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Division III
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NO. 31487-1-III

COURT OF APPEALS, DIVISION III
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON

Respondent,

v.

ADAM EDWIN POWELL,

Appellant.

BRIEF OF RESPONDENT

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I. ASSIGNMENTS OF ERROR

A. ISSUES PRESENTED BY ASSIGNMENTS OF ERROR.

Appellant raises three assignments of error.

1. Powell's right to a public trial was violated.
2. The State's evidence was insufficient to support the conviction for second degree murder.
3. The court erred when it imposed an exceptional sentence.

B. ANSWERS TO ASSIGNMENTS OF ERROR.

The State's response is as follows:

1. There was no violation of Powell's right to a public trial and even if what occurred could be considered a violation it was de minimis.
2. The evidence presented by the State was more than sufficient for the jury to find Powell guilty of second degree murder beyond a reasonable doubt.
3. The trial court properly based its imposition of an exceptional sentence on the jury's determination that the State had proven the aggravators. As well as all of the additional information before the trial court which had sat throughout the trial.

II. STATEMENT OF THE CASE

The substantive and procedural facts are fairly and accurately set forth in appellant's brief. RAP 10.3(b) indicates a separate statement of the case is unneeded if the respondent is satisfied with that which has been set forth by appellant. The State believes additional facts are needed for this court to properly address the allegations set forth by Appellant.

Therefore, the State shall not set forth a complete chronological statement

of the case but limit this section to additional information from the record that will assist this court.

The trial court allowed testimony regarding a prior assault by Powell on the victim. In that incident the victim was walking down a road when suddenly she was struck from behind by a car driven by Powell. Ms. McCoy testified that she observed the car Powell was driving going in excess of 35 miles per hour when it struck the victim. She stated that Ms. Flores flew through the air for approximately 5 feet landing off the road. RP 798-817. Ms. Flores sustained scrapes to her knees and hands and was very shocked. She eventually refused help from the witness who saw the incident and who lived nearby.

Flores lied to the responding officers when they made contact with Powell and the victim. At the time of the police contact Powell told Dep. Roy that he and the victim had been arguing but that she had slipped and fallen as she was running around the car. RP 821-6 Dep. Roy testified that the location he was detailed out to regarding this victim/vehicle collision was 905 Tieton Ave., Tieton. This is the same address where the homicide occurred. RP 859.

Officer Ceja.

After the report by Ms. McCoy, Officer Ceja, who was also a reporting officer at the homicide, responded along with Dep. Roy to the

residence of Powell and the victim to investigate the reported vehicle assault. Upon arrival he heard screaming coming from inside the residence. When Officer Ceja entered this home, he observed Ms. Flores sitting on the couch, her pants were ripped, and she had scrapes on her knees that were clearly fresh. The victim was crying and was otherwise visibly upset. RP 846-50 Officer Ceja was the officer who escorted Powell from the home and it was at this time that Powell told this officer that he and the victim had been in Naches and the victim had jumped from the car and when she got in front of the car he “tapped her” with his car. RP 851-2.

On October 23, 2010 Officer Ceja responded to the same home, 905 Tieton Ave Tieton, where he had previously contacted Powell regarding striking the victim with his car. This time the reported incident was a reported suicide. RP 859. When the officer entered the residence he observed Powell knelling on the floor near the body of the victim, Powell was on the phone. RP 861-862. Officer Ceja testified that Powell was hysterical, sobbing and sweating, crying but there were no tears visible. Powell was escorted outside because of the unsecured weapon in the residence. Officer Ceja reentered the crime scene, took pictures of the crime scene, undisturbed, and then secured the weapon a 40. Caliber High Point. RP 863-6. Medical aid was also called at the time this officer

made initial contact with the deceased. RP 867. Ceja testified that “The body was on its, on its back and her arm was over her face and her feet were crossed... [h]er, her left hand was over her face and her, I want to say her left leg was over her right leg.” At the time Officer Ceja secured the gun it had been on her right side. RP 870.

Officer Ceja testified that he never observed anyone at the crime scene move Ms. Flores’s body. RP 1009-10. The officer also testified that when he “cleared” the gun used to kill Ms. Flores he observed that there was blood on the grip. RP 1015.

Det. Jackson

Det. Jackson processed the scene. He testified that as he processed the home where Powell and the victim lived he walked through and looked into various areas of the one bedroom. He testified that there was a total of three closets, there were no female clothing hanging in any of the closets and in fact two were empty with only hangers. There was male clothing hanging in one closet. He further testified that there was no female clothing in the dresser drawers nor was there any female clothing in the bedroom at all. There was however a pile of what appeared to be female clothing in the kitchen. RP 954-7.

