

No. 40777-9-II

COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION II

STATE OF WASHINGTON

Respondent,

vs.

MICHAEL JOHN PIERCE

Appellant.

ON APPEAL FROM THE SUPERIOR COURT
OF THE STATE OF WASHINGTON
FOR JEFFERSON COUNTY
Cause Number: 09-1-00058-7

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BRIEF OF RESPONDENT

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ORIGINAL

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b. THE SECOND WAS DENIED AFTER AN IMPARTIAL JURY WAS SEATED

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I. STATEMENT OF THE CASE

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- b. THE SECOND WAS DENIED AFTER AN IMPARTIAL JURY WAS SEATED.

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**No. 9. THERE IS NO ACCUMULATION OF SIGNIFICANT
ERRORS THAT PREVENTED PIERCE FROM RECEIVING
A FAIR TRIAL IN FRONT OF AN IMPARTIAL JURY.**

B. SUMMARY OF THE ARGUMENT

On March, 26, 2010, after an eighteen-day trial that included a day-and-a-half of jury deliberations, a jury found that Mr. Michael Pierce shot and killed Janice and James “Pat” Yarr while they lay face down in their kitchen. *See* CP 557-73.

The evidence of Pierce’s guilt was overwhelming. At approximately 6:44 p.m., on the night of the murders Pierce, a convicted felon¹ who could not buy a real firearm, shoplifted a pellet pistol from Henery’s Hardware in Port Townsend. RP (1/20/10) 194-95; RP (2/17/10) 324; RP (3/17/10) 205-10. The pellet pistol had a black frame, brown

¹ Pierce had prior convictions for Attempting to Elude Law Enforcement and four convictions for Burglary in the Second Degree. RP (1/20) 194-95.

faux wood handle, and it resembled an actual firearm. RP (3/17/10) 261-62. The security video of the theft showed that Pierce was wearing a ball cap with a starburst pattern on the front of it and a black coat with the logo for the Peninsula College Automotive Technology Program embroidered on the back of it. RP (3/18/10) 291-92; *See* CP 414, State's 183. After stealing the simulated firearm, Pierce climbed into a white Honda Accord and drove in the direction of Quilcene—where the Yarrs lived. RP (3/17/10) 211-12.

Approximately an hour later a man matching Pierce's physical description was observed in Quilcene walking along Highway 101 across from the Yarr's home.² RP (3/17/10) 68. According to the witness, "the guy was between 5' 11' and 6' 2" . . . the size of this person was remarkable, . . .[and] . . . the width of the shoulders was beyond anything I think I have ever seen." RP (3/17/10) 68. (Pierce renewed his driver's license a month before the murders and listed himself at six feet tall and 360 pounds). RP (4/18/10) 433. The large man was wearing a black coat with "texture" on the back. RP (3/17/10) 69. Because it was unusual to see anyone walking on that stretch of road at night, the witness slowed to see if he needed any assistance. RP (3/17/10) 57-58. The witness

² It is sixteen miles and a 22 minute drive from Henery's Hardware in Port Townsend to the spot on Highway 101 that is across from the Yarr home in Quilcene. RP (3/18/10) 471.

pulled alongside the large man who turned away to conceal his face;

"[w]hat he did was completely creepy." RP (3/17/10) 57-58.

Approximately thirty minutes later, 8:10 p.m., Mr. Merle Frantz rode down the same stretch of Highway 101. As Mr. Frantz passed the Yarr home he noticed what appeared to be a small bonfire burning close to the home. RP (3/11/10) 961-65.

At the same time Mr. Frantz saw the burning home, 8:11 p.m., Pierce was captured on video using the Yarr's ATM card to withdraw \$300 from their account.³ The ATM machine was 7.1 miles, less than a 10-minute drive from the burning home. RP (3/18/10) 470. In the ATM's video Pierce has his T-shirt pulled up over his nose; he is still wearing the starburst cap seen in the Henery's video, but, he is no longer wearing the black coat; and in one hand he has a scrap of paper that appears to have a PIN number written on it. RP (3/22/10) 767-81; RP (3/17/10) 202-33, 251; CP 414 (ATM video State's Exhibit 169-74).

When Detective Mark Apeland reviewed the ATM footage he recognized Pierce.⁴ RP (3/16/10) 1437. Based on this identification

³ Pierce tried to withdraw a total of \$2,300 (\$500, \$500, \$500, then \$400, before successfully withdrawing \$300). After stealing the \$300, he tried once more to withdraw \$400 more. The first withdrawal failed because he used the wrong PIN, the rest failed because Janice and Pat only had \$300 in their account. RP (3/17/10) 25.

⁴ Detective Apeland had several prior encounters with Pierce including a sit-down conversation across a small table just a year earlier. RP (3/16/11) 1433 -1438.

Pierce was arrested ten days after the murders. The initial charge was Theft of an Access Device. RP (3/16/11) 1433-38.

After his arrest Pierce was read his *Miranda* warnings, twice, and then interviewed on two different occasions by Detective Apeland and Detective Joseph Nole. RP (3/17/10) 97, 146. During these interviews Pierce gave the detectives that showed he had first hand information regarding the crimes such as: there was a “shooter;” the shooter had taken a scoped rifle from the Yarr home; the shooter was covered in blood; Pierce had helped the shooter wash off; and the shooter had burned his clothes. RP (3/17/10) 152-53.

All of the above statements eventually pointed to Pierce being the “shooter.” At the time of the interviews, the cause of death had not been made public so only someone with immediate knowledge of the crimes could know there was a “shooter.” RP (3/17/10) 184-87. The shooter would have been covered in blood because the Janice and Pat’s heads had exploded when shot with high velocity rounds. *See* RP (3/15/10) 1273; RP (3/16/10) 1321-22; RP (3/17/10) 185. As to cleaning off the “shooter,” a witness reported that immediately after the murders Pierce smelled clean, as if he had just taken a shower. RP (3/22/10) 764. A scoped rifle was missing from the home, Pat Yarr’s scoped 25.06 rifle, and the 25.06 fired high-velocity rounds so it was likely that this was the

murder weapon. *See* RP (3/11/10) 950; RP (3/16/10) 1321-22; RP (3/17/10) 187. And all of the clothes Pierce wore in the Henery's security video disappeared between the murders and his arrest; most notably missing was his coat.⁵ RP (3/17/10) 205-11; RP (3/15/10) 1273-74. The coat was black, Carhart brand, with "Mike" embroidered on the front and the logo for the Peninsula College Automotive Technology Program embroidered on the back of it. RP (3/22/10) 586; RP (3/18/10) 285. Pierce was enrolled in the Auto Tech program and the coat had been purchased for him by his girlfriend one month before the murders. RP (3/18/10) 284-292; RP (3/22/10) 586-92, 596.

Other witnesses also provided evidence that showed Pierce was guilty. Shortly after the murders, while the Yarr home was still burning, Pierce unexpectedly arrived at the RV camper that Mr. Thomas Boyd lived in. RP (3/22/10) 687-96. The RV was parked on a property located along Highway 101 between the burning Yarr home and the ATM machine that Pierce had just used to take money from the Yarr's account. While in the RV, Pierce, who had \$7.02 in his checking account at the beginning of the day, RP (3/17/10) 42, drank a beer that he had brought with him, and asked Mr. Boyd if he could find some methamphetamine for him. RP (3/22/10) 687-96, 762.

⁵ The starburst hat disappeared and the boots were conveniently thrown away. RP (3/22/10) 586-96.

Two other pieces of evidence were also recovered and admitted at trial. In a bag full of Pierce's garbage, law enforcement found a T-shirt and pair of socks that appeared to have been washed and then thrown away still wet. RP (3/18/10) 340-44. The T-shirt resembled the shirt worn by Pierce on the night of the murders. In the trunk of the car that Pierce drove on the night of the murders, a trunk that was stuffed with bags of household items, there was a single section of a newspaper—the front page of the Peninsula Daily News with the lead story being the Yarr's deaths. RP (3/18/10) 304, 361.

In response to all of the evidence that indicates Pierce executed the Yarrs while they lay face down in their own kitchen, Pierce now asks this Court to create new law and find that he was convicted, not due to the evidence, but of a because a myriad of individually insignificant events accumulated to deny him a fair trial. Pierce should not be granted a new trial.

II. STATEMENT OF THE FACTS

Until March 2009, James "Pat" Yarr and his wife, Janice Yarr, lived on the Boulton Farm in rural Quilcene, Washington.⁶ Married nearly 41 years, they raised their kids on the farm. RP (3/11/10) 929. Farm life required the Yarr girls, Patty and Michelle, to perform daily chores that

⁶ To avoid confusion the victims will be referred to by their first names "Pat" and Janice. No disrespect is intended.

were assigned every morning *Id.* at 949. Not only did the girls learn to work the farm, but Pat also taught them essential skills like how to shoot coyotes with his scoped 25.06 rifle – after all, the farmer has to protect the family herd. RP (3/11/10) 950-51. Eventually, the girls grew up and moved out, and, at that point, Pat would hire friends and neighbors when he needed help around the farm. *See* RP (2/11/10) 972. Janice did not work the farm, she had a full-time job at Seton Construction. RP (3/11/10) 956. When Janice was away at work, Pat kept himself busy running the farm, running his commercial logging business and renting out the small white farmhouse that also sat on the Boulton Farm less than 200 yards from the Yarrs' house. RP (3/22/10) 592.

In 2008, after being released from prison Michael J. Pierce went to live with his girlfriend, Tiffany Rondeau. RP (3/22/10) 593. Together they rented the small white house on the Boulton Farm. RP (3/22/10) 593. While Pierce lived on the farm with Ms. Rondeau, he performed odd jobs for the Yarrs such as feeding the cows. RP (3/22/10) 593-94. The Yarrs compensated Pierce for his efforts; paying by cash or check when the jobs were completed. RP (3/22/10) 594.

On the night of March 18, 2009, sometime between 7:30 p.m. and 8:00 p.m., Pat and Janice Yarr were murdered in their kitchen shortly after eating dinner. RP (3/11/10) 955; (3/16/10) 1356. The cause of death for

each victim was presumed to be a single gunshot to the back of the head. RP (3/16/10) 1358-59. After the Yarrs were murdered, an accelerant, probably gasoline, was poured about the house and over their bodies before the house was set ablaze. RP (3/15/10) 1158.

Eventually the south end of the Yarr home was fully engulfed in flame. RP (3/11/10) 6; RP (3/11/10) 984-85. At 8:10 p.m., Mr. Merle Frantz saw a small “bonfire” near the Yarr’s house as he rode by on Highway 101. RP (3/11/10) 964. Approximately nine minutes later, Mr. Terry Ingalls saw the fire from Highway 101 and drove up to investigate. RP (3/11/10) 984-85. When he arrived at the house the carport was engulfed in flames, so he called 911. RP (3/10/10) 985. Thirty minutes after the 911 call came in, firefighters arrived on scene and they extinguished the blaze. RP (3/10/10) 985, (3/11/10) 1058.

With the fire out, fire investigators began a search for survivors and a preliminary search for the cause of the fire. RP (3/10/10) 1056, 1059, 1061. In the early stages of the investigation two bodies were found in the burned rubble of the kitchen at the south end of the house. RP (3/10/10) 1085. The bodies were found face down and head to head on the kitchen floor. RP (3/15/10) 1391, 1397-98. Both of the bodies were extensively burned and missing the top portions of their skulls. RP (3/16/10) 1352-53, 1357-58, 1370. Skull fragments and human remains

were found scattered around the kitchen. RP (3/17/10) 185. Unburned gasoline was found under the bodies and in the floorboards. RP (3/16/10) 1396, 1400.

Further investigation of the area immediately around the bodies revealed that two bullets were lodged in the floor; one bullet in the location where each head should be. RP (3/15/10) 1186, 1187. A third bullet was located in the basement and was determined to have been fired through the floor of the Yarr's home office on the north end of the house (the bodies and fire were concentrated on the south end of the house). RP (3/15/10) 1105. All three bullets came from the same class of firearm. RP (3/16/10) 1326.

Local firefighters, the Jefferson County Sheriff's Office, Washington State Patrol, and agents from Alcohol Tobacco and Firearms ("ATF") and the Federal Bureau of Investigation ("FBI") investigated the fire and the murders. Since the Yarrs were deceased before the fire and because there was gasoline poured around the interior of the home, the investigators concluded that the fire was an arson that was set to conceal the murders and/ or, to destroy evidence. *See* RP (3/15/10) 1159.

At approximately 8:10 p.m. on the night of the murders, while the Yarr house was burning, Pierce was captured on video using the Yarrs' ATM card. RP (3/16/10) 1437; RP (3/24/10) 1046. After five failed

attempts to withdraw more money, Pierce was finally able to withdraw \$300 from the Yarrs' account. RP (3/17/10) 25- 27. The ATM machine was 7.1 miles, less than 10 minutes, from the Yarr home. RP (3/18/10) 470. In the video Pierce had his T-shirt pulled up over his nose in a failed attempt to conceal his identity. RP (3/17/10) 250. Detective Mark Apeland recognized Pierce when he saw the video. RP (2/18/10) 476. Mr. Todd Reeves, a Technical Surveillance Specialist employed by the ATF did a comparison of the ATM photos, the Henery's security video, and known pictures of Pierce. RP (3/22/10) 772 He concluded that Pierce was the man in the ATM pictures. RP (3/22/10) 781. In closing arguments defense counsel conceded Pierce was the man in the ATM video. RP (3/24/10) 1046.

After using the ATM machine Pierce made an unexpected appearance at the RV trailer of Mr. Thomas Boyd. RP (3/22/10) 679. The RV was parked on property off from Highway 101 in between the Yarr home and the US Bank ATM. Mr. Michael Donahue and Mr. Michael McCone were present in the RV when Pierce arrived.⁷ RP (3/22/10) 680. While in the RV, Pierce, who had \$7.02 in his checking account when the day began, RP (3/17/10) 42, suddenly seemed to have money as he drank beer that he had brought with him, RP (3/22/10) 685, and he asked Mr.

⁷ Mr. McCone later denied being there when put on the stand by defense counsel. RP (3/23/10) 797.

Boyd if he could find him some methamphetamine. RP (3/22/10) 696.

While Pierce was in the RV, Mr. Donahue noted that Pierce smelled as if he had just taken a shower. RP (3/22/10) 748.

Based on the ATM video evidence, Pierce was arrested on March 28, 2009, for Theft of an Access Device. RP (3/17/10) 96. After his arrest Pierce signed a waiver of his *Miranda* rights and then was questioned at the Sheriff's Office from 5:40 p.m. to approximately 6:00 p.m. by Detectives Mark Apeland and Joseph Nole. RP (3/17/10) 96-110; State's Exhibit 1 (2/17/10) (JCSO Suspect Statement); *see* CP 799-814. During this interview Pierce admitted to using the ATM machine on the day of the murders but claimed he was there at a different time and was using his mother's ATM card. RP (3/17/10) 107. When the detectives accused him of being the murderer Pierce ended the interview stating that it wasn't him and if they were saying it was him he was "going to need a lawyer." RP (2/17/10) 331. The Detectives terminated the interview and booked Pierce for Theft 2. RP (3/17/10) 135.

Approximately five hours later, after two phone calls to his girl friend, a potential alibi witness, and a meeting with a Certified Designated

Mental Health Practitioner⁸, Pierce asked to speak to the detectives again so that he could “offer a bargain.” RP (3/17/10) 134, 147.

Pierce was escorted across the parking lot to the Sheriff’s Office for another interview. RP (3/17/10) 135. Prior to the interview, Pierce was again read his *Miranda* warnings and he again waived his rights. RP (3/17/10) 146. Initially, Pierce agreed to be recorded but after several minutes he asked to turn the recorder off so that he could talk to Detective Apeland in private. RP (3/17/10) 149. The recorder was turned off and Detective Apeland told Pierce that their conversation would still be documented as part of the investigation. RP (3/17/10) 149. Pierce then told Detective Apeland that the “shooter” was covered in blood, that he had watched the shooter take his clothes off and burn them, the shooter had taken a scope rifle from the home, and he had helped the shooter wash off. RP (3/17/10) 152-53. At this point the Sheriff’s office had not released the cause and manner of death so it was clear that Pierce had first-hand information regarding the murders. RP (3/17/10) 151. Pierce was ultimately charged with eight crimes including two counts of Felony Murder.

On March 4, 2010, four days before jury selection was to begin, Mr. Donahue, one of the men visiting Mr. Boyd in his RV on the night of

⁸ The CDMHP was in the jail on a routine visit. Pierce was offered a chance to speak with the counselor and chose to do so.

the murders, approached Deputy Prosecutor Scott Rosekrans with some new information. RP (4/9/10) 1477-79. Previously, Mr. Boyd and Mr. Donahue had told the detectives that on the night of the murders, Pierce arrived unexpectedly, ate, and then left, but on March 4, a new detail was added to the story: Pierce had asked Mr. Boyd if he could find him some methamphetamine. See RP (3/22/10) 696. Mr. Donahue explained that he and Boyd did not come forward with this information until that moment, due to a fear of being prosecuted as accomplices to methamphetamine sales. RP (3/22/10) 762-63.

Later on that same night, March 4, 2010, Greg Walsh, Pierce's investigator went to Mr. Boyd's RV to interview him. On that night Mr. Boyd stated that he knew "some other shit" but he refused to say anything else to Mr. Walsh who he felt was harassing him. RP (3/18/10) 272; RP (4/9/10) 1477⁹.

On Friday, March 5, 2010, just three days before jury selection was to take place, Prosecuting Attorney Juelie Dalzell, Deputy Prosecuting Attorney Rosekrans, and Detective Nole traveled to Quilcene and interviewed Mr. Boyd. At this interview Mr. Boyd confirmed that Pierce had asked him to find some methamphetamine on the night of the murder. RP (4/9/10) 1473. Mr. Boyd also asked if the prosecutor's office could do

⁹ Mr. Walsh interviewed several times, to the point where Mr. Boyd felt he was being stalked and harassed. CP 846. See RP (4/9/10) 1480.

something to stop defense investigator Greg Walsh from harassing him. RP (4/9/10) 1477-78. Mr. Walsh kept accusing Mr. Boyd of the murders and he felt like he was being stalked. RP (4/9/10) 1477.

Prosecutor Dalzell agreed to inform the defense that all further contact with Mr. Boyd would occur at the Prosecutor's office. CP 846-47. Later that day, Mr. Rosekrans faxed a memo to defense counsel informing them that Mr. Boyd would only talk to them if the interview took place at the Prosecutor's Office. RP (4/9/10) 1478. CP 625.

Jury selection commenced Monday, March 8, 2010. RP (3/8/10) 515. The jury selection process included the use of jury questionnaires, individual questioning, and general *voir dire* of the panel. RP (3/8/10) 516, (3/8/10) 568, (3/9/10) 647. The trial court gave each party a total of nine peremptory challenges, three more than required by CrR 6.4.

On March 10, 2010, Mr. Walsh saw Mr. Boyd in the courthouse and attempted to interview him without anyone else being present. Mr. Boyd refused to talk to Mr. Walsh. CP 620-24.

March 12, 2010 Mr. Rosekrans sent another email telling defense counsel that Mr. Boyd did not wish to speak with Mr. Walsh. RP (4/9/10) 1473; CP. On March 15, 2010 defense counsel responded by requesting interviews with Mr. Boyd and Mr. Donahue. CP 628. The interviews were conducted on Friday, March 19, 2010, and, at the prompting of Mr.

