

NO. 43693-1-II

**IN THE COURT OF APPEALS OF THE STATE OF
WASHINGTON,**

DIVISION II

STATE OF WASHINGTON,

Respondent,

vs.

SERGEY FEDORUK,

Appellant.

BRIEF OF RESPONDENT

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I. STATE'S REPOSE TO ASSIGNMENT OF ERROR

A. THE DEFENDANT FAILS TO SHOW TRIAL COUNSEL WAS INEFFECTIVE UNDER BOTH PRONGS OF *STRICKLAND V. WASHINGTON*, 466 u.s. 688, 104 S.CT 2052 (1984).

a. The record is insufficient to show defense counsel's performance was deficient.

1. The record does not show counsel had the ability to raise a not guilty by reason of insanity plea (NGRI) or diminished capacity defense prior to the defendant's authorization after the 3.5 hearing.

b. The record is insufficient to show if performance was deficient that it would have changed the outcome of the trial.

B. THE TRIAL COURT PROPERLY DENIED THE MOTION TO CONTINUE AND DID NOT VIOLATE DUE PROCESS.

a. The defendant fails to show he was entitled to bring a plea of NGRI.

b. The trial court used proper discretion in denying the continuance as the defendant was dilatory in bringing the defense.

C. THE TRIAL COURT PROPERLY ADMITTED FEDORUK'S STATEMENTS

a. The Defendant's initiation of conversation with the police overturned his original invocation of the right to remain silent.

b. The Defendant's statements were not the product of force and were voluntary.

c. The Defendant was detained pursuant to a Terry stop and not in custody necessitating Miranda

d. Should the court find a constitutional violation, it was harmless error due to the overwhelming evidence of guilt.

D. THE STATE DID NOT COMMIT PROSECUTORIAL MISCONDUCT

a. The Prosecutor did not commit misconduct in her oral statements during closing argument.

1. The prosecutor did not shift the burden of proof.
2. The prosecutor's reference to intuition and the use of head, heart, and gut in talking about abiding belief was not improper.
3. The defendant failed to establish ineffective assistance of counsel with respect to trial counsel's failure to object.

b. The Prosecutor did not commit misconduct in her PowerPoint presentation during closing argument

1. The Defendant fails to prove ineffective assistance of counsel for failing to object to the PowerPoint presentation.

E. THE COURT PROPERLY DENIED TO GIVE A LESSER OFFENSE OF MANSLAUGHTER AS THERE WAS INSUFFICIENT FACTUAL BASIS UNDER A *WORKMAN* ANALYSIS.

a. The court properly denied to instruct on Manslaughter as there was insufficient factual basis.

II. ISSUES PERTAINING TO THE STATE'S RESPONSE TO THE ASSIGNMENT OF ERROR

- A. Whether the Defendant can prove ineffective assistance of counsel for failing to raise a plea of NGRI or diminished capacity without proof the Defendant authorized counsel to pursue those defenses?
- B. Whether the Defendant can prove ineffective assistance of counsel when there is no evidence in the record the defendant was insane or had diminished capacity in order to show the outcome of trial would be different?
- C. Whether the court violated Fedoruk's due process rights when it denied his motion to continue, even though he could not establish he would be entitled to bring a claim of NGRI ten months after the murder?
- D. Whether the trial court abused its discretion when it denied the motion to continue even though Fedoruk brought the motion the day before trial for a defense he had known was available for the last ten months?
- E. Whether Fedoruk's initiation of conversation was a waiver of his right to remain silent, and he knowingly and intelligently waived his rights and spoke to deputies.
- F. Was Fedoruk in custody for the purpose of Miranda, when the deputies and officers detained him to check on Ischenko's welfare and he was told he was not under arrest.
- G. Was it flagrant and ill-intentioned prosecutorial misconduct that could not be cured with an instruction to argue that undisputed evidence amounted to agreements as to evidence.

- H. Was it flagrant and ill-intentioned prosecutorial misconduct that could not be cured with an instruction to argue the evidence of the family's behavior implied intuition.
- I. Was it flagrant and ill-intentioned prosecutorial misconduct that could not be cured with an instruction to use a simplified interpretation of abiding belief language referencing the jury use their head, hearts, and gut.
- J. Was it ineffective assistance of counsel to fail to object to the prosecution's use of intuition and abiding belief language in closing.
- K. Did the prosecution commit flagrant and ill-intentioned misconduct that could not be cured with an instruction when it used a PowerPoint presentation that did not provide the jury with evidence outside the trial, that did not express opinion and summarized the evidence.
- L. Did the trial court abuse its discretion when it denied the defense jury instruction as to manslaughter when there was no evidence that supported the mental state of recklessness?

III. STATEMENT OF FACTS

Statement of Facts as to Prior Proceedings

The State charged Sergey Fedoruk with Murder in the second degree under both alternatives of intentional murder and felony murder. CP 4. The State filed a motion raising competency, asking for no bail and the Court ordered a Western State Evaluation on August 24, 2011. CP 30-31. In the court's findings of fact for the no-bail hearing, the Court noted the Defendant had a past history of violent behavior as

demonstrated by his prior convictions, prior police contacts, and finding of not guilty by reason of insanity. CP 1.

While awaiting the Western State Hospital (WSH) evaluation, Fedoruk was forcibly medicated as he was banging his head against the concrete floor and nearly chewed his own finger through. CP 32-34. It took eight to nine jail staff to control his behavior and transport him to the hospital. CP 33. The court found Fedoruk was a danger to himself and others. CP 33.

During the WSH evaluation, the evaluator noted Fedoruk reported a history of a head injury with a loss of consciousness and was hospitalized twice in the Ukraine in 1991 and 1992 where he was diagnosed with Schizophrenia. CP 38. When he immigrated to the United States in 2002 he spent eight days in the Longview hospital for being agitated, threatening family, and hearing voices. CP 39. He was involuntary detained and released on a Less Restrictive Alternative. CP 39. The Report detailed a number of episodes of bizarre behaviors. CP 37-47.

In 2007 Fedoruk was diagnosed with Bipolar 1 Disorder. CP 40, 44. In 2011, at the time of the competency evaluation, Fedoruk was compliant with taking his medication and appeared calm. CP 44. The evaluator determined he was competent although did suffer a major

mental illness. CP 46. The Court found Fedoruk competent on October 12, 2011. Supp CP.

The case proceeded and the parties continued the trial three times, ultimately scheduling trial to start June 13, 2012. CP 51, 52, 53. On June 6, 2012, the court held a 3.5 hearing. At the hearing, Officer Chris Napolitano, with the Department of Corrections (DOC), testified Fedoruk was under his supervision. Report of Proceedings 102¹. When Fedoruk would have to deal with violations of his supervision, he would try to talk his way out of them, but would understand if he was arrested for the violation or would have other sanctions. RP 104-05. On August 1, 2011, Fedoruk's family contacted DOC concerned about Fedoruk's behavior and asking for a welfare check as another family member Serhiy Ischenko was missing. RP 107-08, 181 DOC contacted the Cowlitz County Sheriff's office to aid with the welfare check. RP 109, 180. Three deputies and two corrections officers arrived. RP 110-11, 170, 183. Fedoruk came out to meet them and appeared disheveled and dirty. RP 111, 184. He greeted Officer Napolitano by name and asked if everything was ok. RP 113. Fedoruk was sweating, fidgety, put his hands repeatedly in his pockets and turned his back to Officer Napolitano in an attempt to go back inside the house. RP 111, 114-15, 184. Officer

Napolitano and DOC Officer Brad Phillips became concerned with Fedoruk's behavior as it was unusual for Fedoruk. RP 111-12. Deputy Moore heard Fedoruk assure Napolitano that he was taking his medications and offered to go inside to retrieve them. RP 169. Napolitano, who was the lead person dealing with Fedoruk, did not want Fedoruk going inside and told him to stay outside. RP 116, 132, 169. Napolitano asked Fedoruk why his family was concerned about Ischenko and whose car was in the driveway. RP 116, 132, 135, 142. Fedoruk responded "Chris, everything okay. No problem. Just argument. Call Lyuba." RP 117. He also said the car belonged to his sister. RP 116. Deputy Robinson ran the license plate on the car and it belonged to Ischenko. RP 117-18. About five to ten minutes into the contact, Fedoruk was still fidgety and he repeatedly put his hands in his pockets. RP 118, 132, 168. Concerned for their safety, Napolitano put his hands on Fedoruk and told him he was going to put cuffs on him, but that he was not under arrest. RP 118. When Fedoruk began to tense up, Napolitano told him it was okay and he was just going to hold him for safety. RP 118-19, 143-44, 186. He repeated to Fedoruk he was not under arrest and Fedoruk immediately calmed down and said "oh, okay." RP 119, 186. He then put his hands behind him to allow the cuffing. RP

¹ The Report of Proceedings, hereinafter referred to as RP (page #s), consists of nine

119, 186. Napolitano told Fedoruk he needed him to sit on the stairs until they could figure things out and he need him to get a UA today because he suspected Fedoruk of using methamphetamine. RP 119. When Fedoruk denied using drugs, Napolitano told him “Okay. We’ll just take you to the office and...we’ll figure this out. And I’ll... bring you back home.” RP 119. Fedoruk responds “Oh, okay. That’s no big deal.” RP 119.

Deputies Robinson and Moore and Officer Phillips then searched the home to see if anyone else was there and to check for violations. RP 120-21, 144, 186. After their return, Napolitano, in a last minute decision, decided to search the acre-size property. RP 121. Deputy Robinson stayed with Fedoruk on the porch. RP 172. Robinson testified he did not consider Fedoruk in police custody and Robinson was still investigating the welfare check on Ischenko. RP 189.

As part of the welfare check, Robinson asked Fedoruk who owned the vehicle. RP 172, 187. Fedoruk said his sister and when Robinson told him it was registered to someone else, Fedoruk said it was Serhiy’s. RP 172, 187. When Robinson asked where Serhiy was, Fedoruk said “at work.” RP 172, 188. Robinson then asked how he got to work without his car. RP 172, 188. Fedoruk opined that maybe Ischenko’s wife took

consecutively numbered volumes spanning multiple different dates and hearings.

him. RP 188. Robinson asked if he knew how to get in touch with Ischenko and if Ischenko had a cell phone. RP 189. Fedoruck didn't know. RP 189.

It was at this point, Richard Dzhumaniyazov (another family member) came running from the back yelling Napolitano should arrest Fedoruk. RP 122. The deputies found the body of Serhiy Ischenko in the backyard, down a small creekside hill covered with debris. RP 190. Deputy Robinson confirmed the report, escorted Fedoruk to his patrol vehicle, patted him down, and read Fedoruk his Miranda rights. RP 173, 190-92. After reading "You have the right to remain silent. Anything you say can be used against you in a court of law," Fedoruk interrupted and yelled "court, court, court!" RP 192. Robinson told Fedoruk he needed to finish reading and then they could discuss things. RP 192. Fedoruk stopped yelling, however, when Robinson read "you have the right at this time to talk to a lawyer," Fedoruk said "Lawyer, why? Lawyer, why??" RP 173, 192. Robinson did not consider this a request for counsel, rather as a question as why he needed a lawyer. RP 197, 207-08. To answer the question, Robinson told Fedoruk he was being detained and needed to finish. RP 192, 197. Robinson was able to finish reading the *Miranda* warnings and asked Fedoruk if he understood them. RP 192-93. Fedoruk said he did understand, but when Robinson asked Fedoruk if he wanted to

talk, Fedoruk said he did not want to talk and crossed his arms. RP 174, 193. Robinson did not ask him any more questions. RP 193.

About fifteen to twenty minutes later Robinson went to his car to gather a statement form. RP 193-94, 213. Fedoruk spontaneously and not in response to any questions, made statements talking for approximately three to four minutes. RP 194. Robinson tried to write down as much as he could, but Fedoruk was talking rapidly. RP 194-95. Robinson described Fedoruk as using an elevated voice, tensed and sitting forward. RP 195. Fedoruk spoke to him about incidents with his sister and things he spoke to others about. RP 214. Some of the quotes Robinson took down were:

My sister Tatyana...(Fedoruk asked his sister) What you want, a big dick or something. You tell me, sister, I want sex. I tell just this. I tell smoke dick, Tatyana...My sister very, very mad. She get bitchy, say 'Anybody call cops.' I never touch him, I never touch him, never. I go to property of Tatyana, get goats.

RP 214-15.² At the end, Fedoruk asked Robinson to talk to his sister and Robinson agreed. RP 195. Fedoruk stopped talking after the agreement. RP 195.

