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No. 50362-0-II

Kitsap County No. 14-1-01073-5

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

STATE OF WASHINGTON,

Respondent,

v.

DAVID MICHAEL KALAC,

Appellant.

ON APPEAL FROM THE
SUPERIOR COURT OF THE STATE OF WASHINGTON,
KITSAP COUNTY

The Honorable Jeanette Dalton, Judge

APPELLANT'S OPENING BRIEF

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A. ASSIGNMENTS OF ERROR

1. The state failed to present constitutionally sufficient evidence to prove "premeditation."
2. The convictions should all be reversed because appellant David Kalac was deprived of his CrR 3.3 rights to a speedy trial. He assigns error to the court's conclusion of law that "[g]ood cause exists to continue the trial beyond January 13, 2015." CP 429.
3. Appellant assigns error to the trial court's November 5, 2015, findings on the December 29, 2014, motion:
 - [VIII] The state exercised due diligence in seeking various forensic evaluations of evidentiary materials and in its identification for the need and retention of a strangulation expert. . .
 - [IX] The information the State seeks from the various forensic evaluations and its retention of the strangulation expert is relevant and necessary. . .
 - [X] The homicide of Amber Coplin and the resulting amount of forensic material sent to the crime lab for analysis could not have been foreseen when lab employees had scheduled their leave for the Thanksgiving and Christmas Holidays.CP 429.
4. Kalac's Fourth Amendment and Article 1, § 7, rights were violated by the warrantless entry into the home and the resulting evidence should have been suppressed. He assigns error to the CrR 3.5 Findings and Conclusions as follows:
 - [V] That Detective Birkenfeld's movements and observations within the apartment matched Rice's initial entry into the apartment, and therefore Birkenfeld did not expand the scope of the initial search performed by deputy Rice.
 - [VI] That the subsequent entry by detectives, who arrived on the scene hard on the heels of the patrol deputy and medics, did not exceed the scope of the initial lawful entry by Deputy Rice and was therefore a continuation of the first, lawful entry.

CP 405.

5. The trial court erred in refusing to instruct on the lesser included offenses of first- and second-degree manslaughter.
6. There was insufficient evidence to prove the "extreme lack of remorse" and "foreseeable, unusual impact" aggravating factors.
7. The sentencing court improperly considered future "good time" in deciding to impose the exceptional sentence.

B. QUESTIONS PRESENTED

1. Did the state fail to prove the essential element of premeditation where the evidence did not show that the accused deliberated before acting on a design to kill?
2. Is a defendant entitled to the speedy trial rights guaranteed under CrR 3.3 when the state chooses to file charges against him and is the state's lack of sufficient staffing or resources an invalid reason to continue a trial past the speedy trial date?
3. A deputy entered the home in response to a 9-1-1 call reporting a body, under the "emergency" or "exigent circumstances" exception to the warrant requirement. Did the trial court err in holding that subsequent entry by two detectives after the exigent circumstances had ended was somehow valid as a "continuation" of the initial entry under a "crime scene" theory which has been explicitly rejected?
4. Did the trial court err in refusing to give "lesser included offense" instructions for manslaughter in the first- and second-degree based on the theory that strangulation can never be "accidental" when Mr. Kalac raised diminished capacity affecting his ability to form premeditated intent and both the "legal" and "factual" requirements were met?
5. Was the evidence insufficient to show an egregious lack of remorse where, after the crime, the defendant took pictures of the body and posted them but also stated he wished it "hadn't come to this" and otherwise expressed remorse?
6. Was the evidence insufficient to support the aggravating factor of a foreseeable and unusual impact on a person other than the victim where the state failed to show any impact other than the devastation which always

accompanies a homicide?

7. Is reversal and remand for resentencing required where the lower court improperly considered the possibility of earned early release time in deciding to impose the exceptional sentence?

C. STATEMENT OF THE CASE

1. Procedural facts

Appellant David M. Kalac was charged by second amended information in Kitsap County superior court with 1) first-degree premeditated murder with aggravating circumstances (“destructive and foreseeable” impact and “egregious lack of remorse”), 2) theft of a motor vehicle, 3) possession of stolen property, 4) trafficking in stolen property, and 5) sexually violating human remains, all charged as “domestic violence” crimes. RCW 9A.32.030(1)(a); RCW 9A.44.106; RCW 9A.56.020(1); RCW 9A.56.065; RCW 9A.56.140(1); RCW 9A.56.160(1); RCW 9.94A.535(4); CP 1302-1314, 1342-58. After preliminary proceedings before the Honorable Anna Laurie, pretrial and jury trial proceedings were held before the Honorable Jeannette Dalton from November of 2014 through trial in March and April of 2017.¹ The “trafficking” charge was dismissed and the jury found Mr. Kalac guilty of the other counts as charged. CP 2095-2101. On May 16, 2017, Judge Dalton imposed an exceptional sentence of 984 months, above the standard range. CP 2125-2138; SRP 65-72. This appeal follows. See CP 2140.

¹The verbatim report of proceedings is extremely lengthy and not all chronologically paginated. An explanation of the references is attached as Appendix A.

2. Testimony at trial

In the early afternoon on November 4, 2014, police received a telephone call to the "9-1-1" emergency phone number, reporting that Amber Coplin had been found in her bedroom, dead from what officers would later describe as "homicidal violence." TRP 1110-1124. The body was completely covered by blankets and a pillow on top had Coplin's driver's license on it with the word "dead" written in black ink. TRP 1120, 1295-1304, 1308.

Ms. Coplin's estranged husband, Paul² Coplin, had called police after their son, 13-year-old Brycon, had "texted" and asked Paul to come over. TRP 1035-58, 1077-87. Brycon had gotten worried after his mom was not up and around that afternoon and, when he had gone into her room, he had seen "stuff" everywhere and the light did not work. TRP 1045-57. He steadied himself on the bed and touched his mom but she did not wake up. TRP 1047-48. That plus the license made him convinced she was dead, so he "texted" his dad. After he arrived, without Brycon or his older brother in the room - or within view - Paul pulled back the blankets. TRP 1077-92. It was clear that Ms. Coplin was dead and Paul "freaked out," running out of the house, pushing his sons in front of him. TRP 1051. He then called 9-1-1. TRP 1051.

Brycon later told police that he had heard a fight between his mother and her roommate and boyfriend, David Kalac, the night before. TRP 1037-45. He had seen no violence and was clear he had never seen

²Because several witnesses share the same last name, for clarity they will be referred to by their first name with no disrespect intended.

any violence in all the time he had lived with his mom and Kalac. TRP 1040. He heard arguing, however, and his mom had knocked on his door asking for a sleeping bag, so Brycon had figured Kalac would be sleeping on the couch that night. TRP 1040. At some point he thought the arguing got louder but ultimately he did not hear anything else. TRP 1040-45.

Ms. Coplin had marks on her neck, two bite marks on her breasts, and writing in black ink from a marker like the one used to write on the license, on her chest, shoulder, stomach and pubic region. TRP 1110-15, 1323-38, 1386-87. The writing on her stomach said, “[j]ust fucking mean” and “[f]uck dude” and there were horizontal lines and arrows on her breasts. TRP 1328-29. Also written next to the arrows were the words “[b]ite marks gave AD” and there appeared to be two “cut marks,” as well as the word “Dan,” which was next to the pubic region. TRP 1329-32, 1389. On her left shoulder was some writing that said something like “lace, hands, first, though.” TRP 1332-41.

A picture on the wall of the bedroom had writing on it, which read, “she killed me first.” TRP 1120, 1294-1304, 1308. On the blinds was the phrase, “bad news.” TRP 1120, 1295-1304, 1308. A handwriting expert would later testify they all seemed to be in Mr. Kalac’s handwriting. TRP 1756. Ms. Coplin’s car was missing and a chase of what was suspected to be the vehicle occurred in Portland, Oregon, in the early morning hours of November 5, 2015. TRP 1541-66. Officers ultimately broke off the chase and the car was found abandoned shortly thereafter nearby. TRP 1541-77. Later that day, Mr. Kalac walked out of a sort of “forested” area in a suburb outside Portland, walked over to a parked police car and turned

himself in. TRP 1587-91.

In the forested area was found an old mattress with writing on it that said, "Dave's last stand," and a note which said, "I killed Amber Coplin. I strangled her with my hands and then a shoelace. I had no reason other than I was drunk and she pissed me off. Running from the cops was so fun." TRP 1614, 2027-32. Police investigation indicated that, after leaving the apartment, Mr. Kalac had sold Ms. Coplin's computer at a pawn shop and then bought some vodka, orange juice, a BB gun and some BB gun shot at a "Wal-Mart." TRP 1669, 1704-1724. In a backpack found in the forested area was some vodka, orange juice, some bracelets intertwined with hair and a frayed shoelace. TRP 1741-47. Kalac himself appeared to have taken some pills and said he had fallen over walking over to the police car, felt really "out of it" and had an overwhelming feeling of dread that something terrible had happened. TRP 2687=88.

A forensic scientist tested parts of the shoelace, finding Kalac as probable contributor of DNA by creating his "typing profile" from a sample and then comparing it to the "profile" she found on the lace. TRP 1921-22. She could only obtain a "partial DNA typing profile" from one part of the lace and thought it was "consistent with originating from two individuals" - Kalac and Coplin. TRP 1923.

The scientist also found some "mixed" DNA from fingernail clippings from one of Coplin's hands showing Coplin as a possible "major contributor" and Kalac as a possible minor contributor. TRP 1902-15. For swabs from Kalac's hands, the left hand gave "a DNA typing profile that was a mixture consistent with originating from at least two individuals,"

with Coplin and Kalac potentially included. TRP 1917-19. A "partial" profile from a right leg swab partially matched Kalac's profile. TRP 1990-91. From the left breast, the profile was again a "partial" match. TRP 1995.

Anal, vaginal and oral swabs had no sperm and anal and vaginal swabs had a protein found in semen but also in saliva, with the DNA matching only Coplin. TRP 1926-27, 1952, 1972. Coplin's dentures were found with one part on the floor and another in her hair. TRP 1304-1306, 1402-1404. There was no sperm on them and the lower denture had the same protein as the anal and vaginal swabs but again matched only Coplin's DNA. TRP 1955-72. The upper denture had a "mixed" sample of DNA which included both Coplin and Kalac as possible contributors. TRP 1955-58, 1968-72.

The scientist could not say when the DNA was deposited. TRP 1332-41, 1955-58, 1968-72. Indeed, she admitted, it did not necessarily even have to have been within 12 hours of death. TRP 1974. Eating, drinking and even brushing teeth would not normally guarantee that all of the DNA will be removed, for example after consensual sex. TRP 1974-79.

At the time of her death, Coplin's blood alcohol level was twice the legal limit for driving. TRP 2341. The state's expert thought there was evidence of both manual and ligature strangulation, meaning that he thought the assailant had started with his hands but then used a cord-like object. TRP 2294-95.

The medical examiner who had actually conducted the autopsy,

however, testified that he had only seen evidence of ligature strangulation, meaning using a cord of some kind. TRP 2205, 2294-95. He saw none of the scratches and fingernail marks on the neck or bruising he would normally see if manual strangulation had been involved. TRP 2205, 2294-95.

In addition, the medical examiner testified, “[t]here is nothing in the body that would indicate that there was a violent struggle on the part of the victim.” TRP 2240. The state’s expert testified that the chin injury he saw was commonly seen in someone struggling against strangulation. TRP 1756-99. The blunt injuries he saw also could have occurred during strangulation. TRP 1799, 1818-22.

Shortly after the body was discovered, there were postings on a local social media online “bulletin board” of photos of what appeared to be Coplin’s body without clothes on. TRP 2259-61. Some of the postings had the body propped up by pillows without the writing later seen. TRP 1457-58. Also posted were comments the state said came from an account linked to Kalac’s phone which said things like he had used a .26 gauge wire that he normally used for “vaping,” that he had killed her because he had put “food on the table” for three years and she was with some other guy and that it was harder than it looked on television. TRP 2259-61, 2287-90. Several of the claims were false, such as the use of wire and Kalac as the breadwinner for three years. TRP 2259-90.

