of clarification, may I state that when I testified that ‘he asked me if he smelled like gasoline’ during cross-examination, my meaning was ‘Walsh [defense investigator] asked me if Pierce smelled like gasoline.’

CP 346, attachment 10. Mr. Donahue said that Mr. Pierce did not smell like gasoline. RP (3/22/10) 764.

The defense requested the court to grant a new trial, or alternatively, be provided additional time to investigate the issue further in order to provide additional evidence. CP 346. The trial court denied both. RP (4/9/10) 1462.

3. The Sentence.

On May 24, 2010, Mr. Pierce was sentenced to 1415 months: Count I - 608 months; Count II - 380 months; Count III (merged with Counts I and II); Count IV - 116 months; Count V – 120 months; Count VI – 102 months; Count VII – 60 months; and Count VIII – 20 months. Counts I and II included a 60 month firearm enhancement. The court ran Counts I, II, IV, V, VI, VII and VIII consecutively. The court also found, pursuant to RCW 9.94A.535(2)(c), substantial and compelling reasons justified an exceptional sentence. CP 369; RP (5/24/10) 1538 – 1548.

This appeal followed.

E. ARGUMENT

- I. *“I’M JUST SAYING THAT I’M SURPRISED THAT HE IS NOT BEING TRIED SOMEPLACE ELSE.”*
– Prospective Juror⁹

THE TRIAL COURT ERRED WHEN IT DENIED
THE DEFENSE MOTIONS FOR A CHANGE OF
VENUE.

A month before trial the defense, based on the extreme media coverage and the small pool from which jurors were to be culled, moved for a change of venue. RP (2/17/10) 210 – 219; CP 212. The trial court agreed the case generated more publicity than any other in years but denied the motion, opting instead to see how the jury selection process

⁹ RP (3/9/10) 728 – 730.

developed. *Id.* The trial court did indicate that the motion could be revisited if jury selection became “impossible.” *Id.*

The jury selection not only failed to alleviate the defense’s concerns, it exacerbated them. One prospective juror summed up the community and publicity concern as such:

[m]ost the people here have heard about the case. It’s a small town. Everybody knows everyone and it seems to me that Mr. Pierce deserves a fair trial. . . I’m just saying that I’m surprised that he is not being tried someplace else.

RP (3/9/10) 729. After jury selection, but before opening statements, the defense requested again for a change of venue. The motion was denied.

RP (3/10/10) 887. The trial court erred.

"A motion for change of venue should be granted when necessary to effectuate a defendant's due process guaranty of a fair and impartial trial." *State v. Rice*, 120 Wn.2d 549, 556, 844 P.2d 416 (1993) (quoting *State v. Hoffman*, 116 Wn.2d 511, 571, 804 P.2d 577 (1991)). Under both the state and federal constitutions, a defendant makes a showing sufficient to meet this due process standard by showing a "probability of unfairness or prejudice from pretrial publicity." *Shepard v. Maxwell*, 384 U.S. 333, 16 L. Ed. 2d 600, 86 S. Ct. 1507 (1966); *Rice*, 120 Wn.2d at 556.

In Washington, the appellate courts have identified nine factors relevant to the determination of whether there was a probability of unfairness

or prejudice and whether the trial court abused its discretion in denying the defense motion for change of venue. These factors are:

(1) the inflammatory or non-inflammatory nature of the publicity; (2) the degree to which the publicity was circulated through the community; (3) the length of time elapsed from the dissemination of the publicity to the date of trial; (4) the care exercised and the difficulty encountered in the selection of the jury; (5) familiarity of the prospective or trial jurors with the publicity and the resultant effect upon them; (6) the challenges exercised by the defendant in selecting the jury, both peremptory and for cause; (7) the connection of government officials with the release of publicity; (8) the severity of the charge; and (9) the size of the area from which the venire is drawn.

State v. Crudup, 11 Wn.App. 583, 587, 524 P.2d 479, review denied, 84 Wn.2d 1012 (1974). A review of the *Crudup* factors demonstrates a "probability of unfairness or prejudice from pretrial publicity" existed warranting a change of venue.

A. "OBVIOUSLY,. . . WE'VE GOT TWO PAPERS THAT PUBLISH A LOT, AND SO IT'S BEEN WIDELY CIRCULATED THROUGHOUT JEFFERSON COUNTY." - JUDGE¹⁰

THE INFLAMMATORY OR NON-INFLAMMATORY NATURE OF THE PUBLICITY.

The trial court acknowledged the substantial amount of inflammatory and non-inflammatory publicity. RP (2/17/10) 218. The publicity covered all aspects of the case, including the investigation, the deep community affection for the victims, the defendant's criminal history and alleged

¹⁰ RP (2/17/10) 218.

statements, and the costs of the defense at county expense. The media attention was also relentless, beginning immediately and continuing throughout the trial (including matters that occurred post-trial).

On March 25, 2009, *The Leader*, one of two newspapers covering Jefferson County, announced that the fire inquest had turned to a homicide:

Why anyone would hurt Janice and Patrick Yarr of Quilcene remains a mystery today as people throughout the county mourn their loss and a homicide investigation into their deaths continues.

CP 212. The “community tragedy” shook the tight-knit community of Jefferson County:

“I have staff in tears. In a community such as this, this family touched so many lives. It’s awful. There’s no more saying it’s an accident.” *Id.*

Articles also explored the victims’ “deep roots” in the community, explaining how they had been married for nearly 40 years; graduated from the local high school, raised their children, worked, shopped, and lived in the Jefferson County area for the majority of those four decades. CP 212. They were described as “hardworking” “people who cared and put others first.” *Id.* Mrs. Yarr was characterized as an “immensely responsible, reliable, proud, self-educated” woman, and Mr. Yarr as an “icon in the timber industry.” *Id.*

The papers reported, and the trial court acknowledged, that nearly

700 people attended the victims' memorial service, including a truck convoy of 100 timber trucks escorted by the local police. CP 212; RP (2/17/10) 219.

The scope of the media attention widened to include details of the investigation and arrest of Mr. Pierce. One paper had a link to a bank surveillance video that reported to show the killer. CP 212. Alleged statements attributed to Mr. Pierce during police interrogations,¹¹ forensic evidence, such as the collection of bullet fragments and autopsy reports, were also reported in the media. *Id.*

The media also reported that Mr. Pierce had criminal history, with a headline boldly pronouncing: "Accused Killer Skimmed Jail Time." CP 212. Articles reported that Mr. Pierce's police record included ten felonies and thirteen misdemeanors, setting out each charge individually. CP 212. The elected prosecutor even commented on Mr. Pierce's criminal history and jail time: "People are very unaware of how little time is imposed under the state's Sentencing Reform Act." CP 212.

There were also quotes about Mr. Pierce's guilt. On more than one occasion, a family member of the victims was reported as saying that she was "glad that Pierce had been arrested," that she was sure he had done it,

¹¹ For example, it was reported that Mr. Pierce used the victims' ATM card; that the shooter was "Mr. B"; that the shooter had blood on him; that Mr. Pierce was waiting for the shooter; and that Mr. Pierce allegedly requested a "plea bargain" or "immunity" for information about the actual shooter. CP 212.

and that she did not want him to get out and “do it again.” CP 212.

The media aimed its focus on the defense team and the costs associated with representing Mr. Pierce, with captions like: “Defense Costs Soaring” and “Murder Trial Costs Climbing” and speculating that the County had paid over \$75,000 for the defense case. CP 212. A Jefferson County Official was reported as stating that the costs to defend Mr. Pierce were leading to the possible layoffs of Jefferson County employees. CP 212. One article publicly pondered whether the defense attorneys were being given a “blank check with taxpayer money to proceed with Pierce’s defense.” CP 212.

Because the media attention was highly inflammatory and topically wide-ranging, this factor weighed in favor of venue change.

B. *“I’VE BEEN INVOLVED IN THE LEGAL SYSTEM IN THIS COMMUNITY FOR I GUESS ABOUT 24 YEARS NOW. . . AS MUCH PUBLICITY AS SOME CASES HAVE GOTTEN, AND THIS HAS PROBABLY GOTTEN MORE THAN ANY I’VE SEEN.” - JUDGE¹²*

THE DEGREE TO WHICH THE PUBLICITY WAS CIRCULATED THROUGH THE COMMUNITY.

The publicity surrounding the victims, the client, the case, and the defense was relentless. The two newspapers, *The Port Townsend Ledger* and *The Leader*, and the local television news covered the case extensively. The trial court acknowledged as much, stating the media attention to this

¹² RP (2/17/10) 218.

case was more than any seen in over two and half decades. RP (2/17/10) 210
– 219.

The extreme attention to the case was evident when the police had to block off streets leading to the courthouse because of the large crowd that attended Mr. Pierce’s arraignment. CP 212. Also a review of a handful of jury questionnaires illustrated the substantial media attention on the case. Of the sixty-two (62) designated jury questionnaires, fifty-six (56) indicated media exposure about the case and forty-one (41) had formed an opinion that affected their ability to be fair and impartial. *See* Vol. VI, VII, VIII.

The second *Crudup* factor also supports that a change of venue should have been granted.

C. “IT’S [MEDIA ATTENTION] ON-GOING” – JUDGE ¹³

THE LENGTH OF TIME ELAPSED FROM THE DISSEMINATION
OF THE PUBLICITY TO THE DATE OF TRIAL.

The dissemination of the publicity did not wane as the trial neared, it increased. The trial court commented on the relentless media coverage, stating that it was “ongoing” and there was “no doubt” that articles would continue to be distributed as the trial neared. RP (2/17/10) 218. On the first day of jury selection, the court expressed disappointment with the media for

¹³ RP (2/17/10) 218.

running a prejudicial article about the case.¹⁴ A prospective juror also commented on the inability to be free from the media coverage, explaining how the jurors were forced to walk by a newspaper stand in front of the courthouse with “big blazing headlines” about the case. RP (3/10/10) 799.

This factor also supports a change of venue was warranted.

D. THE CONNECTION OF GOVERNMENT OFFICIALS WITH THE RELEASE OF PUBLICITY.

During the pending matter, various Jefferson County government officials were connected with news articles relating to the investigation, the defendant and the defense representation. A few examples include:

- Investigating Sheriff explaining how the investigation costs is “going to raise overtime” and how more funds will be requested to continue the investigation (“right now we are at about \$10,000 in expenses”); - CP 212: “*Pierce in Court Friday*” (4/8/09);
- Investigating officer stating that “he [Pierce] has information that wasn’t public.” CP 212: “*Murders: Suspect Captured on ATM Video*” (4/1/09);
- Elected Jefferson County Prosecutor commenting on Mr. Pierce’s criminal history and jail time; - CP 212: “*Accused Killer Skimmed Jail Time*” (4/1/09);
- Elected Jefferson County Officials asking the Elected Jefferson County Prosecutor [whose office was prosecuting Mr. Pierce] to legally challenge pre-trial motions filed by defense counsel; - CP 212: “*Gag on Murder Trial Irks County*” (8/7/09);

¹⁴ RP (3/8/10) 528 – 529 (Well, I’m disappointed then in the reporter in that particular case then because I did request every(one) read [the Bench Bar Press] that I was hoping we could all get along together).

- Elected Jefferson County Prosecutor suggesting the costs associated with representing Mr. Pierce was unwarranted (“the county has been asked to write a blank check”) – CP 212: “*Commissioners Not Satisfied with Status Quo*” (8/7/09); and
- Elected Jefferson County Official reportedly commenting on how the costs associated to defend Mr. Pierce were leading to the possible layoffs of County employees. – CP 212.

E. THE SEVERITY OF THE CHARGE.

Along with other felonies, Mr. Pierce was charged with two counts of aggravated murder. This factor was undisputed. RP (2/17/10) 213 (Court tells defense counsel that he “does not have to worry about that one.”).

F. THE SIZE OF THE AREA FROM WHICH THE VENIRE IS DRAWN.

The size of the area from which the venire is culled is relatively small. According to the 2008 census reports, Jefferson County has 29,542 residents, of which the jury venire is drawn from a pool of approximately 20,000 residents.¹⁵ CP 212; RP (2/17/10) 219. And as previously noted, a large portion of the residents had knowledge about the case and/or knew the victims.

Because the remaining *Crudup* factors relate to the jury selection process (i.e., care exercised and difficulty encountered in jury selection, familiarity of prospective jurors with publicity and its affect, and the

¹⁵ This ranks Jefferson County 27th out of Washington’s 39 counties. <http://www.ofm.wa.gov/databook/county/jeff.pdf>

challenges lodged by the defense during *voir dire*), they were not addressed during the pre-trial motion for a change of venue. The trial court denied the defense motion for change of venue, opting instead to test whether an impartial jury could be empanelled. RP (2/17/10) 219.

As demonstrated below, the attempt failed.

II. BECAUSE THE JURY SELECTION PROCESS WAS FRAUGHT WITH PROBLEMS THE TRIAL COURT ERRED IN DENYING A MOTION TO CHANGE VENUE AND MR. PIERCE WAS DENIED A FAIR TRIAL.

A criminal defendant is entitled to trial by a fair and impartial jury. U.S. CONST. amend. VI, XIV § 1; WASH. CONST. art. I, § 3, 21, 22; *Duncan v. Louisiana*, 391 U.S. 145, 177, 88 S.Ct. 1444, 20 L.Ed.2d 491 (1968); *State v. Johnson*, 25 Wn.App 443, 457, 105 P.3d 85, 92 (2005). The Sixth Amendment ensures that criminal defendants “ ‘enjoy the right to ... trial, by an impartial jury.’ ” *State v. Latham*, 100 Wn.2d 59, 62, 667 P.2d 56 (1983); *Irvin v. Dowd*, 366 U.S. 717, 722, 81 S.Ct. 1639, 6 L.Ed.2d 751 (1961). The language of article I, section 22 of Washington’s Constitution is similar to that of the Sixth Amendment and has been construed to ensure and protect one’s right to a fair and impartial jury. *State v. Davis*, 141 Wn.2d 798, 855, 10 P.3d 977 (2000). In addition, Washington Constitution article I, section 21 states that a defendant has a right to be tried by an impartial 12 person jury. *State v. Gentry*, 125

Wash.2d 570, 615, 888 P.2d 1105 (1995) (applying Wash. Const. art. I, § 21). *State v. Fire*, 145 Wn.2d 152, 167, 34 P.3d 1218 (2001) (Alexander, C.J., concurring).

The jury selection process is an important mechanism to vet potential bias and impartial jurors. Trial courts have discretion in determining how to conduct the *voir dire* process. *Morgan v. Illinois*, 504 U.S. 719, 729, 112 S.Ct. 2222 (1992); *United States v. Sarkisian*, 197 F.3d 966 (9th Cir. 1999); *State v. Laureano*, 101 Wn.2d 745, 758, 682 P.2d 889 (1984) (citing *State v. Robinson*, 75 Wn.2d 230, 231-32, 450 P.2d 180 (1969)). The discretion is limited, however, the record may reveal that the court abused its discretion and thus prejudiced the defendant's right to a fair trial by an impartial jury. *United States v. Jones*, 722 F.2d 528, 529 (9th Cir. 1983); *Davis*, 141 Wn.2d at 825 – 826.

Here, the record reveals that the *voir dire* implemented failed to live up to its objective of empanelling a fair and impartial jury. First, whatever care the trial court attempted to exercise in empanelling a fair and impartial jury was thwarted as a result of the trial court changing the process during jury selection. Second, the jurors' familiarity with - and effect of - the publicity prevented the empanelment of a fair and impartial jury. Third, the trial court erred when it denied defense counsel's "for cause" challenge to a juror who ultimately sat on the jury because the defense was without

peremptory challenges. And finally, the trial court erred when it informed prospective jurors that the case was not a death penalty case.

A. “*IT [INDIVIDUAL VOIR] WOULD SIMPLY BE TOO BURDENSOME*” - JUDGE¹⁶

THE INADEQUATE JURY SELECTION PROCEDURE
PREVENTED MR. PIERCE FROM RECEIVING A FAIR TRIAL.

The trial court changed the jury selection procedure three times during the jury selection process; ultimately eliminating any attempt to empanel a fair and impartial jury.

On the first day of jury selection, the court summoned forty-nine (49) of the seventy (70) jurors to the Jefferson County courthouse and had them complete a seven page questionnaire. RP (3/8/10) 538. The questionnaire included questions that focused on prospective juror’s knowledge of the case, the defendant, the victims, and potential witnesses; and whether the juror formed an opinion about guilt or innocence. CP 289. Of the forty-nine jurors, the court excused five jurors outright. *Id.*¹⁷ The court also provided the attorneys a list of jurors the court felt “almost for sure will be excused” based solely on the questionnaire answers. *Id.* at 549 – 550. The parties went through the court’s list to determine which

¹⁶ RP (3/9/10) 704.

¹⁷ Juror Nos. 13, 20, 29, 31, 45, and 47. RP (3/1/10) 548 - 549.

excusals were agreed. *Id.* at 552 – 567.

When the jurors returned, the court excused the agreed upon jurors and the attorneys began conducting individual *voir dire* of those jurors whose excusals were not agreed upon, but whose questionnaires contained opinions about the case. RP (3/8/10) 566. The individual *voir dire* process allowed the attorneys to ask jurors about their knowledge of the case, any formed opinion, and whether they could set aside any biases, free from the danger of tainting the entire jury pool. At the end of the first day of jury selection, the court told the parties that for the remaining jurors the parties would have limited time to ask questions. RP (3/8/10) 643 – 647.

Before jury selection began the following day, the defense requested the court to reconsider its sixty-minute time limit. The defense expressed concern that a number of jurors remaining on the panel from the day before had indicated in their jury questionnaires knowledge about the case, having close ties to the victims and their family, or holding a strong opinion about the case that warranted the additional time. The defense stated:

Five of the twenty-nine [of the jurors summoned the day before] indicate some knowledge of the Yarrs. One, two, three, four, five, six, seven, eight, nine of the potential jurors indicate hearing about the case or gossiping about the case. One, two, three, four, five indicate with respect to page, excuse me, questionnaire 23 some problem with them sitting on this case. So, again, I don't believe an hour

is near sufficient and I would move the Court to reconsider that decision and allow essentially all day Wednesday to voir dire the remaining jurors on the panel.

RP (3/9/10) 629. Inexplicably, the court denied the request. *Id.* 630 – 631.

At this point, the trial court still allowed individual *voir dire* to be implemented. Before questioning began, the court provided a list of jurors who the court believed should be brought in and individually questioned, noting that “obviously we’ll add more to it.” *Id.* at 640. The court asked the parties for the juror numbers they believed necessitated individual questioning. *Id.* at 642 – 645. As defense counsel began to list the jurors who it believed warranted individual questioning, the trial court, frustrated that jury selection process was taking too long, changed it to “struck jury method.” RP (3/9/10) 643 – 647. (“I’m going to bring in the panel and we’ll just do the struck jury method with the rest of this panel.”). When it was the defense’s turn to conduct general *voir dire*, it moved the court again to allow individual *voir dire*. The trial court denied the request, stating that “it would be simply too burdensome.” RP (3/9/10) 704.

With the limited time allotted, the defense tried to inquire of individual jurors about their responses on the jury questionnaires, pre-trial publicity and any personally held opinions about the case. *Id.* at 704 – 761. At the end of the second day, the defense informed the court that since a

number of jurors indicated in their questionnaires that they had read about the case, had expressed an opinion about the defendant's guilt and had described a close relationship with the victims; it intended to ask individual questions of each juror the following day. *Id.* at 763.

At the beginning of the third day, the court changed the jury selection procedure again. This time the court decided it would ask the entire jury panel about publicity, opinions and biases. RP (3/10/10) 768.

Because the court refused to conduct individual *voir dire*, jurors who expressed knowledge of the case, the victims, the defendant, and/or formed opinions about the defendant's guilt, were obligated to share those with the entire jury panel. Or alternatively the attorneys were forced to forgo asking about these areas in fear of contaminating the general jury pool. *See e.g.*, (RP 3/9/10) 737.¹⁸ Both occurred here.

The record reveals that the trial court abused its discretion by placing unreasonable time limits on the attorneys, and more importantly, refusing to conduct individual *voir dire* of jurors who expressed knowledge about the case and/or formed strong opinions about Mr.

¹⁸ The following occurred during general *voir dire*:

Juror:	Um, I haven't formed a definite opinion, but there are three major things that I have read in the paper that I would have a really hard time setting aside to make an unbiased decision in the courtroom.
Def. Attorney:	Okay. And so let's not go into what they may have been.

Pierce's guilt. As a result, Mr. Pierce was denied his right to a fair trial by an impartial jury. *Jones*, 722 F.2d at 529.

B. "HE'S GUILTY AS HELL" – PROSPECTIVE JUROR¹⁹

THE PROSPECTIVE OR TRIAL JURORS' FAMILIARITY WITH THE PUBLICITY AND THE RESULTANT EFFECT UPON THEM PREVENTED THE EMPANELMENT OF A FAIR AND IMPARTIAL JURY.

During the general *voir dire* questioning, it became evident the jurors' possessed extensive familiarity with the publicity about the case, and its effect prevented the empanelment of a fair and impartial jury. Of the sixty-two (62) designated jury questionnaires, fifty-six (56) indicated media exposure about the case and forty-one (41) had formed an opinion that affected their ability to be fair and impartial. *See* Vol. VI, VII, VIII.

One juror commented on the general inability to be free from media exposure about the case since they were forced to walk by a newspaper stand in front of the courthouse with "big blazing headlines" about the case. RP (3/10/10) 799. More specifically, a large number of jurors expressed, in front of the other jurors – contaminating the entire pool - their extensive familiarity with the publicity about the case, their formed opinion about Mr. Pierce's guilt, and how they could not be fair or impartial.

- RP (3/9/10) 706 (knew victim, formed opinion);

¹⁹ RP (3/9/10) 744 – 745.

- RP (3/9/10) 708 – 710 (formed opinion that Mr. Pierce was guilty);
- RP (3/9/10) 711 (opinion that Mr. Pierce was guilty);
- RP (3/9/10) 713 (based on what she read, formed opinion that Mr. Pierce was guilty);
- RP (3/9/10) 715 – 718 (based on publicity formed opinion that Mr. Pierce was guilty);
- RP (3/9/10) 719 – 721 (knew the victims and therefore “too emotional” to sit as a juror);
- RP (3/9/10) 724 (formed an opinion about guilt, stating: “**Only if you produce the mysterious Mr. B [the other suspect] and he admits to everything**” and if you don’t “**he’s guilty.**”) (emphasis added);
- RP (3/9/10) 724 – 725 (expressed reservation about being fair because she knows the elected prosecutor, who she characterizes as a fair person);
- RP (3/9/10) 726- 728 (based on what he read formed an opinion that Mr. Pierce is guilty);
- RP (3/9/10) 728 – 733 (reservations about ability to disregard what she read about the case in the media);
- RP (3/9/10) 737 (“**what I saw in the papers was real hard evidence, in my mind, that I would have a really difficult time setting it aside**”) (emphasis added);
- RP (3/9/10) 739 (expressed having nightmares about the murders because she cleaned the victims’ house);
- RP (3/9/10) 740 (could not be impartial because sister was murdered);

- RP (3/9/10) 742 (could not set aside what he read about the case and friend with witness);
- RP (3/9/10) 744 – 745 (when asked whether he could be impartial, juror bluntly stated: “**of course I am, and he’s guilty as hell. So probably, no.**”) (emphasis added);
- RP (3/9/10) 747 (extensive media exposure, formed an opinion that Mr. Pierce was guilty);
- RP (3/9/10) 748 (formed an opinion about guilt);
- RP (3/9/10) 753 (formed an opinion and media exposure);
- RP (3/9/10) 753 – 756 (formed an opinion about guilt);
- RP (3/10/10) 834 (read everything about the case and could not be fair);
- RP (3/10/10) 837 (daughter went to school with victims’ daughter and could not be fair); and
- RP (3/10/10) 840 – 841 (media exposure).

As a result of the trial court’s refusal to allow for individual questioning, jurors had to answer questions about publicity, biases and opinions in front of each other. It didn’t matter whether a juror was properly excused for cause based on his or her answers, the taint was complete. Jurors who may have possessed little or no knowledge about the facts, the victims, or the defendant, did now after hearing the responses of the other prospective jurors. They learned, for instance, that numerous other jurors, based on what they read “was real hard evidence”, had already concluded that Mr. Pierce was guilty. The proverbial bell had been rung.

Whatever care the court initially sought at the state of jury selection by allowing for individual questioning was erased when the court required counsel to inquire about publicity in front of all the jurors. *See e.g., State v. Jackson*, 150 Wash.2d 251, 272, 76 P.3d 217, 228 (2003) (court upheld a denial of change of venue when the record showed that the trial court “took great care in the jury selection procedure and offered defendants the opportunity to question individual prospective jurors alone in case any specific publicity may have unduly influenced a particular juror.”).

C. THE CHALLENGES EXERCISED BY THE DEFENDANT IN SELECTING THE JURY.

The “for cause” and peremptory challenges exercised by the defendant in selecting the jury also supports a change of venue. Because of prejudicial statements and bias opinions, the defense sought to challenge numerous jurors for cause. *See generally*; RP (3/8/10) 554; 598; 604; RP (3/9/10) 644; 715 – 719; 724; RP (3/10/10) 840 – 841; 880. Specifically, the defense moved to excuse more than half of the jurors summoned (forty-one (41)) because they had already formed an opinion about guilt.²⁰ Of these forty-one jurors, the court eventually agreed to

²⁰ This list included Jurors Nos. 1,2,4,6,16,21,22,25,28,32,35,36,37,38,43,44,49, 51,53,54,57,59, 61,62,63,64,66,69,70,74,75,76,78,81,82,84,86,87,88,91, and 92. RP (3/8/10) 554 – 611; RP (3/9/10).

excuse all but three.²¹ As noted, nearly all prospective jurors were familiar with the case, the defendant or the victims. *See* Vol. VI, VII, VIII.

The defense did exercise all its peremptory challenges. RP (3/10/10) 882 – 888. As such, the Washington State Supreme Court has concluded that:

[I]f a defendant believes that a juror should have been excused for cause and the trial court refused his for-cause challenge, he may elect not to use a peremptory challenge and allow the juror to be seated. After conviction, he can win reversal on appeal if he can show that the trial court abused its discretion in denying the for-cause challenge.

State v. Fire, 145 Wn.2d 152, 34 P.3d 1218 (2001); *City of Bothell*, 156 Wn.App. 531, 538, n. 2, 234 P.3d 264 (2010).

The defense sought the excusal of Juror No. 92 for cause, but the motion was denied. RP (3/9/10) 644. Because the defense had exhausted all its peremptory challenges and was therefore without a remedy to challenge, Juror No. 92 remained on the jury. RP (3/10/10) 882 – 886. In the questionnaire, Juror No. 92 indicated having read about the case, including the suggested facts that Mr. Pierce supposedly argued with the victims over money and Mr. Pierce alleged use of the victims' stolen ATM card. The source of the information was the newspaper, the internet and word of mouth. Juror No. 92 also acknowledged discussing the case

²¹ Some of the jurors the defense sought to exclude were not excluded until after hearing their answers during general *voir dire*. Jurors Nos. 49, 62 and 92 were not excused.

with others prior to jury selection. Additionally, Juror No. 92 indicated “I know there were no other suspects leading to the arrest of Mr. Pierce” and “I honestly haven’t heard much about his innocence”, but expressed a willingness to keep an open mind. Juror No. 92 also indicated knowing Detective Mark Apeland, one of the lead detectives on the case.

The trial court abused its discretion in denying the defense motion to excuse Juror No. 92 for cause. Juror No. 92 had more than a passing knowledge about the case. The juror was aware of facts that suggest Mr. Pierce committed a theft of an ATM card, that nothing the juror read suggested anything other than Mr. Pierce being guilty, and no other potential suspects were considered. The information Juror No. 92 described supported a for cause challenge being granted. Because the court denied the motion, and because Juror No. 92 remained on the jury as the defense had no peremptory challenges remaining, a new trial is warranted.

D. “*THIS IS NOT A DEATH CASE*” - JUDGE

TRIAL COURT ERRED IN TELLING THE JURY IT IS NOT A DEATH PENALTY CASE.

The trial court, during general *voir dire*, informed prospective jurors that the death penalty was not involved in this case. RP (3/9/10) 772 (“Now, if you would answer-- oh, another question was, came up

through the questionnaires. This is not a death penalty case. At least one or two jurors, I think were concerned about that. Death is not a possible penalty in this case.”). This was error.

The United States Supreme Court has held that a jury that is not responsible for determining a sentence should not be informed about the defendant's possible sentence. *Shannon v. United States*, 512 U.S. 573, 579, 114 S.Ct. 2419, 129 L.Ed. 459 (1994). The Court reasoned:

The principle that juries are not to consider the consequences of their verdicts is a reflection of the basic division of labor in our legal system between judge and jury. The jury's function is to find the facts and to decide whether, on those facts, the defendant is guilty of the crime charged. The judge, by contrast, imposes sentence on the defendant after the jury has arrived at a guilty verdict. Information regarding the consequences of a verdict is therefore irrelevant to the jury's task. Moreover, providing jurors sentencing information invites them to ponder matters that are not within their province, distracts them from their fact-finding responsibilities, and creates a strong possibility of confusion.

Washington law is consistent with the United States Supreme Court, finding it error to inform prospective jurors in a noncapital case that the death penalty is not involved. *State v. Townsend*, 142 Wn.2d 838, 842-47, 15 P.3d 145 (2001). In *Townsend*, the Washington State Supreme Court found error when the trial court, at the prosecutor's request, instructed the jury “[t]his is not a case in which the death penalty is

involved and will not be a consideration for the jury.” The Court reasoned that where the jury has no sentencing function, it should not be informed on matters that relate only to sentencing. *Id.* at 846. Accordingly, the Supreme Court found “[t]his strict prohibition against informing the jury of sentencing considerations ensures impartial juries and prevents unfair influence on a jury’s deliberations.” *Id.*

In *State v. Mason*, 160 Wn.2d 910, 162 P.3d 396 (2007), the Supreme Court declined to recognize a distinction between whether the court, counsel, or a juror-initiated discussion of the inapplicability of the death penalty. Additionally, in *State v. Hicks*, 163 Wn.2d 477, 181 P.3d 831 (2008), the Washington State Supreme Court, applying the principles outlined in *Townsend* and *Mason*, concluded defense counsel’s performance was deficient insofar as counsel informed the jury that the case was noncapital and failed to object when the trial court and prosecution made similar reference.

Here, the trial court erred when it instructed prospective jurors, during *voir dire*, that this was not a death penalty case. Also, defense counsels’ performance was deficient for failing to object when the trial court and prosecution made similar reference. *Hicks*, 163 Wash.2d at 488. Reversal is not, however, automatic. Counsel’s deficient performance is the failure to object to erroneous oral instructions to the jury. Thus, under

Washington law, when assessing the impact of an instructional error, reversal is automatic unless the error is “trivial, or formal, or merely academic, and was not prejudicial to the substantial rights of the party assigning it, and in no way affected the final outcome of the case.” *Townsend*, 142 Wn.2d at 150, citing *State v. Golladay*, 78 Wash.2d 121, 139, 470 P.2d 191 (1970).