Robinson transported Fedoruk to the Hall of Justice about a half hour later to have a conversation with Undersheriff Marc Gilchrist (then

² Fedoruk cites to this passage from the trial testimony and not what was before the court at the time of the 3.5 hearing. Some of this information was never presented to the court.

chief civil deputy). RP 195, 239. Nothing eventful happened on the ride. RP 196. Robinson testified he explained to Undersheriff Gilchrist he read Fedoruk *Miranda* rights and Fedoruk asked why he needed a lawyer, said he didn't want to talk, but then later made statements in the patrol car. RP 196-97, 210, 241. Gilchrist testified Robinson recounted reading *Miranda* and Fedoruk did want to speak. RP 241. Deputy Robinson placed Fedoruk in an interview room and left. RP 242. Gilchrist and Detective Sergeant Reece entered the room. Fedoruk was still in handcuffs. RP 242. Gilchrist did not read Fedoruk his *Miranda* rights again as Robinson had already done so. RP 242-43.

Before Gilchrist could ask Fedoruk any questions, Fedoruk pointed at Sergeant Reece and said he did not want to speak with him. RP 243-44. Sergeant Reece then left the room. RP 243. Since, Fedoruk did not say he did not want to speak to Gilchrist, Gilchrist remained. RP 243. Gilchrist provided Fedoruk with three glasses of water per his request during the first few minutes. RP 244-45. Fedoruk then asked and was allowed to use the restroom. RP 245-46. The interview then began. RP 245. Fedoruk believed he was at the police station because his sister accused him of inappropriate sexual contact with another family member. RP 249. However, during the conversation, Fedoruk would avoid questions about Ischenko and decline to answer some questions. RP 248,

252. Fedoruk seemed somewhat familiar with police procedure and mentioned prior police contacts. RP 249. He even offered to be a police informant to catch drug dealers. RP 249-50.

At one point during the interview, Gilchrist took a break to confer with Sergeant Reece. RP 253. When he re-entered the interview, Fedoruk was kneeling on the floor as if in prayer. RP 253. Fedoruk came back to the table and engaged in conversation. RP 253. After an hour and half, Fedoruk asked to use the restroom again. RP 253-54. He was in the restroom for about thirty minutes. RP 199, 255. Gilchrist could hear him saying "Hallelujah!" about six or seven times. RP 255. When Fedoruk came out he immediately asked for a lawyer. RP 200. Gilchrist stopped questioning him. RP 256. No officer or deputy ever threatened Fedoruk and or unholstered their firearm in his presence. RP 127-28, 150, 200, 256.

Deputy Robinson notified Officer Napolitano the interview was done, and Napolitano picked up Fedoruk, holding him on a number of supervision violations. RP 126-27, 148. Seven days later, Detective Lincoln contacted Fedoruk in the jail to inform him of the charges with the aid of an interpreter. RP 266. Fedoruk responded "What? What? How could you think anything else?" RP 267. Lincoln re-read the

charge and Fedoruk said, "Goodbye. I want a lawyer. Goodbye." RP 267.

The Court made the following findings of fact and conclusions of law:

1. The Defendant stipulated the Statements made by the Defendant in the car to Deputy Robinson were made knowingly, intelligently, and voluntarily and admissible at trial.
2. The Defendant stipulated the Statements made by the Defendant in the jail to Deputies Taylor and McDaniel during the search warrant processes were made knowingly, intelligently, and voluntarily and admissible at trial.
3. The Defendant stipulated the Statements made by the Defendant in the phone calls collected by the Cowlitz County Sheriff's Office were made knowingly, intelligently and voluntarily and admissible at trial.
4. The Defendant's family called the Department of Corrections (DOC) on August 1, 2011 with their concerns the Defendant was in violation of his terms of supervision. They called a second time as they were concerned the Defendant may have something to do with Serhiy Ischenko being missing.
5. The Defendant was under DOC supervision and knew the terms of his supervision.
6. DOC asked for assistance from the Cowlitz County Sheriff's Office (CCSO) in light of the welfare check of Ischenko.
7. Both DOC and the CCSO deputies went to the Defendant's residence of 140 Hometown Drive. The Defendant came outside of the house to greet them.

8. DOC officers Napolitano and Phillips made direct contact with Defendant.
9. The Defendant appeared disheveled and dirty. And repeatedly placed his hands inside his pockets after being told to keep his hands out.
10. The Defendant was acting in an agitated manner, and tried to go inside the house after being told by DOC not to go inside
11. DOC officers had legitimate officer safety concerns and placed the Defendant in handcuffs for officer safety.
12. The Defendant originally believed he was under arrest and statically resisted. However officers told Fedoruk he was not under arrest and he calmed down and allowed officers to cuff him.
13. Officers made known to Defendant they were there to check on the welfare of Serhiy Ischenko.
14. DOC and two officers checked the residence and the Defendant remained outside seated on the porch.
15. The Defendant was not in custody and not in a situation akin to custodial arrest.
16. DOC then began to search around the outside of the property. At this time Deputy Robinson began asking questions of Fedoruk concerning Ischenko.
17. Officers never unholstered their weapons in the Defendant's presence.
18. The Defendant was only in this position for a very short time.
19. After speaking to the Sheriff's Deputies and DOC officers at 140 Home Town Drive on the morning of

August 1, 2011, Officers located Serhiy Ischenko deceased.

20. Only after finding the body, did Deputy Robinson place the Defendant in custody of CCSO. It is at this point the Defendant was in custody for purposes of Miranda.
21. Deputy Robinson read the Defendant a statement of his rights which exactly mirrored Miranda warnings prior to any substantive questioning concerning the event.³
22. The Defendant was familiar with the legal system and conversed with authorities in English on prior occasions.
23. If the Defendant did not understand something said in English he would tell the person and ask for clarification.
24. The Defendant understood his rights as Deputy Robinson read them to him and this was conveyed to Deputy Robinson.
25. The Defendant invoked his right to remain silent when he stated he did not wish to speak to Deputy Robinson.
26. The Defendant was placed inside a patrol car. After about 30 minutes the Defendant made spontaneous statements concerning the specific considerations of the case to Deputy Robinson.
27. The Defendant initiated this conversation and thus waived his right to remain silent when he chose to make the spontaneous statements.
28. The Defendant was then transported to the Hall of Justice where he was interviewed by Chief Civil Deputy Marc Gilchrist.⁴

³ *Miranda v. Arizona*, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966).

29. The Defendant was not re-read his Miranda rights prior to the interview by Gilchrist. However, only about 30 minutes had passed since they were originally read and this was not a substantial time lapse
30. At the very beginning of the interview, the Defendant stated that he did not want to speak with Detective Joe Reiss and Detective Reiss left the room. The Defendant then spoke with Chief Gilchrist.
31. The Defendant knew what he was doing by directing one officer not to be there. By choosing which officer to talk with the Defendant initiated the conversation.
32. The Defendant agreed to speak to Chief Gilchrist.
33. The interview between Gilchrist and Defendant was in English. At first the Defendant indicated he did not understand English well. However, after Gilchrist stated Fedoruk seemed to be doing fine in the conversation, the Defendant proceeded to speak to Gilchrist in English. The Defendant did not ask for an interpreter and one was not used.
34. Chief Gilchrist could understand Defendant for the most part and both parties used pantomime to aid the conversation.
35. At the end of the interview the Defendant invoked his rights by asking for an attorney. This behavior indicated he was aware of his rights during the entire process and made the conscious choice to be interviewed.
36. The police did not ask him further questions after his invocation.

⁴ That Chief Gilchrist misbelieved the Defendant agreed to talk to him is unimportant given the Defendant's actions.

37. Up until his request for an attorney, the Defendant never attempted to terminate the interview, nor invoked his right to remain silent.
38. The police did not use any threats or coercion to obtain the Defendant's statement(s).

Conclusions of Law

1. The Defendant's initial detention at 140 Hometown Drive was akin to a Terry Stop. The handcuffing of the Defendant was for the purpose of officer safety and did not elevate the detention beyond that of a Terry Stop.
2. The Defendant's statements to the Sheriff's deputies and corrections officer at 140 Hometown Drive on August 1, 2011, were made knowingly, intelligently, and voluntarily and admissible at trial.
3. The Defendant's statements to Deputy Robinson while he was in Robinson's patrol car were made knowingly, intelligently, and voluntarily and admissible at trial.
4. The Defendant's statements to Chief Civil Deputy Marc Gilchrist were made knowingly, intelligently, and voluntarily and admissible at trial.
5. The Defendant's statements in the jail to Deputies Taylor and McDaniel during the search warrant processes were made knowingly, intelligently, and voluntarily and admissible at trial.
6. The Defendant's statements in the phone calls collected by the Cowlitz County Sheriff's Office were made knowingly, intelligently and voluntarily and admissible at trial.

CP 6-11.

After the 3.5 hearing, the parties conducted motions in limine. RP 331. One of the State's motions was to prevent any direct defense testimony or argument of diminished capacity. CP 66, RP 331-32. The State raised the concern Fedoruk would try to "back door" a diminished capacity defense. RP 331. To assist the court, the State gave a rendition of Fedoruk's behavior in the three days leading up to the murder. RP 241-350. Defense counsel argued should the State introduce this behavior for proof of motive and intent under Evidence Rule 404(b), they should be allowed to explain his underlying mental health issues. RP 350-52. The Court granted the State's motion and prohibited any evidence as to a mental defect or disease. CP 66, RP 354. However, the court did reserve ruling leaving open the possibility Fedoruk could use this information to explain the behavior as resulting from mental illness and. RP 354-55.

On June 12, 2012, the day before trial, Fedoruk filed a motion to continue the trial to pursue a defense of Not Guilty by Reason of Insanity (NGRI). CP 55. Defense counsel stated prior to June 11, 2012, counsel had an insubstantial basis to pursue a defense of NGRI and only was able to reach this conclusion after meeting with Fedoruk and Fedoruk was able to hear the State's case in a chronological fashion during motions. CP 55; RP 395-96. Defense counsel and Fedoruk were very aware of Fedoruk's long standing mental health history and his prior plea's of

NGRI for a violent offense and the information was contained in discovery. CP 56, 58-59; RP 395-96, 400. Counsel acknowledged mental health concerns were always present in the case. RP 397. Counsel spoke to the family to obtain mental health history, obtained records and reviewed the records provided in discovery. RP 397, 404. Counsel stated he previously contemplated all mental health defenses. RP 404. However, counsel stated he needed more than bizarre behavior to legally pursue an NGRI defense. RP 395-97. Counsel asked for an additional sixty days for trial, indicating the only thing necessary to raise the defense was an insanity evaluation. RP 398.

The State objected to the continuance as untimely and argued the motion appeared to be a stall tactic. CP 60; RP 400. In its affidavit in support of the objection, the State indicated it had a number of conversations with defense counsel asking if they were raising a diminished capacity defense or plea of NGRI. CP 66. Defense counsel repeatedly told the State it was not raising these defenses. CP 66. The State also indicated its witnesses were ready to testify and the State was worried about their level of cooperation if the matter was continued. RP 402.⁵ Additionally, arrangements were made to bring a witness from

⁵ The State's concern about the family cooperation was substantiated when the court admonished a number of State's witnesses on the second day of trial not to violate the court order prohibiting testimony about a mental health diagnosis. RP 620. The court

Portland and two expert witnesses, one from Spokane, would be testifying. RP 402.

The Court found Fedoruk was dilatory in raising his defense of insanity and did not provide a valid factual basis to continue the trial. CP 108. In its reasoning, the Court cited to RCW 10.77.030 as guidance the NGRI defense should be raised within ten days or at a later time as the court may for good cause permit. RP 405. The court found for over ten and a half months the Defendant was aware of the mental health issues and there was no apparent attempt to pursue or request an insanity defense. RP 405-06. The court intimated that even if such a defense was pursued, given the tardiness of the pursuit, there was no guarantee the court would allow the evidence at trial. RP 406. The trial court denied the motion to continue the trial. CP 108; RP 406.

Statement of Facts as to Trial

The Fedoruk family is a large close-knit family, including all the extended aunts, uncles, and cousins. RP 629-30. Yelena Fedoruk, the matriarch, is married to Victor Fedoruk. RP 436. They have nine children, including Rimma (22 years old) and Roman (21 years old). RP 437. Back in July of 2011, Yelena's brother Serhiy Ischenko (the victim)

indicated it heard the family wanted to introduce this testimony and if they did, they

lived with them, as well as, Victor's brother Sergey Fedoruk (the defendant who also goes by the name of Derek). RP 440. Victor's and Sergey's sisters, Tatyana Varyvoda and Yuliya Belov live a few houses away from Yelena. RP 633-34, 641. Another sister, Svetlana Dzhumaniyazov and her husband Richard, lived in the local area. RP 631-58.

At trial, the State presented evidence in 2010 Sergey Fedoruk⁶ believed Serhiy Ischenko molested his niece Rimma. RP 630, 745. He also threatened to bomb Ischenko and took a bottle, placing some wires inside. RP 630-31, 745-46.

On Sunday July 31, 2011, Fedoruk was late to church and Ischenko waited for him and gave him a ride. RP 495. Most of the day Fedoruk was agitated and angry. RP 441-42. All the family was aware of this and that night Yelena put the younger children to bed and made sure their bedroom doors were locked. RP 446. Before bed, Ischenko made a comment to Rimma, that he didn't want Fedoruk's borscht as he was afraid Fedoruk would poison him. RP 511, 563. Ischenko later fell asleep on the couch, although usually he slept in one of the children's room downstairs. RP 447, 460.

would be held in contempt. RP 620.

