FILED
Court of Appeals
Division II
State of Washington
4/1/2019 2:16 PM

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

STATE OF WASHINGTON,

Respondent/Cross-Appellant,

v.

DAVID MICHAEL KALAC,

Appellant/Cross Respondent.

ON APPEAL FROM THE SUPERIOR COURT OF
KITSAP COUNTY, STATE OF WASHINGTON
Superior Court No. 14-1-01073-5

BRIEF OF RESPONDENT/CROSS APPELLANT

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SERVICE	Kathryn A. Russell Selk 1037 NE 65th St Seattle, Wa 98115-6655 Email: KARSdroit@gmail.com	This brief was served, as stated below, via U.S. Mail or the recognized system of interoffice communications, *or, if an email address appears to the left, electronically.* I certify (or declare) under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct. DATED April 1, 2019, Port Orchard, WA **Original e-filed at the Court of Appeals; Copy to counsel listed at left.** **Office ID #91103 kcpa@co.kitsap.wa.us**

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I. COUNTERSTATEMENT OF THE ISSUES

1. Whether there was sufficient evidence for the jury to find that Kalac premeditated Amber's murder where the evidence showed Amber suffered blows to the head prior to being strangled, that Kalac first strangled Amber manually from the front, and then from the rear with a shoelace, and there was also evidence of motive?

2. Whether the trial court acted well within its discretion under CrR 3.3 in granting the State's motion for continuance where the State needed time to process DNA and other forensic evidence and its expert was unavailable on the date set for trial?

3. Whether the trial court properly denied Kalac's suppression motion where, as Kalac concedes, the initial warrantless entry by Deputy Rice was proper, and where Detective Birkenfeld, who entered the home as Rice exited it, did not exceed the scope of Rice's initial entry, and merely viewed what Rice did and did not seize any evidence, and then promptly obtained a warrant?

4. Whether any error in refusing to instruct the jury on manslaughter would be harmless where the jury was instructed on diminished capacity and intentional murder but still found premeditation?

5. Whether the trial court properly imposed an exceptional sentence

where:

a. Evidence that Kalac posed Amber's dead body, took photos of it and posted them online with flippant comments, along with other similar actions, provided a more than sufficient basis for the jury to conclude he demonstrated an egregious lack of remorse;

b. Any reasonable jury could conclude that leaving a body to be found by the victim's barely teen-aged son, who was then affected such that he was still "coping" with the crime nearly two years after it occurred, which resulted in changed behavior, night terrors, had a negative effect on his schoolwork, and his relationship with his family, and left him, at the tender age of 15, not liking people, satisfied the aggravator that the murder had "destructive and foreseeable impact on persons other than the victim";

c. Kalac's sentence should be affirmed even if only one aggravating factor is upheld because the trial court explicitly stated it would impose the same sentence even if only one of the factors remained; and

d. The record does not show that the trial court improperly based its exceptional sentence on the fact that Kalac would receive earned early release?

6. Whether Kalac's DNA and filing fees and interest assessment should be stricken on remand? [CONCESSION OF ERROR]

7. Whether the trial court erred in allowing testimony of and instructing the jury on diminished capacity under circumstances where the proffered evidence did not establish a forensic application of the symptoms of the alleged disorder to the intent elements and where the testimony of the defense expert and the trial court's ruling confounded voluntary intoxication with diminished capacity? [CROSS APPEAL]

II. ASSIGNMENTS OF ERROR ON CROSS APPEAL

1. The trial court erred in concluding that Dixon's testimony and opinion met the foundation necessary to proceed with a diminished capacity defense.

2. The trial court erred in finding that Dixon's testimony established how the alleged mental condition impaired Kalac's ability to form the requisite level of intent.

III. STATEMENT OF THE CASE

A. PROCEDURAL HISTORY

David Michael Kalac was charged in Kitsap County Superior Court with murder in the first degree (domestic violence) with the aggravating circumstance that the offense involved a destructive and foreseeable impact on persons other than the victim. CP 20. Kalac was subsequently arraigned and trial was set for January 5, 2015, with a time-for-trial expiration date of

January 13, 2015. CP 950, 3RP 8.[1]

On Friday, December 19, 2014, the State moved for continuance of the trial date. CP 180. The State based the motion to continue on multiple grounds, each of which were set forth in a certification of former Deputy Prosecuting Attorney Farshad Talebi. *Id.* The grounds included the following:

1. DPA Davy's planned attendance at a national conference conflicted with the scheduled trial date. Davy had been on a waitlist for over a year before being accepted as an attendee,

2. DNA testing was not completed and the WSP crime lab had advised that the samples were not yet assigned to technicians because of the holidays. Additionally, there was no information back yet from either of the labs that were processing the handwriting or fingerprint analysis.

3. The FBI had not completed its analysis of Kalac's cell phone and had not given a timeline of when the results could be expected.

4. Although the autopsy of the victim's body had been completed on November 6, 2014, the parties had not yet received a toxicology report. Talebi had contacted the coroner's office and had been told that they had not yet received the results of the toxicology report.

[1] To avoid confusion, the State will follow the appellant's numbering scheme for the reports of proceedings, as set forth in Appendix A to his brief. To further assist the reader, the State will follow the appellant's designation of the consecutively paginated trial reports as "TRP," but will add the court reporter's volume numbers as well. Thus, *e.g.*, the report for April 5, 2017, will be designated as 15TRP.

5. The State was attempting to procure an expert to assist them in the presentation of evidence regarding strangulation.

6. Kalac had been involved in another incident that might affect the present case and potentially negotiations between the parties.

CP 181. Kalac filed a written response arguing that simple convenience to the prosecutor was not sufficient grounds to continue the trial, that the State had been dilatory in seeking forensic testing, in submitting items for testing, and in overall preparation of its case. CP 221, et seq.

The hearing was held on Monday, December 29, 2014. In the intervening days between the filing of the State's original motion to continue and the hearing, the following changes in circumstances had occurred:

1. The State had received a handwriting analysis report, CP 899; and
2. The State had been made aware on December 22, 2014, that the WSP crime lab had assigned the samples for DNA analysis. CP 1021.

Several critical grounds alleged in the State's original motion remained:

1. The analysis of Kalac's cell phone was incomplete, 7RP 5;
2. The State had not yet been able to retain a strangulation expert, 7RP 2;
3. The testing of the DNA evidence had not been completed, 7RP 5;
4. The forensic dental analysis was still pending, and further,

> the dental expert would be unavailable January 5 through 18, January 23 through February 1, and February 14 through 22. 7RP 3.

Thus, regardless of the change in circumstances between the date the motion was filed and the hearing, the need for a continuance persisted. At the hearing, the trial court noted Kalac's objection, but granted the continuance:

> This is an issue that is within the sound discretion of the trial court. I do find that the State has not shown a lack of diligence. I do find that the different forensic analyses are material to the State's case; also that their potential expert pathologist is necessary and relevant to the issues of both identification and premeditation, as is the forensic dentist.
>
> What is not factoring into my decision is Mr. Davy's prosecutor training. I agree with Mr. Anderson that that is not justification to continue a trial beyond the defendant's speedy trial rights. However, in weighing the differences between the State's ability to be able to prove its case and the defendant's desire to have a speedy trial in this particular situation, I am persuaded that there is good cause to continue the trial.

7RP 10. Trial was reset to March 2, 2015. CP 394.

On February 17, 2015, the trial court entered the written order granting the continuance to March 2. 13RP 2. At the same hearing, Kalac moved to continue the trial until June 2015, "[i]n order to be adequately prepared to go to trial." CP 391-92. Trial was reset to August 3, 2015. 13RP 30.

Kalac moved to suppress the search of the victim's bedroom, alleging that warrant was invalid. CP 187. The motion was heard on April 13, 2015. 14RP 3. After considering the testimony of the Kitsap County

sheriff's deputies who were involved, 14RP 6, 43, the court denied the motion. 15RP 8-9.

On June 22, 2015, Kalac moved to continue trial until November 9, 2015. 19RP 3, 5. The motion was granted. 19RP 6.

On October 26, 2015, Kalac moved to continue trial until "January or February 2016." CP 415. The case was reset to January 13, 2016. 20RP 10.

On November 12, 2015, Kalac filed a motion to reconsider the December 29, 2014, order granting the continuance, as well as a motion to dismiss under CrR 8.3. CP 432. That motion was denied on December 11, 2015. 22RP 205; CP 1220. Kalac sought discretionary review of the latter order, which was denied. CP 1242. The trial was twice continued on Kalac's request pending the discretionary review proceedings, ultimately to September 19, 2016. CP 1217, 1233; 24RP 4.

Defense counsel Ron Ness died on August 6, 2016. 27RP 217. Co-counsel Adrian Pimentel thereafter announced he would be changing the defense strategy to one of diminished capacity or intoxication. 27RP 219. The State objected to any further continuance due to the change of strategy. 27RP 222.

On September 2, 2016, Kalac again requested a continuance. The

trial was reset to October 31, 2016. 28RP 9.

On October 14, 2016, the trial was continued to allow the State time to prepare for Kalac's diminished capacity evidence. Trial was reset to February 21, 2017. 30RP 11.

Trial commenced with motions in limine on February 10, 2017. 33RP 10. At the next court date, February 21, 2017, it was learned that defense counsel had fractured his shoulder. 34RP 3. As a result, voir dire did not begin until March 6, 2017. 1TRP 2.

On March 6, 2017, the State moved to exclude the testimony of Kalac's diminished capacity expert, David Dixon. CP 1365. The court heard an offer of proof from Dixon and from the State's expert Richard Yocum. 6TRP 790, et seq. The court thereafter denied the State's motion, 6TRP 927.[2]

The evidentiary portion of trial began on March 16, 2017. 7TRP 1019. At the close of the evidence, Kalac requested instructions on diminished capacity, which was granted, and first-degree manslaughter, and voluntary intoxication, which were not. CP 1922, 1941, 1945.

The jury found Kalac guilty as charged in an amended information

[2] The offers of proof and the court's ruling will be addressed more thoroughly in the argument portion of this brief, *infra*.

of first-degree murder,[3] theft of a motor vehicle, and second-degree possession of stolen property, all with domestic violence special verdicts. CP 2095-97, 2100-01. The jury also found that the State had established the aggravating circumstances that the murder involved a destructive and foreseeable impact on persons other than the victim, and that Kalac displayed an egregious lack of remorse. CP 2098-99.

Kalac's standard range, based on an offender score of 8 was 370-493 months. CP 2126. The trial court entered an exceptional sentence of 984 months on the murder, with standard range sentences on the remaining offenses to run concurrently. CP 2127. Findings of fact and conclusions of law in support of the exceptional sentence were duly entered. CP 2190.

Kalac filed a timely notice of appeal. CP 2140. The State cross-appealed the trial court's rulings regarding the diminished capacity defense. CP 2183.

B. FACTS

BC was 13 years old in November 2014. 7TRP 1019. He was the son of Paul and Amber Coplin. 7TRP 1019-20. Paul and Amber had married in 2006. 7TRP 1078. They had three other sons in addition to BC.

[3] The information was amended several times during the several years the case was pending. CP 20, 1295, 1302, 1342, 1361. Additionally the trial court dismissed the charge of violating human remains before the case was submitted to the jury. 22TRP 3192.