One of the posts also said that they had been getting ready to have sex - not fighting - when he had started committing the crime. TRP 2076, 2195, 2259-61, 2287-90. A post said, “I really wish it didn’t have to

come to this," and another said that he had bought a realistic "BB gun" and was going to try to commit "suicide by cop." TRP 2076-88, 2195, 2259-61, 2887-90. Another posting said, "[h]er son will come home from school soon. He'll find her and then call the cops." TRP 2282-83. Kalac also texted his boss about work and also told him he had really screwed up, that "[s]hit is all fucked now," and "[t]here will be no more me ever." TRP 1369-70. His boss admitted that Kalac had been drinking a lot more in the year before Coplin's death, so much so that they had a discussion about it. TRP 1373. The drinking was interfering with Kalac's work because he was showing up hungover and missing days. TRP 1373.

When Kalac was drunk, his boss admitted, he became more argumentative and difficult, with a bad "attitude." TRP 1375. It had gotten so bad Kalac was about to get fired. TRP 1375. A friend Kalac owed some money contacted him the day Coplin was found and got a message back saying he done something "really bad" and would either be in jail or dead by the end of the day. TRP 1248-49. The friend conceded that she thought Kalac had a problem with alcohol and was drinking all the time. TRP 1269-70. She maintained, however, that she had not seen him "act out" or do anything concerning when drunk. TRP 1269-70.

Kalac had recently told the friend that Coplin was pregnant and both he and Coplin had seemed happy. TRP 1252. A detective found some paperwork under Coplin's nightstand which seemed to indicate Coplin had an abortion. TRP 1284-85, 1312. But a friend of Coplin's who admitted to detesting Kalac claimed she was there when Coplin got an "abortion pill" and that Kalac was told. TRP 1522.

Dr. David Dixon, a licensed clinical psychologist with a master's in psychology and specialty training in alcoholism and alcohol abuse diagnosed Mr. Kalac with severe alcohol use disorder which was in remission because of the controlled environment of incarceration, as well as major depressive disorder (moderate to severe), mild neurocognitive disorder due to "multiple causes," panic disorder, a history of opioid use disorder and "amphetamine-type" substance use disorder, also in situational remission. TRP 2383. "Alcohol use disorder" is not just being an alcoholic but in fact a medical disorder involving "use of alcohol that's essentially pathologic and interfering functionally" with areas of the person's life. TRP 2383. The disorder had been recently examined and bolstered by advances in brain imaging which had showed more of how the brain was changed by alcohol long term. TRP 2384-88. There was also evidence that showed severe and extreme alcohol use consistent with the disorder over time affected the nervous and cardiovascular systems and other systems as well. TRP 2384-90.

Chronic alcohol abuse also showed up in certain lobes of the brain such as the parietal and frontal lobes, which are "highly affected" and involve memory formation and executive functioning. TRP 2389. He thought Mr. Kalac presented an extreme case, having started drinking heavily at an early age and reporting blackouts starting shortly thereafter. TRP 2394-2400. He also thought that Mr. Kalac had not engaged in "significant violence" without alcohol being present, but was unaware of the incident which had occurred at the jail pending trial until later. TRP 2415-18, 2452-55.

Dr. Dixon conducted multiple tests, reviewed materials and did things like confirm Kalac's self-reports of the amount of alcohol he was abusing with others. TRP 2108-10. In that testing, he noted that Kalac's memory functioning was "very much abnormal" relative to his intelligence. TRP 2422-24. He was especially concerned that, in Kalac's long history of difficulties with alcohol, Kalac had once been "air-vac'd" to Harborview Hospital with a reported blood alcohol level of .40. TRP 2410. That blood level is high enough that most human beings would be dead and most people would "pass out" at .30 because the body has a "safety mechanism" to shut down at that level. TRP 2411-16.

With that extreme blood level, Kalac was reported by the medics he spoke to as still being "alert and conversive." TRP 2411. That was about two months before the crime. TRP 2418. Kalac had been beaten badly during the incident. TRP 2420-24. Dr. David Dixon, a licensed clinical psychologist with a master's in psychology and specialty training in alcoholism and alcohol abuse diagnosed Mr. Kalac with severe alcohol use disorder which was in remission because of the controlled environment of incarceration, as well as major depressive disorder (moderate to severe), mild neurocognitive disorder due to "multiple causes," panic disorder, a history of opioid use disorder and "amphetamine-type" substance use disorder, also in situational remission. TRP 2383. "Alcohol use disorder" is not just being an alcoholic but in fact a medical disorder involving "use of alcohol that's essentially pathologic and interfering functionally" with areas of the person's life. TRP 2383. The disorder had been recently examined and bolstered by

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Dr. Dixon described "blackouts," in which a person is cognitively unable to form memories during an event because of intoxication but are capable of participating in an event they are later unable to remember. TRP 2387. "Fragmentary" blackouts involve blackouts where there are still or might later be "bits and pieces of memories" which come back while an "en bloc" blackout involves losing most, if not all, memory of an incident. TRP 2387-88. In both, however, people are able to engage in complex-seeming activities. TRP 2387-88. And drinking while in a blackout creates acute "toxicity" and impacts even a fragmentary blackout. TRP 2434. Dr. Dixon described someone in "blackout" in layman's terms as "almost like they were going through life but not conscious," almost as if sleepwalking. TRP 2436.

Dr. Dixon distinguished between being able to function cognitively and do things like drive while in a blackout, which he said could occur, versus memory retention and awareness. TRP 2448-52. He stated he did not believe that Kalac was able to form premeditated intent at the time of the crime. TRP 2450-52, 2667. He also thought that Kalac's diminished capacity "state" varied in levels throughout the incident and thereafter. TRP 2667. The state's expert, Dr. Richard Yocum, did not agree and thought Kalac suffered "antisocial traits" and

had "antisocial behavior" as well as depression but not that he was suffering diminished capacity. TRP 3014-19.

Mr. Kalac testified about his history of extreme use of alcohol and his relationship with Coplin, which did not involve violence prior to the day she died. TRP 2716. At the time he was drinking a lot, buying at least a half gallon of hard alcohol and cans of beer and consuming them, with or without Coplin, daily. TRP 2716-18. He conceded he would come to work hungover and getting the shakes so bad he could not work without going with one of the guys to a convenience store so he could have a drink so the shaking would stop. TRP 2719. He had started bringing a half gallon of vodka and a jug of orange juice to work with him and would just drink it out of a coffee cup all day. TRP 2719-20. Regarding the day he was taken to Harborview, that incident was in and out for him, he did not know what happened but was told he was being aggressive towards a guy and hit him for no reason, and he did not remember much of going to the hospital. TRP 2727-29. He said he would go from "one point to the next" while "skipping stuff in the middle," like not remembering thinking he needed to pull out a knife and doing it but just seeing he had one in his hand. TRP 2729-30.

With Coplin, they drank one night and woke up to find water had caused the roof to collapse on them and they had slept through it. TRP 2767-68. Kalac recalled having moved out when people were upset because he had said some things to Brycon when Kalac was drunk but he could not recall anything he had said that was that way. TRP 2769. At the time of the incident, he did not remember wanting to hurt anyone. TRP

2771. He was pretty sure they were into a second half gallon of vodka at the time of the incident and heard later they had been arguing and it had something to do with a sleeping bag. TRP 2797. He said the first memory he had was of himself with his hands around Coplin's throat. TRP 2798. He not remember actively squeezing or anything similar, did not remember writing on her, the room or the blinds, did not remember biting her although their sex life often included them. TRP 2799. Mr. Kalac also though he had a memory of pulling a blanket over Coplin's head but he admitted he was 'in a fog for so long' even after he was arrested that it was hard for him to recall what was a real memory or something he might have read sometimes. TPR 2800. He did not actively remember driving after the incident but remembered being in the car and thinking the rain was "really heavy." TRP 2804-05. In the Wal-Mart security video it looked to him like he was really drunk and he did not recall being there at all. TRP 2807. Another video showed him sitting in a parking lot in Chehalis for awhile and officers thought that was when he posted the photos but he did not recall it. TRP 2808. He was fairly certain he was drinking the entire time because he always drank anything he bought right away. TRP 2809. He had flashes of driving and going the wrong way and feeling really calm and there being police behind him. TRP 2810. He did not recall going to any bar. TRP 2810. One of his texts said, "I got to get rid of my phone," but he did not recall that and his phone was phone in the car. TRP 2813. He remembered waking up on the mattress and going to the police car but things were fairly foggy still. TRP 2819.

Mr. Kalac said he was unaware of an abortion and thought Coplin had a miscarriage. TRP 2814. As far as he knew, she was not “with some guy” or being unfaithful. TRP 2814. There was no history of any violence between them and nothing they were fighting about that he could think of which would lead to the death. TRP 2814-18, 2314. He could not really comment on what had happened just after the crime until he turned himself in to the surprised officer but testified that there was not a day which did not pass - or a moment - in which he did not feel bad for what he had done. TRP 2180. He also said he would change it if he could go back unlike every other part of his life. TRP 2810-24.

D. ARGUMENT

1. THE STATE FAILED TO PRESENT SUFFICIENT EVIDENCE TO PROVE PREMEDITATION

Due process requires the state to bear the full weight of the burden of proving the defendant guilty of the crime charged, beyond a reasonable doubt. See State v. McHenry, 88 Wn.2d 211, 214, 588 P.2d 188 (1977); In re Winship, 397 U.S. 358, 25 L. Ed. 2d 368, 90 S. Ct. 1068 (1970); Fourteenth Amend.; Art. 1, § 3. To meet this burden, the prosecution must provide sufficient evidence to prove every essential element of its case. See State v. Salinas, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992); Jackson v. Virginia, 443 U.S. 307, 319, 99 S. Ct. 2781, 61 L. Ed. 2d 560 (1979). Failure to meet this burden compels reversal and dismissal with prejudice. State v. Smith, 155 Wn.2d 496, 505, 120 P.3d 559 (2005); Winship, 397 U.S. at 361-64.

In this case, this Court should reverse and dismiss the conviction

for first-degree murder, because the state failed to meet the burden of proving the essential element of “premeditation.”³ This Court reviews this issue by asking whether, taken in the light most favorable to the prosecution, any rational trier of fact could have found the required elements, beyond a reasonable doubt. Jackson, 443 U.S. at 319; State v. Green, 94 Wn.2d 216, 221, 616 P.2d 628 (1980), abrogated in part on other grounds by, Washington v. Recuenco, 548 U.S. 212, 126 S. Ct. 2546, 165 L. Ed. 2d 466 (2006). The state accused Mr. Kalac of committing first-degree murder by having “with a premeditated intent to cause the death” of Amber Coplin, “caused the death of such person[.]” CP 1303. That language mirrors the statute. RCW 9A.32.020(1); see State v. Brooks, 97 Wn.2d 873, 876, 651 P.2d 217 (1982). Thus, to convict Mr. Kalac of first-degree premeditated murder, the state was required to prove not only that he intended to cause that death but that he premeditated causing that death, then acted on that premeditated intent. State v. Ortiz, 119 Wn.2d 294, 313, 831 P.2d 1060 (1992), overturned in part and on other grounds by, State v. Condon, 182 Wn.2d 307, 343 P.3d 357 (2015); see State v. Bingham, 105 Wn.2d 820, 823-24, 719 P.3d 109 (1986); State v. Robtoy, 98 Wn.2d 30, 43, 653 P.2d 284 (1982); see RCW 9A.32.030.

In contrast, a person commits second-degree murder when, “[w]ith intent to cause the death of another person but **without premeditation**, he or she causes the death[.]” RCW 9A.32.050(1)(a) (emphasis added). The fact that only the element of premeditation

³ The state’s failure to meet its burden of proof on two of the three aggravating factors is discussed, *infra*.

separates the first- and second-degree crimes is crucial in the way our courts have examined what evidence is sufficient to prove “premeditation” and thus the higher crime. Bingham, 105 Wn.2d at 826; see Brooks, 97 Wn.2d at 876.

In general, premeditation is “the deliberate formation of and reflection upon the intent to take a human life.” Robtoy, 98 Wn.2d at 43. Put another way, premeditation is “the mental process of thinking beforehand, deliberation, reflection, weighing or reasoning for a period time,” even if short. Brooks, 97 Wn.2d at 876. The state may meet its burden - as it tried to here - with circumstantial evidence, but any inferences drawn from the evidence must be reasonable and the evidence supporting the inference “substantial.” See State v. Luoma, 88 Wn.2d 28, 34, 558 p.2d 756 (1977); State v. Pirtle, 127 Wn.2d 628, 643-44, 904 P.2d 245 (1995), cert. denied, 518 U.S. 1026 (1996).