The error here was prejudicial. As noted by the Washington State Supreme Court: “[t]here was no possible advantage to be gained by defense counsel's failures to object to the comments regarding the death penalty. On the contrary, such instructions, if anything, would only increase the likelihood of a juror convicting the petitioner” and “if jurors know that the death penalty is not involved, they may be less attentive during trial, less deliberative in their assessment of the evidence, and less inclined to hold out if they know that execution is not a possibility.” *Hicks*, 163 Wn.2d at 847. As previously discussed, the jury process was fraught with error. Also during general questioning the prosecution told the jurors that “holding out” may result in an undesired hung jury.²²

²² See RP (3/10/10) 825 – 826:

JUROR : I'm trying to put myself into the situation and kind of think ahead about what might happen. And I'm wondering if, if one person feels like they really don't know for sure . . . and then may not agree with the rest of the group and isn't willing to

Mr. Pierce's right to a fair trial was violated because of the trial court's failure grant a change of venue and because the jury selection process was fraught with error.

III. MR. PIERCE WAS DENIED A FAIR TRIAL
BECAUSE THE PROSECUTOR COMMITTED
MISCONDUCT THROUGHOUT THE TRIAL.

Trial proceedings must not only be fair, they must also appear fair to all who observe. *Indiana v. Edwards*, 554 U.S. 164, 128 S.Ct. 2379 (2008). A public prosecutor is "a *quasi*-judicial officer, representing the People of the state, and presumed to act impartially in the interest only of justice." *In Re Hinton*, 152 Wn.2d 853, 856, 100 P.3d 801 (2004), *State v. Reed*, 102 Wn.2d 140, 147, 684 P.2d 699 (1984) (quoting *State v. Case*, 49 Wn.2d 66, 70, 298 P.2d 500 (1956) (quoting *People v. Fielding*, 158 N.Y. 542, 547, 53 N.E. 497 (1899))). A prosecutor's duty to do justice on behalf of the public transcends mere advocacy of the State's case. As such,

Improper suggestions, insinuations, and, especially, assertions of personal knowledge are apt to carry much weight against the accused when they should properly carry none.

Berger v. United States, 295 U.S. 78, 88, 55 S.Ct. 629, 633 (1935).

PROSECUTOR: capitulate, then does that throw the whole thing off? Does it ruin the whole trial and...?
JUROR: Yeah. . . .
PROSECUTOR: Yeah, so that's my nightmare.
PROSECUTOR: Right. That we get it right the first time. Yeah. Yeah.

Prosecutors therefore have a duty to seek verdicts free from appeals to passion or prejudice. *State v. Belgarde*, 110 Wn.2d 504, 507, 755 P.2d 174 (1988); *State v. Echevarria*, 71 Wn.App. 595, 598, 860 P.2d 420 (1993).

In presenting a criminal case to the jury, it is incumbent upon a public prosecutor, as a quasi-judicial officer, to seek a verdict free of prejudice and based upon reason. As we have stated on numerous occasions, the prosecutor, in the interest of justice, must act impartially, and his trial behavior must be worthy of the position he holds. Prosecutorial misconduct may deprive the defendant of a fair trial. And only a fair trial is a constitutional trial.

State v. Charlton, 90 Wash.2d 657, 664-65, 585 P.2d 142(1978).

The burden rests on the defendant to show the prosecuting attorney's conduct was both improper and prejudicial. *State v. Fisher*, 165 Wn.2d 727, 747, 202 P.3d 937, 947 (2009). In determining whether misconduct occurred, the court evaluates whether the prosecutor's comments were improper. *State v. Anderson*, 153 Wn.App. 417, 427, 220 P.3d 1273 (2009). If the statements were improper, and an objection was lodged, the court considers whether there was a substantial likelihood that the statements affected the jury. *Id.* If there is no objection and request for a curative instruction, the court considered whether the comment was so flagrant or ill intentioned that an instruction could not have cured the prejudice. *Id.*

Here, the prosecution committed misconduct when it tied the jury's oath to the trial's outcome; when it shifted the burden of proof to the defense; when it suggested to the jurors that the prosecution was brought "on behalf" of the victims; when it invoked community fear and raised an improper "Golden Rule" argument; and when it invented outrageously inflammatory statements and improper inferences during its closing argument. The misconduct, either individually or cumulatively, resulted in a violation of Mr. Pierce's right to a fair trial.

A. "YOU'LL HAVE DONE YOUR DUTY" - PROSECUTOR

THE PROSECUTOR COMMITTED MISCONDUCT BY TELLING
JURORS TO DO THEIR DUTY AND CONVICT.

It was misconduct for the prosecution to tell the jurors that they would be honoring their oath by finding Mr. Pierce guilty. *United States v. Young*, 470 U.S. 1, 105 S.Ct. 1038, 84 L.Ed.2d 1 (1985). The *Young* Court found it error for the prosecutor to try to exhort the jury to "do its job" - concluding that such an appeal, whether by the prosecutor or defense counsel, "has no place in the administration of justice." *Id.* at 9; *see also United States v. Mandelbaum*, 803 F.2d 42, 43-44 (1st Cir.1986) (decrying a prosecutor's comment to the jury to do its duty: "There should be no suggestion that a jury has a duty to decide one way or the other; such an appeal is designed to stir passion and can only distract a jury from

its actual duty: impartiality.”).

In *State v. Coleman*, 74 Wn.App. 835, 840-841, 876 P.2d 458, 461 (1994), the prosecutor argued:

It is your job to apply the facts to the law, and we cannot second guess you, and will not second guess you, and if you determine that the only thing that happened here was a theft then that is your judgment. And you are entitled to make it, but I would suggest to you that to do so you have to do two things. And one is to ignore the actual evidence in front of you, and the second is thereby to violate your [oa]th as jurors.

Coleman, 74 Wn.App. at 838. The court found the second argument improper because it implied that the jury would violate its oath if it disagreed with the State's theory of the evidence. *Id.* The court warned:

We trust that prosecutors will take these decisions to heart and will, in the future, refrain from making argument to the jury that it would violate its oath by accepting the defense theory of the case. We cannot emphasize enough the unnecessary risk of reversal that such argument creates.

Coleman, 74 Wn.App. at 840-841.

The prosecutor, here, did not adhere the court's warning. Instead, the prosecutor tethered the juror's oath to a guilty finding. During general *voir dire* the prosecutor questioned prospective jurors about their ability to comply with their oath:

So, that's all I ask. So I guess in closing, you know, if you, if you take the oath to follow the law and apply the facts of the law then I'll be more than happy and proud to go

ahead and present this case to you on behalf of Janice and
Patt Yarr [victims] for your decision and consideration,
whatever that may be. Thank you.

RP (3/10/10) 822 - 832. This statement in isolation is not misconduct; but
was a precursor for later abuse when, during closing argument, the
prosecution equated the jurors' oath to an "oath to protect" the country or
"not to overthrow the government of the United States", told the jury:

***Take that oath seriously and apply the facts to the law
and find Mr. Pierce guilty of every single count and
every single issue.***

And, you know, you'll see that, you know, so answer
yes to all those special questions and ***guilty to all those***,
and all you'll need is the Instructions, and ***I'm confident
if you'll do that***, then, you know, ***I'll be satisfied,
Michelle and Patty'll be satisfied, and you'll have done
everything you possibly can and you'll have done your
duty, and I'm sure that we'll have the justice for the
Yarr's***. Thank you very much.

RP (3/24/10) 1147 – 1148. (emphasis added).

Although the defense did not object, the prosecutor's comments
improperly suggested that the jurors' oath obligated them to return a guilty
verdict, and effectively implied that the jury would violate its oath if it
disagreed with the State's theory of the evidence. *Coleman*, 74 Wn.App.
at 838. This was flagrant and ill-intentioned and nothing short of a new
trial could cure the unfair prejudice of this misconduct.

The misconduct was further compounded when the prosecution

told the jurors that if they did their duty and convicted, then he and the victims' family would personally be "satisfied"; and that "justice" would be done for the victims. This line of argument was, and is, designed to stir passion that distracts the jury from actually performing its duty to act impartially. A reversal of the conviction is warranted since the misconduct was flagrant, ill-intentioned, and prejudicial.

B. "*HOLD THEM [DEFENSE] TO IT*" – PROSECUTOR

THE PROSECUTION COMMITTED MISCONDUCT BY
SHIFTING THE BURDEN OF PROOF TO THE DEFENSE.

The prosecutor's misconduct continued when it told the jury in closing argument that the defense did not present witnesses, did not explain the factual basis of the charges, and did not present evidence to support his defense theory. *State v. Jackson*, 150 Wn.App. 877, 885, 209 P.3d 553 (2009).

The prosecution argued:

[i]f you put on a defense of any sort, then, you know, as a juror, you got to hold them to it. Say, "Okay. You threw it out there to see whether or not it would stick, so we're going to go ahead and hold you to it." Just, you know, throw something out here and throw something out over there. Hold them to that. Hold them to it. That's very, very important.

RP (5/24/10) 1089 (quotations in transcript). And further argued:

Gives him the debit card, obviously gives him the PIN number because you can see Mr. Pierce, and defense

Counsel says it's Mr. Pierce, okay, in the bank video, looking at a PIN number. You got a one in 10,000 chance of guessing what that number is. He had it written down on a piece of paper. Mr. Davies [defense counsel] *didn't try to explain away* how he got the PIN number. I know how he got the PIN number. He got it from the Yarrs.

RP (5/24/10) 1116.²³ (Emphasis added). The prosecution's claim that the jurors must hold the defense accountable if they "put on a defense of any sort" was legally and factually wrong. The defense has no burden or obligation to present a defense. Nor did the defense raise an affirmative defense that might necessitate one. No jury instruction was given that placed any burden on the defense, or any obligation upon the jury. CP 316.

This argument was also misconduct since it told the jurors that the defense was obligated to "explain away" a factual assertion by the state was also legally wrong. The prosecution's argument erroneously shifted the burden to the defense. In essence, by telling the jury that the defense had some obligation to present witnesses, explain the factual basis of the charges, or present evidence to support his defense theory, the prosecution committed misconduct necessitating a new trial.

²³ The ATM card was part of the state's theory to establish Felony Murder (Burglary and Robbery), as well as Count VIII, Theft of Access Device. CP 275.

C. "IT'S NOT ABOUT MICHAEL PIERCE. IT'S ABOUT THEM [VICTIMS]" - PROSECUTOR

PROSECUTOR COMMITTED MISCONDUCT WHEN IT CONSISTENTLY TOLD THE JURY THAT THE STATE WAS BRINGING THE CASE ON BEHALF OF THE VICTIMS.

The prosecution committed misconduct when, throughout the trial, it repeatedly told the jury that the prosecution was brought on behalf of the victims. The prosecution strayed even further away from proper argument when he told the jury the trial had nothing to with the defendant. Although the defense did not object, these claims are not only improper, inaccurate, and misleading; they are flagrant and ill-intentioned misconduct.

A criminal prosecution is not a private right of action on behalf of the victim; rather, the prosecutor represents the citizens of the State to "deter, punish, restrain, and/or rehabilitate those whose actions are so dangerous or offensive that they are an affront to a civilized society." *State v. Hanson*, 126 Wn.App. 276, 282, 108 P.3d 177, 180 (2005)(Schulteis, dissenting), citing *State v. Gentry*, 125 Wn.2d 570, 680, 888 P.2d 1105 (1995) (Johnson, J., dissenting), *see also*; *State ex rel. Romley v. Superior Court In and For County of Maricopa*, 181 Ariz. 378, 382, 891 P.2d 246, 250 (1995)(although not specifically stated in a published opinion in this jurisdiction, the rule is well established that a

prosecutor does not “represent” the victim in a criminal trial; therefore, the victim is not a “client” of the prosecutor); *see also*; *Hawkins v. Auto-Owners (Mut.) Ins. Co.*, 579 N.E.2d 118, 123 (Ind.App.1991), *vacated in part on other grounds*, 608 N.E.2d 1358 (1993) (“A deputy prosecutor does not represent the victims or witnesses in a criminal proceeding, but rather, is the State's representative”); *State v. Eidson*, 701 S.W.2d 549, 554 (Mo.App.1985) (“The prosecutor represents the State not the victim”). *Lindsey v. State*, 725 P.2d 649, 660 (Wyo.1986) (Urbigkit, J., dissenting) (“The prosecutor does not represent the victim of a crime, the police, or any individual. Instead, the prosecutor represents society as a whole,” *citing* Commentary, *On Prosecutorial Ethics*, 13 Hastings Const. L.Q. 537-39 (1986)):

“The difference in our roles as advocates derives from the degree of our authority and the disparity of our obligations. Defense counsel's . . . loyalty is to the individual client alone. The prosecutor, however, enters a courtroom to speak for the People and not just some of the People. The prosecutor speaks not solely for the victim, or the police, or those who support them, but for all the People. That body of “The People” includes the defendant and his family and those who care about him.”

Id. The prosecution violated this principle throughout the trial.

- During *voir dire*, the prosecution stated: “if you take the oath to follow the law and apply the facts of the law then I’ll be more

than happy and proud to go ahead and *present this case to you on behalf of Janice and Patt Yarr [victims]* for your decision and consideration.” RP (3/10/10) 832 (emphasis added).

- During opening statement, the prosecution again declared: “So that being said, again, I appreciate the opportunity to bring this case on behalf of the Prosecuting Attorney’s office and *on behalf of Janice and Pat Yarr.*” RP (3/10/10) 900 (emphasis added).

And during closing argument, after the court instructed the jurors to provide their attention to the state for final rebuttal comments, the prosecution began:

Alright. *On behalf of* Julie Dalzell, the elected Prosecuting Attorney of Jefferson County, and Sheriff Hernandez, whose agency handled this investigation, Michelle Hamm, Patty Waters, the friends and family of, *of the Yarr’s (sic), and certainly last, but not least, Pat and Janice Yarr.*

Now, what I’ve got up here is State’s Exhibit number 1 [photographs of the victims], and it’s number 1 for a reason. We’re here because of them. Because they were murdered. Because they were killed. And they are first and they are foremost in my case and my presentation. When this case first came to me a year ago, a little over a year ago today, these are the number one people and the number one priority in this case. So that’s why this is -- It’s not a coincidence that this is State’s Exhibit number 1. *It’s number 1 because it’s about them. It’s not about Michael Pierce. It’s about them.*

RP (3/24/10) 1085. The state repeated this assertion at sentencing.²⁴

The prosecution committed misconduct when it aligned itself with the victims by telling the jurors that the prosecution was brought on behalf of the victims and declaring the case had nothing to do with defendant. The prosecution committed misconduct when it removed itself from the presumption to act impartially and in the interest only of justice and treaded into improper appeals to the jurors' passion and prejudice. *Hinton*, 152 Wn.2d at 856.

D. *"NEVER IN YOUR WILDEST NIGHTMARES WOULD YOU IMAGINE SOMETHING LIKE THAT HAPPENING TO YOU..."*
- PROSECUTOR

THE PROSECUTOR COMMITTED MISCONDUCT DURING CLOSING ARGUMENT WHEN IT INVOKED COMMUNITY FEAR AND AN IMPROPER "GOLDEN RULE" ARGUMENT.

The prosecution also committed misconduct with arguments that further appealed to the jurors' passion, that invoked community fear, and that requested the jurors to put themselves in the position of the victims.

Although greater latitude is given in closing argument than in cross examination, a prosecutor still has a duty to the public to act impartially and in the interest of justice and as such may not make heated partisan comments which appeal to the passions of the jury in order to procure a

²⁴ RP (5/24/10) 1507 ("Okay . . . on behalf of the State of Washington, Pat and Janice Yarr, we are here for sentencing.").

conviction at all hazards. *State v. Rivers*, 96 Wn.App. 672, 675, 981 P.2d 16, 18 (1999); *see also State v. Hoffman*, 116 Wn.2d 51, 94-95, 804 P.2d 577 (1991)(prosecutors have a duty to seek verdicts free from appeals to passion or prejudice); *Reed*, 102 Wash.2d at 145-146 (when a prosecutor appeals to prejudice and abandons impartiality, that prosecutor “ceases to properly represent the public interest.”).

When appellate courts review the challenged statements, it does so “in the context of the total argument, the issues in the case, the evidence addressed in the argument, and the instructions given to the jury.” *State v. Thach*, 26 Wn.App. 297, 316, 106 P.3d 782, 792 (2005); *State v. Brown*, 132 Wn.2d 529, 561, 940 P.2d 546 (1997) (quoting *State v. Russell*, 125 Wn.2d 24, 85-86, 882 P.2d 747 (1994), *cert. denied*, 514 U.S. 1129, 115 S.Ct. 2004, 131 L.Ed.2d 1005 (1995)), *cert. denied*, 523 U.S. 1007, 118 S.Ct. 1192, 140 L.Ed.2d 322 (1988).²⁵

While addressing the jurors, all of whom reside in the tight-knit community of Jefferson County, the prosecution argued:

Now, when you go back to my opening statement, the way I did my opening statement was let’s look at a day in the life of Janice and Pat Yarr, and I picked March the

²⁵ When there are so many improper comments, courts, in determining whether the prosecutor is expressing a personal opinion about the defendant’s guilt, independent of the evidence, reviews the challenged comments in context, *State v. McKenzie*, 157 Wn.2d 44, 53, 134 P.3d 221 (2006), thus, the full transcript of the closing argument is included as *Attachment A*.

18th 2009. . . Never in their wildest dreams or in their wildest imagination or in their wildest nightmare would they have thought what was going to happen to them . . . that they would be forced to lay face down in their own kitchen in their own home to be robbed by somebody that knew them, somebody who they had given a job to, somebody who they had given money to, and they would shoot them in the back of their heads. Never in their wildest dreams would they have imagined that, and ***never in your wildest nightmares would you imagine something like that happening to you, in your own home, the place where you grew up, where you raised kids, where you sent them to school, where you hoped to go ahead and play with your grandkids.*** Never did they imagine that. Never.

RP (3/24/10) 1086 – 1087 (emphasis added).²⁶

Although the defense did not object, these arguments are flagrant attempts at procuring a guilty verdict not based on the evidence but on jurors' fear and passion. This misconduct is exacerbated when placed in context with the other errors associated with the case, including the denial

²⁶ The prosecution continued this community fear argument at sentencing:

He's also stolen from this community the sense of security and safety that you enjoy by living out in the country. . . This is Jefferson County, it's not Pierce County, it's not King County, it's not supposed to happen here.

And the jury also found him guilty of being a murderer in what he did in his actions on March 19, 2009, was he killed the innocence of Jefferson County. He killed the security that we have to live in our homes and not have to worry about who's at the door, and the sense of serenity that we have living in this county where you can leave your doors unlocked, you can go outside, you can go for walks, you can just kind of do what it is without having to live in fear of some sort of random act of violence.

RP (5/24/10) 1511.

of the change of venue, the extreme publicity associated with the case, the flawed jury selection procedure, the limited jury pool, and the fact that most of the jurors expressed strong opinions about the defendant and the crime (and doing so during general *voir dire*).

The prosecution's remarks are also misconduct because they are an improper "Golden Rule" argument. A "Golden Rule" argument "urg[es] the jurors to place themselves in the position of one of the parties to the litigation, or to grant a party the recovery they would wish themselves if they were in the same position." *State v. Thach*, 126 Wn.App. at 317 (2005); *Adkins v. Aluminum Co. of Am.*, 110 Wash.2d 128, 139, 750 P.2d 1257, 756 P.2d 142 (1988) (quoting JACOB STEIN, CLOSING ARGUMENT § 60, at 159 (1985)). Courts find such arguments improper because it encourages jurors to depart from neutrality and decide the case on the basis of personal interest rather than on the evidence. *Id.* The condemnation of Golden Rule arguments in both civil and criminal cases, by both state and federal courts, is so widespread that it is characterized as "universal."²⁷

²⁷ As a sampling of this universe: *see e.g.*, *Beaumaster v. Crandall* (Alaska 1978) 576 P.2d 988, 994; *Delaware Olds, Inc. v. Dixon* (Del.1976) 367 A.2d 178, 179; *Lycans v. Com.* (Ky.1978) 562 S.W.2d 303, 306; *Chisolm v. State* (Miss.1988) 529 So.2d 635, 639-640; *McGuire v. State* (1984) 100 Nev. 153, 677 P.2d 1060, 1064; *State v. Carlson* (N.D.1997) 559 N.W.2d 802, 811-812; *Von Dohlen v. State* (2004) 360 S.C. 598, 602 S.E.2d 738, 745; *World Wide Tire Co. v. Brown* (Tex.Ct.App.1982) 644 S.W.2d 144, 145-146; *Peterson v. State* (Fla.Ct.App.1979) 376 So.2d 1230, 1233; *State v. Bell* (2007) 283 Conn. 748, 931 A.2d 198, 214; *Ivy v. Security Barge Lines, Inc.* (5th Cir.1978) 585

It is uncertain; however, whether in Washington State the “Golden Rule” prohibition applies to criminal cases. *State v. Borboa*, 157 Wn.2d 108, 124, fn.5, 135 P.3d 469, 476 (2006)(we are not convinced that the prohibition on “Golden Rule” arguments applies in the criminal context).²⁸ The appellant urges this Court to hold that it does. Criminal matters are uniquely different than civil cases; the former involves the potential deprivation of one’s liberty. As such, a right to a fair and impartial trial is constitutionally mandated. This mandate should not be placed in jeopardy by arguments which ask jurors to depart from neutrality.

There is also ample support to disapprove the “Golden Rule” argument in criminal cases. As a recent California court stated:

There is a tactic of advocacy, universally condemned across the nation, commonly known as “The Golden Rule” argument. In its criminal variation, a prosecutor invites the jury to put itself in the victim's position and imagine what the victim experienced. This is

F.2d 732, 741; *Hodge v. Hurley* (6th Cir.2005) 426 F.3d 368, 384 *United States v. Teslim* (7th Cir.1989) 869 F.2d 316, 328; *Joan W. v. City of Chicago* (7th Cir.1985) 771 F.2d 1020, 1022; *United States v. Palma* (8th Cir.2007) 473 F.3d 899, 902; *Lovett ex rel. Lovett v. Union Pacific R. Co.* (8th Cir.2000) 201 F.3d 1074, 1083; *Blevins v. Cessna Aircraft Co.* (10th Cir.1984) 728 F.2d 1576, 1580.; *Grossman v. McDonough* (11th Cir.2006) 466 F.3d 1325, 1348.

²⁸ *But see*; *State v. Saldecke*, 2005 WL 470148, 8 (Wn.App. Div. 2, 2005)(“We have similarly disapproved of ‘golden rule’ arguments in criminal cases.”) and *State v. Franklin*, 2002 WL 31525438, 5 (Wash.App. Div.1,2002) (Although the sole Washington case specifically addressing the golden rule argument (outside of the death penalty phase of a capital trial) is a civil case, the same reasoning is often applied in the criminal context) (citations omitted); *State v. Carter*, WL 22839804 (Wash.App. Div. 1,2003) (same). Appellant cites to these unpublished opinions acknowledging they are not binding authority, but rather to illustrate the issue’s uncertainty.

misconduct, because it is a blatant appeal to the jury's natural sympathy for the victim.

People v. Vance, 188 Cal.App.4th 1182, 1187-1188, 116 Cal.Rptr.3d 98, 102 (2010); *See also: Howard v. State*, 106 Nev. 713, 719, 800 P.2d 175, 178 (1990); *Jacobs v. State*, 101 Nev. 356, 359, 705 P.2d 130, 132 (1985) (a “Golden Rule” argument asks the jury to place themselves in the shoes of the victims, and has repeatedly been declared to be prosecutorial misconduct); *Teslim*, 869 F.2d at 328 (a golden rule argument creates error because it “encourages the jury to depart from neutrality and to decide the case on the basis of personal interest and bias rather than on the evidence”); *Hayes v. State*, 512 S.E.2d 294, 297 (Ga.1999) (golden rule argument improperly asks jurors to consider case not as fair and impartial jurors but from biased, subjective viewpoint of litigant or victim); *State v. McHenry*, 78 P.3d 403, 410 (Kan.2003) (same); *Caudill v. Commonwealth*, 120 S.W.3d 635, 675 (Ky.2003) (golden rule argument improper because prosecutor asks jurors to imagine themselves or someone they care about in position of crime victim).²⁹

The appellant urges this court to align itself with the vast support

²⁹ A sample of the numerous jurisdictions that have held “Golden Rule” argument improper in criminal cases include: *See also: Gomez v. State*, 751 So.2d 630, 632 (Fla.App.1999); *State v. Carlson*, 559 N.W.2d 802, 812 (N.D.1997); *United State v. Kirvan*, 997 F.2d 963 (1st Cir.1993)); *United States v. Gaspard*, 744 F.2d 438, 441 n. 5 (5th Cir.1984), *cert. denied*, 469 U.S. 1217, 105 S.Ct. 1197, 84 L.Ed.2d 341 (1985); *State v. Sowards*, 147 Ariz. 185, 709 P.2d 542 (Ct.App.1984), *remanded on other grounds*, 147 Ariz. 156, 709 P.2d 513 (1985); *People v. Fields*, 35 Cal.3d 329, 197 Cal.Rptr. 803, 673 P.2d 680 (1983), *cert. denied*, 469 U.S. 892, 105 S.Ct. 267, 83 L.Ed.2d 204 (1984).

and sound reasoning of other jurisdictions and hold that the “Golden Rule” argument has not place in criminal cases.

Here, the prosecution made an improper “Golden Rule” argument when it told the jurors to place themselves in the position of the victims while imagining being murdered in their home:

never in your wildest nightmares would you imagine something like that happening to you, in your own home, the place where you grew up, where you raised kids, where you sent them to school, where you hoped to go ahead and play with your grandkids.

RP (3/24/10) 1086 – 1087.

This “Golden Rule” argument is even more prejudicial when considered together with prosecution’s wholly invented scenario of the murders. *See* argument section III-E, *infra*: (prosecution committed misconduct when, during closing argument and without support of the record, claims the victims were forced on the ground “head-to-head, face-to-face where they can see each other. *Where they look into their eyes. They can look into their eyes*” and begged for mercy).

The prosecution’s argument sought to inflame the jury by not only resorting to community fear, but also a passionate plea for each juror to imagine the nightmare of being murdered. This line of argument was prejudicial and warrants a new trial.

E. “*LAY DOWN ON THE FLOOR. SAY YOUR GOODBYE’S.*”
- PROSECUTOR³⁰

UNREASONABLE INFERENCES AND ASSUMING
INADMISSIBLE FACTS NOT IN EVIDENCE

The most egregious misconduct occurred when the prosecution – throughout its rebuttal argument - made up unreasonable inferences, invented outrageous and speculative conversations, and claimed prejudicial facts not in evidence. The defense objected to this misconduct three times and sought a mistrial. RP (3/24/10) 1105; 1115; 1116. The court overruled each objection and denied the mistrial. *Id.* Because the defense lodged objections, the standard is whether there was substantial likelihood that the statements affected the jury. *Anderson*, 153 Wn.App. at 427.

As noted, the state is generally afforded wide latitude in making closing arguments to the jury and prosecutors are allowed to draw reasonable inferences from the evidence. *Anderson*, 153 Wn.App. 417, 427-428, 220 P.3d 1273 (2009). Such latitude is not without boundaries; however:

[i]t is not uncommon for statements to be made in final arguments which, standing alone, sound like an expression of personal opinion. However, when judged in light of the total argument, . . . it is usually apparent

³⁰ A statement the prosecutor attributes to the defendant during rebuttal closing argument, although no evidence or testimony was introduced at trial to support it. RP (3/24/10) 1115 – 1117 (quotations in the transcript).

that counsel is trying to convince the jury of certain ultimate facts and conclusion to be drawn from the evidence. ***Prejudicial error does not occur until such time as it is clear and unmistakable that counsel is not arguing an inference from the evidence, but is expressing a personal opinion.***

Anderson, 153 Wn.App at 428; *McKenzie*, 157 Wn.2d at 53-54 (emphasis in the original) (quoting *State v. Papadopoulos*, 34 Wn.App. 397, 400 662 P.2d 59 (1983)). A prosecutor cannot inject her own beliefs in a closing argument. *State v. Mak*, 105 Wn.2d 692, 726, 718 P.2d 407 (1986). “A person being tried on a criminal charge can be convicted only by evidence, not by innuendo.” *State v. Miles*, 139 Wn.App. 879, 886, 162 P.3d 1169, 1172 (2007).

Here, the prosecutor, under the guise of acceptable inferences, went beyond appropriate closing argument when he injected his improper personal opinions and beliefs of what might have occurred; and when he invented prejudicial statements to the defendant and passionate pleas to the victims. While telling the jury that it can infer certain facts, the prosecutor begins to attribute statements to Mr. Pierce about needing money, needing drugs, waiting at the crime scene, and a full dialogue between Mr. Pierce and the victims at the house.³¹ None of which are found in the record.

³¹ In leading up to these outrageous assertions, the prosecutor explains to the jury: “[t]he law allows you to infer certain things from the evidence, okay? I’m telling you what I

The prosecution invented the following conversation that it claimed Mr. Pierce is having with himself:

So he's thinking, "Alright. Who do I know in Quilcene that has money?" "But who do I know in Quilcene that has money? Well, the Yarr's. I know they got money. And they have cash, because they paid me in cash. I can go up there and get some money. But there's one problem: I don't want to work for it. I want my meth now. I don't want to work for it and then go get it; I want my meth now, so that is a problem. And I'm pretty sure Pat's just not going to give it to me without me working for it. So, hmmm, I've got to get some money. He's not going to give it to me, so I need a gun, but I don't know anybody that has a gun."

RP (3/24/10) 1099 – 1100 (quotations in the transcripts). However, there is no support for this imaginary conversation in the record. [*See entire record*].

Disregarding the evidence presented (or not presented) the prosecution continues with the following fabrication:

He's trying to screw up the courage. It's like, "Okay. I got my gun. Looking at the Yarr house. Now, am I going to do this or am I not going to do this? I need to wait for a little bit." Or maybe he's watching the Yarr house from that vantage point because it is March and the, and the, and the leaves aren't out yet and maybe he's, maybe he's watching to see who's there. Maybe he's watching Greg Brooks. Greg says he was there sometime between 7:00, 7:10, give or take, so maybe he's standing on the road saying, "Somebody just drove

believe or remember the evidence may be, and I'm not going to try and put words in your mouth. I'm not going to try to misdirect you or mislead you or anything, but when you got one piece of evidence here and you got another piece over here, you can make an inference to get over there." RP (3/24/10) 1095.

up. I guess I better wait.” So he’s down there on 101, he’s got his car hid and he’s thinking, “Okay. I got to do this thing. I got to do this thing,” alright? And then he hears a car coming. And, now, he’s waited a little bit longer because it’s getting a little bit darker –

RP (3/24/10) 1105 (quotations in the transcripts). Nothing in the record lends support to this inventive tale. [*See Entire Record*].

Then, again, without support of the record, the prosecution concocts a scenario at the victims’ house, including alleged threats made by the defendant and passionate pleas of mercy by the victims:

Okay. So [Mr. Pierce] overpowers Pat. Probably doesn’t want to do anything at this point to go ahead and place his wife in any kind of jeopardy or danger, “Give me the money.” “What do you mean you don’t have any money,” you know. “I don’t have any money,” you know. “But,” you know, “*don’t hurt us. Don’t hurt my wife. Don’t hurt me.* I’ll give you my debit card. *Please don’t hurt us,*” okay? “I’ll give you my debit card. *Please don’t hurt us.*”

He [Mr. Yarr] *probably said*, “This ain’t over. I know you. This ain’t over.” Okay? I betcha he was hot. Makes these two people lay down on their floor, in their home, in their kitchen, almost head-to-head, face-to-face where they can see each other. *Where they look into their eyes. They can look into their eyes.* “I can’t leave any witnesses, especially one that’ll probably kill me the next time he sees me.” And he shoots. There’s your premeditation. “*Lay down on the floor. Say your goodbye’s.*”

RP (3/24/10) 1115 – 1117 (quotations in the transcript) (emphasis added).