Rosekrans, Mr. Boyd told defense counsel about Pierce seeking methamphetamine. RP (3/22/10) 695-96.

On Monday, March 22, Mr. Boyd and Mr. Donahue testified. Before either witness mentioned methamphetamine, Pierce objected that the evidence was irrelevant. RP (3/22/10) 695. The trial court overruled the objection, finding that even though the information was prejudicial, it was relevant to motive and, therefore, admissible. *Id.* Both Mr. Boyd and Mr. Donahue testified about the events that occurred on the night of the murders, including the fact that Pierce was looking to buy methamphetamine. RP (3/22/10) 696, 757.

III. PROCEDURAL HISTORY

Pierce was arrested on Saturday, March 28, 2009, at approximately 4:52 p.m. RP (3/17/10) 96. Pierce was brought before the court on Monday, March 30, 2009, on the first regularly scheduled "fresh arrest" calendar, at approximately 11:30 a.m. *See* LCR 77(k)(1); CP 816-21; RP (3/30/09) 5. Counsel was appointed to represent Pierce at this time. CP 829; RP (3/30/09) 8.

On February 17-18, 2010, CrR 3.1 and CrR 3.5 hearings were held to determine the admissibility of Pierce's statements to Detective Mark Apeland, Detective Joe Nole, and Jail Superintendent Steve Richmond. Testimony was received from Detectives Apeland and Nole,

Superintendent Richmond, as well as Corrections Officers Jesse Picard, and Jeremy Vergin. Pierce did not testify at the hearing after he was advised that his testimony could not be used against him at trial. RP (2/17/10) 222-23; CP 830. At this hearing the following facts were presented. Pierce was questioned at the Sheriff's office from 5:40 p.m. until about 6:00 p.m. by Detectives Apeland and Nole. RP (2/17/10) 232. At the beginning of the interview Pierce was read his *Miranda* warnings and he signed a form acknowledging that he knew his rights and waived his constitutional rights. RP (2/17/10) 225-27 CP. The warnings included the statements: "[y]ou have the right at this time to talk to an attorney before answering any questions. You have the right to have an attorney present during any questions" and "[i]f you cannot afford an attorney one will be appointed for you without cost if you so desire." RP (2/17/10) 226. During this first interview Pierce admitted to using the US Bank ATM machine on the day of the murders, but said he was using his mother's ATM card. RP (2/17/10) 228. When the detectives accused him of murder he made a series of statements that the Court incorporated into its oral findings of fact:

Pierce: "I'm going to need a lawyer 'cause it wasn't me. You don't have photos of me at the bank, not using a stolen credit card."

Detective: "Well, what do you know about that?"

Pierce: "I don't know."
Detective: "Do you know anything about it?"
Pierce: "Nothing."
Detective: "So you don't want to talk to us then?"
Pierce: "I don't mean if you're-- we're trying, trying to, trying to say I'm doing it. I need a lawyer. I'm going to need a lawyer because it wasn't me. You're wrong."
RP (2/17/10) 331-335. (parties' names added for clarity).¹⁰

After Pierce made these statements he was turned over to corrections staff and booked into the Jefferson County Jail where he was housed in a segregation cell for his own safety.¹¹ RP (2/17/10) 308, 311-12. The segregation cell had no phone but on two different occasions he was allowed to telephone anyone he chose.¹² RP (2/17/10) 314-19. Both of the calls were free of charge and neither call was monitored by corrections staff. CP 802-03. Pierce used those calls to call his girlfriend, a potential alibi witness. RP (2/17/10) 245, 314-19. During this same time Pierce met with a Certified Designated Mental Health Professional. RP (2/17/10) 315.

¹⁰ During a recess the Court read the actual transcripts from the interview and then incorporated those transcripts into its ruling.

¹¹ Pierce was placed in segregation per standard procedures because: he requested protective custody; he had a prior escape charge; he had health concerns; and he had mental health issues. RP (2/17/10) 311-12.

¹² At the hearing it was clear that Pierce had called his girlfriend based upon his statement to Officer Picard that he knew the cops were at his house. A later review of the phone log confirmed he called his girlfriend's phone number. RP (3/17/10) 245.

After sitting in jail approximately five hours, at approximately 11:15 p.m., Pierce asked to speak with the detectives again saying he knew the cops were at his residences and he wanted to make a bargain. RP (2/17/10) 245. Pierce was taken across the parking lot to the sheriff's office for a second interview. RP (2/17/10) 250. At the beginning of the second interview Pierce was read his *Miranda* warnings from Detective Apeland's department issued card. (2/17/10) 250-51. The warnings stated:

You have the right to remain silent. Anything you say can be used against you in a court of law. You have the right at this time to talk to a lawyer and have him present with you while you're being questioned. If you cannot afford to hire a lawyer one will be appointed to represent you before questioning if you wish. You can decide at any time to exercise these rights and not answer any questions or make any statements. Do you understand each of these rights?
Id.

After hearing his rights for the second time that day, Pierce again agreed to talk and during the first part of the interview he agreed to be recorded. RP (2/17/10) At approximately 11:30 p.m. Pierce asked to stop the recording so that he could speak with Detective Apeland in private. RP (2/17/10) 255. Detective Apeland told Pierce they would have to document anything he said. RP (2/17/10) 255. Pierce still agreed to talk, and then proceeded to inform Detective Apeland that the shooter took a

scoped rifle from the Yarr home, the shooter was covered in blood, he had helped the shooter wash off, and that he had watched the shooter take his clothes off, pour gasoline on them and light them on fire. RP (2/17/10) 255-6.¹³

At the conclusion of the CrR 3.1 and 3.5 hearing, Judge Verser held that the statements were all voluntary, that Pierce was properly advised of his *Miranda* rights and that he knowingly, voluntarily, and intelligently waived those rights. RP (2/17/10) 330-31. Judge Verser also held that Pierce never made an unequivocal request to be put in contact with an attorney stating:

“Pierce does not say specifically I want to talk right now, I want to talk to a lawyer right now. He says, ‘I need a lawyer, and I’m going to need a lawyer because it wasn’t me.’ He doesn’t say, ‘I want to talk to a lawyer right now.’ ” RP (2/17/10) 333.

Judge Verser's oral ruling was reduced to written findings of fact and conclusions of law. CP 799-814.

Jury selection began on March 8, 2010, with an initial venire of 49 prospective jurors. RP (3/8/10) 538. After the oath was administered, the prospective jurors were provided with a Juror Questionnaire that was designed to determine fitness to serve. RP (3/8/10) 516; CP 345-51. After

¹³ The manner of death had not been released to the public at this point in time. RP (3/17/10) 165-66.

the questionnaires were completed, the parties were provided an opportunity to review the prospective juror's responses. RP (3/8/10) 542.

Upon reconvening, the court excused juror numbers 13, 20, 29, 31, 45, and 47. These jurors were excused for the for the following reasons: juror 13 had a scheduled vacation to Hawaii, RP (3/8/10) 546; juror 20 was Defense Counsel's legal assistant and stepdaughter, RP (3/8/10) 548; juror 29 was self employed, could not miss work, and said he could not be impartial, RP (3/8/10) 549; juror 31 had religious convictions that would not allow her to judge anyone, RP (3/8/10) 549; juror 45's wife was a witness in the case, RP (3/8/10) 549; and juror 47 was moving out of state during the trial, RP (3/8/10) 549.

Six more jurors, 4, 25, 32, 37, 38, and 43, were excused. Five of them were excused because they could not be impartial: juror 4 had already determined Pierce was guilty, RP (3/8/10) 554; juror 25 could not be impartial because he was friends with local deputies, RP (3/8/10) 556; juror 32 had already formed an opinion of guilt and could not set it aside, RP (3/8/10) 557; juror 37 knew the victim's daughter, had read every article, had made up his mind, and could not set that aside, RP (3/8/10) 558; juror 43 had determined Pierce was guilty and could not set that opinion aside, RP (3/8/10) 559. The last juror struck in this batch was

juror 38, who had a non-refundable trip set for the middle of the trial. RP (3/8/10) 558.

Eleven additional jurors were individually questioned: 1, 2, 7, 16, 21, 22¹⁴, 35, 36, 44, and 49. Of these, only juror 44 was struck for a reason other than bias; he had a medical condition that needed treatment. RP (3/8/10) 602. Eight of this group was struck because they had a bias that would not allow them to decide the case based upon the evidence: juror 7 had formed an opinion that Pierce was innocent and could not make a decision based on the evidence, RP (3/8/10) 579; juror 1 could not be impartial as he had known the Yarrs for 16 years, RP (3/8/10) 571; juror 2 was willing to try and be unbiased but he thought it would be difficult since he had read all the news stories, RP (3/8/10) 572-73, 576; juror 16 believed Pierce was guilty because he had attempted to plea bargain, RP (3/8/10) 583; juror 21 thought Pierce was guilty and would not set that opinion aside, RP (3/8/10) 587; juror 22 thought Pierce was guilty and was not sure she could set aside her opinion, RP (3/8/10) 589; the other juror 22 had formed an opinion as to Pierce's guilt and could not be totally impartial, RP (3/8/10) 593; juror 36 had formed an opinion and tended toward guilty, worked with some of the family, and felt she could not be an unbiased juror, RP (3/8/10) 601. Two of the jurors were

¹⁴ The record indicates that there were two Juror 22's.

challenged for cause but kept on the panel: juror 49 believed Pierce was guilty but said he could set that aside and make his decision based solely on the evidence, RP (3/8/10) 606, 608 and juror 35 felt Pierce was guilty based on the news but three times said she could make her decision based solely upon the evidence and so she was kept in the panel. RP (3/8/10) 593-98.¹⁵

When court concluded on March 8, 2010, 28 prospective jurors remained in the venire. RP (3/8/10) 609. Since at least 33 jurors were needed to allow each side to have 9 preemptive challenges and to allow for 3 alternate jurors, it was agreed that a second panel of prospective jurors should be called in the next day. *Id.*

After determining that another panel was necessary the Court asked the parties to consider how to speed the process along. The parties agreed to follow the same process the following day, Tuesday, and then on Wednesday, assuming that there were enough jurors, do a general *voir dire* of the remaining jurors. RP (3/8/10) 609-10. Defense Counsel specifically agreed with this procedure but felt that at least two hours was necessary for the final *voir dire*. *Id.* The Court denied the request for two hours of *voir dire* ruling that:

¹⁵ There appears to be a typographical error in the RP. The Judge is quoted as saying she “can’t” be unbiased while the context of the ruling clearly indicates that the Court believed that she could have remained unbiased.

I'm going to give each side an hour for *voir dire* after we go through this process. Because we're really weeding out, we're answering most of the questions that you would normally ask on *voir dire* in this process. The rest of it is just sort of bringing them up to speed . . . RP (3/8/10) 610. Accord LCR 38.2(b).

At the conclusion of the day, the first panel was excused and told that they did not have to return until Wednesday morning. RP (3/8/10) 613.

After the jury was excused the parties realized they had failed to address Juror 26. After going back on the record juror 26 was excused as he was scheduled to serve as an election observer in Sudan. RP (3/8/10) 617.

At the beginning of day two, it came to the party's attention that one of the jurors was intoxicated. The Court brought in the juror, questioned him, and then excused him because of his level of intoxication. RP (3/9/10) 628. With this matter attended to, the second day of jury selection began in earnest with a request from Pierce for, 1) an extra day of jury selection, 2) a three-fold increase in the time authorized for attorney questioning, and, 3) an opportunity to re-examine the previous day's panel. RP (3/9/10) 630. Pierce explained that he wished to question the prior day's panel and the current day's panel about answers they had given in their questionnaires *e.g.*, knowing the Yarrs' extended family,

reading about the case in the paper, and gossiping about the case. RP (3/9/10) 630. The State objected to this extension on the grounds that the questionnaires were meant to avoid poisoning the jury pool; they were intended to keep the potential jurors from hearing one another's answers, and the method suggested by Pierce would do exactly that. RP (3/9/10) 631. The Court agreed with the State's assessment of Pierce's request and denied the motion finding that the questions were adequately covered in the questionnaire, reading about the case was not grounds to strike a juror, and knowing the extended family of the victims was not grounds to strike a juror. RP (3/9/10) 631. The Court also indicated that it would continue to monitor the procedure being used and if it looked unfair to Pierce the door was to be left open to address the issue at that time. RP (3/9/10) 632.

The oath was administered to the second panel, and they were provided with the questionnaires. RP (3/9/10) 632. As soon as the parties reconvened five jurors were struck because they were either related to the case in some way or had a medical condition that made them unfit to serve on the jury: juror 58 was the Sheriff's Evidence Technician, RP (3/9/10) 636; juror 67's father was a witness, RP (3/9/10) 637; juror 72's husband was already on the jury panel, RP (3/9/10) 638; juror 77 had a hearing

problem, RP (3/9/10) 638; and juror 90 had bad hearing and said he could not stay awake. RP (3/9/10) 640.¹⁶

After these jurors were struck, Pierce moved to strike for cause an additional 25 jurors on the grounds that they had all read the news accounts or knew members of the Yarrs' extended family. RP (3/9/10) 644-46. That motion was denied as mere exposure to pre-trial publicity or knowing an extended-family member of the victims does not disqualify a person from sitting on the jury. *Id.*

Juror 92, Brenda McCarthy, who was included in Pierce's "mass" challenge for cause, indicated on her questionnaire that: 1) she had only lived in Jefferson County three years, 2) of the 85 potential witnesses she only knew Detective Apeland (though the form does not reveal how she knew him), and, 3) she had "read about what supposedly happened." CP 848-54. She further indicated that nothing she had read about the case would affect her ability to be fair and impartial, she had no opinion about the case, and she would keep an open mind. CP 850-52.

When questioned by Pierce she gave the following answers:

DEFENSE: But you've read a fair amount about the case is that right?

¹⁶ Apparently this juror also declared that he was "dumber than a fence post." RP (3/9/10) 640.

JUROR 92: I read a little bit at the beginning. But, um, like some of the people here I've, I just haven't paid much attention to the papers. . . .

DEFENSE: You haven't formed an opinion about Pierce's guilt or innocence?

JUROR 92: From what I've read I don't think I've had enough input to make an actual opinion about it.

DEFENSE: Okay. And so would you be able to put aside whatever you've read and make a decision based on the evidence presented in court?

JUROR 92: I believe I would. RP (3/10/10) 759.

Pierce did not renew his challenge to Juror 92 after the attorneys concluded their verbal questioning. RP (3/10/10) 759.

After making its ruling regarding the mass challenge for cause, the Court allowed the parties to strike jurors whom they agreed were unfit for jury service. The parties agreed to strike the following jurors: juror 51 should have been a witness, RP (3/9/10) 649; juror 84 was the grandmother of a witness, RP (3/9/10) 649; juror 81 had spoken with the Yarrs' grandfather about the case, RP (3/9/10) 649; and juror 91 was struck for health reasons. RP (3/9/10) 649.

The parties then proceeded to *voir dire* the entire panel for 75 minutes each and during this time they were permitted to make challenges for cause. In the general questioning of the panel, Pierce referred to the jurors by their last names and was able to strike the following 14 jurors

because they exhibited some form of bias: juror 66 worked for the Yarrs and could not remain unbiased; RP (3/9/10) 707; juror McGregor¹⁷ was struck over State's objection because she said she might not be able to block out the articles she had read, RP (3/9/10) 714-16; juror Weekly would not set aside his opinion that Pierce was guilty, RP (3/9/10) 725; juror Rodgers could not guarantee he would remain impartial, RP (3/9/10) 727-29; juror Hilliard could not set aside what she had read in the news, RP (3/9/10) 738; juror Morgan knew the victims, RP (3/9/10) 739; juror Smith could not decide the case based solely on the evidence, RP (3/9/10) 743; juror Harwood had formed an opinion on guilt and would not set it aside, RP (3/9/10) 746-47; juror Krudge (82) could not make a decision based on the evidence presented, RP (3/9/10) 749; juror Lewis could not set aside what she had read and base her decision solely upon the evidence, RP (3/9/10) 752; Juror Hauk (85) had an opinion that she could not set aside, RP (3/9/10) 753; juror Leinhouts could not guarantee he would base his decision solely upon the evidence, RP (3/9/10) 753-57; juror Peterson could not guarantee that he would be totally impartial, RP (3/9/10) 757; and juror Kilmer was excused because he had formed an opinion that he would not set aside. RP (3/9/10) 758.

¹⁷ Pierce only used names when addressing the jurors so that is all that is in the transcript.

Three other jurors were struck due to personal conflicts or medical conditions: juror Reed's sister had been murdered and she did not feel she could remain unbiased, RP (3/9/10) 741-42; juror Harrington had a brain injury that made it difficult for her to pay attention to the testimony, RP (3/9/10) 744; and Juror Danner (80) could not miss work, RP (3/9/10) 747.

At the end of two days of for cause challenges, 41 jurors remained on the panel. RP (3/9/10) 762. The Court determined that there were enough jurors to go forward with selection of the jury but ordered a third panel of jurors to report the following day just in case they became necessary. RP (3/9/10) 764.

Before recessing for the day, the Court informed the parties that they would each have 75 minutes to examine the remaining jurors. RP (3/9/10) 764. Pierce objected and requested more time but this motion was denied. The Court stated that he had reviewed cases on the length of *voir dire* and based on those cases, the 6-11 total hours of *voir dire* that he was giving the parties was not unreasonable. RP (3/9/10) 764-65. The Court also pointed out that he had given Pierce extra time during the session they had just completed. RP (3/9/10) 764-65.

On March 10, 2010, all of the remaining jurors were seated in the courtroom for a general *voir dire*. At the beginning of this session, Jurors

53, 57, 59, and 64 stated that they could not set aside their opinions and decide the case based on the evidence and so they were struck for cause. RP (3/10/10) 779-80. Juror 35 was struck for cause due to a close relationship with a Yarr family member. RP (3/10/10) 835. Juror 6 was struck for cause due to pressure being put upon him by his family at home. RP (3/10/10) 839-40. Juror 12 was struck because his ongoing marriage counseling would make it difficult to concentrate on the evidence. RP (3/10/10) 843-44. Juror 11 was then struck due to a preplanned non-refundable trip to California. RP (3/10/10) 846-47. Juror 73 was excused for medical reasons. RP (3/10/10) 848. Juror 5 was excused because financial hardship would make him unable to concentrate on the evidence. RP (3/10/10) 881.

Once the parties were done making for cause challenges, the parties were allowed to use their nine peremptory challenges each. Pierce used all nine peremptory challenges. RP (3/10/10) 891. He did not request any additional peremptory challenges, and he did not make a general challenge to the seated jury. RP (3/10/10) 891. The jury was sworn to hear the case on March 10, 2010. RP (3/10/10) 888.

Just prior to jury selection, and outside the record, new evidence was disclosed to the prosecutor. On March 4, 2010, four days before jury

selection commenced, Mr. Michael Donahue approached Deputy Prosecutor Scott Rosekrans and provided him new information:¹⁸ Pierce had sought methamphetamine on the night of the murders. Mr. Rosekrans believed this could be evidence of Pierce's motive for the seemingly random murders and so he investigated the newly disclosed information the following day.

On March 5, 2010, three days before jury selection commenced, Prosecutor Juelanne Dalzell, Deputy Prosecutor Scott Rosekrans, and Detective Joseph Nole travelled to Quilcene to interview Mr. Boyd. Mr. Boyd admitted that Pierce had, in fact, asked him to find some methamphetamine. The Defense, who had interviewed Mr. Boyd and Mr. Donahue at least two times, did not learn about the methamphetamine until March 19, 2010.¹⁹ RP (3/18/10) 275-77²⁰.