That night Fedoruk went to Rimma's room, waking her up. RP 517, 564. He asked her if anyone raped her while she was in Portland over the weekend, and if they did she could tell him and he would take care of it. RP 519-20, 548. He told her he felt like he could kill someone and punched the air with his fists. RP 519, 567. Rimma told him nothing happened, but he wasn't convinced, saying he had a vision. RP 523, 550. Rimma left Fedoruk and locked her door. RP 524, 572. Rimma and her friend Lyuba (who spent the night) heard Fedoruk running up and down the stairs late at night, opening the garage door, and running water in the bathroom. RP 508, 525-26, 571-72. Rimma also heard noises outside her bedroom window like someone using a wheelbarrow and noticed the next morning the family's wheelbarrow was moved. RP 512, 528, 540. Lyuba noticed her phone was missing after Fedoruk was in the room. RP 524, 570-71. Rimma also found several tools and a shish kabob hidden underneath her bookcase and a tire-thumper in her closet. RP 531-33. When Rimma asked Fedoruk about pulling the items in her room, he told her he needed them to protect himself from the police. RP 538.

That night, Roman Fedoruk walked home at three a.m. from his cousin's house. RP 588, 591. He encountered Fedoruk outside near the

⁶ The State shall refer herein to the witnesses using their first names, other than the Defendant and victim Ischenko. The State means no disrespect, rather for ease of telling everyone apart.

boat. RP 592. Roman asked why Fedoruk wasn't sleeping and Fedoruk responded he was out with the dog. RP 595. Roman did not see any dog. RP 595. Roman noticed Fedoruk was wearing a dark hooded sweatshirt and jeans. RP 595-96. He later identified the bloody sweatshirt as being one recovered by the police and the bloody shoes as sometimes worn by Fedoruk. RP 596-97. After the exchange Roman went inside, passing by the couch where Yelena last saw Ischenko. RP 599. Ischenko was no longer on the couch. RP 599. Roman went to bed, locking his door. RP 601.

In the morning when Yelena awoke at 6:00 am, she could not find her brother Ischenko. RP 462. She found the couch still in disarray, which was odd as Ischenko would usually put it in order. RP 463-64. She saw her brother's car was still in the driveway and thought it odd as he needed to get to work. RP 462, 469. While waking up the rest of the family, Yelena asked Fedoruk if he knew where Ischenko was and Fedoruk denied any knowledge. RP 465. Yelena then went outside to find Ischenko and found Lyuba's phone wet, outside on an inflated mattress in the pool. RP 468, 479, 529, 575. She asked Roman to help find Ischenko and go to Ischenko's work to see if he was there and tried to reach Ischenko on his cell phone. RP 472, 602-607. When she needed to leave to go to work, rather than leave her children with the usual babysitter

Fedoruk, she took them to Svetlana, informing her she could not locate Ischenko. RP 472-73, 489, 505, 710.

Svetlana called her husband Richard, who was fishing, to tell him Ischenko was missing. RP 657, 711. Svetlana then called her sister Yuliya and the two discussed whether to call DOC to check on Fedoruk. RP 631, 712. Yuliya called DOC and subsequently learned Ischenko was missing. RP 632. She then called and relayed Ischenko was also missing. RP 632. Yuliya called Svetlana again and it was arranged Svetlana's husband, Richard would come to Yuliya's house to take Yuliya's children to Svetlana's to be safe. RP 636, 659, 712-13. Svetlana then called Richard requesting he come back. RP 658.

Richard arrived at Yuliya's and it was agreed he would go to Victor's house to look for Ischenko, since the police were already there. RP 637-38, 665-66.⁷ Earlier Richard discussed with Svetlana where the family searched for Ischenko and the only place left unsearched was the creek. RP 669. Richard cut between the houses using the backyards, checking for Ischenko at the creek. RP 665, 669. He noticed some freshly sawed branches leading in a path. RP 672. He followed the branch path towards the creek and saw some branches thrown over something. RP 672. Until he moved the branch, he didn't realize it was Ischenko. RP

672. When he realized, he immediately yelled for help and gestured to the police. RP 678.

The police did find Serhiy Ischenko dead on a small hill next to the creek. RP 850, 948. The body was covered with various debris. RP 806, 850, 948-962, 1043. It was determined he died of multiple blunt force trauma, likely from being beaten to death. RP 1243, 1264, 1267. Dr. Cliff Nelson determined from the autopsy Ischenko had been strangled from the front with a tremendous amount of force based upon the injuries to his neck and shoulder area. RP 1230-35. Ischenko also had a torn ear, multiple rib fractures, a torn mesentery and bruising all over caused by a more than 10 blows (4 of which were to his ribs) and perhaps stomping. RP 1203-1218, 1223, 1227, 1246, 1257-58, 1274. The police determined the likely fight scene was in the front of the house where the driveway met the roadway, due to the amount of Ischenko's blood spatter. RP 986-888, 997-1019, 1026-1037, 1074-79, 1316-21, 1356-57, 1569-70, 1578-79, 1581-93, 1646-91. The police also discovered Fedoruk's clothing, his sweatshirt, jeans, socks and shoes were covered in blood spatter, contact and saturation transfer from Ischenko. RP 1548, 1553, 1569-70, 1578-79, 1581-93, 1646-91. In an attempt to recreate the blood spatter event, Mitch Nesson with the Washington State Crime Lab determined one possible

⁷ Richard earlier met with the police on their way up to the house. RP 661. He relayed

way to create the spatter was to kneel on his left knee, with his right leg up and smack a blood soaked sponge. RP 1693, 1696. The sweatshirt was located next to Fedoruk's bed, the jeans were hidden inside a jetski on the property about 20 yards from the body, and the shoes were on the front porch. RP 770, 1403-04, 1465.

The Deputies testified when they arrived at the scene to contact Fedoruk, he was acting nervous, fidgety, and lied to them about who owned Ischenko's vehicle, parked in the driveway. RP 759, 761-62, 798, 800, 845, 893-94, 896-97. The police also discovered Fedoruk had multiple scratches on his head, torso, hand and arms, and bruising on his collarbone and arms. RP 855, 857, 1083-87. In a conversation with Undersheriff Gilchrist when Gilchrist asked about Ischenko, Fedoruk would look away, have long pauses, ask him to repeat questions, and change the topic. RP 1292-93. He did tell Gilchrist he went to church with Ischenko the night before in Ischenko's car, he liked Ischenko, and never told Deputy Robinson anything about not hitting Ischenko. RP 1294, 1305.

In a recorded phone call to Svetlana from jail on August 10, 2011, Fedoruk admitted he wiped up a large amount of blood with the jeans, believing his dog mauled someone. RP 717. He told her the jeans were in

information to the police about what Fedoruk was doing at the house. RP 661.

the jetski and this was the reason he had blood under his nails. RP 719, 721. He opined someone set him up for Ischenko's murder and wanted to know who turned him in to the police. RP 721-22, 725-26. About a month later, Svetlana had a face-to-face conversation with Fedoruk. RP 731. She picked his story apart about wiping the blood, catching him telling several different versions. RP 733-34. The Defendant did not testify and did not call any witnesses. RP 1736.

The Defendant proposed a lesser charge of Manslaughter in the first degree to the charge of intentional murder. RP 1749-50. Counsel argued because the evidence could not pinpoint which blow caused Ischenko's death or if it was strangulation, the jury could find the death was the result of a reckless act as opposed to intentional. RP 1750-51. The court disagreed, saying the evidence presented as to the number of blows to create the injuries did not warrant the instruction in this particular scenario. RP 1753-54.

During the State's closing argument, the State utilized a Powerpoint presentation. Ex. #287. The Defense did not object to any part of the presentation or closing. The presentation showed every slide with a gray background, with red lettering in the title denoting the crime of Murder 2 and black and white lettering in other areas of the slides. Ex.

#287.⁸ The title lettering was larger than the content lettering, but consistent throughout. Ex. #287. There were seven slides with 5 different photographs. Ex. #287, slides 2, 3, 15, 16, 32, 33, 34. No photograph was altered from how it was originally admitted into evidence. However, the slides did, as stated above, contain the caption of the crime charged. Ex. #287, slides 2, 3, 15, 16, 32, 33, 34. Many of the slides did contain movement such that when the State' clicked a button a new point would appear as the State made the argument. Ex. #287.

The presentation began with the elements and definitions of the charge of Murder in the second degree. Ex. #287, slides 5-13. Slides 14-16 showed evidence of how Ischenko was murdered, using the headline of "Agreements." Ex. #287, slides 14-16. Slide 17 showed in red lettering the conclusion on the basis of the three slides before, that Ischenko was murdered. Ex. #287, slide 17.

Slides 18-31 then talked about the evidence of identity, the central issue in the case. Ex. #287, slides 18-31. Slide 19 separated the evidence of identity into three separate categories, the defendant's behavior, the family's knowledge, and physical evidence. Ex. #287, slide 19. Slide 21 focused on the family's knowledge. It listed Fedoruk's prior bomb threat to Ischenko believing he raped Rimma; that he's awake, running around

⁸ Every slide but the second slide, contains the title of the crime of Murder 2. Ex. #287.

the home; Roman see's Fedoruk outside wearing the clothing later found with blood; Fedoruk used the bathroom sink for 15 minutes; and the family is immediately concerned when they cannot find Ischenko. Ex. #287, slide 21. Slide 22 then says family immediately suspects Fedoruk, is worried about his behavior, and calls DOC. Ex. #287, slide 22. The State then has a saying - Intuition is a POWERFUL thing. Ex. #287, slide 22. That is followed by a last point that Richard finds the body and immediately says to arrest Fedoruk. Ex. #287, slide 22. Slides 20, 23, 24, 25 focus on the defendant's behavior. Ex. #287. Many of the facts in these slides are also mentioned in the family knowledge slides.

Slides 26-29 deal with the physical evidence of identity. Ex. #287. Slide 30 shows a wide net of suspicion. Ex. #287, slide 30. Slide 31 must be viewed in the Powerpoint presentation to be fully understood as it builds to a point where the final picture shows a target. Ex. #287, slide 31. The first showing of the slide is a black circle with the caption of "prior threat to Serhiy – thinks he raped Rimma." Ex. #287, slide 31. The next click shows a white circle over the black with the caption "Def. acting strange, believes Rimma was raped in Portland." Ex. #287, slide 31. The next click shows another black circle on top the white with the caption "Def. says he feels so strong, wants to kill someone." Ex. #287, slide 31. Another click and there is a circle on top last with a caption "Everyone

else behind locked doors.” Ex. #287, slide 31. A fifth circle is the next click with the caption “Def. clothes have Serhiy’s blood.” Ex. #287, slide 31. A sixth circle then appears with a caption “Blood Spatter on Def. jeans.” Ex. #287, slide 31. A last circle in the center has the caption Sergey Fedoruk. Ex. #287, slide 31. With a last click, each outer circle disappears one by one to leave only the inner circle with the name of Fedoruk. Ex. #287, slide 31.

The State began its closing argument citing to the 32 witnesses the State called. RP 1771-72. The prosecutor argued Fedoruk was guilty of murder two as the undisputed evidence was Ischenko was brutally beaten and strangled. RP 1772. The State theorized there was really only one issue in the case, identity. RP 1772. The State moved through its Powerpoint presentation with the law on murder two. RP 1772-1775. The State then asked the jury what were the agreements in the case. RP 1775. The State couched the term “agreement” in what was the undisputed and uncontroverted evidence. RP 1776-78. The State argued there was no contradictory evidence of Dr. Nelson’s testimony Ischenko was beaten and/or strangled to death. RP 1776-78. There was also no contradictory evidence the assault didn’t happen in the driveway and the physical evidence determined that was the scene. RP 1778. Lastly, there was no undisputed evidence it was Ischenko’s blood in the driveway. RP 1778.

The State concluded that undisputed evidence led to the factual conclusion Ischenko was murdered, consistent with slide 17. RP 1779, Ex. #287, slide 17.

The State then moved into the argument about identity, consistent with slides 18-31. RP 1779, Ex. #287. The prosecutor talked about family knowledge utilizing the slides as she made the same points orally. RP 1783-1786. The argument began Yelena was immediately concerned for Ischenko when she couldn't find him in the morning and the couch was in disarray. RP 1783. She didn't just brush off the concern, she went looking inside and outside, and recruited others to find him. RP 1783-84. She was in a panic and knew something was wrong. RP 1784. The argument was the family suspects Fedoruk and are worried about his behavior. RP 1784. After noting the evidence above, the State then said "[i]ntuition is a powerful thing." RP 1784. The prosecutor then listed additional evidence the family knows something is wrong; they knew Fedoruk, Yelena would not leave the children with him; the three sisters spoke and immediately knew the concern, deciding to call DOC; Richard was so concerned for his friend that he looked for him in the creek; Richard found the body and immediately said to arrest Fedoruk. RP 1784-88. The State then argued the family's knowledge and intuition was bolstered by the defendant's behavior and physical evidence. RP 1788-

1810. All three pointed to the defendant as the murderer. RP 1805-06. The State used slide 31 to tie up all three elements of identity, arguing like the police, the jury, started with a wide net of suspicion of who killed Ischenko. RP 1808-09. It could be anyone in the circle. RP 1809. However as each piece of evidence fell into place, the net narrowed, until the only person left was Fedoruk. RP 1810.