The prosecutor went astray from permissible argument as he no longer attempted to convince the jurors of “certain ultimate facts and conclusions” drawn from the evidence; but rather, expressed personal opinions about events and conversations - derived not from the evidence but concocted entirely from his imagination.³² Further, the prosecution’s outrageous claims that the victims were forced to lie on the ground next to each other, “face to face”, looking into each other’s eyes, while begging for mercy – none of which finds support in the record – were impermissible and inappropriate appeals to the jurors’ passion or prejudice. *See e.g., State v. Claflin*, 38 Wn.App. 847, 690 P.2d 1186 (1984)(court found prosecutor committed misconduct when it read a poem to the jury during closing argument describing how a rape victim may have felt because it was an appeal to the jury’s passion and prejudice, and because it contained prejudicial allusions to matters outside the actual evidence submitted at trial).

Additionally, by making up incriminating statements and attributing them to Mr. Pierce, the prosecution violated Mr. Pierce’s

³² Other examples include: RP (3/24/10) 1097 (“So I think it’s reasonable for you now to go ahead and infer...); RP (3/24/10) 1097 (So I think it’s reasonable to infer...); RP (3/24/10) 1103 (“I’ve [the prosecutor] been up and down that road several times since this happened. I’m thinking like, ‘Golly, but how could you not see that? How could you not see that car?’ Well he hides his car...”).

federal and state constitutional due process rights and his right to remain silent.

Prior to trial, the state provided notice of statements that Mr. Pierce allegedly made and the state sought to introduce. The trial court heard testimony and ruled on the admissibility of those statements based *Miranda* and Criminal Rules 3.1 and 3.5. RP (2/17/10). The prosecution provided no notice, however, of any of these “inferred” statements referenced above, nor were they considered during the CrR 3.5 hearing. *See e.g.*, CrR 4.7(a)(1)(ii)³³ and CrR 3.5.³⁴

Mr. Pierce exercised his right not to testify at trial. As such, the assertion of his constitutionally protected due process rights cannot be considered as evidence of guilt. *State v. Silva*, 119 Wn.App. 422, 428-429, 81 P.3d 889 (2003). The state may not, therefore, invite the jury to infer that a defendant is more likely guilty because he exercised his constitutional rights. *Id.* “The inference always adds weight to the prosecution’s case and is always, therefore, unfairly prejudicial.” *Id.*; *State v. Nelson*, 72 Wn.2d 269, 285, 432 P.2d 857 (1967).

³³ Under CrR 4.7(a)(1)(ii), the prosecution “shall disclose to the defendant...the substance of any oral statements made by the defendant.”

³⁴ “When a statement of the accused is to be offered in evidence, the judge at the time of the omnibus hearing shall hold ... a hearing... for the purpose of determining whether the statement is admissible.”

Here, the prosecutor circumvented this principle and commented on Mr. Pierce's silence by inventing prejudicial and incriminating statements and attributing them to him. When an accused exercises his right to remain silent, the prosecution should not be afforded *carte blanche* to inject imaginary statements and attribute them to the accused under the guise inferences. To do so would erode the constitutional right to remain silent to nothingness.

Prejudice is presumed when due process is violated. *United States v. Whitehead*, 200 F.3d 634, 639 (9th Cir. 2000); *State v. Guloy*, 104 Wn.2d 412, 425, 705 P.2d 1182 (1985). The burden, therefore, falls upon the state to prove the error did not cause prejudice. *State v. McReynolds*, 117 Wn.App. 309, 326, 71 P.3d 663 (2003). As such, the state must prove beyond a reasonable doubt that the due process violation did not affect the outcome of the trial – that any reasonable jury would have reached the same result with or without the error. *Silva*, 119 Wn.App at 431. Additionally, where a comment on the decision to remain silent “so prejudices ... the privilege against compulsory self-incrimination [] as to amount to a denial of that right,” reversal is required. *Silva*, 119 Wn.App at 431; *Donnelly v. Christoforo*, 416 U.S. 6387, 643, 94 S.Ct. 1868, 40 L.Ed.2d 431 (1974) (citing *Griffin v. California*, 380 U.S. 609, 85 S.Ct. 1229, 14 L.Ed.2d 106 (1965)). The prosecution is not permitted to

comment on an accused's silence; nor should the prosecution be permitted to insert unfounded prejudicial statements in lieu of silence.

The prosecution committed misconduct throughout the trial. It committed misconduct: when it impermissibly implied that the jurors would honor their oath and provide justice for the victims by convicting Mr. Pierce; when it improperly aligned itself with the victims by claiming that prosecution was brought on the victims behalf, while also telling the jurors the case had "nothing to do with" Mr. Pierce; when it erroneously told the jury that the defense had a burden and the jury should hold them to it; when it sought a conviction based on community fear and passion, and resorted to a "Golden Rule" argument by asking jurors to imagine the horrors occurring to them; and when it argued unreasonable inferences, invented outrageous conversations, and asserted unfounded and prejudicial facts not in evidence. The misconduct was relentless, consistent, and prejudicial, resulting in a violation of Mr. Pierce's right to a fair trial. As such, the conviction and sentence should be reversed.

IV. THE PROSECUTOR'S INTENTIONAL DELAY IN PROVIDING DISCOVERY OF PREJUDICIAL STATEMENTS UNTIL AFTER TRIAL BEGAN AND THE TRIAL COURT ERRED PERMITTING THE ER 404(B) PREJUDICIAL EVIDENCE TO BE ADMITTED VIOLATED MR. PIERCE'S RIGHT TO A FAIR TRIAL.

Although the prosecution was made aware that a state key witness

was going to testify and claim that Mr. Pierce, at the night of the incident, sought methamphetamine, it withheld this information from the defense (and the court) until after the trial started. Once informed and over the defense objection, the court allowed the prejudicial ER 404(b) evidence to be admitted. RP (3/22/10) 694 - 696. Mr. Pierce's due process right to a fair trial was violated because the prosecution intentionally withheld the improper character evidence and because the trial court allowed it to be admitted.

A. THE UNWARRANTED AND INTENTIONAL WITHHOLDING OF PREJUDICIAL DISCOVERY.

On January 25, 2010, the prosecution filed a pleading entitled, *Notice of Intent to Introduce Evidence of Other Crimes, Wrongs or Acts in the State's Case in Chief Pursuant to Rule 404(b)*. CP 205. The state specifically sought to introduce two incidents of prior bad acts: (1) an alleged prior arrest of Mr. Pierce and (2) a theft that occurred on March 18, 2009, at Henery Hardware in Port Townsend. *Id.*

The matter was scheduled for a pre-trial determination on February 17th, 2010. At that hearing, the trial court noted:

The State tells me in their briefing that they've got two issues they want: An alleged arson, alleged prior arson of a vehicle, and a stolen pellet gun that occurred on the day of the, uh, on March 18th.

RP (2/17/10) 336. After taking testimony, hearing argument and applying

the law, the trial court denied the state's request to admit the prior arrest, but allowed the state to introduce evidence of the theft. RP (2/17/10) 336 – 379.³⁵ Before trial began, on March 4, 2010, the defense interviewed Mr. Boyd, a state witness. During this interview, Mr. Boyd cryptically stated that he knew “some other shit” but refused to elaborate. CP 346; CP 355. The following day, Mr. Boyd told the prosecution what the “other shit” was, claiming for the first time that Mr. Pierce had sought his assistance in getting methamphetamine the night of the incident. *Id.* The state did not provide this new information to the defense until weeks later and after trial had begun.

On March 8, 2010, the defense and the prosecution filed their respective *Motions in Limine*. CP 249; 276. The defense sought the prohibition of any references to prior bad acts under ER 404(b) except for the evidence the court had previously ruled admissible. CP 276 ¶2. The matter was heard just prior to the commencement of jury selection and the prosecution informed the court that the only ER 404(b) evidence it sought was the theft that the court had already found admissible. RP (3/8/10) 529 – 530. The prosecution did not mention the alleged drug dealing or purchasing – even though the state was aware it. CP 355. The state did not discuss the ER 404(b) evidence during jury selection or its opening

³⁵ The appellant does not assign error to the trial court's rulings.

remarks. RP (3/10/10) 899 – 916.

The state does not dispute that it withheld the ER 404(b) evidence from the defense for two weeks; after jury selection was complete, after opening statements were given, and after days of testimony was taken. The prosecution's justification for withholding the information was that they were too busy:

Was disclosure of the methamphetamine quest "prompt?" The prosecution first heard about it on March 5, 2010, when they were fully engaged in preparing for a trial with many witnesses from all over the country. The Defense first learned about it on March 19, 2010, and its disclosure was as prompt as the prosecutors could manage in the midst of a major trial.

Response to Defendant's Motion for New Trial, CP 355.

The state violated its discovery obligations when it was made aware of prejudicial evidence that it intended to introduce at trial, but withheld the evidence from the defense for two weeks and after trial began. The criminal discovery provisions are based on the principle that pretrial discovery should be as full and free as possible:

"In order to provide adequate information for informed pleas, expedite trials, minimize surprise, afford opportunity for effective cross-examination, and meet the requirements of due process, discovery prior to trial should be as full and free as possible consistent with protections of persons, effective law enforcement, the adversary system, and national security."

State v. Krenik, 156 Wn.App. 314, 319, 231 P.3d 252, 254 - 255 (2010). Under CrR 4.7(a)(1)(i), the prosecution is obligated to disclose “the names and address of persons whom the prosecuting attorney intends to call as witnesses at the hearing or trial, together with any written or recorded statements and the substance of any oral statements of such witnesses.” The State has a continuing duty to promptly disclose discoverable information. CrR 4.7(h)(2); *State v. Greiff*, 141 Wn.2d 910, 919, 10 P.3d 390 (2000); *Krenik*, 156 Wn.App. at 320. The state did not comply with its obligation.

Because the prosecution did not act with due diligence, Mr. Pierce was placed in the untenable position of choosing between his right to speedy trial and his right to effective assistance of counsel. *State v. Michielli*, 132 Wn.2d 229, 937 P.2d 587 (1997); *State v. Price*, 94 Wn.2d 810, 620 P.2d 994 (1980). The late discovery injected new and extremely prejudicial facts into the case. The prosecution made the “methamphetamine” testimony a prominent part of its closing argument. *See e.g.*, RP (3/24/10) 1022; 1045, 1098, 1103, 1113 (“when you want that methamphetamine, you’ll take those kind of chances”) (“He can’t wait 10 more days for his methamphetamine fix.”) Additionally, one juror stated “Of course, the bombshell was the methamphetamine. Once Tommy Boyd and Donahue [state’s witnesses] brought up meth, there’s

your motive.” CP 346, attachment 7.

The prosecution sought a motion *in limine* and the court agreed that evidence of Mr. Boyd’s prior drug and/or alcohol use was inadmissible. RP (3/8/10) 519; CP 249. Both topics, however, became relevant fodder for cross-examination when Mr. Boyd, on direct examination from the state about methamphetamine, testified that he “doesn’t mess with that stuff” and that “doesn’t know much about that crap.” RP (3/22/10) 696. He also claimed that he rarely drank beer, even though there were pictures of his mobile home with numerous empty beer cans lying around. RP (3/22/10) 704. Because Mr. Boyd sought to bolster his credibility by claiming ignorance about methamphetamine and drug use, and by minimizing his own alcohol use, his prior drug and/or alcohol use was subject to proper cross-examination. But the late discovery prevented defense counsel the necessary opportunity to investigate and explore the information for a proper examination – a fact that is more pronounced since defense counsel’s agency had represented Mr. Boyd nearly thirty (30) times. Consequently, defense counsel was conflicted since it was forced to choose between cross-examining a former client about matters of prior representation (i.e., drug/alcohol use) for the benefit of a current client or don’t at the current client’s detriment. *See* Conflict of Interest Argument, Sec. VI, *infra*. (Mr. Boyd was previously

represented by defense counsel's agency twenty-eight times).

B. TRIAL COURT ERRED IN ADMITTING THE PREJUDICIAL 404(B) EVIDENCE.

The defense objected when the state sought to admit the late ER 404(b) evidence. RP (3/22/10) 694. The prosecution agreed the testimony was prejudicial, but argued that it was probative as to the "motive behind the crime was committed." *Id.* at 695. The court concluded: "I'll allow it. It is prejudicial, but I can see it being relevant. The jury can give it whatever weight they want." *Id.* It appears the court relied on ER 404(b) since "motive" was the only argument advanced for its admission. Appellate courts review the admission of evidence under ER 404(b) for an abuse of discretion. *State v. Thang*, 145 Wn.2d 630, 642, 41 P.3d 1159 (2002). The trial court abused its discretion in admitting the ER 404(b) evidence.

Under ER 404(b) evidence of other crimes, wrongs, or acts is presumptively inadmissible to prove character and show action in conformity therewith, but may however be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident. ER 404(b). In deciding the admissibility of evidence under ER 404(b), the trial court must first determine whether the alleged misconduct has been proven by a

preponderance of the evidence. *State v. Lough*, 125 Wn.2d 847, 853, 889 P.2d 487 (1995). If there is sufficient proof, then the court must follow a three-part analysis: First, the court must identify the purpose for which the evidence will be admitted. *State v. Salterelli*, 98 Wn.2d 358, 361 – 362, 655 P.2d 697 (1982). Second, the evidence must be materially relevant, under ER 401 and ER 402, and necessary to prove an essential ingredient of the crime charged. *Id.* For this second condition to be satisfied, the purpose for admitting the evidence must be of consequence to the action and make the existence of the identified fact more probable. *State v. Dennison*, 115 Wn.2d 609, 628, 801 P.2d 193 (1990). Third, pursuant to ER 403, the court must balance the probative value of the evidence against any unfair prejudicial effect the evidence may have upon the finder of fact. *Salterelli*, 98 Wn.2d at 362 – 366. “Because substantial prejudicial effect is inherent in ER 404(b) evidence, uncharged offenses are admissible only if they have substantial probative value.” *Lough*, 125 Wn.2d at 863. Doubtful cases should be resolved in favor of the defendant. *State v. Smith*, 106 Wn.2d 772, 776, 725 P.2d 951 (1986). Should the trial court fail to balance on the record, reversal is not required if the trial court carefully set forth its reasons for admission. *State v. Hepton*, 113 Wn.App. 673, 688, 54 P.3d 233 (2002), review denied, 149 Wn.2d 1018, 72 P.3d 762 (2003).

The trial court failed to perform its gate-keeping function and determine, at the outset, whether the proposed ER 404(b) evidence was established by a preponderance of the evidence. If it had, the testimony would not have been permitted. There was simply no evidence to establish, by a preponderance of the evidence, the existence of this alleged misconduct. On the other hand, there were plenty of reasons to doubt it. At no time during the year leading up to the trial did the state's witnesses tell the prosecution, the detectives or the defense of this alleged misconduct. RP (3/22/10) 701 – 703; 757. It was brought up for the first time a week before trial.

Second, in an attempt to provide support that the alleged misconduct occurred, the witness claimed to have called around looking for the requested drugs. A review of his phone records does not support his assertion, as there was nothing in the records to demonstrate any such calls. RP (3/22/10) 720. Additionally, when asked, Mr. Boyd could not recall the number he allegedly made on behalf of Mr. Pierce. *Id.*

Third, the witness did not provide any specifics surrounding his claim. There was no reference or testimony regarding the amount of drugs requested; the amount of money willing to be spent; or that Mr. Pierce showed any money at all for this purpose (which was the “motive” set forth by the prosecution). [*See entire record*].

And finally, Mr. Boyd had an incentive to fabricate the alleged misconduct. He was under investigation for the murders, and, as testimony demonstrated considered another suspect in the killing of the victims. There was also ample evidence to suggest his potential involvement. *See e.g.*, RP (3/22/10) 717 – 718 (gasoline and gas cans at Mr. Boyd’s residence); RP (3/15/10) 1242 (DNA swabs taken of Mr. Boyd by detectives); RP (3/17/10) 161 (under investigation for murders); RP (2/18/10) 492 (search warrant issued on Mr. Boyd); RP (3/23/10) 815-816 (testimony that shotgun was seen at Mr. Boyd’s house).

The trial court abused its discretion when it failed to determine whether the alleged misconduct had been proven by a preponderance of the evidence.

The trial court’s purported basis for admitting the prejudicial evidence (motive) was also error. *See e.g.*, *State v. LeFever*, 102 Wn.2d 574, 102 Wn.2d 777 (1984), *overruled on other grounds by State v. Brown*, 113 Wn.2d 520, 782 P.2d 1013, 787 P.2d 906 (1989). In *LeFever*, the Washington State Supreme Court concluded that the trial court erred in allowing the state to introduce evidence of the defendant’s heroin addiction as proof of motive for the robberies, noting:

The impact of narcotics addiction evidence “upon a jury of laymen [is] catastrophic.... It cannot be doubted that the public generally is influenced with the seriousness of

the narcotics problem ... and has been taught to loathe those who have anything to do with illegal narcotics ...”

Id. at 783 – 784, referencing *People v. Cardenas*, 31 Cal.3d 897, at 907, 647 P.2d 569, 184 Cal.Rptr. 165 (quoting *People v. Davis*, 233 Cal.App.2d 156, 161, 43 Cal.Rptr. 357 (1965)). *See, e.g., State v. Renneberg*, 83 Wn.2d 735, 737, 522 P.2d 835 (1974) (“evidence of drug addiction is necessarily prejudicial in the minds of the average juror”).

The court, under the theory of motive, allowed unfounded testimony that Mr. Pierce sought drugs the night of the incident. The court erred. Furthermore, the prosecution used the testimony to argue that Mr. Pierce was a drug addict. *See e.g., RP (3/24/10) 1098* (prosecutors argues to the jurors that Mr. Pierce cannot “wait 10 more days” to get some methamphetamine); *Id.* at 1103 (“when you want that methamphetamine, you’ll take those kind of chances, I guess. You’ll take those kinds of chances”); and *Id.* at 1113 (“he’s got the urge or the drive to go ahead and do some methamphetamine”). The prosecution used the alleged bad act to “prove character of a person in order to show action in conformity, therewith” in violation of ER 404(b). And the prejudicial impact of the evidence undoubtedly existed. CP 346, attachment 7 (Juror: “Of course, the bombshell was the methamphetamine ...”).

The prosecution failed to timely provide the defense with prejudicial evidence, waiting until after voir dire, opening statements and a handful of witnesses testified before doing so. Additionally, the trial court erred in failing to properly analyze the proffered bad act and for admitting the evidence based on an erroneous exception. Mr. Pierce should be granted a new trial based on these prejudicial errors.

V. THE TRIAL COURT ERRED BECAUSE IT DENIED THE DEFENSE'S MOTION FOR A NEW TRIAL WHEN JURORS CONVICTION WAS BASED ON UNSUPPORTED FACTS.

A critical issue at trial, and the thrust of the state's case, was whether Mr. Pierce committed arson in an attempt to conceal the homicides. Therefore, evidence that suggested he smelled like gasoline the night of the incident was crucial to a conviction; in particular because state witnesses testified about the presence of accelerants at the house and because there was no physical or direct evidence that Mr. Pierce was at the residence.

After the verdict, but before sentencing, a juror explained that when "Michael Pierce asked Donahue if Michael Pierce smelled like gas. That's a damning piece of evidence right there." CP 346, attachment 8. The juror went on to express how he was not the only juror that "picked up" on that testimony. *Id.* It is undisputed that Mr. Pierce never made any

such statement.

Upon learning that jurors misunderstood or misapplied the testimony, the defense requested a new trial, or alternatively, be provided additional time to investigate the issue further so to provide so relevant evidence.³⁶ CP 346. A trial court's order granting or denying a motion for a new trial will be affirmed absent a manifest abuse of discretion. *State v. Balisok*, 123 Wn.2d 114, 117, 866 P.2d 631 (1994); *State v. Marks*, 71 Wn.2d 295, 302, 427 P.2d 1008 (1967). Abuse occurs where the decision is based on untenable grounds or made for untenable reasons, *i.e.*, it rests on facts unsupported in the record. *State v. Fry*, 153 Wn.App. 235, 238-239, 220 P.3d 1245, 1246 (2009). Here, the court's denial of either request was an abuse of discretion.

At trial, Michael Donahue, a state witness, testified that on the night of the incident Mr. Pierce showed up at a trailer where Mr. Donahue and Mr. Boyd were watching television. RP (3/22/10) 743 – 747. The witness also testified that Mr. Pierce smelled as if he had taken a shower. *Id.* Although the witness had been previously interviewed by the detectives and the defense at various times before trial, this was the first

³⁶ The defense also sought additional time to transcribe and seek a new trial based on the state's closing argument since it was "replete with wild speculation" about "facts not in evidence." CP 346. The court denied the request. Appellant is assigning errors to the prosecution's numerous misconduct, including closing argument, in a separate section of this brief. [*See* Section III-E, *supra*].

time he mentioned Mr. Pierce's cleanliness. Defense counsel therefore sought to cross-examine the witness on this new revelation:

DEFENSE ATTORNEY: So, when Mr. Walsh [DEFENSE INVESTIGATOR] spoke with you in May of this year, you told him that Mr. Pierce, quote, "wasn't dirty and smelly or bloody, or anything like that. He didn't talk about anything other than normal stuff he usually talked about," which would be his girlfriend, correct?

MR. DONAHUE: He did talk about his girlfriend.

ATTORNEY: Nothing about him smelling like he'd just washed, correct?

MR. DONAHUE: So?

ATTORNEY: Well, that's –

MR. DONAHUE: He asked me –

ATTORNEY: - what you testified to.

MR. DONAHUE: *He asked me if he smelled like gasoline.*

ATTORNEY: And you – and it's a quote – that he wasn't dirty and smelly or bloody or anything like that.

MR. DONAHUE: He wasn't. He smelled like he'd just gotten out of the shower.

ATTORNEY: But you didn't tell Mr. Walsh that exactly, did you?

MR. DONAHUE: I – Apparently not.

RP (3/22/10) 764 (emphasis added).

As mentioned, jurors misunderstood the testimony and mistakenly attributed the statement “he asked me if he smelled like gasoline” to Mr. Pierce. Because of this error, the defense, on April 2, 2010, filed a *Motion for Arrest of Judgment or in the Alternative for a New Trial*. CP 340.³⁷ Trial counsel struggled with characterizing the bizarre event. RP (4/9/10) 1456 (“I’ll characterize it as jury misunderstanding.”). On April 9, 2010, the defense sought a new trial under CrR 7.5, which included a signed affidavit from the witness:

I, Michael Donahue, declare as follows:

By way of clarification, may I state that when I testified that ‘he asked me if he smelled like gasoline’ during cross-examination, my meaning was ‘Walsh asked me if Pierce smelled like gasoline.’

CP 346, attachment 10.

Even though the court was provided undisputed evidence that jurors misapplied a critical piece of testimony, the trial court denied the defense’s request for a new trial or additional time. In essence, the trial court concluded that jury misunderstanding was not a basis under CrR 7.5

³⁷ The defense also argued that a new trial was warranted because of alleged prosecutorial misconduct, claiming that the prosecution improperly interfered with their ability to interview a witness. *Id.* The trial court rejected this claim. RP (5/19/10) 1490. Because appellant is not assigning error to this issue, the facts are not included in this brief.

to grant a mistrial:

Jury misunderstanding is not one of the basis for arrest of judgment or a new trial. . . Juror affidavits about they (sic) considered the evidence and what they considered in reaching their verdict inhere in the verdict. And none of that can be considered by the Court. I'm not going to give an extension of time so that you can try to get juror affidavits. . . You might want to try to do it anyway, but I'm not going to give an extension of time for that.

RP (4/9/10) 1462.

The trial court erred in limiting the basis under CrR 7.5 to “jury misunderstanding.” There are at least three basis under CrR 7.5 that justify the defense’s motion for a new trial: (1) a new trial may have been granted because a substantial right of the defendant was materially affected due to irregularity in the proceedings of the jury (CrR 7.5(5)); (2) because the verdict is contrary to the evidence (CrR 7.5(7)); or (3) because substantial justice had not been done. CrR 7.5(8). But the trial court did not consider any of these basis, instead refusing because of its reluctance to inquire of the jury’s verdict.

Generally, courts are reluctant to inquire into how a jury arrives at its verdict. *State v. Balisok*, 123 Wn.2d at 117. There must be a strong, affirmative showing of misconduct in order to overcome the long-standing policy in favor of “stable and certain verdicts and the secret, frank and free discussion of the evidence by the jury.” *Id.* at 118, 866 P.2d 631. It is,

however, misconduct for a jury to consider extrinsic evidence and if it does, that may be a basis for a new trial. *Id.* at 118, 866 P.2d 631. “ ‘Novel or extrinsic evidence is defined as information that is outside all the evidence admitted at trial, either orally or by document.’ ” *Id.* (quoting *Richards v. Overlake Hosp. Med. Ctr.*, 59 Wn.App. 266, 270, 796 P.2d 737 (1990)); and *State v. Pete*, 152 Wn.2d 546, 552-553, 98 P.3d 803, 806 (2004). Juror misconduct involving the use of extraneous evidence during deliberations will entitle a defendant to a new trial if there are reasonable grounds to believe a defendant has been prejudiced. *State v. Briggs*, 55 Wn.App. 44, 55, 776 P.2d 1347 (1989) (citing *State v. Lemieux*, 75 Wash.2d 89, 91, 448 P.2d 943 (1968)). A new trial must be granted unless “it can be concluded beyond a reasonable doubt that extrinsic evidence did not contribute to the verdict.” *Id.* at 56 (quoting *United States v. Bagley*, 641 F.2d 1235, 1242 (9th Cir.1981)); *State v. Johnson*, 137 Wn.App. 862, 869-870, 155 P.3d 183, 187 (2007). And any doubt that the misconduct affected the verdict must be resolved against the verdict. *Id.* (citing *Halverson v. Anderson*, 82 Wash.2d 746, 752, 513 P.2d 827 (1973)).

Jurors, in reaching its verdict, attributed an extremely damaging statement to Mr. Pierce even though he never made any such statement. CP 346, attachment 8 (“Michael Pierce asked Donahue if Michael Pierce

smelled like gas. That's a damning piece of evidence right there.""). As such, the jurors relied on extrinsic evidence to reach its verdict. The court was made aware of this irregularity, but refused to grant a new trial or provide additional time for further inquiry. The jurors considered a fact that was contrary to the evidence, resulting in an irregularity in the proceedings that materially affected Mr. Pierce's right to a fair trial. As a result, the court abused its discretion failing to grant a mistrial or alternatively permit additional time for further inquiry.

VI. THE TRIAL COURT ERRED WHEN IT DENIED THE EXISTENCE A CONFLICT OF INTEREST EVEN THOUGH A KEY STATE WITNESS AND POTENTIAL OTHER SUSPECT HAD BEEN REPRESENTED BY DEFENSE COUNSEL'S AGENCY TWENTY-EIGHT TIMES.

On March 28, 2009, the court appointed Jefferson Associated Counsel (JAC) to represent Mr. Pierce. RP (3/28/09) 8. Because the death penalty was a sentencing option, JAC filed a motion seeking the appointment of co-counsel under Superior Court Special Proceedings Rules - Criminal (SPRC) Rule 2 [hereinafter co-counsel]. The court granted the motion. RP (5/26/09) 40 – 51.³⁸

Co-counsel learned that JAC had represented Mr. Boyd, a key witness and potential other suspect, at least twenty-eight (28) times. CP

³⁸ On August 31, 2009, the state indicated that it was not seeking the death penalty and attorney co-counsel was removed from the case.

50. Based on the facts of case and case law, the defense filed a *Motion and Declaration to Inform the Court Re: Status of Counsel*. CP 50. The trial court denied the motion. RP (6/16/09) 76 – 78.

The trial court concluded that although JAC had represented Mr. Boyd (the potential other suspect) on twenty-eight different matters, the representation was not on a “same or substantially related matter” and:

There is no indication in the motion that there are confidential client communications that would be used. His [former client] interests are clearly adverse to those of Mr. Pierce, assuming that theory develops, that Mr. Pierce is going to point the finger at Mr. Boyd. That’s true. But the other two factors, the same or substantially related matter are not true. Mr. Boyd has never been charged in relation to this particular activity, so there is no representation of the same or substantially related matter that I can see from the motion, and there’s no indication that client confidences or privileges, which would be known exclusively by Mr. Davies or, for that matter, any other member of the Jefferson Associated Counsel staff would play into cross-examination of Mr. Boyd. So, for those reasons, the motion to appoint substitute counsel for Jefferson Associated Counsel is at least at this time denied.

RP (6/16/09) 77-78. The determination of whether a conflict exists and thus precluding continued representation of a client is a question of law and is reviewed de novo. *State v. Ramos*, 83 Wn.App 622, 629, 922 P.2d 193 (1996).

The Sixth Amendment to the United States Constitution provides that “[i]n all criminal prosecutions, the accused shall enjoy the right ... to

have the assistance of counsel for his defense.” U.S. Const. amend. VI. This right includes the right to the assistance of an attorney who is free from any conflict of interest in the case. *Wood v. Georgia*, 450 U.S. 261, 271, 101 S.Ct. 1097, 67 L.Ed.2d 220 (1981); *State v. Dhaliwal*, 150 Wn.2d 559, 566, 79 P.3d 432, 436 (2003).³⁹

A trial court’s failure to inquire into a possible conflict of interest between the defendant and defense counsel does not mandate a reversal. *Dhaliwal*, 150 Wn.2d at 571. A defendant asserting a conflict of interest on the part of his counsel need only show that a conflict adversely affected the attorney’s performance to a violation of his Sixth Amendment right. *Id.*

It is undisputed that JAC had previously represented Mr. Boyd - a potential other suspect and/or witness in this case – numerous times. This presents a potential conflict of interest under the Rules of Professional Conduct (RPC).⁴⁰ The general rule on conflicts, RPC 1.9, provides:

³⁹ It cannot be argued that Mr. Pierce voluntarily, knowingly, and intelligently waived the conflict because he may have been aware that the conflict existed since the nature and extent of the conflict was not fully explored by the trial court. *Dhaliwal*, 150 Wn.2d at 568.

⁴⁰ Moreover, under RPC 1.10, if one member of a law firm is precluded from representing a client by RPC 1.9, all of the members of the firm are similarly precluded from representing the client. RPC 1.10; *State v. Hunsaker*, 74 Wn.App. 38, 42, 873 P.2d 540 (citing *State v. Hatfield*, 51 Wn.App. 408, 412, 754 P.2d 136 (1988)). Public Defender agencies are considered “law firms” for purposes of the RPC. *Hunsaker*, 74 Wn.App. at 42; *Ramos*, 83 Wn.App at 629.