The Supreme Court has identified four characteristics of facts “particularly relevant to establish premeditation” by circumstantial evidence. State v. Vasquez, 178 Wn.2d 1, 16, 309 P.3d 318 (2013). Those are 1) whether the defendant had a motive to commit the murder, 2) whether the defendant took steps to procure a weapon, 3) whether the crime was committed with stealth, and 4) the method used to commit the crime. Id. Again, however, any inferences based on circumstantial evidence must be reasonable and “cannot be based on speculation.” Vasquez, 178 Wn.2d at 16; see Jackson, 443 U.S. at 319.

Here, the state presented some evidence of a potential motive - that Kalac was upset about Coplin having ended the pregnancy. But

there was no evidence that Kalac bought a gun or a rope - or even got a knife from the kitchen just steps away. The crime was not committed with "stealth," he did not lie in wait, there was no apparent planning to keep it hidden - it apparently occurred at the culmination of a loud fight and the body was left behind, not hidden in the woods or otherwise disposed of, as one would assume would occur if the murderer had actually planned ahead. Thus, two of the factors regarding proof of premeditation do not support that finding.

The state's main focus here was the nature of the crime, i.e., that strangulation takes time (here 90-100 seconds), that during this time there is an opportunity to consider and stop what you are doing and that the choice is made to continue, which proves premeditation. TRP 3270-72. In addition to the passage of that 90-100 seconds of time for "deliberation," the prosecutor argued that switching from using his hands to using a cord and the evidence of a "significant fight" leading up to death proved the "premeditation" required. TRP 3270-74. The prosecutor also argued that jurors should consider what happened *after* death, such as the writing on the body, photographing and posting to the internet. TRP 3272-74.

The Supreme Court has questioned whether, as a matter of law, acts or "reflection *after the fact* could show *premeditation*[".]" State v. Condon, 182 Wn.2d 307, 321 n. 5, 343 P.3d 357 (2015) (emphasis in original). Further, the state's highest court has rejected nearly every one of the inferences the prosecution urged the jurors to draw. First, the Supreme Court has rejected the theory that, because it takes time,

strangulation is itself proof of “premeditation.” See Bingham, 105 Wn.2d at 826-27; see also Brooks, 97 Wn.2d at 876.

In Bingham, the developmentally disabled victim was last seen with the defendant and her body was found three days later, raped and strangled. 105 Wn.2d at 821-22. She had bite marks on each breast and tears in her vaginal and anal walls with sperm present, although much of that was postmortem. Id. The medical examiner declared that the manual strangulation would have required continuous pressure to the victim’s windpipe for three to five minutes in order to kill (longer than the up to two minutes here). 105 Wn.2d at 826-27.

As here, in Bingham the state claimed that strangulation takes time which means there is time to deliberate, and “if the defendant has the opportunity to deliberate and chooses not to cease his actions,” the jury should find he acted with premeditation. 105 Wn.2d at 826-27. The Supreme Court majority, however, rejected this theory. Id.

Instead, the Court held, the passage of the time needed for strangulation showed only the *opportunity* to form premeditated intent but not that the defendant actually took the opportunity and formed that intent. Id. As a result, the state still had to provide evidence that during the relevant time the defendant had in fact undergone “the deliberate formation of and reflection upon the intent to take a human life.” Bingham, 105 Wn.2d at 826-27. Further, the Court declared, the state’s theory has an improper result, because it converts “any form of killing which took more than a moment” into first-degree, premeditated murder. Id.

The Bingham Court also dismissed another theory advanced by the state here - that the violent nature of the crime also proved "premeditation." Bingham, 105 Wn.2d at 827-28. Because premeditation is the only distinction between the two degrees of murder, allowing the nature of the wounds, the violence of the crime or the time it took to cause death to be used as evidence sufficient to prove "premeditation" would "obliterate[] the distinction between first and second degree murder" the Court concluded. Bingham, 105 Wn.2d at 826. The Supreme Court has also adopted the view that "multiple wounds and sustained violence cannot support an inference of premeditation." Ortiz, 119 Wn.2d at 312.

Thus, in State v. Ollens, 107 Wn.2d 848, 733 P.2d 984 (1987), where the murder was a stabbing death involving a potential motive (to commit a concurrent robbery of the victim, a taxicab driver), with multiple stab wounds and a slit throat which would have required more than one slashing motion and the medical examiner found "numerous defensive wounds" inflicted when the victim was alive and showed struggle, the evidence was sufficient to prove premeditation. 107 Wn.2d at 852. While the violence and multiple wounds were not enough to show an intent to kill alone, the Ollens Court distinguished Bingham because of the use of the knife, evidence of other wounds, the amount of slashing involved and the apparent motive. Ollens, 107 Wn.2d at 852-53.

Similarly, in Ortiz, the killing was committed with a knife and involved multiple wounds, the 77-year-old victim was raped and her face was "crushed," after she was stabbed multiple times and suffered

defensive wounds on her arms it appeared she had been dragged from room to room, probably by her hair, her body was naked from the waist up but had been dressed with "slacks," the murder occurred in the bedroom, not in the kitchen where the knife was apparently procured, and there were defensive wounds on the victim which indicated a prolonged struggle. 119 Wn.2d at 297-99, 311-313. This evidence was sufficient of premeditation. Id. Threats in the past to "waste" the victim and preparatory acts also show premeditation. State v. Neslund, 50 Wn. App. 531, 749 P.2d 725, review denied, 110 Wn.2d 1025 (1988).

In the context of strangling, in a pre-Bingham case, State v. Harris, 62 Wn.2d 858, 385 P.2d 18 (1963), the defendant had worked at the victim's home as an electrician several days before her death, she was beaten and had a "compound fractured skull" which would have independently killed her if she had not died when a vacuum cleaner cord was put around her neck and strangled her. In addition, found near the victim was a piece of a vacuum cleaner, pieces of a mirror, a bra she had been wearing, a vacuum cleaner handle and an apron. 62 Wn.2d at 868. She had suffered a "terrific beating" causing the head trauma and had been struck on the head with a "blunt instrument" several times with such force at one place her skull had "fractured into her brain," one ear and cheek were severely damaged and her jaw was fractured, with two teeth broken. Id. The defendant was accused of also an attempted rape. Id. In affirming, the Court found that the jury "could have found from the evidence that an appreciable period of time had elapsed" between the beating and choking to permit the formation of an "intent to kill." Id.

Similarly, in State v. Gibson, 47 Wn. App. 309, 734 P.2d 32, review denied, 108 Wn.2d 1025 (1987), the court of appeals held there was sufficient evidence to prove premeditation where the victim, who was found dead in her car, had three blunt force injuries to her head which the evidence suggested was from being beaten with a "2 x 4" of lumber or a piece of "thin, heavy pipe," after which she was strangled to death using a different "cord-like object." 47 Wn. App. at 312. Viewing the evidence in the light most favorable to the state, the court noted that a jury could have found a sufficient lapse between the two attacks to find the element of premeditation. Id.

And in State v. Allen, 159 Wn.2d 1, 147 p.3d 581 (2006), the defendant and his mom, the victim, had been arguing about money, she had recently refused his request for a loan to buy a car, he had told his friend about his mom's "cashbox" before her murder, the cashbox was taken after the murder and found empty nearby, and the defendant told police he had been arguing with his mom about being late for work, they "wrestled" a little, she kept "pushing" him, he "went blank" and "had no control," grabbed the telephone and used the cord to strangle her but it snapped apart and she was still alive. 159 Wn.2d at 4-5. He admitted they continued fighting and he went to the gun cabinet and grabbed his rifle, then swung it twice at his mom's head so hard it flew out of his hands and the "stock" broke. Id. He argued that there was insufficient evidence he had "premeditation" because he had not "expressed a preconceived intent to kill, he did not take weapons to his mother's home," and he was "shocked" at how the argument had "escalated[.]" Id.

But the court found sufficient evidence to uphold the jury's verdict, because the altercation moved from room to room, had involved pushing and wrestling, then strangling, then a pause while the defendant grabbed the rifle, which was not "readily available," and used it to beat his mother in the head from behind. Id.

More recently, in State v. Small, 1 Wn. App. 2d 254, 404 P.3d 543 (2017), review denied, 190 P.2d 1014 (2018), in an unpublished (and thus nonbinding but only persuasive) portion of the decision, Division Three found sufficient evidence to support the jury's finding of premeditation where the defendant had secretly kept a key to the victim's home for months prior to the killing, used it to let himself into the house, wielded a knife to threaten the victim, cut off her underwear and rape her, and she suffered blows to the head prior to strangulation. Id.; see GR 14.1.

But here, there was no evidence of prior violence or threats. Brycon, who lived with them, said he saw no violence - not even things getting "thrown." TRP 1053-65. There was no preparatory act such as buying a gun or acquiring a key, laying in wait or acting with stealth. Further, while the prosecutor told jurors that there was evidence of a big fight leading up to and somehow independent of the death, the medical examiner who conducted the autopsy said, "[t]here is nothing in the body that would indicate that there was a violent struggle on the part of the victim." TRP 2240. And the state's own expert testified that the chin injury he saw was commonly seen in someone struggling against strangulation. TRP 1799, 1811-25. That same expert said that the blunt injuries he saw on Coplin's body could also have occurred during the

strangulation. TRP 1799, 1818-22.

The strangulation occurred over at most 100 seconds. The state told the jurors that it had proved premeditation by proving that this time had passed and Kalac had thus had time to “reflect,” and because of the violence required. TRP 3294-95. It is not surprising that the jurors had difficulty with the concept of premeditation and the state’s burden of proof. Indeed, that is the only issue upon which jurors had such a concern that they felt the need to ask a question during deliberations, as follows:

Instruction no. 9 states “Premeditated means thought over beforehand” Does “beforehand” mean prior to formation of intent or does it mean anytime prior to the completion of the crime?”
CP 2053.

The evidence in this case was insufficient to prove premeditation. Instead, the state urged the jury to rely on improper inferences and find premeditation based on theories the Supreme Court has largely rejected. This Court should reverse and dismiss the conviction for first-degree murder.

2. MR. KALAC’S CrR 3.3 “SPEEDY TRIAL” RIGHTS WERE VIOLATED

The convictions should all be reversed, because the trial court erred in granting a motion to continue over objection under CrR 3.3. Under that rule, it is the “responsibility of the court” to “ensure a trial in accordance” with the speedy trial date for “each person charged with a crime.” CrR 3.3. Failure to comply with the speedy trial ruled can compel reversal and dismissal with prejudice. See State v. Kenyon, 167 Wn.2d 130, 216 P.3d 1024 (2009). In this case, this Court should grant that relief for all of the convictions, because Mr. Kalac’s rights under CrR 3.3 were

violated when the trial court improperly continued the trial over defense objection, past the “speedy trial” date, for improper reasons, on December 29, 2014.

a. Relevant facts

The crime occurred on November 3 or 4, 2014. CP 1-2. Ms. Coplin was found on November 4. CP 1-2. Mr. Kalac turned himself in outside of Portland on November 5, and he was returned to Washington state on November 6, 2014. CP 1, 16-17. His first appearance was November 7, 2014, and counsel appeared on November 12, 2014. CP 30-32, 36-37.

The following day, on November 13, the state moved to “compel” Kalac to submit to blood, photo, dental and other testing. CP 38-39, 46. In fact, the state asked for “acceleration,” urging the court to “shorten time” for any defense response. CP 38-39, 46. At a hearing on November 17th, the prosecutor told the court the order was needed so quickly because of “the time that the crime lab will need to process this rather extensive batch of evidence” that the state wanted tested. 3RP 5-6.

Appointed counsel was concerned about continuing to represent Mr. Kalac because the state had not taken the death penalty off the table. 3RP 6-8. He was not “death qualified” and he did not want to litigate anything without knowing its potential risks for Mr. Kalac if he was not qualified to handle Kalac’s case. 3RP 6-8. But he had no objection to the state’s request for DNA swabs and had filed a response so declaring, asking only for “reasonable notice and accommodation” for him to be present. CP 48-49.

The matter was set over for a day and before the conclusion of the

November 17 hearing, the prosecutor proposed a trial date of January 5, 2015, consistent with the "speedy trial" limit. 3RP 8-9. Judge Dalton noted for the record that "[s]peedy trial expires" on January 13, 2015. 3RP 8-9. Judge Dalton decided to appoint a "death qualified" attorney in an abundance of caution and the disputed "motion to compel" issues were set over with the hopes new counsel - not yet appointed - could be up to speed in a week. 3RP 12-16.

