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MAY 13 2011

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DIVISION III
STATE OF WASHINGTON
By _____

NO. 28958-3

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OF THE STATE OF WASHINGTON**

THE STATE OF WASHINGTON,

Plaintiff,

v.

CORY JAMES MONAGHAN,

Defendant.

BRIEF OF RESPONDENT

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Attorney General

John C. Hillman
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Criminal Justice Division
800 5th Avenue, Suite 2000
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206-464-6430

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I. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Did the trial court properly deny the defendant's pretrial motion for judgment of acquittal on grounds of insanity where the record failed to establish by a preponderance of the evidence that the defendant was criminally insane?
2. Should the defendant's conviction for murder in the first degree be affirmed where the evidence was sufficient for the jury to find beyond a reasonable doubt that the defendant's acts of murder were premeditated?
3. Did the trial court properly refuse the defendant's proposed instruction requiring the jury to be unanimous as to the particular act that caused the victim's death where the evidence was clear that the defendant's multiple murderous acts were a continuous course of conduct?
4. Should the defendant's convictions for murder and arson be affirmed where the prosecutor's closing argument was neither misconduct nor prejudicial?

II. STATEMENT OF THE CASE

A. Procedure

On October 28, 2008, the State filed an information in Ferry County Superior Court charging appellant Cory James Monaghan (“defendant”) with one count of premeditated murder in the first degree and one count of arson in the first degree. CP 1-3, 13-15. Defendant entered a plea of not guilty by reason of insanity. CP 24.

1. Pretrial Motion for Judgment of Acquittal on Grounds of Insanity

Defendant moved the trial court for a pretrial order of judgment of acquittal on grounds of insanity. CP 109-131. Both parties presented evidence to the trial court on the issue of insanity, including conflicting expert testimony. RP 26-826. The trial court denied the motion for judgment of acquittal on grounds of insanity and entered written findings of fact and conclusions of law. CP 271-273; RP 879. The case proceeded to jury trial.

2. Jury Trial

The State presented evidence that the defendant committed unprovoked acts of premeditated murder against Jeremy Karavias. The State presented evidence that the defendant shot Karavias; broke Karavias’ neck; and may have stabbed Karavias. RP 1180-93. The State presented

evidence that the defendant burned down his uncle's residence with Karavias inside. RP 1100-03, 1200, 1612-14.

Defendant testified in his own defense. RP 2014. Defendant admitted that he shot Jeremy Karavias, but he claimed that it was self-defense. RP 2167. Defendant denied breaking Karavias' neck or stabbing him. RP 2195. Defendant denied that he set the house on fire. RP 2203.

The defense presented the testimony of two psychologists who gave the opinion that the defendant was criminally insane at the time of the murder. RP 1844; 2293-2424. The defense theory of the case was that the defendant suffered from a paranoid delusion that a business competitor named Mike Blankenship was "out to get him, to ruin him" and the delusion "somehow" caused the defendant to kill Jeremy Karavias. RP 1830, 1835-36; RP 2330-33, 2357, 2398; RP 2864, 2869-73, 2883-84. The defense experts conceded that they could not find the defendant insane for the act of arson. RP 1864, 2402.

In support of their opinion that the defendant was insane, the defense experts referred to past medical records from Covington Multicare Clinic as evidence that the defendant had a "long-standing delusional disorder." RP 2296, 2307-09, 2319-2321, 2338, 2416. The defense experts also referred to medical records from Sacred Heart Medical Center in Spokane (SHMC) and testified that medical doctors at SHMC

diagnosed the defendant with an “acute psychotic episode” on the day of the murder. RP 1879-80, 1906-07; RP 2321, 2335, 2337. The medical records were not admitted as evidence, nor did the defense call the medical doctors who examined the defendant and authored the records.

The State presented rebuttal evidence from experts at Eastern State Hospital who testified that the defendant was not criminally insane at the time of the charged acts. RP 2432-2719.

The defendant proposed a unanimity instruction that would have required the jury to determine which act of the defendant caused the death of Jeremy Karavias: shooting, neck-breaking, or burning. CP 153; RP 2761-62. The State objected on grounds that the three acts amounted to one continuous course of conduct and it would be impossible for the jury to determine which particular act was the cause of death. RP 2735, 2762-67. The trial court agreed and refused the defendant’s proposed unanimity instruction. RP 2769-2772.

Defense counsel’s closing argument asked the jury to find the defendant not guilty by reason of insanity. RP 2859. Defense counsel frequently referred to the testimony of the defense experts who testified. RP 2865-70, 2873-74, 2877-2879, 2882-2885, 2889-90. Defense counsel referred to the bases of the expert’s opinions, which included hearsay from medical records not admitted as evidence nor testified to by the medical

doctors who authored the records. RP 2865-70, 2873-74, 2877-2879, 2882-2885, 2889-90. Defense counsel argued that the information in these medical records established that the defendant suffered an “acute psychotic episode” on the date of the murder and arson. RP 2877. Defense counsel further argued that the medical records established a past history of “pervasive paranoia.” RP 2880.

The prosecutor responded to defense counsel in rebuttal argument. RP 2912. The prosecutor pointed out that experts are allowed to rely on such records, “but that’s not really evidence, that’s just things they read to support their opinions.” RP 2912. Defense objected, “That’s not a proper argument. That is evidence.” RP 2912. The trial court overruled the objection. RP 2913.

The jury returned verdicts of guilty as charged. CP 201-202. The jury returned a special verdict finding that the defendant was armed with a firearm when he committed murder. CP 203. Defendant received a standard range sentence. CP 248-257. This appeal follows. CP 258-270.

3. Facts

Jeremy Karavias lost his mother to cancer in 2000 when he was 11-years-old. RP 1787. Jeremy lost his father to cancer in 2006 when he was 16-years-old and a sophomore in high school. RP 1788. Jeremy and

his younger twin siblings, Jordan and Rachel, went to live with their aunt and uncle after the passing of their parents. RP 1785-89.

Jeremy graduated high school in the spring of 2007. RP 1789. Jeremy had been devastated by the loss of his parents. RP 1789. Jeremy had a large, loving family that took care of him, but after graduating high school he was determined to make a life for himself. RP 1790. Jeremy obtained a job at Cameron Trucking in King County and rented a home in Pierce County, WA. RP 1789-90.

In 2008, Jeremy was laid-off by Cameron Trucking. RP 1790. Jeremy met the defendant in July 2008. RP 2104. The defendant owned and operated a tree service business in King County. RP 1791, 1962-63, 1974, 1993. The defendant befriended Jeremy and hired him as a laborer. RP 1791, 1962-63, 1974, 1993. Jeremy was a shy, gullible person. RP 1788. If someone paid attention to Jeremy, he would “stick to them like glue.” RP 1788.

The defendant invited Jeremy Karavias to accompany him on a hunting trip in October 2008. RP 2211. Karavias had never hunted or shot guns growing up, but was “excited” to go hunting with the defendant. RP 2279. The defendant and Karavias left King County for a week-long hunting trip to eastern Washington. RP 2117-18, 2218, 2233-35. The details of this days-long journey, and whether any disputes arose between

the defendant and Karavias, are unknown except to the defendant. RP 1984. Jeremy Karavias was 19-years-old and out of high school a little over a year when he left on this trip with the defendant. RP 1785, 1789.

Ron Wessel is the defendant's uncle. RP 1137. Ron Wessel, his wife Wessel, and their daughter Amanda lived at 180 Art Creek Road outside of the small town of Malo, WA. RP 997, 1136, 1224-25. Ron Wessel has known the defendant for all of the defendant's life. RP 1137, 1213.

On October 21, 2008, the defendant and Karavias arrived unexpectedly at the Wessel residence. RP 1000, 1017, 1142. The Wessels were surprised to see the defendant. RP 1017. The Wessels had never met Karavias. RP 1000, 1142. Karavias "seemed like a good guy, a nice kid." RP 1031.

Ron Wessel invited the defendant and Karavias into his home. RP 1145. Defendant carried a loaded pistol and a knife on his belt; he also brought a loaded AR-15 assault rifle into the home. RP 1004, 1029-30, 1152-53. The loaded weapons inside the home made the Wessels uneasy. RP 1004. Jeb Olton, Amanda Wessel's boyfriend, asked the defendant why he was bringing a loaded rifle into the home. RP 1030. Defendant responded, "What's the point of having an unloaded gun?" RP 1030. Amanda Wessel took the loaded rifle from the defendant and gave it to

Olton, who unloaded it. RP 1004. Defendant kept the pistol on his belt. RP 1005.