- (a) A lawyer who has formerly represented a client in a matter shall not thereafter represent another person in the same or a substantially related matter in which that person's interests are materially adverse to the interests of the former client unless the former client gives informed consent, confirmed in writing.
- (b) A lawyer shall not knowingly represent a person in the same or a substantially related matter in which a firm with which the lawyer formerly was associated had previously represented a client
 - (1) whose interests are materially adverse to that person; and
 - (2) about whom that lawyer had acquired information protected by Rules 1.6 and 1.9(c) that is material to the matter; unless the former client gives informed consent, confirmed in writing.

Prior representation of a witness does not automatically disqualify counsel from proceeding with representation of a defendant in a trial where that witness will testify. *State v. Hunsaker*, 74 Wn.App. 38, 42, 873 P.2d 540 (1994); *State v. Anderson*, 42 Wn.App. 659, 713 P.2d 145 (1986); and *State v. Ramos*, 83 Wn.App 622, 629, 922 P.2d 193 (1996); *but see State v. Hatfield*, 51 Wn.App. 408, 754 P.2d 136 (1988) (the court held that the defendant's interests were adverse to those of defense counsel's former client who was called as State's witness when both had an interest in blaming the other for the charged offense).

Here, JAC represented Mr. Boyd nearly thirty times. Mr. Boyd's involvement in the current case is substantial since JAC's current client,

Mr. Pierce, directly implicated Mr. Boyd as the culprit of the homicides. Furthermore, Mr. Boyd was investigated, interrogated, and his residence searched by the investigating officers, with the search resulting in two “alerts” by the assisting canine.

As the trial neared, Mr. Boyd refused to be interviewed by the defense and would only do so in the prosecution’s presence. CP 346. Mr. Boyd was a significant state witness, claiming for the first time at trial that Mr. Pierce sought his assistance in obtaining methamphetamine. RP (3/22/10) 701 – 703; 757. As previously discussed, the court prohibited the defense from inquiring of Mr. Boyd’s prior drug and/or alcohol use. RP (3/8/10) 519; CP 249. On direct examination, the state asked Mr. Boyd about drugs, to which Mr. Boyd responded that he “doesn’t mess with that stuff” and that “doesn’t know much about that crap.” RP (3/22/10) 696. He also claimed to rarely drinking beer, even though pictures of his mobile home with numerous empty beer cans lying around. RP (3/22/10) 704.

Because Mr. Boyd sought to bolster his credibility by claiming ignorance about methamphetamine and drug use, and by minimizing his own alcohol use, his prior drug and/or alcohol use was subject to proper cross-examination. However, as a former client, JAC was forbidden to reveal information relating to the representation of their prior client (*i.e.*,

Mr. Boyd) unless he gave informed consent. RPC 1.6. And under RPC 1.6, comment [19] “information relating to the representation” should be interpreted broadly:

The phrase "information relating to the representation" should be interpreted broadly. The "information" protected by this Rule includes, but is not necessarily limited to, confidences and secrets. "Confidence" refers to information protected by the attorney client privilege under applicable law, and "secret" refers to other information gained in the professional relationship that the client has requested be held inviolate or the disclosure of which would be embarrassing or would be likely to be detrimental to the client.

The fact that JAC did not presently represent Mr. Boyd or maintain an “active” file is not dispositive since the duty of confidentiality remains even after the client-lawyer relationship has terminated. RPC 1.6, Comment [18], RPC 1.9(c)(1)(2), Comment [1] (“After termination of a client-lawyer relationship, a lawyer has certain continuing duties with respect to confidentiality and conflicts of interest and thus may not represent another client except in conformity with this Rule”).

Because of these competing loyalties, the conflict of interest adversely affected JAC’s performance in representing their current client, Mr. Pierce. As such, Mr. Pierce was denied his Sixth Amendment right which warrants a new trial.

VII. THE TRIAL COURT ERRED WHEN IT FAILED TO SUPPRESS STATEMENTS MADE IN VIOLATION OF CRIMINAL RULE 3.1.

On February 17, 2010, the trial court took testimony regarding statements allegedly attributed to Mr. Pierce that the state sought to admit. There were the three situations that these statements were to have occurred: (1) when he was initially arrested; (2) when he was interviewed again approximately five hours later; and (3) when the superintendent talked to him at the hospital a few days later. Because the defense did not challenge the first, and appellate is not assigning error to the third, only pertinent facts regarding the second situation are discussed.

A. FACTS SURROUNDING THE STATEMENTS.

On March 28, 2009, Mr. Pierce was arrested for the crime of second degree theft and taken to the Sheriff's Office to be interrogated by Detectives Nole and Apeland. RP (2/17/10) 222 – 238. The interrogation lasted about 20 minutes, starting around 5:40 p.m. and ending at 6:00 p.m. RP (2/17/10) 230. Detective Nole read Mr. Pierce his *Miranda* rights, which Mr. Pierce acknowledged. RP (2/17/10) 222. When asked why he had been arrested, the officers said that his picture was seen on the bank surveillance camera. RP (2/17/10) 226.

The detectives eventually switched the focus of the interrogation to directly accusing Mr. Pierce of killing the Yarrs and igniting the house on

fire. RP (2/17/10) 227. Mr. Pierce immediately responded that if they were going to accuse him of murder, then he “wanted an attorney.” RP (2/17/10) 227. The interrogation ceased at that point, and the detective called for the jailer to transport Mr. Pierce to the Jefferson County jail. RP (2/17/10) 227 – 228; RP (3/17/10) 108. The detectives acknowledged that Mr. Pierce requested an attorney and that they did not provide one to Mr. Pierce. The detectives did, however, tell the jailer that Mr. Pierce requested an attorney. RP (2/17/10) 230 - 231. The defense did not challenge any statement attributed to this interrogation. RP (2/17/10) 324 – 326.

At about 11:30 p.m., Mr. Pierce still not been given access to an attorney told a Jefferson County Jail Officer that he wanted to talk to the detectives. RP (2/17/10) 243 - 245. Mr. Pierce was then transferred to the Sheriff’s Office, where Det. Apeland read Mr. Pierce his *Miranda* warnings, and begins to record the conversation. Mr. Pierce requested immunity for the theft charges and in return he could tell the detective the name of the person who committed the murders. RP (2/17/10) 249 – 254. Mr. Pierce then provided information about the shooter, including how the shooter used a rifle to kill the Yarrs. *Id.* Mr. Pierce also said that the shooter was “Mr. B” and expressed fear of retaliation and being murdered so he asked the detective for protection. RP (3/17/10) 178. The interview

concluded and Mr. Pierce was transported back to the Jefferson County Jail. These alleged statements were challenged under CrR 3.1. RP (2/17/10).

Jail officer Jeremy Vergin testified that Mr. Pierce, upon being returned to the jail, was placed in segregation. RP (2/17/10) 306 – 307. There are no phones available in segregation. *Id.* Officer Vergin further testified that because it was after hours, numbers for the public defender was not in plain sight; that it was the jail’s policy to provide the list of numbers if a person requested an attorney. RP (2/17/10) 316 - 317. Although the staff members of the jail were made aware that Mr. Pierce had earlier requested an attorney, Officer Vergin agreed that there was no effort made by any jail officer – including him – to give Mr. Pierce the contact information for an attorney. RP (2/17/10) 318.

The trial court denied the defense motion. Contrary to CrR 3.5(c), there are no formal written findings of fact or conclusions of law, so the court’s findings are derived from the court transcripts. It appears the trial court made the following legal conclusions: (1) that Mr. Pierce did not specifically request to talk to an attorney; (2) that, as a matter of fact, “had he [Mr. Pierce] asked to speak with an attorney any member of the jail staff would have put him on the phone to an attorney” but he never asked “anyone on the jail staff to contact an attorney for him, and he didn’t

request to contact an attorney.” RP (2/17/10) 331; and (3) that if Mr. Pierce’s statements about wanting an attorney were considered an assertion and “even if CrR 3.1 was not complied with, Mr. Pierce nevertheless knowingly and voluntarily waived his rights” when he requested to speak with Det. Noles five hours later. RP (2/17/10) 329 – 334. The trial court erred.

B. LEGAL ANALYSIS

In Washington, the right to a lawyer as provided by court rule accrues “as soon as feasible after the defendant is taken into custody, appears before a committing magistrate, or is formally charged, whichever occurs earliest.” CrR 3.1(c)(1). Mr. Pierce was clearly in custody. As such Criminal Rule 3.1(c)(2) mandates:

At the earliest opportunity a person in custody who desires a lawyer shall be provided access to a telephone, the telephone number of the public defender or official responsible for assigning a lawyer, and any other means necessary to place the person in communication with a lawyer.

The purposes of CrR 3.1 are different from the reasons for *Miranda* warnings since *Miranda* is designed to prevent the State from using presumptively coerced and involuntary statements against criminal defendants; whereas, CrR 3.1 is designed to give a defendant a meaningful opportunity to contact an attorney. *State v. Mullins*, 241 P.3d 456 (2010).

Here, CrR 3.1 was not followed.

First, the trial court suggests that Mr. Pierce did not specifically request to talk to an attorney. RP (2/17/10) 329 - 331. This finding is at odds with the Detective's testimony regarding the assertion:

PROSECUTOR: Once you finished talking to him about that did you ask him any other questions surrounding the ATM card? Or did you move on to a different subject at that point?

DET. NOLE: He denied using the Yarr's ATM card. So then I moved on to the . . .murdering the Yarrs.

PROSECUTOR: Okay. And what statements did he make at that point?

DET. NOLE: He said that wasn't him. That he didn't do it and, um, that *he wanted a lawyer*.

RP (2/17/10) 227 (emphasis added); *see also* RP (2/17/10) 230 (Mr. Pierce requested an attorney, correct? Yes). The detectives' conduct also clearly demonstrates that Mr. Pierce requested an attorney as they ceased the interview at the point he requested an attorney. RP (2/17/10) 230 – 231; 256. The trial court was therefore mistaken to suggest the Mr. Pierce did not request to talk to an attorney during the initial interview that occurred at approximately 6:00 p.m.

Next, the trial court concluded Mr. Pierce had access to a phone while at the jail to call an attorney but never asked "anyone on the jail

staff to contact an attorney for him, and he didn't request to contact an attorney." (2/17/10) 331. This, too, was error.

Mr. Pierce asserted his right to counsel during the initial interrogation that occurred around 5:40 - 6:00 p.m. Once he asserted his right to speak to an attorney, the detectives ceased the interrogation and transported him to the Jefferson County Jail. Although the detectives did not put Mr. Pierce in contact with an attorney, both detectives testified that "one of us told the jailer that he wanted to be, you know, that he wanted an attorney. That would be standard practice." RP (2/17/10) 231; 258 ("I recall it [advising a jailer that Mr. Pierce wanted an attorney] mentioned to the corrections officer that Mr. Pierce didn't want to talk to us any longer without an attorney"). This was around 6:00 p.m., and Mr. Pierce was booked into the Jefferson County Jail around 6:30 p.m. RP (2/17/10) 318. Although Mr. Pierce was provided access to a telephone a few hours later, he was never given access to a list of attorney numbers nor was such a list easily accessible. RP (2/17/10) 316. The officer testified that a person booked would have had to ask for the list and the jail officer would only then dial the number to an attorney. RP (2/17/10) 317.

The fact remains that Mr. Pierce requested an attorney at 6:00 p.m. and was never "provided access" to the means necessary to communicate with one. There is no authority to support the conclusion that Mr. Pierce

has the burden to reinitiate his request for an attorney. The contrary is true, “at the earliest opportunity a person who in custody desires a lawyer *shall* be provided access” to not only a phone, but phone numbers to the public defender. CrR 3.1(c)(2) (emphasis added). *cf. City of Seattle, Carpenito*, 32 Wn.App. 809; 649 P.2d 861 (1982)(defendant had access to a telephone book with the phone numbers of private attorneys and the public defender, both having a 24-hour answering service, sat by the telephone); *City of Bellevue v. Ohlson*, 60 Wn.App. 485, 487, 803 P.2d 1346 (1991)(officer made six attempts to telephone arrestee’s attorney); *City of Seattle v. Wakenight*, 24 Wn.App. 48, 49-50, 599 P.2d 5 (1979)(officer telephones public defender and gives arrestee phone book and access to a phone).

Finally, the trial court concluded that if Mr. Pierce did in fact request an attorney, he waived his right when he requested to speak with Det. Noles five hours later. To support this conclusion, the trial court cited cases pertinent to waiver of *Miranda*, not Criminal Rule 3.1. *See e.g.*, RP (2/17/10) 332 – 333, referencing *State v. Birnell*, 89 Wn.App 459, 467 - 469, 949 P.2d 433 (1998); *State v. Pierce*, 94 Wn.2d 345, 351, 618 P.2d 62 (1980); *State v. Aten*, 130 Wn.2d 640, 663 – 664, 927 P.2d 210 (1996); and *State v. Robtoy*, 98 Wn.2d 30, 35 – 41, 653 P.2d 284 (1982).

However, an accused's waiver of *Miranda* rights does not

necessarily waive the State's duty under court rule requiring access to attorney at earliest opportunity under CrR 3.1. *State v. Kirkpatrick*, 89 Wn.App. 407, 414, 948 P.2d 882 (1997). And although true a person can waive his CrR 3.1 rights by voluntarily initiating communication with the police; such a waiver, however, may be involuntary when the rights under CrR 3.1 had already been violated. *Id.* (The “earliest opportunity” to put the defendant in touch with an attorney was immediately after his request, and thus a valid waiver must have occurred before the “earliest opportunity.”). Thus, because the mandatory language of CrR 3.1(c)(2), an accused’s waiver for the rule requires more than the State’s non-compliance. *Id.*

The court-suggested “waiver” occurred at 11:00 p.m., nearly five hours after he was arrested and four hours after he was booked. There is nothing in the record that the officers could not provide him access to counsel because to do so would interrupt the booking procedure. Moreover, the trial court did not make any such finding to support this claim. In short, Mr. Pierce was never given access to counsel at the “earliest opportunity” and thus his rights under CrR 3.1 were violated. Had he been given access as required, a lawyer would have told Mr. Pierce to remain silent: “[A]ny lawyer worth his salt will tell the suspect in no uncertain terms to make no statement to police under any

circumstances.” *Kirkpatrick*, 89 Wn.App. at 414; quoting *Watts v. Indiana*, 338 U.S. 49, 59, 69 S.Ct. 1357, 1358, 93 L.Ed. 1801 (1949) (Jackson, J., concurring).

The failure to comply with CrR 3.1(c)(2) does not necessarily mean automatic suppression of evidence, but rather the courts review the violation under a harmless error analysis. *State v. Jaquez*, 105 Wn.App. 699, 716, 20 P.3d 1035, 1043 (2001). It cannot be argued that the error was harmless. The statements attributed to Mr. Pierce in violation of CrR 3.1(c)(2) consisted of him seeking immunity, telling officers about seeing the shooter with a gun, knowledge of the real shooter, and observing the shooter burn his clothes⁴¹; all of which the prosecutor presented and argued throughout its case.⁴²

The trial court erred when it refused to suppress statements made in violation of CrR 3.1.

VIII. CUMULATIVE ERROR DENIED MR. PIERCE A FAIR TRIAL

This trial was fundamentally unfair for the numerous reasons set forth above. However, the cumulative effect of multiple errors can violate due process even where no single error rises to the level of a constitutional

⁴¹ (RP (2/17/10) 251 – 253).

⁴² See e.g., RP (3/17/10) 147 – 160 (Detectives testimony); RP (3/10/10) 912 (opening statement), and RP (3/24/10) 1128, 1136 - 1137 (closing argument).

violation or would independently warrant reversal. *Chambers v. Mississippi*, 410 U.S. 284, 93 S.Ct. 1038, 35 L.Ed.2d297 (1973); *Parle v. Runnels*, 505 F.3d 922 (9th Cir., 2007). 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). Reversal is required where the cumulative effect of several errors is so prejudicial as to deny the defendant a constitutionally fair trial under the federal and state constitutions. *Mak v. Blodgett*, 970 F.2d 614 (9th Cir. 1992); *United States v. Frederick*, 78 F.3d 1370, 1381 (9th Cir. 1996).

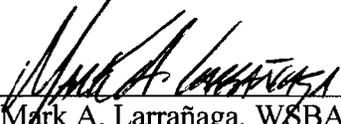
Although, here, each error challenged on appeal, including the flawed jury selection process, the misconduct by the prosecution, the untimely disclosure and improper admission of prejudicial evidence, the undisputed irregularity in the jury verdict, and the potential conflict of interest should result in a new trial or dismissal of a conviction; the combined and overwhelming prejudice of all the errors considered together should require a new trial even if the individual errors do not.

G. CONCLUSION

Mr. Pierce respectfully submits that all his convictions should be reversed and remanded for retrial.

Respectfully submitted,

DATED this 18th day of January, 2011



Mark A. Larrañaga, WSBA#22715
Attorney for Appellant

CERTIFICATE OF SERVICE

I certify that on the 18TH day of January, 2011, I caused a true and correct copy of the OPENING BRIEF OF APPELLANT, to be served on the following via electronic court filing:

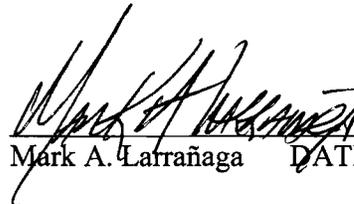
Counsel for the Respondent:

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The Court of Appeals of the State of Washington
Court of Appeals Division II
950 Broadway, Suite 300
Tacoma, WA 98402-4454

Michael Pierce, #750786
Delta East 125-1
Washington State Penitentiary
1313 N. 13th Ave.
Walla Walla, WA 99362

COURT OF APPEALS
DIVISION II
11 JAN 19 AM 11:30
STATE OF WASHINGTON
BY MP
DEPUTY


Mark A. Larrañaga DATE 1/18/11 at Seattle, WA

APPENDIX A

TRANSCRIPT OF CLOSING ARGUMENT
RP (3/24/10) 1020 - 1153

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CLOSING ARGUMENT OF THE PLAINTIFF

BY MR. ASHCRAFT:

Good afternoon, ladies and gentlemen of the jury.

First I'd like to thank you all for your service. On behalf of my immediate supervisor, Scott Rosekrans, who you've got to know the last couple of weeks, and the elected Prosecutor, Julie Dalzell, we all appreciate the sacrifice that you've made, the time you've taken out of your lives to come here and do your civic duty to listen to all the facts, listen to the State's argument, listen to the defense's argument, and then hopefully find what the State believes: That Mr. Pierce is guilty beyond a reasonable doubt of all the crimes charged.

On March 18th 2009, James Pat Yarr and Janice Yarr were shot in the back of their heads while they lay facedown in their kitchen. We heard from the medical examiner. The cause of the death was a traumatic head injury with comminuted skull fracture and partial brain avulsion. Or, as the defense Counsel pointed out, their

1 heads were blown off. You saw the pictures. It was
2 graphic. It was horrifying. You can only imagine what it
3 was like that day.

4
5 What was the manner of the death, which you also
6 heard from the medical examiner, there was a high amount
7 of bleeding. He talked about the blood that was pooled up
8 and had been collected and put into body bags with them.
9 There was skull damage that was consistent with a high
10 velocity rifle round. What you also heard was you heard
11 from the firearms expert, Ms. Geel (phonetic), that a .25
12 caliber rifle round is a high velocity rifle round, and it
13 can cause a massive amount of damage to the human skull
14 upon impact. A single .25 caliber round, rifle round, not
15 just a low caliber little pistol round, but rifle round,
16 was found lodged beneath the remains of each head. That's
17 a high velocity round. And it was found underneath the
18 remains of each head; one under Mr. Yarr, one under Mrs.
19 Yarr.
20
21
22

23 When did they die? Can I tell you the exact
24 minute they died? No. But we know they died before the
25 fire. There was no carbon monoxide in their blood. I

1 think the actual level the doctor has was it's less than
2 5%, and that's well below normal. Their larynxes were
3 free of soot. They were pink and shiny and clean. The
4 doctor saw no sign at all that they had breathed in any
5 smoke, which they would've done in a fire like this, if
6 they'd been alive at the time of the fire.
7

8 Additionally, there were fragments of their
9 skull, as you saw the pictures, that were burned on the
10 inside, but not on the outside, or burned in the middle,
11 but not burned on the other two sides. You can tell the
12 heads had to have been opened when the fire started. They
13 were dead before the fire started.
14

15 Then the question becomes: Why were they
16 murdered? They were murdered, according to the testimony
17 you heard, so that Michael Pierce could go and withdraw
18 \$300.00 from their ATM -- from an ATM machine from their
19 account so that he could find some methamphetamine.
20

21 Now we come to you, the jurors. You're the
22 trier of fact. We've, in a sense, given you all the
23 puzzle pieces, and now you decide which pieces fit in the
24 puzzle, which, which testimony was truthful, which
25

1 testimony was not truthful, what fits, and you put it all
2 together, based on all the evidence that was admitted at
3 trial, nothing that wasn't admitted, nothing that you may
4 have heard before, only what was admitted at trial, you
5 look at all those facts, and then you make the decision.
6 And what you're going to see is there's both direct and
7 circumstantial evidence that was admitted here at trial,
8 and I'll explain what that means in just a second, and the
9 State would argue that once you review all this evidence,
10 both circumstantial and direct, that you find Mr. Pierce
11 guilty beyond a reasonable doubt of all the charges that
12 we've charged him with today.

15 Now, it goes to direct and circumstantial evi-
16 dence. I think everybody has an idea just generally from
17 watching TV or reading newspaper what's direct evidence,
18 what's circumstantial evidence. We've actually given you
19 a definition, Judge Verser read it to you earlier. I'm
20 sure by now it's a blur in amongst the 50-some odd
21 directions we gave you. Direct evidence is given by a
22 witness who has directly perceived something at issue in
23 this case. A perfect example would be Karen House. She
24
25

1 sat here on the stand and she told you that she watched
2 the Defendant, Michael Pierce, come inside Henry's Hard-
3 ware, ask for that pistol, the air pistol, she takes him
4 back, he gets the pistol -- she gets the pistol out of the
5 case because it was locked up, she hands it to him, and
6 then later she says he walks right on by, hands her the
7 box, says he's got to go get his wallet, but the box is
8 now empty. They go back and search the store, never find
9 the pistol again. So she's direct evidence that -- You
10 know, her testimony is direct evidence of what she saw
11 that day, and she saw Mr. Pierce take that pistol.

12 She's also a good example of circumstantial
13 evidence. It's evidence from which based on your common
14 sense and experience you may reasonably infer something
15 that is at issue in this case. Now, the State would argue
16 that that pistol was used in the commission of a robbery
17 or burglary. Now, we didn't actually see the pistol at
18 any point, and what we have is an empty box, but you can
19 infer from the fact that she said the box had something in
20 it when she handed it to him, but then when he hands the
21 box back to her, the box is now empty. Using your own
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25

1 common sense, you can infer that that's circumstantial
2 evidence that Mr. Pierce took that pistol. And that was
3 the pistol that Detective Greenspane testified that if he
4 had seen in the public he would've treated as a real
5 firearm. And the State would argue that was why that one
6 was stolen, and that's exactly how Mr. Yarr would've
7 reacted, or Mrs. Yarr would've reacted if that was pulled
8 on them in their house that night.
9

10
11 The law does not distinguish between direct and
12 circumstantial evidence in terms of the weight or value in
13 finding the facts of this case. One is not necessarily
14 more or less valuable than the other. And I think Mrs.
15 House's testimony perfectly illustrates that. We all know
16 the pistol disappeared. We don't need her to say, "I saw
17 him take the pistol and put it in his pants." You can
18 infer indirectly that he took it. So you weigh those both
19 the same, you know, because they fit together like pieces
20 of a puzzle and make a clear picture of what happened at
21 that moment.
22
23

24 Now we get to the charges, and as you already
25 know, there's a lot of them. Murder in the first degree

1 is a unique charge and there's two different ways you can
2 find him (sic); you can find him guilty of either, or, or
3 both of these, and I'm going to explain all this as we go
4 through it. When a defendant, with a premeditated (sic)
5 intent acts to cause the death of another person, and he
6 causes the death of such person or a third person, that's
7 one way. That's premeditated murder. I think we all know
8 what that is. That's the cold-blooded, "I wanted to kill
9 you. I went out and killed you. You're now dead."
10 That's premeditated murder. I'll explain what premedi-
11 tated means, though, because it has a special legal
12 definition, but that fits squarely within the facts we
13 have in this case.

14
15
16
17 The second way that you can find him guilty of
18 murder in the first degree is when a defendant commits or
19 attempts to commit the crime of robbery in the first
20 degree or robbery in the second degree and/or burglary in
21 the first degree, and in the course of, or in the further-
22 ance of such crime, or in immediate flight from such a
23 crime, he causes the death of a person, other than one of
24 the participants. You have seen absolutely no evidence
25

1 that in any way the Yarr's had anything to do with what
2 happened that night. They talked to their daughter on the
3 phone. They ate dinner. Mr. Pierce shows up at their
4 house and they end up dead. They're not a participant, so
5 the last part does not apply.
6

7 What we'll go into as I go further in is I will
8 tell you what robbery is in the first and second degree,
9 or first degree actually I'll address, burglary in the
10 first degree, because the facts will bear out that he's
11 guilty of both of those crimes, and, therefore, the State
12 argues you could find him guilty of premeditated murder,
13 or you could find him guilty of what's known as felony
14 murder, the second option, or you could find both in this
15 case.
16
17

18 So this is what the State has to prove to show
19 premeditated murder in the first degree. And you'll see
20 this A and B, and you'll see on jury -- the verdict form,
21 there's an A and B. This is A. What we have to show is
22 that on or about the 18th day of March 2009, Mr. Pierce
23 acted with intent to cause the death of James Pat Yarr and
24 Janice Yarr. It's that simple. He acted with an intent
25

1 to cause their death. How do you know his intent? When
2 you stand over somebody with a firearm and you point it
3 down at their head while they're lying facedown, the
4 intent is clear. It's a gun; it's not an air pistol.
5 It's a 25.06. When you pull the trigger and then reload,
6 because it was a bolt-action rifle, that's intent to kill
7 somebody.
8

9 That the intent to cause the death was premedi-
10 tated. There's a lot of different ways to get to premedi-
11 tated, and I'll address that in just a minute.
12

13 That Mr. and Mrs. Yarr died as a result of Mr.
14 Pierce's acts is the third element we have to prove. And
15 in this case, that's what the evidence points to. He went
16 there to rob them, he went there to burglarize them, and
17 in the course of doing that, at some point he made the
18 premeditated decision to kill both of them, and that's
19 what he did.
20

21 And, then, last, and you're going to see this
22 element all over the place, that any of these acts
23 occurred in the State of Washington. In any felony you're
24 going to hear that all the time, that the crime had to
25

1 have been committed in the State of Washington. We heard
2 it; it's Quilcene. The shoplifting took place in Port
3 Townsend. We all know that those are in Jefferson County,
4 which is in the State of Washington, so that's an element
5 that the State has proved through circumstantial and
6 direct evidence repeatedly throughout this case.

7
8 The legal definition of premeditated is means
9 (sic) thought of over beforehand. When a person, after
10 any deliberation, forms an intent to take a human life,
11 the killing may fall immediately after the formation of
12 the settled purpose, and it will still be premeditated.
13 Premeditation must involve more than a moment in a point
14 of time. The law requires some time, however long or
15 short, we're not talking five minutes, 20 minutes, 10
16 seconds, some time, no matter how long or short, in which
17 a design to kill is deliberately formed. Here's how you
18 find premeditation in this case: You can start it --
19 Remember it's some time, no matter when that decision is
20 formed. You can start all the way at the beginning of
21 what we've shown you, when he shoplifts the pellet pistol.
22 That shows the intent to commit a crime. It's intent to
23
24
25

1 commit a robbery. That's an intent to maybe commit a
2 burglary to use it to get into the house, to unlawfully
3 enter the house, but that shows an intent right here to
4 commit a violent act or dangerous crime against two people
5 in their own house.
6

7 He then goes to the house of two people he knew,
8 two people who could identify him. What you can infer
9 from that is he couldn't've gone to that house expecting
10 to leave two witnesses alive. It just doesn't make any
11 sense. But you continue from there. There's a shot fired
12 into the floor in the office. The only way, the State
13 would argue, that that makes any sense is that -- there's
14 really two ways that could've happened: Maybe there's a
15 struggle for the gun, we don't know, and in the course of
16 the struggle for the gun the shot goes to the floor.
17 That's one option. Maybe he gets a hold of the gun and at
18 that point decides, "I mean business," and fires a warning
19 shot through the floor. But what that does is that gives
20 him that moment. That's more time to stop and think about
21 what he's doing. To decide, "What am I going to do? Am I
22 going to go back and am I going to form that intent to
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25

1 kill these two people?" So everything that comes after
2 that, he now makes them lie down facedown on the floor.
3 He fires one shot. It's a bolt action rifle, reloads. It
4 was premeditated on the first shot because he had to re-
5 load after the first shot. Second shot, he's now already
6 killed one person, he must reload that rifle again, the
7 25.06. The casing was never found so he probably took it
8 and put it in his pocket, so now he's even thinking more,
9 "I'm hiding evidence. I'm trying to conceal my acts," and
10 turns on the second person and pulls the trigger again.
11 Those were both premeditated murders.
12

13
14 Now we get to option B, felony murder in the
15 first degree. We go back to on or about the 18th day of
16 March 2009, Mr. Pierce committed or attempted to commit a
17 robbery in the first degree or second degree, or burglary
18 in the first degree. Again, I'll explain what those --
19 the elements of those crime (sic) because we have to prove
20 all that beyond a reasonable doubt, and the State argues
21 that we have done that.
22

23
24 Now, so to get to felony murder, what he has to
25 have done is committed one of those crimes, and that Mr.