Three days later, March 22, 2010, Mr. Donahue and Mr. Boyd each took the stand. Before they testified regarding the methamphetamine, Pierce objected on the grounds of relevance. RP

¹⁸ Since the night of the murders, Mr. Donahue and Mr. Thomas Boyd had told the State that Pierce unexpectedly arrived at Mr. Boyd's RV, drank a beer, ate a sandwich, and then left.

¹⁹ On March 19, 2010, in the middle of the trial, Defense Counsel interviewed Mr. Boyd and Mr. Donahue. During this interview, at the prompting of Deputy Prosecutor Rosekrans, Mr. Boyd finally told Defense Counsel that Pierce had been trying to buy methamphetamine shortly after the murders. RP (4/9/10) 1479.

²⁰ Initially Pierce accused the State of hindering his defense by keeping him away from witnesses but this story changed when the State pointed out that it could document that Pierce's investigator had conducted at least two interviews with Mr. Boyd.

(3/22/10) 695-96. The State argued that the evidence was relevant to show Pierce's motive for the murders. *Id.* The Court ruled, "I'll allow it. It is prejudicial, but I can see it being relevant. The jury can give it whatever weight they want." *Id.*

At the conclusion of testimony, the court read the jury instructions to the jury. RP (3/24/10) 979. Included in these instructions was the general admonishment that "the lawyer's statements are not evidence" and that the jury "must disregard any remark, statement, or argument that is not supported by the evidence or the law" in the court's instructions. CP 504; WPIC 1.02.

The State's initial closing argument lasted some 30 minutes and spans 16 pages in the record. RP (3/24/10) 1084, & 1019 to 1045. Pierce made no objections during the entire argument. *Id.*

Pierce's closing argument followed and it spanned 38 pages of the record. RP (3/24/10) 1046-84. In his closing argument Pierce conceded that it was him in the ATM video taking money from the Yarrs' account. RP (3/24/10) 1046.

The State's rebuttal (an additional 65 pages) lasted approximately 65 minutes. RP 1084 to 1149. During this rebuttal Defense objected three times; *all three objections were overruled.* RP (3/24/10) 1105, 1115, and

1116-17. After his first objection the Court told the jury, “the evidence that you are to consider in making your decision consists of the testimony of the witnesses. The attorneys’ remarks, statements and arguments are not evidence. They are intended to help you understand the evidence and apply the law.” RP (3/24/10) 1105-06. On the second overruled objection the Court observed that the Prosecutor “can make the argument. The jury heard the evidence.” RP (3/24/10) 1115. On the final objection – also overruled – the Court instructed the jury, “This is argument, ladies and gentlemen of the jury. If you find it’s not supported by the evidence, you’re obviously free to ignore it.” RP (3/24/10) 1116-17.

The jury returned their verdicts on March 26, 2010. CP 557-73. In their verdicts, the jury rejected the State’s argument that Pierce acted with premeditation, but convicted Pierce of Felony Murder First Degree and all other charges. *See* CP 558, 563.

After the jury was discharged, two jurors were interviewed by a reporter. In the subsequent article the reporter paraphrased one juror as stating that when Pierce arrived at Mr. Boyd’s RV, Pierce asked if he smelled like gas. CP 629-34. Based upon the article, Pierce filed a motion for a new trial. CP 612-16.

The State promptly objected to the consideration of a juror's thought processes. CP 648-60; RP (4/9/10) 1458-60. The State's objection was sustained by the court. RP (4/9/10) 1460-62. It denied Pierce's motion ruling that 1) the jury did not consider any extrinsic evidence, 2) juror affidavits cannot be used to impeach a verdict, and, 3) nowhere in the law was "jury confusion" a basis for a new trial. RP (4/9/10) 1460-62.

IV. ARGUMENT

The Trial Court Did Not Abuse Its Discretion When It Denied Pierce's Two Motions For A Change Of Venue: The First Motion Was Properly Denied After Balancing The Nine *Crudup* Factors And Determining It Was Still Possible To Empanel A Fair And Impartial Jury And The Second Motion Was Properly Denied After A Fair And Impartial Jury Was Empanelled.

A. STANDARD OF REVIEW ON A CHANGE OF VENUE

A "[m]otion for change of venue in a criminal case is directed to sound discretion of the trial court, and its decision will not be disturbed on appeal, absent convincing showing of abuse of discretion." *State v. Rupe*, 108 Wn.2d 734, 750, 743 P.2d 210 (1987) ("Courts are . . . reluctant to disturb the trial court's discretion to decide motions for change of venue."); *State v. Stiltner*, 491 P.2d 1043, 53, 491 P.2d 1043 (1971). A court abuses its discretion when it exercises its authority in a manifestly unreasonable manner or on untenable grounds. *State v. Jackson*, 150

Wn.2d 251, 269, 76 P.3d 217 (2003). In the context of a change of venue, a “defendant must show a probability of unfairness or prejudice from pretrial publicity” in order to prove an abuse of discretion. *Jackson*, 150 Wn.2d at 269-73, 76 P.3d 217 (citing *State v. Hoffman*, 116 Wn.2d 51, 71, 804 P.2d 577 (1991)).

B. CHANGE OF VENUE: THE *CRUDUP* FACTORS

Pretrial publicity does not create *per se* probability of unfairness; “[t]he fact that the great majority of veniremen remember a case, without more, is essentially irrelevant.” *Jackson*, 150 Wn.2d at 269, 76 P.3d 217 (internal citations omitted). “The relevant question is not whether the community remembered the case, but whether the jurors at the trial had such fixed opinions that they could not judge impartially the guilt of the defendant.” *Id.* (internal citations omitted).

In evaluating pretrial publicity to determine if a defendant can obtain a fair trial, courts consider nine *Crudup* factors:

- (1) The inflammatory or non-inflammatory nature of the publicity;
- (2) The degree to which the publicity was circulated throughout the community;
- (3) The length of time elapsed from the dissemination of the publicity to the date of trial;

- (4) The connection of government officials with the release of publicity;
- (5) The severity of the charge;
- (6) The size of the area from which the venire is drawn;
- (7) The care exercised and the difficulty encountered in the selection of the jury;
- (8) The familiarity of prospective or trial jurors with the publicity and the resultant effect upon them; and
- (9) The challenges exercised by the defendant in selecting the jury, both peremptory and for cause. *State v. Crudup*, 11 Wn. App. 583, 587, 524 P.2d 479 (1974) (the State has reordered the factors to mirror Pierce’s brief).

Ultimately, the best test of whether an impartial jury can be empanelled is to attempt to empanel one, *Hoffman*, 116 Wn.2d at 72-73, 804 P.2d 577, and the trial judge is in the best position to determine if a particular juror would be impartial. *State v. Brett*, 126 Wn.2d 136, 158, 892 P.2d 29 (1995).

1. The Inflammatory Or Non-Inflammatory Publicity

“I didn’t see anything particularly inflammatory in any of the publicity.”
Judge Verser, RP (3/10/11) 892.

None of the news coverage was so inflammatory, so prejudicial, that it would lead jurors to convict Pierce based on passion or emotion, therefore, this factor never favored a change of venue. Furthermore, any prejudice that did exist because of the news was mitigated by the care exercised by the Trial court, which excused jurors that *may* have been prejudiced in order to protect Pierce’s right to a fair trial.²¹ *Jackson*, 150 Wn.2d at 272-73, 76 P.3d 217.

Widespread publicity of a factual, non-inflammatory nature, does not support a change in venue. *See Crudup*, 11 Wn. App. at 5887-88, 524 P.2d 479; *State v. Rupe*, 101 Wn.2d 664, 675, 683 P.2d 571 (1984). Inflammatory news coverage is not necessarily dispositive, though, because careful jury selection can mitigate the affect of press coverage. *See Jackson*, 150 Wn.2d at 269, 76 P.3d 217 (“although the publicity was at times extensive, and some of it inflammatory, and the great majority of the veniremen had heard of the case, the care taken by the trial court to ensure an impartial panel leads us to conclude that the Court of Appeals correctly found no abuse of discretion.”).

²¹ Judge Verser stating, “We were incredibly thorough in grilling these jurors about what they had read and how that might or might not affect them And, you know, we excused a number of juror for cause that ordinarily wouldn’t be, but just to be on the cautious side for Pierce.” RP (3/10/10) 891-92.

Defense counsel argues that the press was so inflammatory that a change of venue was necessary. In support of this argument the Pierce cites to stories that discussed:

- The biographies of the Yarrs, CP 212;
- The mystery surrounding the murders, *Id.*;
- The County mourning the deaths because they had deep roots in the community and had “touched so many lives,” *Id.*;
- Pierce’s Statements to law enforcement, *Id.*;
- Forensic evidence and autopsy reports, *Id.*;
- Pierce’s criminal history, *Id.*;
- A family member stating that they were glad that Pierce was arrested and did not want him to get out and do it again, *Id.*;
- The financial cost to the county in paying for Pierce’s defense that could have led to layoffs, *Id.*; and
- A public official pondering if Pierce’s defense was given a blank check, *Id.*

Of all of the articles that Pierce has cherry picked from a years-worth of newspaper coverage, the only truly inflammatory article he cites to in his brief is a family member saying they were afraid Pierce would get out and do it again. The rest of the stories were factual: Janice and Pat had lived

in the community for a long time, people were saddened by their deaths, and the county had budget concerns.

Other news stories Pierce cites as being inflammatory turn out to be evidence that was actually admitted at trial.²² In closing arguments Pierce conceded that he used the Yarrs' ATM card, the forensic evidence was all admitted, and the jury heard Pierce's statements that: "Mr. B" was the shooter, the shooter was covered in blood, and he wanted immunity in exchange for the name of the real shooter. RP (3/24/10) 1046; RP (3/17/10) 152-54.

While Pierce cites to news coverage that he calls "inflammatory," he ignores all of the favorable news coverage he received:²³

- Pierce denied being the murderer and implicated someone else, CP 177, 180, 181;
- "Pierce's attorney questions probable cause," CP 192;
- Defense arguing Pierce can provide information on the real killer in exchange for immunity on the theft charge, CP 192;
- Defense arguing "The probable cause statement didn't establish probable cause," CP 194;

²² The Judge found that much of what was in the papers came from the court record. RP (3/17/10) 221

²³ Missing from the Clerk's Papers is the sympathetic interview of his mother and girlfriend that was coincidentally published just a week before the trial. <http://www.ptleader.com/main.asp?SectionID=36&SubSectionID=55&ArticleID=26434>.

- “Defense challenges murder evidence,” CP 197;
- Defense decrying their lack of funding: “we don’t have the budget or manpower to keep up with the case,” CP 198;
- Pierce stating “I couldn’t do something like that, and I am devastated by what I saw,” CP 199; and
- “Top concern must be fair trial, says Yarr family,” CP 207.

There was little or no inflammatory news coverage, the coverage was evenly balanced, factual in nature, and based on the court record.

Therefore, the trial court did not abuse its discretion in finding this factor did not require a change of venue. RP (3/10/11) 892. Because there was little or no inflammatory coverage and because the Trial court was quick to strike jurors who indicated any bias, this factor never weighed in favor of a change of venue. RP (3/9/10) 891-92.

2. The Degree to Which the Publicity Was Circulated Throughout the Community

“[T]his case hasn’t gotten that much publicity. There’s been some and the jurors have seen it, but there’s certainly been more in other cases in this County.”

Judge Verser after the selection of the jury. RP (3/10/11) 891.

Due to the limited number of media outlets on the Olympic Peninsula the publicity did not circulate to such an extent that the Trial court abused its discretion by denying Pierce’s motion for a change of venue.

Pierce argues “The publicity surrounding the victims, the client, the case, and the defense was relentless. He claims the two newspapers, “The Port Townsend Ledger” and “The Leader,” as well as the local television news, covered the case “extensively.” Appellant’s Brief at 26.

The above statement is erroneous. There is only one Port Townsend newspaper: The Leader – a weekly publication. The Port Townsend Ledger does not exist nor did it at any time subsequent to the Yarrs’ murders. Also, there is no broadcast television news station anywhere on the Olympic Peninsula. It is likely that the Seattle television stations reported the double homicide, however, that story was not newsworthy for very long in those markets.

The one local source for news at the time of trial was the Port Townsend Leader, which has 1,700 subscribers. The only other source of news that covered the story was The Peninsula Daily News, which is published in Port Angeles and has 2,000 subscribers in Jefferson County. Between the two papers, only a small minority of Jefferson County’s 30,000 residents were regularly exposed to any news about this criminal matter.

The purpose of the *Cruddup* factors is to determine if a defendant can receive a fair trial from an impartial jury, *see* RCW 4.12.030(2) (Grounds Authorizing a Change of Venue: “there is reason to believe that

an impartial trial cannot be had therein.”), and in this case the trial court was in the best position to review the local media and its affect on the community. Given the limited number of media outlets on the Olympic Peninsula, the Court did not abuse its discretion in determining that this factor did not make it impossible to impanel an impartial jury. Since this factor never weighed in favor of a change of venue it is not grounds for a new trial.

3. Length of Time From Dissemination of the Publicity to the Date of Trial

The media coverage occurred periodically from the day after the murders through Pierce’s sentencing. This factor would weigh in favor of a change of venue if the coverage had saturated the community and been biased or inflammatory, but it was neither. *See supra.* (1) The Inflammatory or Non-Inflammatory Publicity. Given that the news coverage was balanced and primarily factual in nature, and there are few media outlets on the Olympic Peninsula, *See supra* (2) The Degree to which the Publicity was Circulated Throughout the Community, this factor sheds little light on whether or not a fair and impartial jury could be seated in this case.

4. The Connection of Government Officials with the Release of Publicity

“Most of the information comes from these hearings, which are going to be open to be open to the public.”
Judge Verser, denying the first motion for a change of venue, RP (2/17/10) 221.

The purpose of the *Crudup* test is to determine if pre-trial publicity created a venue where a defendant could not receive a fair trial. In the present case, Pierce seems to argue that the mere connection of government officials to news articles about the case impaired his right to an impartial jury. The difficulty with this argument is that all of the examples cited by Pierce are factual, noninflammatory statements: the case cost the county money, Pierce told the detectives non-public information about the murders, Pierce had a long criminal history, the SRA limited the amount of time he spent in custody, and the State opposed Pierce’s pre-trial motions. This argument also ignores the fact that one of the officials releasing information was Defense Counsel—who was frequently releasing information favorable to Pierce. RP (2/17/10) 215; CP 181, 192, 194, 197, and 198.

The trial court was in the best position to determine if this factor created an unfair venue for Pierce, and in this case the trial court believed that a fair panel could be empanelled. RP (2/17/10) 222. Additionally, many of the statements Pierce cites to were in the court record and none of them are inflammatory so, like the previous factor, this factor should be

given little weight as it sheds little or no light on whether Pierce could get a fair and impartial jury.

5. The Severity of the Charge

Murder is a serious charge and could weigh in Pierce's favor if the publicity had been inflammatory or if the Court had not taken great care to strike all potentially biased jurors. RP (3/10/10) 891-92.

6. The Size of the Area from Which the Venire is Drawn

Jefferson County is not so small that a fair and impartial jury could not be seated. Jefferson County has a diverse population of approximately 30,000 people. Some of the residents are natives with local ties and many are retirees from all around the country.²⁴ The population is large enough and diverse enough, that in just two-and-a-half days the trial court was able to empanel a fair and impartial jury of fifteen people.

Defense Counsel seems to argue that the county so "tight knit" that it was just too small. The evidence to support this is comments of potential jurors such as "I'm just saying that I'm surprised that he is not being tried someplace else," RP (3/9/10) 728-30, and another potential juror expressing his surprise that the case was being tried in such a small

²⁴ See <http://www.greatplacetoire.com/port-townsend.php>;
[http://www.co.jefferson.wa.us/commdevelopment/PDFS/GMSC/Hovee%20Existing%20Conditions%20Report%20\(Final\)_10'10.pdf](http://www.co.jefferson.wa.us/commdevelopment/PDFS/GMSC/Hovee%20Existing%20Conditions%20Report%20(Final)_10'10.pdf) at 7.

community (though this juror went on to say that he could be fair and impartial). *Id.*

The person in the best position to evaluate the jury panel was the trial judge and he disagreed with the sentiments Pierce cites to in his brief, stating: “Familiarity of the prospective trial jurors with the publicity. That’s always surprising. You’d be surprised how many are not familiar with the publicity, I believe, from my experience.” RP (2/17/10) 220. Ultimately, “[t]he fact that the great majority of veniremen remember a case, without more, is essentially irrelevant. The relevant question is not whether the community remembered the case, but whether the jurors at the trial had such fixed opinions that they could not judge impartially the guilt of the defendant.” *Jackson*, 150 Wn.2d 251, 270, 76 P.3d 217 (2003); (citing *Patton v. Yount*, 467 U.S. 1025, 1035, 104 S.Ct. 2885, 81 L.Ed.2d 847 (1984) (internal quotations omitted)).

Because the population was large enough and diverse enough that the Court could, and did seat an impartial jury, the area was not too small and the Court did not abuse its discretion in denying the change of venue.

C. THE FINAL THREE *CRUDUP* FACTORS

The Court did not abuse its discretion when it denied a change of venue after two-and-a-half days of jury selection ended with the seating of fifteen jurors.

In spite of the fact that, prior to the trial, none of the above *Crudup* factors clearly showed it was impossible for Pierce to get a fair trial in front of an impartial jury, and Pierce cannot show that a biased juror sat on his jury, Pierce insists that the Court abused its discretion in denying his dual motions for a change of venue. In this branch of his argument, Pierce cites the remaining *Crudup* factors, while actually arguing that the Court was so careless that it abused its discretion throughout the entire jury selection process.

In spite of the fact that Pierce attacks the “inadequate” jury selection process he can only point to one juror that he *claims* was biased, Juror 92. And there is nothing in the record that shows that Juror 92 was biased. *See* CP 848-54; RP (3/10/10) 759. The reason Pierce can only complain of one juror, is due to the care exercised by the trial court which stated:

We were, I felt incredibly thorough in grilling these jurors about what they had read and how that might or might not affect them even to the point, [Defense Counsel] where you were asking things like, gee, can you separate if it goes three or four weeks can you separate what you read from the paper from what you heard in the courtroom? And, you know, we excused a number of juror for cause that ordinarily wouldn't be, but just to be on the cautious side for Pierce.” Judge Verser in denying Defense's second motion for a change of venue. RP (3/10/10) 891-92.

1. The Care Exercised and the Difficulty Encountered in the Selection of the Jury

Under this heading, Pierce makes three different arguments: 1) the trial court did not exercise due care in selecting the jury, 2) it was difficult to select a jury, and 3) the Court did not grant the parties enough time to select the jury.

All of these arguments fail, especially when examined for an abuse of discretion. It was not difficult to select a jury because the trial court exercised a great deal of care in overseeing the process: it went out of its way to strike jurors just to be “cautious;” it held a third panel of potential jurors in reserve in case they were needed at the end of the general *voir dire*²⁵; it gave the parties extra challenges; and it gave the parties a reasonable amount of time—more than two full days—to select a jury.

a. Standard of Review

It is well settled that trial courts have wide discretion in determining how best to conduct *voir dire*. *E.g. Morgan v. Illinois*, 504 U.S. 719, 729, 112 S.Ct. 2222, 119 L.Ed.2d 492 (1992); *State v. Mak*, 105 Wn.2d 692, 707, 718 P.2d 407 (1986), *cert. denied*, 479 U.S. 995 (1986).