The State spoke about the burden of proof. RP 1805. It recited the jury instruction and pointed out that beyond a reasonable doubt is not beyond a shadow of a doubt. RP 1805. The prosecutor said a reasonable doubt is an abiding belief in the truth of the charge and asks the jury what did their heads, hearts, and guts say. RP 1805. She then acknowledged the jury will always want more, but that this want is unnecessary and not reasonable. RP 1805-06.

The State ended its argument with a summation of the evidence, and the conclusion the defendant killed Ischenko, left his body in the ravine and was guilty of murder two. RP 1810.

In the defense's closing argument, the defense focused on the issue of identity. RP 1815, 1861. They conceded Ischenko was killed by homicide. RP 1845, 1860. They argued Fedoruk did not have a motive to kill Ischenko and liked him. RP 1815-17. However, the defense conceded the jeans found in the jetski and the sweatshirt Fedoruk was wearing were

saturated in Ischenko's blood. RP 1820, 1838. 1843, 1846. The defense also conceded Fedoruk was worried something happened to Rimma in Portland, but distinguished the concern from his previous accusation against Ischenko. RP 1821. The Defense talked about the timing of Ischenko's death, arguing Fedoruk did not have time to commit the murder given the State's witnesses' timelines. RP 1822-23. They also argued the family intuition wasn't telling, because Yelena didn't immediately become concerned when Ischenko was not on the couch and the family didn't look that hard for Ichenko outside. RP 1825-27. However, the defense did concede Fedoruk acted crazy that day, the family saw it and called DOC. RP 1827.

The Defense tried to cast suspicion on Richard given the ease and timing he located the body. RP 1829, 1862. They argued since Fedoruk did not have many injuries to his person, the physical evidence did not point to him. RP 1836-37. Additionally, they argued the DNA evidence did not conclusively link Fedoruk. RP 1838-39.

The Defense argued the reasonable doubt instruction by questioning whether there was evidence that could make the jury more certain or more sure. RP 1841. Counsel tied this argument together with the abiding belief language and gave an additional definition (not contained in the court's instructions): "[a]biding belief means

unwavering, continuing without change, a certainty in the evidence that State goes to that point in the line that maintains today, tomorrow and every day thereafter.” RP 1841-42, 1860. They argued the jury should put aside their gut feelings and intuition as it wasn’t rational. RP 1861.

In its rebuttal closing, the State pointed out the defense’s definition of abiding belief was not the judge’s. RP 1867. The State encouraged the jury to not go beyond the definitions of the burden in the instructions. RP 1866-68. However, since the court did not define abiding belief, the State asked the jury what their definition for abiding belief was. RP 1867. It did not suggest a definition, like defense counsel, but asked them what their head, heart, and gut told them abiding belief was. RP 1867. It countered defense counsel’s argument that a gut feeling cannot be rational, by pointing out multiple witnesses gut feelings matched with the evidence, and they were right. RP 1868.

The jury returned a verdict of guilty as to intentional murder, but not as to murder in the commission of an assault. RP 1881.

IV. ARGUMENT

- A. **THE DEFENDANT FAILS TO SHOW TRIAL COUNSEL WAS INEFFECTIVE UNDER BOTH PRONGS OF *STRICKLAND V. WASHINGTON*, 466 U.S. 688, 104 S.CT 2052 (1984).**

i. Standard of Review

The standard of *de novo* review is applied to claims of ineffective assistance of counsel. *State v. A.N.J.*, 168 Wn.2d 91, 109, 225 P.3d 956 (2010).

ii. Burden of proof and test for ineffective assistance claims

When a defendant raises a claim of ineffective assistance of counsel, he bears the burden to show (1) defense counsel's representation fell below an objective standard of reasonableness based on consideration of all the circumstances; and (2) defense counsel's deficient representation prejudiced the defendant such that there is a reasonable probability that, except for counsel's unprofessional errors, the results of the proceeding would have been different. *State v. McFarland*, 127 Wn.2d 322, 334-35, 899 P.2d 1251 (1995) (applying the 2-prong test in *Strickland v. Washington*, 466 U.S. 668, 687, 104 S.Ct. 2052 (1984)).

There is a strong presumption defense counsel's conduct is not deficient and judicial scrutiny must be highly deferential. *Id.*, *In Re Personal Restraint of Davis*, 152 Wn.2d 647, 721, 101 P.3d 1 (2004). "A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the

conduct from counsel's perspective at the time." *State v. Grier*, 171 Wn.2d 17, 33, 246 P.3d 1260 (2011) (quoting *Strickland*, 466 U.S. at 689). The relevant question is whether counsel's choices were reasonable, not whether they were strategic. *McFarland*, 127 Wn.2d at 34. Competency of counsel is based upon the entire record below, however consideration is limited only to the record. *Id.* at 335, *Grier*, 171 Wn.2d at 29. If a defendant needs to rely on evidence outside the record, they may file a concurrent personal restraint petition. *Id.*

iii. The Defendant fails to prove counsel's performance was deficient.

In order to prove defense counsel was ineffective in this instance, the Defendant must prove that prior to the day before trial, there was a sufficient basis to raise a not guilty by reason of insanity defense or diminished capacity, and the failure to investigate it previously fell below an objective standard of reasonableness. The Defendant cannot meet their burden because the record does not prove Fedoruk authorized defense counsel to investigate nor raise the defenses prior.

Washington Courts have on several occasions considered ineffective assistance of counsel claims under a theory of unreasonable investigations, mostly in capital cases. *In Re Personal Restraint of*

Elmore, 162 Wn.2d 236, 172 P.3d 335 (2007); *In Re Personal Restraint of Davis*, 152 Wn.2d 647, 721, 101 P.3d 1 (2004). The standard created for reasonable investigation by defense counsel is:

Defense counsel must, “at a minimum conduct a reasonable investigation enabling [counsel] to make informed decisions about how best to represent [the] client.” This includes investigating all reasonable lines of defense, especially “the defendant’s ‘most important defense.’” Counsel’s “failure to consider alternate defenses constitutes deficient performance when the attorney ‘neither conduct[s] a reasonable investigation nor ma[kes] a showing of strategic reasons for failing to do so.’” Once counsel reasonably selects a defense, however, “it is not deficient performance to fail to pursue alternative defenses.” An attorney’s action or inaction must be examined according to what was known and reasonable at the time the attorney made his choices and “‘ineffective assistance claims based on a duty to investigate must be considered in light of the strength of the government’s case.’”

Davis, 152 Wn.2d at 721-22 (alterations in original) (footnotes and citations omitted); *Elmore* at 252. Courts have held in these type of cases, inquiry into counsel’s conversations with the defendant may be critical to a proper assessment of counsel’s investigation decisions. *Elmore* at 252.

The Rule of Professional Conduct 1.2 states, “[i]n a criminal case, the lawyer shall abide by a client’s decision, after consultation with the lawyer, as to a plea to be entered....” WA RPC 1.2. Additionally, RPC 1.4(a)(1) requires counsel to “promptly inform the client of any decision or circumstance with respect to which the client’s informed consent...is

required ...” The comments to RPC 1.4 state “[i]f these Rules require that a particular decision about the representation be made by the client, paragraph (a)(1) requires that the lawyer promptly consult with and secure the client’s consent prior to taking action unless prior discussions with the client have resolved what action the client wants the lawyer to take.” WA RPC 1.4(a)(1) comments.

In *State v. Jones*, 99 Wn.2d 735, 402-404, 664 P.2d 1216 (1983), the Washington Supreme Court determined a plea of not guilty by reason of insanity (NGRI) is a decision in the hands of a defendant under a defendant’s Sixth Amendment right to present a defense. The court deemed it to be both a plea and strategic decision by the Defendant. *Id.* at 740. As such, it cannot be forced upon a defendant by a court or the State. *Id.* at 743; *State v. McSorley*, 128 Wn.App. 598, 605, 113 P.3d 431 (Div 2, 2005). The court recognized there may be many reasons why a defendant, even though a plea of NGRI is viable defense, would forgo pleading NGRI. *Id.* at 743. It could be the plea conflicts with another defense the defendant wishes to raise, the defendant may prefer confinement of prison over a mental institution, there may be stigma associated with the plea, he may not wish to admit guilt, philosophical reasons, etcetera. *Id.* It could also be that the affirmative defense places

the burden on the defendant to prove the defense. *State v. Coristine*, 300 P.3d 400, 404 (2013).

Under the combined reasoning of the Rules of Professional Conduct 1.2 and 1.4 and the line of cases beginning with *State v. Jones*, 99 Wn.2d 735, 402-404, 664 P.2d 1216 (1983), it would actually be professional misconduct for a defense attorney to decide to pursue an investigation requiring the Defendant to submit to a psychological evaluation for insanity when the Defendant has not previously consented to this course of conduct.

In *In Re Personal Restraint of Davis*, 152 Wn.2d 647, 721, 101 P.3d 1 (2004), the Washington Supreme Court considered Davis' claim of ineffective assistance of counsel for failure to adequately investigate and present a mental illness defense in the guilt phase of a capital murder trial. Defense counsel in the case had prepared a mitigation packet chronicling Davis' medical history and a neuropsychological evaluation done three years prior to the murder. *Id.* at 723. Additionally, five pre-trial evaluations were conducted on Davis' brain functioning. *Id.* at 723-24. These evaluations had inconsistencies between them. *Id.* at 725-730. Because this was a PRP, the court also had the advantage of defense counsel's declaration describing his efforts in investigating the case. *Id.* at 729-30. The court found particularly instructive the considerations of

counsel regarding presenting this evidence at trial. Counsel first was skeptical about the psychological evidence and what it could be used to support. *Id.* at 730. Additionally, counsel stated “I also determined not to pursue a mental defense because [Petitioner] insisted that he was innocent and he instructed us not to pursue any defense that required an admission that he killed Mrs. Couch.” *Id.* The court found defense counsel did adequately investigate Davis’ medical and mental health and their decision was reasonable under the circumstances. *Id.* at 732.

In *In Re Personal Restraint of Brett*, 142 Wn.2d 868, 16 P.3d 601 (2001), the Court found defense counsel was ineffective based upon a combination of factors. In *Brett*, another capital case, defense counsel was (1) dilatory in seeking appointment of co-counsel; (2) failed to present a mitigation packet to the prosecutor before the death penalty notice was filed; (3) was dilatory in investigating relevant mental health issues; (4) was late in seeking timely appointments of investigators; (5) was late in the timely appointment of qualified mental health experts; and (6) was inadequately prepared for the penalty phase for failing to have relevant mental health issues fully assessed and retaining mental health experts to testify. *Id.* at 882. The Court held, “[w]hile the failure to perform one of these actions alone is insufficient to establish ineffective assistance of counsel, the failure to perform the combination of these actions establishes

that defense counsel's actions...were not reasonable under the circumstances of the case." *Id.* at 882-83.

In the present case, the record on appeal does not support Fedoruk's contention that defense counsel did not consult with a mental health expert and conducted an insufficient investigation. Def. Brf at 22. In fact the record makes no mention of whether defense counsel did or did not consult a mental health expert and there is no reference hearing testimony or declaration of counsel to provide this information in the record. The record shows defense counsel was aware of Fedoruk's mental health history, the discovery was replete with information of his prior mental health history, that counsel spoke to the Defendant's family to obtain mental health history, obtained records of mental health, and that he contemplated all mental health defenses and repeatedly denied raising such defenses to the State. CP 56, 58-59, 66; RP 395-97, 400, 404.

What the record does support and is undisputed, is that counsel did not have a basis to pursue the NGRI defense prior to the motion. In counsel's declaration and motion for a continuance, counsel states it was not until Mr. Fedoruk heard the testimony at the 3.5 hearing and motions and defense counsel was able to talk to him, did the defense become viable. CP 55-56. Appellate counsel alludes to the suggestion that Fedoruk withheld permission to pursue an insanity plea until after hearing

this evidence. Def. Brf. ftnt 16. Defense counsel's declaration about his examination of the mental health defenses and the timing of the pursuit make this the most logical conclusion. The State invited the court to inquire about counsel's communication with Fedoruk about the mental defense, pointing out there was nothing in the record about their discussions. RP 403.⁹ Under RPC 1.2 and 1.4 and *State v. Jones*, and *In Re Personal Restraint of Davis*, 152 Wn.2d 647, 721, 101 P.3d 1 (2004) defense counsel could not pursue an NGRI plea or diminished capacity defense any further without Fedoruk's permission and appellate counsel does not cite to any law to indicate otherwise. Under *State v. McFarland*, 127 Wn.2d 322, 334, 899 P.2d 1251 (1995), counsel's choices were reasonable as there was no contrary information he could raise this defense prior to date in question. There is nothing in the record to support a contention Fedoruk wanted to pursue an NGRI plea or diminished capacity defense prior to the motion to continue and he fails to overthrow the strong presumption defense counsel's conduct is not deficient. *Id.*, *In Re Personal Restraint of Davis*, 152 Wn.2d 647, 721, 101 P.3d 1 (2004).