During the evening, the defendant read aloud religious passages about slaying enemies. RP 1007. Defendant made a statement about killing “the weak people.” RP 1020-21. Defendant talked about the banks failing. RP 1216. Defendant said it was “Armageddon time, and it was anarchy, and you could have anything you want, all you’ve got to do is be willing to take it.” RP 1216. Defendant made the Wessels uneasy. RP 1009. Ron Wessel confided in his daughter Amanda, “This guy is here to do something that’s not good.” RP 1009-1010.

Defendant never made any statements about Mike Blankenship or anyone else being “out to get him” while he was at the Wessels. RP 1021, 1220. Defendant never said anything to anyone about Karavias posing a threat to him. RP 1085, 1220, 2278. Defendant appeared “sneaky” but not “paranoid” during the night he spent at the Wessels. RP 1021-22. Defendant telephoned his girlfriend and his children that night and seemed “normal” to them. RP 2277.

However, the defendant was “snappy” towards Karavias throughout the evening. RP 1156. Ron Wessel perceived that the defendant did not want Wessel to talk to Karavias because the defendant interrupted every time Wessel tried to talk to Karavias. RP 1147, 1155.

Defendant was upset at one point in the evening because Karavias left the residence and went outside. RP 1060. Defendant went outside and saw Karavias in the defendant's pickup truck. RP 1032, 1060. Defendant asked Karavias what he was doing. RP 1032. Karavias responded, "I'm going to bed." RP 1032. Defendant responded in a raised voice and aggressive tone, "I don't think so. Get back in the fuckin' house now." RP 1032, 1044-45.

Defendant's cousin Kenna Ruiz noticed that the defendant's boots were covered in blood. RP 1061. Ruiz inquired. RP 1061. Defendant responded that he shot a deer and then slit the deer's throat and let the blood spurt onto his boots. RP 1061. Defendant explained that the spilling of the deer's blood was "cleansing." RP 1061.

The next morning, October 22, 2008, the defendant talked to Ruiz on the telephone between 9:00-9:30 a.m. RP 1065. Ruiz thought that the defendant "sounded like his regular self." RP 1065.

Defendant and Karavias began to leave the Wessel residence sometime after 10:00 a.m. RP 1177. Only Ron Wessel was home. Wessel sat on the living room couch as the defendant and Karavias walked to the front door. RP 1178. Wessel saw Karavias stop near the front door but he could not see the defendant, who was also at the front door but still inside the house. RP 1178. Karavias held the defendant's assault rifle

from the top and at a 45° angle with the barrel pointed towards the ground. RP 1180-81. The rifle had been unloaded in the defendant's presence the night before. RP 1004.

Defendant and Karavias conversed at the front door in hushed but rising and falling voices. RP 1179. Defendant and Karavias talked in this manner at the front door for 1-2 minutes. RP 1180. Karavias never raised the gun. RP 1181. The conversation ended with a sudden "boom." RP 1182. Karavias called out, "Cory, Cory" and slumped to the ground. RP 1182.

Wessel jumped off the couch and saw the defendant standing over Karavias with a .45 pistol in his hand. RP 1183. Karavias was "squirring around on the ground." RP 1183. Wessel asked his nephew, "What in the F did you do?" RP 1183. Defendant responded, "He pointed a gun at me." RP 1183. Wessel replied, "Bull F-ing shit!" RP 1184. Wessel had been watching Karavias and knew that Karavias never raised the gun or pointed it at the defendant. RP 1184.

At 10:22 a.m., Ron Wessel called 911 from his home telephone. RP 1120-21. Karavias was still alive and moaning during the 911 call. 2RP¹ (**Appendix A**). Wessel handed the telephone to the defendant as a ruse to get the gun away from the defendant. RP 1184, 1186. When the

¹ The State will cite the verbatim report of the trial proceedings as "RP" and the transcript of Exhibit 13 as "2RP."

defendant took the phone, Wessel grabbed the defendant's pistol and jerked it out of the defendant's hand. RP 1184.

The defendant told 911 that there had been "a terrible accident" and "someone had been shot." RP 1123; 2RP. Defendant did not say anything to 911 about shooting Karavias in self-defense. RP 1123; 2RP. Defendant gave the phone back to Wessel. RP 1187-88; 2RP. Wessel provided his address to 911. 2RP. Wessel advised 911 that Karavias was shot in the chest and bleeding. RP 1123, 1184; 2RP.

Defendant got down on the floor next to Karavias. RP 1188. Wessel thought that the defendant was going to help Karavias. RP 1188. The defendant instead braced both of his feet against the front door and took Karavias' head in his arms. RP 1188-89. Wessel said, "What in the F are you doing?" RP 1189. Karavias' face turned purple and veins bulged out of his forehead. RP 1189. Defendant used all of his strength and then "snapped his neck and his neck went 'snap, snap, snap.'" RP 1189. Defendant looked up at Wessel with a look of "ecstasy" on his face. RP 1189. Karavias' feet twitched, and then went still. RP 1190. Wessel "knew it was over for the boy"; "I knew Jeremy was gone." RP 1190, 1192.

Wessel ran down the hallway and into his bedroom, still with the

telephone in his hand. RP 1191. Wessel called 911 a second time² and told 911 that the defendant broke Karavias' neck. RP 1123, 1191; 2RP. Wessel talked quietly to 911 so that the defendant would not overhear. RP 1195; 2RP; Exhibit 13. Wessel retrieved his own .45 pistol and returned to the end of the hallway to see what the defendant was doing. RP 1191. Wessel observed that the defendant had rolled Karavias onto his back and was kneeling next to him. RP 1191.

Wessel thought to himself, "You have to shoot him. You've got to take three steps, you have to shoot him." RP 1191. As Wessel contemplated shooting his sister's son, he observed the defendant pull out a hunting knife and lift up Karavias' shirt. RP 1191. Defendant raised the knife inches above Karavias' abdomen and Wessel was sure "he's gonna gut that kid." RP 1191-92. Wessel could not shoot his nephew. RP 1193. Wessel thought, "He's preoccupied; I can get out of here." RP 1192.

Wessel fled out the back door, still on the cordless phone with 911. RP 1192-93. Wessel was shoeless and wearing only his underpants and a sweatshirt. RP 1194. Wessel ran outside and hid in a shed. RP 1195; 2RP. Wessel saw his pickup truck and he got in and drove away as quietly as he could. RP 1196. The cordless phone went out of range and disconnected. RP 1126. 911 tried to call into the house several times

² Wessel accidentally disconnected from 911 during the first 911 call.

afterwards but never got an answer. RP 1126. Wessel drove down the mountain to SR 21. RP 1196-97.

Medical aid and police were dispatched during Wessel's first 911 call. RP 1126. The United States Border Patrol, Ferry County Sheriff's Office, Washington State Patrol (WSP), and Republic Police all responded to SR 21 and Art Creek Road and began staging at approximately 10:45 a.m. RP 1127, 1261-62, 1274.

At approximately 11:00 a.m., Ron Wessel arrived at the staging area. RP 1275. Wessel's .45 pistol was on the front seat of the truck and was collected by police. RP 1276. Wessel told the police what the defendant had done to Karavias. RP 1197-98, 1275. Wessel advised the police that there was a functioning police scanner inside his home. RP 1201-03. Wessel advised that the defendant was a good shot and it was dangerous to approach the home. RP 1198.

Police determined to summon air support and set up a perimeter around the Wessel residence. RP 1277. Amanda Wessel's boyfriend Jeb Olton arrived and assisted in showing law enforcement how to approach the Wessel home without being seen. RP 1014, 1035, 1278. Olton led a ground team of police officers up another road and across a cattle trail to Art Creek Road above the Wessel property. RP 1035-36, 1278, 1608-09. After arriving in the area, Olton and the officers exited

their vehicles and approached the Wessel residence on foot. RP 1036, 1279, 1610.

A helicopter arrived over the Wessel residence at approximately 11:30 a.m. RP 1099. The house was not on fire and there was no smoke visible. A few minutes after arrival, a Border Patrol agent in the helicopter observed smoke rising from the southwest corner of the house. RP 1100-01. The fire was reported at 11:42 a.m. RP 1130. The smoke intensified and spread down the length of the house. RP 1100. Flames were visible within minutes of the smoke becoming visible. RP 1101. The airborne Border Patrol agent observed the defendant exit out of the north end of the house at the carport. RP 1101. Defendant ran north from the burning residence, away from Art Creek Road. RP 1102.