7TRP 1078. At the time of the murder they were still married but had been separated for several years. 7TRP 1078. They nevertheless got along well. 7TRP 1078. They texted daily and spoke when they dropped the boys off. 7TRP 1078. BC lived with his mother and the other three lived with Paul. 7TRP 1079. Paul last spoke to Amber on Sunday November 2 when she dropped the boys off. 7TRP 1079. They texted on Monday. 7TRP 1079. Nothing in their conversation or the texts caused him concern for Amber's well-being. 7TRP 1079.

Kalac lived with Amber and BC at the time. 7TRP 1021-22. At some point, Amber had kicked Kalac out because he was abusive toward BC. 7TRP 1025. Kalac objected that it was "over a stupid kid." 7TRP 1026. After a time, Kalac offered Amber $250 a month and BC $50 a month to let him move back in. 7TRP 1027.

The apartment had two bedrooms. 7TRP 1028. Kalac slept in Amber's room. 7TRP 1029. BC did not have much interaction with Kalac except for video games. 7TRP 1028. Both Kalac and Amber worked full time. 7TRP 1028.

BC described Kalac and Amber's relationship as "friends with benefits." 7TRP 1029. They got along well when they were not drinking. 7TRP 1030. When they drank they argued a lot. 7TRP 1030. Amber would tell Kalac to leave but he would refuse. 7TRP 1030.

Kalac did not have a car; his boss picked him up for work. 7TRP 1032. Amber drove to work in her gold Ford Focus. 7TRP 1033. It had two spare tires on the back. 7TRP 1034. Kalac never drove Amber's car. 7TRP 1034.

When BC got home from school there was usually no one there. 7TRP 1034. Kalac typically got home around 6:00 p.m. and Amber around 10:00 p.m. 7TRP 1034.

BC last saw his mother alive on November 3, 2014. 7TRP 1035. He was in his room watching Netflix, and Kalac and Amber were elsewhere in the home. 7TRP 1036-37. It was a normal evening. 7TRP 1037.

Later in the evening, he heard Amber and Kalac arguing. 7TRP 1038. Amber told Kalac he needed to leave. 7TRP 1038. Then she came to BC's room and asked for his sleeping bag. 7TRP 1039. BC assumed from the argument that Kalac would be sleeping on the couch that night. 7TRP 1040.

The arguing got louder, so BC went out to the kitchen to get some water and see what was going on. 7TRP 1040. They were in the living room and the sleeping bag was on the couch. 7TRP 1041.

The next morning BC got up and went to school. 7TRP 1041. When he was getting ready for school he noticed that Kalac was not there. The

sleeping bag, along with Kalac's suitcase and laptop, which were normally in the living room, were not there either. 7TRP 1042. Amber's bedroom door was shut, which was normal for a weekday morning. 7TRP 1043.

While at school, BC had a "weird feeling in [his] stomach," like something was wrong, and tried to text Amber, but she did not respond. 7TRP 1043, 1080. He called and texted Paul, who came and picked him up. 7TRP 1044, 1080. Paul bought him some orange juice and then took him back to the apartment. 7TRP 1044. Paul did not come in; he just dropped BC off. 7TRP 1044, 1081.

BC got back to the apartment around 11:30 a.m. and went into his room. 7TRP 1044. He played Xbox for a while and then went to sleep. 7TRP 1044. Amber's bedroom door was shut, but that was normal. 7TRP 1045.

BC woke up and took a shower and had some food. 7TRP 1045. When he went by Amber's room, he noticed an odd smell. 7TRP 1045. He went into Amber's and her stuff was all over. 7TRP 1045. Her ID was on a pillow on her head and it said "dead." 7TRP 1045. He did not see Amber at the time. 7TRP 1046. He tried to turn on the light, but it was not working. 7TRP 1047. He tried to climb onto the bed but then touched Amber in the bed. 7TRP 1047. Amber was not a heavy sleeper, so he became concerned when she did not wake up. 7TRP 1048.

BC texted Paul and told him that he thought something was wrong

with his mother. 7TRP 1048, 1081. Paul arrived in less than 10 minutes with BC's brother AC, who was also 13. 7TRP 1050, 1082.

The boys stayed in the living room and Paul went into the bedroom. 7TRP 1082. The light was ripped from the wall and the contents of Amber's purse were strewn all over the room. 7TRP 1083.

On the bed was what looked like a pile of blankets. Amber's license was on the pillow and "dead" was written on it. 7TRP 1084. Paul lifted the pillow and Amber was underneath it. 7TRP 1050, 1084. She was dead. 7TRP 1085. Paul lifted the pillow and the blanket. 7TRP 1050. Paul freaked out and ran out of the house and called 911. 7TRP 1085-86. Amber's car was gone when Paul discovered her body. 7TRP 1086.

Sheriff's Deputy Greg Rice arrived at the scene at 3:27 p.m. 7TRP 1102. Rice contacted Paul there. 7TRP 1102. Rice entered the apartment and found Amber's body. 7TRP 1103. She was lying in the bed with the blanket pulled up to her chin. 7TRP 1103. There was blood coming from her nose and she was obviously deceased. 7TRP 1103. Her body was cold to the touch. 7TRP 1104. Aid personnel entered the apartment and confirmed that she was dead. 7TRP 1104.

Sheriff's Detectives Chad Birkenfeld and Timothy Keeler were nearby when the call came in and proceeded to the scene. 7TRP 1110. They arrived as Rice was coming out of the apartment. 7TRP 1110. Birkenfeld

and Detective Elizabeth Gundrum, who had also just arrived, entered the apartment. 7TRP 1111. They proceeded to the bedroom. 7TRP 1113.

On the wall was a print that someone had written "she killed me first" on. 7TRP 1114. The blinds were closed and had "bad news" written on them. 7TRP 1114. All the writing on walls, etc. was done with a black sharpie. 9TRP 1290.

Amber's face had bruising and redness on it. 7TRP 1114. There was blood and other bodily fluids coming from her nose. 7TRP 1114. There was what appeared to be blood on the wall. 7TRP 1115. A half-set of dentures were on the floor. 7TRP 1115. There was a purse on the floor near the window with its contents dumped out. 7TRP 1115. Birkenfeld and Gundrum left the apartment and sought a search warrant for the home. 7TRP 1115.

Once the warrant was obtained, Gundrum and Detective Nicole Menge processed the scene. 7TRP 1119. On the nightstand was paperwork from the Kitsap Public Health District regarding an abortion. 9TRP 1312.

Amber's body was mostly on the right side to the middle of the bed. 9TRP 1387. She was on her back with her hands out to her sides. 9TRP 1387. Her feet were over the bed, slightly. 9TRP 1387. She was covered with sheets and a comforter all the way up to her neck. 9TRP 1388. Amber had a lot of bedding around her. As the detectives removed the bedding,

they became aware of more injuries. 9TRP 1323.

Amber had writing all over her body. 9TRP 1323. There was no sheet under her. 9TRP 1328. The writing on the body was the same as that on the walls – made with a sharpie. 9TRP 1328.

On her torso was written "just fucking mean" and "Fuck dude." 9TRP 1329. There were two cut marks adjacent to the J. 9TRP 1330. Below that, in her pubic area, was written "Dan ..." 9TRP 1331, 1389. There were also horizontal lines and arrows drawn on her breasts, with the lettering "Bite marks gave AD." 9TRP 1329. The arrows pointed to her nipples and the bite marks on each one. 9TRP 1329. On her shoulder it appeared to say "lace hands first though." 9TRP 1333. There was an abrasion under her chin. 9TRP 1333. There were a pair of sweatpants in the laundry basket. 10TRP 1448. The crotch was very wet and smelled of urine. 10TRP 1448.

A Good to Go! toll bill showed that Amber's car crossed of the Tacoma Narrows at 5:33 a.m. on November 4. 10TRP 1477.

At 6:20 a.m. that morning Kalac texted his employer that "Shit is all fucked now. You will see me in the news." 9TRP 1370. He further stated, "There will be no more me ever. You'll read about it. That's all." 9TRP 1370.

Later that day, Kalac pawned his laptop in Olympia for $125.

10TRP 1506, 1516. According to the surveillance video, he arrived at 12:59 p.m. and left at 1:27 p.m. 10TRP 1510, 1513.

Surveillance footage from the Walmart in Chehalis showed Amber's car arriving in the Walmart parking lot. 10TRP 1463. Kalac got out of the car and went in and made a purchase around 2:33 p.m. 10TRP 1463-64, 1490. Video from inside the store showed Kalac purchasing a BB gun. 10TRP 1492. Kalac came out of the store and got in the car at 2:44. 10TRP 1497. He left the parking lot at 3:11. 10TRP 1494. It appeared that Kalac was posting to 4chan, an online bulletin board site, while he was sitting in the car at Walmart, based on the timing. 10TRP 1496.

Kalac posted photos of Amber's dead body to 4chan, starting at 2:56 p.m. In the photos Amber was naked, and the ligature marks were visible on her neck, but there was no writing on her body. 10TRP 1458. Her body was posed with pillows under her neck and back that were not there when her body was discovered. 10TRP 1458. The photos had commentary along with them, including:

> "Turns out its way harder to strangle someone to death than it looks in the movies."
>
> "She fought damn hard."
>
> "Check the news for port orchard Washington in a few hours. Her son will be home from school soon. He'll find her, then call the cops. I just wanted to share the pics before they find me. I bought a bb gun that looks realistic enough. When they come, I'll pull it and it will be suicide by cop. I understand the doubts. Just check the fucking news. I have

> to lose my phone now."
>
> "pro tip: tie their hands and feet first or you are gonna have a bad time."

Exhibit 158. The metadata for the pictures of Amber's body on Kalac's phone indicated the pictures were taken on November 4 between 1:07 and 1:09 a.m. 13TRP 2062-66. The file names of the pictures matched those of the photos posted on 4chan. *Id.*; Exh 158.

Kalac was sighted by Portland police around 1:15 a.m. on November 5. 11TRP 1550. Kalac pulled into a Jack in the Box and then the police attempted to initiate a traffic stop. 11TRP 1553-55. As soon as the officer turned on his lights, Kalac drove over the curb and across the grass, fleeing the restaurant. 11TRP 1556. Police pursued him for a considerable period, but eventually gave up the pursuit. 11TRP 1556-67.

Later that day, around 4:00 p.m., a citizen reported seeing Amber's car near the area where the chase was called off. 11TRP 1574-75, 1578. Police responded and found the car in a parking lot. 11TRP 1577. They impounded the car. 11TRP 1577.

Around 8:46 p.m. Kalac approached a Clackamas County sheriff's deputy and said, "I think I have a warrant out of Port Orchard." 11TRP 1590, 1592. The deputy arrested him. 11TRP 1593. He also seized his backpack along with a wallet and a black sharpie. 11TRP 1594.

Clackamas deputies recovered a number of items from a nearby abandoned transient camp. 11TRP 1604. There was a box spring that had been recently written on with a black sharpie: "Dave's last stand." 11TRP 1610, 1612. The BB gun was on the box spring. 11TRP 1612. There was also a note written in black sharpie:

> I killed Amber Coplin. I strangled her with my hands then a shoelace. I had no reason other than I was drunk and she pissed me off. Running from the cops was so fun.

11TRP 1614. The note was signed "DK." 11TRP 1614. A handwriting expert concluded that it was highly probable Kalac wrote the note found at the camp. 12TRP 1764.