1 Pierce caused the death of Mr. and Mrs. Yarr in the course
2 of or in furtherance of such crime, or in the immediate
3 flight from the crime. So he killed them at the start of
4 the crime, killed them in the middle of the crime, killed
5 them as he was escaping, but the fact that he did that
6 makes this felony murder because the State'll show that it
7 was a burglary or a robbery. They kind of meld together
8 and they can overlap.
9

10
11 Again it gets to the third point: Mr. and Mrs.
12 Yarr was not a participant in the crime of robbery in the
13 first or second degree or burglary in the first degree or
14 attempt to commit robbery in the first or second degree or
15 burglary in the first degree. They're not accomplices to
16 the crime. They're two innocent people sitting at home.
17 And, again, this occurred in the State of Washington.
18

19 First degree robbery. The State has to show
20 that on March 18th 2009, Mr. Pierce unlawfully took person-
21 al property from a person or in the presence of another.
22 The State has shown that. Mr. Pierce has the debit card
23 in his hand. He's using it at the ATM machine with the
24 PIN number that he had to have gotten from the Yarr's. We
25

1 also never recovered purses or wallets. There's other
2 items missing. We have the knife block that also appears
3 to have been taken out of their kitchen and put in the
4 back of his -- the trunk of his car.
5

6 Then we have to show that Mr. Pierce intended to
7 commit theft of the property. You can clearly see the
8 intent when he walks up to the ATM machine, pulls the t-
9 shirt up over his nose so that the camera hopefully won't
10 see who he is, even though it was found who he was, and
11 then looks down, as you look it appears he has a piece of
12 paper in his hand, types in the PIN number and tries, I
13 think it was four times but I lost track, and starts too
14 high and works his way down until he gets to an amount
15 that the ATM machine will give him, that \$300.00. And,
16 then, he's not done there, he tries to get it again, the
17 machine said, "No. You're done." That shows that he
18 intended to commit theft of property. He wasn't borrowing
19 their money. He wasn't going to return it. He already
20 knew they were dead.
21
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24 That the taking was against the person's will by
25 Mr. Pierce, the use or threatened use of immediate force,

1 violence, or fear of injury to that person. They were
2 laying facedown in the kitchen. If that's not fear, if
3 that's not fear of force, I don't know what is.
4

5 That force or fear was used by Mr. Pierce to
6 obtain or retain possession of the property or to overcome
7 resistance to the taking. Kind of folds back into three.
8 That force, that fear that was put into them so he could
9 take their property, so that they couldn't keep their
10 property that they earned working at Seton Construction
11 and working as farmers and logging. They worked hard for
12 that money and he went to their house and he took it from
13 them.
14

15 Then we get to that the commission of these
16 acts, or in the immediate flight therefrom, Mr. Pierce was
17 armed with a deadly weapon. We heard testimony that Mr.
18 Yarr owned a 25.06. It was his little pride and joy. Had
19 a nice scope on it. It was a very powerful scope. He
20 used it to shoot coyotes because he's a farmer. I believe
21 the testimony was that they thought it was purchased when
22 he'd gone to Montana and he'd gotten a big elk, I think it
23 was. It was kind of his prize and joy (sic) when it comes
24
25

1 to guns. That gun matches the caliber of the murder
2 weapon. That gun has never been recovered, and that shows
3 that Mr. Pierce was armed with a deadly weapon, and that's
4 what was used to kill them.
5

6 You see also B. Another option is you could
7 find him guilty if in the commission of the crime he
8 inflicted great bodily injury -- or inflicted bodily
9 injury, excuse me. You heard how they died. That's
10 bodily injury. And, again, that occurred in Quilcene in
11 the State of Washington.
12

13 Now, to prove first degree burglary we have to
14 prove that on March 18th 2009, Mr. Pierce entered or
15 remained unlawfully in a building. He can enter unlaw-
16 fully. That's come in with a gun. You know, he used the
17 pellet pistol to gain access. That's entering unlawfully.
18 Or what he can do is they knew him, he could knock on the
19 door, they could've let him in, he said, "Hey, I'm just
20 looking for work," he uses that as some sort of rouse to
21 get in the door, and then at that point starts demanding
22 the money and the moment he's not -- he is unlawfully on
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the property, now it's burglary again, even if he came in originally lawfully.

That the entering or remaining was with intent to commit a crime against a person or property therein. The intent. What you see from the shoplift of the pistol through to the ATM that night, the intent was robbery or burglary. The intent was to steal, in common language. He was there to take their money. He was there to take their stuff.

So that in entering the building or in immediate flight from the building, Mr. Pierce was armed with a deadly weapon or assaulted a person. He was armed with a deadly weapon, I discussed that a minute ago, Mr. Yarr's 25.06. A 25.06 is a very deadly weapon, as we can see from this case, and Mr. Pierce used that to execute the Yarr's while they lay on their kitchen floor. And that also folds right into or he assaulted a person. Shooting somebody in the back of the head is assaulting a person. And that, again, any of these acts occurred in the State of Washington.

1 So here's where you get to where you have to.
2 You have to make an individual decision, and then a col-
3 lective decision. Each and every one of you has to decide
4 whether or not the State has shown every element of A
5 beyond a reasonable doubt, or every element of B beyond a
6 reasonable doubt, or you can actually decide on your own
7 that every element of both has been shown beyond a reason-
8 able doubt. And, then, once you reach that point as a
9 group, as a jury, you make the decision, and then if it's
10 a unanimous decision that it's first degree murder, then
11 he's guilty. Now, it doesn't matter if half of you think
12 it's A and half of you think it's B, so long as each
13 individual one of you believes that the State has proven
14 its case for A or B or both beyond a reasonable doubt.
15 And that's -- I could read this to you, but once you get
16 back in the jury room you'll have the chance to really
17 pick that one apart.

18 Other charges that come after this: Arson in
19 the first degree. On or about March 18th 2009, Mr. Pierce
20 caused a fire or explosion. That the fire or explosion
21 was manifestly dangerous to human life, including fire-

1 fighters. We could easily argue that. You saw the
2 pictures of the remains of the fire. You heard some of
3 the testimony how the house looked like it was engulfed.
4 It could've been dangerous to -- It could've been
5 dangerous to the firefighters. If they had had to go into
6 rescue somebody, it would've been dangerous to them. But,
7 more clearly, damaged, another way to show this is a fire
8 or explosion that damaged a dwelling. That was the Yarr
9 home and he set it on fire to cover his crime.
10

11
12 That Mr. Pierce acted knowingly and maliciously.
13 Now, you're going to get legal definitions of what
14 knowingly is; legal definitions of what maliciously is.
15 Pouring gasoline in somebody's living room and running it
16 out the door, or pouring it in the carport and then
17 setting it on fire is obviously knowingly because it
18 didn't just happen by accident. You knew what you were
19 doing. It's a conscious decision. It's a premeditated
20 decision, and it's malicious. There's nothing friendly,
21 happy, joking about pouring gas in somebody's house and
22 setting it on fire to cover the crime you just committed.
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1 And that crime happened in Quilcene, which is in the State
2 of Washington.

3 And here's how you know it was arson: The
4 living room, these two pictures of the living room where
5 the gas poured and where samples were taken that were sent
6 off to the forensic lab, and they reported back that the
7 gasoline tested positive for gas -- the Yarr clothing
8 tested positive for gas. And then you see the results
9 there in the top left corner. There's what's left of the
10 house. And this picture's actually taken after the car-
11 port had been pulled out, but you see. That's the
12 evidence of arson. Or some of the evidence. The results
13 of arson, I would argue.

14
15
16
17 Now, theft of a firearm. Another charge we have
18 to prove that on or about March 18th 2009, Mr. Pierce
19 wrongfully obtained or exerted unauthorized control over a
20 firearm belonging to another person. We're going back to
21 Mr. Yarr's 25.06. He used that weapon to kill. Obviously
22 Mr. Yarr did not give him that firearm willingly and ask
23 him, you know, "Shoot me in the back of the head," so he
24 wrongfully obtained or exerted unauthorized control over
25

1 that firearm, used it to kill them, that firearm belonged
2 to Mr. Yarr, Mrs. Yarr, too, in this state, and, there-
3 fore, he committed theft of a firearm at that point.
4

5 Now, we also have to show the Defendant intended
6 to deprive the other person of the firearm. I think
7 that's rolled in with the rest, too. The fact that he
8 killed them, he took the gun from the house, he hid the
9 gun, it's never been found, shows that he intended to
10 deprive the other person, in this case the Yarr's, of the
11 firearm, and he did that in Quilcene, here in the State of
12 Washington.
13

14 The second charge we have to show, a lot shorter
15 after all the other ones we've kind of gone over with,
16 second degree unlawful possession of a firearm is
17 knowingly owns a firearm or has a firearm in his or her
18 possession or control and he or she has previously been
19 convicted of a felony. You'll see a stipulation that was
20 just entered into the record a minute ago showing that Mr.
21 Pierce stipulates to the fact that he has a prior convic-
22 tion for a felony. So the second one is proven.
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1 The first one comes back to has a firearm in his
2 possession or control. And I've gone over this before,
3 but again, it's taking Mr. Yarr's weapon. The moment he
4 takes it in his hand as a convicted felon, he's already
5 committed the crime. He keeps going from there and shoots
6 them, but the crime of second degree unlawful possession
7 of a firearm occurs when he takes that 25.06 and has
8 unlawful possession of it.
9

10
11 Then we get to second degree theft of an access
12 device. We go back to March 18th 2009, which is the testi-
13 mony we heard. This is when it all happened. Now,
14 granted, the ATM photos are stamped 2001, but we had testi-
15 mony explaining that; something about the upgrade and
16 2001 meant 2009. So it shows on March 18th at eight
17 o'clock, 8:09 I think is the first picture, Mr. Pierce is
18 there at the bank using their ATM card, and that's second
19 degree theft of an access device, because what he did was
20 he wrongfully obtained or exerted unauthorized control
21 over property of another. That that property was an
22 access device, I'll tell you what that is in just a
23 second, and that the Defendant intended to deprive the
24
25

1 other person of the access device and, again, that it
2 happened in the State of Washington.

3 Looking at all the facts, an access device is
4 any card, plate, code, account number or other means of
5 account access that can be used alone, or in conjunction
6 with another access device, to obtain money, goods,
7 service or anything else of value, or that can be used to
8 initiate a transfer of funds, other than a transfer origi-
9 nated solely by paper instrument, so it's not a check. In
10 this case we know what it is; it's an ATM card is what
11 we'd call it. A debit card. He has that. He has the PIN
12 number, both of which individually and together form an
13 access device. And we know that he's intending to deprive
14 them of this because of what went on before. He took it
15 from their house, he set their house on fire, he killed
16 them. Obviously he's not going to return it. He knows
17 they're dead. And when he deprived them of it, he goes to
18 the ATM machine, pulls up his t-shirt, more evidence of an
19 intent that this is a theft. This is not I'm borrowing
20 money. I'm not borrowing money from my mom. I'm not
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1 doing anything else. I'm taking money from two people
2 that don't want to give it to me

3 And, yes, Mr. Pierce did use the access device.
4 We heard from the expert who reviewed these pictures and
5 showed you the similarity between the hands, the thumbs,
6 the thick wrists. He further showed you the similarities
7 between the hats. Here's two large men with a big build,
8 same facial features, wearing the same hat, and these
9 pictures were taken roughly an hour-and-a-half apart, one
10 here in Port Townsend, one out in Quilcene at the ATM
11 machine.
12

13
14 And, then, our expert got into more details
15 regarding the shape of the ear and he gave all the differ-
16 ent definitions of the ear, but I wasn't going to go into
17 that. That's not my area of expertise, but when you look
18 at these pictures, the head are in the same angle (sic).
19 You look at the ear and the ear is the same shape and the
20 hairline's the same shape, and the hair's the same color
21 in these two black-and-white photos, and the body build
22 and all those other things that I think we all naturally
23 do when we look at a person, but Mr. Reeves sat down and
24
25

1 broke it down and pointed out: These are the things that
2 are all the same between that person. And he believed
3 that this was Michael Pierce.
4

5 So what the State asks: The State would argue
6 that we've proven every element of every crime charged
7 beyond a reasonable doubt. Now, in his *voir dire*, Mr.
8 Rosekrans talked about what is reasonable doubt? It's not
9 scientific certainty. It's not beyond a shadow of a
10 doubt, which is the term he uses, it's reasonable doubt,
11 and you'll get a definition of that. But the State has
12 proven every element beyond a reasonable doubt because
13 we've shown that he robbed the Yarr's through the use of a
14 pellet pistol, which he'd shoplifted earlier that night.
15 He murdered the Yarr's with Pat's 25.06 rifle. He then
16 burned their house to conceal the crime, destroyed his
17 clothing to conceal the crime, and then used the Yarr ATM
18 card while the fire was still burning. He's using that
19 ATM card at almost the exact same time that Mr. Merle
20 Franz first sees the fire and thinks, "Wow, Pat's burning
21 a little close to his house tonight." That's what time
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1 Mr. Pierce is down using the ATM. It's that close in
2 time; he's seven miles away.

3 And that while the fire was (unintelligible) all
4 this was done, as we heard from Mr. Boyd and Mr. Donhue,
5 were a little embarrassed to admit it (sic), but he showed
6 up at their trailer, or Mr. Boyd's trailer, and said,
7 "Hey, man, can you find somebody and get me some metham-
8 phetamine," and that's what set this whole thing off. And
9 the State would argue we've proven everything beyond a
10 reasonable doubt and that you need to find Mr. Michael
11 Pierce guilty of all crimes charged.
12
13

14 THE COURT: Ladies and gentlemen, please give your
15 attention to Mr. Davies, who will address you on behalf of
16 Mr. Pierce.
17

18 Hang on, Mr. Davies.

19 MR. DAVIES: Okay.

20 THE COURT: We got a minor -- hopefully a minor
21 technical problem here.
22

23 Alright, Mr. Davies.
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25CLOSING ARGUMENT OF THE DEFENDANT

BY MR. DAVIES:

At the beginning of this trial I told you that not everything is as it first appears. What we've got on the screen here is a picture of Michael Pierce at the ATM machine in Quilcene. The tunnel-vision prosecution has proved that for you. I admitted as much during a number of my examinations. "What's Michael holding in his hand?" The State's proved that Mr. Pierce is the large-framed individual in the picture at the ATM machine, but what else is it evidence of? What doesn't first appear in this picture? It is evidence that Mr. Pierce did not commit the crime of arson.

What evidence do we have with respect to the arson committed at the Yarr place that very evening? We had testimony of a number of firefighters, fire investigators, first responders, people that called 911. Testimony of Mr. Hammond, fire investigator for East Jefferson Fire Rescue, who worked the scene from the beginning, was there that night, was there the next day, and over the next several, digging through the debris at the Yarr place

1 there at Boulton Road. Fifteen years' experience as a
2 fire investigator. Number of years as a firefighter. He
3 was among those investigators assigned to the task,
4 intimately involved in the investigation. What did he
5 conclude with respect to how fast the fire at the Yarr
6 place went up? I'll recall his testimony for you. He
7 told you that a fellow sitting on his own couch at home
8 who drops a cigarette on it, that fire in a room would be
9 fully engulfed within five minutes (sic). Within five
10 minutes. And, then, Mr. Hammond told you that given the
11 circumstances here, that is a carport that is fully
12 exposed to the elements, that has fuel loads well beyond a
13 couch stuffed full of stuffing, it would go from ignition
14 to fully engulfing the carport as fast as two minutes.
15 That's the State's testimony. And it's borne out by the
16 testimony of everyone that testified about this fire.

17 So at 20:10:38, we've got a picture of Mr.
18 Pierce looking at a little sticky note and punching some
19 numbers into a bank machine. He arrived there at the
20 bank, and there's a picture of it, you'll get to look
21 through all these admitted (sic). He's at the front door

1 of the bank at 20:09:21. The last picture of him at the
2 bank machine is at 20:11:31. So Mr. Pierce is at the ATM
3 bank machine there in Quilcene for a period of just over
4 two minutes. You heard the testimony of Detective
5 Apeland: It takes nine minutes to drive from the Yarr
6 place to the bank machine in Quilcene. Nine minutes.
7 And, so, in order for Mr. Pierce to get there, if in fact
8 he left from the Yarr's, it would've been at about eight
9 o'clock exactly.
10
11

12 In order for Mr. Pierce to get back from the
13 bank machine in Quilcene, and the last picture of him
14 there is 8:11:31, it would take him nine minutes to get
15 back. The fire was already almost fully engulfed by that
16 time. He wasn't there at the beginning, and he wasn't
17 there at the end. That's what the State's witnesses told
18 you. That's why this picture here, and I told it to you
19 at the beginning of the trial, is not as it first appears.
20 It's evidence that he didn't commit arson.
21
22

23 So what did the other witnesses testify to
24 regarding this fire that supports Mr. Hammond's opinion as
25 to how fast this fire would have developed? We have Merle

1 Franz, a neighbor just down the road, who was driving
2 southbound on 101 past the Yarr place. Mr. Franz testi-
3 fied that he has this habit of timing his ride home, and
4 that evening he specifically recalled checking - it wasn't
5 his watch because he didn't have one on - checking the
6 clock in the car he was riding at the first marker.
7 Recall what the first marker was. Big sign indicating
8 mileage points south. He checked the clock and it said
9 8:11. You heard the testimony of Mr. Walsh yesterday who
10 timed that odd little habit he has on his way home. At
11 8:11 he's at the road sign. At the next minute he's -- I
12 don't recall that marker, but the second marker, that is
13 two minutes away from the first was directly across from
14 the Yarr place. That's what Merle Franz testified about.
15 So when he saw this fire that night it was 8:13, you know,
16 plus some number of seconds. You know, could be closer to
17 8:14. He sees what he describes as a small bonfire. No
18 dimensions to it. No restrictions that would make it a
19 structure. He sees a small bonfire.

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24 Now, this is a picture admitted during the test-
25 imony of Fire Investigator Hammond. Recall that it was

1 taken from above Highway 101 across the valley, and you'll
2 see some other pictures also of approximate location where
3 it was taken from, but it is directly across from Highway
4 101, and if you're on the road at, directionally anyway,
5 about three o'clock (sic). Why is that important? It's
6 important because at the time Mr. Franz drives by, which
7 is 8:13, 8:14 or thereabouts, he sees a small fire. Where
8 does he see that small fire? He sees that small fire in
9 the carport. You'd be looking right at it, Mr. Hammond
10 testified. Where the John Deere tractor is, that's where
11 the carport used to be, and there was a big breezeway
12 opening as high as the roof and six to eight feet wide.
13 Merle Franz drove by, he saw what appeared to be a small
14 fire, didn't think much of it, kept on moving along.

15 Here's a picture drawn by Fire Investigator
16 Hammond. Notice the opening there on the bottom of the
17 structure on the A side, if you will. We heard a lot of
18 testimony about that, the carport being on the B side of
19 the house, there is half of that wall is open to view
20 (sic) when you're on 101 looking directly towards it at,
21 say, three o'clock direction, okay? That's what Mr. Franz
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1 saw. And he didn't see it bounded by any structure. It
2 was the beginning of a fire that minutes later engulfed
3 the carport, and then pushed into the kitchen. How do we
4 know that? Because there are a number of other people
5 that saw the fire that evening also. Tyler Ingalls
6 (phonetic) was driving southbound on 101 in a pickup
7 truck. He stated that at about two or three o'clock,
8 almost directly across from the Yarr place looking the
9 direction we're look at here in the picture taken by Fire
10 Detective Hammond, he saw, and he described it in his
11 testimony, as a bright light.

14 At about the same time there's three guys coming
15 north on Highway 101, John McConagey, Josh Maya and a
16 Tyler Erhardt (phonetic). We heard from just John
17 McConagey, the driver of the vehicle, they're coming from
18 the south up 101, up the picture, and when they get
19 directly to the left of the Yarr place, they see a fire.
20 Now, this isn't 8:13 or 14, this is, and we know exactly
21 what time it is, much like we know exactly what time it is
22 there at the bank machine, because they called 911. 911
23 generates time and brief entries about what's seen, who's
24
25

1 responding, etcetera, and at 8:21 and, well, 12 seconds,
2 if you want to know, there's a call from McConagey --
3 actually, it was Josh Maya in the back of the car, that
4 they saw flames, and at that point in time, 8:21, they
5 could tell that it was some sort of structure fire,
6 described by Mr. McConagey to Mr. Gilmore as being framed.
7 Being framed by what? Being framed by the breezeway
8 through the A side of the carport. There it is again.
9 Framed by the breezeway of the carport. What do they do?
10 They've just called 911. They realize it's a structure
11 fire. I believe they initially thought it was a, was a
12 barn. Excuse me. Mr. McConagey flips a U-turn on 101,
13 turns up Boulton Road from the south, drives towards the
14 Yarr home from the south, that's the carport side of the
15 structure. Tyler Ingalls, who did the same thing,
16 although he was heading south, made that turn, arrived at
17 about the same time. From the south side Tyler Ingalls
18 thought the entire place was engulfed. He didn't go any
19 further. John McConagey went further, as did one of the
20 other fellows he was with. They went up the backside of
21 the Yarr house, and they could see into the carport from
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1 the C side, from the west side. And how did he describe
2 it? He described it as fully engulfed and pushing into
3 the kitchen. He ran around the house knocking on what he
4 believed were doors, turned out to be windows. Went
5 around the backside down the front of the house to the
6 daylight basement knocking, yelling, trying to make sure
7 that anybody in would get out. As he comes around the
8 carport side, what does he see? He sees Janice Yarr's PT
9 Cruiser burst into flames. That's how fast and how hot
10 this fire was developing.
11
12

13 The first fireman on-scene was acting Chief
14 Canofell (phonetic) I think he pronounced his name. He
15 gets there at 8:38. What does he see? He sees the car-
16 port consumed and the fire moving into the kitchen. A
17 couple of minutes later we had testimony of a firefighter
18 Gregory from Port Ludlow Fire (sic), he described the fire
19 as moving from the carport to the kitchen, as did
20 Investigator Bentley (phonetic). This fire moved fast, it
21 was hot, and that's borne out by the pictures that we've
22 seen.
23
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1 The carport doesn't even exist after this fire.
2 Why? Because it has a constant supply of oxygen. It has
3 a fuel load that, well, everybody was going on about.
4 There was a ramp that Ms. Yarr apparently needed to come
5 and go up the steps to the kitchen. There were gas cans.
6 There was a riding mower. There was an ATV. There were
7 paint cans. There was propane, possibly kerosene. This
8 fire, this arson went up, again, within five minutes.
9 Probably faster is the testimony that you've heard, the
10 evidence that you've received.

13 And much of the trial, you know, has been you've
14 learned through pictures. And there's plenty of them.
15 Some of us are visual, some of us aren't, but this is how
16 the story's told. This is the carport and the inferno it
17 became within minutes. You see the house across the
18 valley there? That's what Fire Investigator Hammond said
19 where he took this picture, and now it's above the road,
20 obviously, but the picture, I'm showing you again, shows
21 you the approximate angle of the house and the carport, if
22 it hadn't been burned to the ground. But that's what
23 happened. And it happened quickly. And it happened

1 quickly because the carport was full of gas; full of real
2 flammable materials. This is Mr. Bentley's picture and
3 presentation. Four-wheel ATV added to the fuel load.
4 Riding mower added to the fuel load. Here's a picture of
5 the south side of the carport. He was, I think, showing
6 why he concluded that the fire started with a trailer out
7 the garage of flammable liquid into the house. But look
8 at the other items in there, paint cans, all sorts of cans
9 full of flammable liquid. This thing went up incredibly
10 quickly.
11

12
13 That's the wall between the carport and the
14 master bedroom. There was testimony about the charring
15 pattern down below and how it showed that the fire went
16 from the carport into - breached the wall I think was the
17 term - of the house. And it breached the wall of the
18 house near the kitchen door first because, as you heard
19 Investigator Bentley talk about, this door, if it was
20 closed, was extremely thin and two minutes is all it takes
21 to burn through a hollow core door.
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23
24 This is again presentation by Investigator
25 Bentley. A, B, C, D, E. What's that? That is the

1 remnants of a trail of gasoline that led out of the house
2 and then down the ramp. The ramp didn't exist when they
3 did this investigation. The picture was taken by
4 Investigator Bentley of the garage floor after it was
5 cleaned up. What did Investigator Hammond note? He noted
6 the red discolorations on the floor itself, as well as the
7 spalling that led him to believe, as Investigator Bentley,
8 too, that there was a trail of gasoline led out the car-
9 port. You see the red in the back that's been scraped off
10 the bottom, the red discolorations in the middle of the
11 carport. This carport was full of gas products and it
12 went up very, very quickly.

13 In fact, the only evidence that you have in this
14 case regarding the generation of this fire, its progress-
15 sion, is that this fire was went from (sic) ignition into
16 fully engulfing the carport within five minutes. Where
17 was --

18 MR. ROSEKRANS: Your Honor, I'm going to object to
19 that. He's said it several times. There is no evidence
20 in the record that this fire went from Point A to Point B
21 in less than five minutes or five minutes.

1 THE COURT: Ladies and gentlemen, you are the triers
2 of fact. You'll remember the evidence that was presented.

3 MR. DAVIES: And you took notes. Review your notes
4 of Fire Investigator Hammond's conclusions. Review your
5 notes regarding the other witnesses' testimony regarding
6 how fast and how hot this fire burned.
7

8 Where was Mr. Pierce at the time back before the
9 fire was lit? He was at the bank machine in Quilcene.
10 Like I said at the beginning of the trial, not everything
11 is as it first appears. This is evidence that Mr. Pierce
12 did not light the fire at the Yarr's that evening.
13

14 What evidence is there that links Michael Pierce
15 to the Yarr place that night? Just saying he's there
16 doesn't make it so, and that's all that Prosecutor
17 Ashcraft was able to offer you. He said a number of
18 times, "He was there." What evidence has been presented
19 in this case that Michael Pierce was at the Yarr home that
20 evening? The State offered you a knife block with an
21 explanation that Mr. Pierce did these horrific things, and
22 then ran off with a knife block. I'd submit to you that
23 is outlandish. But I can understand the Yarr daughters'
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1 response to this. It's an emotional response. I think it
2 would be for all of us. On seeing a block of knives
3 that's the last remnants of your mom's kitchen that's been
4 burned to the ground, you're going to have an emotional
5 response, and they did. You heard it. It was emotional
6 here. But it was an emotional response and not one borne
7 out by the facts.
8

9 You saw both the Yarr daughters testify about
10 the response that they had. You saw Ms. Waters testify
11 about her knowledge of the knives, and I suppose it'd be
12 characterized as a little bit of trickery by me, but I
13 just gave her a knife and said, you know, "Where'd this
14 come from?" Misidentified the knife. It wasn't the knife
15 that her sister that afternoon had found in her kitchen
16 drawer and attributed to her mom that we saw a picture of
17 that the State hasn't even bothered to enter into evi-
18 dence. It was an emotional response to, you know, a super
19 emotional time. What happened to Mr. and Mrs. Yarr is
20 horrible. It's a tragedy. It's a tragedy for the family,
21 and it's a tragedy for our community.
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1 This knife block came out of Michael's girl-
2 friend's trunk, a white Honda. Stuffed to the gills, I
3 think that's my characterization, but quite full of all
4 sorts of stuff, knife block deep down in it. You heard
5 Ms. Rondeau's testimony about why it was there. She'd
6 been given it some months ago in a move by Michael's mom,
7 and although she meant to get it out of there for, you
8 know, a number of months, life got in the way and it just
9 never quite happened. It remained in her trunk in amongst
10 a bunch of other stuff, including her son's green piggy
11 bank. They were living, you know, a, a stressful and
12 time-consuming, all-consuming life there in Sequim, going
13 to school, shuffling kids back and forth, trying to stay
14 on top of things, some stuff got left in the trunk,
15 including what's pictured here among the other refuse in
16 the trunk and is here in Court today, a knife block.

17
18 You heard Michael's mom testify about the
19 history and origin of this knife block. She got it from,
20 well, a client it sounded like started off, a friend that
21 she lived with in the Poulsbo area. When he passed away,
22 she got it in his estate. I think two pickup loads of
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1 boxes. And she had one, she was going to give it to the
2 kids, and that's what happened. When they became aware
3 that this knife block was playing, you know, a far more
4 significant role than perhaps it should've in this case,
5 she realized, well, at least kept an eye out for the rest
6 of the set. In the end of May last year, she handed a, a
7 little paring knife to Mr. Walsh, said, you know, "I think
8 this is from the knife set." And it fits.
9

10
11 The end of June, Ms. Rondeau, Mr. Pierce's girl-
12 friend, is at his mom's house in Quilcene and discovers in
13 a drawer full of kitchen utensils another knife, the same
14 make, a Chicago Cutlery. It fits. This knife block out
15 of Ms. Rondeau's trunk belongs to her. It was given to
16 her by Michael's mom. And Michael's mom got it from her
17 friend, since passed, Jerry Merrill. We're able to show
18 the history of it, you know, not -- in a, in a real sense.
19 Richard Merrill didn't -- couldn't say, "Oh, yeah, that's
20 my brother's knife set," but he told the back story that,
21 and I can't remember which way it goes now, but one of the
22 brothers had it and gave it as a president (sic) to the
23 other. Here's its twin sitting on Richard Merrill's
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1 kitchen counter. Remember? Took him a while to identify
2 it, but when we talked about the wallpaper in the back-
3 ground, he realized, "Yeah, that's my kitchen counter.
4 That's my block of knives. I got it in 1977 at the same -
5 - or about the same time as my brother did." Hard to tell
6 based on the glare, looks like he took a little bit better
7 care of it, but it is a twin. This knife block belongs to
8 Michael's girlfriend, Tiffany Rondeau.
9
10

11 And the science bears that out. You heard the
12 testimony of forensic scientist for the Washington State
13 Patrol, Mr. Frank. He testified that there were at least
14 three DNA contributors to this knife block. Michael
15 Pierce was a match. You also heard that the probability
16 of selecting the same DNA profile at random from the
17 population is one in 6.6 billion. Pretty clear Michael
18 Pierce has handled this knife block.
19

20 What else did he tell you? He told you that Mr.
21 Yarr was excluded as a contributor of DNA to the knife
22 block. We heard some testimony about washing of knives
23 and that what we also learned, which shouldn't surprise
24 anybody, but you don't put the knife block in the -- in a
25

1 dishwasher. Not at the Yarr's; not at anybody else's
2 house. Michael Pierce has handled this knife block. No
3 denial on that. Mr. Yarr did not.
4

5 We also heard testimony from the forensic
6 scientist that the -- there was a swab of DNA taken off
7 the knife handles themselves, well, not these two, but
8 these that were in the block when it was taken out of Ms.
9 Rondeau's trunk. The testimony there was that there were
10 at least two DNA contributors, and that Michael Pierce was
11 a possible contributor. One in four. One in four is the
12 probability of selecting the same DNA profile at random
13 from our population. So when I asked, I don't think I did
14 the math very well, but there were a number of us here,
15 you all, would it be three or four of you whose profile is
16 going to match what's on these knife block -- excuse me,
17 knife handles? But, more importantly, Mr. Frank testified
18 that Mr. and Mrs. Yarr were excluded as possible contribu-
19 tors. So there's a one in four chance, but it's not Mr.
20 and Mrs. Yarr. Might be you or me, but it's not Mr. or
21 Mrs. Yarr.
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1 Okay. The knife block. At least initially
2 asserted that this block of knives came from Mr. and Mrs.
3 Yarr's house. It didn't. What other evidence does the
4 State have or assert links Michael Pierce to the Yarr's
5 place that night? It's at least part of Michael's own
6 statements made to police investigators on the 28th when he
7 was taken into custody. So let's examine those. Recall
8 that there was a interview, if you will, the 28th of March
9 at about 5:00, yeah, 5:00, 6:00 in the evening. How did
10 that interview end? You heard it during testimony, and
11 it's Detective Nole bearing down on Mr. Pierce. Not
12 improperly, but that's what he's doing. And this is what
13 he said, "Well, what I'm going to tell you here, I just, I
14 just want you to listen to what I'm going to say. Before
15 you can say anything back, okay, right now it's looking
16 like you're the person that started the fire at the Yarr
17 house and killed those -- No, no, no, just let me finish
18 what I'm saying, okay? Can I finish what I'm saying? And
19 that you killed those guys, okay, because we have you on
20 video using their credit card, and before you can say
21 anything just let me finish. Now, I'm not sure how you
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1 got the credit card or anything like that, but that's what
2 we're -- that's, that's what we're putting, I'm putting it
3 out for you right there, that's, that's what this is all
4 about. That's why you're in handcuffs. That's why they
5 took you down like they did, because what we have now is
6 you, you're the person that did it because you had that
7 credit card. I'm not -- But you had the credit card and
8 I don't know --"

10
11 MR. ROSEKRANS: Your Honor, at this point I'm going
12 to object. Number one, that's not evidence, it wasn't
13 admitted into evidence, and he's reading something into
14 evidence that was not admitted into evidence.