Should the court find counsel failed to adequately investigate the mental health defenses, *In Re Personal Restraint of Brett*, 142 Wn.2d 868,

⁹ Under *State v. Hartley*, 56 Wn.App. 562, 566, 784 P.2d 550 (Div 1, 1990) trial counsel's testimony whether they advised a client of the advantages and disadvantages of an NGRI plea do not amount to disclosure of privileged client communications.

16 P.3d 601 (2001), indicates the failure alone is insufficient to meet the burden of proof. In *Brett*, the Supreme Court had the benefit of testimony in a reference hearing about the standards a reasonable attorney would have taken in six different aspects of the case. There is no such evidence in the record about what the objective reasonable standard for investigation would be and Fedoruk only claims one failure. Under *Brett*, this failure does not amount to objective unreasonableness.

iv. The Defendant fails to show the outcome of trial would have differed

The second prong of the *Strickland* test requires Fedoruk to prove defense counsel's deficient representation prejudiced the defendant such that there is a reasonable probability that, except for counsel's unprofessional errors, the results of the proceeding would have been different. *State v. McFarland*, 127 Wn.2d 322, 334-35, 899 P.2d 1251 (1995) (applying the 2-prong test in *Strickland v. Washington*, 466 U.S. 668, 687, 104 S.Ct. 2052 (1984)). Fedoruk argues there is a reasonable likelihood the outcome would have been different citing to *State v. Reichenbach*, 153 Wn.2d 126, 101 P.3d 80 (2004). In *Reichenbach*, defense counsel failed to bring a motion to suppress drugs the Supreme Court determined were illegally seized. *Reichenbach* at 137. The Court

determined there was no legitimate tactic in failing to bring the motion and there was prejudice because the underlying evidence of the charge would be suppressed. *Id.* at 131.

Citation to *Reichenbach* is misplaced in light of *State v. Turner*, 143 Wn.2d 715, 23 P.3d 499 (2001). Turner alleged his trial counsel was ineffective for failing to present expert testimony in support of Turner's diminished capacity defense. *Id.* at 730. Turner faced charges of kidnapping in the first degree, attempted murder in the first degree, assault of a child in the second degree, and assault of a law enforcement officer. *Id.* at 718-19. Turner had a number of violent and disruptive outbursts in court and was evaluated by Eastern State Hospital for sanity and competency. *Id.* at 721. The evaluator found he suffered from polysubstance abuse and antisocial personality disorder, but did not believe Turner suffered from a mental disease or defect that made his acting-out behavior out of his volitional control and he was competent. *Id.* The Court stated "[i]t cannot be determined from the record on appeal that any expert would have testified that Turner lacked the ability to form the specific intent required to commit crimes with which he was charged. Therefore, Turner has failed to show that his counsel's performance was deficient." *Id.* at 730.

Moreover, in *In Re Personal Restraint of Davis*, 152 Wn.2d 647, 739, 101 P.3d 1 (2004), the Court stated in order obtain relief under a failure to investigate theory a defendant must show a “reasonable likelihood that the investigation would have produced useful information not already known to defendant’s trial counsel.” And such claims must be evaluated in light of the strength of the government’s case. *Id.*

In the present case, Fedoruk has not supplied the court with citation to the record that any expert would be able to testify Fedoruk was either insane or lacked capacity to commit the crime of Murder in the second degree. He is asking the court to speculate what this evidence would be, that it would be admissible, and that it would have swayed the jury. In light of the State’s evidence that prior to the event there were threats and suspicion of Ischenko by Fedourk, that close in time to the murder Fedoruk was able to carry on conversations with Rimma and Roman, and after the murder, Fedoruk moved the body to a hidden location, covered the body with numerous debris, cleaned the scene and tried to disposed of his bloody pants. Lastly, he was able to recall the details enough to tell Svetlana where he hid the pants. This would indicate a processing of the mind to formulate actions and understand the consequences of those actions.

B. THE TRIAL COURT PROPERLY DENIED THE MOTION TO CONTINUE AND DID NOT VIOLATE DUE PROCESS.

i. Standard of Review

A criminal defendant is not entitled to a continuance as a matter of right. *State v. Early*, 70 Wn.App. 452, 457, 853 P.2d 964 (Div 3, 1993). A trial court has discretion to grant or deny a continuance and generally appellate courts review the denial of a continuance for an abuse of discretion. *State v. Iniguez*, 167 Wn.2d 273, 280, 217 P.3d 768 (2009); *State v. Barnes*, 58 Wn.App. 465, 471, 794 P.2d 52 (Div 1, 1990). A failure to grant a continuance may deprive a defendant of a fair trial and due process depending on the circumstances of a case. *State v. Downing*, 161 Wn.2d 265, 274-75, 87 P.3d 1169 (2004). If a defendant can show the court's decision denied a defendant's constitutional rights, the review is de novo. *Iniguez* at 280-81.

Even if the denial of a continuance deprives a defendant of a constitutional right, the decision will only be reversed on a showing the defendant was prejudiced by the denial or the result of the trial would likely have been different. *State v. Tatum*, 74 Wn.App. 81, 86, 871 P.2d 1123 (Div 1, 1994) (considering the constitutional right to compulsory process).

ii. Fedoruk was not denied due process as he was not entitled to present a new defense of NGRI.

The Defendant fails to show he had a right to present a NGRI defense under Revised Code of Washington Section 10.77.030 and hence fails to show a constitutional violation.

Revised Code of Washington section 10.77.030 governs when a defendant may raise a NGRI defense. It is a statutorily created defense and governed by specific time frames. Section 10.77.030 states: “[e]vidence of insanity is not admissible unless the defendant, at the time of arraignment or within ten days thereafter or at such later time the court may for good cause permit, files a written notice of his or her intent to rely on such a defense.” Arguably the time constraints are put into place to give both parties the opportunity to take advantage of the best evidence. The best evidence of the Defendant’s mental state at the time of the crime is to have him evaluated as close in time to the crime as possible.

At the time of the motion for a continuance, the case was pending for 10 ½ months. CP 65-66, RP 405-06. There were multiple continuances and at pre-trial on November 9, 2011, the defense stated was denial. CP 65. In its denial of the motion to continue the Court found Fedoruk was dilatory in raising their defense of insanity and did not provide a valid factual basis to continue the trial. CP 108. In its

reasoning, the Court cited to RCW 10.77.030 as guidance the NGRI defense should be raised within ten days or at a later time as the court may for good cause permit. RP 405. The court found for over ten and a half months, the Defendant was aware of the mental health issues and there was no apparent attempt to pursue or request an insanity defense. RP 405-06. The court intimated that even if such a defense was pursued, given the tardiness of the pursuit, there was no guarantee the court would allow the evidence at trial. RP 406.

In order to show a constitutional violation of his right to present a defense, Fedoruk must show he would have the ability to present such a defense. Given the time restrictions in RCW 10.77.030, he cannot show a constitutional violation.

iii. Under a court's discretion, Fedoruk was not entitled to a continuance.

Should this Court consider the factors a trial court discretionally uses to determine a continuance, Fedoruk is not entitled to a continuance. A court must consider "diligence, materiality, due process, a need for an orderly procedure and the possible impact on the result of the trial." *State v. Kelly*, 32 Wn.App. 112, 114, 645 P.2d 1146 (1982). A court should consider if the purpose of the motion is to delay the proceedings and whether there were prior continuances. *State v. Bonisisio*, 92 Wn.App.

783, 792, 964 P.2d 1222 (Div 2, 1998); *State v. Honton*, 85 Wn.App. 415, 423, 932 P.2d 1276 (Div 3, 1997). The existence of due diligence does not determine whether a constitutional right has been violated. *State v. Downing*, 151 Wn.2d 265, 275, 87 P.3d 1169 (2004).

In *State v. Kelly*, 32 Wn.App. 112, 645 P.2d 1146, (Div 1, 1982), the defendant sought a continuance to obtain an expert in diminished capacity. Kelly proceeded to a bench trial in his case in August 1980, two months after arraignment. *Id.* at 113. In preparation for trial, defense counsel had Kelly undergo a diminished capacity evaluation. *Id.* However, counsel did not use the evidence at trial as it was deemed adverse to the defendant. *Id.* at 115. During the middle of trial, the court declared a mistrial because Kelly requested substitution of counsel. *Id.* at 113. The trial was reset to October 1980. *Id.* Kelly again requested new counsel, it was granted, and a new trial was set for December 1980. *Id.* In December counsel requested a continuance on the basis they needed additional time to secure an expert for a defense of diminished capacity. *Id.* The court denied the motion to continue and Division Three upheld the decision as Kelly did not show diligence after October 1980 in obtaining the expert. *Id.* at 115.

The present case is very similar to that of *State v. Kelly*. It was obvious to both the defendant and defense counsel from the first

appearance that the Defendant has some mental instability. CP 66. Defense counsel did not agree to the competency order, but the court ordered one anyway. CP 66. The Defendant was then forcibly medicated because of mental instability. Moreover, the court held the defendant without bail due in part to mental instability. CP 66. Lastly, the discovery was replete with investigation into the defendant's prior mental instability and included the police reports and orders involving his not guilty by reason of insanity plea in Clark County. CP, RP 395-96, 400. The case was pending 10 ½ months from the murder. CP 66, RP 405-06. There were four pre-trial hearings and just as many continuances of the trial date. CP 66. There was absolutely no indication the Defendant or his counsel were unaware of these issues.

As the State argued in its response to the motion to continue, the Defendant's sudden realization after listening to testimony appears to be a delay tactic to postpone the trial.¹⁰ This is not unusual for Defendants. In *State v. Honton*, 85 Wn.App. 415, 422-23, 932 P.2d 1276 (Div 3, 1997), Honton on the day of his murder trial moved to proceed *pro se*. The trial court allowed the motion, but when Honton then moved to continue the trial to "learn how to be a lawyer" the court was within their discretion to

¹⁰ The State does not intend to imply defense counsel was using a delay tactic, rather it was the Defendant.

deny the continuance. *Id.* Division Three remarked the case was pending 14 months, Honton had waived his speedy trial several times, the jury was summoned and waiting and witness were present from out-of-state. *Id.* at 423.

In *State v. Barnes*, 58 Wn.App. 465, 794 P.2d 52 (Div 1, 1990), Division one found Barnes' request for a continuance to review and make additional discovery requests was a delay tactic. In *Barnes*, the defendant was allowed to proceed *pro se* a week before his murder trial, after a lengthy list of previously disqualified counsel. *Id.* at 468-69. The trial court reviewed Barnes' requests for additional discovery, concluding none was sufficiently important to warrant further delay. *Id.* at 471. Division Three considered this reason adequate, noting there were three prior continuances. *Id.* The court stated: "[t]o guard against abuse and to discourage motions made merely for delay, it is generally required that a stronger showing be made in support of subsequent motions for continuance." *Id.*

In *State v. Early*, 70 Wn.App. 452, 458-59, 853 P.2d 964 (1993), the court considered the number of prior continuances granted, the readiness of the State's witnesses and the cooperation of those witnesses. Moreover, in *State v. Chase*, 59 Wn.App. 501, 799 P.2d 272 (Div 2, 1990),

Division two looked to a defendant's right to hire their own counsel. The court acknowledged the Constitutional importance of representation of counsel, but found that the right to retain counsel of one's own choice was limited to the timely assertion of that right. *Id.* at 506. In *Chase*, the court cited that "in the absence of substantial reasons a late request should generally be denied, especially if the granting of such a request may result in the delay of the trial." *Id.* citing *State v. Garcia*, 92 Wn.2d 647, 655-56, 600 P.2d 1010 (1979).

The Defendant cites to *United State's v. Flynt*, 756 F.2d 1352 (9th Cir, 1985) to support his argument that a continuance is warranted to obtain a psychiatric evaluation as to mental capacity. However, *Flynt* is distinguishable on its facts. In *Flynt*, the defendant's behavior at arraignment was combative and obstreperous. *Id.* at 1355. The court threatened to hold him in contempt and set the matter for a hearing in three weeks on the contempt. *Id.*¹¹ In between arraignment and the setting of the hearing, another judge ordered a competency evaluation of Flynt. *Id.* at 1356. Counsel asked to continue the contempt hearing to obtain a mental health evaluation to show Flynt lacked mental capacity to commit contempt. *Id.* The court denied the continuance and found Flynt in contempt. *Id.* The Ninth Circuit, using an abuse of discretion standard,

found the continuance would serve a useful purpose, the diligence was not so terrible given the circumstances, there was little inconvenience to the trial court as it was a contempt, and such an evaluation was potentially effective to his defense. *Id.* at 1359-61.