Kalac had been Malinda Cool's her best friend for 19 years. 8TRP 1249. Around the time of the murder, she texted Kalac about some money he owed her and he responded that he had done "something really bad, and he would either be in jail or dead by the end of the day." 8TRP 1249. She contacted the police and forwarded the messages to them. 8TRP 1249. Kalac had told her earlier that Amber was pregnant. 8TRP 1253. He was really excited and happy about it. *Id.*

Wendy Nelson was Amber's best friend. 10TRP 1518. She referred to Kalac as "Douchebag Dan" or "DD" for short, but not usually to his face. 10TRP 1519-20. She and Amber called him that when they were talking. 10TRP 1519. Amber got an abortion shortly before she was killed. 10TRP

1522.

The medical examiner concluded that Amber died as a result of manual and ligature strangulation. 12TRP 1784. The bruising showed that the ligature was wrapped at least twice around her neck. 12TRP 1789. It appeared that Kalac was behind her when he used the ligature. 12TRP 1791. The recovered cords were consistent with the ligature marks. 12TRP 1873.

She had internal bruising in her neck that was not where the ligature had been. 12TRP 1798. This indicated that there was also significant manual strangulation, actually resulting in a broken hyoid bone in her neck. 12TRP 1799-1800. The doctor did not see how the ligature in this case could have broken the hyoid bone. 12TRP 1873. The manual strangulation likely preceded the ligature and was from the front. 12TRP 1818.

She also had a lot of bruising on her face indicating she was struck multiple times. 12TRP 1804. There were multiple blows to her head and upper torso. 12TRP 1804. She had extensive injuries to her scalp. 12TRP 1806. The bruising on her chin was typical of someone struggling while being strangled. 12TRP 1792. Everything was consistent with a struggle at the time of death. 12TRP 1808.

IV. ARGUMENT

A. THERE WAS SUFFICIENT EVIDENCE FOR THE JURY TO FIND THAT KALAC PREMEDITATED AMBER'S MURDER WHERE THE EVIDENCE SHOWED AMBER SUFFERED BLOWS TO THE HEAD PRIOR TO BEING STRANGLED, THAT KALAC FIRST STRANGLED AMBER MANUALLY FROM THE FRONT, AND THEN FROM THE REAR WITH THE SHOELACE, AND THERE WAS ALSO EVIDENCE OF MOTIVE.

Kalac argues that there was insufficient evidence for the jury to find that he premeditated the murder of Amber Coplin. This claim is without merit because the evidence showed Amber suffered blows to the head and body prior to the strangulation. Additionally, both the medical examiner's opinion, as well as Kalac's own note showed that Kalac first strangled Amber manually from the front, and then from the rear with the shoelace. Finally, there was also evidence of motive.

In a criminal case, evidence is sufficient to convict if it permits a rational trier of fact to find the essential elements of the crime proved beyond a reasonable doubt. *State v. Munoz–Rivera,* 190 Wn. App. 870, 882, 361 P.3d 182 (2015). When a defendant challenges the sufficiency of the evidence, the proper inquiry is "whether, after viewing the evidence in the light most favorable to the State, any rational trier of fact could have found guilt beyond a reasonable doubt." *State v. Salinas,* 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). "[A]ll reasonable inferences from the evidence must be

drawn in favor of the State and interpreted most strongly against the defendant." *Id.* Furthermore, "[a] claim of insufficiency admits the truth of the State's evidence and all inferences that reasonably can be drawn therefrom." *Id.*

In a challenge to the sufficiency of the evidence, circumstantial evidence and direct evidence carry equal weight. *State v. Goodman,* 150 Wn.2d 774, 781, 83 P.3d 410 (2004). The appellate court's role is not to reweigh the evidence and substitute its judgment for that of the jury. *State v. Green,* 94 Wn.2d 216, 221, 616 P.2d 628 (1980). Instead, because the jurors observed the witnesses testify firsthand, this court defers to the jury's resolution of conflicting testimony, evaluation of witness credibility, and decision regarding the persuasiveness and the appropriate weight to be given the evidence. *State v. Thomas,* 150 Wn.2d 821, 874-75, 83 P.3d 970 (2004).

A person is guilty of first degree murder when "[w]ith a premeditated intent to cause the death of another person, he or she causes the death of such person or of a third person." RCW 9A.32.030(1)(a). "Premeditation must involve more than a moment in time; it is defined as the deliberate formation of and reflection upon the intent to take a human life and involves the mental process of thinking beforehand, deliberation, reflection, weighing or reasoning for a period of time, however short." *State*

v. Hoffman, 116 Wn.2d 51, 82-83, 804 P.2d 577 (1991) (footnotes omitted). Premeditation can be proved by circumstantial evidence where the inferences drawn by the jury are reasonable and the evidence supporting the jury's verdict is substantial. *Hoffman*, 116 Wn.2d at 83.

Premeditation can be inferred from circumstantial evidence, including evidence of motive and the method of killing. *State v. Elmi*, 138 Wn. App. 306, 314, 156 P.3d 281 (2007), *aff'd*, 166 Wn.2d 209 (2009). Sufficient evidence of premeditation may be found where multiple wounds are inflicted by various means over a period of time. *State v. Allen*, 159 Wn.2d 1, 8, 147 P.3d 581 (2006); *see also State v. Scott*, 72 Wn. App. 207, 216, 866 P.2d 1258 (1993) (first strangulation and/or blows to the head established premeditation before victim's death by final strangulation); *State v. Harmon*, 50 Wn. App. 755, 760, 750 P.2d 664 (1988) (infliction of multiple stab wounds established premeditation), *review denied*, 110 Wn.2d 1033 (1988).

Kalac relies in large part on *State v. Bingham*, 105 Wn.2d 820, 719 P.2d 109 (1986). There, a 5-4 majority of the Court overturned a first degree murder conviction involving manual strangulation occurring during an act of sexual intercourse. The majority concluded that the act of strangulation alone, even though it occurred during a three to five minute period, did not show any deliberation by the defendant. *Bingham*, 105 Wn.2d at 822-23.

Kalac's case may easily be distinguished from *Bingham.* Shortly after *Bingham*, the Washington Supreme Court itself distinguished *Bingham* on the basis that the presence of other evidence suggesting a struggle or pre-incident planning showed deliberation. *State v. Ollens*, 107 Wn.2d 848, 733 P.2d 984 (1987) (procuring weapon and presence of defensive wounds supported premeditation); *accord State v. Sherrill*, 145 Wn. App. 473, 186 P.3d 1157 (2008) (beating death over period of time).

This Court similarly distinguished *Bingham* in a case where strangulation was accompanied by other evidence suggesting sufficient time to formulate the intent to kill. *State v. Gibson*, 47 Wn. App. 309, 734 P.2d 32 (1987). In *Gibson*, this Court relied on evidence that the victim had suffered several blows to the head before being strangled with a cord. *Gibson* found primary support for its analysis in a pre-*Bingham* decision, *State v. Harris*, 62 Wn.2d 858, 385 P.2d 18 (1963).

In *Harris*, the defendant also had inflicted several injuries during a beating before obtaining a cord and strangling the victim. *Harris*, 62 Wn.2d. at 867-68. The *Harris* Court concluded that the evidence supported the jury's conclusion that the killing was premeditated. *Harris*, 62 Wn.2d. at 868. The *Bingham* majority also distinguished *Harris* on the basis of the additional injuries inflicted prior to the strangulation. *Bingham*, 105 Wn.2d at 826.

As in *Harris* and *Gibson*, the victim here suffered blows to the head and torso prior to the strangulation. Additionally, both the medical examiner's opinion, as well as Kalac's own note showed that Kalac first strangled Amber manually from the front, and then from the rear with the shoelace. Further, there was evidence from which it could be concluded that Kalac was displeased that Amber had aborted his child. There was thus more than sufficient evidence for the jury to conclude that Kalac had a moment in time to consider his purpose before strangling Amber to death. Accordingly, the evidence supports the jury's verdict.

B. THE TRIAL COURT ACTED WELL WITHIN ITS DISCRETION UNDER CRR 3.3 IN GRANTING THE STATE'S MOTION FOR CONTINUANCE WHERE THE STATE NEEDED TIME TO PROCESS DNA AND OTHER FORENSIC EVIDENCE AND ITS EXPERT WAS UNAVAILABLE ON THE DATE SET FOR TRIAL.

Kalac next claims that the trial court abused its discretion in granting the State's motion for continuance. The decision was valid where State needed time to process DNA and other forensic evidence and its expert was unavailable on the date set for trial.

This Court reviews alleged violations of CrR 3.3's time-for-trial rule de novo. *State v. Kenyon,* 167 Wn.2d 130, 135, 216 P.3d 1024 (2009). However, the decision to grant or deny a motion for a continuance rests

within the trial court's discretion, and this Court will not disturb that decision unless there is a clear showing that the trial court was manifestly unreasonable. *Kenyon,* 167 Wn.2d at 135.

CrR 3.3(b)(1) requires a defendant who is detained to be brought to trial within 60 days after being arranged. Delays in commencing trial due to a trial court's grant of a continuance under CrR 3.3(f) are excluded from the computation of the time for trial. CrR 3.3(e)(3). A trial court may grant a party's motion for a continuance 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." CrR 3.3(f)(2).

In general, a trial court does not abuse its discretion in granting a continuance to permit the parties adequate time to prepare for the case or to permit the parties time to obtain new evidence. *State v. Flinn,* 154 Wn.2d 193, 200–201, 110 P.3d 748 (2005); *State v. Cauthron,* 120 Wn.2d 879, 910, 846 P.2d 502 (1993), *overruled on other grounds*, *State v. Buckner,* 133 Wn.2d 63, 65–67, 941 P.2d 667 (1997). A trial court must dismiss with prejudice charges not brought to trial within the time required by CrR 3.3. CrR 3.3(h).

Citing *State v. Wake,* 56 Wn. App. 472, 783 P.2d 1131 (1989), Kalac contends that the trial court abused its discretion by granting the State's motion for a continuance based on delays that were caused by inadequate

funding for the Washington State Patrol Crime Laboratory. In that case, this Court held that the trial court abused its discretion by granting the State's motion for a continuance based on the unavailability of an expert witness from the State crime lab. *Wake,* 56 Wn. App. at 473. In so holding, the Court reasoned:

> [T]he State has failed to keep pace with the growing number of drug cases, has an inadequate staff available for court testimony and, as a result, a logjam is being created. If congestion at the State crime lab excuses speedy trial rights, there is insufficient inducement for the State to remedy the problem.

Wake, 119 Wn.2d at 475.

Wake does not assist Kalac. The trial court here found good cause to grant the State's continuance motion to allow the state crime lab time to conduct testing on Kalac's recently obtained DNA samples. There is nothing in the record suggesting that the continuance was necessary to accommodate delays at the crime lab due to inadequate funding. Kalac's citation to *State v. Crandall*, 176 Wn. App. 1016, 2013 WL 4774140 (2013), is similarly unavailing. There, as here, there is no evidence that the delay was due to a lack of crime lab funding.

Instead, the trial court reasoned that continuing the start of trial until March 2, 2015, was necessary to allow the state crime lab time to conduct its DNA testing on the evidence, and to allow the State to present the testimony of its forensic dental expert, among other reasons. Kalac fails to

show, the trial court's decision to grant the trial continuance was manifestly unreasonable.