The defendant was alone in the Wessel residence with Jeremy Karavias for approximately an hour and fifteen minutes after Ron Wessel fled. RP 1120, 1130. There was no fireplace or operating wood stove in the Wessel residence. RP 1200. There were no fires in the home when Ron Wessel fled the home. RP 1200. During the hour and fifteen minutes the defendant was alone in the home with Karavias, he never made an effort to summon help for Karavias. RP 2209. Defendant never transported Karavias to a hospital or anywhere else after shooting him, even though the defendant's truck was parked outside the Wessel

residence the entire time. RP 2209.

The defendant instead fled across fields away from the Wessel residence. RP 1103. Defendant was shirtless and held a sweatshirt in his right hand as he ran. RP 1103. The helicopter pursued the defendant and used a PA system to order the defendant to stop running and get down on the ground. RP 1037, 1103-04. The defendant complied. RP 1103. The helicopter radioed the defendant's location to the officers on the ground. RP 1104, 1279, 1610.

The ground team approached the defendant with guns drawn and ordered him to hold still. RP 1037, 1282, 1611. Police and Olton observed that the defendant was shirtless and covered in blood. RP 1038, 1047, 1265, 1283, 1306. A makeshift bandage was wrapped around the defendant's left leg and seeped blood. RP 1265, 1283. Police secured the defendant at 11:47 a.m.. RP 1105, 1131, 1282, 1611.

Detective Lorne Spooner asked the defendant if he was injured. RP 1265, 1284. Defendant responded, "Jeremy stabbed me." RP 1265, 1284. Police took the defendant into custody 300 yards from the Wessel residence, which was visible and engulfed in flames. RP 1266, 1284. Detective Spooner asked if there was anyone inside the burning residence. RP 1265-66, 1284. Defendant responded that "Uncle Ron and Jeremy" were still inside the house. RP 1266, 1284. Defendant volunteered again

that "Jeremy had stabbed him." RP 1266, 1284.

Border Patrol Agent Chris Wirth searched the area where the defendant was detained. RP 1612. Agent Wirth found the defendant's sweatshirt, a Bible with the defendant's name in it, and a blue lighter. RP 1592, 1612-14.

Rounds of ammunition exploded inside the Wessel residence as it burned intensely. RP 1266, 1284, 1591. The fire department could not safely approach the house to extinguish the fire. RP 1592, 1647-48. A decision was made to allow the structure to burn until it was safe to approach. RP 1592, 1647-48.

Defendant was placed into the back of a truck and transported down Art Creek Road until the officers ran into an ambulance coming up the mountain. RP 1266, 1284. Curlew Fire took custody of the defendant at 12:05 p.m. RP 1305. Defendant was fully alert and conscious. RP 1307-08. Defendant remained conscious and alert throughout the transport to the hospital. RP 1309. Medics observed two small and relatively insignificant stab wounds to the defendant's left thigh which were cleaned and bandaged. RP 1309-1310. Defendant's moustache hairs were singed. RP 1312.

Defendant arrived at Ferry County Memorial Hospital in Republic at 12:25 p.m. RP 1266, 1286, 1310. Police collected the defendant's

clothing and an AR-15 magazine clip and loose cartridges that were in his pants pocket. RP 1266-67, 1286.

Deputy Ray Maycumber contacted the defendant at Ferry County Memorial Hospital at approximately 2:00 p.m. RP 1371. Deputy Maycumber noted that the defendant's head, eyebrows and hair were singed. RP 1372, 1377. Deputy Maycumber further noted the presence of a "flash burn" on the defendant's face and forehead. RP 1372. A flash burn is typically the result of quick exposure to high temperature. RP 1370. Defendant also had burns on his hands. RP 1372.

Defendant was airlifted to SHMC in Spokane. RP 1464. Defendant arrived at SHMC at 6:55 p.m. on October 22, 2008, approximately 8½ hours after the murder and arson. RP 1464. Defendant's hands were bagged prior to transport to Spokane. RP 1465. Police collected swabs of blood from the defendant's hands upon arrival at SHMC. RP 1466-67.

Police investigators walked through the Wessel property late in the afternoon of October 22, 2008. RP 1540-41. The remains of the house were burning and smoking and the police could not search due to the heat. RP 1546. An undamaged kitchen knife with the defendant's blood on the blade was found next to the defendant's burning pickup truck, which was parked just outside the area that had been the front door of the residence.

RP 1447-1451, 1541-44, 1560, 1623-25, 1652.

Deputy Maycumber was the primary fire investigator for the Ferry County Sheriff's Office. RP 1370. Deputy Maycumber examined the remains of the Wessel residence on October 23, 2008. RP 1374. Deputy Maycumber could not determine a point of origin or cause for the fire because the fire had so completely consumed the residence. RP 1374.

On October 23, 2008, the defendant was still under observation at SHMC. RP 1479. Defendant was in a hospital room watching television under the guard of WSP Trooper Joe Leibrecht. RP 1489. SHMC determined to take x-rays because the defendant complained of neck and back pain. RP 1480. Defendant's restraints were removed and he was wheeled on his bed, under guard, to the x-ray room at approximately 6:30 p.m. RP 1480, 1490.

The x-ray technician directed Trooper Leibrecht to stand behind a protective barrier away from the defendant. RP 1482. As soon as Trooper Leibrecht removed himself behind the barrier, the defendant leaped off his bed and "made a bee-line dash for the door." RP 1487. The defendant opened the door, but Trooper Leibrecht raced over and slammed it shut. RP 1488. The defendant looked at Trooper Leibrecht "with an extreme look of rage on his face." RP 1488. Defendant tensed as if to fight Trooper Leibrecht. RP 1488. Trooper Leibrecht forced the defendant to

the ground and secured him. RP 1488. Defendant repeatedly told Trooper Leibrecht that he was “sorry.” RP 1488.

Police investigators examined the remains of the Wessel residence on October 23, 2008. RP 1556. Nothing remained of the Wessel residence except ashes and metal. Police used buckets and a sifter to comb through the debris in search for evidence. RP 1558, 1711, 1721.

In the area of debris where the front door to the residence had been, police found the charred remains of Jeremy Karavias. RP 1569-71, 1658, 1710, 1720. In the same front entryway area, police found the defendant’s burned up .45 pistol, a magazine for a .45 pistol, and a .45 fired cartridge casing. RP 1563-64, 1584, 1722. The .45 fired cartridge casing had ballistic markings on it consistent with having been struck by the firing pin of the defendant’s .45 pistol and extracted by the ejectors in the defendant’s .45 pistol. RP 1774. Police also found the burned up remains of the defendant’s AR-15 assault rifle (RP 1699, 1774), and the remains of one of the Wessels’ dogs.³ RP 1708.

Police searched the defendant’s burned-out pickup truck. RP 1574. A charred deer carcass was in the back of the defendant’s truck. RP 1709. Police were not able to search the debris underneath the truck because the tires had burned off and the truck was resting on the ground.

³ The Wessels’ two dogs and cat were trapped and killed in the fire.

RP 1574.

What little remained of Jeremy Karavias was delivered to the Spokane County Medical Examiner's Office on October 24, 2008. RP 1527. A charred skull and torso were all that remained. RP 1528. The skin was completely burned off of the corpse. RP 1528. There were no legs and only part of one arm attached to the torso. RP 1528. The organs and bones were intensely charred. RP 1528. The medical examiner could not determine a cause of death due to the extreme thermal damage to the remains. RP 1532. Jeremy Karavias could not have survived the thermal damage to his body if he was alive at the time he was exposed to the fire. RP 1533.

The Wessel family was not allowed to return to their property for several days while the police investigated the crime scene. RP 1067, 1231. Approximately one week later, the defendant's cousin Kenna Ruiz found the burned remains of a hunting knife where the defendant's truck had been parked (the truck had been hauled away). RP 1071-72. Ruiz contacted police, who retrieved the knife. RP 1072, 1132, 1627.

The swabs used to wipe blood off of the defendant's hands at SHMC were examined by the Washington State Patrol Crime Lab. RP 1466-67. The blood on the defendant's hands matched the DNA profile of Jeremy Karavias. RP 1453, 1461.

III. ARGUMENT

A. The Trial Court Properly Denied The Pretrial Motion For Judgment Of Acquittal Because The Record Failed To Establish The Defense Of Insanity.