On November 21, the prosecution again raised the issue, asking for samples for DNA and other testing, "because the investigation is ongoing, and we need that information and material to be provided so we can continue to conduct our investigation." 4RP 3-4. The prosecution wanted the samples taken quickly and stated, "[w]e are on a speedy trial clock." 4RP 5-6. The state was still objecting to the defense request to have someone present as "unnecessary." 4RP 5. The prosecutor said:

the order that we are going to present says it must be done within two weeks. The holidays are upon us, timing is difficult because of those holidays, but the State is preceding to go forward and obtain those samples if it is granted today.

4RP 6. Counsel again stated he was not objecting but just wanted to be present, noting the swabs could be done quickly at the jail. 4RP 6-7. Judge Dalton ruled he could be and ordered the testing to occur. 4RP 15.

On December 5th, the prosecutor said told the court the "last thing" the state was waiting for was the toxicology report, which he said was "just being processed and in their normal procedure." 5RP 11-12. Counsel was anxious because he had not been given that report and wanted to know when he would get it, because the trial date of January 5,

2015, was so close. 5RP 12. The prosecutor responded, "I am not going to bind us to a certain date. When we get it, we are going to hand it over."

5RP 12. On December 15th, the prosecutor told the court he had not received back any of the WSP tests and once he knew "who specifically did the tests" he would put them on his witness list. 3RP 18-22.

Four days later, however, on December 19, the prosecutor filed a written motion asking for a continuance past the "speedy" trial date of January 12, into March. CP 181. In the accompanying affidavit, Prosecutor Talebi declared, under penalty of perjury, that there was "good cause" for the following reasons:

- 1) Prosecutor Davy, the "co-chair," was scheduled to go to a four-day prosecutor's conference on January 12-16, 2015,
- 2) the DNA testing was going to take time because the WSP Crime Lab "advised that they are so short staffed over the holidays that the samples will not even be assigned to a forensic analyst until the New Year,"
- 3) handwriting samples and fingerprints sent to experts for analysis were not back,
- 4) Kalac's cell phone was sent to the FBI on November 24 and there was of yet no result or a "firm timeline" on when it might be ready,
- 5) the toxicology report was not yet available,
- 6) the state "has been in the process of procuring an expert to testify about strangulation," and expected confirmation on December 22 - which could not be obtained earlier because the expert was out of their office until that day, and
- 7) that a recent incident in jail involving Kalac changed "negotiations."

CP 181. The prosecutor argued that the prosecutor's unavailability "due to training" was sufficient good cause to support a continuance, also

declaring that, under CrR 3.3(f)(2), “[t]he State has acted with diligence to process material evidence, procure expert testimony and issue this discovery to the defendant as quickly as possible.” CP 182.

The same day, when the parties were in court, the prosecutor handed the motion to counsel and raised the issue. 6RP 3-4. Prosecutor Talebi complained that it was going to take a lot of “coordination” for the state to subpoena witnesses that week “and start arranging for times making sure they are available” for the January 5th trial, given that it was now December 19th. 6RP 3-4. The prosecutor admitted that, “[p]rimarily one of the reasons” for the state’s request was that the co-chair was scheduled to go to some training he had gotten money for and waited a year for, which was on January 12-16th. 6RP 3-4. The prosecutor went on:

So Detective Menge has sent all of that evidence. It includes the DNA. I have attached her evidence reports to the back of this motion. It includes a DNA. It includes fingerprint samples. It includes writing samples. We were told specifically from the supervisor, Ms. Hemmit (phonetic) at the DNA Crime Lab in Seattle, that they are so short-staffed over these next couple of weeks because holidays that they won’t even be able to assign the DNA and the testing to their people until the new year, and then it will take an additional couple of weeks to get the results.

6RP 4-5. Talebi told the judge the cell phone had been “submitted right away” and it was still “being processed.” 6RP 4-5. He declared he had contacted the coroner’s office about the victim’s toxicology report the day of the hearing and there were “no updates,” but it was likely to take several weeks. 6RP 5-6. Talebi also said he needed time for an additional strangulation expert, because that expert was “gone this week” and the state had not been able to “get confirmation and work out those details”

regarding the expert until the following Monday, December 22. 6RP 5.

Counsel noted for the record having just received the state's motion and expressed sympathy for the prosecutor having to work to coordinate the subpoenas for their case but objected strongly to any continuance based on the state's failure to get prepared. 6RP 5-6. When he asked for time to respond, the prosecutor demurred, objecting that he and his co-prosecutor had scheduled the following week off. 6RP 7-8. Judge Dalton suggested coming back on the 29th but Talebi also was unhappy with this date, because he would only have two working days to respond to whatever counsel might file. 6RP 7-10. The matter was set over to the 29th. 6RP 10-11.

On that day, the prosecutor said he needed more time, that he needed an expert to testify about strangulation and was "in the process of hiring Dr. Eric Keeler but "still haven't completely verified that." 7RP 2. The prosecutor also said the forensic dental person he wanted to use, Dr. Hempel, had not yet begun the process of conducting the analysis and was going to be out of town "January 5th through the 18th, January 23rd through February 1st and February 14th through the 22nd["]." 7RP 3. The main thrust of the prosecutor's position was that the state was acting with diligence and everyone was "all trying to process it as quick as possible at this point." 7RP 3.

In addition, Prosecutor Talebi urged the court to find that the timing of the crime was an "unforeseen circumstance[]" under the rule. 7RP 4. The prosecutor's theory was the defendant "murdered somebody" before the holiday and "it is unforeseen for the lab to have to process this

amount of evidence when people have already scheduled vacations.” 7RP 4. The prosecutor thought it was not the prosecution’s fault that the forensic lab had this schedule, saying, “[w]e don’t have any control over that.” 7RP 4. And he urged the court to declare the continuance in the “interest of justice” because the case involved murder. 7RP 4. He described the state as, “processing this evidence as quickly as possible” and “doing our diligence” and suggested a March trial date as more reasonable. 7RP 4.

Counsel objected that the prosecution was claiming the evidence they did not have yet was “material” but they had no way to know until the results came back. 7RP 6-7. He also thought “prosecutor training” was not a good reason. 7RP 8-9. Ultimately, he said, if the state chooses to charge a murder case, it does so knowing the speedy trial rule will apply. 7RP 7. In addition, he argued, the speedy trial rule does not contain an exception based on the prosecutor’s concern the case was “complicated” - except maybe in an extreme multi-victim case like the Green River murders. 7RP 8. The prosecutor then complained that the case was “extraordinarily similar” to the Green River mass murder case because here, too, the state was “asking the lab to process a significant amount of evidence in a short period of time.” 7RP 9.

According to the prosecutor, it was “extraordinary” that a defendant accused of murder would be “objecting to any continuance in trying to force” a speedy trial. 7RP 9. In fact, the prosecutor suggested, someone wanting a speedy trial in a case like this was itself “unforeseen[.]” 7RP 9. The prosecutor declared that the lab and others

doing the testing could not “prepare” for that unusual situation that the defendant wanted to go to trial on time, because of “the resources they have and the resource that we have.” 7RP 9.

In granting the state’s motion, Judge Dalton said there were “competing desires” of the state wanting to “be able to perfect its evidence” and build its case and “the defendant’s right to a speedy trial under the rules.” 7RP 10. The judge declared that the prosecution had not “shown a lack of diligence,” that the “different forensic analyses are material to the State’s case,” that the potential “expert pathologist” was necessary and relevant to “both identification and premeditation, as is the forensic dentist.” 7RP 10. The judge rejected the need to accommodate the prosecutor’s training as a basis, stating that was not a justification. 7RP 10. The judge concluded that there was “good cause to continue the trial.” 7RP 10. The judge set the case over to March 2nd “with a new expiration date of March 31st under the rule.” 7RP 11.

On January 2, 2015, Mr. Kalac filed a written objection to the setting of the trial date past the speedy trial date, demanding a speedy trial. CP 256-57.

On January 9, 2015, the prosecution filed a motion to “supplement” and “reaffirm.” CP 278-88; 8RP 2-3. When the parties appeared just three days later, on January 12, 2015, counsel objected to having less than five days notice for a motion, arguing that the state’s claim of “emergency” was improper. 8RP 2-4. The prosecutor told the court she had filed the motion because “the original speedy trial date expires tomorrow” (January 13). 8RP 4-5. The prosecutor had realized

she wanted more in the record to support the original motion - despite having won. 8RP 5. She maintained the "facts" had "already been developed" by December 29th, even if they had not been presented at the hearing, so that the additional evidence she wanted to put into the record to support the continuance was properly part of the court's decision. 8RP 5. Once the declarations were entered, she was going to use them in drafting the findings and conclusions for the December 29th ruling, the prosecutor said, admitting this was a "rather unique request."

The prosecutor called the process "reaffirmation of the order." 8RP 5. In addition, the prosecutor did not think she would need the extension into March. 8RP 6. The crime lab now thought it could conclude the testing "as early as reasonably January 26th" and the prosecutor argued that starting trial on that day would mean the extension past the defendant's speedy trial date would be less than 14 days over the original date, and a "cure period" would then apply. 8RP 6. The state thought their expert could be on board and the phone might be back, too. 8RP 7. One attorney for Kalac was not present, so the matter was set over. 8RP 7-10.

The parties next appeared in front of Judge Dalton on January 16, 2015. 9RP 2. Counsel again objected that the state's motion to "reaffirm" was not proper or timely, noting that the court had already ruled and extended the speedy trial date when it did so, on December 29th. 9RP 2-5, 10. The state's talk of a "cure" or the "speedy trial" date having run in January was therefore irrelevant. 9RP 4-5, 11-12. Counsel had been prepared to go to trial on January 5 based on the existing evidence the

state had at that time because it had no technical and scientific evidence he had not seen, but getting the results just before trial was not an acceptable option. 9RP 4-5, 10-12.

The prosecutor admitted her concern in wanting to supplement the record on the December motion to continue was to try to ensure that any reviewing court would uphold the December 29 continuance. 9RP 5.

Judge Dalton first ruled that it was proper for the prosecutor to "supplement the record." 9RP 12. The judge said she had granted the December 29 motion by the state because, "the State as well as the Defense should have a fair opportunity to be able to present its case." 9RP 12. The judge also thought the prosecution should not be faulted for the delays in the processing of the evidence by others. 9RP 12-13.

Judge Dalton thought the state had acted with "due diligence" but said that due to the "nature of the case" and the "amount of material which had to be examined forensically" it would have been "woefully unfair" to require the state to go to trial within the speedy trial rule time. 9RP 12-14. The judge thought that the evidence that the state was waiting to get back was so important that, if the state had been required to go forward on January 5 and no continuance been granted, the state's case would have been "gutted" and the defendant would have had "a tremendous strategical advantage." 9RP 13-14. The judge "affirmed" her prior ruling. 9RP 15.

The court did not enter written findings and conclusions until November 5, 2015. See CP 427-30. Those provided, in relevant part, that "the state exercised due diligence in seeking various forensic evaluations

of evidentiary materials and in its identification for the need and retention of a strangulation expert," that "[t]he information the State seeks from the various forensic evaluations and its retention of the strangulation expert is relevant and necessary," and that "[t]he homicide of Amber Coplin and the resulting amount of forensic material sent to the crime lab for analysis could not have been foreseen when lab employees had scheduled their leave for the Thanksgiving and Christmas Holidays." CP 429.⁴

- b. Lack of resources or responsible management of them is not "good cause" nor was it "in the interests of justice" to grant a continuance

The court's ruling on December 29 granting the state's motion was improper and Mr. Kalac's CrR 3.3 speedy trial rights were violated. As a result, this Court should reverse and dismiss all the convictions with prejudice. In general, the decision whether to grant or deny a continuance is within the sound discretion of the trial court. State v. Flinn, 154 Wn.2d 193, 199, 110 P.3d 748 (2005). A judge abuses her discretion when her decision is made on "untenable grounds" or for "untenable reasons." State v. Downing, 151 Wn.2d 265, 272, 87 P.3d 1169 (2004). But any charge not brought within the required time limit of the speedy trial rule "shall be dismissed with prejudice." CrR 3.3(h). While the rule is not constitutional, its purpose is nevertheless to further the constitutional right to a speedy trial. State v. Mack, 89 Wn.2d 788, 791-92, 576 P.2d 44 (1978).