There is no evidence that either the crime lab or the State were not diligent in their trial preparation. Indeed the trial court specifically found that the State had been diligent. 7RP 10.

To the contrary, the record shows that the charges and an application for arrest warrant were filed on November 5, 2014. CP 1, 10. Kalac was arraigned November 7. CP 1RP 5.

On November 13, the State filed a motion to compel Kalac to provide the State a handwriting sample and to allow the taking of dental photography and impressions, hair, fingernail scrapings, and DNA swabs. CP 35. Kalac objected the next day, a Friday,[4] to parts of the State's request, and further moved to defer ruling on the request until the pre-assigned judge was available. CP 43, 45. The State replied the following Monday, November 17. CP 50. Kalac filed another response on November 20. CP 56. The motion was granted on November 21. 4RP 15.

After the order was granted, the State's newly-hired dental expert expressed some concern with certain terms of the proposed order. CP 85. As part of the motion to amend the order, it was noted that the parties had

[4] The State has attached as an appendix calendars for November and December 2014 to assist the reader.

agreed on the date of December 12, 2014, for the collection of all samples. CP 86. The order was entered on December 5, 2014. CP 89.

The evidence was collected as agreed late on December 12, 2014, a Friday. CP 181. A sheriff's detective delivered the materials to the WSP crime lab on December 15, only 10 days before Christmas. CP 181, 279. The Seattle lab supervisor indicated that because of the impending holidays, she would be unlikely to assign a DNA technician until after the new year. CP 181. A technician was assigned by January 8. CP 281.

Moreover, as of December 19, the State had not yet heard from the Spokane and Olympia labs about the time frame for the analysis of the handwriting and fingerprints, respectively. CP 181. Nor had it heard from the FBI regarding the cell-phone analysis. *Id.*

Thus, it appears that the trial court correctly concluded that the State had been diligent in preparing for trial and in having the evidence processed. Particularly of note, given Kalac's current argument, the *only* evidence of any alleged lack of funding for the crime lab was the supervisor's observation that they were short-handed due to the holidays. Such a seasonal lack of personnel does not reflect a funding deficit but a normal issue faced by any employer. Nordstrom may hire a cadre of temps to cover the holiday rush. However, unlike a unlike retail clerk, crime lab personnel are highly specialized. It is not likely feasible for the lab to simply hire extra

personnel to cover the holidays. Nor would it be reasonable to deny employees holiday time off. *See, e.g.*, *Flinn*, 154 Wn.2d at 200 (scheduling conflict is a valid consideration); *State v. Heredia–Juarez*, 119 Wn. App. 150, 154-55, 79 P.3d 987 (2003) (valid continuance granted to accommodate prosecutor's reasonably scheduled vacation); *State v. Kindell*, 181 Wn. App. 844, 855, 326 P.3d 876, 882 (2014) (same); *State v. Grilley*, 67 Wn. App. 795, 799, 840 P.2d 903 (1992) (valid continuance granted to accommodate officers' previously scheduled vacations). In any event, this was not an issue that was delved into below,[5] so there is no record on which to conclude that the delay was due to inadequate funding.

Additionally, another ground for continuance accepted by the trial court was the unavailability of the State's expert dental witness. 7RP 3. As noted above the State had been working with the expert since about two weeks after arraignment. The unavailability of a material State witness is a valid ground for continuing a criminal trial where there is a valid reason for the unavailability, where the witness will become available within a reasonable time, and where there is no substantial prejudice to the defendant's ability to present a defense. CrR 3.3(f); *State v. Day*, 51 Wn. App. 544, 549, 754 P.2d 1021, *review denied*, 111 Wn.2d 1016 (1988).

[5] Kalac made brief reference to lab congestion being an invalid basis for a continuance. but offered no evidence that the delay here was due to lab congestion. CP 224.

Here, the expert would be available two weeks and six weeks after the original trial date. 7RP 3. The trial court properly based the continuance on this factor as well. 7RP 10.

In *Cauthron,* the Supreme Court held that the trial court did not abuse its discretion by granting the State's continuance motions where "the continuances were necessary to obtain the required evidence" and where the defendant was not prejudiced by the delay in starting trial. *Cauthron,* 120 Wn.2d at 910. Similarly here, the State's request for a continuance was necessary to process DNA evidence, to present necessary expert testimony, and to complete the forensic analysis of the cell phone.

Finally, Kalac does not demonstrate any prejudice stemming from the trial court's decision to grant the State's motion. *See* CrR 3.3(f)(2). As the trial court cogently noted, the only "prejudice" to Kalac was the tactical advantage of the State not having all the relevant evidence with which to proceed to trial, which would have been "woefully unfair to the prosecution." 9RP 14. Tellingly, at the very hearing at which the written order regarding the continuance was entered, Kalac himself moved for a continuance because he was not ready for trial," and the case was set out another five months. CP 391-92; 13RP 30. Kalac fails to show the trial judge abused her discretion in granting a continuance less than two month after

Kalac was arraigned.[6]

C. THE TRIAL COURT PROPERLY DENIED KALAC'S SUPPRESSION MOTION WHERE, AS KALAC CONCEDES, THE INITIAL WARRANTLESS ENTRY BY DEPUTY RICE WAS PROPER, AND WHERE DETECTIVE BIRKENFELD, WHO ENTERED THE HOME AS RICE EXITED IT, DID NOT EXCEED THE SCOPE OF RICE'S INITIAL ENTRY, AND MERELY VIEWED WHAT RICE DID AND DID NOT SEIZE ANY EVIDENCE, AND THEN PROMPTLY OBTAINED A WARRANT.

Kalac next claims that evidence recovered from the apartment should have been suppressed because Detective Birkenfeld improperly entered the home before he obtained a warrant. This claim is without merit because, as Kalac concedes, the initial warrantless entry by Deputy Rice was proper. Because Birkenfeld, who entered the home as Rice exited it, did not exceed the scope of Rice's initial entry, and merely viewed what Rice did and did not seize any evidence, and then promptly obtained a warrant, no unlawful entry of the home occurred. The trial court therefore properly denied the motion to suppress.

1. Facts from suppression hearing.

Here, the evidence adduced at the CrR 3.6 hearing showed that

[6] The State is aware that it this case took an unusually long time to get to trial. However, the continuance at issue was the only one sought by the State not due to defense decisions. The State has set out a detailed timeline in the statement of the procedure, *supra*.

Kitsap County Sheriff's Deputy Greg Rice was the first to get to the scene. 14RP 44. On arrival, Rice spoke to Paul Coplin, who met with him at the sidewalk. 14RP 44. There were two kids with him. 14RP 45. Paul indicated he was the one who had called 911. 14RP 45. He stated that the Amber, who was the mother of his kids, appeared to be beaten inside the home. 14RP 45. He said she was in the bedroom immediately to the right of the living room. 14RP 45.

Rice entered the apartment to check on Amber's status. 14RP 46. The medics entered a minute or two after Rice. 14RP 48. He requested a camera because medics sometimes disrupted the scene and he wanted to record what it looked like when he got there. 14RP 48. Detective Gundrum radioed and said she had a camera and was almost there. 14RP 49. Rice briefly touched the body to check for signs of life. 14RP 49. Amber was cold to the touch. 14RP 49. The medics did not touch anything because it was obvious she was dead. 14RP 49. They left immediately. 14RP 49. Rice stayed in the home for not more than eight minutes. 14RP 49. About half that time was spent in the bedroom. 14RP 49. He did not seize or move anything at that time. 14RP 50.

While in the house Rice walked through the living room, immediately into the bedroom. 14RP 50. There, he walked around the bed to where Amber was, then back out. 14RP 51. From there he went down a

short hall to BC's bedroom, back out to the living room and into the kitchen. 14RP 51. He was making sure there was no one else in the home. 14RP 51. He heard the detectives outside and left the building. 14RP 52.

Rice spoke to the detectives on the sidewalk and told them what he knew and had done. 14RP 52. He did not reenter the home. 14RP 53. Detectives Chad Birkenfeld and Elizabeth Gundrum entered the apartment and looked in the bedroom where Amber's body was. 14RP 10, 29.

Rice had pointed out the bedroom to them. 14RP 30. They did not go anywhere in the apartment that Rice had not already gone. 14RP 30. From the door of the bedroom Birkenfeld could see "bad news" written in magic marker on the window. 14RP 30. Half a pair of dentures was lying on the floor near the baseboard heater. 14RP 30. There was a driver's license on the bed pillow. 14RP 30. The deceased woman was on the bed covered up to her neck with a comforter. 14RP 31. She had blood coming from her nose and mouth and possibly her eye. 14RP 31. What appeared to be blood was smeared on the wall at the head of the bed. 14RP 31. Stepping into the room, Birkenfeld saw that on the right side of the bed, a purse had been dumped on the floor. 14RP 31. He turned to leave and saw on the wall next to the door he saw "she killed me first" written with black marker on an artwork. 14RP 31.

Birkenfeld did not touch anything in the residence. 14RP 32.

Gundrum took photos as they went in. 14RP 32. After viewing the bedroom they stopped taking photos and left the apartment. 14RP 32. Gundrum did not go anywhere that he did not. 14RP 32. They returned to his car and began preparing the application for the warrant. 14RP 33. The warrant was granted. 14RP 33. After the entry, Birkenfeld applied for two additional expansions of the warrant. 14RP 33.

The first time was to clarify the unit number of the duplex, which was granted. 14RP 34. The second was made after the scene was processed and the blanket was removed from the victim's body. 14RP 34. They decided to expand the warrant to include searches for other items based on viewing the victim's body. 14RP 34.

2. Birkenfeld's entry was a lawful continuation of Rice's.

Warrantless searches and seizures are per se unreasonable. *State v. Stevenson*, 55 Wn. App. 725, 729, 780 P.2d 873 (1989), *review denied*, 113 Wn.2d 1040 (1990). There are, however, a few "jealously and carefully drawn exceptions" to the warrant requirement which provide for those cases where the societal costs of obtaining a warrant outweigh the reasons for insisting upon prior recourse to a neutral magistrate. *State v. Williams*, 102 Wn.2d 733,736,689 P.2d 1065 (1984).

One such exception applies to emergency situations, including the discovery of a crime. Thus, when the police come upon the scene of a

homicide, they may make a prompt warrantless search of the area to see if there are other victims or if a killer is still on the premises. *Stevenson*, 55 Wn. App. at 730. Further, so long as they do not exceed the scope of the initial intrusion, other officers may subsequently reenter the premises. *Stevenson*, 55 Wn. App. at 731-32; *accord State v. Gocken*, 71 Wn. App. 267, 279, 857 P.2d 1074 (1993), *review denied*, 123 Wn.2d 1024 (1994).