Det. Jackson also testified that from his observations of the victim’s body at the crime scene it appeared that her body had been

moved, post mortem. The deceased was found lying on her back. However, her feet were crossed with her left foot over her right foot. Det. Jackson testified that the way some of the blood had dried on her face could not have occurred if she had been lying on her back. There was a pool of blood on the floor next to the right side of her body. He testified that based on his training and experience the body had been rolled. RP 970-1

The detective testified that through his training he had been taught to look for indicators, one specifically was the fact that Ms. Flores' feet were crossed, this position was one that was actually taught as part of his training. This position would indicate that the body had been rolled because feet will cross if a body is completely limp and moved in this manner. RP 972. He also pointed out that there was a large amount of blood that had come from the wounds or orifices on the victim's face. One specific blood pattern was one that had drained from the left side of her face and across her nose. He testified that it would defy gravity for that to occur if the victim had been lying on her back. The blood would have had to "go uphill and over the nose, but if you're lying face down, it would, gravity would pull it right down along your face." He also testified that there was blood on the palm of the victim's left hand but no blood on her right hand. RP 973. Det. Jackson also testified that Ms.

Flores' body was not completely on her back that she was "canted a little off to her right side." PR 983.

Det. Jackson was present at the time of Sabrina Flores' autopsy. He observed that there was a hole to the right side of her head that he had seen at the crime scene but in addition there was a hole to the back-left side of her head as well as a hole in her right bicep. These additional injuries were not apparent at the crime scene. RP 974

Sgt. Gillespie.

Just after the sergeant arrived at the crime scene he briefly interviewed the defendant. Powell was read his rights per Miranda and then told Sgt. Gillespie that he had gone upstairs to retrieve some keys and while doing that he had left his loaded handgun on the couch. Powell stated that when he came back down Ms. Flores had his gun to the side of her head. Powell stated that he walked toward Flores and Flores fired the gun and fell to the floor. The Sgt. described Powell's demeanor as "He was sobbing. Yet I noticed that there were no tears coming from his eyes. He was shaking his arms and upper body as if he was going into a seizure. He would also act as if he was going to vomit, but never did. And I also made note that..." The sergeant noted that Powell had blood on his hands. RP 1085-6

This witness testified that Ms. Flores was on the floor, legs crossed

one arm over her face and there was a large trauma, a gunshot wound, to the front right side of her head. He could not determine from this initial observation if that was an entrance or exit wound. RP 1088.

Sgt. Gillespie's examination of the crime scene aroused his suspicions about the nature of what had occurred. He then went out and spoke to Powell again, he asked him "which hand was the gun in when she shot herself?" Powell "after a quite a long pause...[h]e paused for several seconds...[a]nd he told [Det. Gillespie] it was in her left hand to the left side of her head...he thought the gun was in direct contact to the side of her head when she fired." PR 1083.

Sgt. Gillespie further testified that he had suspicions regarding what had occurred, that this was the first time he had ever had a suicide where a female had shot herself in the head. He had been part of investigations of over fifty suicides. He combined his experience with Powell's statements, Powell's suspicious emotional response, the victim's position on the floor, the blood pool, and lack of blood splatter on the walls which should have been there if Ms. Flores had been standing as Powell indicted when she shot herself in the head, all of those factors aroused the detective's suspicions and made him believe he needed to investigate further. RP 1100-1102.

Officer Hinze

Officer Hinze testified that he arrived at the scene and while inside the residence he observed Officer Ceja taking pictures of the scene. He testified that Ms. Flores's body was on the floor on her back with a hand above her head and her legs were crossed. RP 1061. Officer Hinze transported Powell from the crime scene in a police car, during the approximately twenty minute trip Powell fell asleep. RP 1063. When questioned on cross-examination by Powell's counsel about how this officer knew that the defendant was asleep the officer stated "His head was tilted all the way back against the headrest. And he was making snoring sounds." RP 1065

Paramedic Weigley.

Paramedic Weigley testified that when she entered the crime scene she went to examine Ms. Flores, she checked for a pulse and at that time observed "... there was obvious signs of brain mater on the ground." PR 1109. Ms. Weigley testified that Ms. Flores was laying crossed legged on the ground... [w]ith one hand above her head and one hand across her face." RP 1110. She identified from exhibit three that it was Ms. Flores' left arm over her face and that there was blood coming from her nose, mouth and the back of her head and again confirmed that she could see brain matter at the back of Ms. Flores' head. RP 1111-1112. Paramedic

Weigley described seeing blood splatter up the defendant's left arm. RP 1118.