A criminal defendant is presumed sane at the time of the alleged offense. *State v. Box*, 109 Wn.2d 320, 322, 745 P.2d 23 (1987). Insanity is an affirmative defense which the defendant must prove by a preponderance of the evidence. RCW 9A.12.010(2); *E.g.*, *State v. Crenshaw*, 98 Wn.2d 789, 792, 659 P.2d 488 (1983).

A defendant asserting insanity may motion the court for a pretrial judgment of acquittal on grounds of insanity. RCW 10.77.080.⁴ A defendant who invokes the provisions of RCW 10.77.080 admits for purposes of the motion that he committed the acts alleged by the State. *State v. Jones*, 84 Wn.2d 823, 832, 529 P.2d 1040 (1974). The only issue for the court to decide is whether the defendant proved by a preponderance of the evidence that he was insane at the time of the charged offenses. *Id.* If the court is not satisfied that such a judgment should be entered, the

⁴ The defendant may move the court for a judgment of acquittal on the grounds of insanity: PROVIDED, That a defendant so acquitted may not later contest the validity of his or her detention on the grounds that he or she did not commit the acts charged. At the hearing upon the motion the defendant shall have the burden of proving by a preponderance of the evidence that he or she was insane at the time of the offense or offenses with which he or she is charged. If the court finds that the defendant should be acquitted by reason of insanity, it shall enter specific findings in substantially the same form as set forth in RCW 10.77.040. If the motion is denied, the question may be submitted to the trier of fact in the same manner as other issues of fact.

question must be submitted to the trier of fact at a regular trial. *Jones, supra* at 832-0833.

A defendant asserting insanity must prove by a preponderance of the evidence:

(1) At the time of the commission of the offense, as a result of mental disease or defect, the mind of the actor was affected to such an extent that:

(a) He was unable to perceive the nature and quality of the act with which he is charged; or

(b) He was unable to tell right from wrong with reference to the particular act charged.

RCW 9A.12.010. “Unable” as used in RCW 9A.12.010 means “incapable, not merely possessed of a limited capability.” *State v. Jamison*, 94 Wn.2d 663, 665, 619 P.2d 352 (1980). Washington strictly limits the insanity defense “to those persons who have lost contact with reality so completely that they are beyond any of the influences of the criminal law.” *State v. White*, 60 Wn.2d 551, 558-590, 374 P.2d 942 (1962). A defendant with a “hair trigger” who explodes at a particular moment without regard to what he is doing is not insane and has no mental defense. *State v. Vidal*, 82 Wn.2d 74, 79, 508 P.2d 1589 (1973).

1. The trial court’s findings of fact are supported by substantial evidence in the record.

At a pretrial motion for judgment of acquittal on grounds of insanity, the trial court weighs the evidence presented by the parties and acquits only if the evidence preponderates in favor of the defendant. *State v. Sommerville*, 111 Wn.2d 524, 531, 760 P.2d 932 (1988). On appeal, the

court simply reviews whether there was substantial evidence in the record to support the trial court's conclusion that the defense did not prove insanity. *Sommerville*, 111 Wn.2d at 533-534.

In *Sommerville*, the defendant was charged with murder and rape and moved the court for pretrial judgment of acquittal on grounds of insanity. *Sommerville*, 111 Wn.2d at 525-529. The experts for the defense and the prosecution disagreed on whether the defendant was insane at the time of the act of rape. *Id.* at 527. The trial court weighed the evidence and determined that the defense did not prove insanity by a preponderance of the evidence. *Id.* at 528. The trial court sent the case to jury trial on the rape charge. *Id.*⁵ The jury convicted. On appeal of the pretrial ruling, the Supreme Court affirmed that it was for the trial court to weigh the conflicting opinions of the experts and determine whether the defense proved insanity by a preponderance. *Id.* at 533-534. The Supreme Court found that the testimony of the State's expert was "substantial evidence" supporting the trial court's pretrial determination that the defendant was not insane. *Id.*

Here, the defendant complains that he "proved" he was insane at the pretrial hearing by offering the testimony of his expert. Defendant's appellate brief focuses entirely on evidence favorable to the defense and

⁵ The experts agreed the defendant was insane for the charge of murder.

ignores all of the evidence the State presented to rebut the claim of insanity. Like *Sommerville*, the trial court in the present case was tasked with weighing all of the evidence, including the State's evidence, before deciding the question of insanity. The trial court concluded that the defendant did not prove insanity, and entered findings accordingly.

The defendant specifically challenges the trial court's findings of fact 10-11, 13, 15-16. CP 271-273. These findings were supported by substantial evidence.

Finding 10: Defendant did not suffer from delusional disorder at the time of the charged offenses.

Dr. Travers testified and gave his expert opinion that the defendant was not experiencing delusional disorder at the time of the charged acts. RP 690, 763. Dr. Grant gave the same expert opinion. RP 804, 807-09. Like *Sommerville*, the trial court was entitled to find the opinions of the state's experts more persuasive after considering the evidence in its entirety. The testimony of Dr. Travers and Dr. Grant was substantial evidence that the defendant was not experiencing "delusional disorder" at the time of the charged acts. *Sommerville, supra*.

Moreover, the trial court's finding that the defendant was not experiencing delusional disorder was not critical to the more important findings that the defendant was able to appreciate the nature, quality, and

wrongfulness of the charged acts. A person can suffer a major mental disorder and still appreciate the nature, quality, and wrongfulness of his actions. RP 728, 731. Dr. Travers testified that even if the defendant suffered from delusional disorder, and even if the defendant believed that Mike Blankenship was “after” him, the delusion had no connection to the charged criminal acts and would not change Dr. Travers’ opinion that the defendant was not criminally insane. RP 712-713, 721-723, 731. Dr. Grant similarly testified that even if the defendant was delusional and/or paranoid with regards to Mike Blankenship, there was no evidence that either condition contributed or was connected to the defendant’s actions towards Karavias. RP 802, 809, 811. Accepting this testimony, the trial court was not persuaded that the delusion, even if true, had anything to do with the defendant’s acts of killing Jeremy Karavias and burning down the Wessel home. RP 878.

Finding 11: Defendant did not display a persistent adherence to the claimed delusion alleged by the defense.

Dr. Travers concluded that the defendant did not suffer from delusional disorder in part because the defendant did not persistently adhere to his claimed delusion that Mike Blankenship was out to get him. RP 640, 676. Dr. Travers testified that it would be atypical for a person suffering delusional disorder to accept a rational explanation for the

delusion. RP 674. The defendant told Dr. Travers that he feared that Mike Blankenship was eavesdropping on his cell phone calls. RP 675. Dr. Travers asked the defendant why he did not obtain a new cell phone if he believed that his cell phone was bugged by Mike Blankenship. RP 675. The defendant responded that he did not want a new cell phone because his contacts were saved in his current cell phone. RP 675. Defendant told Dr. Travers that he eventually obtained a new cell phone and thereafter Mike Blankenship was no longer able to monitor his calls. RP 676. Dr. Travers opined that someone suffering from delusional disorder (a) would not keep a cell phone he believed bugged just to save contact information, and (b) would not accept that Blankenship could not monitor calls on the new cell phone. RP 676.

Similarly, the defendant reported that a police officer investigated his report of sabotage of his equipment by Mike Blankenship, but the police officer told the defendant he was not able to obtain any fingerprints from the equipment. RP 676. The defendant told the state's experts that he thought that the police officer was lying. RP 676. The state's experts asked the defendant if it was possible that the police officer was not lying. RP 676. The defendant agreed it was possible. RP 676. Dr. Travers testified that he would not expect a true delusional person to accept a rational explanation for the police officer's inability to confirm that

Mike Blankenship was sabotaging his equipment; rather, a true delusional person would tenaciously defend the delusion and incorporate the police officer into the delusional conspiracy. RP 676.

Dr. Travers also listened to weeks of telephone calls between the defendant and family members that took place after the murder and arson. RP 684. Defendant never once mentioned Mike Blankenship during the phone calls. RP 684. Nor did the defendant exhibit any signs of psychosis the entire time he was at Eastern State Hospital or when experts (both state and defense) visited him in the Ferry County Jail. RP 398, 639. Dr. Travers opined that if the defendant truly suffered from a persistent delusion regarding Mike Blankenship, he would expect the defendant to exhibit signs of the delusion after the murder and arson. RP 685.⁶

Dr. Grant, a board-certified psychiatrist with decades of experience evaluating criminal offenders, advised the court:

it is hard to express to a layman how tenacious a delusional person is in hanging on to his delusion. You can't talk a delusional person out of being delusional. ... I think everybody should once in his training go in and try to talk a paranoid out of his paranoia. You just can't do it. The medical students come out shaking their heads.