⁴Subsequently, facts came to light about deception in the state's claims about its "due diligence." See CP 1242-53.

This Court reviews an alleged violation of the speedy trial rule de novo. State v. Carlyle, 84 Wn. App. 33, 35-36, 925 P.2d 635 (1996). Where, as here, the government chooses to detain the accused pretrial, a trial is only speedy if it is set within 60 days of the defendant's arraignment. CrR 3.3(b)(1)(i). There are "excluded periods," - times not included when computing the "speedy trial" date. Flinn, 154 Wn.2d at 199. Such periods include time when the defendant is on trial for unrelated charges or competency proceedings are in progress. See CrR 3.3(e)(2). After an excluded period, the speedy trial rule resets, so that the time for trial expires no earlier than 30 days past the end of the last excluded period. CrR 3.3(b)(5); see Kenyon, 167 Wn.2d at 136.

Here, the relevant excluded period was a continuance granted by the trial court. CrR 3.3(f) provides for continuances either by "written agreement of the party" or on a party's motion, if the continuance "is required in the administration of justice and the defendant will not be prejudiced in the presentation of his or her defense." Another "excluded period" is if there are "[u]navoidable or unforeseen circumstances affecting the time for trial beyond the control of the court or of the parties." CrR 3.3(e)(8). It appears Judge Dalton relied on both of these grounds, the "administration of justice" ground because she thought it unfair to require the state to go to trial on the speedy trial date when the case was big and the state had not received back all the testing it hoped to potentially use. gRP 12-14. The "unforeseen circumstances" ground the judge appeared to rely on was that "[t]he homicide of Amber Coplin and the resulting amount of forensic material sent to the crime lab for

analysis could not have been foreseen when lab employees had scheduled their leave for the Thanksgiving and Christmas Holidays.” CP 429. Finally, Judge Dalton was concerned that the prosecution should not be held responsible for things outside its “control,” such as the fact that the WSP crime lab did not have sufficient people available at the time the evidence had been sent to them to process. 9RP 12. As the judge would later explain, she believed that, “ the State cannot control the third parties who are evaluating the evidence for forensic purposes or for evidentiary purposes” and “cannot control the schedules of the third-party witnesses[.]” 9RP 12.

The judge abused her discretion in making these rulings, because neither the state’s failure to commit sufficient resources to the WSP crime lab nor the timing of the crime in November and vacation schedules over December holidays were “good cause” or an “unforeseen circumstance” justifying a continuance under CrR 3.3 past the “speedy trial” date.

At the outset, the state’s failure to allocate enough funding to crucial criminal justice resources like the WSP crime lab - and the resulting delay of trial - is nothing new. See Mack, supra; see also, City of Seattle v. Hinton, 62 Wn. App. 487, 815 P.2d 808 (1991), review denied, 122 Wn.2d 1012 (1993); State v. Wake, 56 Wn. App. 472, 783 P.2d 1131 (1989); State v. Kokot, 42 Wn. App. 733, 713 P.2d 1121, review denied, 105 Wn.2d 1023 (1986). In 1978, in Mack, the Supreme Court rejected the idea that the state’s failure to assign sufficient resources for trials was a proper reason for a continuance past speedy trial. 89 Wn.2d at 794. That

case involved docket congestion, difficulty in jury selections, the trial schedules of judges and the cost of hiring judges pro tem or “double setting” to try to ensure constant trials. 89 Wn.2d at 794. In holding those reasons improper, our state’s highest court held that “such delays are contrary to the public interest in the prompt disposition of criminal cases.” Id. Further, the Supreme Court declared, allowing the state to cite “congestion” for delay would mean the system would be “lacking sufficient inducement” for the state to fix the problem. Id.

A few years later, however, in 1983, “court congestion” - i.e., not having sufficient resources for criminal cases the state chose to charge - was still being cited at the superior courts as good reason to continue trials. Kokot, 42 Wn. App. at 737. The lack of a prosecutor or courtroom and the hunting trip a witness wanted to take were used as reasons to extend the time for trial but those reasons were not valid. Id. Further, the court noted, “past experience” had shown that anything less than strict compliance with the speedy trial rule will affect not only the speedy trial right but also the “integrity of the judicial process[.]” Id.

A few years later, in 1987, in Wake, the same issue again arose and understaffing, increased caseload and the government’s failure to “keep pace” with funding had caused congestion and delay at the crime lab as increased volumes of drug cases were being pursued. Wake, 56 Wn. App. at 473. Again, the state’s failure to have sufficient resources to handle the work was not a proper reason to go beyond the date of speedy trial. Wake, 56 Wn. App. at 473. In Wake, the defendant was charged on September 11, arraigned on September 24, and had a speedy trial date of

December 22. 56 Wn. App. at 473. The WSP crime lab expert was unavailable to testify in December, however, so the trial court, finding “no prejudice” to the defendant, continued the trial a few weeks in “the interests of justice.” Id.

But the Wake Court was aware that the issue involved the state’s budgetary decisions as well as a person’s rule-based rights. 56 Wn. App. at 475-76. It was the State which brought the criminal case and that case involved the “use of expert witnesses who are employed by the State and whose departmental budgets are subject to State budgetary constraints.” Id. The Wake Court then rejected the idea that “congestion at the State crime lab excuses speedy trial rights[.]” 56 Wn. App. at 475-76. The Court reiterated the concern that allowing such delay to be considered proper would create “insufficient inducement” for the state to take steps “to remedy the problem.” 56 Wn. App. at 473.

Yet again in 1991, the city of Seattle argued that “heavy caseloads and congestion” in its municipal courts justified its failure to follow requirements for timely bringing defendants to trial. See Hinton, 62 Wn. App. at 487. The court of appeals rejected this idea, saying so holding “would directly conflict with the public’s interests in having criminal matters resolved in a timely manner.” 56 Wn. App. at 492-93. More recently, a backlog occurred

The state’s failure to have sufficient resources for the cases it decides to file has again reared its head here. And a recent case in this Court is instructive and, while not precedential, persuasive. See GR 14.1 (unpublished decisions). In State v. Crandall, 176 Wn. App. 1016, 2013 WL

4774140 (2013), the defendant was charged with crimes and evidence involved a cigarette butt which appeared to have her DNA. There were a number of continuances and then the state moved to compel a DNA swab sample, because the state's index system "did not contain an adequate amount of DNA necessary to present a true match." *Id.* After hearing testimony from a forensic DNA analyst, the court decided to order the DNA cheek swab and held that there was "good cause" to continue the trial, "based on the newly obtained DNA swab and the time necessary to conduct DNA testing on the swab." In holding there was no violation of CrR 3.3, this Court noted that there was "nothing in the record suggesting that the continuance was necessary to accommodate delays at the crime lab due to inadequate funding." *Id.*, at 3-4.

Here, the prosecutors themselves admitted that the issue was resources and the state's lack. 7RP 9. And the regular, normal nature of the failure to comply with speedy trial rules and provide timely return of testing results by WSP was so regular and common in the prosecutor's experience that the prosecutor declared that a defendant wanting to go to time in consistent with the actual speedy trial rule was itself "unforeseen[.]" 7RP 9. Indeed, the prosecutor declared that the lab was unable to prepare to even try to meet the speedy trial date, nor could the prosecution, because of "the resources they have and the resource that we have." 7RP 9.

It is not "unforeseen" that a crime lab might need to process criminal case materials. Even under the newer, more forgiving CrR 3.3, a prosecutor's "reasonably scheduled vacation" may only be a valid reason

for a continuance if there is information showing the state has “responsibly managed its resources” regarding vacation. See State v. Heredia-Juarez, 119 Wn. App. 150, 79 P.3d 987 (2004); see State v. Kelley, 64 Wn. App. 755, 767, 828 P.2d 1106 (1992). Scheduling so that there are no resources available to perform any DNA testing because of normal yearly holidays hardly seems “responsible.” And the reason prosecutors’ responsibly scheduled vacations are sufficient is because of the difficult work they do in handling criminal trials and the need for them to regroup - a far different concern than whether the state’s crime lab, with a history of underfunding, fails to ensure they have sufficient resources to be able to perform testing on a murder case in a timely fashion by scheduling too many vacations at once. Notably, in cases like Heredia-Juarez, there are other reasons the continuance was proper, i.e, the defendant had requested several continuances already himself, the prosecutor’s vacation had been scheduled for almost a year, and it did not conflict with the originally scheduled trial date. Heredia-Juarez, 119 Wn. App. at 156.

The prosecutor also compared this case to the Green River serial murder investigations, saying that like that case the lab was being asked to process a lot in a short period of time. TRP 9. There is no question that, when that serial murder investigation was going on, congestion at the WSP crime lab was held sufficient to justify a continuance past speedy trial in State v. Howell, 119 Wn. App. 644, 79 P.3d 451 (2003). That investigation, however, involved at least 49 murders, as bodies of women started turning up in the Green River area in the early 1980s through the 1990s, albeit slowing down for a time - and Ridgway was arrested for four

murders on November 30, 2001, and suspected of at least 49 different murders by September of 2003. Matthew R. Wilmot, NOTE: *Sparing Gary Ridgway: The Demise of the Death Penalty in Washington State?* 42 Willamette L. Rev. 435 (2005). Because the state had no way to “anticipate the crush of work generated by this unique investigation,” the case did not involve the kind of “foreseeable administrative congestion” that was involved in Wake. Howell, 119 Wn. App. at 648-49; see also, State v. Calderon, 102 Wn.2d 348, 684 P.2d 1293 (1984) (lab supervisor testified that there was a backlog because of a number of serious homicide cases, an unusual number of robbery cases transferred from the FBI, and an employee on sick leave where a priority system had been adopted to reduce the backlog and there had been delay).⁵

Here, there was no evidence of some unusual backlog or unusual illness at the crime lab to support the continuance request. Indeed, the prosecutor made it clear that he did not ask for any rushes or emergency acceleration and just thought that it was unreasonable for anyone to even suggest complying with the January 5 date and complying with the speedy trial rule.

Prosecutors have “great discretion” in determining how and when to file criminal charges. See State v. Lewis, 115 Wn.2d 294, 299, 797 P.2d 1141 (1990); Deal v. United States, 508 U.S. 129, 134 n. 2, 113 S. Ct. 1993, 124 L. Ed. 2d 44 (1993). But that discretion is not unfettered. See

⁵Lack of funding and continued delays at WSP reportedly continue. https://www.yakimaherald.com/news/crime_and_courts/state-patrol-toxicology-test-backlog-means-big-delays-for-police/article_0787284e-6c72-11e8-acd4-fb62376f363e.html.

former RCW 9.94A.411(2) (2006). It is presumed that prosecutors follow the law and only file charges for crime against persons "if sufficient admissible evidence exists which, when considered with the most plausible, reasonably foreseeable defense that could be raised under the evidence, would justify conviction by a reasonable and objective fact-finder." Id. The state had a written confession from the day they searched the forested area in early November - and had online confessions and communications even before Kalac's arrest. Although the judge declared that the testing results for which the state was waiting was somehow material, in fact the state already had sufficient evidence to bring the murder and other charges.

Mr. Kalac was deprived of a speedy trial under CrR 3.3. This Court should so hold and should reverse and dismiss the convictions, with prejudice.

3. THE TRIAL COURT ERRED IN EXPANDING THE "EXIGENT CIRCUMSTANCES" EXCEPTION AND IN DENYING THE MOTION TO SUPPRESS EVIDENCE SEIZED AS A RESULT OF THE WARRANTLESS ENTRY INTO THE HOME

In the alternative, the trial court erred in ruling that the "exigent circumstances" exception applied to the evidence found in the warrantless entry of detectives into the home and in refusing to suppress the resulting evidence.

a. Relevant facts

At the hearing on the motion to suppress the evidence seized from the house after Coplin's body was found, Deputy Rice testified about responding to the 9-1-1 call that afternoon and entering the home,

with medics entering about four minutes later. 14RP 27-28. The deputy testified that he had gone into the home to make sure there was no need for medical assistance, but it was obvious that Coplin was dead and the medics quickly confirmed. 14RP 43-48. They left and the deputy then made his way through the apartment, doing a "clearing of the house for any suspects, just a security-sweep-type thing." 14RP 49-51. Rice described it as "a safety sweep, making sure nobody else was in the residence, nobody else was harmed, no suspects were in there, officer safety." 14RP 49-51. He said with this search he had "dispelled those concerns as far as officer safety or other victims." 14RP 51.