Det. Perrault

Det. Perrault identified that there was a spent shell casing found inside the crime scene and it was located on the coffee table in the area where Ms. Flores body was located. RP 1199. Det. Perrault testified that he observed what he described as a pile of women's clothing and personal belongings in the kitchen. The detective did not notice any male clothing in that pile. PR 1201. He also observed that there was no female clothing in the upstairs bedroom but there were mens clothing. PR 1202.

Powell's neighbors - Ernesto Amonzo.

Mr. Amonzo testified that on the day of the murder he heard yelling and crying coming from Powell's half of the duplex. Mr. Amonzo testified the woman was crying and that the male, Adam, was yelling many things, most of which Mr. Amonzo did not understand. That which he did understand were statements such as "shut the fuck up, fuck you, fuckin' bitch, stupid." RP 894-6. He testified that he heard this yelling and crying for about a half-hour before he heard the gunshot. RP 900. After he heard the gunshot he heard Powell pacing from one side to the other and could hear him talking. RP 902. On cross-examination Mr. Amonzo testified that after the gun shot the crying that he heard was the

male and that he thought that it sounded like the male was frightened. RP 914.

He testified that he heard this yelling and crying commonly, three times per week. RP 896

Griselda Vaca

Ms. Vaca was Powell and Ms. Flores' next door neighbor. She testified there was a couple living next door to her and her husband. That she could hear what she described as "mumbling" from the other side of the wall and that at times she could hear the male using the "F" word. She testified that the male would talk more and she would hear the female sobbing. RP 921-22. Mrs. Vaca identified Powell as the person who was the male half of the couple that was living next door to her in the duplex. RP 942-3.

Anthony Jennings.

Mr. Jennings met Powell in the Yakima County Jail. Powell told Jennings his name and that he went by "Twisted." RP 1144. Powell told Jennings that Ms. Flores was his girlfriend and had been for a while. Powell spoke to Jennings about his relationship with Ms. Flores. RP 1145. Mr. Jennings testified that Powell had told him about beating up Flores, domestic violence towards Flores and about how he, Powell, had killed Flores. Jennings testified that Powell told him that he beat up Ms.

Flores, that he “choke slammed” her and this resulted in Powell actually injuring himself, Powell punched her, bounced her head off walls “[j]ust demented stuff. Powell told Jennings that this happened quite frequently up until the time he killed her. RP 1145

Jennings testified that Powell told him how he killed Flores, stating that Powell was “proud of his work.” Powell told Jennings “in detail how it happened.” This all began within 24 hours of Powell being housed with Jennings. Jennings described this as Powell venting, he just came forth and told me about it...basically venting...[b]cause he had a lot of stuff on his chest...[a]nd he was just letting it all off.” RP 1146.

Jennings testified that Powell told him that he and Flores had been fighting quite a bit towards the night of murder. Powell had come home from the store or something and Flores told him she was leaving, and Powell told her “You’re not leaving” and Flores stated she was. Powell pushed Flores and the two argued some more. Powell told him he left to check the mail or something and when he came back Flores was on the phone and she stated she was calling her father to tell him what Powell had done to her. Powell grabbed the phone from Flores, one thing led to another and Powell grabbed Flores’ hair pushing her around a little bit, cussing at her telling her “[y]eah, you bitch you’re not living day by day now are you?” Powell told Jennings that he told Flores “yeah, I’m gonna

blow your fucking head off bitch, put the gun to her head and blew her head off. “RP 1147.

Powell told Jennings the murder occurred in the living room of his apartment. That he held Flores’ head down and that Flores was crying. Powell had Flores on her knees with her head down while he was killing her. When asked about Powell’s demeanor as he was recounting this murder to Jennings, Jennings testified that Powell was “arrogant...[a] smile on your (sic) face saying, Ha, ha that’s what the bitch gets, ha ha, I had her like this, and...[t]here was no remorse ...there wasn’t no tears or nothing...[i]t was a smile on his face thinking he was cool” RP 1150

Jennings testified that Powell told him about this murder over thirty times. Jennings testified that the retelling happened so often that “it got on my nerves.” When asked about why he was giving this statement Jennings testified “Because I don’t wanna hear about how he killed his girlfriend and how they should’ve charged him with aggravated murder. And he’s only got murder two. And how he did it. And how proud he is. I don’t wanna hear that type of stuff. Sick.” RP 1151

Powell told Jennings that he had killed Flores with a forty-caliber Smith and Wesson that he, Jennings, believed Powell stated was chrome. Powell also told Jennings that he put the gun in Flores’ hand, but he put it in the wrong hand, that Powell was trying to make it look like a suicide.

Powell told him a couple times he tried to make it look like a suicide.