RP 801. Dr. Grant also did not believe the defendant suffered from delusional disorder, in part because the defendant did not tenaciously

⁶ At the jury trial, the defendant's own expert, Dr. Wise, conceded that delusional disorder "is not something that comes and goes." RP 1851.

defend his delusion when pressed. RP 801-802, 808, 816. Dr. Grant concurred that a true delusional person who believed his cell phone was bugged by Mike Blankenship would not keep the cell phone just because he had phone numbers stored in it; nor would he accept that a new cell phone was not also bugged. RP 801-802, 808.

The defendant's appeal places undue emphasis on the DSM-IV-TR. The defendant complains that "persistent adherence to the delusion" is not one of the specific criteria for delusional disorder set forth in the DSM-IV-TR; and that the trial court's finding that the defendant did not suffer delusional disorder "hinged entirely upon the court's finding that he did not persistently adhere to his delusion when challenged." As the experts agreed, both defense and state, the DSM-IV-TR is not a legal authority; it is simply a reference manual for practitioners. The experts' testimony accurately reflects the state of the law: the DSM-IV is not a binding authority for defining "mental disease" for legal insanity. *State v. Klein*, 156 Wn.2d 103, 117, 124 P.3d 644 (2005).⁷ Dr. Grant and Dr. Travers gave the court their opinions based not only on the DSM-IV-TR, but their real-life experiences working with patients who actually suffered from delusional disorder.

⁷ "[In] recognizing that the term 'mental disease or defect' often is synonymous with the term 'disorder,' we reiterate our prior caveat that the DSM is, after all, an evolving and imperfect document and it is not sacrosanct."

The trial court was well within its discretion to weigh the testimony of Dr. Grant and Dr. Travers against the testimony from the defense expert and find the state's experts more persuasive. *Sommerville, supra*. Substantial evidence in the record supported the trial court's finding that the defendant did not adhere to his claimed delusion.

Finally, the finding that the defendant did not persistently adhere to his claimed delusion was not critical to the trial court's more important and ultimate conclusion. As noted above, whether or not the defendant suffered from delusional disorder was not critical to the court's conclusion that the defendant was able to appreciate the nature, quality, and wrongfulness of his actions when he committed the charged crimes.

Finding 13: Defendant was not suffering from a mental disease at the time of the alleged offenses.

Dr. Travers testified that the defendant was not psychotic at the time of the charged acts, i.e., he did not suffer from a mental disease such as delusional disorder. RP 690-91, 763. Dr. Grant testified that he could not diagnose the defendant with delusional disorder. RP 807-808. The trial court heard a conflicting opinion from the defense expert, Dr Gollogly. The trial court weighed the persuasiveness of the testimony presented by each party and concluded that the defendant did not suffer from mental disease at the time of the charged acts. RP 869. The

opinions of the state's experts were substantial evidence that the defendant did not suffer from mental disease at the time of the charged acts.

Sommerville, supra.

Finding 15: Defendant was able to appreciate the nature and quality of his actions at the time of commission [of the charged acts].

Dr. Travers gave his expert opinion that the defendant was able to appreciate the nature and quality of his actions. RP 720-721. Dr. Travers described the resolution of this issue as a “no-brainer” due to the lack of any evidence that the defendant did not know he was killing Karavias or that he did not appreciate the consequences of shooting, strangling, and burning Karavias. RP 719-720. Dr. Grant similarly gave his expert opinion that the defendant was able to appreciate the nature and quality of his actions. RP 809-810. The opinions of the state's two experts were substantial evidence sufficient to support Finding of Fact 15.

Sommerville, supra.

Finding 16: Defendant was able to tell right from wrong at the time he committed the charged offenses.

The trial court never found that delusional disorder was not a mental disease.

The defendant erroneously cites to pages 778 and 806 of the trial transcript in support of his claim that the State's experts found that

delusional disorder is not a “mental disease.” On both cited pages, the State’s experts opined that *paranoid personality disorder* was not “mental disease” for purposes of criminal insanity. The State’s experts never testified that delusional disorder was not mental disease.

Defendant may be confusing the trial court’s oral musings that the Legislature could not have intended personality disorders to constitute mental disease for purposes of an insanity defense. RP 872. The trial court fully acknowledged that the defense expert and the state’s experts disagreed on whether personality disorders were “mental disease” for criminal insanity, and that “reasonable minds can differ.” RP 873. The trial court concluded that regardless of whether a personality disorder was “mental disease” when considering criminal insanity, the court was not persuaded by a preponderance of the evidence that the defendant was incapable of appreciating his acts or their wrongfulness, with or without a personality disorder. RP 873-874.

Moreover, a trial court’s oral statements are at best tentative rulings (if anything) and may not be used to impeach a court’s written decision. *See State v. Martinez*, 76 Wn.App. 1, 3-4 n. 3, 884 P.2d 3 (1994). Here, Judge Baker’s ponderings on the record do not equal a final conclusion. Judge Baker made clear that there was a dispute between the experts and that whether or not personality disorders were “mental

disease” did not influence her final conclusion. Judge Baker never entered a written finding that personality disorders could never be “mental disease.”

Finally, the trial court would have been well within its discretion to find that personality disorders are not “mental disease” for criminal insanity even if she had made such a finding. Dr. Travers fully acknowledged that “mental disease” was a legal term for the court to define. RP 681, 780. Dr. Travers testified that within the forensic psychological community, personality disorders were not considered “mental disease” for purposes of evaluating criminal insanity. RP 682. Dr. Travers considered “mental disease” in the criminal insanity context to require mental illness so severe that perceptions of reality are distorted. RP 682. Dr. Travers related that personality disorders on Axis II of the DSM-IV are simply a set of volitional behaviors and viewpoints that cause social problems for that person or others. RP 678. A major mental illness on Axis I of the DSM-IV, on the other hand, is organic and cannot be controlled by the person afflicted. RP 679-680 (“For instance, a borderline [personality disorder] can decide whether or not to cut themselves. A schizophrenic cannot decide whether or not to hallucinate”).

Dr. Travers opinions are correct. Insanity requires mental disease

causing a break from reality such that the person is unable to conform his conduct to the law. *State v. White*, 60 Wn.2d at 558-590. Personality disorder is a composition of personality traits where the person chooses to engage in behaviors (or not engage in behaviors) not accepted as normal behavior by society. RP 678. Dr. Travers' opinions are entirely consistent with the standard of insanity codified in RCW 9A.12.010 and explained in *State v. White*.

Defendant's citation to sexually violent predator (SVP) civil commitment cases do not support his argument. Criminal insanity absolves a person of responsibility for their actions because of mental disease; SVP civil commitment pursuant to RCW 71.09 determines whether a person is sexually dangerous due to mental illness. The two concepts are very different.

The trier of fact in an SVP case does not determine whether a person's mental illness caused the person to be unable to appreciate his actions or their wrongfulness such that he cannot be held criminally liable for his actions. The issue in an SVP case is whether the person's mental illness (whether it be a major Axis I mental disorder or an Axis II personality disorder as described in the DSM-IV-TR) "makes the person likely to engage in predatory acts of sexual violence." RCW 71.09.020(18). The SVP statute defines a personality disorder as

“an enduring pattern of inner experience and behavior that deviates markedly from the expectations of the individual's culture.” RCW 71.09.020(9). The SVP statute fully acknowledges that personality disorders can render a person “likely to engage in sexually violent behavior.” RCW 71.09.010.

There is a monumental difference between mental illness that causes a break from reality such that a person is unable to appreciate his actions or their wrongfulness, and entrenched personality traits that make it likely that a convicted sex offender is still dangerous. Criminal insanity and mental illness for civil commitment are two vastly different concepts.⁸ The trial court’s conclusion that the defendant did not prove by a preponderance of the evidence that he was criminally insane at the time of the charged acts is supported by ample evidence in the record.

Dr. Grant and Dr. Travers both testified and gave their expert opinions that the defendant was not insane at the time of the charged acts. The State additionally presented evidence from persons who eyewitnessed the defendant’s behavior and his statements contemporaneous and immediately after the murder and arson.