The present case is unlike *Flynt* in the timing and degree of seriousness of the charge. The Ninth Circuit was particularly taken with the lack of inconvenience to the court and parties. Which was very different from the present case.

In the present case there was certainly lack of due diligence on the Defendant's behalf for failing to raise the need to explore the NGRI defense. While he has argued the defense would be material to the case. He has not provided any evidence in the record to indicate he could show he was insane at the time of the offense. Fedoruk argues the State's overwhelming evidence of guilt meant the NGRI defense was his only hope to present a defense. However, the defendant certainly cross-examined witnesses and argued the identity issue to the jury. In consideration of the orderly procedure of the case, there were considerations of timeliness to raise the NGRI defense under RCW 10.77.030. The State also arranged for a witness to be brought from Portland, had two expert witnesses, and raised the concern whether the

¹¹ The hearing was actually held five weeks after the summons. *Id.* at 1356.

family witnesses would be cooperative at a later date. CP 66, RP 402. It is interesting to note that during the trial, the State did encounter problems with the family and their cooperation. RP 620. Given the lateness of the request, the lack of evidence supporting the ability to raise an NGRI plea, and the impact at trial, the court properly denied the continuance.

C. THE TRIAL COURT PROPERLY ADMITTED FEDORUK'S STATEMENTS

i. Standard of Review

Because the admissibility of a defendant's statements is a question of due process under the Fourteenth Amendment, claims involving Miranda are reviewed de novo. *State v. Daniels*, 160 Wn.2d 256, 261, 156 P.3d 905 (2007); *State v. McReynolds*, 104 Wn.App. 560, 575, 17 P.3d 608 (Div 3, 2001). This is also true for whether a defendant's statements were made voluntarily. *McReynolds* at 575. However, when there is "substantial evidence from which the trial court could find by a preponderance of the evidence that a confession was given voluntarily, the ... determination ... will not be disturbed on appeal." *Id.* If the trial court's findings are supported by substantial evidence they will not be overturned. *Id.* at 576; *State v. Broadaway*, 133 Wn.2d 118, 942, P.2d 363 (1997). The Supreme Court sees no reason to "distinguish between constitutional claims and other claims of right in reviewing findings of

fact entered following a motion to suppress.” *Broadaway*, 133 Wn.2d 118, 130. As such, the appellate court will review only those facts to which error is assigned. *Id.* Unchallenged findings are verities on appeal, and if challenged, findings are verities if supported by substantial evidence in the record. *Id.* at 131. If the court does find a constitutional violation, it is subject to a harmless error analysis. *State v. Boggs*, 16 Wn.App. 682, 689-90, 559 P.2d 11 (1977).

ii. The Defendant’s initiation of conversation with the police overturned his original invocation of the right to remain silent.

The Defendant alleges the police failed to scrupulously honor an invocation of the right to remain silent. However, the defendant clearly understood his rights, had a history of trying to talk himself out of trouble, and re-engaged conversation with the police after being formally arrested for the murder of Ischenko.

In *Edwards v. Arizona*, 451 U.S. 477, 184-85 101 S.Ct 1880 (1981), the United State’s Supreme Court clarified even when a defendant invokes their right to remain silent, if they initiate further communication, exchanges, or conversations with the police, the police may question the person. *See State v. Aten*, 130 Wn.2d 640, 666, 927 P.2d 210 (1996). However, a court must still determine whether the defendant knowingly

and intelligently waived the right he had invoked. *Smith v. Illinois*, 469 U.S. 91, 94, 1015 S.Ct 490 (1984).

If a defendant has clearly invoked the right to silence and not initiated conversation, then officers can only reinitiate questioning if at the time of invocation the questioning ceased, a substantial interval passed before the second interrogation, the defendant is given his *Miranda* warnings again and the subject of the second interrogation is unrelated to the first. *United States v. Rambo*, 365 F.3d 906, 911 (10th Cir, 2004).

In *Oregon v. Bradshaw*, 462 U.S. 1039, 1040-41, 103 S.Ct 2830 (1983), the police investigated Bradshaw for first degree manslaughter, driving under the influence and driving with a suspended license. Bradshaw was questioned at the police station and read his *Miranda* warnings. *Id.* at 1041. He was placed under arrest, questioned some more, and then invoked his right to counsel. *Id.* Sometime later when the police transported him to jail, Bradshaw asked “[w]ell what is going to happen to me now?” *Id.* at 1042. The officer told Bradshaw he didn’t have to talk to him and reminded him he requested an attorney. Bradshaw then continued to speak to the officer. *Id.*

The Court found Bradshaw’s question was a clear initiation “evinced a willingness and desire for a generalized discussion about the

investigation.” *Id.* at 1045-46. The Court then looked to see if the waiver was knowing and intelligent under a totality of the circumstances test. *Id.* The Court was emphatic saying the “determination depends upon the particular facts and circumstances surrounding the case, including the background, experience, and conduct of the accused.” *Id.* The Court found in Bradshaw’s case the police did not make any threats, promises, or inducements to talk, he was properly advised of his rights and understood them and within a short time after requesting an attorney, changed his mind. *Id.*

A waiver may be either implicit or explicit, and may be found from a course of conduct by the defendant. *Berghuis v. Thompkins*, 560 U.S. 370, 2261-63, 130 S.Ct. 2250 (2010). In *Berghuis v. Thompkins*, 560 U.S. 370, 130 S.Ct. 2250 (2010), the court found Thompkins received his *Miranda* warnings from a pre-printed form and confirmed he understood them. *Id.* at 2256. Thompkins did not ever say he wished to remain silent nor request an attorney. However, he did remain silent during most of the interrogation, answering select questions. *Id.* at 2256-57. After almost three hours, Thompkins admitted to the murder but refused to give a written statement and the interview ended. *Id.* at 2257. Thompkins argued his behavior in remaining silent was a implied invocation of the right to silence. *Id.* at 2259-60. The court rejected this theory and instead

relied upon his understanding of the rights and choosing to speak. *Id.* at 2262-63. The choice was evidence of a course of conduct. *Id.* at 2263; *State v. Wheeler*, 108 Wn.2d 230, 238, 737 P.2d 1005 (1987) (selectively answering questions after initially invoking may constitute a waiver).

In the present case the only question is whether there is substantial evidence to support the court's factual findings the defendant initiated contact with the deputies. Because the Defendant has not challenged the court's finding of fact number 1 – that Fedoruk's statements in the car were made knowingly, intelligently and voluntarily, it is a verity on appeal. Moreover, the defendant did stipulate the statements Fedoruk made while in the car to Deputy Robinson were admissible under Rule 3.5. RP 271-72. However, even under a totality of the circumstances test, Fedoruk understood his rights and waived them. The undisputed findings of fact indicate, the Defendant was under supervision with DOC and was familiar with the legal system. CP 7-8, FF #5, 22. He was read his *Miranda* warnings and knew how to tell the deputy he did not want to talk to him as demonstrated to Robinson. CP 8-9, FF #21, 25. Moreover, he continued to demonstrate his understanding of the rights throughout his interview with Gilchrist by telling Gilchrist that he did not wish to speak to Sergeant Reece. RP 243-44. In choosing not to talk to one officer, there is an implied agreement to talk to the other. Moreover, after forty-

five minutes at the scene, then an hour and half in the interview and another 30 minutes in the bathroom, Fedoruk remembers and understands the warnings to say he wants an attorney. RP 193-95, 200, 213, 239, 253-54, 256. As such, there is a basis for the finding that he understood those rights and any statements made in the car and later to Gilchrist were made with that knowledge.

The question then becomes did the Defendant initiate conversation with Deputy Robinson. Fedoruk argues the statements in the car were incomprehensible. Def. Brf at 34. Yet, they are rational in light of Fedoruk's concern about who turned him in and for what. In both his conversations with Gilchrist and Svetlana, Fedoruk believes Tatyana turned him in. RP 249, 725-26. It makes perfect sense in an effort to smooth things out with Robinson, Fedoruk tries to explain why Tatyana would be mad enough at him to call DOC and the police. He explains Tatyana is mad at him for the sexual conversation and she is bitchy. RP 214-15. That is when he leaps to saying he didn't touch him. RP 215. It is logical that the "him" is Ischenko, the person the police have been asking him about. It also demonstrates a connection with the investigation into the welfare of Ischenko when he says he didn't "hit" him.

Additionally, unlike the case of *United States v. Whaley*,¹³ F.3d 963 (1994), where contact is made with a different officer some days later after the arrest and then three weeks later with the lead officer, Fedoruk's statements are made to the arresting officer that was just previously questioning Fedoruk about Ischenko and where he was. Fedoruk was placed upon notice both DOC and the Deputies were there for the family's concern for Ischenko and both asked him questions about Ischenko. RP 172, 187-88.

iii. The Defendant's statements were not the product of force and were voluntary.

The Defendant argues the presences of five police officers at the defendant's residence and their interaction with him given his mental instability on that day mean his statements were not voluntary. However, the record reflects the defendant acted of his own free will. When the officers and deputies first arrived, Fedoruk met them outside. CP 7, FF #7, RP 111, 184. He engaged in conversation with Officer Napolitano and while had problems initially following the commands to keep his hands out of his pockets, he was cooperative to a fault in trying to go inside to get his medications to show to Napolitano. CP 7, FF #9, 10, RP 113, 116, 132, 135, 142, 169. He did become tense when they attempted to place him in handcuffs, but once they assured him he was not under

arrest, this was for his safety and would be returned after a UA, he calmed and was easy to talk to. RP 118-19, 143-44, 186. No officer ever manhandled Fedoruk, none unholstered their weapon or threatened him. CP 7, FF # 17, RP 127-28, 150, 200, 256. Lastly, Fedoruk's prior law enforcement contacts and being under DOC supervision mean he is not a stranger to the system and dealing with police. CP 7-8, FF #5, 22.

Defendant argues the State's failure to call an expert as to Fedoruk's mental health was fatal. However, there was no evidence the Defendant did not understand what the officers were saying or that he couldn't calm or control himself when necessary. In fact, Officer Napolitano and Deputy Robinson were able to have coherent conversations with Fedoruk and Gilchrist was able to have an hour and half long conversation with him without an interpreter. CP 9, FF 33.

iv. The Defendant was detained pursuant to a Terry stop and not in custody necessitating Miranda

A person subject to custodial interrogation is entitled to the benefit of the *Miranda* warnings. *State v. Walton*, 67 Wn.App. 127, 129, 834 P.2d 624 (Div 1, 1992). "Custody" for *Miranda* purposes is established "as soon as a suspect's freedom of action is curtailed to a degree associated with formal arrest. *Id.* citing *State v. Watkins*, 53 Wn. App. 264, 274, 766 P.2d 484 (1989). The only relevant inquiry is how a

reasonable person in the suspect's position would have understood their situation. *Id.*

A *Terry* stop does not automatically amount to custody even though the person is not free to leave. *Id.* at 130; *State v. Marcum*, 149 Wn.App. 894, 910, 205 P.3d 969 (Div 1, 2009); *State v. Wakeley*, 29 Wn.App. 238, 240, 628 P.2d 835 (Div 1, 1981). Washington courts agree a *Terry* stop is not custodial for the purposes of *Miranda*. *State v. Heritage*, 152 Wn.2d 210, 95 P.3d 345 (2004). Additionally, the use of drawn guns is justified in cases warranting officer safety and does not convert an investigatory stop into an arrest. *State v. Belieu*, 112 Wn.2d 587, 602-04, 773 P.2d 46 (1989). Handcuffing an individual is also not unreasonable as a collary of a lawful stop when there are safety risks. *Wakeley*, 29 Wn. App. at FN1; *Houston v. Clark County Sheriff Deputy John Does 1-5*, 174 F.3d 815 (6th Cir, 1999); *U.S. v. Taylor*, 716 F.2d 701 (9th Cir. 1983). Moreover, an officer's questions designed to elicit an incriminating response during a *Terry* stop do not require *Miranda*. *Walton*, at 130.

In the present case the officers were there to check Fedoruk was compliant with supervision and the deputies were there to check on the welfare of Ischenko. This is clearly a basis for an investigatory stop to

make sure everyone is safe. The officers begin talking with Fedoruk and have legitimate concerns for their safety because he is fidgety, repeatedly places his hands in his pockets, and tries to go inside. RP 111, 114-15, 184. Thus they place him in handcuffs. Fedoruk is concerned about being under arrest, but he calms after they tell him his is not under arrest and will be returned home after a UA. RP 118-19, 143-44, 186. A person in Fedoruk's situation would understand that because he is under supervision, he is subject to UAs and in the present situation he is not under arrest. Hence *Miranda* was not required.

v. **Should the court find a constitutional violation, it was harmless error due to the overwhelming evidence of guilt.**

Constitutional violations are subject to the harmless error analysis. The question becomes is there overwhelming untainted evidence of the defendant's guilt beyond a reasonable doubt. *State v. Koslowski*, 166 Wn.2d 409, 431, 209 P.3d 479 (2009); *State v. Boggs*, 16 Wn.App. 682, 689, 559 P.2d 11 (Div 2, 1977).