15
16 THE COURT: Ladies and gentlemen of the jury, you are
17 instructed once again the attorneys' remarks, statements
18 and arguments are intended to help you understand the evi-
19 dence and apply the law. They are not evidence, however.
20 The evidence consists of the testimony of the witnesses
21 that you have heard, so if there are remarks, statements
22 and arguments are not supported by the evidence, you can
23 ignore them entirely.
24
25

1 MR. DAVIES: Alright. You were all taking notes. It
2 was during an exchange between me and Detective Nole and
3 this is what was said. Ignore anything I tell you right
4 now, accept it, it's my memory of what was said. "Just
5 let me finish. I don't know if there's some way you
6 could've got that or somehow, um, that you came into
7 possession of that, but we have photos of you at the bank
8 using that," and then Mr. Pierce says, "I'm going to need
9 a lawyer because it wasn't me. You're wrong."
10

11
12 But presumably Detective Nole's got him thinking
13 because what Detective Nole just told him is that based on
14 possession of this ATM card, they're pinning the murder of
15 the Yarr's and arson on him. So Mr. Pierce comes back,
16 middle of the night, about 11:30. Remember Mr. Apeland,
17 Detective Apeland testified, "Okay. I'm all ears," and
18 Mr. Pierce told Detective Apeland that he could give him
19 the name of the shooter. Details given to him. The
20 actual murder. That he had first-hand knowledge. That he
21 watched him burn his clothes. That he could tell them
22 where. And that he, that's Mr. Pierce, wanted immunity
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1 from the charges he was being held on, that is for being
2 at the Quilcene bank machine using the Yarr's ATM.

3 He also said, "I got to have some protection. I
4 don't want to get murdered myself." And later he said,
5 "You know, I got real fear for my mom, too." So they take
6 him into another room where he's not being recorded and he
7 gives Detective Apeland pertinent information. Why is it
8 pertinent? Because at the time they hadn't disclosed that
9 the Yarr's had been shot. Mr. Pierce was telling Detec-
10 tive Apeland, "I know they were shot and I could tell you
11 who did it." He gives him an account of being somewhere
12 between the Yarr place and Quilcene drinking with the
13 shooter. The shooter said he was going to go borrow some
14 money from Pat Yarr and that Mr. Pierce waited at the
15 shooter's place for him to get back. There was just
16 supposed to be some borrowing of money. Nothing like this
17 was supposed to go down.

18 But when the shooter comes back, he's covered in
19 blood. That's pertinent information because, as you've
20 heard throughout this trial, and I think the Prosecutor
21 quoted me, this was a horrific scene. Mr. and Mrs.

1 Yarr's, well, I have to say it, heads were blown off. It
2 was horrible. And there would have been blood everywhere,
3 and so Mr. Pierce saying that this fellow comes back with
4 blood all over him is relevant, is important information.
5 That he returned with a long rifle and a scope on it.
6 We'll talk a little bit about that later, but that's
7 pertinent information because at least some years go Mr.
8 Yarr owned a 25.06 with a scope on it.

11 And Mr. Pierce implicates himself. He says that
12 he helped him clean up. Poured water over the shooter.
13 Washed blood off him. But what isn't in Mr. Pierce's
14 statement? Nothing in Mr. Pierce's statement about the
15 shooter having lit the house on fire. Nothing. That
16 would've been the easiest thing to say if you're just
17 concocting a story. Why? Because everybody knew that the
18 Yarr's house burned down. But Mr. Pierce is relating what
19 this other fellow told him. Nothing about a house burning
20 down. Why? Because at the time the house hadn't burned
21 down. The house isn't lit on fire until after Mr. Pierce
22 is at the bank machine. Why?

1 What else does the State point to as evidence
2 that Mr. Pierce was at the Yarr house that night? Pam
3 Roberts, the lady that's driving home from her job at WSU
4 out there at Shoal Business Park in Hadlock. She drives
5 home every night at about seven o'clock, and on this
6 particular evening she says she's delayed, having to do
7 with a kid forgetting his computer or the like, and that
8 she's driving southbound on Highway 101. She's driving
9 southbound on Highway 101, and as she gets just across
10 from the Yarr place, 7:45 she testified, said it was dark
11 out, just as she enters that slight curve past where the
12 tree line retreats, she sees what she describes as the
13 biggest man she'd ever seen in her life walking in the
14 road in a menacing, would be one way to describe it, way.
15 He doesn't even get out of the road. This is a highway.
16 People driving -- I think the speed limit's 50. Maybe
17 it's 55. She slows down, going to be a Good Samaritan
18 until she just gets the heebie-jeebies because this
19 fellow, who is dressed in a multi-textured black coat,
20 maybe camo. Again, look at your notes. And that this
21 jacket went down well below his waist. It covered his
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1 bottom, I think the exact language was. And he had a
2 hoodie on, and as she creeped by slowly, creeped by,
3 creeped out, this fellow takes his right hand and pulls
4 that hoodie over his face and turns away. Black, multi-
5 textured coat down below the waistline, a hoodie over his
6 head, no ball cap, and nothing in his hands.

8 Alright. Well, no dispute that Mr. Pierce is a
9 big fellow. Biggest man I've ever seen in my life? No.
10 And what was he dressed in that evening? Because Ms.
11 Roberts was clear that there was no big, bright sign on
12 the back of this jacket, no lettering, no logo. And we
13 know that that's what Michael Pierce had on that evening.
14 Why? Because there he is at Henry Hardware. Somewhat
15 ironically because he may have been shoplifting a pellet
16 gun, but at 6:40 in the evening, he has a black jacket
17 that ends at his waist with, you know, a bright colored
18 logo, it's about as bright as a stop sign. That is not
19 what or who Ms. Roberts saw walking briskly, menacingly,
20 creepily on the side of the road across from the Yarr's
21 place at 7:45.
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1 So at 6:40, Michael Pierce has a black, waist-
2 high or low jacket on with very bright lettering on the
3 back of him. If you're to believe that Mr. Pierce is the
4 fellow that Ms. Roberts saw at 7:45, he's changed his
5 clothes, he's got a textured, black coat that goes down
6 below his waist, covers his bottom, and he's got a hoodie
7 on.
8

9 Alright. This is at 6:40, 6:45 that evening.
10 That's Michael Pierce at 8:10 that evening. Well, he
11 doesn't have his coat on. Why? Because he's taken off a
12 big multi-colored, black coat and a hoodie so he can
13 obscure his face with his t-shirt? You wouldn't do that.
14 You wouldn't take your hoodie off if you're looking to
15 obscure your identity. Certainly it's not what this
16 menacing man did on Highway 101 at 7:45. You don't take
17 the coat off and the hoodie off and just cover yourself in
18 a t-shirt. Why did Michael do that? Well, he did that
19 because he was using somebody else's bankcard and he know,
20 or should've known, that he had no right to and shouldn't
21 be doing it. But he took his jacket off that he was
22 wearing at 6:40 that day because it has his name on the
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1 left said. It said, "Mike." We heard that testimony.
2 You know, not the best disguise, given the fact that he's
3 got a hat on that -- well, it seems fairly unique to me.
4 But he takes his jacket off because it says Mike on the
5 lapel. Not a criminal mastermind, that's for sure.
6

7 Alright. And, then, we've got testimony of Mr.
8 Boyd and Mr. Donahue. We're sort of getting a little
9 further afield here from being at the Yarr's place, but
10 some of what was said is informative because the testimony
11 there was that he showed up at Mr. Boyd's place at some-
12 where between 9:00 and 9:30 with a ball cap on similar to
13 the one pictured in the, the bank machine photo, and this
14 time a fawn-colored Carhartt coat, having showered.
15

16 Alright. So if this is the same guy, he's had a Carhartt
17 coat on with big lettering on the back and his name on the
18 front, a hat that's fairly distinct. He changes into a
19 textured coat that comes down below his waist over his
20 bottom, a hoodie that he used to obscure his identity, he
21 took those things off, covered his face with his t-shirt,
22 put his hat back on, and then between 8:10 and supposedly
23 nine o'clock or 9:30 he's smelling good, showered, has a
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1 fawn-colored coat on and a hat that looks like that. Mr.
2 Boyd can't even place Michael there at 9:00 or 9:30, any-
3 way, anytime, plus or minus two days, before or after this
4 event. And that testimony you heard through Mr. Walsh's
5 investigation and questioning of Mr. Boyd.
6

7 Both Mr. Boyd and Mr. Donahue come to Court and
8 say that, "Oh, yeah, there was a Mike McCone there, too."
9 Didn't say that at the time. Didn't say it at anytime
10 during the investigation until shortly before Court, and
11 then here in Court. You saw Mr. McCone testify. He
12 wasn't there, not possible, there's no bus after seven
13 o'clock, "I'm not in Quilcene at the time. I didn't hear
14 the sirens go by. I remember where I was when I heard
15 about the Yarr's place burning down the next day." He
16 wasn't there. And Mr. Boyd and Mr. Donahue, well, they're
17 making that up.
18
19

20 The other piece that they testified to for the
21 first time here in Court, never came out at the time or
22 anytime prior to trial, that, "Mr. Pierce was there and he
23 asked if I could get some methamphetamine." That's Mr.
24 Boyd. You know, or yabba dabba, yabba dabba, you know, "I
25

1 don't do that, but maybe I could call somebody." No phone
2 record of a call being made at that time. Phone record of
3 a number of calls to the drug dealer before that day.

4 "Well, you know, scrap metal this, scrap metal that." Mr.
5 Pierce wasn't at the Boyd compound at 9:00 to 9:30. How
6 do we know that? Because he was at home with his girl-
7 friend sometime between 8:30, nine o'clock. She said when
8 he got home she can't remember what he had on, which
9 strikes me as a real, but she sure would've remembered if
10 he had something else on or smelled real good. There
11 wasn't anything unusual about his appearance. He looked
12 like he did when he left.

13 In fact, the next day he wakes up early, takes a
14 final exam in his automotive class, passes it. Later that
15 day after school, both his mom and his girlfriend see him
16 with this Peninsula Auto jacket on. There's a trip to
17 Costco that jives with a receipt that Ms. Rettig, his mom,
18 you know, was able to say, "Oh, I got watermelons," and
19 then she's presented with a receipt and says, "Oh, yeah,
20 here they are." I mean, memories are spotty, but the
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1 memory of the Costco trip and the seeing the jacket (sic)
2 is, well, consistent with mom and the girlfriend.

3 Mr. Pierce that day is living a regular life.
4 There are cell phone records of the phone that Mr. Pierce
5 was using. And, so, if you look at State's Exhibit 218, I
6 think it's registered to his mother, but there's no
7 denying he was using it, based on those records, and
8 there's a receipt from a QFC in Port Townsend, that sort
9 of put Mr. Pierce's day together. And although his mom
10 suggested that he was at her house until about 7:00, you
11 know, when presented with the receipt from the shopping
12 they did at QFC that day, and a telephone, quick telephone
13 call to mom from Michael, from mom to Michael, realized
14 that, you know, that her memory is, you know, maybe even
15 two hours off.

16 And, so, these records show where these
17 telephone calls were made from, Port Townsend to Port
18 Townsend, Port Hadlock to Hood Canal, and then at 8:26
19 Tacoma and Seattle? Well, that doesn't make any sense at
20 all. But it could have made sense, because if you look at
21 this information furnished by the provider, TracFone, the
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1 records furnished make reference to an S-I-D. Well, what
2 on earth is that? And if you look at the second page,
3 origin SID, the source from where the call is placed, SID
4 is a grouping of cell towers. Responses to frequently
5 asked questions: The SID (grouping of cell towers) and
6 cell tower locations are managed by each carrier. Infor-
7 mation pertaining to a handset's location or sector
8 orientation needs to be requested from the respective
9 carrier. So there's a way, and Detective Nole testified
10 to it on the stand, there is a way to triangulate where
11 the person is when they get a cell phone call or make one.
12 8:26, where was Mr. Pierce? Well, this record says that
13 he was either in Tacoma or Seattle, which he wasn't. More
14 information was requested. Maybe you know (sic).

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18 Now, there was also a great deal of testimony
19 regarding search warrants for, you know, anything to do
20 with murder or arson, his girlfriend's white Honda that he
21 was driving that night. Detective Nole testified they
22 were looking for, well, what they found, a knife block
23 set, a green piggy bank. No trace evidence of blood. No
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1 trace evidence of accelerants or gasoline, except in the
2 tank of the thing. No evidence of guns or ammunition.

3 At the house they had a, an arson dog there.
4 That's the house in Sequim. The arson dog, you know,
5 sniffed all of the clothes and no --

6
7 MR. ROSEKRANS: Objection. Arguing facts not in
8 evidence.

9 THE COURT: Once again I'll remind you, ladies and
10 gentlemen, that the attorneys' remarks, statements and
11 arguments are intended you to understand the evidence
12 (sic), help you understand the evidence and apply the law.
13 The attorneys' remarks are not evidence. The evidence
14 consists of the testimony of the witnesses and the
15 Exhibits that were introduced. Your memory of those must
16 serve as the evidence.

17
18 MR. DAVIES: Well, what we're looking at is a photo-
19 graph of clothes in the yard and a dog, been admitted, and
20 again, if you'd look at your notes regarding the search
21 warrant executed at Michael and his girlfriend's house in
22 Sequim, you'll see there were -- this dog did sniff these
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1 clothes and no -- with no results, no hits. No acceler-
2 ants.

3 In the garbage, and there was just no dispute
4 about whose garbage it is, they found a blue t-shirt. A
5 stained blue t-shirt. Here's what they fished out of the
6 garbage. Have a look at it. Pretty well stained. And a
7 pair of dirty socks. You can look at those back in the
8 jury room. The stains on the t-shirt were tested for
9 blood; no result. Pair of shoes tested for the presence
10 of blood. No result. Even the socks were tested for the
11 presence of blood. No result. Nothing that they were
12 looking for was either present in the Honda or at the
13 Sequim house/trailer.

14 And look at that shirt compared to the shirt
15 that Michael was wearing on the 18th of March last year.
16 It isn't even the same shirt. This was collected on the -
17 - I think it was the 31st, possibly the 29th of March, and
18 the picture there of Michael is taken the 18th. It's not
19 the same shirt. And Detective Nole, well, admitted as
20 much, reluctantly.
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1 Now, some of these charges have to do with
2 possession of a firearm and a pellet gun, pellet air
3 pistol, is not a firearm, and that's set out in the Jury
4 Instructions. The State's position is that Mr. Pierce
5 possessed Mr. Yarr's 25.06. Did the State prove beyond a
6 reasonable doubt that Mr. Yarr was missing a 25.06? The
7 testimony that we heard about that was from Mr. Bowman
8 (phonetic), a good friend of Mr. Yarr, who said he
9 remembers Mr. Yarr buying a 25.06, one that he took real
10 good care of, with a nice scope, having, I guess, hunted I
11 think for prong-horn in Montana 10 years ago. That he
12 hadn't seen this gun in two years. And that the gun
13 wasn't ever kept upstairs even. It was kept downstairs in
14 a gun safe with other guns that Mr. Yarr, sort of col-
15 lector items, keepsakes that he had.

19 You heard testimony that there was no 25.06
20 ammunition found at the Yarr place. None. Not spent; not
21 live. All of the ammunition they found, spent, live, .300
22 magnum, and the guns upstairs that were fished out of the
23 fire, and that's hard to see, were .300 magnum caliber
24 guns. A Savage lever action, and it's escaping me what
25

1 the other one was just now, but it had a scope on it, too.
2 So the only 25.06 caliber bullets recovered from the Yarr
3 house were in the floor below Mr. and Mrs. Yarr, and one
4 that went through the floor further back in the house in
5 the living room, went down to the bedroom below,
6 scattered. Those are the only 25.06 rounds recovered.

7
8 So what happened at the Yarr place that night?
9 The answer is: You don't know. We all know the result,
10 and it's a tragic one, but we don't know how it happened.
11 We don't know who was there. And your duty is to apply
12 the law to the facts that have been presented to you.

13
14 One of the instructions has to do with
15 reasonable doubt. It's something that we talked about
16 during *voir dire* a lot. You've got a hard job. You got a
17 really hard job. Made all the harder because the State
18 hasn't proved that Michael Pierce was present at the Yarr
19 home for any of this. Hasn't proved beyond a reasonable
20 doubt that he is the person that did the burglary, the
21 robbery, the murders and the arson. Just saying it
22 doesn't make it so. The State has to prove their case
23 beyond a reasonable doubt.
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1 One motive suggested for this was that Mr.
2 Pierce's bank account was low. Well, yeah, at that time
3 it was \$7.02, but it undulated over the months. You can
4 see that in the bank records that were subpoenaed. You
5 can see that he was getting a tremendous amount of money
6 from -- or for school, some \$14,000.00 a year. That's a
7 lot of money. And that he would borrow against that and
8 then pay his mom back. Ten days after this he had about
9 \$3,700.00 in cash in his wallet that he was borrowing
10 against and was going to pay back. So motive having to do
11 with a need for money doesn't exist.

14 The story told by Mr. Boyd and Mr. Donahue about
15 methamphetamine, what, I mean, methamphetamine is a nasty
16 drug. It inflames and perhaps makes you feel more
17 compelled to do something without any evidence, but that
18 is a late-breaking story; wasn't mentioned after the time
19 or during the course of the investigation until the trial
20 had begun.

23 Mr. Pierce is guilty of theft of an access
24 device. The State has proved that beyond a reasonable
25 doubt. But has not proved that Mr. Pierce murdered Mr.

1 and Mrs. Yarr, burglarized their home, robbed them at
2 gunpoint, and burned down their house to hide evidence.
3 I'm asking you return a verdict of not guilty to those
4 charges because the State has not met its burden and it is
5 a high one. Thank you, ladies and gentlemen.
6

7 THE COURT: Ladies and gentlemen, we're going to take
8 a short afternoon recess and in 15 minutes we'll hear from
9 Mr. Rosekrans. Be at recess.
10

11 CLERK: Please rise. Court is at recess.

12 (RECESS - 3:36:58 to 3:49:18 p.m.)

13 CLERK: Please rise. Pursuant to recess, Superior
14 Court is again in session. The Honorable Craddock Verser
15 presiding.
16

17 THE COURT: Good afternoon. Please be seated.

18 Bailiff?

19 MR. GILMORE: Your Honor, could we be heard before
20 the jury, please?
21

22 THE COURT: Okay.

23 MR. GILMORE: Thank you.

24 The Court's made perfectly clear how the Court
25 will respond to facts not in evidence --

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THE COURT: Can't hear you, Mr. Gilmore.

MR. GILMORE: Maybe if I just come closer.

I know the Court's made it clear it's the Court's position on any objections about references to facts not in evidence, so I don't want to repeat any of those objections. There was one piece of evidence that came in very quickly during the testimony of Officer Apeland about when he was requesting the video to tell a bank person where to search for the video, and he used some expression about the fire starting at eight o'clock. We objected, basis of hearsay and facts not in evidence. I think the Court let it in for the limited purpose of explaining why the request was made, so we would like a protective order against any mention of that because we don't think it was admitted for the purpose of the truth of the matter asserted and that there wasn't evidence for that, so...

THE COURT: Mr. Rosekrans?

MR. ROSEKRANS: Well, I don't recall it that way. I think what Detective Apeland was testifying to was that based upon the fire investigation and his consultation

1 after all the fire investigators got done and met and did
2 their debriefing, that they estimated the time of the fire
3 to be around eight o'clock, and it was based upon their
4 investigation and their estimation of when the fire
5 started as being eight o'clock, and that's why he, he
6 asked for the bank records from around eight o'clock from
7 the US Bank.
8

9 MR. GILMORE: Yeah, the actual objection, I think
10 first objection to it was hearsay, which is what it was
11 because its reference was to the fire investigator's
12 discussion. Nothing came in about him having any founda-
13 tion to lay that personally for that. That was a hearsay
14 reference by him.
15

16 THE COURT: I'll, I'll let the jurors remember the
17 evidence, and if Mr. Rosekrans says something about
18 evidence you don't think was admitted, I'll instruct the
19 jury the same way I did when Mr. Rosekrans made the
20 objections with Mr. Davies.
21

22 MR. GILMORE: Thank you.
23

24 THE COURT: It's up to the jury to remember what the
25 evidence was for. I instructed them at the time, if I did

1 it was admitted for that purpose only, according to --
2 that was Deputy Apeland's statement.

3 MR. ROSEKRANS: Right. Right.

4 THE COURT: But there are other statements. Alright.
5

6 MR. GILMORE: The Court want me to repeat that
7 objection, or can I have a standing objection to that?

8 THE COURT: If you want to, if you want me to
9 instruct the jury as I did during Mr. Davies' argument,
10 I'll do so.
11

12 MR. GILMORE: Alright.

13 THE COURT: I'll tell them the same thing. They are
14 the sole judges of the evidence. They can take it.

15 Alright. Let's bring our jury in.
16

17 MR. ROSEKRANS: And I saw where of the hour-and-a-
18 half Mr. Ashcraft actually used 30 minutes, so...

19 THE COURT: Yeah. You have an hour. I guess we're
20 going to be late.

21 MR. ROSEKRANS: Just a little bit.
22

23 THE COURT: Somebody ought to tell the... I don't
24 know how long you're going to take.

25 (JURY ENTERS)

1 THE COURT: Ladies and gentlemen, please give your
2 attention to Mr. Rosekrans who will make rebuttal argument
3 on behalf of the State.
4

5 REBUTTAL CLOSING ARGUMENT OF THE PLAINTIFF

6 BY MR. ROSEKRANS:

7 Alright. On behalf of Julie Dalzell, the
8 elected Prosecuting Attorney of Jefferson County, and
9 Sheriff Hernandez, whose agency handled this investiga-
10 tion, Michelle Hamm, Patty Waters, the friends and family
11 of, of the Yarr's, and certainly last, but not least, Pat
12 and Janice Yarr (sic).
13

14 Now, what I've got up here is State's Exhibit
15 number 1, and it's number 1 for a reason. We're here
16 because of them. Because they were murdered. Because
17 they were killed. And they are first and they are fore-
18 most in my case and my presentation. When this case first
19 came to me a year ago, a little over a year ago today,
20 these are the number one people and the number one
21 priority in this case. So that's why this is -- It's not
22 a coincidence that this is State's Exhibit number 1. It's
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1 number 1 because it's about them. It's not about Michael
2 Pierce. It's about them.

3 Now, when you go back to my opening statement,
4 the way I did my opening statement was let's look at a day
5 in the life of Janice and Pat Yarr, and I picked March the
6 18th 2009. And for them, like Mr. Ashcraft said, it was
7 just another day in a, in a, in a married couple (sic), a
8 lady that worked, a man that farmed, a man that logged.
9 It was just another day. Never in their wildest dreams or
10 in their wildest imagination or in their wildest nightmare
11 would they have thought what was going to happen to them
12 probably 14 hours after they rolled out of bed, 14, 15
13 hours after rolled out of bed, that they would be forced
14 to lay facedown in their own kitchen in their own home to
15 be robbed by somebody that knew them, somebody who they
16 had given a job to, somebody who they had given money to,
17 and they would shoot them in the back of their heads.
18 Never in their wildest dreams would they have imagined
19 that, and never in your wildest nightmares would you
20 imagine something like that happening to you, in your own
21 home, the place where you grew up, where you raised kids,
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1 where you sent them to school, where you hoped to go ahead
2 and play with your grandkids. Never did they imagine
3 that. Never.

4
5 Now, in opening statement defense said, "Hold
6 the prosecution to the whole story. They can't prove most
7 of it because there's missing pieces." We talked about
8 the missing pieces in *voir dire* and who is responsible for
9 some of the pieces being missing, and that's what you can
10 take into consideration when you're trying to go ahead and
11 put this puzzle back together so that you can really see
12 what really happened on that, on that day. And, see,
13 that's part of the misdirection. That's part of the mis-
14 direction. They can't prove it so, you know, you can't
15 find him guilty. But you've got to think about that mis-
16 direction that the Defendant talked (sic), and how that
17 misdirection is being worked into the defense, okay? So
18 keep your, keep your, keep your eye on the ball.

19
20
21 And he says, "Not everything is as it first
22 appears." And, again, that's part of the misdirection,
23 the misdirection that Mr. Pierce employs as soon as the
24 police figure out, "We got a suspect. We got a person of
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1 interest. We got somebody we can look at," and the mis-
2 direction starts and it continues. It continues and it
3 continues and it continues to today, okay? And, again, we
4 talked about the pieces and that part of that misdirection
5 (sic), and who controls those pieces? You know, law
6 enforcement's out there trying to go ahead and find them,
7 and it's a race to go ahead and find these pieces. And
8 the pieces, boy, they're just disappearing like crazy, you
9 know? It's like, "Well, I got to get rid of this piece.
10 I got to get rid of that piece," so you have to understand
11 who controls that and why law enforcement may or may not
12 have it.
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15 And I think one other thing that was said in
16 *voir dire* is I think Mr. Davies says, you know, "In
17 America, in the State of Washington, you know, the Defen-
18 dant doesn't have to do anything." In fact, I think he
19 said, "I could sit here like a potted plant and not do a
20 thing and it's the State's burden to go ahead and prove
21 beyond a reasonable doubt that somebody has broken the
22 law," and that's correct. But the flipside of that coin
23 is is if you do put on a defense of any sort, then, you
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1 know, as a juror, you got to hold them to it. Say, "Okay.
2 You threw it out there to see whether or not it would
3 stick, so we're going to go ahead and hold you to it."
4 Just, you know, throw something out here and throw some-
5 thing out over there. Hold them to that. Hold them to
6 it. That's very, very, very important.

8 Alright. So, golly, what was it? Two weeks
9 ago, or almost two weeks ago we started out with opening
10 statements? It was on a Thursday, so I guess tomorrow
11 morning would be exactly two weeks ago when we started
12 this, this saga, I did a day in the life of Janice and Pat
13 Yarr. Well, let's do a day in the life of Michael Pierce,
14 who Mr. Davies described in his opening statement or
15 closing arguments, "He's just leading a regular life."
16 Alright. Well, let's just take a look at one of those
17 days of his regular life, okay?

18 March the 18th 2009 he wakes up in Sequim, cuts
19 class. He's paid to go to school. That's his job. He
20 cuts class. Mike Hansen told you he was a no-show at his
21 review class. He wants to get some sort of a degree or
22 something in auto technology that's being paid for, and he
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1 cuts class. He's got an exam the next day. So that's how
2 he starts his day out, "Aw, I'm not going to go to school.
3 Yeah, I know I'm getting paid to go to school. I don't
4 have to go to work, so I'm just not going to go, I'm not
5 going to go to school. I'm going to cut class."

6
7 So sometime we know later on that day, you know,
8 he drives to Quilcene where he goes to his mom's house
9 over on Lake Leland Road, and he takes the tire off her
10 car because she's got a slow, a slow leak, you know, so
11 she calls, she calls her son, "Come on over and take care
12 of, take care of my tire." And we know that he drove
13 Tiffany's white Honda to Port Townsend because that's what
14 Ila told us. And we know that they got the tire fixed.
15 And she tells us, "After we got the tire fixed we went
16 over to QFC and we did some shopping." And we know that's
17 a fact because we got a picture of the QFC receipt that
18 was found in the Honda 10 days later that they did check
19 out at 3:48 p.m. And they go back to Quilcene and they
20 get home somewhere between 4:30, five o'clock, because
21 that's what Ila tells us. You know, she says, "Well, you
22 know, we left there," and we know if you're leaving at
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1 3:48 it's about, maybe where she lives on Lake Leland, it
2 may take a half-an-hour to get there, so they get home
3 between 4:30 and five o'clock. They may have gone by and
4 stopped at some other house to look at for rent, but they
5 were home around 4:30, five o'clock.

6
7 Now, this is where the story splits. Doesn't
8 take long and the story starts to split. And I remember
9 back during *voir dire* talking to the jurors about what's
10 important to each individual juror, and one juror said,
11 "Well, a consistent story is important to me." Consis-
12 tency. It's got to remain the same. It's got to be a
13 consistent story. Well, the State's case has been consis-
14 tent right from the beginning, and I'll go through it,
15 and, and, actually, you know, I put this case together in
16 kind of a chronological manner. I know at one point it
17 may have seemed like Apeland's on, Apeland's off;
18 Apeland's on, Apeland's off. Nole's on, Nole's off.
19 Patty's on, Patty's off. Michelle's on, Michelle's off.
20 But it was chronological so that while you're taking your
21 notes and you go back to try to deliberate on this thing,
22 you can look at your notes and you can say, "This thing
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1 starts at Point A and goes all the way to Point Z, that's
2 chronological." That's the way I did it. Number one, it
3 makes more sense to me, and I'm hoping it would make more
4 sense to the jury and it would be easier for the jury to
5 follow.
6

7 So you've got a consistent statement from the
8 State, but the consistency, that's where it ends for, for
9 Ila Rettig and, and, and Michael Pierce because Ila says,
10 "It was getting dark when he fixed the tire." But Gary
11 Hammond, who was one of our fire investigators, as part of
12 his job because these guys are really thorough, he checked
13 with the US Naval Observatory and he said, "Well, sunset
14 that day was 7:22 p.m." Remember, we're only a year, a
15 year back. All you got to do is look out the window this
16 evening to know what time it gets dark. So sunset on that
17 day was at 7:22 p.m. and the end of civil twilight was at
18 7:53 p.m., so the sun, you know, goes down below the moun-
19 tain, but it still stays light, and then it's officially
20 twilight at 7:53 p.m. So she says, "Well, he fixed my
21 tire and it was just starting to get dark," so that means
22 it's somewhere between 7:22 and 7:53 p.m. Maybe 7:30 when
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1 he's fixing the tire according to Ila Rettig. And she
2 says, "We ate and we watched TV and he left at 8:00 p.m."
3 And she said that, you know, when I showed her, you know,
4 and she, she was a little fuzzy after cross examination, I
5 said, "Well, let's just go back and look at one page where
6 you say three times, 'It was 8:00. It was 8:00. Yeah, it
7 was 8:00.'" Okay. No confusion. It was eight o'clock.
8 But, and I told her, I said, "But," I said now, "Wait a
9 minute. So you say, you know, you ate, you watched a
10 little TV and he left at eight o'clock, but at 7:02 p.m.
11 he's calling you, and at 7:03 p.m. you're calling him.
12 You know, what's your explanation?" And I think her
13 explanation was, "Well, that certainly is odd." I guess
14 that just didn't dawn on them that we had the phone
15 records or would get the phone records, so she didn't have
16 time to come up with an excuse for that because, bang, we
17 shot a hole right square in the middle of his alibi. You
18 weren't home up until eight o'clock, my friend, you know,
19 unless their house is so big that they get on the cell
20 phone to call each other to dinner. I guess that's the
21 only explanation she could come up. Well, no, it's a one-

1 bedroom, one-bath house, alright? So, boy, there's a,
2 there's a hole right there.

3 Now, don't let defense Counsel confuse you, you
4 know, or, or trick you with this tower information because
5 he did get that Exhibit and says, "Well, you know, here,
6 it says it was Tacoma, it says it was Seattle, it says it
7 Port Townsend," you know. First he wants you to believe
8 that the phone call was that he was in Sequim when he made
9 this phone call. Well, then, he, you know, turns around
10 and says, "Well, no, it says Seattle, Tacoma, Port
11 Townsend." You can't have it both ways. That's just when
12 you make the call, depending upon, I don't know,
13 atmospheric conditions or whatever, that's just the tower
14 that picks it up and relays it, okay? That's not it. You
15 know, so there's, there's no explanation there. So, so
16 she has no explanation.