²⁵ The Court ordered parties to try and limit voir dire to an hour and left open the possibility that it could be extended if necessary. RP (3/9/10) 632. There was a 50 juror panel in the basement waiting to be called into the courtroom if it turned out that a jury could not be selected from the first two panels. RP (3/9/10) 892.

A trial court's exercise of discretion is limited only when the record reveals 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). The Appellate court will reverse a trial court's ruling on the scope of *voir dire* for an abuse of discretion if the defendant demonstrates that the abuse substantially prejudiced his case. *State v. Brady*, 116 Wn. App. 143, 147, 64 P.3d 1258 (2003) (citing *State v. Davis*, 141 Wn.2d 798, 825-26, 10 P.3d 977 (2000)), *rev. denied*, 150 Wn.2d 1035, 84 P.3d 1230 (2004).

The entire purpose of *voir dire* is to allow the parties to discover what biases and prejudices potential jurors may possess that would prevent them from deciding a case based on the facts admitted at trial. All Jurors must be capable and willing to decide the case solely on the evidence before them. *Rupe*, 108 Wn.2d 734, 748, 743 P.2d 210.

The general process of *voir dire* is outlined in CrR 6.4(b) which provides:

A voir dire examination shall be conducted for the purpose of discovering any basis for challenge for cause and for the purpose of gaining knowledge to enable an intelligent exercise of peremptory challenges. . . . The judge and counsel may then ask the prospective jurors questions

touching their qualifications to serve as jurors in the case, subject to the supervision of the court as appropriate to the facts of the case.

Additionally, RCW 2.36.110 states:

It shall be the duty of a judge to excuse from further jury service any juror, who in the opinion of the judge, has manifested unfitness as a juror by reason of bias, prejudice, indifference, inattention or any physical or mental defect or by reason of conduct or practices incompatible with proper and efficient jury service.

If a juror declares that they can set aside their preconceived notions and decide a case based upon the evidence presented at trial, they are fit to sit on a jury. *Rupe*, 108 Wn.2d at 749, 743 P.2d 210.

Despite the fact that 15 jurors were selected out of 93 veniremen in two-and-one-half days Pierce asserts the fourth *Crudup* factor supports a change in venue because the jury selection process was “inadequate.” Brief of Appellant at 32.

The defense argument seems to boil down to three main issues:

- 1) The Court abused its discretion by limiting the length of jury selection,
- 2) The Court abused its discretion by changing the format of jury selection, and

- 3) The Court abused its discretion by using the struck jury method which allowed jurors to hear one another's comments about the case.

All of the defense arguments fail. A trial court has broad discretion in determining the appropriate manner to select a jury and Pierce has not, and cannot, show that he was substantially prejudiced by any of the Court's decisions. *State v. Davis*, 141 Wn.2d 798, 825-26, 10 P.3d 977 (2000).

b. Scope of *Voir Dire*

I can't imagine [Defense Counsel] you standing here saying you're going to need three hours of *voir dire* to explore the very issues that were on that questionnaire yesterday. I'm going to limit it to an hour. . . . [I]t shouldn't take more than an hour to go through the jury panel. You've got the questionnaires, you've got your chart, um, to figure out how you're going to use your preempts. But, I thought that questionnaire process was maybe more than necessary to begin with. But to have you now say that, well, we used the questionnaire process, now I want three hours to explore the very issues that we raised on the questionnaire. Judge Verser denying motion for additional *voir dire* time RP (3/9/10) 631.

A trial court is not obligated to allow *voir dire* to go on until a defendant has the jury of their choosing, all that is necessary is that a fair and impartial jury be seated, and a trial court may limit the scope of the process so long as it remains an effective means of obtaining an impartial jury in an expeditious amount of time. *State v. Frederiksen*, 40 Wn. App.

749, 752-53, 700 P.2d 369 (1985). Should a court abuse this discretion it is not mandatory grounds for a new trial so long as the abuse did not substantially prejudice the rights of the defendant. *Davis*, 141 Wn.2d at 825-26.

A trial court has broad discretion in determining the proper scope or extent of *voir dire*. CrR 6.4(b); *Brady*, 116 Wn. App. at 146-47, 64 P.3d 1258; *Frederiksen*, 40 Wn. App. at 752-53, 700 P.2d 369. The only limits on a court's discretion is the need to assure a fair trial by an impartial jury. *Frederiksen*, 40 Wn. App. at 752, 700 P.2d 369. "The trial court is vested with discretion (1) to see that the *voir dire* is effective in obtaining an impartial jury and (2) to see that this result is obtained with reasonable expedition." *Frederiksen*, 40 Wn. App. at 753, 700 P.2d 369; *State v. Yates*, 161 Wn.2d 714, 748, 168 P.3d 359 (2007) (No abuse of discretion in refusing to give questionnaire that included questions about juror's religious beliefs, when parties were allowed to question jurors about how their beliefs would affect them as jurors); *State v. Marsh*, 106 Wn. App. 801, 24 P.3d 1127 (2001) (no abuse of discretion in process that automatically excluded non-english speaking jurors); *State v. Williamson*, 100 Wn. App. 248, 255, 996 P.2d 1097 (2000) (no abuse of discretion when trial court allowed State to exercise peremptory challenge, after jury had been sworn and state's first witness had testified); *but see Brady*, 116

Wn. App. at 147-48, 64 P.3d 1258 (court abused its discretion by changing process without notice to parties; each side told they would have two chances to question panel but after first round, questioning was halted over both parties objections).

To prevail on a claim that a court abused its discretion in limiting the scope of *voir dire*, a defendant must show both: the trial court abused its discretion and the abuse substantially prejudiced the defendant. *Davis*, 141 Wn.2d at 825-26, 10 P.3d 977.

When it comes to the extent of *voir dire*, the courts have never created a bright line rule, though the Supreme Court has alluded to the fact that the process can go on too long, stating:

We cannot fail to observe that a *voir dire* process of such length, in and of itself undermines public confidence in the courts and the legal profession. The process is to ensure a fair impartial jury, not a favorable one. Judges, not advocates, must control that process to make sure privileges are not so abused. Properly conducted it is inconceivable that the process could extend over such a period. We note, however, that in response to questions counsel stated that it is not unknown in California courts for jury selection to extend six months.

Press-Enterprise Co., v. Superior Court of California, 464 U.S. 501, 510-11 fn 9, 104 S.Ct. 819, 78 L.Ed.2d 629 (1984).

Ultimately, a court is vested with broad discretion to assure that a fair and impartial jury is seated. *Frederiksen*, 40 Wn. App. at 752, 700 P.2d 369.

And when overseeing *voir dire* a trial court must exercise its discretion in

a manner that “is effective in obtaining an impartial jury” and assures “that this result is obtained with reasonable expedition.” *Frederiksen*, 40 Wn. App. at 753, 700 P.2d 369.

The trial court granted both parties a reasonable amount of time to expeditiously select a fair and impartial jury. During the first day of jury selection the parties were given a full court day to examine 49 jurors. On the following day, the parties were again given a full day to work through an additional panel of jurors. On the third day of jury selection the parties were then granted 75 minutes each, to conduct a general *voir dire* of the 44 remaining jurors before selecting the final 15 for the jury. Based on this record Pierce can show neither abuse of discretion nor substantial prejudice. *Davis*, 141 Wn.2d at 825-26. Nothing in the record indicates that the Court abused its discretion in limiting the *voir dire* to two-and-a-half days. And Pierce has not shown, nor can he, that he was substantially prejudiced by the process because there is no record that shows a biased juror was seated.

Without citing to any legal authority for his position, Pierce takes a very narrow view of the record and argues that the Court did not grant the parties enough time for *voir dire*. His evidence for this argument is that the trial court only gave the parties one hour to conduct *voir dire*. Brief of Appellant at 33. While this statement is true, the parties had one hour

each to *voir dire* a particular panel, the entire *voir dire* was not wrapped up in just two hours—in excess of two days to select a fair and impartial jury.

Because Pierce cannot show that the court abused its discretion in limiting *voir dire* to two-and-a-half days and because Pierce cannot show that he was substantially prejudiced by the process employed by the trial court, the scope of *voir dire* is not grounds for a new trial.

c. Method of Voir Dire

The only limits placed upon a trial court's discretion during *voir dire* is the requirement that the entire process ensures that the defendant receives a fair and impartial jury in an expeditious amount of time. *Frederiksen*, 40 Wn. App. at 753, 700 P.2d 369. And in the event a court abuses its discretion, this only becomes grounds for a new trial if a defendant can show that they were substantially prejudiced by the abuse. *Davis*, 141 Wn.2d at 825-26, 10 P.3d 977.

The trial court did not abuse its discretion in changing the jury selection process mid-stream because the court evaluated the process, determined it was not expeditious and not effective, and, therefore, it altered the process to a manner that it believed would lead to a fair and impartial jury in a more reasonable amount of time. *Frederiksen*, 40 Wn.

App. at 753, 700 P.2d 369 (citing *United States v. Jones*, 722 F.2d 528, 529 (9th Cir.1983)).

Again without citing to any legal authority, Pierce argues that by changing the manner in which jury selection was conducted, somehow he was denied a fair trial. A careful review of the record, however, indicates that the trial court monitored the progress of jury selection for a day-and-a-half, read all of the jury questionnaires, and eventually came to the conclusion that the process was both ineffective and being abused. RP (3/9/10) 646. The trial court found that Pierce's counsel wanted to interview "pretty much" every juror individually and went so far as to chastise Pierce's counsel for making a "mockery" of the questionnaire process. RP (3/9/10) 646. The trial court had broad discretion and was in the best position to evaluate the process being used in *voir dire*. See *Frederiksen*, 40 Wn. App. at 753, 700 P.2d 369. Based on the record, it appears that the Court found the original process was ineffective and being abused. At that point, the Court did not abuse its discretion by changing the format of jury selection to a general questioning of the panel. *Id.* Furthermore Pierce has not shown, and cannot show, that the change in process prejudiced him in any way because no prejudiced juror sat upon his jury.

Because Pierce cannot show that the Court abused its discretion and cannot show substantial prejudice due to the jury selection process, the change in *voir dire* is not grounds for a new trial.

d. The Struck Jury Method, i.e., “jury contamination”

Voir Dire of an entire jury panel is widely used and approved across the State and Pierce cannot meet his burden of proof and demonstrate that this method of jury selection was an abuse of discretion that prejudiced any of his constitutional rights. *Davis*, 141 Wn.2d at 825-26, 10 P.3d 977.

Pierce, like every defendant, had the right to be judged by an unbiased jury of his peers, but when alleging that this principal was violated, the burden is on him to prove that the jury selection system employed by the Court was constitutionally invalid. *State v. Hilliard*, 89 Wn.2d 430, 440, 573 P.2d 22 (1977).

Pierce implies that the use of the struck jury method was prejudicial to him but in making this argument he ignores the care that the Court exercised during the jury selection process, *e.g.* striking jurors just to be cautious. (3/9/10) 891-92.

The Court exercised a due amount of care to insure that Pierce was tried by a fair and impartial jury panel. Nearly two-thirds of all the prospective jurors examined were excused for cause, including many

potential jurors who would not have been struck for cause in any other case. RP (3/9/10) 891-92. Others were challenged for cause but kept on the general panel for later *voir dire*.

The record is clear that every potential juror completed a questionnaire that had them disclose whether they had heard about the case, knew any participants, whether they had formed an opinion, whether they could be impartial, and every other fact bearing on their qualification that the court and both parties could think of. Both parties, and the Court, reviewed the questionnaires and had an opportunity to question the jurors further about their answers. Eventually, 60 of 92 jurors were excused for cause.

In spite of the care exercised by the trial court, and again without citing to any legal authority, Pierce alleges that he could not get a fair trial because jurors who knew nothing about the case were contaminated by the statements made by jurors who had read about the case, when the Court required the parties to use the “struck jury” method of *voir dire*.

First, this argument ignores the fact that it was Pierce who initially suggested conducting a *voir dire* of the whole panel when he made his motion to re-interview the first panel of jurors, so any error that occurred was invited by Pierce and he cannot now claim it as grounds for appeal. RP (3/9/10) 630-31. *See State v. Momah*, 167 Wn.2d 140, 217 P.3d 321

(2009) (defendant cannot agree to closure of *voir dire*, participate in the process, and then claim his rights were violated on appeal).

Second, Pierce's only evidence in support of this argument consists of the fact that most of the jurors had heard about the case and as many as 41 had formed an opinion about the case before *voir dire* started. Brief of Appellant at 36.

This argument implies that all 41 jurors were prejudiced against him but at least two jurors declared that Pierce was not guilty and were struck for cause on that basis. RP (3/8/10) 560 and RP (3/9/10) 649.

Furthermore, this Court has already addressed this argument and found it unpersuasive. *State v. Ford*, 151 Wn. App. 530, 213 P.3d 54 (2009) *rev.* on different grounds ___ P.3d ___, 2011 WL 1196316 (2011). In *Ford* the defendant argued that the jury panel was contaminated against him during *voir dire* because two potential jurors, who were eventually struck for cause, discussed their past experiences as victims of sexual abuse in the presence of the entire jury panel. This Court denied the appeal on that basis and the issue was not addressed when the case went before the Washington Supreme Court.

Ultimately, it is irrelevant that jurors knew about the case no matter what the source of their information. *See Jackson*, 150 Wn.2d at 270, 76 P.3d 217. Pierce must show that his trial was unfair because

jurors were prejudiced against him or that jurors would not base their decision on the facts of the case but he has not made that showing. He has not demonstrated that a single seated juror was prejudiced against him nor has he shown that a specific seated juror should have been struck for cause, therefore, he has not met his burden of demonstrating that the jury selection process violated his constitutional rights. *Hilliard*, 89 Wn.2d at 440, 573 P.2d 22.

The Court did not abuse its discretion during the jury selection. Pierce has failed to demonstrate that the Court abused its discretion by limiting the amount of time the parties had to select jurors, or by requiring the parties to question the entire panel during *voir dire*, he has also failed to show that if the court erred, he was substantially prejudiced by it, therefore, this factor, the difficulty in selecting a jury, did not favor a change of venue.

2. Prospective Jurors' Familiarity with Publicity

Despite the fact that a majority of jurors had some knowledge about the case the care exercised by the Court in selecting jurors mitigated any prejudice to Pierce in the jury selection process. RP (3/9/10) 891-92.

Pierce argues that the prospective jurors' knowledge of the publicity surrounding the case affected their ability to be impartial and shows that his trial was unfair but this argument standing alone is

meaningless. “[T]he fact that a majority of prospective jurors had knowledge of the case, without more, is irrelevant.” *State v. Rice*, 120 Wn.2d 549, 558, 844 P.2d 416 (1993) (nearly all of the 153 prospective jurors had knowledge of the murders). The critical question is not “did jurors know about the case?” The critical question is whether the jurors had such fixed opinions that they could not be impartial. *Jackson*, 150 Wn.2d at 269-73, 76 P.3d 217. In this case, it appears that the jurors who demonstrated that they *may* have had fixed opinions were struck by the Court “just to be on the cautious side,” and Pierce has been unable to show that any particular juror was prejudiced against him. RP (3/10/10) 891-92.

Since the Court struck jurors that could be potentially biased and because Pierce cannot show that a single biased juror actually sat on his panel he has failed to show prejudice and this argument is not grounds for a new trial.

3. Challenges Exercised by the Defendant

Nothing in the record indicates that a biased juror sat on Pierce’s jury and the Court did not abuse its discretion when it denied the defense motion to strike juror 92 for cause.

When reviewing the final *Crudup* factor to determine if venue should have been changed, the focus is on the challenges exercised by the

defendant. In this analysis, the sheer number of jurors struck for cause is essentially irrelevant. *Jackson*, 150 Wn.2d at 269-73, 76 P.3d 217. The relevant issue is: did a biased juror sit on the jury? *Id.* “ ‘So long as the jury that sits is impartial, the fact that the defendant had to use a peremptory challenge to achieve that result does not mean the Sixth Amendment was violated.’ ” *State v. Roberts*, 142 Wn.2d 471, 518, 14 P.3d 713 (2000) (quoting *Ross v. Oklahoma*, 487 U.S. 81, 88, 108 S.Ct. 2273, 101 L.Ed.2d 80 (1988)).

When it comes to determining the suitability of jurors, the trial judge is in the best position to observe the juror's demeanor, to evaluate their responses, and determine if the juror would be impartial. *Rupe*, 108 Wn.2d at 749, accord *Uttecht v. Brown*, 551 U.S. 1, 9, 127 S.Ct. 2218 (2007) (“Deference to the trial court is appropriate because it is in a position to assess the demeanor of the venire, and of the individuals who compose it, a factor of critical importance in assessing the attitude and qualifications of potential jurors.”).

If a juror declares that they can set aside their preconceived notions and decide a case based upon the evidence presented at trial, they are fit to sit on a jury. *Rupe*, 108 Wn.2d at 749, 743 P.2d 210.

Pierce argues the trial court abused its discretion by not excusing juror 92 for cause. The alleged grounds to strike Juror 92, was that she knew Detective Apeland (although there is no information in the record regarding how she knew him) and she “had more than a passing knowledge about the case.” Appellant’s Brief at 41. Furthermore, Pierce argues that because he had exhausted his peremptory challenges, he could not excuse Juror 92, and, therefore, he had to suffer a biased juror. But the problem with this argument is that having “more than a passing knowledge” about the case was not grounds for dismissal. *Ottis v. Stevenson-Carson School Dist. No. 303*, 61 Wn. App. 747, 756, 812 P.2d 133 (1991) (no abuse of discretion for denying challenge to juror who had “long-term contact with various persons involved in the case,” and was associated with a party but answered questions in manner that allowed the court to determine that he would hear the case fairly and impartially).

The Court was in the best position to evaluate Juror 92²⁶ and Juror 92 told the Court that she had no opinion as to guilt or innocence and she “believed” that she would make her decision based on the record, therefore, the Court did not abuse its discretion by keeping Juror 92 in the jury pool. CP 848-54.

²⁶ Juror 92 is Mrs. McCarthy in some of the transcripts. RP (3/10/10) 759; CP 848-54.

“[I]f a defendant through the use of a peremptory challenge elects to cure a trial court's error in not excusing a juror for cause, exhausts his peremptory challenges before the completion of jury selection, and is subsequently convicted by a jury on which no biased juror sat, he has not demonstrated prejudice, and reversal of his conviction is not warranted.”

State v. Fire, 145 Wn.2d 152, 165, 34 P.3d 1218 (2001).

In this case, Pierce's Counsel read the jury questionnaires, then moved to dismiss twenty-five jurors for cause, all at one time. RP (3/9/10) 644. The blanket motion, which included Juror 92, was denied.

Juror 92's questionnaire does not demonstrate she should have been struck for cause. In her questionnaire she provided the following information:

- Out of the eighty-five potential witnesses, she only knew Detective Apeland;
- She had lived in the county three years and “did not know many people in Quilcene;”
- She did not know the Yarrs or Pierce;
- She had “[r]ead about what supposedly happened,” knew the basic facts of the case, and knew there were no other suspects;
- When asked if anything she had heard or read about the case would affect her ability to be fair and impartial, she answered “No;” and

- When asked if she had formed an opinion about guilt or innocence she again answered “No,” and stated that she had not heard “much about his innocence” and was “willing to keep an open mind.” CP Questionnaire Juror 92, Brenda McCarthy.