Powell told him that he had messed up and that he forgot to put the gun into Flores' opposite hand from where the gunshot entered Flores' head.

RP 1154

Jennings testified that after being told about this killing numerous times by Powell, he, Jennings, told Powell that he did not want to talk about it, that it was getting on his nerves and that it was not something to be proud of, because Flores was someone's daughter, mother, someone's niece.

During additional questioning Jennings testified that Powell told him that he would not let Flores leave, that she wanted to leave and all the domestic violence that was happening and that Flores had reached out to her dad for help. RP 1156. Powell also talked to Jennings about the domestic violence and that he thought Flores had been cheating on him.

RP 1156.

When question on direct by the State Jennings indicated that Powell had planned to kill Ms. Flores and make it look as if Flores had committed suicide. Powell had had this planning done before the day he killed Flores. PR 1163.

Jennings testified that Powell had even drawn out a map of the crime scene in the apartment. PR 1157. Jennings testified that "He was

explaining to me where the couch was. And he was drawing the couch. Where her body was and drew her body. Where the sword was. I remember him talking about a sword. That got, that fell down where the entertainment center was and the TV. Just the whole, the whole lay out of the crime scene.” RP 1158.

Jennings was able to identify State’s exhibit 67 which was the same map that Jennings had watched Powell draw. That map was admitted into evidence. RP 1162.

Jennings testified that Powell told him that once he attempted to run Flores over with a car and that a neighbor had come out yelling. Jennings did not know if the police had been called. Powell told Jennings that the reason he had tried to run Flores over was that they had been arguing, that Powell had wanted to leave and Flores did not want that to occur. That she somehow got in the way and that car went forward and Flores was put on the hood. RP 1160

Jennings did not get any type of consideration from the State for his testimony. In fact, he testified that due to his testimony he would now be labeled a snitch in prison. He testified that the reason he was doing what he was going was “[b]ecause of what Adam Powell did to Sabrina. For her family, for her. And it’s despicable and that’s why I’m here.” RP 1164-5.

Doctor Fino

Dr. Gina Fino, a forensic pathologist, conducted the autopsy on Ms. Flores. RP 1233, 1236-37. Dr. Fino determined that Ms. Flores had a gunshot wound to her head and a gunshot wound to the front of her right arm. RP 1239. The entrance wound was to the left side of her head and the other entrance wound was on her right anterior, front, upper arm with a partial exit wound on the posterior outside of the arm. 1239-40. The entrance wound on Ms. Flores' head was behind her left ear and the exit wound was on the right side of the face near her right eyebrow. Those injuries were the result of a gunshot wound, as well as the fractures to her skull. RP 1240.

Dr. Fino testified that she found that there was some soot present on the soft tissues. She stated that this meant there was not much distance from the gun muzzle to the entrance wound. RP 1241. She testified there was no skin splitting or stippling so Dr. Fino's opinion was there may have been fabric between the muzzle and scalp and she did find an oval defect in the jacket that the deceased was wearing. RP 1242.

The bullet went left to right, back to front. It entered 5" from the top of the head and exited 3" from the vertex, the top, of Ms. Flores body. RP 1244. Dr. Fino testified that these measurements indicated that the bullet traveled in upward from back to front, left to right. RP 1242, 1246-

7, 1256-7. Ms. Flores's right arm sustained a wound that was three inches below her armpit and on the inside portion of her arm. RP 1248, 1256 Dr. Fino testified that Ms. Flores arm was in contact with her head so there were two injuries from one wound path. RP 1249. The gunshot caused her injuries and the gunshot wound to the head caused her death. RP 1250, 1267. Dr. Fino found a bullet in Ms. Flores' arm. RP 1260. Dr. Fino characterized the bullet as a large caliber. RP 1262.

The blood pattern Dr. Fino observed would not be indicative that Ms. Flores was standing when she was shot and then fell on her back. RP 1263. She testified that there is an initial dumping of blood and because of gravity would have flowed downward if Flores was standing when shot, Dr. Fino observed no such blood patterns. RP 1263-4. The doctor testified that based on the blood patterns that she observed on Ms. Flores it would indicate that the right side of her body was lower than the left at the time she was shot. RP 1264.

Flores wound was not consistent with being self-inflicted. She opined that based on the position, the blood pattern and her final resting place, it did not matchup. The fact that her left hand was quite bloody, the back to front nature of the wound. The doctor testified that based on the nature of the holes in the coat and in Ms. Flores' arm, her right arm had to have been in contact with her head at the time she was shot. RP 1267-9.

The doctor also opined that based on the evidence she observed that Ms. Flores could not have had the gun in her left hand. RP 1273.