In the present case, the physical evidence connected Fedoruk to the murder. Fedoruk's clothing was covered in Ischenko's blood. Much of the staining was contact transfer and spatter, indicating he had to be at the scene of the murder. He admitted to Svetlana he hid the pants in the

jetski. Additionally, Fedoruk was awake, running around the house and acting strangely. There were no other clear suspects.

D. THE STATE DID NOT COMMIT PROSECUTORIAL MISCONDUCT.

i. Standard of review

When a defendant alleges prosecutorial misconduct, it is the defendant's burden to establish the impropriety of the comments as well as their prejudicial effect. *State v. Anderson*, 153 Wn. App. 417, 427, 220 P.3d 1273 (Div 2, 2009); *State v. Boehning*, 127 Wn.App. 511, 518, 111 P.3d 899 (2005) citing *State v. Dhaliwal*, 150 Wn.2d 559, 578, 79 P.3d 432 (2003). The court reviews alleged improper remarks in the "context of the total argument, the issues in the case, the evidence addressed in the argument, and the instructions given to the jury." *Anderson*, at 427, citing *State v. Russell*, 125 Wn.2d 24, 85-86, 882 P.2d 747 (1994). If the statements are improper and an objection was made, the court considers whether there was a substantial likelihood the statements affected the jury. *Id.* If the defendant failed to object or request a curative instruction, the defendant waives the issue, unless the comment was so flagrant or ill intentioned that an instruction could not have cured the prejudice. *Id.* Moreover, the failure to object to a prosecutor's statement "suggests that it was of little moment in the trial." *State v. Curtiss*, 161 Wn. App. 673, 699,

250 P.3d 496 (Div 2, 2011) citing *State v. Rogers*, 70 Wn.app. 626, 631, 855 P.2d 294 (1993) rev. denied 123 Wn. 2d 1004, 868 P.2d 871 (1994).

ii. The Prosecutor did not commit misconduct in her oral statements during closing argument.

a. The prosecutor did not shift the burden of proof.

The State is afforded great latitude in making arguments to the jury and reasonable inferences from the evidence. *Id.* citing *State v. Gregory*, 158 Wn.2d 759, 860, 147 P.3d 1201 (2006). An argument commenting on the quantity and quality of the defendant's evidence does not automatically result in burden shifting. *Id.* When a witness or the State talks about undisputed evidence as fact, they do not shift the burden of proof. *Hickethier v. Washington State Dept. of Licensing*, 159 Wn.App. 203, 218-19, 244 P.3d 1010 (Div. 3, 2011). A prosecutor may say that testimony is undisputed so long as they do not refer to the person who could have denied it. *State v. Brett*, 126 Wn.2d 136, 176, 892 P.2d 29 (1995); *State v. Fiallo-Lopez*, 78 Wn.App. 717, 729, 899 P.2d 1294 (Div. 1, 1995).

In the present case the prosecutor did not shift the burden of proof, but narrowed the case to the element of identity by pointing out the undisputed evidence. The State asked the jury what were the agreements

in the case. RP 1775. The State couched the term “agreement” in what was the undisputed and uncontroverted evidence. RP 1776-78. The State argued there was no contradictory evidence of Dr. Nelson’s testimony Ischenko was beaten and/or strangled to death. RP 1776-78. There was also no contradictory evidence the assault didn’t happen in the driveway and this evidence was consistent that was the scene. RP 1778. Lastly, there was no undisputed evidence it was Ischenko’s blood in the driveway. RP 1778. The State utilized three slides in its PowerPoint presentation to illustrate this argument. Ex. #287, slide 14, 15, 16. Fedoruk argues the use of the slide compounded the burden shifting. But in actuality the State concluded that undisputed evidence listed, led to the factual conclusion Ischenko was murdered, consistent with slide 17. RP 1779, Ex. #287, slide 17.

Moreover, in the defense’s closing argument, the defense focused on the issue of identity. RP 1815, 1861. They conceded Ischenko was killed by homicide. RP 1845, 1860. The defense conceded the jeans found in the jetski and the sweatshirt Fedoruk was wearing were saturated in Ischenko’s blood. RP 1820, 1838. 1843. 1846.

There is no reason to believe that under the totality of the entire case and argument and the instructions given to the jury, that using the term “agreement” was improper. *Anderson*, at 427, citing *State v. Russell*,

125 Wn.2d 24, 85-86, 882 P.2d 747 (1994). Should the court determine they were improper, the Defendant does not meet the burden to show comment was so flagrant or ill intentioned that an instruction could not have cured the prejudice. *Id.*

b. The prosecutor's reference to intuition and the use of head, heart, and gut in talking about abiding belief was not improper.

The Defendant argues the state urged the jury to use other than rational thought in coming to a verdict when it summarized the family's response as intuition and put a question to the jury about what it means to have an abiding belief. Def. Brf at 43.

Again, the State is afforded great latitude in making arguments to the jury and reasonable inferences from the evidence. *Id.* citing *State v. Gregory*, 158 Wn.2d 759, 860, 147 P.3d 1201 (2006). "The State is allowed to draw inference from the evidence 'as to why the jury would want to believe one witness over another.'" *State v. Curtiss*, 161 Wn.App. 673, 699, 250 P.3d 496 (Div 2, 2011) quoting *State v. Brett*, 126 Wn.2d 136, 175, 892 P.2d 29 (1995).

In the context of the entire trial and argument, the state presented the argument the family's intuition led to the investigation of Ischenko's disappearance and murder; and ultimately that Fedoruk committed the

crime. The prosecutor linked the family's intuition that something was wrong because Ischenko was missing to their actively looking for Ischenko and then to calling DOC because of the defendant's odd behavior. RP 1783-84. The State also linked the family's concern of Fedoruk's behavior as a direct result to them locking their doors and hence the defendant was the only person not behind a locked door when Ischenko was killed. RP 1808-09. The State linked the family intuition and actions then to the physical evidence of the crime. RP 1788-1810. This argument does not encourage the jury to follow the family's intuition, but rather to explain the evidence and why the family reacted the way they did.

Fedoruk also argues the state encouraged the jury to rely on intuition when it asked the jury to use their heads, hearts, and gut to determine if they had an abiding belief in the truth of the charge. The Defendant cites to *In Re Personal Restraint of Glasman*, 175 Wn.2d 696, 286 P.3d 673 (2012), for the argument the State may not encourage the jury to use anything other than probative evidence and sound reasoning to reach a verdict. Def. Brf at 44.

Glasman is certainly distinguishable on the facts. Moreover, if one were to look up the definition of "belief" available to most jurors, Merriam Webster's dictionary defines "belief" as

- 1) a state or habit of mind in which trust or confidence is placed in some person or thing
- 2) something believed; *especially* : a tenet or body of tenets held by a group
- 3) conviction of the truth of some statement or the reality of some being or phenomenon especially when based on examination of evidence

MERRIAM WEBSTER DICTIONARY, *belief* (visited May 20, 2013) <http://www.merriam-webster.com/dictionary/belief>.

Dictionary.com defines belief as:

1. something believed; an opinion or conviction: *a belief that the earth is flat.*
2. confidence in the truth or existence of something not immediately susceptible to rigorous proof: *a statement unworthy of belief.*
3. confidence; faith; trust: *a child's belief in his parents.*
4. a religious tenet or tenets; religious creed or faith: *the Christian belief.*

DICTIONARY.COM, *belief* (visited May 20, 2013)

<<http://dictionary.reference.com/browse/belief?s=t&path=?>>

It is interesting that nowhere in either definition is belief based upon “probative evidence and sound reason.” See Def. Brf. at 6. The State is not saying belief should not be based upon probative evidence and sound reason, however, when approaching a jury with the common understanding of belief as defined in terms of conviction, confidence, and faith, it is not misconduct to encourage a jury to use all their faculties to reach such confidence. In reality, the State did not lighten its burden of proof, but made it harder.

However, there is a case directly addressing when a prosecutor urges a jury to use their heart and gut to determine guilt. In *State v. Curtiss*, 161 Wn. App. 673, 699, 250 P.3d 496 (Div 2, 2011), the prosecution charged Curtiss with first degree murder. The Defendant alleged the State committed multiple acts of prosecutorial misconduct during closing argument when it analogized the burden of proof to putting a puzzle together and urged the jury to trust its gut and to search for and speak the truth. *Id.* at 698. The Defendant did not object to either argument.

The first argument by the State analogized the reasonable doubt standard to putting together a puzzle. *Id.* at 700. The State told the jury that at some point when putting a puzzle together, even if there are missing pieces, a person could say with some certainty, beyond a reasonable doubt what the puzzle shows. *Id.* The court found the analogy used did not shift the burden of proof, but described the relationship between circumstantial evidence, direct evidence, and the burden of proof. Additionally, the court found the arguments were not flagrant or ill-intentioned, and the defendant failed to show prejudice in light of the jury instruction that lawyers' statements are not evidence and to disregard any not supported by the evidence or the law. *Id.*

The second argument challenged by Curtiss is remarkably similar to that challenged by Fedoruk. During closing argument, the Prosecutor in *Curtiss* stated:

This trial is a search for the truth and a search for justice, and the evidence in this case is overwhelming. [Curtiss] is guilty of Murder in the First Degree as an accomplice. Consider all the evidence as a whole. Do you know in your gut—do you know in your heart that Renee Curtiss is guilty as an accomplice to murder? The answer is yes.

We are asking you to return a verdict that you know is just, a verdict of guilty to Murder in the First Degree.

Id. at 701.

Division Two held that urging the jury to render a just verdict supported by the evidence was not misconduct. *Id.* Moreover, while the State’s gut and heart arguments were arguably overly simplistic, they were not misconduct. *Id.* at 702. The court rejected the defendant’s argument that appealing to the heart and gut were emotional appeals. *Id.* The court again pointed out the jury instructions told the jury to reach a decision “based on the facts proved to you and the law given to you, not on sympathy, prejudice, or personal preference.” *Id.* The court assumed the jury followed the instructions. *Id.* Lastly, Curtiss could not show prejudice stemming from the argument and failed to show that the alleged errors to which she did not object could not be cured with an instruction. *Id.*

In the present case, the State used nearly the same language as that in *Curtiss*. Additionally, the court instructed the jury in exactly the same way as *Curtiss*. CP 138. Under the facts of *Curtiss*, the State did not commit flagrant or ill-intentioned misconduct. Additionally given the court's instruction in WPIC 1.02 it is highly unlikely there was a substantial likelihood the statements affected the jury. *State v. Anderson*, 153 Wn. App. 417, 427, 220 P.3d 1273 (Div 2, 2009). Since the courts of appeals presume the jury follows the instructions, the defendant cannot show prejudice. *Curtiss*, 161 Wn. App. 673, 702, *State v. Kirkman*, 159 Wn. 2d 918, 928, 937, 155 P.3d 125 (2007). Lastly Fedoruk, just like *Curtiss*, fails to show that any potential errors could not be cured with an additional instruction. *Id.*

c. The defendant failed to establish ineffective assistance of counsel with respect to trial counsel's failure to object.

The defendant argues that his trial counsel's failure to object to the State's reasonable argument of using head, heart, and gut to determine an abiding belief in the charge was ineffective. Should the court find the argument was proper, there is no need to consider the ineffective assistance argument.

Should the court consider the argument of ineffective assistance, the test for determining effective counsel is whether: “[a]fter considering the entire record, can it be said that the accused was afforded an effective representation and a fair and impartial trial?” *State v. Jury*, 19 Wn. App. 256, 262, 576 P.2d 1302, 1306 (1978) citing *State v. Myers*, 86 Wn. 2d 419, 424, 545 P.2d 538 (1976). Moreover, this test places a weighty burden on the defendant to prove two things: (1) counsel's performance was deficient; and (2) the deficient performance prejudiced him. *Strickland v. Washington*, 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984); *State v. Thomas*, 109 Wn.2d 222, 225-26, 743 P.2d 816 (1987). The first prong of this two-part test requires the defendant to show “that his . . . lawyer failed to exercise the customary skills and diligence that a reasonably competent attorney would exercise under similar circumstances.” *State v. Visitacion*, 55 Wn.App. 166, 173, 776 P.2d 986, 990 (1989) citing *State v. Sardinia*, 42 Wn.App. 533, 539, 713 P.2d 122 (1986). The second prong requires the defendant to show “that there is a reasonable probability that, but for the counsel’s errors, the result of the proceeding would have been different.” *Id.* citing *State v. Sardinia*, 42 Wn.App. 533, 539, 713 P.2d 122 (1986). Moreover, counsel is presumed effective. *Strickland*, 466 U.S. at 689, 104 S.Ct. 2052; *State v. McFarland*, 127 Wn.2d 322, 335, 899 P.2d 1251 (1995).