When examined by Defense Counsel the following exchange took place:

DEFENSE: You haven’t formed an opinion about Pierce’s guilt or innocence?

JUROR 92: From what I’ve read I don’t think I’ve had enough input to make an actual opinion about it.

DEFENSE: Okay. And so would you be able to put aside whatever you’ve read and make a decision based on the evidence presented in court?

JUROR 92: I believe I would. RP (3/10/10) 759.

After the jury was seated, Defense Counsel did not request additional challenges, instead they made their second motion for a change of venue because: (1) they had been forced to use a strike on juror 49, who Pierce had previously moved to strike for cause²⁷, (2) Juror 92 was seated, (3) they were out of peremptory challenges, and (4) they had previously moved to strike Juror 92 for cause because her questionnaire “indicated she had read a significant amount of press accounts.” RP (3/10/10) 889-90.

²⁷ The Trial court denied the motion to strike Juror 49 for cause stating: “He seemed sincere in his belief that he could make a decision based on the evidence produced in court. He said he could do that and I don’t have any reason to believe that he couldn’t do it.” RP (3/8/10) 608.

The trial court did not abuse its discretion in keeping Juror 92 on the jury. The Trial Court was in the best position to evaluate Juror 92. *Rupe*, 108 Wn.2d at 749, accord *Uttecht v. Brown*, 551 U.S. at 9. The Court read her questionnaire which stated she did not have an opinion on guilt or innocence and that she would keep an open mind. The Court also observed her demeanor when defense counsel interviewed her, and again she stated that she did not have a fixed opinion as to guilt or innocence and she would make her decision based upon the evidence produced at trial. In the face of these facts Pierce now argues that Juror 92 should have been struck because she had “more than a passing knowledge” about the case and because she knew one of the detectives, but these facts do not show that Juror 92 was biased and they do not show the Court abused its discretion by keeping her on the jury. *Ottis v. Stevenson-Carson School Dist. No. 303*, 61 Wn. App. at 756, 812 P.2d 133 (knowing the parties not necessarily grounds for disqualification of juror). Because Juror 92 stated that she had no opinion about guilt and that she would make her decision based upon the evidence the Court did not abuse its discretion by keeping her on the jury. *Jackson*, 150 Wn.2d at 269-73, 76 P.3d 217; *See also* RCW 2.36.110.

Since Pierce has failed to show that any seated juror was prejudiced and should have been struck for cause, or stated differently,

that the Court abused its discretion by denying Pierce's motion to strike juror 92 for cause, the use of challenges does not support a change of venue or grounds for a new trial. *Fire*, 145 Wn.2d at 165.

4. Conclusion on Change of Venue

The trial court did not abuse its discretion in denying either of Pierce's motions for a change of venue. And Pierce has been unable to meet his burden of proof and show that any one *Crudup* factor, or combination of *Crudup* factors, prove that he could not receive a fair trial in front of an impartial Jefferson County jury. In the end fifteen unbiased jurors were seated after two-and-a-half days of jury selection, therefore, Pierce should not be granted a new trial in a new venue.

D. PIERCE CANNOT RAISE THE IMPROPER DEATH PENALTY ARGUMENT FOR THE FIRST TIME ON APPEAL AND IT WAS HARMLESS ERROR FOR THE TRIAL COURT TO INFORM JURORS THAT PIERCE'S CASE DID NOT INVOLVE THE DEATH PENALTY

Not all errors that occur in the heat of trial require a reversal of the conviction that resulted from that trial.²⁸ When there is strong evidentiary support for a verdict the State Supreme Court has found the trial court's

²⁸ It was error for the trial court to inform the potential jurors that the case did not involve the death penalty because a jury in a noncapital case cannot be informed about the defendant's possible sentence. *Shannon v. United States*, 512 U.S. 573, 579, 114 S.Ct. 2419, 129 L.Ed.2d 459 (1994); *State v. Bowman*, 57 Wn.2d 266, 271, 356 P.2d 999 (1960); *State v. Townsend*, 142 Wn.2d 838, 840, 15 P.3d 145 (2001).

reference to possible sentencing outcomes to be harmless. *See State v. Hicks*, 163 Wn.2d 477,488-89, 181 P.3d 831 (2008) (defense counsel described murder case as noncapital as did trial judge and prosecution without objection from defense counsel, nonetheless court found defense counsel’s performance “deficient” but also “nonprejudicial.”) and *State v. Townsend*, 142 Wn.2d 838, 840, 15 P.3d 145 (2001) (although defense counsel failed to object to judge informing the jury a case was noncapital, said ineffective assistance of counsel was deemed not prejudicial because jury would have come to same verdict on allegation of premeditated murder); *See also State v. Murphy*, 86 Wn. App 667, 937 P.2d 1173 (1997) (Division 1 holding “[t]rial court's improper *voir dire* instruction that murder trial did not involve death penalty was harmless error in light of jury's acquittal of defendant on first-degree murder charge” and conviction on second-degree murder.).

This issue cannot be raised for the first time on appeal by Pierce as he now attempts to do. RAP 2.5(a)(3). His trial counsel not only failed to object at trial, but when given two opportunities to object he either remained silent or indicated “there was no problem” with the Court informing the jury that they were sitting on a non-capital case. RP (3/10/10) 561, 773, 778. Under RAP 2.5(a)(3) only if the error constituted “manifest constitutional error” could the defendant raise this claim for the

first time on appeal. *State v. Abuan*, ___ P.3d ___, 2011 WL 1496182, *3 (2011). In order to establish manifest constitutional error allowing appellate review, Pierce must “demonstrate actual prejudice resulting from the error.” *State v. Kirkman*, 159 Wn.2d 918, 935, 155 P.3d 125 (2007). “ ‘Essential to this determination is a plausible showing ... that the asserted error had practical and identifiable consequences in the trial.’ ” *Kirkman*, 159 Wn.2d at 935, 155 P.3d 125 (internal quotation marks omitted) (quoting *State v. WWJ Corp.*, 138 Wn.2d 595, 603, 980 P.2d 1257 (1999)).

Pierce cannot show any prejudice. As an initial matter, the jury was correctly instructed that they “have nothing whatever to do with punishment” and jurors are presumed to follow jury instructions. CP 504; WPIC 1.01. Furthermore, given the weight of the evidence against Pierce and the fact that the jury did not convict him on every charge he faced²⁹, it is simply not plausible that informing the potential jurors that the death penalty was not a sentencing option had any “identifiable consequences in the trial.” *Kirkman*, 159 Wn.2d at 935, 155 P.3d 125. And even assuming, without conceding, that an “ineffective assistance of counsel” argument had been made in the defense’s Opening Brief, which it was not, the single mention by the trial judge of the noncapital status of this case

²⁹ Pierce was not convicted of two counts of premeditated murder. CP 558, 563.

must be reviewed in light of the *Hicks* and *Townsend* holdings described above. The Court should quickly conclude that if the facts of *Hicks* and *Townsend* did not warrant reversal of the jury's verdict, then the single statement of the trial judge made during *voir dire* was not prejudicial to Pierce.

The State also points out the alleged error was a harmless instructional error. Instructional errors in a criminal case are subject to a harmless error analysis. *State v. Hoffman*, 116 Wn.2d 51, 97, 804 P.2d 577 (1991) (“an error in instructions is likewise harmless if it did not affect the final outcome of the case.”) An instructional error in a criminal trial is harmless if the error (1) is trivial, formal, or merely academic; (2) did not prejudice the substantial rights of the defendant; and (3) in no way affected the final outcome of the case. *State v. Wanrow*, 88 Wn.2d 221, 237, 559 P.2d 548 (1977).

Any error in informing the jury about the absence of the death penalty was harmless as it did not lead to a materially different verdict. Specifically, (1) this particular error was trivial, formal, or merely academic since the Court merely stated something that had been previously published in the newspaper after the State decided not to seek the death penalty. CP 216-17. (2) there was no substantial prejudice to Pierce's rights as it was mentioned only once, and the jury took its duty

seriously, spending a day-and-a-half on deliberations and failing to convict Pierce on every count. CP 558, 563. (3) Because the evidence against Pierce was overwhelming it is highly unlikely that the error affected the outcome of the trial.

The evidence shows that Pierce knew the Yarrs, had rented a house on their farm, had worked on their farm, and he had reason to believe they had cash on hand because they had paid him for his work. RP (3/22/10) 593-94. He shoplifted a simulated firearm just prior to the murders. RP (3/17/10) 205-10. A man matching his description was seen in the area of the murders. RP (3/17/10) 48-78 He used the Yarr's ATM card and PIN number while their home was still burning. RP (3/11/10) 964; RP (3/16/10) 1437. When questioned he gave the detectives information about the murders that had not been released to the general public. And while he told the detectives the shooter burned his clothes, it turns out that all of the clothes Pierce was wearing on the night of the murders (the starburst hat, the boots, the brand new customized jacket) disappeared immediately after the murders. RP (3/22/10) 586-92, 596. Based upon this just this evidence, it is not within reasonable probabilities that the mistake in any material way influenced the verdict of the jury. *State v. Thomas*, 150 Wn.2d 821, 83 P.3d 970 (2004).

Since the Court's error did not actually prejudice the substantial rights of Pierce and in no way affected the verdict, it was harmless error and not grounds for reversal.

V. THE PROSECUTOR DID NOT COMMIT ANY MISCONDUCT DURING CLOSING ARGUMENT

A. Nothing the Prosecutor said in Closing Argument was so Flagrant and Ill-Intentioned as to Constitute Prosecutorial Misconduct

The law applicable to prosecutorial misconduct in closing arguments is summarized as follows:

Where improper argument is charged, the defense bears the burden of establishing the impropriety of the prosecuting attorney's comments as well as their prejudicial effect. Reversal is not required if the error could have been obviated by a curative instruction which the defense did not request. The failure to object to a prosecuting attorney's improper remark constitutes a waiver of such error unless the remark is deemed to be so flagrant and ill intentioned that it evinces an enduring and resulting prejudice that could not have been neutralized by an admonition to the jury. (Footnotes and citations omitted).

State v. Hoffman, 116 Wn.2d 51, 804 P.2d 577 (1991).

If a defendant did not object to the allegedly improper argument and request a corrective instruction, the defendant also bears the burden to show that the misconduct was so flagrant and ill intentioned that a curative instruction would have been useless. *See Hoffman*, 116 Wn.2d at 93, 804 P.2d 577; *State v. Lane*, 37 Wn.2d 145, 151, 222 P.2d 394 (1950); *State v.*

Graham, 59 Wn. App 418, 428-29, 798 P.2d 314 (1990). As noted by our supreme court, " '[c]ounsel may not remain silent, speculating upon a favorable verdict, and then, when it is adverse, use the claimed misconduct as a life preserver on a motion for new trial or on appeal.' " *State v. Swan*, 114 Wn.2d 613, 661, 790 P.2d 610 (1990), *cert. denied*, 498 U.S. 1046 (1991), (quoting *Jones v. Hogan*, 56 Wn.2d 23, 27, 351 P.2d 153 (1960)).

B. Standard of Review

The trial judge is generally in the best position to determine whether the prosecutor's actions were improper and whether, under the circumstances, they were prejudicial, *see State v. McKenzie*, 157 Wn.2d 44, 52, 134 P.3d 221 (2006), and "[a]llegations of prosecutorial misconduct are reviewed under an abuse of discretion standard." *State v. Brett*, 126 Wn.2d 136, 174-75, 892 P.2d 29 (1995) (citing *State v. Hughes*, 106 Wn.2d 176, 195, 721 P.2d 902 (1986)). To prevail on a claim of prosecutorial misconduct, the defendant bears the burden of showing that the comments were improper and that they were prejudicial. *State v. Warren*, 165 Wn.2d 17, 26, 195 P.3d 940 (2008) (citing *State v. Yates*, 161 Wn.2d 714, 774, 168 P.3d 359 (2007), *cert. denied*, 554 U.S. 922, 128 S.Ct. 2964, 171 L.Ed.2d 893 (2008)).

Appeals courts “review allegedly improper comments in the context of the entire argument, the issues in the case, the evidence addressed in the argument, and the instructions given.” *State v. Bryant*, 89 Wn. App. 857, 873, 950 P.2d 1004 (1998). Dismissal under CrR 8.3(b) is an “extraordinary remedy” and dismissal should not be based on speculative prejudice to defendant’s right to a fair trial. *State v. Baker*, 78 Wn.2d 327, 332-33, 474 P.2d 254 (1970).

Despite this high standard of proof, Pierce claims that the Prosecutor committed misconduct by making five different allegedly improper arguments:

- 1) Telling the jury, without objection, they would be honoring their oath by finding Pierce guilty;
- 2) Making arguments that shifted the burden of proof;
- 3) Telling the jury that the case was on behalf of the victims;
- 4) Making statements invoking community fear and a “Golden Rule” argument; and
- 5) Making unreasonable inferences, “inventing outrageous speculations,” and claiming prejudicial facts not in evidence.

All of these arguments are flawed because they ignore the record or pull the statements out of context of the entire trial, or both ignore the record and pull the arguments out of their proper context.

- a. It was not misconduct for the Prosecutor to ask the jury to apply the law to the facts and then do their duty.

When the State has proven every element of a crime beyond a reasonable doubt the jury has a duty to convict, therefore, it is not prosecutorial misconduct for a prosecutor to essentially rephrase one of the jury instructions. *See e.g.*, WPIC 26.04; *State v. Curtiss*, __P.3d __, 2011 WL 1743926, at *13 (Div. 2, May 6, 2011) (“Urging the jury to render a just verdict that is supported by evidence is not misconduct.”).

Pierce argues that three statements made by the Prosecutor, without objection, two weeks apart, taken together, constituted misconduct. The first statement, made during *voir dire*, was:

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 Pat Yarr for your decision and consideration, whatever they may be. Thank you. RP (3/10/10) 833.

The second statement, made 14 days later during closing argument was:

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

RP (3/24/10) 1148

The third statement, also made during closing argument shortly after the previous statement, was:

So find him guilty of every count, all eight counts in the Information. ***The evidence is there, the evidence supports it.*** Find him guilty, and then answer yes to all the special verdicts. And those special verdicts are, you know, did he use a gun? Yes. Was more than one Person Killed? Yes. 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.³⁰ RP (3/24/10) 1148-49 (emphasis added).

The Defense failed to object to any of these statements, therefore, the issue of prosecutorial misconduct is waived unless the misconduct was “so flagrant and ill-intentioned that it evinces an enduring and resulting prejudice that could not have been neutralized by an admonition to the jury.” *Hoffman*, 116 Wn.2d at 93, 804 P.2d 577.

Pierce's reliance upon *State v. Coleman*, 74 Wn. App. 835, 840-41, 876 P.2d 458, 461 (1994), is misplaced because there is nothing flagrant

³⁰ By the end of closing the prosecutor was forced to wrap up in a hurry as he had run over the time the Court had granted for closing argument. See RP (3/24/10) 1131 & 1146.

or ill-intentioned about what is essentially a restatement of the jury instructions and, therefore, the prosecutor did not commit misconduct. *See generally Curtiss*, __P.3d __, 2011 WL 1743926, at * 13.

b. The Prosecutor did not shift the burden of proof by pointing out the evidence did not support Pierce’s theory of the case.

The prosecutor did not shift the burden of proof when he told the jury to hold Defense Counsel to whatever argument they made and by pointing out that Pierce’s theory of the case did not explain away all of the evidence. *See State v. Russell*, 125 Wn.2d at 87, 882 P.2d 747 (1994). “It is not misconduct . . . for a prosecutor to argue that the evidence does not support the defense theory.” *Id.* (citing *State v. Graham*, 59 Wn. App. 418, 429, 798 P.2d 314 (1990); *State v. Contreras*, 57 Wn. App. 471, 476, 788 P.2d 1114, *rev. denied*, 115 Wn.2d 1014 (1990)). Moreover, the prosecutor is an advocate for the State and “is entitled to make a fair response to the arguments of defense counsel.” *Id.* (citing *United States v. Hiatt*, 581 F.2d 1199, 1204 (5th Cir.1978)).

Pierce alleges the prosecutor shifted the burden of proof to him by telling the jury during closing argument that Pierce did not present witnesses, explain the factual basis of the charges, or present evidence to support his theory of the case.

This argument is without merit. The prosecutor never mentioned Pierce's lack of witnesses, never mentioned that Pierce did not "explain the factual basis of the charges," and never said that Pierce failed to present evidence to support its theory. What the Prosecutor did instead, without drawing any objections, was two things: tell the jury to examine Pierce's defense to see if the evidence supported it and point out a specific deficiency in Pierce's defense.

The first statement was made during the Prosecutor's closing argument:

If 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 (3/24/10) 1088-89 (quotations in transcript).

Here, in the first statement, the prosecutor simply told the jury that *if* Pierce had raised a defense, i.e., his theory of the case, reasonable doubt, etc., they should be sure the evidence supported that defense and that it was not a mere unsupported claim. *See Russell*, 125 Wn.2d at 87, 882 P.2d 747. This is not a shifting of the burden of proof, and not misconduct, because in context of the whole trial the statement merely

points out that none of the admitted evidence supported Pierce's theory of the case. *Id.*

The Second statement was made in rebuttal and it did not shift the burden of proof either, instead, it specifically refuted one of the Pierce's arguments. The State's argued that Pierce covered his face at the ATM machine because he had just murdered two people. RP (3/24/10) 1044, 1063-64. Pierce countered by admitting he had used the Yarr's ATM card while the house was burning but then asserted that he only covered his face "because he was using somebody else's bankcard and he know [sic], or should've known that he had no right to and shouldn't be doing it." RP (3/24/10) 1070.

Pierce's argument left unexplained how he acquired the Yarr's PIN number, which the ATM video showed he had written down on a scrap of paper. The prosecutor pointed out this deficiency by stating:

You got a one in 10,000 chance of guessing what that number is. He had it written down on a piece of paper. [Pierce] 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 (3/24/10) 1116.

In context of the entire trial, the Prosecutor did not shift the burden of proof by merely pointing out that Pierce had not, and could not, explain

how he acquired the Yarr's PIN number around the time of their murders. *Russell*, 125 Wn.2d at 87, 882 P.2d 747.

In addition, Pierce failed to object these statements, therefore, the issue of prosecutorial misconduct is waived unless the misconduct was "so flagrant and ill-intentioned that it evinces an enduring and resulting prejudice that could not have been neutralized by an admonition to the jury." There is nothing flagrant or ill intentioned about telling the jury to carefully examine Pierce's defense or to point out that there is a key piece of evidence that Pierce was unable to explain away, therefore, the Prosecutor did not commit flagrant and ill-intentioned misconduct by making these closing arguments. *See generally Russell*, 125 Wn.2d at 87, 882 P.2d 747.

Furthermore, Pierce did not object to any of these arguments and as our Supreme Court has stated, "[c]ounsel may not remain silent, speculating upon a favorable verdict, and then, when it is adverse, use the claimed misconduct as a life preserver on a motion for new trial or on appeal." *Swan*, 114 Wn.2d at 661, 790 P.2d 610 (internal citations omitted).

- c. It was not misconduct for the Prosecutor to tell the jury the case was presented to them on behalf of the victims.

Informing the jury, without objection, that the case was brought on behalf of the Yarrs, does not rise to the level of prosecutorial misconduct that is flagrant and ill-intentioned and, therefore, does not merit a new trial.