17 But even if that's no good, "Well, you know, he
18 left at eight o'clock. You know, he changed the tire
19 about dark. We ate, watched TV and, and, and, and, and
20 then he left about 8:00." But wait, we've got him at
21 Henry Hardware, Ila. He's at Henry Hardware between 6:40
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1 and 6:44 p.m. This is not a very good alibi because when
2 she's giving the statement trying to alibi her son, she
3 doesn't know that he's at Henry Hardware. She doesn't
4 know about the phone bills (sic). That's not very --
5 Well, I guess she's consistent. She's consistently off.
6 She's consistently not being honest or truthful or upfront
7 with the investigators. She's trying to cover for her
8 son. I'm sure she loves her son. It's got to be a tough
9 spot for a mother to be in, knowing that your son's
10 accused of killing two people that you know, that you live
11 next to, but she's not doing a very good job and that's
12 not a very good alibi.
13
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15 Now, that being said, and, and, and Mr. Ashcraft
16 talked about it, the law does allow you to infer certain
17 things from the evidence, okay? So that's what closing
18 argument is. I'm telling you what I believe or remember
19 the evidence may be, and I'm not going to try to put any
20 words in your mouth. I'm not going to try to misdirect
21 you or mislead you or anything, but when you got one piece
22 of evidence here and you got another piece of evidence
23 over here, you can make an inference to get over there.
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1 So you're allowed to go ahead and, and, and infer that.
2 It's like, you know, I smell smoke, so I can infer that
3 something must be burning, alright? So you can, you can
4 make the -- even though you don't see the burning, you can
5 smell the smoke, you said, "Something's on fire," alright?
6 So you can make those things, okay? And you can make
7 those inferences to go ahead and connect the dots and to
8 fill in the missing pieces of this puzzle.
9

10
11 You know, one of the things you got to watch out
12 in this little puzzle thing is is, kind of like we talked
13 about in *voir dire*, you know, you're going to have that
14 sack, you know, that you lost the box and you got this
15 sack and you assume that the pieces that are in there all
16 go to the same puzzle. What you got to watch out for is
17 something that, you know, throws a few extra pieces in the
18 puzzle that don't belong there. I guess that would be a
19 real nightmare if the power went off if, you know, you
20 just had one sack that had two different puzzles in it,
21 trying to figure out which pieces goes where and which
22 piece does what, you know, and I think we talked about
23 that on *voir dire*, you know, getting together and doing
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1 those puzzle pieces, so watch out for people that go ahead
2 and try to, you know, slip another piece of that puzzle in
3 there, or make a pieces fit where it doesn't belong.

4
5 Okay. So I think it's reasonable for you now to
6 go ahead and infer because, as I said, you can believe
7 some, all or none of what a witness says at any particular
8 time, and you just have to kind of take into consideration
9 why they're saying it, where they're coming from, and what
10 their vantage point might be. So I think it's reasonable
11 to infer that Ila's probably telling the truth, that they
12 did get home between 4:30 and five o'clock, and he
13 immediately got out and he fixed the tire. And he, you
14 know, he may or may not wolfed down some chili (sic), I
15 don't know. She was pretty adamant about that. She said,
16 "I know we had ravioli because I bought garlic bread."
17 That's the one thing she's sure of that day is she bought
18 garlic bread, and the receipt proves that, okay? So he
19 changes the tire, he wolfs down some ravioli, and he says,
20 "Mom, I got to run. Got to run. Got a big test in the
21 morning," because we know that because Mike Hansen
22 testified he had a big test and, you know, spring break
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1 was the next day and he had, he had an exam. "Got to run,
2 Mom. Got to, got to, got to get home. Got to get some
3 sleep. Got to take a test." Doesn't tell his mom, "Well,
4 I really need some methamphetamine," okay, "but I don't
5 have any money. I've only got \$7.00," and we know he only
6 has \$7.02 in his account, in his account because the
7 Sheriff's Department, in their thorough investigation, got
8 his bank records, you know, and they know he's only got
9 \$7.02 in his account. So his school check hasn't come in
10 or whatever and he needs, he needs some money, so his next
11 school check is towards the end of the month. I guess
12 that's the only thing really significant about this thing,
13 that he's got a school check, is is he's not going to get
14 any money for another 10 days. He can't wait 10 more
15 days, okay? He's, he's just got the urge to go out and
16 get him some methamphetamine and he can't wait 10 more
17 days. And he can't borrow money from his mom because she
18 knows that she tells us, mom says, "He already owes me 700
19 bucks and I was counting on that check getting cashed so
20 he could pay me back." And I think I asked her, "Well,
21 you didn't get paid back," and she shot back, she says,
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1 "No, you guys got all the money." So I guess, you know,
2 it hadn't been turned back over yet or not, but she was
3 waiting for that check to get cashed so that she could get
4 the money back that he had been borrowing off of her all
5 that time.
6

7 So he's thinking, "Alright. Who do I know in
8 Quilcene that has money?" Okay. Well, we know he knows
9 Tommy Boyd, and we know that he knows Mike Donahue, and we
10 know they don't have any money, okay? "But who do I know
11 in Quilcene that has money? Well, the Yarr's. I know
12 they got money. And they have cash, because they paid me
13 in cash. I can go up there and get some money. But
14 there's one problem: I don't want to work for it. I want
15 my meth now. I don't want to work for it and then go get
16 it; I want my meth now, so that is a problem. And I'm
17 pretty sure Pat's just not going to give it to me without
18 me working for it. So, hmmm, I've got to get some money.
19 He's not going to give it to me, so I need a gun, but I
20 don't know anybody that has a gun." Well, I guess if you
21 believe Mr. Walsh, he could've gone down there to the
22 Boyd-Levett-Richards' compound or whatever and said, "Does
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1 anybody down here have a sawed off shotgun I can use?"
2 You know, we don't even know whose trailer that was in,
3 okay? But he doesn't know anybody that has a gun. He
4 doesn't have any money to buy a gun, and he can't legally
5 have one anyway, so he couldn't go to a gun store and say,
6 "I need to go ahead and buy, I need to go ahead and buy a
7 gun," because he can't legally buy one or own one or have
8 one. "Well, I guess I'll go steal one." Well, you don't
9 want to go into a gun store to steal a gun because you
10 probably won't get out the door, "So I need to go ahead
11 and get something that looks real," so what does he do?
12 He, he, he, he goes to Henry Hardware here in Port
13 Townsend. And he enters the store at 6:40 p.m., talks to
14 Karen House, you know, "Hey, do you all have any pellet
15 guns or anything like that?" You know, Miss Fine doesn't
16 really know for sure, but Karen says, "Oh, yeah, yeah,
17 yeah, yeah. Come on." So she takes them back to where
18 they are and she unlocks them, and she says, "Take your
19 pick," and, of course, of the guns that're there he picks
20 out the most realistic-looking one and, and says -- And
21 we know it's realistic because Detective Greenspane said,
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1 you know, "If you had pointed that gun at me, I would've
2 drawn my weapon and told you to drop your weapon." So he
3 picks out the most realistic-looking pellet gun. And,
4 then, he says, "Where's the paint? I need to look at some
5 paint." And she says, "Well, it's right over there," and
6 she goes back up to the register. Well, that's another
7 one of his little misdirections, okay, because he goes
8 over to the paint section and she says, "Well, we hear him
9 over there rattling around. We hear cans rattling and
10 whatnot," but what he's doing over there is he's removing
11 the gun from the box and he's hiding it on his body, and
12 then he walks back up to the front of the store, and you
13 can see on the video, and hands her the box, and she
14 testifies, "I've got to go out to my car and get my
15 wallet." And, and like Chris said, that's where the
16 intent is formed. You know at this point: Okay. He's up
17 to no good. He's planning on doing something because he
18 just shoplifted this pellet pistol, okay? Hand her the
19 empty box, goes outside and doesn't get his wallet,
20 because she goes outside, she's like, "Hey, hey, hey," you
21 know, "is he going to get his wallet and come back in?"
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1 What's the deal?" And he drives off at 6:44 p.m., they go
2 in, the box is empty, they look around the store, they go
3 to the paint department, the gun is missing.
4

5 Now, I think one of the things that people
6 wrestle over is, is, is concepts of time. You know, how
7 long does it take to commit a crime? Well, here's a
8 perfect example: You want to know how long it takes to
9 commit a crime? You just saw how long it takes to commit
10 at least this crime on the Henry Hardware thing, because
11 he goes in at about 6:40, asks some questions, goes back
12 and looks at what he wants, goes over and rattles around
13 with a few paint cans and leaves. It took him four
14 minutes to commit a crime. You know, so somebody will be
15 like, "Well, you know, it takes a long time to go ahead
16 and do this stuff." Well, when you start thinking about,
17 if you got your mind made up, you say, "Okay. Now it's
18 time to go ahead and do it." You go in, you do it, you
19 don't waste any time and you do it. So you're in, you're
20 out, and you don't waste any time because you don't want
21 anybody to catch you. You don't want anybody to see you.
22 You don't want anybody to recognize you. Of course,
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1 you're not thinking, and I think Mr., Mr. Davies said
2 something about he's not the smartest criminal in the
3 world or, or whatever, got to know that Henry Hardwares
4 (sic) is on video. I mean, everything's on video now.
5 You know, you got to know that they're going to put two
6 and two together, but when you want that methamphetamine,
7 you'll take those kind of chances, I guess. You'll take
8 those kind of chances.
9

10
11 So, anyway, so Henry Hardware, it gets on (sic),
12 gets, you know, and goes to 101, and Detective Apeland
13 tells us that he, you know, timed it one day driving, I
14 think, you know, the normal speed, and it was approxi-
15 mately 22 minutes. So if he leaves Henry Hardware at
16 6:44, and you see the little Honda going up there behind
17 the Safeway, that puts him back, you know, at least on 101
18 in the vicinity of the Yarr home at around 7:06 p.m. So
19 now he's down to 101, he's down in Quilcene, and he hides
20 his car where you can't see you, you know, because that's
21 a pretty straight stretch, you know, and, and, and I've
22 been up and down that road several times since this
23 happened. I'm thinking like, "Golly, but how could you
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25

1 not see that? How could you not see that car?" Well he
2 hides his car in any one of those little old side roads
3 that you see, and I forgot who, who testified about that,
4 but they put one of those photographs up there that showed
5 101 and they were pointing at all these little driveways.
6 Oh, whoever it was that went up and took that photograph
7 up on hill. But, anyway, so he hides his car probably in
8 one of those. At first I was thinking, "Maybe it was that
9 little pullout down there on the right-hand side," but
10 then you got all those little driveways. So 7:06, 7 oh 10
11 (sic), whatever, he hides his car in one of those little
12 side roads because it's still kind of broad daylight out,
13 okay? And we know, we know he had to hide the car
14 because, you know, Pam Roberts says, "Well, you know,"
15 maybe she drove by and didn't see the car, I don't know,
16 but she, she tells you, "I didn't see a car, but I thought
17 there may have been a car wreck when I saw this guy
18 walking down the road," so she's looking for, you know, "I
19 didn't pass a car wreck." So, you know, he hides his, he
20 hides his car and he standing on 101 and she says right
21 about opposite where the Yarr's live. He's trying to
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1 screw up the courage. It's like, "Okay. I got my gun.
2 Looking at the Yarr house. Now, am I going to do this or
3 am I not going to do this? I need to wait for a little
4 bit." Or maybe he's watching the Yarr house from that
5 vantage point because it is March and the, and the, and
6 the leaves aren't out yet and maybe he's, maybe he's
7 watching to see who's there. Maybe he's watching Greg
8 Brooks. Greg says he was there sometime between 7:00,
9 7:10, give or take, so maybe he's standing on the road
10 saying, "Somebody just drove up. I guess I better wait."
11 So he's down there on 101, he's got his car hid and he's
12 thinking, "Okay. I got to do this thing. I got to do
13 this thing," alright? And then he hears a car coming.
14 And, now, he's waited a little bit longer because it's
15 getting a little bit darker --

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18
19 MR. DAVIES: Judge, I'd object to this line of
20 argument as there are no such facts in evidence.

21 MR. ROSEKRANS: That Greg Brooks was there at 7:10?

22
23 THE COURT: Ladies and gentlemen, once again, the
24 evidence that you are to consider in making your decision
25 consists of the testimony of the witnesses. The

1 attorneys' remarks, statements and arguments are not
2 evidence. They are intended to help you understand the
3 evidence and apply the law.
4

5 MR. ROSEKRANS: Alright. So we know Greg Brooks is
6 there between 7:00 and 7:10, and if he left Henry Hardware
7 at 6:40 and it took 22 minutes, we know he's there at 7:06
8 to 7:10, and Pam Roberts says she drives down the road at,
9 what she'd say, somewhere around 7:45, and she sees one of
10 the largest human beings that she's ever seen. A big man
11 walking down the road. One of the largest guys she's
12 ever, ever seen. Big shoulders. Huge shoulders.
13
14 Alright. And so this, this big guy on the side of the
15 road, here's a car coming from behind him. Now, if you're
16 hitchhiking or you're just walking down the road and you
17 hear a car coming, the natural inclination is is, "Gee, I
18 wonder if it's anybody I know?" You know, or, "Maybe I
19 better get out of the way so I don't get run down." Does
20 he turn and look at the car? No. This big guy that she
21 sees she says takes his right hand and covers his face and
22 turns away. Okay? Now, she said may have been, he may
23 have been wearing a hoodie or was wearing a hoodie or may
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1 have been wearing a hoodie, but she says he covered his
2 face and turned away. As she slows to a crawl, because
3 she sees this really big guy, she thinks, "Well, maybe he
4 needs some help," or, "Maybe there's been a car wreck,
5 something's up." She lives down there. She drives that
6 road every day. Maybe it's somebody she knows. Maybe
7 somebody needs help. You know, she's going to be the Good
8 Samaritan, and she slows to a crawl.

9
10
11 Now, remember, she's driving -- I forgot what
12 kind of car she said it was, but it was a real small car,
13 so she's driving a real small car so she's sitting down
14 there kind of low and here's this big guy hulking on down
15 the road, and her daughter's next to her, so as she's
16 slowing to a crawl she's, you know, obviously looking
17 down, looking across her daughter, looking out the wind-
18 shield, looking out the side window to see if she can get
19 a look at this guy who, you know, does this number here in
20 an attempt to go ahead and conceal his face and turn away,
21 which would make it a little bit hard to go ahead and see
22 the back of his jacket, and she says it was a huge man, he
23 was fair-skinned. Well, she hit that. You know, we kind
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1 of talked about, "Well, are we talking about maybe some-
2 body with a Albino pigmentation or somebody that just got
3 back, you know, from a vacation and has a pretty good
4 tan?" She says, "No, he was fair-skinned." Okay. And
5 she nailed his age. She said, "Between," I thought it was
6 like, "26 and 35," or something like that, and I think he
7 just turned 35, so she nails his age. Pretty good
8 recollection. And she said he was wearing a flat back
9 jacket that looked textured on the back. Well, they kept
10 trying to get her to say camouflaged, and she kept saying,
11 "No, I'm not saying camouflage because it had some sort of
12 a texture on the back," alright? Now, there's not very
13 good lighting down there. There's no streetlights,
14 alright? It's 7:45. It's almost civil twilight; it's
15 dark. You're down there in the valley, okay? You're
16 between, you know, two ridges. It's probably pretty dark,
17 you know, plus you got the tree lines on both side (sic),
18 so it's not lit up. She says, "It was textured," so she
19 can't tell you it said Peninsula College Automotive
20 Program or anything like that, but she was insistent it
21 was not camouflaged. They tried to put those words in her
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1 mouth, okay? No. She was insistent she did not say camo.
2 She wouldn't let them put any words in her mouth or try to
3 go ahead and, you know, and trick her. She didn't say he
4 wasn't wearing a ball cap. She says, "I couldn't recall a
5 ball cap," alright, because he does one of these numbers,
6 okay, to where she can't see him. So she says, "I don't
7 recall a ball cap." And, then, she gets this really
8 creepy feeling and she's got her daughter with her and
9 it's like, "We're out of here. We're out of here." And
10 it disturbs her so much, and I think she tells some of her
11 coworkers the next day, and then she calls the Sheriff's
12 Department when she hears that, you know, right where she
13 saw this guy there was some problems at the, at the Yarr
14 house.
15
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18 So now this car has gone by and this big,
19 hulking guy on the side of the road says, "Phew, it's now
20 or never." Meanwhile, back at the Yarr farm, you know,
21 Janice is home from work. Like she does every day, she's
22 called her daughter, Patty, and they talk between 6:09 and
23 6:23, she calls her daughter to say, "Michelle's daddy-in-
24 law had just passed away. Your sister would probably like
25

1 to go ahead and hear from you. Here Dad's home," you
2 know, "talk to Dad." Just that normal, everyday thing,
3 you know, that they do, and she says, "Oh, you know, well,
4 Dad says dinner's ready, you know, it's time to eat," and,
5 you know, "here's your Mom. Dinner's on the table. It's
6 ready. It's ready to go," so they're having their dinner
7 around 6:23, 6:30 probably is when they're, when they're,
8 when they're having their leisurely evening dinner like
9 they did every day, you know, of their lives. And the
10 next thing we know is, you know, Greg Brooks wanted to do
11 -- was going to do some work for them, and he says, "I, I
12 got there sometime around seven o'clock, give or take,
13 maybe a little bit later, I knocked on the door and, you
14 know, there was no answer," and I think he said that he
15 went up to the garage port door where everybody who knows
16 the Yarr's go. You don't go downstairs. You know, you go
17 up to the carport because that's, that's, that's where
18 they are, "and I didn't see anything wrong, and I looked
19 in the kitchen and I didn't see any bodies. I didn't see
20 anything wrong. And it was still daylight." I think they
21 tried to say, "Well, how could you tell that? It was
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1 dark. It was dark." Well, no, if it's seven o'clock,
2 7:10, the sun hadn't even gone down, okay? Or, you know,
3 now, the Yarr's house backs up to the west so, you know,
4 it may be, you know, maybe there was some shadows, but
5 still, it's still daylight now. But, now, we don't know
6 where they are at that point. He says both their vehicles
7 were there, but we know they're not dead because they're
8 not laying on the kitchen floor. Maybe they're downstairs
9 doing something in the office or whatever, or maybe
10 they're out back or maybe they're watching TV, or, you
11 know, maybe they're in... I don't know. Or maybe Pat
12 walked down to the barn to take a look at the cows that
13 are down there. He's got cows all over the place. He's
14 got some at Mr. Bowman's place, he's got some on his
15 property, he's got them, he's got them everywhere, so
16 maybe he just walked down to the barn for a few minutes
17 rather than drive his truck, it's only a couple-hundred
18 yards, to check on his cows. Maybe Janice is downstairs
19 doing a load of wash; I don't know. But he says, "Nothing
20 looked wrong," okay?
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1 Well, then, you know, Deit Broderson (phonetic)
2 says, "Well, you know, I called Pat around 7:30 and had a
3 really short phone call with Pat," which was not unusual.
4 If he felt like talking, he'd talk. If he didn't feel
5 like talking, he didn't talk. He didn't think there was
6 anything wrong, and that's around 7:30, about the time
7 that, you know, this big, hulking guy is kind of hanging
8 around on 101 trying to screw his courage up to do the
9 deed.
10

11
12 So, Mr. Pierce makes his move, gets in his car,
13 drives up to the home. Brooks is gone. It's dark enough
14 now, gets in his car, drives up to the home because he's
15 been there so he knows that's where you got to go ahead
16 and go. Gets to the kitchen door and, you know, they
17 either let him in because they recognize him, or go to the
18 door and say, "What do you want," or he forces his way in.
19 One way or another he's going to go in. Just like Chris
20 said, he either forces his way in, or once he gets in, if
21 he's invited in, then, you know, he's an uninvited guest
22 when he decides it's time to go ahead and start, you know,
23 committing crimes against these, against these people.
24
25

1 That's the burglary. When you enter somebody's house,
2 doesn't matter if they're home or not, but if you enter
3 somebody's house or building with the intent to commit a
4 crime, or you're in there and then you form the intent to
5 commit a crime, you are committing a burglary. Doesn't
6 matter if they're home; doesn't matter if they're not
7 home. There's your burglary. Now, he produces his pellet
8 gun, okay? Because he knows Pat has guns and he's
9 probably not going to like this guy showing up saying, "I
10 want money. I don't want to work for it. Just give me
11 some money," because he's got the urge or the drive to go
12 ahead and do some methamphetamine.
13

14
15 And we know that, you know, the daughters, Patty
16 testified that, you know, Dad a lot of times, you know,
17 she kept the, she kept the -- he kept his rifle right
18 there by the slider in case he looked out the window in
19 the evening and saw a coyote messing with his cattle,
20 he'd, you know, he'd whip open that slider and he'd grab
21 that 25.06 or whatever rifle he had there, and he'd snipe
22 that coyote (sic) and, and, you know, that was the end of
23 it. And she says, "I shot off the balcony with Dad, so it
24
25

1 wasn't unusual for Dad to have a gun there. It wasn't
2 unusual to have shells laying around or whatever." So, so
3 he comes in, you know, "I want money." And you can just
4 imagine, you can just imagine Pat Yarr, "You want money?
5 How dare you come to my house and demand money?" You
6 know, "How dare you?" And, like Chris says, I think at
7 that point there's probably a race to the gun. You know,
8 he's inside, he's got this pellet gun, maybe Pat looks at
9 that and goes like, you know, the Crocodile Dundee thing,
10 "That ain't a knife. This is a knife," okay? "That's not
11 a gun. Who you trying to fool with that," and there's a
12 struggle for this 25.06 and it discharges and one round
13 goes into the living room floor, and we had that photo-
14 graph. It's kind of out of the way, but if he runs over
15 and they're wrestling over the gun over by the slider and
16 this big guy is wrestling with Pat, who's 60 years old,
17 and the gun goes off and bang into the floor. Or maybe he
18 got the gun and said, "I'm serious. I mean business."
19 Pow. "Now, do what I tell you to." Struggle for the gun,
20 gets the gun, gets them under control, overpowers Pat, and
21 being the good husband, you know --

1 MR. DAVIES: Judge, again, I'm objecting to this line
2 of argument as it is unsupported by any evidence admitted
3 at trial.

4 MR. ROSEKRANS: These are inferences that you can
5 make from the evidence, that you got two bullets --

6 THE COURT: The objection's overruled. He can make
7 the argument. The jury heard the evidence.

8 MR. ROSEKRANS: You can say later, you can go back in
9 the jury room and say, "Pretty interesting inferences, Mr.
10 Rosekrans. Phew, boy, that's a leap." Or you can say,
11 "You know, yeah, you're right." You got one bullet hole
12 over here not that far from the slider where the guns are
13 normally kept, and you got two bullet holes over here, so
14 you can reasonably infer that there was a struggle between
15 Pat Yarr and somebody in that house that went through
16 that, that went through that floor (sic).

17 Okay. So overpowers Pat. Probably doesn't want
18 to do anything at this point to go ahead and place his
19 wife in any kind of jeopardy or danger, "Give me the
20 money." "What do you mean you don't have any money," you
21 know. "I don't have any money," you know. "But," you

1 know, "don't hurt us. Don't hurt my wife. Don't hurt me.
2 I'll give you my debit card. Please don't hurt us," okay?
3 "I'll give you my debit card. Please don't hurt us."
4 Gives him the debit card, obviously gives him the PIN
5 number because you can see Mr. Pierce, and defense Counsel
6 says it's Mr. Pierce, okay, in the bank video, looking at
7 a PIN number. You got a one in 10,000 chance of guessing
8 what that number is. He had it written down on a piece of
9 paper. Mr. Davies didn't try to explain away how he got
10 the PIN number. I know how he got the PIN number. He got
11 it from the Yarr's. He didn't get it from the mysterious
12 Mr. B. In fact, he didn't even talk about the mysterious
13 Mr. B. He got the PIN number from the Yarr's. Couldn't
14 explain that away. Didn't even try to explain that away,
15 okay?
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19 Pat --

20 MR. DAVIES: Again, Judge, I'll object to this line
21 of argument as it's unsupported by the evidence, and to
22 preserve the record, we'd move for a mistrial.
23

24 THE COURT: Objection's overruled.
25

1 This is argument, ladies and gentlemen of the
2 jury. If you find it's not supported by the evidence,
3 you're obviously free to ignore it, but...
4

5 MR. ROSEKRANS: And what we know about Pat Yarr from
6 what some of his friends have told us and his daughters
7 have told us, he is not going to take this laying down, in
8 spite of the fact that he was laying down eventually. He
9 was not going to take this laying down. He probably said,
10 "This ain't over. I know you. This ain't over." Okay?
11 I betcha he was hot. Makes these two people lay down on
12 their floor, in their home, in their kitchen, almost head-
13 to-head, face-to-face where they can see each other.
14 Where they look into their eyes. They can look into their
15 eyes. "I can't leave any witnesses, especially one
16 that'll probably kill me the next time he sees me." And
17 he shoots. There's your premeditation. "Lay down on the
18 floor. Say your goodbye's." He shoots each of them in
19 the back of the head, and just like Mr. Ashcraft said, one
20 round into the floor, got to jack another round into it,
21 bam. Got to jack another round into it, bam. Premedita-
22 tion doesn't mean, "Well, I got to take a couple hours to
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1 go ahead and think about this." How much time does it
2 take you to go ahead and make your mind up to go ahead and
3 do something? Okay. We're not talking about knee-jerk
4 reaction. How much time does it take to go ahead and
5 decide that's what you're going to do? That's how much
6 time it takes. Shoots them both in the back of the head
7 execution-style, pointblank range. Got the gun down, it's
8 a rifle with a scope, got the gun down, shoots them
9 execution-style, pointblank range with a high-velocity
10 round. I don't care how you cut that, that is murder.
11 That is murder. No if, ands or buts about that.

14 And it did, that high-velocity round did just
15 want the medical examiner and Dr. Taylor said it did:
16 Their heads exploded. It's a high-velocity round, not,
17 like Mr. Walsh says, not a high-caliber round; it's a
18 high-velocity round, designed to go ahead and take down
19 moose or deer or elk or, or whatever, okay? And at first
20 I'm thinking, this is how, this is how much I know about
21 guns, ".25 caliber. I remember .25 calibers when I was a
22 policeman. Those are those little old Saturday Night
23 Special pistols." No this is a 25.06, and I think that's
24
25

1 what Mr. Broderson said, he says, "It's like the Army uses
2 a 30.06." This is just a hair underneath what the Army
3 uses, okay? Their heads explode. Blowback goes every-
4 where, everywhere. We know it goes across the kitchen
5 because they find skull stuff up against the kickboard on
6 the other side of the wall, they find skull stuff there,
7 and it goes all over the shooter because he's down there.
8 Blowback goes everywhere. And it's all over the shooter.
9 Here's an inference for you, here's something you can
10 infer: The blowback is all over the shooter, and what
11 does he do? He turns around, goes over to the sink, and
12 he washes up, because he tells us the shooter is covered
13 in blood. He is the shooter. He's got blood and skull
14 and hair and brain matter and tissue all over him. It's
15 like golly, especially if you shoot two people. You know,
16 you got some with one, you got some with another, so he
17 turns and he goes to the sink and washes up because the
18 shooter, he tells Mr. Apeland, is covered in blood. Of
19 course he is; he's the shooter.

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24 And Mr. Donahue tells us that, you know, when he
25 came in the trailer he smelled clean. He smelled like he

1 just stepped out of the shower. He didn't say he took a
2 shower. He smelled like he just stepped out of a shower.
3 He smelled like soap because he's right there and he's
4 got, you know, the Joy or whatever kind of dishwashing
5 soap that may be there, or hand sanitizer, and he's wash-
6 ing his face and he's washing his neck and he's washing
7 his hands and his arms and everything because he's got
8 stuff all over him because he smells -- See, a piece of
9 the puzzle. Connect the dots, okay? He smells like
10 smoke. Or maybe he went home, you know, because, you
11 know, Mrs., Mrs. Rettig said, "Well, you know, there's
12 three ways into my house and Michael has the back bedroom
13 or whatever and he can get there and the bathroom's right
14 there." I don't know if he washed up at the Yarr's house.
15 Makes sense to me. You know, or maybe he went down to the
16 shower at the Marina, I don't know. We know from the
17 search of the trunk that there was like soap and shampoo
18 in there, you know. And, and, and a change of clothes,
19 okay? But I think if he says, "The shooter was covered in
20 blood and I helped washed the shooter off," it was in the
21 Yarr home. It makes sense.