At that point, Rice heard detectives walking up to the apartment so he met them at the apartment threshold and briefed them. 14RP 52-54. Detective Birkenfeld, the lead detective, would testify that, after that, he and the detective with him, Detective Gundrum spoke with Deputy Rice, then went into the home. 14RP 10. Rice had asked over the radio for a camera to be brought to start taking pictures of the scene and Gundrum had complied, so Gundrum took photos while Rice pointed them to the room where Coplin's body lay. 14RP 27-32. Birkenfeld described these photos as recording "the way we went in and what we observed." 14RP 31-32.

Detective Birkenfeld knew, at the time he and Gundrum went inside the apartment, that Coplin had been pronounced dead. 14RP 28-29. Indeed, he had seen them getting into the ambulance to leave as he arrived - and Rice had told him. 14RP 28-29. Other deputies had already been putting up "crime scene tape." 14RP 19.

Detective Birkenfeld conceded that he went into the apartment to “see what observations” he could make and start investigating whether there had been a homicide. 14RP 15. The detectives were in the home for about five minutes, after which Birkenfeld went to his car and used what he had seen to request a search warrant so officers could then “enter in totality and process the crime scene.” 14RP 32-33.

At the suppression hearing, Birkenfeld admitted that he sought the subsequent warrant based on his observations of what he had seen in that warrantless walk-through/photo shoot. 14RP 39. He had not given the magistrate a description of what Rice had told him, he said, but instead relayed what he himself had seen. 14RP 39-41. In fact, Birkenfeld admitted he had not mentioned Rice’s initial entry when seeking the warrant. CP 207-218. The transcript of the first warrant request showed Birkenfeld stating they had entered the home and seen “evidence of homicidal violence, or things that appeared very important for us for this type of investigation.” CP 207-209. He described the condition of the body, the writing on the wall, blinds and license, the dentures on the floor, and the other things he had seen. CP 209-12.

In denying the motion to suppress, the judge found that Rice had entered, checked for signs of life, then performed “a quick security sweep of the remainder of the apartment to search for other possible victims or suspects without touching anything except the doors.” CP 404. The judge also found that the deputy had run into and briefed the detectives at the door about the “facts that he observed in plain view,” after which the detectives had “only retraced Rice’s path in the apartment.” CP 404.

Judge Dalton agreed that the warrant had been based not solely on the initial observations by Deputy Rice as conveyed to Birkenfeld but instead found, "Detective Birkenfeld relayed his personal observations based upon his own entry into the apartment along with other facts provided by law enforcement on scene, to include those provided by Rice." CP 404-405. The judge concluded that the warrantless entry of the detectives was based on an "exception [which] applies to emergency situations, which includes the discovery of a crime," because Rice's initial entry was lawful under the emergency exception and the other detectives had "matched" Rice's "intrusion" and thus did not "expand the scope of the initial search[.]" CP 405. She concluded that the "subsequent entry by detectives" who had arrived "hard on the heels" of Rice was a "continuation" of his lawful search. CP 405.

b. The evidence should have been suppressed

Judge Dalton erred in declining to suppress the evidence, because the "emergency" or "exigent" circumstances exception did not apply. Further, the unlawful entry formed the basis for the warrant under which all the resulting evidence was found. Under both the Fourth Amendment and Article 1, § 7, a warrantless search and seizure of evidence is *per se* unconstitutional. State v. Tibbles, 169 Wn.2d 364, 370, 236 P.3d 885 (2010); Flippo v. West Virginia, 528 U.S. 11, 14, 120 S. Ct. 7, 145 L. Ed. 2d 16 (1999); see also, RCW 10.79.040. There are only a few exceptions, which are "carefully drawn" and "jealously guarded" against expansion. See State v. Garvin, 166 Wn.2d 242, 249, 207 P.3d 1266 (2009); Thompson v. Louisiana, 469 U.S. 17, 105 S. Ct. 409, 83 L. Ed. 2d 246 (1985).

It is the state's burden of proving that an exception applies. State v. Ladson, 138 Wn.2d 343, 350, 979 P.2d 833 (1999). The "emergency" or "exigent circumstances" exception cited by the state in this case applies when "obtaining a warrant is not practical because the delay inherent in securing a warrant would compromise officer safety, facilitate escape or permit the destruction of evidence." See State v. Duncan, 146 Wn.2d 166, 171, 43 P.3d 513 (2002). But the exception only applies when 1) the officer subjectively believed someone likely needed assistance inside for health or safety reasons, 2) that belief was reasonable and 3) there was a "reasonable basis to associate the need for assistance" with the place intruded upon. See State v. Kinzy, 141 Wn.2d 373, 386, 5 P.3d 668 (2000), cert. denied, 531 U.S. 1104 (2001).

This Court reviews *de novo* whether the circumstances met the required standards. See Seattle v. Pearson, 192 Wn. App. 802, 811-12, 369 P.3d 194 (2016). The state must show by clear and convincing evidence that sufficient exigent circumstances existed based on the totality of the circumstances. Id. But the "emergency exception" cannot be invoked as a pretext for conducting an evidentiary search or entering a home simply because there *was* an emergency that has since been dispelled. See State v. Schroeder, 109 Wn. App. 30, 38, 32 P.3d 1022 (2001). Thus, in Schroeder, officers acted under the "emergency" or "caretaking" exception in going into the home and remaining at the scene of a suicide until the coroner arrived to maintain the integrity of the scene. They exceeded it, however, when they searched for identification in a coat pocket, finding drugs instead. Id. Further, the emergency which

had justified the entry into the home had ended, because the victim had died. Id.

The “emergency” or exigent exception is based upon the need to “render aid and assistance,” so that the state must show both subjectively and objectively that the purpose of the entry and search was to provide such aid. See State v. Loewen, 97 Wn.2d 562, 568-69, 647 P.2d 489 (1982). Thus, Judge Dalton’s conclusion of law that the initial warrantless entry by Deputy Rice was justified under the “emergency exception” is correct, as he was responding to a 9-1-1 call. See CP 403. But any warrantless search must be “strictly circumscribed by the exigencies which justify it” in the first place. See Terry v. Ohio, 392 U.S. 1, 25-26, 86 S. Ct. 1886, 20 L. Ed. 2d 889 (1968). And when the detectives entered, they knew that Coplin was dead, the medics had left, Rice had established that there was foul play, and the investigation had already begun with crime scene tape already being festooned.

Further, the judge’s theory that the detectives entry was “a continuation of the first, lawful entry” (CP 403) is wholly inconsistent with controlling law. There is no “murder scene exception” to the warrant requirement. Mincey v. Arizona, 437 U.S. 385, 98 S. Ct. 2408, 57 L. Ed. 2d 290 (1978). Instead, police are allowed to make warrantless entry, as Deputy Rice did here, if they reasonably believe someone inside needs immediate aid and, upon tending to that need, may make a search of the area for other victims or the killer. 437 U.S. at 392. That does not, however, authorize them to go in and out of that scene once those tasks are complete. Thompson, supra.

In Thompson, for example, deputies responded to a report of a homicide, entered and made a cursory search and found a man dead of a gunshot in the bedroom and a woman lying unconscious of an apparent overdose elsewhere. 469 U.S. at 18. Her daughter said her mom had shot her dad and then taken pills and she had responded to his call for help, then contacted police. 469 U.S. at 18-19. The daughter invited the officers in and they transported the woman to a hospital and “secured the scene.” Other officers then searched the home for other victims or suspects, after which two homicide investigators went to the home and spent about two hours inside. 469 U.S. at 19-20.

In reversing, the Supreme Court rejected the idea that, because police had been called to provide assistance, there was a “diminished expectation of privacy” in the home. 469 U.S. at 22. Further, the Court held, it was not constitutionally permissible to conduct a warrantless entry or search of a home simply because a homicide had recently happened inside. 469 U.S. at 21.

The trial court erred in denying the motion to suppress based on the warrant which the detective sought based on what he saw in the home during his warrantless entry. The decision to invade the privacy of a home is one that is constitutionally delegated to be made by a neutral magistrate, not an agent of the executive like the police. See Johnson v. United States, 333 U.S. 10, 13-14, 68 S. Ct. 367, 92 L. Ed. 436 (1946). Further, “[t]he mere fact that law enforcement may be made more efficient . . . can never by itself justify disregard of the Fourth

Amendment,” or Article 1, § 7. State v. Wisdom, 187 Wn. App. 652, 349 P.3d 953 (2015). Investigating crime would no doubt be easier and cheaper if warrants were not required, but those considerations were not what won the day in drafting the state and federal constitutions. See id. at 669. Despite the general integrity of police, “[f]airness demands that, except in emergency circumstances, a review by a neutral magistrate precede a search by a law enforcement officer” of a home. Id.

The evidence should have been suppressed. Our state’s exclusionary rule is stronger than that applied under the Fourth Amendment, which focuses on the “deterrent effect.” State v. Chenoweth, 160 Wn.2d 454, 472 n. 14, 158 P.3d 595 (2007). Article 1, § 7 is “constitutionally mandated, exists primarily to vindicate personal privacy rights, and strictly requires the exclusion of evidence obtained by unlawful governmental intrusions.” Id. Where, as here, a warrant is sought based on information gathered in an unlawful warrantless entry, the court must suppress the evidence seized under that warrant and its progeny as “fruits of the poisonous tree.” See State v. Young, 123 Wn.2d 173, 196, 867 P.2d 593 (1994). The court erred in refusing to suppress the evidence. This Court should so hold and, because the evidence from the house was acquired as “fruits of the poisonous tree,” the convictions cannot be sustained.

4. THE TRIAL COURT ERRED IN REFUSING TO GIVE INSTRUCTIONS ON THE LESSER INCLUDED OFFENSES OF MANSLAUGHTER 1 AND 2

Reversal and remand for a new trial on the first-degree murder would also be required even if there had been sufficient evidence to

support the conviction, because the trial court erred in denying Mr. Kalac's request for instructions on the lesser included offenses of first- and second-degree manslaughter. Jury instructions are sufficient only if they permit each party to argue his or her theory of the case and "properly inform the jury of the applicable law." State v. Bowerman, 115 Wn.2d 794, 809, 902 P.2d 116 (1990), disapproved of in part and on other grounds by State v. Condon, 182 Wn.2d 307, 343 P.3d 357 (2015) The test used to determine whether a lesser included offense instruction should be given is two-pronged and asks 1) if the "lesser" offense consists only of elements necessary to prove the greater, charged offense and 2) whether the evidence presented supports the inference that only the lesser offense was committed. State v. Workman, 90 Wn.2d 443, 447-48, 584 P.2d 382 (1978); see State v. Fernandez-Medina, 141 Wn.2d 448, 455, 6 P.3d 1150 (2000).

This Court reviews a trial court's refusal to give a jury instruction depending upon the reason for the decision below. See State v. Walker, 136 Wn.2d 767, 771-72, 966 P.2d 883 (1998). Where the trial court decides based on factual issues, abuse of discretion applies; where the decision is based on a legal conclusion, this Court uses the more stringent de novo review. Id.

Here, counsel proposed manslaughter 1 and 2 instructions, arguing that the jury could find that, based on his diminished capacity, the killing was not intentional. TRP 3194. The judge, however, did not think that she could give the lesser included offenses when the crime involved strangulation, because this could not be a reckless or negligent

strangulation such as if a kid got tangled up in a blind. TRP 3203-3204. The judge was concerned about the “factual basis for manslaughter on this crime,” because she could not see “the facts that would support willful and wanton disregard.” TRP 3207-3208. Judge Dalton agreed that the crimes were lesser “legally” but said it could not be factually, because she did not think it was possible “you can strangle somebody. . . willfully and wantonly.” TRP 3212-3213. The judge also cited cases from other states on the topic. TRP 3213-3220. She reaffirmed her ruling later. TRP 3234.

These rulings were in error. The right to a “lesser included” offense instruction is wholly statutory. See Condon, 182 Wn.2d at 316-17. Both the state and the defendant is entitled to present instructions on a lesser included offense if the evidence supports it. State v. Gamble, 154 Wn.2d 457, 462, 114 P.3d 646 (2005). Failure to give appropriate lesser included offense instructions can be reversible error if not deemed “harmless.” Id.; see State v. Parker, 102 Wn.2d 161, 164, 683 P.2d 189 (1984).