To prevail on a claim of prosecutorial misconduct, when an argument did not draw an objection, Pierce must show a “substantial likelihood” that the Prosecutor’s statements influenced the jury’s verdict. *State v. Stenson*, 132 Wn.2d 668, 718-19, 940 P.2d 1239 (1997). He has not made such a showing.

Courts disagree whether a defendant is unfairly prejudiced by a prosecutor's statement that she "speaks for" a victim. *Compare Sanchez v. State*, 2002 WY 31, 41 P.3d 531, 535 (Wyo. 2002) (prosecutor did not err by telling jury: "You and I get to speak for" the victim); *State v. Braxton*, 352 N.C. 158, 531 S.E.2d 428, 455 (N.C. 2000) (holding that prosecutor does not err by arguing that he speaks for victim); *Henderson v. State*, 583 So.2d 276, 286 (Ala. App. 1990) ("we find no reversible error in a brief statement suggesting that the prosecuting attorney speaks for the victim's family"); with *United States v. Lowder*, 5 F.3d 467, 473-74 (10th Cir. 1993) (although the comment did not deprive the defendant of a fair trial, prosecutor made an improper comment to the jury by stating: "Who gets left out? The victims get left out. They don't get anybody to talk for

them."); *People v. Brown*, 253 Ill. App. 3d 165, 624 N.E.2d 1378, 1388, 1391-92, 192 Ill. Dec. 26 (Ill. App. Ct. 1993) (prosecutor's statement that "we speak for the victims in this case" was irrelevant to defendant's guilt, and while no single trial error required reversal, cumulative error did); *State v. Roberts*, 838 S.W.2d 126, 131 (Mo. App. 1992) (although the comment did not require reversal, prosecutor made an improper statement by arguing: "The victim, Mr. Booker, isn't here to speak for himself and able or not, it is my job to speak for Mr. Booker and Mr. Booker was a man with a family.").

Pierce claims that four statements spread out over the three weeks of trial merit reversal of the jury's verdict:

- "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. . . ,” RP (3/10/10) 832;
- "I appreciated 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;
- "On behalf of Juelie 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, and certainly last, but not least, Pat and Janice Yarr," RP (3/24/10) 1085; and

- The Prosecutor stating that the case is about the Yarrs, not about Pierce. *Id.*

None of these statements drew an objection, therefore, Pierce bears the burden of showing that these statements were flagrant, ill-intentioned, and so prejudicial that a curative instruction could not undo any harm caused. He has failed to make this showing.³¹

Ultimately, the question comes down to whether a prosecutor's brief claim to "speak for" a victim, in the context of surrounding statements, appeals excessively to jurors' emotions. *See, e.g., United States v. Rodriguez*, 581 F.3d 775, 803 (8th Cir. 2009), *cert. denied*, 131 S. Ct. 413 (2010). Here, the surrounding statements focused jurors' attention on the State's evidence, not on sympathy for the Yarrs or their family. The comment, if improper, does not merit a new trial.

d. The Prosecutor did not improperly invoke a "Golden Rule" argument.

The condemnation of Golden Rule arguments, in which counsel asks jurors to place themselves in the shoes of the victim, in both civil and

³¹ Pierce claims the dissent in *State v. Hanson*, 126 Wn. App. 276, 282, 108 P.3d 177 (2005), supports his position but that case is clearly distinguishable as it was a domestic violence case with a recanting victim and neither the Court nor the Dissent actually addressed the issue the Pierce now cites to.

criminal cases, by both state and federal courts, is so widespread that it is characterized as “universal.” *See State v. Bell*, 283 Conn. 748, 931 A.2d 198, 214 (2007); *Peterson v. State*, 376 So.2d 1230, 1233 (Fla. Dist. Ct. App. 1979); *Granfield v. CSX Transportation Co.*, 597 F.3d 474, 491 (1st Cir. 2010); *Ivy v. Security Barge Lines, Inc.*, 585 F.2d 732, 741 (5th Cir. 1978); *United States v. Teslim*, 869 F.2d 316, 328 (7th Cir. 1989); *Joan W. v. City of Chicago*, 771 F.2d 1020, 1022 (7th Cir. 1985); *Lovett ex rel. Lovett v. Union Pacific Railroad Co.*, 201 F.3d 1074, 1083 (8th Cir. 2000); *Blevins v. Cessna Aircraft Co.*, 728 F.2d 1576, 1580 (10th Cir. 1984).

As recently as 2006 however, the Washington Supreme Court has stated that it is “not convinced that the prohibition on “golden rule” arguments applies in the criminal context.” *State v. Borboa*, 157 Wn.2d 108, 124 n. 5, 135 P.3d 469 (2006) (prosecuting attorney did not commit malpractice by asking jury to imagine walking around with a disfigured face, like the victim).

Pierce contends that the single highlighted line from the beginning of the State’s 65 minute closing argument constituted an improper “Golden Rule” argument:

“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 18th 2009. And for them, like Mr. Ashcraft said, it was just another day in a, in a, in a married couple (sic), a lady that

worked, a man that farmed, a man that logged. It was just another day. 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 probably 14 hours after they rolled out of bed, 14, 15 hours after rolled out of bed, that they would be forced to lay facedown 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.” RP (3/24/17) 1086-7.

This lone statement, which drew no objection, did not expressly ask the jury to place themselves in the Yarrs’ shoes and to imagine their suffering.³² While the statement may be a regrettable slip of the tongue, it is similar to other arguments that courts have refused to label a “golden rule” argument. *See, e.g., Borboa*, 157 Wn.2d at 123-24 (prosecuting attorney did not commit malpractice by asking jury to imagine walking

³² *See Adkins v. Aluminum Co. of America*, 110 Wn.2d 128, 140-41, 750 P.2d 1257 (1988), for an express golden rule violation: “I’ve questioned whether I should even say it. . . . Can a corporation get a fair trial? And you have all told me that they can, and that you will treat them as if you were the landowner, and that this was a roofer going on your roof and doing a job, whether it be a roofer or a plumber, or other special skilled contractor, who should know what he’s doing.

If it was your roof, and if this was your attic vent and fan, you would not expect to be liable for injury to a roofer that you hired, who was injured in doing something he should know better not to do. We ask only that you give ALCOA that same consideration.”

around with a disfigured face, like the victim); *Wade v. State*, 41 So.3d 857, 872 (Fla. 2010), *cert. denied*, 131 S. Ct. 1004 (2011). To the extent the prosecutor’s “wildest nightmares” statement constituted an appeal to emotions, the prosecutor’s repeated references to the jury’s duty to apply the facts to the law and the strength of the State’s case require the rejection of Pierce’s request for a new trial. *See, e.g.*, RP (3/10/10) 833 and RP (3/24/10) 1148. *See, e.g.*, *State v. Manning*, 885 So.2d 1044, 1095-96 (La. 2004), *cert. denied*, 544 U.S. 967 (2005) (a Golden Rule argument, while improper, does not merit reversal when the State’s arguments, as a whole, does not urge the jury to ignore the law as given by the court).

Pierce, moreover, did not object when the “wildest nightmares” statement was made. The absence of a motion for mistrial at the time of argument strongly suggests that the event in question did not appear critically prejudicial to the defendant in the context of the trial. *Swan*, 114 Wn.2d at 661, 790 P.2d 610. A timely objection from Pierce, moreover, would have allowed the Court to remind the jury that it “must not let your emotions overcome your rational thought process. You must reach your decision based on the facts proved to you and on the law given to you, not on sympathy, prejudice, or personal preference.” CP 504; WPIC 1.02.

Finally, evidence of Pierce’s guilt is strong, including his use of the Yarr’s ATM card and PIN number immediately after their murders.

RP (3/17/10) 202-03; RP (3/22/10) 767-81. Also, the jury's verdicts, included a rejection of the greatest charge, indicating its ability to overcome emotions and sympathy and no prejudicial impact from the statement. *See* CP 558, 563.

- e. The Prosecutor made reasonable inferences from facts in evidence and did not insert his opinion into closing arguments.

A prosecutor has wide latitude in closing argument to draw reasonable inferences from the evidence and then to express those inferences to the jury. What the prosecutor cannot do is insert his personal opinion into his closing argument. However, the defendant bears the burden of proving that the alleged insertion of a prosecutor's opinion was prejudicial and said burden is quite high because the insertion of the personal opinion has to be "clear and unmistakable." For example, the use of the word rapist to describe the Defendant in a criminal trial for three counts of second degree rape of a child was found to not constitute prosecutorial misconduct in *State v. McKenzie*, 157 Wn. 2d 44, 134 P. 3d 221 (2006). Justice Owens writing for the majority in *McKenzie* explained this rule in some detail:

"It 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 the light of the total argument, the issues in the case, the evidence discussed during the argument, and the court's instructions, it is usually apparent that counsel is trying to convince the

jury of certain ultimate facts and conclusions 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.*

Id. at 53-54 ((*Quoting*) *State v. Papadopoulos*, 34 Wn. App. 397, 400, 662 P.2d 59, *rev. denied*, 100 Wn.2d 1003 (1983)) (emphasis added).

Additionally if the alleged insertion of personal opinion was clear and unmistakable the court would also have to find “that there is a substantial likelihood that the misconduct affected the jury’s verdict.” *Id.* at 52. As always, it is black-letter law that the trial court judge is generally in the best position to determine whether the prosecutor’s statements were improper, *i.e.*, prejudicial, since the appellate court has before it only the “cold, printed record.” *Id.*

Pierce asserts that the Prosecutor committed misconduct by 1) making unreasonable inferences, 2) “inventing outrageous and speculative conversations,” and 3) claiming prejudicial facts not in evidence. These arguments are flawed at their foundation because every argument made by the prosecutor was rationally inferred from the evidence presented to the jury.

The record shows the Defense objected three times during the Prosecution’s closing argument and was overruled each time.

In the first instance, according to the record, the following transpired:

PROSECUTOR: "...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 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 –"

DEFENSE: "Judge, I'd object to this line of argument as there are no such facts in evidence."

PROSECUTOR: "That Greg Brooks was there at 7:10?"

THE COURT: "Ladies and gentlemen, once again, the evidence that you are to consider in making your decision consists of the testimony of the witnesses. The attorneys' remarks, statements and arguments are not evidence. They are intended to help you understand the evidence and apply the law." RP (3/24/10) 1105.

The prosecutor's argument in this case could be easily inferred from the timeline that the State presented. Pierce left Henery's Hardware at 6:44 p.m. and it is a 22 minute drive from Henery's to the Yarr home. RP (3/17/10) 202-233; RP (3/18/10) 472. Mr. Brooks testified that he was at the Yarr home around 7:10 p.m., and then had driven by their home again around 7:20, but he never saw Pierce, Pat, or Janice. RP (3/11/10) 970-77. At 7:30 p.m., Pat was at home talking on the phone. RP (3/11/10) 979. The next step in the timeline came around 7:45 p.m. when

a witness reported seeing a man, who resembled Pierce, out on the highway across from the Yarrs' home. RP (3/17/10) 202-33. And finally, Pierce was seven miles from the Yarrs' burning home, using their ATM card, at 8:10 p.m., the time the fire was first spotted. RP (3/24/10) 1046. From this evidence the prosecutor rationally inferred that Pierce was waiting down by the highway and watching the Yarr home before the murders. Nothing in this argument is clearly and unmistakably personal opinion, therefore, it was a proper closing argument. *McKenzie*, 157 Wn.2d at 53, 134 P.3d 221. Additionally, the Court, which was in the best position to evaluate this argument because it had heard all of the evidence and seen all of the exhibits, overruled the objection therefore it did not appear to be improper argument to the Court.

Here is what the record shows happened in the second Defense objection:

PROSECUTOR: "...and there's a struggle for this 25.06 and it discharges and one round goes into the living room floor, and we had that photograph. It's kind of out of the way, but if he runs over and they're wrestling over the gun over by the slider and this big guy is wrestling with Pat, who's 60 years old, and the gun goes off and bang into the floor. Or maybe he got the gun and said, "I'm serious. I mean business." Pow. "Now, do what I tell you to." Struggle for the gun, gets the gun,

gets them under control, overpowers Pat, and being the good husband, you know –“

DEFENSE: “Judge, again, I’m objecting to this line of argument as it is unsupported by any evidence admitted at trial.”

PROSECUTOR: “These are inferences that you can make from the evidence, that you got two bullets –“

THE COURT: “The objection’s overruled. He can make the argument. The jury heard the evidence.”

Again, the Prosecutor properly used his closing argument to present his theory of the case. Testimony about Pat Yarr showed that he was a tough, hard working farmer, who was good with a firearm. RP (3/17/10) 948-52. Testimony also showed that Pat’s scoped 25.06 rifle was missing from the house, three shots had been fired in the house (one to kill each of the Yarrs, and a third seemingly random bullet that was fired through the floor at the opposite end of the house), RP (3/17/10) 187, RP (3/15/10) 1105, and the Yarrs were laying head to head, face down on their kitchen floor before they were each shot in the head with a high velocity bullet (like a 25.06 would fire). *See* RP (3/15/10) 1352-53, 1357-58, 1370; RP (3/16/10) 1321-22. Once again, the prosecutor was inferring what had happened that night based on what was known about Pat Yarr, the third bullet in the floor, and the position of the bodies. RP (3/15/10) 1352-53, 1357-58, 1370. It was not improper closing argument and it was not clearly and unmistakably the prosecutor’s personal opinion. *See*

Commonwealth v. Moran, 75 Mass. App. Ct. 513, 915 N.E.2d 240, 249 (2009) ("Although prosecutor's suggestion that the defendant grabbed the knife intending to kill the victim is only a possible inference to be drawn from the evidence, it is not an unreasonable inference.").

Here is what the record shows happened in the third Defense objection:

PROSECUTOR: "...Gives him the debit card, obviously gives him the PIN number because you can see Pierce, and defense Counsel says it's 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 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 Yarr's. He didn't get it from the mysterious Mr. B. In fact, he didn't even talk about the mysterious Mr. B. He got the PIN number from the Yarr's. Couldn't explain that away. Didn't even try to explain that away, okay? Pat . . ."

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

THE COURT: Objection's overruled. This is argument, ladies and gentlemen of the jury. If you find it's not supported by the evidence, you're obviously free to ignore it, but... RP (3/24/10) 1115-6.

Once more, the Prosecutor properly used his closing argument to present his theory of the case. Pierce had the Yarr's ATM card, their PIN number written down on a scrap of paper, a 25.06 rifle was missing from the house, and there was a seemingly extra round fired through the floor of

the house. See RP (3/15/10) 1105, 1186-87; RP (3/11/10) 950; RP (3/16/10) 1321-22; RP (3/17/10) 187. The prosecutor's theory of the case was that Pierce took the ATM card from the Yarrs and forced them to give him the PIN number at gun point. This is a proper argument that can be rationally inferred from the evidence and it is not clearly and unmistakably the personal opinion of the prosecutor. Furthermore, any improper prejudice due to this line of argument was not so flagrant or ill-intentioned that the trial court's instruction to the jury that it was "argument" that the jury was "obviously free to ignore" could not have cured it. RP (3/24/10) 1115-16.

Given the overwhelming evidence presented to the jury, evidence allowed in by the trial Judge and evidence which proves that only the State's explanation of what occurred on the night of the double murder explains all that the jury was informed of, this court should not find that prosecutorial misconduct occurred in such a manner that there was a substantial likelihood that without said misconduct a different verdict would have been reached by the jury.

- f. The Prosecutor did not violate Pierce's right to remain silent by attributing statements to him.

It is not misconduct for a prosecutor, during closing argument, to present the jury with hypothetical dialogue that can be rationally inferred

from the evidence. *See McKenzie*, 157 Wn.2d at 55, 134 P.3d 221 (“The jury could not have reasonably construed the deputy prosecutor's hypothetical dialogue as a personal opinion unrelated to the context and the evidence.”)

In a separate argument, Pierce objects to the Prosecutor's attributing statements to him such as he needed money, needed drugs, waited at a crime scene to screw up his courage, and his dialogue with the two victims. Pierce claims that these assertions are merely the prosecutor's opinions and they are not supported by any evidence, but a closer look at the record shows that all of the statements could be rationally inferred from the record. *See Id.*; *See also People v. Smith*, 362 Ill. App. 3d 1062, 841 N.E.2d 489, 509 (2005), *appeal denied People v. Smith*, 218 Ill. 2d 554, 850 N.E.2d 812 (2006) (not improper for the prosecutor to "concoct an imaginary dialogue between the defendant and the victim" if based upon reasonable inferences from evidence admitted at trial).

Pierce alleges that no evidence supports the statements that he was broke and needed to get some money fast so that he could buy some methamphetamine but this argument is wrong. Testimony showed Pierce had \$7.02 in his bank account at the start of the day, yet, after the murders,

he had enough money to buy a cold beer and seek out methamphetamine. RP (3/17/10) 42; RP (3/22/10) 687-96, 762. This evidence supports the inference that Pierce was in need of cash, and wanted it right then, especially in light of the fact that Pierce was due to receive a \$3,940.12 financial aid check only one week after the murders. RP (3/18/10) 384, 501-05. Other testimony indicated that Pierce had lived on the Yarr farm in a rental house, had done odd jobs for the Yarrs, and had been paid by the Yarrs for doing the work, so he had reason to believe they had money on hand. RP (3/22/10) 593-94. From these facts it could be rationally inferred that Pierce decided to rob the Yarrs to get money for methamphetamine and, therefore, these statements were not clearly and unmistakably the prosecutor's opinion. *Commonwealth v. Underwood*, 36 Mass. App. Ct. 906, 627 N.E.2d 492 (1994) (prosecutor's use of imaginary dialogue was not improper because the closing argument had a solid basis in the evidence and was followed by the trial court's admonition that statements of counsel did not constitute evidence).

- g. The evidence in the case allowed the Prosecutor to infer what happened in the house and that Pierce stood out on the highway and watched the Yarr house.

Pierce argues that no evidence supports the State's theory that he was out on the highway watching the house or what happened once he got in the house but again this argument ignores the evidence. He knew the

Yarrs, had reason to think they had money. RP (5/22/10) 593-94. Pierce left Henery's Hardware, which is approximately 20 minutes from the Yarr home, at approximately 6:45. RP (3/18/10) 472. Around 7:10 p.m. and 7:25 p.m., a witness went by the Yarr home, but he did not see either Pierce or the Yarrs. RP (2/11/10) 972. At 7:30 p.m., the Yarrs were alive, at home, and on the phone. RP (3/11/10) 979. At approximately 7:45 p.m., a man resembling Pierce was seen on the highway across from the Yarr' home. RP (3/17/10) 202-233. Pierce is next seen at 8:11 p.m. when he is withdrawing money from the Yarr's account at an ATM machine that is seven miles from the burning home. RP (3/17/10) 24-29; RP (3/24/10) 1046.

At some point between 7:30 p.m. and 8:00 p.m., a shot was fired through the floor of the Yarrs' office, the Yarrs were forced to lie face down, head to head, in their own kitchen before being shot in their heads, and a scoped rifle was taken from their home. RP (3/17/10) 150. Based on all of these facts, the Prosecutor inferred plausible interactions and thoughts to explain his theory of the case. *Commonwealth v. Underwood*, 36 Mass. App. Ct. 906 (prosecutor's use of imaginary dialogue was not improper because the closing argument had a solid basis in the evidence and was followed by the trial court's admonition that statements of counsel did not constitute evidence).

Because these arguments could be inferred from the trial record, they are not clearly and unmistakably the opinions of the Prosecutor and they are not misconduct.