1 So, then, it's like, "Okay. Now I'm all cleaned
2 off," and he goes out to the carport and he gets gasoline,
3 put his gasoline in, and you heard the testimony from the
4 fire investigators, from Mr. Tracer, Mr. Hammond, Mr.
5 Bentley, you know, he, he, he, he douses the body with an
6 ignitable liquid, okay? And that's what Hammond says.
7 You know, and he pours a trailer, you know, Hammond and
8 Bentley, who testified on different days, both say the
9 same thing, he pours a trailer, he douses it, douses it
10 there, douses it there, pours a little trailer out to the
11 door, you know, holds the door open, pours more gas there,
12 goes around, goes around all the way to the end of the
13 carport, and that's where he finally stops, so he's got
14 his trailer.
15

16 And, and, and, now, so sometime during that time
17 period it's like, "Okay. I've got the debit card. I've
18 got the debit card number. I've got the rifle. I wonder
19 what else I can get?" Well Detective Nole tells you when
20 they were drawing up their search warrants they were
21 looking for purses and wallets, and when they went sifting
22 through all that debris, you know, shaking and everything
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1 with those little screens, they didn't find the charred
2 remains of any wallets or any purses or anything like
3 that. Wallets are gone. Purses are gone. The rifle's
4 gone because that's worth something. You can sell it,
5 trade it, barter with it. "I'll give you this if you'll
6 give me some dope," you know, whatever. That's gone,
7 okay?
8

9
10 Now, Mr. Hammond, he didn't assign any time to
11 this, neither did Mr. Bentley, and I think it was Bentley
12 that said, you know, "If you were sitting in your Lazy Boy
13 at home, you don't understand, that thing's all full of
14 formaldehyde and all the rest of that stuff and if you
15 drop a match or cigarette in it, your, your Lazy Boy will
16 go up in a matter of minutes." He didn't say a house
17 would go up in a matter of minutes, so that's a mischarac-
18 terization. He said, "Your Lazy Boy would go up in a
19 matter of minutes just because of all the stuff that's in
20 your, that's in your chair," so don't, you know, don't run
21 down that rabbit trail, don't bite, don't bite for that.
22
23

24 And, you know, he didn't say that the fire
25 started -- Neither one of these guys said the fire

1 started that fast. And, you know, and nobody, no wit-
2 nesses from the State said that the fire started in five
3 minutes, you know, as, as they would have you believe.
4 And, see, and that doesn't make any sense with what Mr.
5 Franz tells you. You know, I mean, he's driving down the
6 street and he's got a habit; he knows if he leaves a
7 certain place at a certain time it's going to be -- it's
8 going to take him that long to get home, you know, whether
9 you're going to work or whatever, he knows, and that's
10 just one of those peculiar habits that he has, and I've
11 got peculiar habits, too, and, and he just knows, okay?
12 So you can go ahead and choose to believe Mr. Franz, who
13 lives down there and does this every day and that's his
14 little oddity and that's the thing he does, or you can
15 believe what Mr. Walsh tells you. He says, "Well, I went
16 down there and did a few experiments," and you can go
17 ahead and give whatever credibility you want to Mr. Walsh
18 when he, of course, told us that, you know, he does these
19 really detailed and accurate investigations when he
20 doesn't get times right or doesn't even get times, gets
21 nicknames but doesn't get full names, so you can go ahead
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1 and rely upon his, you know, professional investigation
2 skills, or you can rely upon what Merle Franz tells you,
3 "This is just me. This is just what I do. It was 8:11."
4 Not around 8:11. Not 8:10. Not 8:12. It was 8:11,
5 alright?
6

7 So he pours the trailer to the end of the car-
8 port and he sets it on fire to destroy the evidence of the
9 crime; to destroy the crime and to destroy any evidence.
10 Now, one thing Bentley said, the fire starts out there at
11 the carport and it works its way through the carport, and
12 it's picking up fuel loads. It's burning the ramp and
13 anything else that's there. Well, what Bentley tells you,
14 when it gets to the door, you know, it stops because it's
15 got to burn through the door. The door is closed, okay?
16 And the fire's not going to go through that door until the
17 door is consumed, so the door is closed. Now, he says
18 it's a hollow-core door and once the door starts burning
19 it probably doesn't take too long to get through the door,
20 you know, but it does slow it down a little bit, you know,
21 so it's, it's igniting on the ramp and it's igniting on
22 some of the wood that's there and, you know, the hollow-
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1 core door, and we know that door is closed because Bentley
2 tells you, "The locking mechanism was laying right there
3 where it was," you know, where you could just pick it up
4 and say, "Okay. Here's the door. It was right there."
5 Wasn't kicked out of the way or anything like that, it was
6 right there.
7

8 So, fire starts at the carport, gets to the
9 door, takes... I have no idea how long it takes to burn
10 through a hollow-core door, but it does take a while, and
11 then whoosh (phonetic), you know. Now, it may have
12 already gone to the bodies. It may have, you know, the
13 fire may have gone underneath the door, I don't know, but
14 the other thing that the fire guys tell you is is when you
15 start a fire with gas, you get that immediately whoosh,
16 that big flash, you know, it's just flames and whoosh.
17 They call it the whoosh factor. I think that's what he
18 said, the whoosh factor. And, then, all of the sudden it
19 just kind of dies back down, you know, so you got the big
20 whoosh, big flash, because I think one of the guys -- I
21 think I asked Bentley, I said, "Well, did you ever have
22 anybody, you know, stand right where they did it and then
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24
25

1 drop the match?" "Oh, yeah, the whoosh factor, you know,
2 blew them against the wall and killed them," okay? So you
3 get that big whoosh factor. And, then, it goes down and
4 then it starts burning stuff, whether it's linoleum or
5 whether it's carpet or wood or whatever, and then the fire
6 starts building, so that's going to take some time. Not
7 in the three to five minutes that defense Counsel would
8 have you, would have you, would have you believe.
9

10
11 So, anyway, he sets fire to destroy the evi-
12 dence, to destroy the fact that a crime was committed,
13 and, and, and who tells us that? Well, you know, Tracer
14 tells us that. Bentley tells us that. Hammond tells us
15 that. "Well, you know, in our, in our professional
16 opinion as fire investigators, it's an arson, and this is
17 why they do it: You either do it for the insurance money
18 or you do it to go ahead and destroy evidence or cover up
19 a crime." And that's what Franks (phonetic), I think,
20 also tells you, you know, one of the reasons why you may
21 not have DNA evidence at the scene is is it all got burnt
22 up. I mean, it was all burnt up, okay?
23
24
25

1 Okay. So but on the way out, that's when he
2 goes ahead and takes, he takes the rifle, it's evidence
3 worth stealing, takes the shell casings because that's
4 evidence, that's CSI, takes the purse, the wallet, you
5 know, because Nole says they're not recovered, they're
6 looking for them, and on the way out he takes the knife
7 block, okay? Why do thieves steal what they do? It's
8 impulse. It's impulse. It's like, "Well, well, I need
9 that, too." Who knows what else they took? You know,
10 Michelle and Patty may be at a garage sale next month or
11 six months from now and see something else that was their
12 Mama's. Who knows what else was taken? But we know that
13 stuff was taken, okay? We know it was. We know it was.
14 So there's your theft. And the firearm, the rifle that
15 was never found. And there was not testimony that said it
16 was in a gun safe. The testimony was these guns were
17 downstairs, I think, maybe in a gun cabinet, so they're
18 not locked up in a gun safe, okay? So don't, you know,
19 don't get run down that rabbit trail. Don't get in the
20 sled.
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1 Alright. Now, takes the knife block, he lights
2 a match, you know, to the little trailer, and he tells the
3 Detective, "I watched him burn his clothes." He's outside
4 of his body. He's watching himself burn his clothes
5 because he may have had all this blowback all over his
6 jacket like, "Oh, crap!" He may have thrown the jacket on
7 top of the bodies and doused it with gasoline and burned
8 it up, too. "I watched the shooter burn his clothes."
9 You know, and, and, and if you think about defense's time-
10 line, you know, it doesn't work because they don't tell
11 you that, you know, he has to -- Let's see, the timeline
12 doesn't work because the Defendant claims the shooter came
13 back to where he was waiting and he cleaned him off.
14 Well, if he took time to go ahead and clean this guy off
15 and watch him burn his clothes, then the timeline at the
16 bank doesn't work, either. It doesn't work, okay? That's
17 a misdirection, alright?

18 He goes straight to the bank. He parks his car
19 because he knows if he drives through the drive through
20 teller, the drive through ATM, the car is going to be on
21 camera, alright? Because he knows there's a camera.

1 That's his bank, alright? Can't wear the jacket. Even if
2 he still has the jacket, and Mr. Davies brought this out,
3 too, he can't wear the jacket because he may not be the
4 world's smartest criminal, but he's not the world dumbest
5 criminal, because it says, "Mike," on it, okay? So he, he
6 takes his, he takes his jacket, he takes his jacket off
7 because he can't be seen wearing his jacket on the ATM
8 card (sic), not because he's stealing money out of an
9 account, but because he just murdered two people.
10

11
12 He pulls his shirt up over his face, okay? Not
13 because he doesn't want to, you know, be identified as
14 stealing money out of the bank machine; because he's just
15 murdered two people and set their house on fire. Unfortu-
16 nately for him, and, again, this is where he may be not
17 the smartest criminal in the world, he forgets about his
18 very distinctive hat because Ila tells us three times,
19 "That's his hat." Three times, "That's his hat." Several
20 of the witnesses tell you, "That's his hat. That's his
21 hat." Defense Counsel even says, "Yeah, that's his hat,"
22 alright? So he, he's just not, he's just not that smart.
23 So he's seen on camera trying to go ahead and get money at
24
25

1 about 8:09 p.m. and he's looking at something in this
2 hand. That's your theft two because how did he get the
3 PIN number, okay? He stole the card, he's stealing money.
4 At first he tries 500, 500, 500, 400, bingo he gets 300,
5 "Well, alright. Jackpot. Let me see if I can get 400."
6 That's all for the day.

8 Now, it's time to go ahead and get some dope.
9 He's got, he's got clothes in the car he can change into,
10 and remember Tiffany said, "I gave him this brand new
11 jacket for an early birthday present," his birthday was
12 just a few days, I guess, before this thing happened,
13 before this murder happened, so she gives him this brand
14 new jacket. It's wintertime. It's cold. It's been cold
15 in November. It's been cold in December. It's been cold
16 in January. It's been cold in February. I think it's
17 reasonable to infer he's probably got another coat, and it
18 looks like he's living out of a car because it's full of
19 clothes. So he can't, you know, he can't wear his, his
20 favorite Carhartt jacket because he's either burned it or
21 it's got, you know, Yarr DNA all over it and he hadn't had
22 a chance to go ahead and clean it up, so he changes
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1 clothes, because he's got clothes in the car, and he puts
2 on another coat. He may have had another winter coat. He
3 may have had another tan Carhartt, I don't know. You
4 didn't hear any testimony from Ila or Tiffany saying, "I
5 don't know what they're talking about, tan Carhartt
6 jacket, he don't own one." They had their opportunity to
7 get up here on the stand and say, "I don't know where Boyd
8 and Donahue got tan Carhartt. He don't have one."

10 THE COURT: You've got 15 minutes, Mr. Rosekrans.

11 MR. ROSEKRANS: Alright. Thanks, Judge.

12 So goes to Tommy Boyd's, "Maybe Tommy knows
13 where I can go ahead and get some meth now that I've got
14 some money," engaged in a little bit of small talk, have a
15 couple of drinks, eat a sandwich, "Can you make a call for
16 me?" Well, Tommy knows somebody that uses so, "I'll go
17 ahead and make call." You know, why on God's green earth
18 he would do that, but, you know, he did. Fortunately
19 there was no answer. So, you know, defense wants you to
20 think that they're making it up, you know. You got to
21 assess their credibility. What do they got to lose? What
22 do they got to gain by this thing? And Donahue tells us,
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1 "He's still wearing a hat and a tan coat." And he tells
2 us he smells like soap. And he tells us on the stand
3 about, you know, the little dope thing going on, "You
4 know, it's just not the kind of thing that you just volun-
5 teer to the police. You don't want to draw attention to
6 the police, so, you know, I thought about it and the more
7 I thought about it the worse I felt about it, so, yeah, I
8 finally came, I finally came forward to do the right
9 thing." In the meantime, the fire department is called.
10 Merle Franz, you know, sees this suspicious fire, calls it
11 in, you know, the guys show up, they try to go ahead and
12 put the fire out. The fire department arrives, they fight
13 the fire, they contain the fire, and they tell you that
14 they're fighting the fire so that they don't disturb any
15 evidence. That they don't disturb any evidence.

16
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18
19 The bodies are found. Mr. Gregory tells you,
20 you know, they go in a certain way, they come out a
21 certain way so that they don't disturb evidence. And they
22 preserve the scene for the Sheriff's Department, and about
23 this time, okay, Pierce is, is, is leaving Boyd's because
24 that's the end of a day in the life of Michael Pierce.
25

1 Don't know where he went. Tiffany's not sure when he got
2 home. I think she said... I don't... To me I don't care
3 where he went. But that's a day in the life of Michael
4 Pierce.
5

6 Now, you want CSI? You got CSI. Okay. I think
7 one juror during *voir dire*, you know, when talking about
8 why there would be no evidence, he said, "Well, the police
9 might lose the evidence," okay? They just might lose it.
10 Alright. So what do we got here? We got -- You know,
11 that's not the case. That's not the case. They secure
12 the scene, they called in help, alright? And, and, and
13 what they did was they called in the FBI, ATF, Washington
14 State Patrol Lab, the Arson Task Force. Like my mom, she
15 watches every CSI program in the world and every time I
16 talk to her about a case, you know, she wants to know
17 about CSI stuff because that's what people expect. And
18 that's what law enforcement knows people expect, you know,
19 so Tony Hernandez calls CSI. You know, we just don't get
20 David Caruso, but we get Ted Hella (phonetic) and we get
21 everybody else, and they go -- you know, white jumpsuits
22 and washing their feet and sifters and trowels, and they
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1 go through that thing with a fine toothed comb and it
2 takes days to process that scene. They work slow. They
3 don't want to overlook anything. They sifted, they
4 sorted, they found all there was to find. There was evi-
5 dence they didn't find because the shooter, Mr. Pierce,
6 took it with him because, if he's like my mom, he watches
7 CSI, alright?
8

9 They found bodies and bone fragments, bullet
10 holes and bullets, traces of gasoline and burn patterns.
11 The things he couldn't take with him. Good old-fashioned
12 police work, okay? So, now, they say, "Okay. We got a
13 murderer out there. Let's withhold some information. We
14 won't even, we won't even tell the Deputy Prosecutor; we
15 won't tell the family. Let's see what bubbles to the
16 surface." So they are watching the Yarr bank account on
17 the outside chance that maybe somebody did steal their
18 debit card and, bingo, Bank of America says, "The card was
19 used at the Quilcene bank. Go to the Quilcene bank."
20 Bingo. It was used. "Give me the ATM records. Give me
21 the surveillance video." Wow, it matches the time of our
22 fire and our murder. We have a suspect. So they get
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1 clean and they get clear stills, Jason Greenspane from
2 PTPD comes in and helps them clean up these stills. They
3 got the stills. Mark Apeland looks at it, "I know this
4 guy. I'm confident it's Michael Pierce." They compare it
5 to known photographs. They compare it to his DOL photo-
6 graph that was just taken six days earlier. "That's
7 Michael Pierce. I'm confident that's Michael Pierce."
8 The hunt is on. He's arrested on the 28th, 10 days later.
9 First interview, "I don't know anything." "Well, we know
10 plenty." "Yeah, well, I think I need to talk to a
11 lawyer." "Alright. Well, got back to your cell. We're
12 done talking to you. Go back to your cell." Six hours
13 later Jesse Picard, one of the corrections officers says
14 (sic), "Hey, I know the cops have been at my house." I
15 guess he made his phone calls. Not to the lawyer, but I
16 guess to his girlfriend. "I know the cops have been at my
17 house. I want, I want to talk to Apeland. I want to make
18 a deal."
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23 Second interview, six hours later, he's had
24 plenty of time go ahead and think about the trouble he is
25 in and to come up with some sort of a story. So he tells

1 them some things that aren't released to the public.

2 "Well, there was a scoped rifle. There was a weapon used
3 and it was a scope rifle, but I waited down the street
4 about three miles while the shooter went to the Yarr's."
5 See, that's a diversion, okay? That's to throw them off
6 the trail, okay? Give them a little bit of information,
7 maybe you can kind of throw them off the trail. Maybe
8 you'll get out of jail, alright? And, "For immunity, I'll
9 tell you everything up to the ATM photos." But what he
10 wants you to believe is is he's afraid for himself or his
11 family. Well, you can't have it both ways. "Yeah, I'll
12 give you immunity you drop this case and let me go (sic),"
13 or "I, I, I can't really tell you because I'm afraid for
14 my family," and all that stuff is self-serving hearsay
15 statements. It's not evidence. It's not evidence. It
16 doesn't mean a thing. It's not reliable. It's not
17 credible. This is just stuff that he's giving the detec-
18 tive, that he's feeding the detective. It's not tested,
19 it's not probed; it's not double-checked or anything like
20 that. It's self-serving. He's serving himself with this,
21 with this, with this stuff.

1 "The shooter's last name starts with B. No,
2 it's not Bruce Branton, but my mom knows the name." He
3 doesn't say, "My mom knows the shooter. My mom just knows
4 somebody whose name, last name starts with a B," and, "Oh,
5 yeah, I was in Quilcene 10 days ago," because he's
6 thinking, "Well, the cops must know something," and,
7 "Yeah, you know, I did go to the bank. It was after dark.
8 I used my mom's card," because he knows he's only got
9 seven bucks in his, in his account, so, "I used my mom's
10 card." Well, guess what? That's where he begins. His
11 web of lies continues because we got Ila's card for US
12 Bank and there was no withdrawal anywhere near that time
13 period. Well, then she gets on the stand and said, "Well,
14 that's not the only account I have." Well, it would've
15 been nice if you'd told the police six or eight months
16 ago. So Friday we get a subpoena, we get those records at
17 the Timberline Bank, and guess what? Didn't use your card
18 on that day, either. "Now you don't want -- You're not
19 implying to the jury, you're not trying to mislead the
20 jury that --" "No. No. No. No. No, I'm not doing
21 that." "Sorry, no immunity. We're not biting. We're not
22 that." "Sorry, no immunity. We're not biting. We're not
23 that." "Sorry, no immunity. We're not biting. We're not
24 that." "Sorry, no immunity. We're not biting. We're not
25 that." "Sorry, no immunity. We're not biting. We're not

1 going to take the bait. Without more, there's no deal."

2 That's good police work.

3 Okay. Ila, who does Michael know whose name
4 ends in B -- or starts in B? Tommy Boyd, okay? That's
5 the only person she knows. Michael didn't have any
6 friends down there. Tommy Boyd. So, you know, so Mr. B,
7 so that's Mr. B, according to Ila. He doesn't know any-
8 body else. So, you know, if you believe what the Defen-
9 dant is implying, you know, so they go down, you know, so,
10 they go to Boyd's, he's implying that he goes to Boyd's,
11 he waits at Boyd's while Tommy either rides his bicycle up
12 to the Yarr house carrying gasoline, or borrows, you know,
13 Mr. Pierce's girlfriend's car and drives up there. Tommy
14 goes to the Yarr (sic), little Tommy Boyd, overpowers Pat
15 Yarr for no reason whatsoever, gets Pat's gun, kills Pat,
16 kills Janice, and then drives back or rides back down to
17 his house, cleans up, with Mr. Pierce's help, and burns
18 his clothes, with Mr. Pierce's help, and then gives Pierce
19 the debit card, or, you know, or maybe that was Tommy on
20 video. Well, no, they just admitted that it's them on the
21 video. Doesn't work, okay? "Well, let's just blame it on
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1 Tommy Boyd. Nobody's going to -- You know, they'll
2 believe me over Tommy Boyd." Well, we got one problem:
3 Mike Donahue was there and Mike Donahue pretty much says,
4 "No. We were there all day long. He didn't go anywhere."
5 Again, not a very good alibi. Again, not a very, very
6 good plan.
7

8 They searched the white Honda. Detective Nole
9 tells you some of the things that they're looking for.
10 They don't find everything they're looking for, but he
11 says, "We also look for newspapers because sometimes when
12 people do something bad, they want to see if it made the
13 paper and how much the cops know." So what do they find
14 in the white Honda that he was driving that day? The
15 front page of the Peninsula Daily News about the murder
16 story and no other parts of the paper because he wants to
17 know. "What do the cops know? What do the cops know?"
18 The piggy bank and the knife block seem out of place.
19 It's kind of like that game we played as kids, you know,
20 what doesn't fit in this picture, you know, bus, car,
21 airplane, beach ball? Okay. You know, that's like, "Ch
22 (phonetic), well, this is kind of weird," alright? And
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1 the QFC, and the QFC receipt. So they go out -- So, now,
2 the search is on. They go to the Sequim trailer, they're
3 looking for evidence. Well, there's, there's no evidence
4 of accelerant there because he's had 10 days to get rid of
5 it, if it was even there. And, of course, if it was
6 there, if it was in the car or was at the house, "Well, of
7 course you got traces of accelerant. I'm in auto shop.
8 That stuff gets on my boots in the greasy garage." Got a
9 perfect built-in excuse.
10
11

12 Bill Dickey, I guess he thought it was an
13 episode of Cops, "Hey, what are you guys doing?" Comes
14 out there, "What are you doing?" "Well, we're running a
15 search warrant." "What are you looking for?" "Well,
16 we're looking for some evidence of a crime." "Well, who?"
17 "Well, you know, the guy that lives in number 27." "Oh,
18 Mike, yeah, hey, you know, the other day I saw him take
19 the garbage out and, and the garbage hasn't gone off yet.
20 Matter of fact, that's the garbage bag." So they open up
21 the garbage bag and what do they find? They find some
22 documentation that says, "The stuff in here is Mr.
23 Pierce's," and, and, and it's a sopping wet t-shirt and
24
25

1 sopping wet socks. You know, if you got an old crappy t-
2 shirt that's not worth anything, it's got rips and tears
3 and holes in it, you don't wash it first before you throw
4 it away, and if you got socks that aren't worth anything,
5 you don't wash them before you throw them away. Who
6 throws away sopping wet clothes? You know, unless you try
7 to go ahead and get the DNA out, you know. And Frank
8 says, "It's not that hard to go ahead and get, you know,
9 DNA out," because what is DNA? It's your sweat, it's your
10 blood, it's your saliva, it's skin cells. Doesn't take
11 that much to get it out. You just throw it in the sink,
12 you wash it, you throw it in the spin cycle. It just
13 doesn't take that much to go ahead and get DNA out, and
14 apparently he was successful because he got rid of the CSI
15 DNA evidence. But, you know, he thinks he got rid of it
16 because it's really a pretty nice high quality t-shirt and
17 he tries to wash it out. Tiffany wants you to believe
18 that it had some grease stain on it. Well, wouldn't it be
19 a good shirt just to go ahead and work on cars, mow the
20 yard and paint the house? "Well, no, it had grease. He's
21 not that way." "On second thought, I better go ahead and
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1 get rid of my clothes because I have watched CSI and David
2 Caruso may find some DNA on that, so if I wash them and
3 don't get it out, then, gee, that may not do it."
4

5 What else is missing? The hat's gone. The
6 boots that might have evidence on them are gone. The coat
7 that can't be cleaned. Maybe he wore it the next day,
8 maybe he didn't, I don't know. Maybe he did go to Costco
9 with his mom and, and, and look down on his coat and said,
10 "What are all these spots and splotches on my coat? Oh,
11 man, that's DNA." Coat's gone. Coat's gone.
12

13 Shirt color. Well, you know, the suit I wore
14 yesterday, I bought it, I bought it at the store and I
15 really liked it and I thought it was one color, and then
16 when I got it home in, in, in the natural light, it's
17 like, "Geez, I thought it was gray, but it's kind of a
18 greenish-gray." I have a hard time finding ties and shoes
19 that, that fit it, so depending on which way the light
20 hits that suit yesterday, it's either slate gray or slate
21 green-gray or whatever, so you got these Henry Hardware
22 surveillance videos with the cameras and the fluorescent
23 lights and, you know, if you've ever had to go to the mall
24
25

1 and buy something that just that fluorescent lighting just
2 makes it look really, really, really, really weird. But
3 Ila, let's (unintelligible) Ila said he was wearing a
4 light blue t-shirt. She said he was wearing a light blue
5 t-shirt when he was there that day changing her tire and
6 she fed him ravioli and he left the house, and he was
7 wearing a light blue t-shirt and that's a light blue t-
8 shirt.
9

10
11 Alright. Now, so, is Mr. Davies saying,
12 regarding this knife set and, and, and these knives here,
13 is he, is he, is he honestly saying if the knives fit you
14 must acquit? No way. No way. You know, for, for that to
15 work, you got to believe Ila and Tiffany. It doesn't
16 work, okay? You got the knife block. They show it to the
17 girls. Matter of fact, Mark asked Michelle to describe
18 the knife set before she saw it and she described it to a
19 T. They show them the knife set. They get this incredi-
20 ble startle reaction. Joe Nole says, "In all the years of
21 police work, I've never had a reaction like that." They
22 had it for years, Michelle said, "Since junior high when I
23 was in Forks." She's in her early 40's; they've had that
24
25

1 knife for 25 years. For 25 years. It's a mismatched set.
2 "I've used them. Mom would replace the worn out knives
3 with other worn out knives, and there was a black,
4 plastic-handled knife." Farmers don't throw away
5 anything. Mr. Merrill didn't even throw away his knife
6 set, alright? So Michelle describes it, you know, and
7 now, you know, I guess they did admit that, you know,
8 maybe they're going to go ahead and try to trick Patty on
9 that deal there, but it just didn't work. So I guess they
10 want you to believe that it would be outlandish that
11 somebody would go ahead and steal a knife block, you know,
12 why would you do that? Why do crooks do what crooks do?
13 "I need one. I need one."
14

15
16
17 Pierce's DNA is on the block. Boyd's DNA is not
18 on the block, so if he's the one that committed this crime
19 and stole the knife block and then gave it to Mr. Pierce
20 down at the Boyd compound or the Boyd residence, Boyd's
21 DNA would be on it. It's not. It's not. And if she used
22 that knife block, you know, because this is the way I do
23 it when I, when I clean out the dishwasher I take it out
24 of the dishwasher, you know, like this so I don't stab
25

1 myself, and I slip it back into the, into the block, so
2 all you've got is, you know, my little old fingers on the
3 end of that there, and Franks tells you casual-type DNA,
4 it takes more than that. You've really got to handle it
5 to go ahead and leave that kind of DNA on there. So who
6 do you want to believe? Ila, who says she conveniently
7 got it from a guy who's dead now and the deceased's
8 brother who can't say whether or not his brother even
9 still had a knife set? "I gave it to Tiffany because she
10 needed some sharper knives." But she doesn't tell Apeland
11 about the mismatched knife set or the black handle. She
12 doesn't tell Tiffany, "Oh, yeah, I'm going to give you
13 this knife block and, by the way, I've got some other
14 knives in my drawer so let's make it a complete set." She
15 didn't tell that (sic) because she didn't know until this
16 stuff started becoming relevant and they had pictures and
17 things like that.

21 Or do you want to believe Tiffany? "I needed
22 sharper knives, Ila gave them to us," but they stayed in
23 her trunk for six months, never once, never once did she
24 say, "I can't cut this chicken. Let me go out to the
25

1 trunk and get that sharp knife." No, her excuse was,
2 "Well, my kitchen cabinet was so cluttered I didn't have
3 room for them." Alright, ladies, if you believe that,
4 that's fine. That's fine. "I thought she needed sharper
5 knives," but they rolled around in the trunk of her car
6 for six months allegedly.
7

8 So what do you got? Another juror said --

9 THE COURT: Start wrapping it up, Mr. Rosekrans.

10 Sorry.
11

12 MR. ROSEKRANS: I'm down to my last two pages, Judge.

13 So you got another juror who says, you know, "To
14 have proof beyond a reasonable doubt, it all has to add
15 up," you know, and that's it because, you know, proof
16 beyond a reasonable doubt, it all has to add up. Another
17 juror said, "You know, it's really going to be good enough
18 in my mind to tip the scale for me, so, you know, what I
19 know, it's got to be able to go ahead and tip the scale
20 for me. It has to add up." So in this case here, you
21 have so much, and it, and it all does add up. You know,
22 you've got the investigation by the Sheriff's Department.
23 They left nothing out. They called in help. This is,
24
25

1 this is big. This is a big crime. They ran down all the
2 leads. They just didn't zero in on one guy; they ran down
3 those leads. They tried to find out all the people whose
4 name ends in B (sic) within, you know, a radius of the
5 Yarr home, and it all keeps coming back to Mr. Pierce.
6

7 Or you can believe the defense investigator, you
8 know, Mr. Walsh, who, you know, in his own words said his
9 job was to ensure that you have a factual count for both
10 the defense and the prosecution. His dates, if there are
11 any dates, are off, the names are off, you know, so you
12 got to go ahead and compare what he does to what the
13 Sheriff's Department did in the incredibly thorough job
14 that they did.
15

16 Okay. As I said in *voir dire*, it's a hard job,
17 you've done it, you've got my respect, you've got my
18 gratitude, and I asked you during *voir dire*, you know,
19 "Are you up to the task? Are you up to the task?" Just
20 think about those other 40 or 50 people who just blew it
21 off, "I'm not going to jury duty. I'll let somebody else
22 do it." I asked you if you were up to the task and you
23 said you were. And you took an oath. And we talked about
24
25

1 that oath, much like the oaths that you took to, you know,
2 protect your country, you know, to -- you know, the oath
3 that you took when you passed the Bar and went to law
4 school (sic), you know, the marriage oath, it was pretty
5 important to one person. Not to overthrow the government
6 of the United States and, you know, not to divulge company
7 secrets, you know, so you've got that oath. Take that
8 oath seriously and apply the facts to the law and find Mr.
9 Pierce guilty of every single count and every single
10 issue. So you're going to get that and, you know, you're
11 going to have to go through it and kind of figure it out.

12
13
14 It sounds complicated, but if you take your
15 time, especially on the murder counts, you can find him
16 guilty of both premeditated and both felony murder. You
17 don't have to be unanimous on each one, but you can find
18 him guilty of both, and that's what I'm asking you to, to
19 do. So find him guilty of every count, all eight counts
20 in the Information. The evidence is there, the evidence
21 supports it. Find him guilty, and then answer yes to all
22 the Special Verdicts. And those Special Verdicts are, you
23 know, did he use a gun? Yes. Was more than one person
24
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1 killed? Yes. And, you know, you'll see that, you know,
2 so answer yes to all those special questions and guilty to
3 all those, and all you'll need is the Instructions, and
4 I'm confident if you'll do that, then, you know, I'll be
5 satisfied, Michelle and Patty'll be satisfied, and you'll
6 have done everything you possibly can and you'll have done
7 your duty, and I'm sure that we'll have the justice for
8 the Yarr's. Thank you very much.

11 THE COURT: Well, ladies and gentlemen, it's time now
12 to pick our three alternates. Before we do so, I want to
13 tell you: The alternates will still be serving as jurors
14 until the verdict is in. It may well be that we'll call
15 you and get you back here to fill in on deliberations.
16 That happens, not frequently, but it does happen. So if
17 you are one of the alternates, make sure you give your
18 phone number and where you can be reached tomorrow and
19 until the deliberations are over, I'm not sure how long
20 that will take, but make sure there's a phone number where
21 we can reach you and we'll call you when the trial's over,
22 but if you're an alternate, you're still under those
23 instructions. Do not discuss the case with anyone, don't
24
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1 read anything about it, don't do any research on your own
2 until we've released you because you'll still be serving
3 as a juror, although you are one of the alternates.
4

5 And I'll ask our Clerk to call the alternates.

6 CLERK: The first one is Al Ritchie (phonetic).

7 THE COURT: Mr. Ritchie, you will serve as an
8 alternate.

9 CLERK: Juror number 5 (inaudible - away from mic)

10 THE COURT: Ms. Ehrkoff (phonetic)?

11 JUROR: Ekoff (phonetic).

12 THE COURT: Ekoff.

13 CLERK: Kathleen (inaudible - away from mic)

14 THE COURT: And Ms. Burnham (phonetic). Mr. Ritchie,
15 Ms. Ekoff and Ms. Burnham, make sure that our Bailiff can
16 get in touch with you by phone until we call you and let
17 you know because when -- and if we call you back, we'd
18 call Mr. Ritchie first, and then Ms. Ekoff, and then Ms.
19 Burnham, because they were called in that order, if we
20 need you. And it could easily be that we do, so I'll ask
21 you to continue to serve as alternate jurors.
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1 We'll commence our deliberations tomorrow at
2 nine o'clock. So be here tomorrow at nine o'clock -- the
3 other 12 of you be here tomorrow at nine o'clock to
4 commence the deliberations, and you know all of the
5 instructions. Those instructions continue to apply. You
6 are excused at this time.
7

8 Will the people remain in -- the audience please
9 remain until the jurors have had the opportunity to clear
10 the courthouse?
11

12 (JURY DEPARTS)

13 THE COURT: I want to commend all four of the
14 attorneys. You've done an excellent job with the case.
15 The State did a good job presenting it. Mr. Davies and
16 Mr. Gilmore, you did an excellent job defending it. Mr.
17 Pierce, I don't know how it's going to come out, but you
18 were certainly well represented.
19

20 We'll be in recess. The attorneys know this:
21 We've got to be able to get in touch with you and some-
22 body's got to be here within 10 minutes of being called,
23 so make sure our Clerk knows where you are, and you'll
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always have someone up in the Prosecutor's Office, I'm
sure, Mr. Rosekrans.

MR. ROSEKRANS: Yes, sir.

THE COURT: We will be adjourned for the day.

CLERK: Please rise. Court will be adjourned.

(END OF DAY 11/VOLUME VIII - 5:02:14 p.m.)