Defendant’s argument on appeal is simply a disagreement with the weight the trial court afforded the State’s experts, or, the weight the court

⁸ Likewise, civil commitment pursuant to RCW 71.05 does not require a showing that the individual is unable to appreciate the wrongfulness of his or her acts.

declined to give to the defense expert, Dr. Gollogly. Weight and credibility determinations are for the trier of fact and are not subject to review. *State v. Thomas*, 150 Wn.2d 821, 874-75, 83 P.3d 970 (2004). Given the record presented, the trial court was well within its discretion to find that the defense did not prove insanity by a preponderance of the evidence. *State v. Sommerville, supra*.

B. Defendant's Conviction For Murder In The First Degree Should Be Affirmed Because There Was Sufficient Evidence Presented To Find That The Murder Was Committed With Premeditation.

“A claim of insufficiency admits the truth of the State's evidence and all inferences that reasonably can be drawn therefrom.” *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). The court views the evidence in the light most favorable to the State to determine whether “any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.” *State v. Joy*, 121 Wn.2d 333, 338, 851 P.2d 654 (1993).

Premeditated murder in the first degree requires the State to prove beyond a reasonable doubt that an act of intentional murder was premeditated. RCW 9.32.020(1)(a). Premeditated means:

thought over beforehand. When a person, after any deliberation, forms an intent to take human life, the killing may follow immediately after the formation of the settled purpose and it will still be premeditated. Premeditation

must involve more than a moment in point of time. The law requires some time, however long or short, in which a design to kill is deliberately formed.

WPIC 26.01.01; RCW 9A.32.020(1); *State v. Ollens*, 107 Wn.2d 848, 850, 733 P.2d 984 (1987).

Defendant argues that there was no evidence that the defendant's acts of killing Jeremy Karavias were committed with premeditated intent to kill Jeremy Karavias. Defendant's arguments are not supported by the record.

First, it was not necessary for the jury to find that the shooting, standing alone, was premeditated. The jury could reasonably conclude from the evidence that Karavias was still alive after the shooting and the shooting did not cause his death. Ron Wessel testified that Karavias was still moving after the shooting, but stopped moving when the defendant twisted his neck. RP 1190. The jury could reasonably conclude that the neck-twisting or the stabbing or the fire killed Karavias subsequent to the shooting, making the issue of premeditation for the shooting irrelevant.

Second, there was substantial evidence presented that the shooting was premeditated. The jury was presented with circumstantial evidence that the defendant was angry at Karavias the night before the murder; and that he argued with Karavias immediately prior to the murder, giving the defendant motive to kill Karavias. RP 1044-45, 1156, 1179. The

defendant had to unholster, raise, and fire his pistol in order to shoot Karavias. Defendant admitted that he purposefully shot Karavias in the chest at close range after some amount of reflection and knowing that it would kill Karavias. RP 2194-95, 2201-02. Indeed, the defendant admitted that as soon as Karavias raised a gun at him (according to the defendant), he determined that he was going to shoot Karavias. RP 2201-02. There was “more than a moment in time” for the defendant to reflect about killing Karavias prior to shooting him, and the defendant’s conduct thereafter were proof that he did in fact premeditate his murderous actions.

Karavias was still alive after he was shot. RP 1183, 2222; 2RP. The defendant thereafter knelt next to Karavias as Karavias moaned and moved about on the floor. RP 1183, 1188; 2RP; Exhibit 13. The defendant twisted Karavias’ neck until there was a “crack, crack, crack” sound. RP 1190. Defendant then took out a knife and raised it over Karavias’ abdomen as if to “gut him.” RP 1191-92. Defendant was later found to have Karavias’ blood all over his body and clothing, a fact from which the jury could rationally infer that the defendant did in fact “gut” Karavias. RP 1038, 1047, 1306. Finally, the defendant took the time to purposefully set the home on fire with Karavias in it, knowing that it would kill Karavias if he was not already dead.

Evidence of multiple acts of violence supports an inference of premeditation. *State v. Hoffman*, 116 Wn.2d 51, 84, 804 P.2d 577 (1991). From the facts presented here, and the reasonable inferences, the jury could rationally conclude that the defendant's continuous acts of murderous violence were the manifestations of a premeditated intent to kill. A rational juror would be hard-pressed to find that the act of shooting Jeremy Karavias was not premeditated given the very deliberate and sustained efforts to kill Jeremy Karavias that took place immediately thereafter.

Similarly, the evidence belies the defendant's argument about premeditation for the fire. If Karavias was still alive when the fire started, he was in a shot, strangled and obviously helpless condition. The jury could rationally infer that the defendant intended to burn to death the helpless Karavias when he started the fire; and that these thoughts were with the defendant before and during his act of setting the fire.

Defendant further argues that "there was no evidence that the fire was started by anyone," implying that if there was no evidence that the defendant started the fire, the element of premeditation must fail. Defendant's argument again ignores the evidence presented to the jury. Defendant had a clear motive to set the fire: destroy evidence of the murder of Jeremy Karavias. Ron Wessel testified that the house was not

on fire, and there was no threat of fire, when he left the defendant alone in the house with Karavias. RP 1200. The defendant was alone in the residence with a dead or dying Karavias when the fire started. Deputy Maycumber observed a “flash burn” on the defendant’s forehead and burns on his fingertips, suggesting that the defendant was close to an ignition of fire. RP 1370-72. Border Patrol agents in the helicopter observed the defendant flee the Wessel residence immediately after it went up in flames. RP 1101. Defendant discarded a lighter immediately prior to his apprehension. RP 1592, 1612-14. The medical examiner testified that the fire would have killed Karavias if he was alive when he was exposed to it. RP 1533.

The jury could rationally infer that the Wessel residence did not spontaneously combust. The only rational inference from the evidence was that the defendant purposefully set the home on fire with the premeditated intent to ensure Karavias’ death and destroy evidence.

C. The Trial Court Properly Refused The Defendant’s Request For An Instruction Requiring The Jury To Unanimously Agree On Which Act Caused The Victim’s Death.

The jury was instructed that it must be unanimous in order to return a verdict of guilty. CP 156-200. The jury unanimously agreed that the defendant was guilty of Count I, murder in the first degree. CP 201. Defendant argues that the jury was further required to determine which

particular act of the defendant caused the death of Jeremy Karavias: shooting, strangling, or burning.

- 1. A unanimity instruction was not required because the evidence showed continuous conduct constituting the crime of murder in the first degree.**

Generally, when the evidence indicates that several distinct criminal acts were committed, but the defendant is charged with only one count of criminal conduct, the constitutional requirement of jury unanimity is assured by either: (1) requiring the prosecution to elect the act upon which it will rely for conviction; or (2) instructing the jury that all 12 jurors must agree that a criminal act has been proved beyond a reasonable doubt. *State v. Petrich*, 101 Wn.2d 566, 572, 683 P.2d 173 (1984).

A unanimity instruction is not required, however, where the State cannot or does not elect because the several criminal acts are part of a continuous criminal episode. *State v. Crane*, 116 Wn.2d 315, 330, 804 P.2d 10 (1991) (*overruled on other grounds, In re Personal Restraint of Andress*, 147 Wn.2d 602, 56 P.3d 981 (2002)). Under the “continuous conduct” exception to *Petrich*, the jury must be unanimous only that the continuous criminal conduct occurred. *Id.*

A continuing conduct case is distinguished from a case where several distinct acts could each be the basis for the criminal charge. *State*

v. Petrich, 101 Wn.2d 566, 571, 683 P.2d 173 (1984). A continuing course of conduct requires an ongoing enterprise with a single objective. *State v. Love*, 80 Wn. App. 357, 361, 908 P.2d 395 (1996). “Common sense must be utilized to determine whether multiple acts constitute a continuous course of conduct.” *State v. Love*, 80 Wn. App. 357, 361, 908 P.2d 395 (1996). Factors to consider include whether the acts occurred in a separate time frame or separate place. *State v. Marko*, 107 Wn. App. 215, 220-221, 27 P.3d 228 (2001).