Thus, in *State v. Bell*, 108 Wn.2d 193, 198-201, 737 P.2d 254 (1987),[7] the Court held the police properly seized marijuana plants earlier observed by firefighters who responded to an alarm at the defendant's residence. Similarly in *Michigan v. Tyler*, 436 U.S. 499, 511, 98 S. Ct. 1942, 56 L. Ed. 2d 486 (1978), the Supreme Court held that fire officials were not required to obtain a search warrant to determine the cause of a fire when they re-entered the burned building four hours after steam, smoke and darkness had forced them to postpone their initial investigation. The court concluded that the later entries were "no more than an actual continuation of the first, and the lack of a warrant thus did not invalidate the resulting seizure of the evidence." *Tyler*, 436 U.S. at 511. Applying *Bell*, the Court in *Stevenson* reasoned:

As the *Bell* court observed, once the privacy of the residence

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[7] In 1990, the United States Supreme Court eliminated one of *Bell*'s requirements, *i.e.*, that the officer's discovery of the evidence be inadvertent. *Horton v. California*, 496 U.S. 128, 110 S. Ct. 2301, 110 L. Ed. 2d 112 (1990). *State v. O'Neill*, 148 Wn.2d 564, 583 n.6, 62 P.3d 489 (2003).

> lawfully has been invaded, it is senseless to require a warrant for others to enter and complete what those already on the scene would be justified in doing.
>
> We see no reason why this rule should not apply to the present situation. Having other, more immediate concerns, the officers had not collected evidence during the first sweep. Rather, they waited for the better equipped investigative unit to arrive on the scene. This was surely reasonable in view of the need to be certain the evidence properly would be preserved. The second entry followed hard on the heels of the initial sweep and was nothing more than a continuation of the prior lawful search.
>
> Of course, the officers who enter later may not exceed the scope of the earlier intrusion.

Stevenson, 55 Wn. App. at 731-32 (footnotes omitted). Finally, the *Stevenson* Court specifically distinguished its holding from *Thompson v. Louisiana*, 469 U.S. 17, 105 S. Ct. 409, 83 L. Ed. 2d 246 (1984), and *Mincey v. Arizona*, both of which involved seizure of incriminating evidence from drawers, closets, waste baskets, and other concealed places. *Stevenson*, 55 Wn. App. at 732.

Kalac argues that the detectives' entry into the residence, regardless of the initial warrantless exception or scope, violated his privacy interest and requires suppression as fruit of the poisonous tree. Kalac contends that once Rice left the home, no law enforcement personnel were permitted to reenter before a warrant was obtained. To quote *Stevenson*, "This is not the law." 55 Wn. App. at 730.

Curiously, although *Stevenson* was argued extensively below, Kalac

does not even mention the case in his brief. Instead he mocks the trial court, alleging "the judge's theory that the detectives entry was 'a continuation of the first, lawful entry" (CP 403) is wholly inconsistent with controlling law."[8] Brief of Appellant at 47. In fact, the judge's language is almost a verbatim quote from *Stevenson*, which in turn was quoting the U.S. Supreme Court: "The court concluded that the later entries were 'no more than an actual continuation of the first, and the lack of a warrant thus did not invalidate the resulting seizure of evidence." *Stevenson*, 55 Wn. App. at 731 (*quoting Tyler*, 436 U.S. at 511).

In addition to ignoring *Stevenson*, he utterly fails to present any authority that contradicts it. Instead, Kalac's argument relies on cases such as *State v. Kinzy*, 141 Wn.2d 373, 5 P.3d 668 (2000), *State v. Schroeder*, 109 Wn. App. 30, 32 P.3d 1022 (2001), and *Thompson v. Louisiana*, none of which address the issue here: whether additional entries that do not exceed the scope of an initial lawful entry are also lawful.[9]

Kinzy is inapposite. In that case, the issue was whether under the community caretaking function police could continue to detain a teen without suspicion she had committed any crime after she attempted to end the encounter. *Kinzy*, 141 Wn.2d at 377-81. Here, the issue is whether,

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[8] The referenced conclusion of law actually appears at CP 405.

[9] Kalac concedes that Rice's initial entry was lawful. Brief of Appellant at 47.

where a deputy initially lawfully entered a home, deputies may reenter the home within a short timeframe if they did not expand the scope of the original entry.

Schroeder also differs significantly from the instant case. Kalac recognizes again that the community caretaking function is a recognized exception to the warrant requirement. He nevertheless fails to acknowledge that Schroeder involved significantly different facts. In *Schroeder*, the police lawfully entered the defendant's home following a 911 call reporting a suicide. However, the police then searched the home with the rationale that they needed to find the deceased's ID. This Court rejected that rationale, because there were ample other means of identifying the deceased without conducting a warrantless search of the defendant's home. *Schroeder*, 109 Wn. App. at 45. No such overstepping occurred here: the detectives limited themselves to retracing Rice's steps.

As noted above, *Thompson* is also qualitatively different from what occurred here. There, "homicide investigators entered the residence and commenced what they described at the motion to suppress hearing as a 'general exploratory search for evidence of a crime.' During their search, which lasted approximately two hours, the detectives examined each room of the house." *Thompson*, 469 U.S. at 18-19. Here, on the other hand, as authorized by *Stevenson*, the detectives merely retraced the steps of Deputy

Rice, and then sought and obtained a warrant. The trial court properly declined to suppress the evidence.

D. ANY ERROR IN REFUSING TO INSTRUCT THE JURY ON MANSLAUGHTER WOULD BE HARMLESS WHERE THE JURY WAS INSTRUCTED ON DIMINISHED CAPACITY AND INTENTIONAL MURDER BUT STILL FOUND PREMEDITATION.

Kalac next claims that the trial court erred in refusing his request for instructions on manslaughter. Assuming that the trial court erred, any error would be harmless where the jury was instructed on diminished capacity and intentional murder but still found premeditation.

A party is entitled to have the jury instructed on a lesser included offense if that offense satisfies the two-pronged test this court established in *State v. Workman*, 90 Wn.2d 443, 447-48, 584 P.2d 382 (1978). Under the legal prong, the offense must consist solely of elements necessary to conviction of a greater offense charged. *Workman*, 90 Wn.2d at 448. Under the second, or factual, prong, the evidence must support an inference that only the lesser offense was committed, to the exclusion of the greater offense charged. *Id.*

Here, the State concedes that *Workman*'s legal prong is met, since first and second degree manslaughter consist solely of elements necessary to conviction of first degree premeditated murder. *State v. Schierman*, ___

Wn.2d ___, 415 P.3d 106, 146 (2018). A trial court's refusal to give instructions to a jury is reviewed for abuse of discretion if it is based on a factual determination.

Schierman appears to be on all fours with the present case. In *Schierman*, although the trial court denied Schierman's request for instructions on first and second degree manslaughter, it did instruct the jury on second degree murder and voluntary intoxication. Taken together, these three rulings indicated that the trial court believed the evidence supported an inference that Schierman was too intoxicated to premeditate the murders, but not an inference that he was too intoxicated to intend the murders. The Supreme Court agreed with Schierman that this was error and held that because the evidence supported giving the voluntary intoxication instruction, which told the jury that intoxication might diminish intent, the trial court should have instructed the jury on manslaughter—a homicide offense with a lesser mental state (recklessness or negligence) than intent to kill. *Schierman*, 415 P.3d at 147.

Notably *Schierman* also relied for this conclusion on *State v. Warden*, 133 Wn.2d 559, 947 P.2d 708 (1997). *Warden* involved a diminished capacity defense instead of a voluntary intoxication instruction, but the Court concluded that same reasoning applied. its reasoning supports Schierman's argument in this case. *Schierman*, 415 P.3d at 147.

In *Warden*, the defendant "disguised herself as a delivery person and gained entry into [the victim's] residence," demanded money, broke a mason jar over the victim's head, and then stabbed the victim to death with a butcher knife she found in a kitchen drawer. *Id.* A defense expert testified that Warden suffered from PTSD (posttraumatic stress disorder) resulting in dissociative episodes, and that he believed "[she] lacked that the mental capacity to form the intent to kill." *Warden*, 133 Wn.2d at 564. The Court held that Warden was therefore entitled to an instruction on manslaughter in addition to second degree murder. *Id.*

The Supreme Court concluded that testimony that Schierman was in an alcoholic blackout when the murders occurred created the same factual question that existed in *Warden* and other cases: whether, if the defendant did commit the acts charged, he or she did so with the conscious intent necessary to constitute intentional, as opposed to reckless or negligent, murder. The Court therefore held that the trial court erred when it refused Schierman's request for a manslaughter instruction. The State is unable to distinguish *Schierman* from the instant case.

Nevertheless, that is not the end of the analysis. Like, the error in *Schierman*, the error here was harmless. In that case, the jury convicted Schierman of first degree premeditated murder, despite the fact that it also received an instruction on the lesser included offense of second degree

intentional murder. The same is true in the instant case.

The *Schierman* Court noted that it had recently rejected a harmless error argument in recently rejected a similar argument in *State v. Condon*, 182 Wn.2d 307, 313, 326, 343 P.3d 357 (2015). In *Condon*, the defendant was charged with first degree premeditated murder and first degree felony murder. After the trial court erroneously refused an instruction on the lesser included offense of second degree intentional murder, and the jury convicted the defendant of premeditated murder (the greatest crime charged) instead of first degree felony murder. In holding that the trial court's instructional error was not harmless, the Court rejected the argument that simply by instructing the jury on the definitions of premeditation and intent, the trial court effectively emphasized the legal distinction between first degree premeditated and second degree intentional murder. *Schierman*, 415 P.3d at 148.

The Supreme Court found that Schierman's case was distinguishable from *Condon*. *Id.* In *Schierman*, the relevant legal distinction was between intentional murder (committed by a person whose level of intoxication prevented him from premeditating his offenses) and reckless or negligent murder (committed by a person whose intoxication prevented him even from intending those offenses). *Id.* Unlike the instructions given in *Condon*, the instructions given *Schierman* called the

jury's attention to this distinction—and to the defense theory that Schierman was in a state of alcoholic blackout when the murders occurred. *Id.* The Court explained why:

> This is because even though Schierman's jury was not instructed on manslaughter, it was instructed on voluntary intoxication. That instruction specifically called the jury's attention to Schierman's intoxication evidence, and it specifically told the jury that it could consider this evidence when deciding whether the defendant had premeditated or intended the murders. Having heard this instruction, the jury nevertheless found that Schierman premeditated the murders—that is, it found that he committed the murders with the most conscious and culpable mental state. On this record, and given these instructions, there is only one possible explanation for that verdict: the jury did not credit the theory that an alcoholic blackout diminished Schierman's capacity to premeditate. There is no possibility that a manslaughter instruction would have led the jury to a different conclusion.

Id. Kalac's case is indistinguishable. In addition to premeditated murder, his jury was also instructed on second-degree intentional murder. CP 2075. Similar to *Schierman*, Kalac's jury was also instructed that "[e]vidence of a mental illness or disorder mat be taken into consideration in determining whether the defendant had the capacity to premeditate." CP 2071. The jury found Kalac guilty as charged of first-degree premeditated murder. CP 2095.

As in *Schierman*, there is only one possible explanation for that verdict: the jury did not credit the theory that an alcoholic blackout diminished Kalac's capacity to premeditate. There is no possibility that a

manslaughter instruction would have led the jury to a different conclusion. This claim should be rejected.

E. THE TRIAL COURT ACTED WITHIN ITS DISCRETION IN IMPOSING AN EXCEPTIONAL SENTENCE.

A trial court may sentence a defendant to an exceptional sentence above the standard range if (1) the jury enters a special verdict., finding beyond a reasonable doubt one or more aggravating factors alleged by the State; and (2) the trial court determines that the facts found are substantial and compelling reasons justifying an exceptional sentence. RCW 9.94A.535; RCW 9.94A.537(3), (6); *State v. Stubbs*, 170 Wn.2d 117, 123, 240 P.3d 143 (2010). To reverse such an exceptional sentence, this Court must find either that the record does not support the sentencing court's articulated reasons, that those articulated reasons do not justify a sentence outside the standard sentence range for that offense, or that the length of the exceptional sentence was clearly excessive. RCW 9.94A.585(4). Here Kalac challenges the sufficiency of the evidence and also claims that the trial court improperly considered eligibility for earned early release or "good time" when it imposed sentence. None of these contentions has merit.