The Court uses a two-part analysis in determining if the defendant is entitled to a lesser offense instruction (called the “Workman” test). Under the legal prong, every element of the lesser included offense must be a necessary element of the higher crime. Workman, 90 Wn.2d at 447-48. Under the factual prong, the Court asks whether the evidence is sufficient for a jury to rationally find a defendant guilty of the lesser offense and acquit on the higher. See Gamble, 154 Wn.2d at 462-63.

Here, Judge Dalton agreed that the “legal prong” of Workman was

met but believed that the factual prong was insurmountable, because she could not see how it was possible to “recklessly” or non-intentionally strangle someone. That analysis, however, was flawed. At the outset, when determining whether the factual prong of the Workman analysis is met, the trial court is required to take the facts in the light most favorable to the party requesting the “lesser included.” Fernandez-Medina, 141 Wn.2d at 455-56.

First degree manslaughter occurs when someone recklessly causes the death of another. See RCW 9A.32.060(1)(a). Second degree manslaughter is when a person causes the death of another with “criminal negligence.” See RCW 9A.32.070. RCW 9A.08.010(1) defines recklessness and criminal negligence as follows:

RECKLESSNESS. A person is reckless or acts recklessly when he knows of and disregards a substantial risk that a wrongful act may occur and his disregard of such substantial risk is a gross deviation from conduct that a reasonable man would exercise in the same situation.

CRIMINAL NEGLIGENCE. A person is criminally negligent or acts with criminal negligence when he fails to be aware of a substantial risk that a wrongful act may occur and his failure to be aware of such substantial risk constitutes a gross deviation from the standard of care that a reasonable man would exercise in the same situation.

But further, proof of higher culpable states, such as intent, necessarily includes the lesser. See id.

As a result, the defense of diminished capacity or the similar claim of voluntary intoxication affects the Workman “factual” prong. Diminished capacity exists when the defendant has a “mental condition not amounting to insanity which prevents the defendant from possessing

the requisite mental state necessary to commit the crime charged.” State v. Warden, 133 Wn.2d 559, 564, 947 P.2d 708 (1997). Where the charged crime includes premeditation or intent to kill, diminished capacity (or voluntary intoxication) makes it a question for the jury as to whether the defendant possessed the required mental state. State v. Colwash, 15 Wn. App. 530, 531-33, 550 P.2d 57 (1976), aff’d, 88 Wn.2d 468 (1977). Put another way, the defense creates a “factual” question as to whether, if the defendant did commit the charged acts, he did so with the required mental state.

Thus, a defendant was entitled to a manslaughter “lesser” for a second-degree murder offense where the defendant wore a disguise in order to get access to the victim’s home, demanded money, broke a mason jar over the victim’s head and then stabbed her to death with a butcher knife, but claimed “diminished capacity.” Warden, 133 Wn.2d at 566. An expert testified that the defendant suffered from “PTSD” which made it so he did not have the capacity to form “intent.” Warden, 133 Wn.2d at 566. More recently, the Supreme Court addressed this in a case where the defendant was charged with aggravated murder for the death of four people, all of whom were stabbed to death and the women’s bodies partially undressed before the defendant started a fire which engulfed the home. State v. Schierman, ___ Wn.2d ___, 415 P.3d at 146 (April 2018). The defendant argued he was in an “alcoholic blackout” at the time of the crimes and asked for a manslaughter instruction but the state claimed, as it did here, that the “factual prong” could not be satisfied because the evidence indicated “premeditated intent.” Id.

The Supreme Court disagreed. Id. The defendant had established “diminished capacity,” the Court noted, and that meant there was evidence to support an inference that he was too intoxicated to form the required intent. Id.⁶ Because the jury could have believed that he committed the murder but without the required intent, the jury should have been given the manslaughter instructions. Similarly here, the jury could have believed that Mr. Kalac’s diminished capacity made him incapable of forming premeditation or intent but had committed the murder and thus the manslaughter instructions should have been given. This Court should so hold and should reverse even if no other remedy is granted.

5. IN THE ALTERNATIVE, THE EXCEPTIONAL SENTENCE DOES NOT WITHSTAND REVIEW

The trial court’s sentencing authority is defined wholly by statute. See In re the Personal Restraint of West, 154 Wn.2d 204, 213, 110 P.3d 1122 (2005). Even if other relief was not required, Mr. Kalac would be entitled to resentencing, because two of the three aggravators were not supported by sufficient evidence. Further, the trial judge considered improper matters in deciding to impose the sentence.

a. Insufficient evidence to prove aggravators

Under the Sentencing Reform Act (“SRA”), aggravators are an essential part of any effort by the state seek a sentence above the standard range. See State v. Davis, 182 Wn.2d 222, 229, 340 P.3d 820 (2014). The “presumptive”

⁶It found the error harmless, however, based on the facts of that case. Id.

sentence is one within the standard range, but trial courts may impose an “exceptional” sentence above that “standard” range in limited situations. Id.; see RCW 9.94A.535. The purpose of an exceptional sentence is “to impose additional punishment where the particular offense at issue causes more damage than that contemplated by the statute defining the offense.” Davis, 182 Wn.2d at 229. The legislature set forth a list of exclusive “aggravating factors” which must be proved to a jury, beyond a reasonable doubt. See State v. Stubbs, 170 Wn.2d 117, 124-25, 240 P.3d 143 (2010). This Court reviews the meaning and applicability of a statutory aggravating factor “as a matter of law.” Davis, 182 Wn.2d at 229. And it uses the same sufficiency of the evidence standard as that used to review a finding of guilt for an underlying crime. See State v. Yarbrough, 151 Wn. App. 66, 96, 210 P.3d 1029 (2009).

Here, the standard range for the crimes was 370-493 months. SRP 9. The prosecutor argued that the “only” and “right” sentence would be one which did not ever allow Mr. Kalac to be released. SRP 10. She argued that the crime had an impact “on this community, on this nation,” which was “heinous,” then describing the results of an internet search she had conducted of Ms. Coplin’s name that day and saying that the continued circulation of the pictures outside anyone’s control had a huge likely impact on the family “and the world will never go away.” SRP 10-11.

In imposing the exceptional sentence, Judge Dalton declared that the behavior of writing on the body and taking the photographs and posting them online showed a “lack of remorse,” because it was likely those would circulate for years and cause the family to have trouble healing. SRP 57-58. She stated she was “inclined,” because of the “competing issues” to impose “a sentence that would ensure that you stay in a prison setting for life,” because she thought that it would be hard for him to get released “at the age of 68, 70, 75, unless you

were solid again in a strong, long-term recovery program[.]” SRP 62. She then imposed “[e]ighty-two years.” SRP 63-65.

The judge entered the following findings on the judgment and sentence:

EXCEPTIONAL SENTENCE - Special allegations found by jury verdict establish substantial and compelling reason justifying a sentence above below the standard range, within the standard range for Count ___ but served consecutively to Count(s) __, or warranting exceptional conditions of supervision for Count(s) ____.

The Prosecutor did did not recommend a similar sentence. The exceptional sentence was stipulated by the Prosecutor and the Defendant.

CP 2127.

The court erred and abused its discretion in ordering the exceptional sentence, because there was insufficient evidence to support two of the three aggravating factors and the court considered improper facts in deciding to impose the sentence.

At the outset, it is arguable whether the trial court’s boilerplate findings are sufficient. Where, as here, a court imposes an exceptional sentence, it is required to “set forth the reasons for its decision in written findings of fact and conclusions of law.” RCW 9.94A.535. Further, the rules seem to contemplate that the trial court will enter a document separate from the judgment and sentence. See, CrR 7.2(d) (requiring written findings and conclusions for any exceptional sentence to be sent to the state’s Sentencing Guidelines Commission along with the judgment and sentence). In a similar context, the Supreme Court has held that a trial judge does not satisfy a requirement of considering the defendant’s actual financial situation by signing a judgment and sentence with a pre-printed “boilerplate” clause indicating that the court had “engaged in the required inquiry.” State v. Blazina, 182 Wn.2d 827, 344

P.3d 680 (2015). However, there is also a line of cases establishing that , where written findings and conclusions were entered but are insufficient, a reviewing court may consider the oral decision in filling in the blanks. See e.g., State v. Cunningham, 116 Wn. App. 219, 226, 65 P.3d 325 (2003). Such filling does not remedy the problems here, because it is the proof on the aggravating factors which is lacking and further, the court relied on improper matters in deciding to impose the sentence.

RCW 9.94A.535(3)⁷ provides, in relevant part:

Aggravating Circumstances - Considered by a Jury - Imposed by the Court

Except for circumstances listed in subsection (2) of this section, the following are an exclusive list of factors that can support a sentence above the standard range. . .

. . .

- (q) The defendant demonstrated or displayed an egregious lack of remorse.
- (r) The offense involved a destructive and foreseeable impact on persons other than the victim.

Taking the latter first, at trial it appeared the state’s theory was that the murder had a destructive and foreseeable impact on Brycon and on Paul, Coplin’s estranged spouse. TRP 3277-78. In closing, the prosecutor argued that jurors should rely on “what Brycon was feeling” when he saw his mom underneath the covers and with the driver’s license with “dead” written on it,” also urging jurors to look at, “the impact on Paul” Coplin. TRP 3288-29. According to the prosecutor, Kalac had set up the situation knowing that Brycon would come home and find his mom dead. TRP 3299-3300. The prosecutor also told jurors the crime had likely happened

⁷2016 changes did not affect the relevant sections. See Laws of 2016, ch. 6.

when the teen was “feet away,” so they should find “[i]t stands to reason that . . . it is reasonably foreseeable that this would have a destructive impact on that child.” TRP 3300.

Indeed, over defense objection to “facts not in evidence,” the prosecutor urged the “reasoned jurors” to use their “common sense” to “piece this one together” about the impact on the teen. TRP 3300.

An aggravating factor cannot be found based on facts already considered in crafting the presumptive “standard” range. State v. Nordby, 106 Wn.2d 514, 518, 723 P.2d 1117 (1986). Put another way, an exceptional sentence cannot be based on facts which “inhere” in the crime, because those facts are already considered by the legislature in setting the standard range. See State v. Law, 154 Wn.2d 85, 95, 110 P.3d 717 (2005). Instead, an aggravating factor must be unique or extreme in some way so as to distinguish the case from the majority for which a presumptive sentence would suffice. Id.

Even before the “destructive impact” factor was codified, some courts imposed exceptional sentences based on a finding of a harmful impact on nonvictims. See, State v. Johnson, 124 Wn.2d 57, 63-64, 873 P.2d 514 (1994); State v. Mulligan, 87 Wn. App. 261, 263, 941 P.2d 694 (1997), review denied, 134 Wn.2d 1016 (1998); State v. Way, 88 Wn. App. 830, 832, 946 P.2d 1209 (1997), review denied, 135 Wn.2d 1002 (1998). But the harmful impact must be extreme and unusual, not the normal impact from the relevant kind of case. See State v. Webb, 162 Wn. App. 195, 206, 252 P.3d 424 (2011). Put another way, for this aggravator to be proved, the State must show that the defendant’s actions had an

foreseeable impact on others which is distinct and not usually associated with the crime. See Way, 88 Wn. App. at 834.

Thus, where the defendant raped the victim while her young children were awake, aware of what was going on and nearby, the lasting impact on them of having witnessed the event supported the aggravator. State v. Cuevas-Diaz, 61 Wn. App. 902, 812 P.2d 883 (1991). Similarly, there was sufficient evidence to support the finding in State v. Chanthabouly, 164 Wn. App. 104, 262 P.3d 144 (2011), review denied, 173 Wn.2d 1018 (2012), where the defendant high school student planned to commit a murder at his school, brought a gun there, approached the victim in the hallway and shot them in the head from a foot away before then shooting into the victim on the floor, saying “boom, mother fucker,” while other students and administrators stood nearby. 164 Wn. App. at 125. The impact of this “execution” on fellow students was extreme and testimony was presented about the unique impact of the crime on the students who had witnessed it, as well as the school. 164 Wn.App. at 125.

In contrast, the devastating effect of a murder on the victim’s family does not support this aggravating factor unless the impact is unusually severe and specific to the particular case. See Mulligan, 87 Wn. App. at 266. *Every homicide is without question “devastating to the family of the victim.”* Id. Losing a loved one through murder will always have an impact on those left behind. See id. Unless that impact is unusual and distinguishes the crime from others, however, it cannot be an aggravating factor - and impact on “others” does not include general “impact to the community.” See Davis, 182 Wn.2d at 230-32.