In *Crane*, the defendant was charged with a single count of murder for causing the death of a 3-year-old boy. *Crane*, 116 Wn.2d at 317-18. The State presented evidence that the defendant committed numerous acts of child abuse over 12 days that culminated in the death of the child. *Id.* at 317-321. The medical examiner testified that in her opinion a fatal head injury occurred during the 3 days prior to the child’s death. *Id.* at 323. No lay witness or expert testified to a particular act by the defendant that caused the child’s death. No unanimity instruction was requested or given. *Id.* at 324. The jury found the defendant guilty of murder. *Id.*

On appeal, the defendant argued that the jury should have been instructed that it had to be unanimous as to the specific act that caused the child’s death. The Washington Supreme Court rejected this argument, finding instead that the case fell within the “continuous conduct”

exception to the unanimity requirement. *Id.* at 330. The Court held that absent any evidence as to which act killed the child, and given that the fatal assault must have occurred within a short time frame, “a continuous course of conduct analysis is better suited to the evidence presented.” *Id.*

Like *Crane*, there was no single act in this case that could have supported a conviction for murder in the first degree. There was no evidence to prove which of the acts (shooting, strangling, stabbing, burning) caused the victim’s death. Like *Crane*, no witness testified, or could testify, as to which act caused the death of Jeremy Karavias. Because Karavias burned until only 42 lbs. of ashes and charred bone were left of him, even the medical examiner at autopsy could not determine a cause of death.

However, despite this uncertainty, the evidence was overwhelming that one or all of the defendant’s acts caused Karavias’ death. The acts were committed at the same place, against the same victim, and during a very short period of time; indeed, a significantly shorter period of time than the acts deemed continuous in *Crane*. All of the defendant’s acts had a singular purpose: kill Jeremy Karavias. Like *Crane*, “a continuous course of conduct analysis is better suited to the evidence presented.”

Defendant’s argument is the antithesis of the common sense analysis required by case law. Were the court to accept the defendant’s

argument, the logical conclusion would be that a person could never be prosecuted for murder where the exact manner of death is unknown, even though the evidence is overwhelming that the person maliciously and intentionally caused the victim's death (the very definition of murder). Such a result is not required by any constitutional provision, statute, or case law. Indeed, it is contrary to law as there are numerous cases of defendants who were convicted of murder even though no body was ever found and no specific cause of death established at all. *See e.g., State v. Mason*, 160 Wn.2d 910, 162 P.3d 396 (2007).

2. Any error in the court's decision to refuse a unanimity instruction was harmless.

Failure to give a special unanimity instruction in a case involving multiple acts is harmless if overwhelming evidence exists that the elements of the crime were established. *State v. Stockmyer*, 83 Wn. App. 77, 88, 920 P.2d 1201 (1996). Overwhelming evidence exists where no rational trier of fact could not find that the evidence established the crime beyond a reasonable doubt. *Id.*

On appeal, the only element of murder in the first degree at issue with respect to unanimity is causation. At trial, the defense conceded the defendant caused the victim's death but argued he was insane at the time.

Evidence that defendant caused Karavias' death was overwhelming. Any perceived error for failure to give a unanimity instruction was harmless.

D. Defendant's Convictions Should Be Affirmed Because The Prosecutor Did Not Commit Misconduct In Closing Argument.

To prevail on a preserved claim of prosecutorial misconduct, a defendant must show that the State's conduct was both improper and prejudicial. *State v. Weber*, 159 Wn.2d 252, 270, 149 P.3d 646 (2006), *cert. denied*, 551 U.S.1137 (2007). Prejudice is established if the record reflects a "substantial likelihood the misconduct affected the jury's verdict." *Id.* The defendant bears the burden of showing both improper conduct and prejudice. *State v. Hughes*, 118 Wn. App. 713, 727, 77 P.3d 681 (2003).

1. The prosecutor's argument was proper.

The defendant's theory of the case is subject to the same scrutiny as the State's. *State v. Contreras*, 57 Wn. App. 471, 476, 788 P.2d 1114 (1990). In closing argument, the prosecutor has wide latitude to draw reasonable inferences from the evidence admitted and to express such inferences to the jury. *State v. Hoffman*, 116 Wn.2d 51, 94-95, 804 P.2d 577 (1991). The prosecutor's comments in closing argument are reviewed in the context of the entire closing arguments, the issues in the case, the evidence addressed in the argument, and the instructions given.

State v. Russell, 125 Wn.2d 24, 85-86, 882 P.2d 747 (1994).

Here, the defendant had no history of mental illness; he had never been hospitalized or medicated for mental illness; and he had no brain defects. RP 1865, 1976, 2007, 2281-82, 2343. Defense experts Drs. Gollogly and Wise nevertheless opined that the defendant had a history of mental illness and was insane at the time of the murder, relying in part on the defendant's medical records as the basis for these opinions. The medical records were not admitted as exhibits. The defendant could have called his own medical doctors as witnesses to explain and/or interpret the medical records, but he chose not to. Defense counsel argued in closing that the medical records established that the defendant had longstanding and pervasive mental illness; and further established that the defendant had suffered "an acute psychotic episode" the day of the murder. RP 2880.

The prosecutor acknowledged during rebuttal argument that the experts properly testified about the contents of the medical records in order to support their opinions, but the jury should be careful in accepting the recited information at face value:

Counsel—made reference to a lot of the records that the experts testified to. And that's something that you wouldn't normally hear in a criminal case. Normally all that stuff would be hearsay; you have to hear it, you know, directly from the horse's mouth. But when experts testify

they're allowed to give opinions and they're allowed to tell you why they have the opinions, including relying on things that they've read. But that's not really evidence, that's just things that they read to support their opinions.

RP 2912. The prosecutor never argued or suggested that the jury could not consider the information recited from the medical records.

The prosecutor continued his argument after the objection was overruled, pointing out that if the medical records truly reflected what the defense experts and defense counsel claimed they did, the defendant could have called the defendant's treating physicians as witnesses to explain their observations. RP 2913. The prosecutor asked the jury to consider that in weighing the testimony of the defense experts:

... [T]he defense in a criminal case is not required to present any evidence. The defendant's presumed innocent. It's the state's burden to prove the crimes beyond a reasonable doubt.

But they can choose to present evidence. They can choose to present a defense. And they did in this case. And they called witnesses.

And Mr. Purtzer argues to you that the doctors at Sacred Heart were convinced that – that the defendant had a psychotic episode. And he puts up his doctors to read snippets of – of things that they've [medical doctors] written in medical reports.

But I would ask you if that was really the case, if the doctors at Sacred Heart were that convinced that this defendant had a – psychotic episode, why didn't they call those doctors, so that they could tell you themselves, "Yeah, we saw this guy; he was out of his mind."

They didn't do that.

And again, as Dr. Grant told you, an ER doctor, not trained in psychology and psychiatry, who has no

explanation for why the defendant went unconscious because there was nothing wrong with him at Sacred Heart, said, "Must be a psychotic episode."

And remember that at the time the defendant told the doctors at Sacred Heart – unlike what he told you, and what he would later tell his own doctors – he said he had no memory of anything that had happened. And based upon that, based upon a defendant with – or, a patient with – nothing wrong with him, who went inexplicably unconscious, and claims he can't remember anything that happened the day before, or why he was there, they said, "acute psychotic episode," and these were just ER doctors not trained in psychology and psychiatry. The one psychiatrist who did see him for 20 minutes did not diagnose him with any mental disorder or disease.

RP 2913-14.

There was nothing improper about the prosecutor's argument. In context, the prosecutor simply argued the weight that the jury should afford the testimony of Drs. Gollogly and Wise when they referenced and relied upon the defendant's medical records without explanation or interpretation from the physicians who actually examined the defendant and authored the reports. This was a fair response to defense counsel's argument that the medical records established certain facts, such as past and current mental illness. There was no misconduct.

2. There is no substantial likelihood that the prosecutor's argument affected the outcome of the trial.

The jury was instructed that it was to determine what weight and credibility to give to an expert's opinion; and that the jury could consider

the sources of the expert's information in evaluating weight and credibility. CP 156-200 (Instruction No. 8). The jury is presumed to follow the court's instructions. *State v. Stein*, 144 Wn.2d 236, 247, 27 P.3d 184 (2001).

The jury heard weeks of testimony, including days and days of expert testimony. The defendant's experts testified at great length to their opinions and the bases for their opinions, which included the medical records from Covington Multicare and SHMC. The jury is presumed to have followed its instructions and weighed the conflicting testimony for itself. It is simply irrational to conclude that during a lengthy closing argument, a prosecutor's comment about what weight to give the defense expert's reliance on medical records which were not substantively admitted had any bearing on the outcome of the case. Any perceived error was harmless.