1. The evidence was sufficient to support the jury's findings that the aggravators applied.

Kalac first argues that the evidence was insufficient to support the

jury's finding of the aggravating circumstances that Kalac demonstrated or displayed an egregious lack of remorse, (RCW 9.94A.535(3)(q)), and that the offense involved a destructive and foreseeable impact on persons other than the victim (RCW 9.94A.535(3)(r)).

This Court reviews a jury's special verdict finding the existence of an aggravating circumstance under the sufficiency of the evidence standard. *Stubbs*, 170 Wn.2d at 123; *see also* RCW 9.94A.585(4) (court may reverse a sentence outside of the standard range if "the reasons supplied by the sentencing court are not supported by the record"). Under this standard, the Court reviews the evidence in the light most favorable to the State to determine whether any rational trier of fact could have found the presence of the aggravating circumstances beyond a reasonable doubt. *See State v. Yates*, 161 Wn.2d 714, 752, 168 P.3d 359 (2007).

a. Evidence that Kalac posed Amber's dead body, took photos of it and posted them online with flippant comments, along with other similar actions, provided a more than sufficient basis for the jury to conclude he demonstrated an egregious lack of remorse.

For this aggravating circumstance, "the lack of remorse must be of an aggravated or egregious nature." *State v. Ross*, 71 Wn. App. 556, 563, 861 P.2d 473, 883 P.2d 329 (1993), *review denied*, 123 Wn.2d 1019 (1994). Refusing to admit guilt or remaining silent is not an indication of lack of remorse. *State v. Russell*, 69 Wn. App. 237, 251, 848 P.2d 743, *review*

denied, 122 Wn.2d 1003 (1993). Whether a sufficient quantity or quality of remorse is present in any case depends on the facts of the case. *Ross*, 71 Wn. App. at 563.

Circumstances that have been held to support the aggravator include the defendant minimizing his own actions, and a cavalier attitude about the seriousness of what he had done. In *State v. Zigan*, 166 Wn. App. 597, 599, 603, 270 P.3d 625 (2012), a vehicular homicide case, this Court upheld a trial court's finding that Zigan displayed an egregious lack of remorse. There, immediately following the fatal accident, Zigan asked the victim's husband if he was "'ready to bleed.'" *Zigan*, 166 Wn. App. at 602. Zigan additionally smiled and laughed while talking with police officers at the scene, later joking with one of the officers that the officer should not ride a motorcycle because "he might get killed by [Zigan] too." *Zigan*, 166 Wn. App. at 603. Zigan also joked with other inmates, imploring them not to get caught if they hit a motorcyclist. *Zigan*, 166 Wn. App. at 603.

In another case, this Court found a defendant's lack of remorse sufficiently egregious where he bragged and laughed about a murder he committed. *State v. Erickson*, 108 Wn. App. 732, 739, 33 P.3d 85 (2001). Erickson also mimicked the victim's reaction to being shot, told a fellow inmate that "[he] blew [the victim's] guts right out," and told police that he felt no remorse. *Erickson*, 108 Wn. App. at 738-39.

Here, after killing Amber, Kalac posed her dead body and took pictures of it, which he then posted online with sarcastic comments about how hard it was to strangle someone to death. After taking the pictures he then defaced her body with more comments and wrote "dead" on her ID, leaving his handiwork for Amber's 13-year-old son to find. Additionally, in texts to his boss and best friend, he focused solely on how the situation was affecting his life. He made no mention of Amber at all.

Finally, in the note he left at the camp, he was particularly flippant:

> I killed Amber Coplin. I strangled her with my hands then a shoelace. I had no reason other than I was drunk and she pissed me off. Running from the cops was so fun.

Kalac's argument seems to rely primarily on his own professed remorse at trial. Brief of Appellant at 63. The credibility of that profession, however, is one for the jury to decide. Moreover, it also fails to take into account the standard of review, which requires all inferences to be viewed in the light most favorable to the state. This contention should be rejected.

b. Any reasonable jury could conclude that leaving a body to be found by the victim's barely teen-aged son, who was then affected such that he was still "coping" with the crime nearly years after it occurred, which resulted in changed behavior, night terrors, had a negative effect on his schoolwork, and his relationship with his family, and left him, at the tender age of 15 not liking people, satisfied the aggravator that the murder had "destructive and foreseeable impact on persons other than the victim."

A trial court may impose an exceptional sentence if the offense

involves a "destructive and foreseeable impact on persons other than the victim." RCW 9.94A.535(3)(r). The Legislature enacted this statutory aggravator in 2005. Laws of 2005, ch. 68, § 3. Before 2005, sentencing courts sometimes imposed exceptional sentences based on a crime's impact on non-victims. *See, e.g., 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); *State v. Way*, 88 Wn. App. 830, 832, 946 P.2d 1209 (1997). In these cases, Courts required "that defendant's actions impact others in a distinctive manner not usually associated with the commission of the offense in question, and that this impact be foreseeable to the defendant." *Way*, 88 Wn. App. at 834 (*citing Johnson*, 124 Wn.2d at 74-75).

Kalac attempts to minimize the impact this murder had on BC, alleging that "[e]very homicide is without question 'devastating to the family of the victim." Brief of Appellant at 59. Every homicide does not, however, occur in a manner where it is a certainty that the victim's body will be found by her 13-year-old son. Here, BC was the only other resident of the home. It was therefore not merely foreseeable that BC would find his mother's dead body, it was inevitable. Moreover, Kalac himself bragged in his 4chan post that BC would find the body. Exh. 158.

Further, Kalac minimizes the evidence presented regarding the effect on BC. Paul testified to the impact on his son. He explained that

murder impacted BC very negatively. 7TRP 1088. His behavior changed, and he was still coping with it every day. 7TRP 1088. It affected BC's schoolwork, his relationship with Paul, his grandparents, and his siblings, and with people in general: "he doesn't like people." 7TRP 1098.

Although the cases do seem to more often apply this aggravator to cases where there was an to the crime, *see State v. Cuevas-Diaz*, 61 Wash. App. 902, 906, 812 P.2d 883 (1991), *State v. Barnes*, 58 Wash. App. at 475, 794 P.2d 52, *State v. Chanthabouly*, 164 Wash. App. 104, 262 P.3d 144 (2011), no case appears to discuss the impact on a family member who finds the body of a loved one. However, the effect is certainly comparable. *Chanthabouly* is instructive:

> Here, any rational trier of fact could have found that the shooting involved a "destructive impact" on the students, teachers, and administrators at Foss. The shooting occurred in a public school hallway populated with students and staff. At least two students witnessed the killing from a distance of less than 10 feet. One of these students received medical treatment for irritation to her eyes. Another student who witnessed the shooting spoke with a counselor afterward. That student testified that the shooting "affected me tremendously. It made me realize that I could die any time and that bad things happen." RP (Mar. 12, 2009) at 684. A teacher who heard the shots suffered insomnia after the incident and felt more distant from friends and family who had not experienced the trauma of the shooting. The principal testified that the shooting "continues to affect me profoundly," and he recalled that no "training or experience can ever prepare you to ... tell a family that their son had been killed while they're [sic] under your supervision."

Chanthabouly, 164 Wn. App. at 144. *See also State v. Webb*, 162 Wn. App.

195, 206, 252 P.3d 424 (2011) ("Cases examining this aggravating factor have often involved the presence of children").

Although Kalac attempts to minimize the testimony, the impact evidence in *Chanthabouly* is comparable to that here. The weight to be given that testimony was for the jury to weigh, not this Court. As in *Chanthabouly*, any reasonable jury could conclude that leaving a body to be found by the victim's barely teen-aged son, who was then affected such that he was still "coping" with the crime nearly years after it occurred, which resulted in changed behavior, night terrors, had a negative effect on his schoolwork, and his relationship with his family, and left him, at the tender age of 15 not liking people, satisfied this aggravator.

c. Kalac's sentence should be affirmed even if only one aggravating factor is upheld because the trial court explicitly stated it would impose the same sentence even if only one of the factors remained.

Even if one of the aggravating circumstances were found unsupported by the evidence, this Court can affirm the sentence. If an appellate court is satisfied that the trial court would have imposed the same sentence based on the valid aggravating factors, remand for resentencing is not warranted. *State v. Douglas*, 173 Wn. App. 849, 856, 295 P.3d 812 (2013) (*citing State v. Jackson*, 150 Wn.2d 251, 276, 76 P.3d 217 (2003)).

Here, the trial court explicitly stated that it would have imposed the same sentence based on either factor:

> That the grounds referenced in the preceding paragraph, taken together or considered individually, constitute sufficient cause to impose the exceptional sentence. This Court would impose the exact same sentence even if only one of the grounds referenced were valid.

CP 2190. Given this pronouncement, Kalac's sentence should be affirmed even if the court

2. It is not apparent from the record that the trial court based its exceptional sentence on the fact that Kalac would receive earned early release.

"The trial court has 'all but unbridled discretion' in fashioning the structure and length of an exceptional sentence. *State v. France*, 176 Wn. App. 463, 470, 308 P.3d 812 (2013) (*quoting State v. Creekmore*, 55 Wn. App. 852, 864, 783 P.2d 1068 (1989)), *review denied*, 179 Wn.2d 1015 (2014). Kalac nevertheless argues that he is entitled to a new sentencing hearing because the trial court improperly based his sentence on the fact that he could earn "good time." This contention is contrary to the record. While the court briefly referred to good time when discussing the standard range of the offense, it does not appear that that comment was the basis of the sentence.

The court made good time comment when it fist started speaking, advising Kalac what he was facing:

> 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 --
>
> MR. PIMENTEL: It's 10 now, I believe.
>
> THE COURT: 10 percent?
>
> MR. PIMENTEL: I believe it's 10 now.
>
> THE COURT: 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. The court then entered into a lengthy disquisition on the nature of justice and the history of how murders are punished, and on the character of Kalac and the victim. SRP 54-58. Only then did it address its reasoning as to the sentence:

> Here's what I do know: There are things about this crime that are different than any other homicide that I have been privy to, two things. One is the behavior of the defendant after having killed Amber with respect to how she was found, marking, writing on her body, biting, things like that.
>
> I can tell you, I've been at this an awfully long time. I'm not sure there is a psychologist who can tell me why that happens. What is that? What I believe is, somebody just snapped. Snapped, lost it completely.
>
> And then there was the posting of the photographs and the discussion on the internet, and that can't be ignored. That is, as the prosecutor says, the defendant's demonstration of the lack of remorse.
>
> The presence of the internet makes this very different than crimes I attended to when I was in my 30s, but we didn't have the internet back then. Homicides, murders, victim's

family members, communities were left to heal, because the gruesome nature of the crime became compartmentalized in memories, and it could be diminished by memory and by life itself and moving forward. This is not that case.

This is not that case because the internet keeps the gruesome nature of this crime present and alive forever, despite the efforts of the owners of that particular site to erase the photographs. In the few hours that they were up on 4chan, they became widespread throughout the world.