The defendant fails to establish ineffective assistance of counsel with respect to both prongs in failing to show another attorney would have objected and asked for an instruction and failing to show how but for the error, the result would be different. To support their argument of ineffective assistance, Defendant states the failure to object to improper closing arguments is objectively unreasonable. Def. Brf. at 45. To support this claim, the Defendant cites to a footnote in a Sixth Circuit case involving flagrant prosecutorial misconduct. Def. Brf. at 45. In actuality the footnote does not state the failure to object is objectively unreasonable, but how an attorney worried about interrupting closing argument should approach making such an objection. *Hodge v. Hurley*, 426 F.3d 368, 386 ftnt 25 (6th Cir. 2005).

The Defendant's argument for ineffective assistance of counsel is thus based upon the citation to *State v. Glasmann*, 175 Wn.2d 696, 286 P.3d 673 (2012). Def. Brf. at 46. However, *State v. Glasmann* never considered or mentioned whether Glasmann's attorney was ineffective, because it determined there was reversible prosecutorial misconduct. *Glasmann*, at 714. Thus, Defendant's whole argument for ineffective assistance of counsel rests on their argument of prosecutorial misconduct.

The Defendant makes assertions trial counsel should have known it was prosecutorial misconduct and therefore should have objected.

However, under the argument above and *State v. Curtiss*, 151 Wn. App. 673, 250 P.3d 496 (Div 2, 2011), this argument is untrue. The Defendant's assertion the prosecutor's statement of "head, heart, and gut" increased the substantial likelihood the jurors would vote guilty based on improper factors, comes from the misplaced citation to *Glasmann*. In *Glasmann*, the Supreme Court determined that un-admitted evidence and improper argument of believing the defendant's story likely inflamed the jury and made a difference between a finding of guilt as to the lesser offenses offered by the Defense. *Glasmann*, at 709-712.

There is no such danger here. If the court believes the State's argument was improper, there is little danger the outcome would have been different. The court did give the jury the instruction in WPIC1.02. Moreover, this case was a question of identity, with overwhelming evidence pointing to Fedoruk. There is no reason to believe that the State's expansion on the abiding belief language would have affected the outcome.

iii. The Prosecutor did not commit misconduct in her PowerPoint presentation during closing argument.

The Defendant argues in his supplement brief the State expressed a personal opinion and appealed to the jury's passions and emotions in the

PowerPoint presentation. The controlling case is *State v. Glasmann*, 175 Wn.2d 696, 286 P.3d 673 (2012) and it is a highly factual issue. Up until *Glasmann* the courts had not considered the impact a PowerPoint presentation could have in closing and on a jury.

In *Glasmann*, the State used a visual presentation in closing where the State modified images with captions thus presenting multiple images of un-admitted evidence. *Id.* at 705-06. Specifically, the State's slides contained video and photographs with captions consisting of testimony, recorded statements, or the prosecutor's commentary. *Id.* at 701. One slide showed Glasman restraining a person in a choke hold with the caption "YOU JUST BROKE OUR LOVE." *Id.* Another slide showed the victim's back injuries with the caption "What was happening right before defendant drove over Angel..." and "...you were beating the crap out of me!" *Id.* At least five slides showed Glasmann's booking photo and a caption. *Id.* One had the caption "DO YOU BELIEVE HIM?" *Id.* Another read, "WHY SHOULD YOU BELIEVE ANYTHING HE SAYS ABOUT THE ASSUALT?" *Id.* at 701-02. Three of them had the word GUILTY superimposed over his face, one that created an X. *Id.*

The Court found the prosecutor intentionally presented the jury a copy of Glasmann's booking photo showing him unkempt and bloody and

altered it with phrases calculated to influence the jury. *Id.* at 705. The Court was swayed the photo itself would result in greater impact when combined with the phrases not to believe the defendant. *Id.* The Court found the prosecutor did not merely combine the evidence with the court's instructions and argument of the law and facts, but went beyond and created evidence. *Id.* at 706. A prosecutor should know it is improper to present evidence that has been deliberately altered in order to influence the jury's deliberations. *Id.* Moreover, the court felt the repeated flashing of the word GUILTY was improper in combination with the image and expressed the prosecutor's opinion of guilt. *Id.* at 707-10. The court reasoned that a prosecutor could not yell "Glasman is guilty, guilty, guilty!" and to do so visually was improper.

The prosecutor also used the argument the jury could only acquit Glasman if he told the truth. *Id.* at 701. The Court found the pervasive and often referred to evidence amounted to inadmissible evidence and the expression of a personal opinion of Glasman's guilt. *Id.* at 707. The court emphasized that Glasman's case came down to whether he was guilty of the greater crimes the State argued or lesser crimes sought by defense. *Id.* at 709-10. Given the images of Glasman with the word GUILTY imposed over him three times were the last thing the jury saw, they were predisposed to return a harsh verdict. *Id.* The Court found

under the totality of the record, the opinion argument combined with the improper burden shifting argument was cumulative and flagrant and ill-intentioned misconduct. *Id.* at 710.

The Defendant raises three separate arguments concerning the PowerPoint presentation in the case at hand. The first centers on slides 3, 33, 34 and the caption of the crime to photos. The second theory is the addition of PowerPoint slides into the arguments of intuition was an improper emotional argument as cited in his opening brief. Def. Brf at 40-45, Def. Supp Brf at 6. The third theory also faults the use of PowerPoint slides 14, 15, 16 in the argument as to agreed undisputed facts.

The present case is distinguishable from *Glasmann* under the first argument. Fedoruk argues the State's inclusion of the charge on every slide, even those with pictures, improperly expressed an opinion of Fedoruk's guilt. Def. Supp Brf at 6. This is not what *Glasmann* says. The slides in *Glasmann*, unlike the slides complained of here, contained prosecutor argument, testimony, or recorded statements. The slides in *Glasmann* posited questions to the jury and combined two pieces of evidence into one. In the present case there is NO reason why the jury would consider the title of the crime on each slide to be a personal opinion of guilt versus the caption of the crime the defendant is charged.

Fedoruk points to three slides arguing the caption of “Murder 2” over a photo of the deceased victim from the waist up and showing the victim laying dead at the scene is particularly graphic and hence sought to appeal to the jury’s emotions. There were over 200 pictures placed into evidence, 50 of which were from the autopsy and over twenty from the scene. RP 982-1093, 1199-1275. Comparing the photos used by the State there is little traction to the argument of prejudice. Neither photo is bloody nor shows the body internally.

Fedoruk argues because the State showed photographs on large screen after they were admitted into evidence, the jury assumed the judge approved of the slides and hence approved of the State’s PowerPoint presentation. Def. Supp. Brf at 9. However there is no factual support for this argument, nor legal support that showing evidence on a large screen is an improper display of admitted evidence.

As to Fedoruk’s second and third argument, the court should consider them in light of the State’s response above. *Glasmann* does not speak to the use of PowerPoint slides under a theory of undisputed facts or the listing of facts as recited by the State. Nor does it speak to the use of slides to present a theory of the case. The Defendant seems to imply that words on a screen without more are improper as in slide number 22 when

the slide says “Intuition is a POWERFUL thing.” However, it is not merely the words that troubled the court in *Glasmann*. It was the arguments and questions specifically imposed over the certain inflammatory images. If the arguments are themselves proper, the slides used could not be improper.

a. The Defendant fails to prove ineffective assistance of counsel for failing to object to the PowerPoint presentation.

The defendant argues that his trial counsel’s failure to object to the State’s use of a PowerPoint presentation was ineffective. Should the court find the PowerPoint was proper, there is no need to consider the ineffective assistance argument.

However, if the court finds it was improper, defense counsel would not have known such conduct was improper given the slides did not change the evidence submitted to the jury and as stated in the argument above controlling case law of Curtiss and the ability to argue undisputed evidence of fact do not place counsel’s actions below a reasonable standard. Moreover, since *Glasmann* did not consider the argument of ineffective assistance of counsel, and there was overwhelming evidence of guilt, there is little reason to believe the jury was swayed.

**E. THE COURT PROPERLY DENIED TO GIVE A
LESSER OFFENSE OF MANSLAUGHTER AS
THERE WAS INSUFFICIENT FACTUAL BASIS
UNDER A WORKMAN ANALYSIS.**

i. Standard of Review

An appellate court reviews a trial court's refusal to instruct a jury on an included offense for an abuse of discretion when it is factual dispute. *State v. Walker*, 136 Wn.2d, 767, 771-72, 966 P.2d 883 (1998); *State v. George*, 161 Wn.App. 86, 94, 249 P.3d 202 (Div 2, 2011). If the refusal is based upon an issue of law, it is reviewed *de novo*. *George* at 94. Under *de novo* review a court considers the factual evidence in the light most favorable to the defendant. *Id.* at 95.

A trial court abuses its discretion when its decision is manifestly unreasonable or is based on untenable grounds. *State v. Rohrich*, 149 Wn.2d 647, 654, 71 P.2d 638 (2003). A trial court's decision is manifestly unreasonable if it is outside the range of acceptable choices, given the facts and the applicable legal standard. *Id.* A court bases its decision on untenable grounds if that court applies the wrong legal standard or relies on unsupported facts. *Id.*

ii. The court properly denied to instruct on Manslaughter as there was insufficient factual basis.

Washington Law applies the *Workman* test to determine whether an offense is an “included” offense. “First, each of the elements of the lesser offense must be a necessary element of the offense charged. Second, the evidence in the case must support an inference that the less crime was committed.” *State v. Berlin*, 133 Wn.2d 541, 550, 947 P.2d 700 (1997). To satisfy the factual prong, the evidence would permit a jury to rationally find a defendant guilty of the lesser offense and acquit him of the greater. *Id.* at 551.

State v. Berlin held that manslaughter in the first degree satisfies the first prong of *Workman*. *Id.* at 551-52. The only question before this court is whether the trial court abused its discretion in finding there was not a factual basis to support the instruction. RP 1753.

In the present case, defense counsel argued to the court the lesser of manslaughter was appropriate because the evidence was insufficient to show which strike killed Ischenko, and a jury could find the death was the result of a reckless act. RP 1750. The trial court disagreed and cited to the number of blunt force traumas and strangulation and in this particular scenario the court could not find the acts would support a finding of recklessness. RP 1753.

The evidence supports the trial court's decision as Dr. Nelson testified to over 10 different areas of blunt force trauma and a significant level of force in strangulation from a frontal assault. RP 1203-1218, 1223, 1227, 1246, 1257-58, 1274. He also testified it would require a different blow for each trauma, meaning there had to be over 10 blows to Ischenko's body. RP 1203-1218, 1223, 1227, 1246, 1257-58, 1274. The cause of death was the blunt force trauma. The defendant never admitted to killing Ischenko. RP 1243, 1264, 1267. There was no testimony elicited from any witness that he was insane or had diminished capacity at the time of the offense. Fedoruk cites to testimony of his distorted thinking and irrational behavior, but there was never any connection that this behavior prevented an intentional act.¹² Fedoruk makes a blanket assumption that odd behavior means he didn't act with intent. This is not the evidence before the judge. With the evidence before the judge of what level of force was necessary to cause the injuries to Ischenko, the judge did not abuse her discretion by denying the instruction.

¹² Fedoruk cites to a number of places in the record for this behavior. At least two of these citations were prior to trial. As such they should not be considered as evidence before the jury in determining whether to give an instruction.

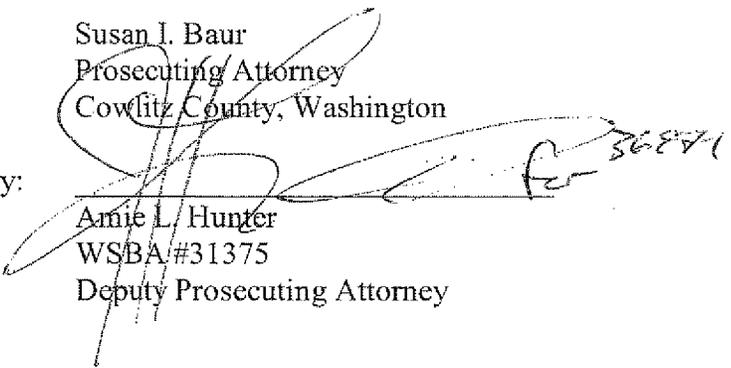
V. CONCLUSION

The Court should deny the defendant's appeal on the above referenced grounds.

Respectfully submitted this 15th day of July, 2013.

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By:

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I CERTIFY UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT.

Signed at Kelso, Washington on July 15th, 2013.



Michelle Sasser

COWLITZ COUNTY PROSECUTOR

July 15, 2013 - 11:37 AM

Transmittal Letter

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