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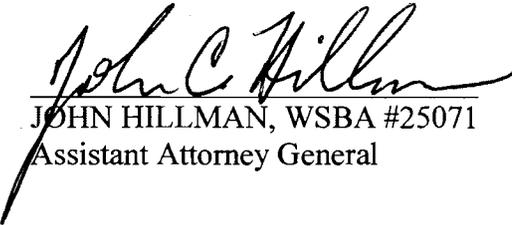
IV. CONCLUSION

The defendant received a fair trial. The defendant twice presented his claim of insanity for consideration: once to the judge, once to the jury. A superior court judge and twelve jurors all came to the same conclusion: the defendant's acts were not excused by insanity. Rather, the defendant's acts constituted the crimes of murder in the first degree and arson in the first degree. The defendant's convictions must be affirmed.

RESPECTFULLY SUBMITTED this 11TH day of May, 2011.

ROBERT M. MCKENNA
Attorney General

By:


JOHN HILLMAN, WSBA #25071
Assistant Attorney General

Appendix A

Transcript of Exhibit 13

State v. Monaghan
Audio Recording of 911 call

R. WESSELL: Calm down. Calm down! Here, tell 'em.

DISPATCHER: 911, what's the address of the emergency?

[dogs barking and victim moaning in background]

DISPATCHER: Hello? Hello?

MONAGHAN: Hello?

DISPATCHER: Yes, this is 911.

MONAGHAN: There's been a terrible accident.

DISPATCHER: K, what's going on?

MONAGHAN: Um, there's a, a... the man's been shot.

DISPATCHER: Ok, where at sir?

MONAGHAN: Right here.

DISPATCHER: Right there at the...

R. WESSELL: Hello?

DISPATCHER: Yes, go ahead.

R. WESSELL: 180 Art Creek

DISPATCHER: And what happened sir?

R. WESSELL: Ah, the gun went off and he got shot.

DISPATCHER: Ok, how's he doing?

R. WESSELL: He's rolling around.

DISPATCHER: Okay, where was he shot?

R. WESSELL: Right in the chest.

DISPATCHER: Right in the chest?

R. WESSELL: Yup.

[victim moaning in background]

DISPATCHER: Is he bleeding?

R. WESSELL: Yeah.

DISPATCHER: Okay.

R. WESSELL: We need an ambulance.

DISPATCHER: Right, I'm going to page the ambulance and I'll be right back. Stay on the line, okay?

R. WESSELL: 'Kay.

DISPATCHER: How old is he?

R. WESSELL: Huh?

DISPATCHER: How old is he?

R. WESSELL: I don't know. In his twenties.

DISPATCHER: Okay, hold on.

[beeping noises]

R. WESSELL: You there? ... 'Kay? ... Huh?

[clicking noises]

The foregoing interview was transcribed by Victoria L. Robben.

I certify under penalty of perjury under the laws of the state of Washington that the foregoing is true and correct to the best of my knowledge.

DATED this 29th day of December, 2009.

Victoria L. Robben
VICTORIA L. ROB BEN

Monaghan 000611

State v. Monaghan
Audio Recording of Second 911 call

DISPATCHER: 911, what's the address of your emergency?

R. WESSELL: 180 Art Creek Road. Tell the cops to get up here.

DISPATCHER: Pardon me? Say again sir.

R. WESSELL: Get up here now.

DISPATCHER: Yeah, we got an ambulance going. Now what can you tell me about what happened?

R. WESSELL: Are you there?

DISPATCHER: Yes, I'm here.

R. WESSELL: K, get up here now.

DISPATCHER: I heard that sir. I got the ambulance on the way. What happened?

R. WESSELL: You [unintelligible] get cops up here now.

DISPATCHER: What happened sir? Can you give me some idea?

R. WESSELL: [unintelligible]

DISPATCHER: Sir? Hello?

R. WESSELL: Yeah.

DISPATCHER: Now tell me what happened, will ya?

R. WESSELL: Um, I can't. I can't. This guy's out there going nuts.

DISPATCHER: Okay, so this wasn't an accidental gun shot then?

R. WESSELL: No. Would you get up here?

DISPATCHER: They is on the way sir. Just tell me what happened.

R. WESSELL: He got shot.

DISPATCHER: Okay, how did he get shot?

R. WESSELL: [unintelligible] shot him. He was out in the other room and he fucking pulled a knife out. And I'm in the other room and it's bad, it's bad. You guys get the cops up here. This guy's fucking going nuts.

DISPATCHER: Okay, I got it. Now, who shot who?

R. WESSELL: Hang on, hang on. I'm gon, getting out of the house.

DISPATCHER: Are you... okay. Are you still there?

R. WESSELL: Are you there?

DISPATCHER: Yeah, I'm here. Now where is the guy who shot?

R. WESSELL: I'm, I'm gonna go hide in my shed.

DISPATCHER: Okay.

R. WESSELL: [unintelligible] is crazy.

DISPATCHER: Sir, the shooter. Where is he?

R. WESSELL: He's in the house.

DISPATCHER: Okay.

R. WESSELL: He fucking was holding and I said what the [unintelligible] you doing? I said what the fuck are you doing?

DISPATCHER: Okay, do you know who he is?

R. WESSELL: Cory Monaghan.

DISPATCHER: Cory Monaghan?

R. WESSELL: Yep.

DISPATCHER: Okay, and who was shot?

R. WESSELL: I don't know. One of...

DISPATCHER: You don't

R. WESSELL: his buddies.

DISPATCHER: Okay, you don't know him?

R. WESSELL: I'm in the shed now.

DISPATCHER: Ok.

R. WESSELL: Tell the fucking cops to get the fuck up here.

DISPATCHER: Right, they're getting up here sir.

R. WESSELL: Okay, you tell 'em to get up here.

DISPATCHER: Now, what's your name?

R. WESSELL: Ron Wessell.

DISPATCHER: Okay.

R. WESSELL: When I was coming out of the shed, when I was coming out...

DISPATCHER: Uh huh.

R. WESSELL: He was holding it and I said what you fucking doing?

DISPATCHER: Uh huh.

R. WESSELL: He's reaching for his pistol and here's his pistol.

DISPATCHER: Uh huh.

R. WESSELL: And he fucking all of a sudden he snapped the kid's, the guy's neck. I heard the neck [unintelligible] snap and I go what the fuck. He's got a knife.

DISPATCHER: Uh huh.

R. WESSELL: Looks like he's going to take the guts out. You gotta get them cops up here.

DISPATCHER: Right. They're on the way.

R. WESSELL: You know what?

DISPATCHER: What?

R. WESSELL: This mother fucker, he's got in the house, he's got ah, an assault rifle.

DISPATCHER: Okay.

R. WESSELL: In there. So... you know what, fuck I couldn't get that out. I...

DISPATCHER: Okay. Are you in a safe place, do you figure, now? Or do you want to leave?

R. WESSELL: Um, no. I'm gonna go hide in a pickup out here.

DISPATCHER: Okay.

R. WESSELL: Okay, hold on.

DISPATCHER: Ron, what's your cell phone number?

R. WESSELL: Um, I don't have one.

DISPATCHER: You don't have...okay. You're on a cordless?

R. WESSELL: Yep.

DISPATCHER: Okay.

R. WESSELL: Hang on, hang on. Hang on. Hang on. I'm gonna get in the truck and you [unintelligible] kay? Could be a mistake, fucking starting.

DISPATCHER: Hey Ron?

R. WESSELL: What?

DISPATCHER: Are you in... stay, stay calm dude. Are you in the truck now?

R. WESSELL: Yeah.

DISPATCHER: Ok.

R. WESSELL: But it won't fucking start.

DISPATCHER: Is he still inside the building?

R. WESSELL: Yes.

DISPATCHER: Okay.

[phone ringing in background]

DISPATCHER: Jon, or Ron?

R. WESSELL: Yeah?

DISPATCHER: I'm gonna put you on hold. Just stay on the line, okay?

R. WESSELL: [unintelligible] [phone ringing in background]

DISPATCHER: Just keep the line open Ron. I'll be back as soon as possible.

R. WESSELL: K, hurry up.

[beeping noise]

R. WESSELL: Are you there?

[beeping noise]

The foregoing interview was transcribed by Victoria L. Robben.

I certify under penalty of perjury under the laws of the state of Washington that the foregoing is true and correct to the best of my knowledge.

DATED this 29th day of December, 2009.

Victoria L. Robben
VICTORIA L. ROBBEN