The trial judge had sat through all of the testimony and had seen all of the evidence, and was in the best position to evaluate these arguments. In each of these objections the trial judge evaluated the Prosecutor's actions and determined they were proper argument and not unduly prejudicial. The Court did not abuse its discretion by finding the State's closing arguments were proper.

Pierce has not shown that any of these inferences were either unfounded or prejudicial. Given the overwhelming evidence presented to the jury, evidence which proves the State's theory of the murders and weaves together all that the jury was informed of, this Court should not find that prosecutorial misconduct occurred in such a manner that there was a substantial likelihood that without said misconduct a different verdict would have been reached by the jury.

VI. THE STATE'S DELAY IN PROVIDING INCULPATORY EVIDENCE TO PIERCE, IF MISCONDUCT, WAS NOT SO PREJUDICIAL AS TO REQUIRE A MISTRIAL

It is well-established in this state that a court may only declare a mistrial when "nothing the trial court could have said or done would have

remedied the harm done to the defendant.” *State v. Gilchrist*, 91 Wn. 2d 603, 612, 590 P. 2d 809 (1979) (defense witness throwing water at jury and bomb that exploded in vicinity of court room at end of closing arguments ruled not grounds for a mistrial.) The *Gilchrist* court further opined “only those errors which may have affected the outcome of the trial are prejudicial.” And even then the defendant would need to convince the court that there was a substantial likelihood that prejudice affected the jury’s verdict. *State v. Hopson*, 113 Wn.2d 273, 284-85, 778 P.2d 1014 (1989) (prosecution witness mentioning that he met a defendant before he began serving a prior term in prison deemed not prejudicial although it revealed the defendant’s prior criminal history). To determine if there is a substantial likelihood that prejudice affected the jury’s verdict, reviewing courts look to three factors: (1) the seriousness of the irregularity; (2) whether it involved cumulative evidence; and (3) whether the trial court properly instructed the jury to disregard it. *Id.* at 284.

On March 4, 2010, only four days before jury selection, Mr. Michael Donahue approached Prosecutor Scott Rosekrans and provided him new information:³³ Pierce had sought methamphetamine on the night of the murders. RP (3/17/10) 42; RP (4/9/10) 1479; CP 846-847. Mr.

³³ Since the night of the murders, Mr. Donahue and Mr. Thomas Boyd had told the State that Pierce unexpectedly arrived at Mr. Boyd’s RV, drank a Tilt beer, ate a sandwich, and then left.

Rosekrans believed that this could be evidence of Pierce's motive for the seemingly random murders and so he investigated the statement.

On that same evening, March 4, 2010, Pierce's investigator Mr. Walsh contacted Mr. Boyd who told him he "knew some other shit" but then refused to talk with Mr. Walsh whom Mr. Boyd believed was stalking him. RP (3/18/10) 272; RP (4/9/10) 1477.

On Friday, March 5, 2010, a mere three days before jury selection commenced Prosecutor Julieanne Dalzell, Deputy Prosecutor Scott Rosekrans, and Detective Joseph Nole went to Quilcene and interviewed Mr. Boyd. Mr. Boyd admitted that Pierce had in fact asked him to find some methamphetamine. Pierce had interviewed Mr. Boyd and Mr. Donahue numerous times, but did not learn about the methamphetamine until Friday, March 19, 2010.³⁴

Three days later, Monday, March 22, 2010, Mr. Donahue and Mr. Boyd each took the stand. Before they testified regarding the methamphetamine the following exchange took place outside the presence of the jury:

³⁴ On March 19, 2010, in the middle of the trial, Pierce interviewed Mr. Boyd and Mr. Donahue. During this interview, at the prompting of Deputy Prosecutor Rosekrans, Mr. Boyd finally told Pierce's Counsel that Pierce had been trying to buy methamphetamine shortly after the murders. It was explained that they waited to come forward due to fear of prosecution for trafficking in methamphetamine. RP (3/22/10) 763.

PIERCE: “Judge, the objection is relevance. I believe Mr. Boyd is going to say that Pierce asked him if he could get him some methamphetamine, and I would argue that that is certainly more prejudicial than probative.”

THE COURT: “How is that relevant, Mr. Rosekrans?”

PROSECUTOR: “Well, as I think probably stated early on in this case, the, the State’s position is this crime was committed for the purposes of getting money to now, you know, get money to buy, to buy drugs. So Mr. Boyd will testify that Pierce asked him if he could make a phone call so he could go ahead and find some methamphetamine because now he has money. And that’s why we think it would be -- understanding it is prejudicial, but it would be probative as to the motive behind the, the crime that was committed.

THE COURT: Anything else to say, [Defense Counsel]?

PIERCE: No.

THE COURT: I’ll allow it. It is prejudicial, but I can see it being relevant. The jury can give it whatever weight they want. RP (3/22/10) 695-96.

As the record indicates, there was no motion for a mistrial, not even a motion for a continuance, presumably because Pierce found the three days between discovery of the new statement and the witnesses’ testimony was sufficient to allow him to determine the best way to respond to the new evidence.

Had there been a motion for a mistrial it would most likely have been denied because nothing about the late disclosure so prejudiced Pierce that a mistrial was the Court’s only remedy to insure a fair trial. The court

could have suppressed the late disclosed information if it found it was more prejudicial than probative, the Court could have suppressed it on grounds of relevancy, and the Court could have given a limiting instruction regarding how the jury was to use the information. The one thing the Court could not have done *sua sponte* without abusing its discretion would have been to declare a mistrial. *See generally State v. Robinson*, 146 Wn. App. 471, 191 P.3d 906 (2008) (declaring a mistrial and discharging an empanelled, sworn jury, without manifest necessity or a defendant's motion has the same effect as an acquittal.)

Pierce was not Forced to Choose Between Competing Constitutional Rights Due to Any Action of the State; Any Choice Between Rights that Pierce Faced was Due to the Late Disclosure of Evidence by the Witnesses.

In order for a delay in providing discovery to rise to the level of a Due Process violation, the State must take some action that compromises a defendant's rights but in Pierce's case it was the witnesses and not the State that put Pierce in a position to choose between constitutional rights. The State was unaware that the evidence existed until March 4, 2010—only four days before jury selection was to commence. Surprised by this new revelation, the prosecutor sought to confirm the information. One day later, March 5, 2010—only three days before jury selection—Mr. Boyd confirmed that Pierce sought methamphetamine shortly after the

Yarrs' murders. Had the prosecution immediately informed the Defense Team of the new evidence on either March 4th or March 5th, Pierce's status would have been unchanged. Regardless of when he learned of the evidence (and the State would argue he knew all along that the evidence existed since the "new" evidence was his own statements), he would have still been in a position where he would have been required to choose between effective assistance of counsel (delayed trial while the new witness was questioned) and his right to a speedy trial (trial not delayed but new witness not questioned). Since there was no request for a continuance by the Defense when they learned of this new evidence and since Pierce's investigator had not one, but at least three chances to interview Mr. Boyd before he testified at trial, this late disclosure, which was an occurrence entirely outside the control of the State, does not rise to the level of a Due Process violation.

In light of the overwhelming evidence presented by the State that convinced an impartial jury of the veracity of the State's theory of the case, the errors complained of here did not affect the trial's outcome.

VII. THE TESTIMONY REGARDING PIERCE SEEKING METHAMPHETAMINE ON THE NIGHT OF THE MURDERS WAS PROPERLY ADMITTED OVER AN OBJECTION OF RELEVANCE; IT WAS RELEVANT TO SHOW HIS MOTIVE FOR THE MURDERS

The court committed no error when it admitted evidence of Pierce's motive for the murders under ER 402 and ER 403.

Because relevant evidence is presumed admissible the trial court did not abuse its discretion when it balanced the probative value against the prejudicial impact and then permitted the State to present evidence of Pierce's motive over an objection that it was irrelevant.

Relevant evidence is presumed admissible. ER 402. Evidence is relevant if it has any tendency to make the existence of any fact that is of consequence more or less probable than it would be without the evidence. ER 401. The threshold to admit relevant evidence is very low; even minimally relevant evidence is admissible. *State v. Darden*, 145 Wn.2d 612, 621, 41 P.3d 1189 (2002). Relevant evidence must be excluded, however, if its probative value is substantially outweighed by the danger of unfair prejudice. ER 403; *Kappelman v. Lutz*, 167 Wn.2d 1, 8 n. 10, 217 P.3d 286 (2009).

Appeals courts review the admission of evidence for abuse of discretion. *State v. Magers*, 164 Wn.2d 174, 181, 189 P.3d 126 (2008). A court abuses its discretion when its ruling is manifestly unreasonable or based on untenable grounds. *State v. Powell*, 126 Wn.2d 244, 258, 893 P.2d 615 (1995).

Though not always an element that the State is required to prove, Washington courts have long allowed in evidence that goes to an alleged murderer's motive for the killing. *See e.g. State v. Stenson*, 132 Wn. 2d 668, 702-705, 940 P.2d 1239 (1997) (testimony during murder trial that made defendant-husband seem controlling over murdered wife and testimony from defendant's creditor revealing that creditor learned he was named as the beneficiary of a quarter-million dollar life insurance policy husband had taken out on murdered wife both deemed more probative of motive than prejudicial against defendant); *State v. Powell*, 126 Wn.2d 244, 260, 893 P.2d 615 (1995) (Evidence of a hostile relationship between the defendant and the victim admissible in murder trial to show motive); *State v. Matthews*, 75 Wn. App. 278, 284, 877 P.2d 252 (1994) (whether a suspect had a motive to commit a crime becomes relevant, otherwise the likelihood that he or she committed the crime is rationally reduced); *State v. Burkins*, 94 Wn. App. 677, 688, 973 P.2d 15 (1999) (holding that in first degree murder trial, it was not error to admit evidence of defendant's sexual demands upon another woman under circumstances similar to those leading up to the murder to show that defendant's motive was the victim's refusal to consent to his sexual demands).

Pierce argues that the methamphetamine testimony was improperly admitted under 404(b). His evidence for this argument is that the

prosecutor said that the evidence showed Pierce's motive for executing the Yarrs, therefore, it must be 404(b). While the prosecutor did mention motive, he did so in response to an objection of relevancy. There is no mention in the record of 404(b) and the evidence was admitted solely because it was relevant to show Pierce's motive. RP (3/22/10) 695-96; ER 402; ER 403.

The record clearly indicates that Pierce never used the words "404(b)" when objecting to the methamphetamine evidence, he did however specifically object on the grounds that the evidence was irrelevant. When the State was about to present testimony that Pierce sought methamphetamine on the night of the murders, Pierce objected on the grounds that this evidence was "irrelevant." RP (3/22/10) 695-96. After the jury left the courtroom the court asked the prosecution how the testimony was "relevant." *Id.* The prosecution responded by explaining its theory of the case and stating ". . . understanding it is prejudicial, but it would be probative as to the motive behind the, the crime that was committed." *Id.* The court held: "I'll allow it. It is prejudicial, but I can see it being relevant. The jury can give it whatever weight they want." *Id.*

The only argument the court heard was relevance, and the court correctly applied ER 402 and ER 403 by balancing probative value against

prejudice. There is no mention of 404(b) and no 404(b) analysis anywhere in the record.

Because the court properly weighed the probative value against the prejudicial effect of informing the jury that Pierce sought methamphetamine, it did not abuse its discretion, *i.e.*, did not make a manifestly unreasonable ruling, by admitting the evidence and this argument is not grounds for a new trial. *Powell*, 126 Wn.2d at 258, 893 P.2d 615; *Magers*, 164 Wn.2d at 181, 189 P.3d 126; ER 402 & 403.

Given the weight of the evidence against Pierce, most notably his use of the Yarr ATM card immediately after the murders, the new evidence was not so prejudicial that a jury instruction could not have cured prejudice if defense counsel had requested one. Therefore, the late disclosure is not grounds for a mistrial nor was the admission of the methamphetamine evidence grounds for a new trial.

There is No 404(b) Record for this Court to Review.

The Court properly admitted evidence of Pierce's motive over Pierce's objection that it was *irrelevant*. On appeal, Pierce now goes to great lengths in arguing that the evidence was improperly admitted under ER 404(b). Our Supreme Court has held that evidentiary errors under ER 404(b) are not of constitutional magnitude and cannot be raised for the

first time on appeal. *State v. Jackson*, 102 Wn.2d 689, 695, 689 P.2d 76 (1984). Since Pierce, after three days of contemplating how to combat the newly revealed evidence, objected on the grounds of “relevancy,”³⁵ ER 402 and ER 403, and he did not object under “character evidence,” “other bad acts” or just “404(b),” he did not create a record for this Court to review and, therefore, this assignment of error is not grounds for reversal.

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VIII. THE INDIVIDUAL OR COLLECTIVE THOUGHT PROCESSES LEADING TO A VERDICT “INHERE IN THE VERDICT” AND CANNOT BE USED TO IMPEACH A VERDICT³⁷

There are few things in our society that are more immune from second guessing or “Monday morning quarterbacking,” than the deliberations of a jury. Pierce, in violation of this precept sought a new trial based upon a juror’s unsworn post verdict statement to a newspaper reporter. The Court properly rejected this motion.

Appeals courts review denials of a motion for new trial under the abuse of discretion standard. *State v. Williams*, 96 Wn.2d 215, 221, 634 P.2d 868 (1981). A trial court abuses its discretion when its decision is

³⁵ And Pierce had the entire weekend to contemplate what objection to use since he interviewed Mr. Boyd and Mr. Donahue on Friday and was aware they were testifying on the following Monday.

³⁶ When there was a 404(b) motion before the Court, it addressed all of the factors that are covered in Pierce’s brief. RP (2/17/11) 381-83.

³⁷ *State v. Ng*, 110 Wn.2d 32, 750 P.2d 632 (1988).

manifestly unreasonable or based upon untenable grounds or reasons. *State v. Stenson*, 132 Wn.2d 668, 701, 940 P.2d 1239 (1997), *cert. denied*, 523 U.S. 1008 (1998). Because the vast weight of authority in this State has consistently held that deliberations of a jury cannot be used to impeach a verdict, the trial court correctly denied the motion for a new trial that would have required an examination of how the jurors deliberated. *E.g.*, *State v. Gunns*, 136 Wash. 495, 240 P. 674 (1925) (Jurors will not be permitted to impeach their own verdicts); *State v. Ford*, 250 P.3d 97, 101 n. 2 (2011) (“An appellate court should not delve into the jury deliberation process.”).

Pierce argues that the verdict must be overturned because the jury considered “novel or extrinsic evidence” in reaching its verdict. Brief of Appellant at 85. His support for this argument is articles in the local newspapers that indicated a couple of jurors may have misunderstood some of the testimony.³⁸ *See* CP 629-34. By defense’s own definition “novel or extrinsic evidence” is “information that is outside all the evidence admitted at trial, either orally or by document.” *Id.* If the jury had considered evidence that was not admitted, this might be grounds for a new trial, but even by Pierce’s definition the jury did not consider any

³⁸ There was not testimony that Pierce asked if he smelled like gas. There was an exchange between Pierce and Mr. Donahue on cross examination where it was possible to misconstrue who was talking; who “he” was in the examination. RP (3/22/10) 764.

novel or extrinsic evidence because no juror considered any evidence that was “outside all the evidence admitted at trial.” At best, Pierce can show jurors misunderstood some of the testimony, but this does not make the evidence extrinsic and it does not open the door to impeaching the verdict. CP 629-30.

The jurors did not contemplate any evidence that was not presented at trial therefore there was no juror misconduct that any court can address and the Court did not abuse its discretion in denying Pierce’s motion for a new trial.

IX. THE TRIAL COURT CORRECTLY DETERMINED THERE WAS NO CONFLICT OF INTEREST BETWEEN PIERCE’S TRIAL COUNSEL AND A STATE’S WITNESS

On March 28, 2009, the trial court appointed Jefferson Associated counsel (hereinafter “JAC”) to represent Pierce. RP (3/28/09) 8. Co-Counsel was later appointed. RP (5/26/09) 40-51. Co-counsel filed a motion asking the court to remove JAC because they had, on several occasions, previously represented one of the State’s witnesses. The trial court heard this motion in closed session and denied the motion.

Here is the trial court’s explanation:

COURT: I’m going to-- obviously, Larranaga, is appearing here in the courtroom. The first motion I want to address is the motion regarding the status of counsel. I did review the, the declaration in support of that motion. I read the cases,

um, *State v. Hunsager*, *State v. Anderson*, *State v. Ramos*, *State v. Hatfield*, and the other two, more broader cases, *Richland*, I think and the other one, 100 Wn.2d 669. The one at 142 Wn.2d is 506.

The motion to have Jefferson Associated Counsel replaced, really, Mr. Davies works for Jefferson Associated Counsel, Jefferson Associated Counsel of the declaration and the motion supply the backgrounds, the background. And that motion and declaration will be sealed for the same reasons that we just address in terms of Bone-Club.

On reading those cases, and looking at the Request to Withdraw, the Code of Professional Conduct, the Rules of Professional Conduct 1.9 and 1.10, and 1.6 really are called into question. And, the representation of a person who may be, Mr. Pierce may point the finger at that person, is “this person did it.” The person is named in the declaration and as Tommy Boyd. And the public defender’s office has represented Tommy Boyd throughout, on twenty-eight apparently different cases and different times throughout the history of the Public Defender’s Office.

The Public Defender’s Office has not represented Mr. Boyd on a same or substantially related matter. And, I found the reasoning of the Court in *Hunsaker* at 74 Wn. App. 38 to be particularly applicable to this case. And, in that case, they noted, as is the case here, that Mr. Boyd’s criminal history is public record. His various cases are public record. To the extent that he could be impeached or be questioned and impeached, for instance, I don’t know if this would be where it would go, on his use of alcohol or his various convictions related to either thefts, alcohol use, or assault. And I’m not sure what his convictions are. I did not look up Mr. Boyd’s record.

But, all of those things are public record and would be available to any attorney. There is no indication in the motion that there are confidential client communications that would be used. His 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.

I will grant the order again to seal that motion, the motion and declaration in support of it, but I'm not going to substitute counsel for Mr. Davies at this point. There's no indication that his loyalties would be divided or that this is the same or substantially related matter, despite the clear indication that the interests are adverse. They are, but that's after reading those cases. RP (6/16/9) 81-83.

Public Defender's representation of a defendant and its prior representation in a criminal matter of one prosecution witness, when the two representations were not with respect to substantially related matters under factual context analysis, do not preclude continued representation of a defendant by a public defender if the prosecution witness testifies. *State v. Hunsaker*, 74 Wn. App. 38, 873 P.2d 540 (1994). As in *Hunsaker*, Pierce has failed to present any evidence that cross-examination of Mr. Boyd by JAC would involve inquiry into confidences or secrets acquired by that public defense firm. At most, it appears that JAC intended to discredit Mr. Boyd based upon his prior convictions. Doing this could be achieved via information available to defense counsel in discovery.

Accordingly, Pierce has failed to demonstrate that disqualification is necessary pursuant to RPC 1.9(b).

As the trial court explained, Mr. Boyd was only a witness and never charged in this case, there was no conflict of interest or danger of revealing client confidences and, therefore, no reason to remove the Defense Counsel.

Pierce has not shown his interests were adverse to Mr. Boyd, has not shown his attorney had a conflict of interest. Pierce has not shown his attorney's performance was adversely affected by Mr. Boyd's presence.

X. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION WHEN IT FOUND: PIERCE KNOWINGLY AND VOLUNTARILY WAIVED HIS *MIRANDA* RIGHTS AND PIERCE FAILED TO UNEQUIVOCALLY ASSERT HIS RIGHT TO CONTACT AN ATTORNEY UNDER CRR 3.1

“Mr. Pierce does not say specifically I want to talk right now, I want to talk to a lawyer right now. He says, “I need a lawyer, and I’m going to need a lawyer because it wasn’t me.” He doesn’t say, I want to talk to a lawyer right now.”

Judge Verser ruling on the Pierce’s CrR 3.1 motion. RP (2/17/10) 333.

A. Procedural history.

An evidentiary hearing was held on February 17-18, 2010, to address the issues Pierce raises in this section of his brief. Findings of Fact and Conclusions of Law were not admitted into This Court’s record until after Pierce’s appellant council filed his notice of appeal. Since that

time they have been filed with This Court and they are now part of the record.

B. Facts surrounding Pierce's two interviews.

Pierce was arrested on March 28, 2009 for Theft 2: Theft of an Access Device. RP (3/17/10) 96. After his arrest he was questioned at the Sheriff's office from 5:40 p.m. until about 6:00 p.m. by Detectives Mark Apeland and Joseph Nole. RP (3/17/10) 96-110. At the beginning of the interview Pierce was read his *Miranda* warnings and he signed a form acknowledging that he knew his rights and waived his constitutional rights. State Exhibit 1 (2/17/10) (Suspect Statement Form). During this first interview Pierce admitted to using the US Bank ATM machine on the day of the murders, but said he was using his mother's ATM card. RP (2/17/10) 228. When the detectives told him he was the murderer he made a series of statements that the Court incorporated into its oral findings of fact:

Pierce: "I'm going to need a lawyer 'cause it wasn't me. You don't have photos of me at the bank, not using a stolen credit card."

Detective: "Well, what do you know about that?"

Pierce: "I don't know."

Detective: "Do you know anything about it?"

Pierce: "Nothing."

Detective: "So you don't want to talk to us then?"

Pierce: “I don’t mean if you’re-- we’re trying, trying to, trying to say I’m doing it. I need a lawyer. I’m going to need a lawyer because it wasn’t me. You’re wrong.”
RP (2/17/10) 331-35. (parties names added for clarity).

Based on all of the facts before it, the Court found that these statements did not amount to a specific request to immediately communicate with an attorney.³⁹ RP (2/17/10) 333; CP 799-814.

The Court also found that the jail had procedures in place to put an arrestee in touch with an attorney and that had Pierce asked to call an attorney he would have been put in touch with one. CP 802.

Once Pierce was booked into the Jefferson County Jail, he was housed in a segregation cell where there was no phone but on two different occasions he was allowed to telephone anyone he chose.⁴⁰ CP 802-03. Both of the calls were free of charge, and unmonitored by corrections staff. CP 802-03. Pierce used those calls to call his girlfriend, a potential alibi witness. CP 803. During this same time Pierce met with a Certified Designated Mental Health Professional who was making a routine visit to the jail at that time. CP 803.

³⁹ During a recess the Court read the actual transcripts from the interview and then incorporated those transcripts into its ruling. *See* RP (2/17/10) 333.

⁴⁰ Pierce knew that law enforcement was out at his house and so he contacted the detectives to “offer a bargain.” RP (3/17/10) 134, 147.

After sitting in the jail approximately five hours, Pierce asked to speak with the detectives again so that he could make “offer a bargain.” CP 804. At this point Pierce was taken across the parking lot to the sheriff’s office for a second interview. CP 804. At the beginning of the second interview Pierce was read his *Miranda* warnings again. CP 806. This second set of warnings clearly told him that he had a right to counsel *before* saying anything to the detectives. *See* CP 804. Again, Pierce agreed to talk and initially agreed to be recorded. *See* CP 805.

At approximately 11:30 p.m. Pierce asked to stop the recording and asked to speak with Detective Apeland in private. RP (3/17/10) 149; CP 805. Detective Apeland told Pierce they did not have to record the interview but that anything Pierce said would be documented. RP (3/17/10) 149; CP 805. Pierce still agreed to talk, and then proceeded to inform Detective Apeland that the shooter had returned from the Yarr house with a scoped rifle, the shooter was covered in blood, he had helped the shooter wash off, and that he had watched the shooter take his clothes off, pour gasoline on them and light them on fire. RP (3/17/10) 152-53; CP 805-06. The Sheriff’s office had not released the cause and manner of death to the public, yet Pierce knew how the Yarrs had died. RP (3/17/10) 151, 187.

C. Standard of review.

When a defendant's challenges the admission of their own statements at trial, appeals courts review the admission of any statements under an abuse of discretion standard. *See State v. Cross*, 156 Wn.2d 580, 619, 132 P.3d 80, *cert. denied*, 549 U.S. 1022 (2006); *State v. Stenson*, 132 Wn.2d 668, 701, 940 P.2d 1239 (1997) (trial court is only reversed upon showing of manifest abuse of discretion), *cert. denied*, 523 U.S. 1008 (1998).

If the trial court finds that statements were made knowingly and voluntarily, the trial court's finding of voluntariness is binding on appeal where the record contains substantial evidence supporting that conclusion. *State v. Ng*, 110 Wn.2d 32, 38, 750 P.2d 632 (1988); *State v. Wolfer*, 39 Wn. App 287, 290 (1984), *rev. denied*, 103 Wn.2d 1028 (1985); *State v. Vannoy*, 25 Wn. App 464, 467 (1980). "Substantial evidence" is evidence that is sufficient to persuade a fair-minded person. *State v. Cyrus*, 66 Wn. App 502, 506 n. 4 (1992), *rev. denied*, 120 Wn.2d 1031 (1993).

D. Because Pierce made conflicting, equivocal statements regarding an attorney, the Court did not abuse its discretion in finding that Pierce did not affirmatively request to immediately contact an attorney.

During questioning, Pierce made an equivocal request for an attorney, never asked to be put in contact with an attorney at that moment, and, therefore, he never invoked his rights under CrR 3.1(c)(2); CP 808-810. Additionally, prior to the second interview, the interview that was initiated by Pierce and not by law enforcement, Pierce was told that he had the right to speak with an appointed attorney at *that* moment, before any questioning, yet, having been given this warning, Pierce chose to speak with the detectives and thereby knowingly and voluntarily waived his rights under CrR 3.1(c)(2). CP 811.

Under the *Miranda* line of cases a defendant must unequivocally request to speak to an attorney; otherwise law enforcement does not have to stop an interview. *Berghuis v. Thompkins*, __ US __, 130 S.Ct. 2250, 2259-60 (2010). When an individual receives *Miranda* warnings, “the invocation of the right to remain silent must be clear and unequivocal (whether through silence or articulation) in order to be effectual.” *State v. Walker*, 129 Wn. App. 258, 276, 118 P.3d 935 (2005), *rev. denied*, 157 Wn.2d 1014, 139 P.3d 350 (2006). When invoking the right to remain silent is not clear or unequivocal, the police are not required to ask clarifying questions and may even continue interviewing a suspect. *Walker*, 129 Wn. App. at 276, 118 P.3d 935.

Unlike the *Miranda* warnings, CrR 3.1 is a procedural right that does not grant additional rights; it is a court rule that merely reinforces defendants' constitutional rights. *State v. Kirkpatrick*, 89 Wn. App. 407, 414-15, 948 P.2d 882 (1997), *rev. denied* 135 Wn.2d 1012 (1998). But, just as in the *Miranda* line of cases, under CrR 3.1(c)(2) an arrestee must make an unequivocal request to speak to an attorney before law enforcement is obligated to attempt to find them a lawyer, “ ‘[o]therwise, the mere mention by the suspect of the word ‘attorney’ takes on talismanic significance.’ ” *State v. Whitaker*, 133 Wn. App. 199, 217-18, 135 P.3d 923 (2006), (*quoting State v. Robtoy*, 98 Wn.2d 30, 38, 39, 653 P.2d 284 (1982)), *rev. denied* 159 Wn.2d 1017, (2007), *cert. denied* 552 U.S. 948 (2007) (Division 1 holding that a defendant's equivocal request for an attorney did not activate the requirements of CrR 3.1(c)(2)).

The trial court did not abuse its discretion in finding that Pierce failed to unequivocally request to speak to an attorney. After being accused of murder Pierce stated that he was “gonna need a lawyer.” RP (2/17/10) 225-27. Seconds later, when the detectives were attempting to confirm that Pierce wanted to terminate the interview, Detective Nole asked “so you don't want to talk to us then?” RP (2/17/10) 225-27. In response to a question about whether or not he wanted to “*talk*,” Pierce stated “I don't mean if you're-- we're trying, trying to, trying to say I'm

doing it. I need a lawyer. I'm going to need a lawyer because it wasn't me. You're wrong." RP (2/17/10) 225-27. In context of the whole record which included, Pierce's full criminal record⁴¹, the fact that the Sheriff's office had procedures in place to assure arrestees could contact attorneys, Pierce being allowed to make two unmonitored calls to whomever he chose, the fact that Pierce initiated the second interview, and given Pierce's waffling answers to the question of whether he wanted to "talk," i.e., "I'm gonna need a lawyer," "I need a lawyer," and "I'm going to need a lawyer," the trial court did not manifestly abuse its discretion in finding that Pierce never invoked his right to immediately contact counsel under CrR 3.1. RP (2/17/10) 333; CP 779-814.

Pierce relies on two statements from the cold record pulled out of the context of the entire hearing in support of his declaration that trial court was both factually wrong and legally wrong. Pierce relies entirely upon defense counsel's leading questions to Detective Nole for support of his proposition that he requested an attorney:

PIERCE: All right. At the close of your interrogation Mr. Pierce requested to speak with an attorney, correct?

DET.NOLE: Yes.

PIERCE: And at that point you ended your interrogation of Mr. Pierce, correct?

⁴¹ RP (2/17/10) 324 (State's records indicated 42 prior arrests).

DET.NOLE: Yes.

PIERCE: Do you recall where Mr. Pierce was taken after he invoked his right to speak with an attorney?

DET.NOLE: As far as I know he was taken back over to the jail, or taken to the jail because it would have been the first time he was there. RP (2/17/10) 232-33.

Assuming without conceding that these out of context answers to defense counsel's leading questions prove that Pierce invoked his right to an attorney, none of these statements show that he wanted to speak to an attorney right at that moment, because he never made any such statement to that affect.

But Pierce insists that he did in fact request to talk to an attorney at that moment and the evidence in support of this assertion is another defense question to Detective Nole:

DEF. COUNSEL: Did you make any efforts to put Mr. Pierce in touch with the attorney that he had requested?

DET.NOLE: I told the jailer that he, he, or Mark, 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) 233.

First off, Pierce has pulled these answers out of context. The very next question asked by Pierce during the hearing indicates Detective Nole had no clear recollection:

PIERCE: So you don't have a specific memory that you told the jailer that led Mr. Pierce out of the interview room, uh, that Mr. Pierce wanted to speak with an attorney, but that's just standard operating procedure?

DET. NOLE: If someone says—*I don't have a specific recollection*. But if someone says, which quite often happens, that they want to speak to an attorney we would relay that to the corrections officer with the thought that they would probably be put in touch on the phone in the booking room, booking area. RP (2/17/10) 233.

Second, what is evident based even upon the cold record before this Court is that Detective Nole did not recall what happened as the interview was terminated. Detective Nole had no “specific recollection” of whether or not he, or any other deputy, actually told corrections that Pierce wanted to talk to an attorney. *See* RP (2/17/10) 233. He did not remember what officer or officers came to pick up Pierce. RP (2/17/10) 233. He could not remember how many officers picked up Pierce. RP (2/17/10) 233. He did not even remember who conveyed the alleged request for an attorney to the officer or officers.⁴² RP (2/17/10) 233. And the trial court had more to review than the cold record this Court has before it. RP (2/17/10) 331 (Court reading Exhibit 3, transcript of the Pierce interview, into the record).

⁴² The State was unable to determine what officers were involved on the night Pierce was booked because Pierce had successfully obtained an *ex parte* order that barred the prosecutor from reviewing any jail records regarding Pierce. RP (2/17/10) 305-06.

The trial court observed the manner in which Detective Nole answered the above questions and by leaving the above answers out of both the oral ruling and the written Findings and Conclusions it appears that the Court gave no credence to Detective Nole's educated guess that someone told an unknown corrections officer or officers that Pierce wanted an attorney. Also, the trial court did not just rely upon Detective Nole's testimony in making its decision, during a recess the Court read the actual transcript of the interview, RP (2/17/10) 331, so the Court took into account what was actually said during the interview, not the answers Detective Nole gave from his memory a year after the interview. Based on the entire record before it, the trial court did not abuse its discretion in making its factual findings and concluding, based upon those findings, that Pierce did not ask for an attorney in such a manner as to activate CrR 3.1(c)(2).

Additionally, the Court did not abuse its discretion when it found that Pierce knowingly and voluntarily waived his rights under 3.1 when he re-initiated contact with the detectives. CP 811. Pierce, who was not new to the criminal justice system, RP (3/17/10) 324 (State pointing out 42 prior arrests), was clearly told at the beginning of the second interview "[y]ou have a right *at this time* to talk to a lawyer and have him present with you while you're being questioned. If you cannot afford to hire a

lawyer one will be appointed to represent you *before questioning* if you wish.” CP 804 (Finding 47). Yet even then, when told he could talk to an attorney “at this time” and he would be appointed an attorney “before questioning,” he chose to talk to the detectives instead of asking for an attorney therefore he knowingly and voluntarily waived both his *Miranda* rights and his CrR 3.1(c)(2). CP 811-12; *Kirkpatrick*, 89 Wn. App. at 414-15, 948 P.2d 882.

Even if this court were to find that CrR 3.1 was violated, this does not mandate suppression of the evidence and a new trial. *See Kirkpatrick*, 89 Wn. App. 415-16, 948 P.2d 882. An alleged statutory error, such as this one, is subject to harmless error analysis. *Id.*; *State v. Jaquez*, 105 Wn. App. 699, 716, 20 P.3d 1035 (2001). To prevail under this test the defendant must show “within reasonable probabilities, had the error not occurred, the outcome of the trial would have been materially affected.” *Hancock*, 46 Wn. App. at 678, 731 P.2d 1133 (internal citation omitted). In this case it is not reasonably probable that the outcome of the trial would be different without the statements. Had the second set of statements been suppressed, the State would have still have presented the jury with Pierce’s knowledge that the Yarrs had some money in their home, Pierce only had \$7.02 at the beginning of the day, RP (3/17/10) 42, Pierce shoplifting a simulated firearm, RP (3/17/10) 261-62, Pierce’s

sighting near the Yarr home around the time of the crimes, RP (3/17/10) 48-78, Pierce using the Yarr ATM card while the fire was in its early stages, RP (3/16/11) 1433-38, Pierce's unexpected arrival at Mr. Boyd's RV, and his request for methamphetamine, an indication that he suddenly had a newfound source of money. RP (3/22/10) 696. It is also likely that the State would still have presented his missing coat as evidence, since it disappeared sometime between the Henery's video and the ATM video on the night of the murders. RP (3/17/10) 202-33.

The State would have also introduced additional unsuppressed statements that Pierce made to corrections staff shortly after his arrest:

- He “knew the shooter,”
- “He would tell [Superintendent Richmond] the details of what happened and who the shooter was.”
- “He needed to do the right thing and tell [Superintendent Richmond] everything.”
- “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) 280.

Based on the above evidence, it is unlikely that the outcome of the trial would have been materially altered by the suppression of the second set of

statements, thus admitting the second set of statements was harmless error.

Hancock, 46 Wn. App. at 678, 731 P.2d 1133.

XI. **THOUGH THE COURT ERRED IN TELLING THE JURY THAT THE CASE DID NOT INVOLVE THE DEATH PENALTY AND THE STATE MAY HAVE ERRED BY FAILING TO PROMPTLY DISCLOSE EVIDENCE, NEITHER OF THESE ERRORS, OR AN ACCUMULATION OF OTHER ERRORS, DENIED PIERCE A FAIR TRIAL**

“Trials must be fair but they need not be perfect.” *Brown v. United States*, 411 U.S. 223, 231-32, 93 S.Ct. 1565, 36 L.Ed.2d 208 (1973).

The cumulative error doctrine “is limited to instances when there have been several trial errors that standing alone may not be sufficient to justify reversal but when combined may deny a defendant a fair trial.”

State v. Greiff, 141 Wn.2d 910, 10 P.3d 390 (2000) (*en banc*). Even the existence of multiple errors is insufficient to warrant reversal of a conviction so long as the errors did not deprive a defendant of a fair trial.

Id. Furthermore, the defendant bears the burden of proving an accumulation of errors of sufficient magnitude that retrial is necessary.

State v. Price, 126 Wn. App. 617, 655, 109 P.3d 27, *rev. denied*, 155 Wn.2d 1018, 124 P.3d 659 (2005).

Beyond directing the court’s attention to “all issues,” Pierce does not point This Court toward any particular significant error or set of significant errors. All alleged errors, individually or collectively, were

harmless in light of the overwhelming evidence of Pierce's guilt.

Cumulative errors did not deny Pierce a fair trial and he should not be granted a new trial based upon an accumulation of errors that may have occurred but, due to the evidence against Pierce, in no way altered the outcome of the trial.

V. CONCLUSION

Michael Pierce murdered Janice and Pat Yarr as they lay face down on their kitchen floor. All of the evidence points to this lone conclusion. Pierce's familiarity with Pat and his having reason to think Pat would have cash money on hand, his shoplifting of a simulated firearm an hour before the murders, his appearance near the Yarrs' home around the time of the murders, his use of the Yarrs' ATM card while their house was still burning, and, finally, because he told law enforcement that the shooter had burned his clothes, and all of the clothes that Pierce was wearing that night have since vanished is all convincing evidence of why he is guilty. Pierce was not convicted because the venue might have been biased, nor was he convicted due to any procedural error, or errors, that might have occurred during his trial. The jury found Pierce guilty because he did it.

For these reasons Pierce's appeal should be denied.

Respectfully submitted this 20th day of May, 2011.

SCOTT W. ROSEKRANS, Jefferson County
Prosecuting Attorney

A handwritten signature in black ink, appearing to read 'Chris R. Ashcraft', written over a horizontal line.

By: CHRIS R. ASHCRAFT, WSBA #41692
Deputy Prosecuting Attorney

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STATE OF WASHINGTON
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IN THE COURT OF APPEALS FOR THE STATE OF WASHINGTON
DIVISION II

STATE OF WASHINGTON,
Respondent,
vs.
MICHAEL JOHN PIERCE,
Appellant.

Case No.: 40777-9-II
Superior Court No.: 09-1-00058-7

DECLARATION OF SERVICE

Janice N. Chadbourne declares:

That at all times mentioned herein I was over 18 years of age and a citizen of the United States; that on the 20th day of May, 2011, I mailed a copy of the State's BRIEF OF RESPONDENT, MOTION OF RESPONDENT FOR PERMISSION TO FILE AN OVERLENGTH BRIEF and PLAINTIFF/RESPONDENT'S SECOND SUPPLEMENTAL DESIGNATION OF CLERK'S PAPERS AND EXHIBITS, to the following:

David C. Ponzoha, Clerk
Court of Appeals, Division II
950 Broadway, Suite 300
Tacoma, WA 98402-4454

Mark A. Larranaga
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DECLARATION OF SERVICE
Page 1



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

Dated this 20th day of May, 2011 at Port Townsend, Washington.


Janice N. Chadbourne
Lead Legal Assistant