And just like the detective who downloaded the pages so that he could preserve them on his computer, we have no idea what other databanks exist. But they do, and you can find them. Like the prosecutor said, if you, [BC], want to Google yourself when you're 20 years old, your mother's homicide will come up.

So how do they heal? How do they survive this? How do they move forward? I can't answer that question, but I do know who's the one who caused all of that to happen and what punishment fits that crime. ...

What Amber's family, all of you who knew her and loved her -- Ms. Wey, Mr. Wey, [BC], [JC], Ms. Schraw -- the words that you have said are extraordinary. And this is true. This is why this is so hard to bear, because Amber isn't here. You cannot avenge her death. You're looking to me to do something just so that you can breathe a little bit.

What I also know, Ms. Wey, is that the people that I have seen who navigate beyond these events have done it the way that you're doing it.

[BC], your little girl may not be able to actually hug your mama, but she's there, and she's here for each of you. And let that legacy be given to your daughter so that she knows she had a fighter for a grandma who was strong and resilient, who loved freely, who laughed easily, who cared for other people. Let that be your daughter's legacy, to know she has those genes in her too. That's part of who she is.

All right. Mr. Kalac, I am inclined, because of the competing issues that I have available to me, to give you a sentence that would ensure that you stay in a prison setting for life. This is not out of anger. This is not out of anything

> other than a sincere desire, because I think that, if you were to get out of prison at the age of 68, 70, 75, unless you were solid again in a strong, long-term recovery program, you would have a very difficult time, very difficult. You have an opportunity – even though you aren't going to be living among the rest of us, you have an opportunity, because each person you come across in the setting that you'll be living in, you're smart enough, if you want to, you can help people.

SRP 58-62. Clearly the court's reasoning was that the severity of the crime required that Kalac be removed from society for the rest of his life because of the danger he presented due to his alcoholism. Whatever the intent of the reference to good time may have been, it is not apparent from the record that consideration of good time was part of the court's justification of the sentence imposed. Notably, good-time was not mentioned in the court's findings of fact and conclusions of law. *See* CP 2189-90. Kalac's sentence should be affirmed.

F. KALAC'S DNA AND FILING FEES AND INTEREST ASSESSMENT SHOULD BE STRICKEN ON REMAND.

Kalac argues in his supplemental brief that the assessment of DNA and filing fees were inappropriate because he is indigent. He relies on recently passed statutes that change the legal landscape on the legal financial obligations that may be imposed and the Supreme Court's interpretation of those statutes. The state concedes that the filing and DNA fee, along with the interest provision (except as to restitution) should be

stricken from Kalac's judgment and sentence.

First, there is no doubt in this record that Kalac is indigent. *See* RCW 10.101.010(3); CP 2146 (order of indigency on appeal). Second, pursuant to RCW 10.01.160 and RCW 10.82.090(1), the trial court may not assess costs or interest on an indigent defendant.[10]

Further, under RCW 36.18.020(2)(h), the prohibition on assessing costs on indigent defendants is specifically applied to the $200 filing fee. Likewise, under the amended statutes, a DNA fee may only be assessed once. RCW 43.43.7541. As Kalac notes, he has numerous prior convictions in which the fee was likely assessed.[11] CP 2126. In *State v. Ramirez*, 191 Wn.2d 732, 749, 426 P.3d 714 (2018), the Supreme Court held that the new rules apply to any case pending direct appeal, which includes the present case.

The state concedes that the filing and DNA fees must be stricken from Kalac's judgment and sentence. As in *Ramirez,* a remand for that purpose should not entail a new sentencing hearing. *Ramirez*, 191 Wn.2d at 750. Therefore, the case should be narrowly remanded with an order to strike the fees and non-restitution interest.

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[10] Interest may still accrue on restitution. RCW 10.82.090(1). The trial court awarded $40,000 in restitution. State's Supp. CP.

[11] The fee was originally enacted effective in 2002. Laws 2002, Ch. 289, § 4.

G. THE TRIAL COURT ERRED IN ALLOWING TESTIMONY OF AND INSTRUCTING THE JURY ON DIMINISHED CAPACITY UNDER CIRCUMSTANCES WHERE THE PROFFERED EVIDENCE DID NOT ESTABLISH A FORENSIC APPLICATION OF THE SYMPTOMS OF THE ALLEGED DISORDER TO THE INTENT ELEMENTS AND WHERE THE TESTIMONY OF THE DEFENSE EXPERT AND THE TRIAL COURT'S RULING CONFOUND VOLUNTARY INTOXICATION WITH DIMINISHED CAPACITY. (CROSS APPEAL)

After having interviewed the defense expert and received the opinion of the state's expert, the state moved to exclude the diminished capacity defense. CP 1365. The trial court ruled that expert testimony regarding the diminished capacity defense was admissible. 6TRP 927. The jury was instructed that "[e]vidence of a mental illness or disorder may be taken into consideration in determining whether the defendant had the capacity to premeditate." CP 2071 (Instruction 12). This was error because the symptoms of alcoholism were used as the diminishing mental condition. The symptoms of alcoholism are relevant to a voluntary intoxication defense, but not to a diminished capacity defense.

The written forensic evaluation of Kalac by defense expert David Dixon, PhD, is found in the record at CP 1378. Early in that evaluation, Dr. Dixon pointed to the gravamen of the present issue. He noted that Kalac believed that the purpose of the evaluation was to determine whether a

diminished capacity defense could be based on alcohol intoxication. CP 1379. This understanding was highlighted by the inclusion of Kalac's self-reporting about his behavior when he drank alcohol. *Id.* Recounting statements by various people in the discovery, Dixon highlighted statements about Kalac's level of sobriety during his instances of criminal behavior. CP 1379-1383.

Dixon's conclusions were all based around Kalac's chronic alcoholism, not a "mild neurocognitive disorder" nor a "major depressive disorder." CP 1407. That is, Dixon's conclusions were a catalog of the results of too much alcohol consumption. At no point did he attempt a "forensic application" of the alleged disorders to Kalac's intent at the time of the murder.

Pretrial, Dixon testified in a defense offer of proof. 6TRP 790. There, he conceded that the alleged neurocognitive disorder would not preclude Kalac from forming the intent to commit murder. 6TRP 795. However, his theory was that in combination with other problems, the neurocognitive disorder could have waxed and waned. 6TRP 796. He did not endorse the assertion that Kalac's blackouts were alone sufficient to make him unable to form intent. 6TRP 799. In discussing Kalac's possible impairments, Dixon tied the inability to form intent to Kalac's blood alcohol level at the time. 6TRP 803. Dixon opined that Kalac's history showed an

equation between intoxication and aggressive behavior. 6TRP 820. But he speculated that this "might be" related to frontal lobe injury. *Id.*

Also in the record is the forensic mental health report of Richard Yocum, PhD. CP 1412-1427. Significant in Dr. Yocum's evaluation was his observation that "[d]uring this evaluation the defendant presented free from acute symptoms of psychosis, anxiety, mood, or neurocognitive impairment." CP 1418. Yocum's diagnostic impression of Kalac was unspecified personality disorder, with antisocial traits, alcohol abuse disorder, severe, in institutional remission, stimulant use disorder (methamphetamine), in institutional remission, and unspecified depressive disorder, by history, well controlled with medication. CP 1425.

Yocum opined that a connection between Kalac's disorders and his criminal intent (including premeditation) was not established:

> My review of the available information fails to establish that Mr. Kalac's capacity to act intentionally, with premeditation, was impaired with respect to the alleged offenses.

CP 1426. This conclusion was supported by a list of 13 instances of Kalac's behavior during the time period of the murder and his flight. CP 1425-26. He concluded that at the time of the crime Kalac was not impaired mentally:

> Mr. Kalac demonstrates the ability to contemplate his actions, and act in a goal directed manner. Additionally, on several occasions, he demonstrated higher order thinking and the ability to respond to his environment through complex problem solving.

CP 1426.

Yocum also testified during the pretrial offer of proof. 6TRP 890. Yocum, aware of Dixon's diagnostic formulation, saw "nothing that indicated" mild neurocognitive disorder. 6TRP 898. Yocum described the process of evaluating diminished capacity. The evaluation requires first the existence of a mental disorder and then consideration of the symptoms of that disorder, and, finally, whether those symptoms precluded the defendant from forming the requisite intent. 6TRP 899. Yocum criticized Dixon's opinion for positing a neurocognitive disorder but then discussing the symptoms of alcohol intoxication and the impairments resulting from it. 6TRP 901-02. Yocum did not believe that alcohol-caused impairment was the same as a diminished capacity. *Id.* Yocum found that Dixon never made the connection between mental disorder symptoms and observed behavior. 6TRP 903. Evidence of neurocognitive deficits should have occasioned neuropsychological testing. 6TRP 905, 909. Also, the type of damage asserted by Dixon to be secondary to excessive alcohol use is not reversable and should have been apparent later during the evaluations. *Id.* Lacking a disability caused by excessive alcohol, all that remained was excessive alcohol use. 6TRP 906. This would at best establish voluntary intoxication. *Id.*

The trial court nevertheless ruled that Dixon's testimony would be

allowed. 6TRP 927. The trial court provided the diagnostic symptomology that Dixon neglected. The trial court ruled that the defense applied to the premeditation element. 6TRP 928-29. The trial court believed that under the diagnosed alcohol use disorder, a symptom would be the inability to stop drinking. 6TRP 929. The trial court found that there was evidence of increased tolerance and withdrawal. 6TRP 930. The trial court found that inability to cease drinking is a symptom of the alcohol use disorder and the drinking affects the ability to form premeditation. 6TRP 931.

1. Kalac did not meet the standards for the defense of diminished capacity.

In *State v. Ellis*, 136 Wn.2d 498, 963 P.2d 843 (1998), the test for admissibility of expert testimony on the issue of a defendant's capacity changed. The test moved from the ten so-called *Edmund*[12] factors to an evidence rule approach. Thus, rather than reviewing the ten factors, a trial court should determine admissibility "under ER 702 and application of ER 401 and 402." *Ellis*, 136 Wn.2d at 523. Then, assuming admissibility under those rules, the trier of fact is allowed to exercise its role in deciding the weight and value of that evidence. *Ellis*, 136 Wn.2d at 521. A trial court's ruling on admissibility of the defense is reviewed for abuse of discretion. *Ellis,* 136 Wn.2d at 523.

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[12] *State v. Edmund,* 28 Wn. App. 98, 621 P.2d 1310, *review denied* 95 Wn.2d 1019 (1981).