Here, the state simply failed to present sufficient proof to show that the impact from the murder on Paul or Brycon was extreme and unusual for a murder case. When asked if his mother's death had a "negative impact" on Brycon, Paul said yes, including the impact "of finding his mother." TRP 1087-88. The prosecutor then asked if there was a change in the teen's behavior and Paul again responded, "[y]es." TRP 1088.

But the teen's father was then "[n]ot really" able to describe that impact, saying, "we don't have time for that" and that Brycon "deals with it every day" but was making the best of things. TRP 1099. Brycon had only received "[s]ome" counseling and his dad had not "encouraged" it. TRP 1088. Paul also was asked if he "too suffer the consequences of having discovered this" and responded, "[y]es" but gave no details. TRP 1089.

On redirect examination, the prosecutor urged him to list the "consequences for the family" from the crime and Paul responded, "[y]eah. The guys got to grow up without their mother." TRP 1096. When asked for "specific things" that had been experienced by "Brycon as an individual," Paul said, "other than the night terrors that all of the kids have had to suffer through, they're all affected." TRP 1096. A few moments later, counsel asked, "[w]as there anything specifically different about Brycon immediately following what you dealt with that day?" TRP 1097. Paul asked for clarification and the following exchange occurred:

[COUNSEL]: I'm asking for anything you noticed about him physically or emotionally closer to the time that Amber [Coplin] died, as opposed

to what we just discussed about the ongoing consequences.

[PAUL COPLIN]: No. Like I said, they're all trying to make the best with what they got.

Q: So you would say - - is it fair to say that generally all of the children feel similarly in terms of the negative impact?

A: Yes, definitely.

1097-98. The prosecutor tried asking about the "night terrors," eliciting that Brycon had experienced them but had not discussed having any recently. TRP 1097. With a series of "yes/no" questions, Paul answered, "[y]es," establishing that finding his mom had "affected" schoolwork, his relationships with others and how he got along with people, but no details. TRP 1098. And Paul again said that all of the kids "handle it differently," with the youngest still sometimes looking out the window waiting for his mom before he remembers. TRP 1099.

There is no question that the family suffered impacts from Coplin's death. But those impacts were all of the very difficult but normal impacts resulting from the death of a parent through homicide. While the state tried to claim that Brycon had suffered foreseeable impacts in some unusual way, they failed to provide sufficient evidence to support it.

There was also insufficient evidence to prove the "extreme lack of remorse" aggravating factor. Again, the factor is not supported by regular, run-of-the-mill common lack of remorse. State v. Garibay, 67 Wn. App. 773, 781, 841 P.2d 49 (1992), overruled in part and on other grounds by, State v. Moen, 129 Wn.2d 535, 919 P.2d 69 (1996); see State v. Wood, 57 Wn. App. 792, 800, 790 P.2d 220, review denied, 115 Wn.2d

1015 (1990). Instead, the lack of remorse must be significant, unusual and egregious. See State v. Ross, 71 Wn. App. 556, 861 P.2d 473, 883 P.2d 329 (1993), review denied, 123 Wn.2d 1019 (1994).

Here, there was insufficient evidence to prove an egregious, unusual lack of remorse. Mr. Kalac expressed remorse -indeed, the prosecutor admitted here that, when he testified, Mr. Kalac said "that he was very, very remorseful about what happened." TRP 3034. She just did not believe it, even trying to "rebut" it with the psychologist by seeking an improper opinion on that point. See TRP 3030-37.

Proof of egregious - not average - lack of remorse has been found when, after a murder, the defendant told officers, "I'm glad the bitch is dead" and he hoped she had "felt a lot of pain" for the position she had put him in. State v. Burkins, 94 Wn. App. 677, 698, 973 P.2d 15, review denied, 138 Wn.2d 1014 (1999). There was also sufficient evidence where the defendant killed his disabled 80-year-old roommate who was legally blind in one eye and only partially sighted in the other after an argument, starting by bashing him in the head and then shooting him from 12 inches away, and later said he had killed a dog the same night and was much more sorry about the dog . State v. Stuhr, 58 Wn. App. 660, 664, 794 P.2d 1297 (1990). Egregious lack of remorse was supported in Wood, supra, where the defendant whose boyfriend, Joe, helped her murder her husband, taunted Joe callously about the sound her husband had made as he was dying, saying, "Hey, Joe. Gurgle, gurgle." 57 Wn. App. at 975.

And an egregious lack of remorse was found when, in a second-degree felony murder case, the defendant used torture to "potty train"

his 3-year-old son, beating him with a yardstick, pushing him to the floor, kicking him in the buttocks, once forcing him to eat a jalapeno pepper until he threw it up. State v. Creekmore, 55 Wn. App. 852, 860-62, 783 P.2d 1068 (1989), review denied, 114 Wn.2d 1020 (1990). On the night the child died Creekmore tried to keep his mom from tending to the toddler even though he had vomited on himself and was weak and limp with marks across his bottom and the left side of his abdomen. 55 Wn. App. at 858. He refused to take the child to the hospital and, after the child died, yelled at his grieving mother to shut up and go to sleep because her crying was keeping him awake. 55 Wn. App. at 858.

Here, as the prosecutor herself admitted below, when he testified, Mr. Kalac specifically expressed his remorse. And at sentencing, when asked if he wished to speak on his own behalf, Mr. Kalac said, "[t]he only thing that I can say is that I'm truly sorry, and I will never forgive myself." SRP 53. The state's theory that there was "lack of remorse" was based upon the belief that there was somehow such lack shown by having posted the photos just after the death but it was never explained. Because the state presented insufficient evidence to prove the aggravating factors, those factors must be stricken and the exceptional sentence upon which they depend reversed, even if the conviction is deemed supported by sufficient evidence regarding premeditation.

The exceptional sentence should be reversed and resentencing is required. Where, as here, there are multiple aggravating factors, this Court will reverse and remand for resentencing when it invalidates any factor, unless it is convinced beyond a reasonable doubt that the

sentencing judge would impose the same sentence even without the invalid factor - for example, if the lower court entered a finding that , each of the factors individually would support the exceptional sentence by themselves. See, e.g., In re the Personal Restraint of Crow, 187 Wn. App. 414, 425-26, 349 P.3d 902 (2015). No such findings were made here.

b. The court considered improper facts

Finally, resentencing would still be required even if there was no sufficiency issue with two of the three aggravators, because the sentencing judge acted outside her statutory authority and erred in considering the possibility that Mr. Kalac might earn “good time” early release credits when deciding to impose the sentence. Under the SRA, a “trial court may not consider a defendant’s potential good time credits when imposing an exceptional sentence.” Crow, Jr., 187 Wn. App. at 425-26. This is because the “framework” used in sentencing “indicates that earned early release time is to be considered only after the offender has begun serving his sentence.” State v. Wakefield, 130 Wn.2d 464, 477-78, 925 P.2d 183 (1996). Further, it would be “inappropriate” to impose a sentence above the presumptive standard range “based on an entirely speculative prediction of the likely behavior of an offender while in confinement.” See State v. Fisher, 108 Wn.2d 419, 429 n. 6, 739 P.2d 683 (1987).

Thus, in Crow, Jr., the defendant was convicted of arson and of two counts of second-degree murder, each with two aggravators, one for “deliberate cruelty” and one for the crimes involving a “good Samaritan.” 187 Wn. App. at 417-18. At sentencing, the prosecution asked for an

exceptional sentence and the trial court asked, “what credit for good time in the future” the defendant would be “eligible to receive that would subtract from the sentence” the prosecutor had recommended. *Id.* It was established that the maximum was ten percent for “good time.” 187 Wn. App. at 418. The judge then told the defendant, “[w]ith the imposition of this sentence, Mr. Crow, you will serve, even with a good time credit, a full 50 years of incarceration.” 187 Wn. App. at 419.

Here, in deciding what sentence to impose, the judge began:

THE COURT: The standard range in this case is 31 to 41 years, maximum 493 months. The defendant has the opportunity, while incarcerated, to earn some of that time as a good-time credit. It’s not 30 percent. I think it’s - - -

[COUNSEL]: It’s 10 now, I believe.

THE COURT: 10 percent?

[COUNSEL]: All right. So top of the range sentence 493 would mean that - - and he’s 35. You’re 35 right now, Mr. Kalac?

THE DEFENDANT: Yes, Ma’am.

THE COURT: All right. So 38 years gets you to 73. That’s a standard-range sentence.

SRP 53. A little later, she noted that, if sentenced to the standard range, Kalac was likely to be released “well into his late 60s or 70s, if he should survive that.” SRP 57.

Judge Dalton erred in considering the possibility of earned early release in deciding whether to impose an exceptional sentence. Reversal and remand for resentencing is thus required even if no other relief is granted.

E. CONCLUSION

For the reasons stated herein, this Court should reverse and dismiss all of the convictions for violation of CrR 3.3, or because the evidence should have been suppressed, or at the least the conviction for first-degree murder and the accompanying aggravating factors for insufficient evidence. In the alternative, remand for a new trial is required on the murder charge because of the refusal to instruct the jury on manslaughter 1 and 2. Finally, if no other relief is granted, the exceptional sentence should still be reversed.

DATED this 12th day of August, 2018.

Respectfully submitted,

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DECLARATION OF SERVICE BY EFILING/MAIL

Under penalty of perjury under the laws of the State of Washington, I hereby declare that I sent a true and correct copy of the attached Opening Brief to opposing counsel VIA this Court's upload service, to Kitsap County Prosecutor's Office, and to Mr. Kalac, by depositing a true and correct copy into first-class postage prepaid, at the following address: David Kalac, DOC 325173, WSP, 1313 N. 13th Ave., Walla Walla, WA. 99362.

DATED this 12th day of August, 2018,

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APPENDIX A

CITATION TO VERBATIM REPORT OF PROCEEDINGS

Pretrial proceedings

November 7, 2014	1RP
November 14, 2014	2RP
*November 17, 2014	3RP (volume includes multiple dates)
*November 18, 2014	3RP (volume includes multiple dates)
November 21, 2014	4RP
December 5, 2014	5RP
*December 15, 2014	3RP (volume includes multiple dates)
December 19, 2014	6RP
December 29, 2014	7RP
January 12, 2015	8RP
January 16, 2015	9RP
January 23, 2015	10RP
January 30, 2015	11RP
February 3, 2015	12RP
*February 9, 2015	3RP (volume includes multiple dates)
February 20, 2015	13RP
*February 27, 2015	3RP (volume includes multiple dates)
April 13, 2015	14RP
April 17, 2015	15RP
April 23, 2015	16RP
May 29, 2015	17RP
June 9, 2015	18RP
June 22, 2015	19RP
October 28, 2015	20RP
November 13, 2015	21RP
+December 7, 2015	22RP (volume includes multiple dates)
+December 8, 2015	22RP (volume includes multiple dates)
+December 11, 2015	22RP (volume includes multiple dates)
December 28, 2015	23RP
March 4, 2016	24RP
August 29, 2016	25RP
August 30, 2016	26RP
#March 2, 2016	27RP (volume includes multiple dates)
#August 22, 2016	27RP (volume includes multiple dates)
September 2, 2016	28RP
October 4, 2016	29RP
October 14, 2016	30RP
November 29, 2016	31RP
December 9, 2016	32RP
#January 13, 2017	27RP (volume includes multiple dates)
February 10, 2017	33RP
February 21, 2017	34RP
February 23, 2017	35RP

Trial proceedings

The trial transcript is in 25 separate volumes, chronologically paginated, and will be referred to as "TRP." The relevant dates are as follows:

March 6, 2017	TRP
March 7, 2017	
March 8, 2017	
March 13, 2017	
March 14, 2017	
March 15, 2017	
March 16, 2017	
March 20, 21, 22, 2017 (volume includes multiple dates)	
March 23, 2017	
March 27, 2017	
March 28, 2017	
March 29, 2017	
April 3, 2017	
April 4, 2017	
April 5, 2017	
April 6, 2017	
April 7, 2017	
April 10, 2017	
April 11, 2017	
April 12, 2017	
April 13, 2017	
April 14, 2017	
April 17, 2017	
April 18, 2017	
April 19, 2017	
April 21, 2017	36RP
May 16, 2017	SRP (sentencing)
#June 6, 2017	27RP (volume includes multiple dates)
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