Due process, the defendant's right to maintain a defense, is implicated in considering admissibility of evidence on this mental health defense. *See Rock v. Arkansas*, 483 U.S. 44, 107 S. Ct. 2704, 97 L. Ed. 2d 37 (1987). But the *Ellis* Court cited the United States Supreme Court's pronouncement that the Due Process Clause does not grant an accused an absolute right to introduce all relevant evidence. *Ellis,* 136 Wn.2d at 519 (*citing Montana v. Egelhoff*, 518 U.S. 37, 116 S. Ct. 2013, 135 L. Ed. 2d 361 (1996)). In particular, "[t]he accused does not have an unfettered right to offer [evidence] that is incompetent, privileged, or otherwise inadmissible under standard rules of evidence." *Id.* Without expressly so stating, the *Ellis* court concluded that its evidence rule based test comports with due process; proper application of the evidence rules on the question of admissibility does not offend the defendant's constitutional right to present a defense. *See also Daubert v. Merrell Dow Pharmaceuticals, Inc*, 509 U.S. 579, 113 S. Ct. 2786, 125 L. Ed. 2d 469 (1993) (applying the same test, ER 401, 402, and 702, in deciding the admissibility of all scientific evidence). However, under the somewhat unique circumstances in *Ellis*, application of the *Edmund* test, and the trial court ruling thereon, was questionable with regard to the defendant's right to assert a defense. *Id.*

Neither *Ellis* nor subsequent cases following it have changed the substance of the diminished capacity defense. The *Ellis* Court's formulation

is that "[t]o maintain a diminished capacity defense, a defendant must produce expert testimony demonstrating that a mental disorder, not amounting to insanity, impaired the defendant's ability to form the specific intent to commit the crime charged." *Ellis*,136 Wn.2d at 521; *accord State v. Atsbeha*, 142 Wn.2d 904, 914, 16 P.3d 626 (2001). Another formulation is that "[d]iminished capacity is 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. Bottrell*, 103 Wn. App. 706, 712, 14 P.3d 164 (2000) (*citing State v. Warden*, 133 Wn2d 559, 564, 947 P.2d 708 (1997)), *review denied* 143 Wn.2d 1020 (2001). Further, "[w]hen specific intent or knowledge is an element of the crime charged, a defendant is entitled to present evidence showing an inability to form the specific intent or knowledge at the time of the crime." *Id.* (*citing Edmund*).

Again, in *State v. Johnson*, 150 Wn. App. 663, 670, 208 P.3d 1265 (2009), *review denied* 167 Wn.2d 1012 (2009) (*citing State v. Gough*, 53 Wn. App. 619, 622, 768 P.2d 1028 (1989) *review denied* 112 Wn.2d 1026 (1989)), the Court said "[t]he diminished capacity defense allows a defendant to undermine a specific element of the offense, a culpable mental state, by showing that a mental disorder rendered him incapable of having the required level of culpability. Although pre-*Ellis*, and citing *Edmund*, the *Gough* Court thoroughly provided the law on point:

> Diminished capacity arises out of a mental disorder, usually not amounting to insanity, that is demonstrated to have a specific effect on one's capacity to achieve the level of culpability required for a given crime. Evidence of such a condition is admissible only if it tends logically and by reasonable inference to prove that a defendant was incapable of having the required level of culpability. Existence of a mental disorder is not enough, standing alone, to raise an inference that diminished capacity exists, nor is conclusory testimony that the disorder caused a diminution of capacity. The testimony must explain the connection between the disorder and the diminution of capacity.

Gough, 53 Wn. App. at 622 (internal citation omitted). The propositions there asserted have not changed under *Ellis*. The mere assertion of a mental disorder is still alone insufficient. Even under a test focused on relevance and the helpfulness of the evidence to the trier of fact, proffered evidence should allow a logical and reasonable inference proving the defendant incapable of forming the necessary intent. Moreover, testimony that does not demonstrate a connection between the disorder and the diminution of capacity simply is not testimony about diminished capacity and is thus irrelevant to the task; else it would be a defense that the defendant simply has a mental disorder. *State v. Stumpf*, 64 Wn. App. 522, 528, 827 P.2d 294 (1992) ("[t]o support a diminished capacity instruction, there must not only be substantial evidence of the mental disorder, but the evidence must also explain *the connection between* the disorder and the diminution of capacity." (emphasis added)).

The necessity of this connection is paramount. As one court put it:

> Under ER 702, expert testimony will be considered helpful to the trier of fact only if its relevance can be established. "[I]t is not enough that ... a defendant may be diagnosed as suffering from a particular mental [disorder]. The diagnosis must, under the facts of the case, be capable of forensic application in order to help the trier of fact assess the defendant's mental state at the time of the crime." The opinion of an expert concerning a defendant's mental disorder must reasonably relate to impairment of the ability to form the culpable mental state to commit the crime charged.

State v. Atsbeha, 142 Wn.2d 904, 16 P.3d 626 (2001) (internal citation omitted; *quoting State v. Greene*, 139 Wn.2d 64, 984 P.2d 1024 (1999), *reversed sub nom., Greene v. Lambert*, 288 F.3d 1081 (9th Cir. 2002)).

The law of diminished capacity and considerations controlling its admissibility under the evidence rules require a demonstrable link between that particular illness and the failure to have the requisite culpable mental state. Thus the *Ellis* formulation requires proof that the defendant was in fact "impaired." Or, as in *Bottrell*, "prevents" the defendant from forming intent, the evidence needing to prove "inability" to form the requisite intent. Or, again, in *Johnson* the mental problem must render the defendant "incapable" of having the required culpable mental state.

In this case, the trial court ruled on a supposed demonstrable link between Kalac's chronic alcoholism and his ability to form premeditation. The ruling highlights the lack of a demonstrable link between the symptoms of any other disorder that Dixon found and premeditation. Moreover, it is at

this point that the trial court confounded diminished capacity with voluntary intoxication.

2. At best, Kalac showed that he might be entitled to present a defense of involuntary intoxication.

The trial court ruled that since Kalac was diagnosed with a alcohol use disorder, and the record reflects that he was intoxicated at the time of the murder, he is entitled to present testimony and argue he was incapable of premeditation. The trial court erred in confounding voluntary intoxication and diminished capacity.

The legislature has defined voluntary intoxication:

> No act committed by a person while in a state of voluntary intoxication shall be deemed less criminal by reason of his or her condition, but whenever the actual existence of any particular mental state is a necessary element to constitute a particular species or degree of crime, the fact of his or her intoxication may be taken into consideration in determining such mental state.

RCW 9A.16.090. In order to receive an instruction on voluntary intoxication, the defense must show:

> (1) the crime charged has as an element a particular mental state, (2) there is substantial evidence of drinking [or drug use], and (3) the defendant presents evidence that the drinking [or drug use] affected [the defendant's] ability to acquire the required mental state.

State v. Everybodytalksabout, 145 Wn.2d 456, 479, 39 P.3d 294 (2002). The defense has the burden to produce sufficient evidence of intoxication to put the matter in issue before seeking the instruction. *See State v. Carter*, 31

Wn. App. 572, 575, 643 p.2d 916 (1982). "Substantial evidence is evidence that is sufficient to persuade a fair-minded person of the truth or correctness of the matter." *Pacific Topsoils, Inc. v. Washington State Dept. of Ecology*, 157 Wn. App. 629, 238 P.3d 1201 (2010); *see also State v. Paul*, 64 Wn. App. 801, 806, 828 P.2d 594 ("substantial evidence has been described as evidence sufficient to persuade a fair-minded person of the truth of the declared premise."). As with diminished capacity "the evidence must reasonably and logically connect the defendant's intoxication with the asserted inability to form the required level of culpability to commit the crime charged." *State v. Gabryschak*, 83 Wn. App. 249, 252-53, 921 P.2d 549 (1996).

On the evidence offered by Dixon, voluntary intoxication would have been the correct method by which Kalac could have attacked the intent element. It appears that the trial court's ruling supposed that since Kalac's alcoholism made it difficult for him to stop drinking, his intoxication during the murder was in some sense not voluntary. But our Supreme Court has considered and rejected this very position.

In *State v. Hutsell,* 120 Wn.2d 913, 916, 845 P.2d 1325 (1993), Hutsell received a downward departure from the standard range and the state appealed. The trial court's justification for the departure was that Hutsell's wrongful conduct was diminished by cocaine use and that that

cocaine use was involuntary because Hutsell was addicted to cocaine. Thus the trial court was relying on RCW 9.94A.390(1)(e) which allows for mitigation if

> The defendant's capacity to appreciate the wrongfulness of his conduct or conform his conduct to the requirements of law, was significantly impaired (*voluntary use of drugs or alcohol is excluded*).

Hutsell, 120 Wn.2d at 917 (emphasis the Court's). The Court accepted the trial court's finding that an addiction to psychoactive drugs impaired Hutsell's capacity. But the Court continued, asking "whether as a matter of law impairment due to psychoactive substance dependence justifies an exceptional sentence below the standard range." *Hutsell,* 120 Wn.2d at 918. The Supreme Court held that the trial court's ruling that the "voluntary use" exclusion does not apply to an addict's use of psychoactive substances was a conclusion of law.

The Court noted that the statutory exclusion of voluntary use applies to either drugs or alcohol. The gravamen of the issue became the meaning of the term "voluntary" in this context. The Court noted that involuntary intoxication requires proof of force or fraud. *See State v. Stacy,* 181 Wn. App. 553, 571, 326 P.3d 136 (2014), *review denied* 181 Wn.2d 1008 (2014) (citing *Hutsell* as "defining 'voluntary intoxication' as intoxication not caused by force or fraud"). In that the Court would narrowly construe a complete defense of "involuntary" intoxication the Court would

"conversely assign 'voluntary' a definition broader than its colloquial meaning." *Hutsell,* 120 Wn.2d at 920. The Supreme Court held that the trial court's chemical dependence ground for departure was not justified. *Hutsell,* 120 Wn.2d at 923. The Court explained that in "so holding, we interpret the phrase 'use of drugs or alcohol' as encompassing both intoxication and dependence."

It is the breadth of the definition of the term "voluntary" that the trial court failed to consider in its ruling. The term encompasses all intoxication that does not result from force or fraud. And, the term encompasses both the intoxication and the disorder driven dependence underlying the intoxication. On this record, then, Kalac may well have lain an adequate foundation for a voluntary intoxication instruction but not for testimony and jury instructions on diminished capacity. This Court should hold that the trial court erred in allowing a diminished capacity defense that was bereft of forensic application because what was being discussed was voluntary intoxication.

V. CONCLUSION

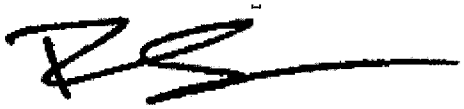
For the foregoing reasons, Kalac's conviction and sentence should be affirmed, and the matter remanded to strike the fees referenced above from the judgment and sentence. Additionally, in the event the Court remands for a new trial, it should reverse the trial court's rulings regarding

diminished capacity, as discussed, *supra.*

DATED April 1, 2019.

Respectfully submitted,

CHAD M. ENRIGHT
Prosecuting Attorney



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APPENDIX

November 2014

	Sunday	Monday	Tuesday	Wednesday	Thursday	Friday	Saturday
44							1
45	2	3	4	5	6	7	8
46	9 *Daylight Saving*	10	11	12	13	14	15
47	16	17	18 *Veterans' Day*	19	20	21	22
48	23	24	25	26	27 *Thanksgiving*	28	29
49	30						

Calendar-365.com

December 2014

	Sunday	Monday	Tuesday	Wednesday	Thursday	Friday	Saturday
49		1	2	3	4	5	6
50	7	8	9	10	11	12	13
51	14	15	16	17	18	19	20
52	21	22	23	24	25	26	27
1	28	29	30	31			

Pearl Harbor Remembrance Day

Christmas Day

New Year's Eve

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April 01, 2019 - 2:16 PM

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Appellate Court Case Title:	State of Washington, Respondent v David Michael Kalac, Appellant
Superior Court Case Number:	14-1-01073-5

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