On cross-examination Dr. Fino testified it was in the realm of possibility that Ms. Flores fell and hit the floor at or shortly before the time the bullet was fired. RP 1281-84). However, on redirect she testified that the hypothetical put to her by Powell's counsel was highly unlikely RP 1298-1301. She testified that given the specific hypothetical that the probability would be that the wound would go from front to back. RP 1301. In fact, the doctor testified that the second hypothetical put forth by Powell would put the wound path in the opposite direction of gravity. RP 1302.

Defendant Powell's testimony

Powell testified in his defense. He stated that the time he hit Ms. Flores with his car was due to her walking in front of the car and his foot slipping off the clutch and he "bumped her." RP 1402. He claimed that immediately after this occurred he safely stopped his car and got out to help Ms. Flores. He stated that a lady was yelling and screaming at him and he told her to shut up and mind her business. He also stated that he was traveling under five miles per hour and that Ms. Flores did not fly through the air from him hitting her with his car. RP 1402.

He claimed that he and Ms. Flores yelled at each other but he never

hit her and that they would call each other names. RP 1403. Powell stated that Ms. Flores said she was going to move out, however this was a common thing. He testified that she would put her things in anything she could find and leave and come back in a short period and yell at him for not finding her. RP 1405.

Powell's testimony regarding Mr. Jennings was that he told Jennings what he had been charged with and what the police said Powell had done, but nothing else. RP 1405. Powell stated he told Mr. Jennings what really happened, that he had been charged with something he had not done. RP 1406. He stated the diagram of the crime scene was partially done by him, but the portion that had the "body with the gun" he had not drawn that. He stated that the diagram was done for a previous attorney. PR 1406-7. Powell disavowed all of Mr. Jennings testimony regarding Powell's previous assaults of Ms. Flores. He did agree that he might have told Mr. Jennings that he told the victim that she was a bitch. RP 1408-9. Powell did agree that he had told Mr. Jennings about his gun. He disavowed telling Jennings almost everything else that Mr. Jennings testified to, including that Flores was having suicidal thoughts so that he could blame her death on that if he needed to, that Powell had been planning this murder, that Flores was dead and that the bitch deserved everything that she got. RP 1410.

Powell stated that his relationship with Ms. Flores was volatile and that they were on the edge a lot of the time and would fight but they would make up. PR 1412. He stated on the night Ms. Flores was killed they were arguing because he had found a methamphetamine pipe in Flores' clothing. RP 1414-15. He claimed he assumed the reason Flores' clothing was in the kitchen was she was doing another feint at leaving then coming back. RP 1415.

Powell stated that on the day Ms. Flores was murdered he had been out shooting his forty caliber Highpoint by himself. RP 1416. When he arrived at home Ms. Flores was there and she accused him of spying on her then she sat on one of the couches, he on the other. He took out his weapon, from the right side of his pants because he shoots with his left hand even though he is right handed. RP 1421. He left the gun on the coffee table and went up to change his pants having observed that Ms. Floris' clothes were in the kitchen. RP 1424. During this time, he finds Ms. Flores clothing had a pipe in it and then he starts yelling at Flores saying vulgar things and she was yelling back. He told her that she could go live with her father since her stuff was already packed. RP 1425. He stated that they were both angry. He stated that even though he had his keys on him he had to go upstairs to retrieve his spare set of keys “[b]ecause I don’t leave, usually, things like that out by themselves

unsecured. His gun was now on the futon downstairs because he had to move it when he went to get his pants. During this time, they were still yelling at each other. When he came back downstairs Mr. Flores had "...my gun to her forehead, her head region." RP 1426-27, 1428. He stated when he saw Flores with the gun to her head he thought she had lost her mind and was going to hurt herself. He stated he told her to stop and she responded that he should get the fuck away from her, so he lunged at her and grabbed a hold of her to get the gun away. He stated he did not know if he grabbed for the gun. He stated that she fought him and she pulled away from him as he was pulling her towards himself and in the struggle they fell to the ground and Ms. Flores shot herself. RP 1428-9. After the gun went off he rolled her over to see if she was breathing she was not. He then moved the gun away from "them" but he did not try to put it into her hand. RP 1430

Powell then proceeded to call his friend and his grandmother before he called 911. RP 1431.

He states that after the shooting he remembered pretty much nothing. Until he remembered that he lied to the officers because he was scared, scared that they would blame him for something that he had not done. RP 1431-4. He could not explain why they would do that other than they were asking him too many questions. RP 1434. He stated that

he did not intend for the gun to go off or for Ms. Flores to be killed. RP 1434.

He then stated he told the officers Ms. Flores had shot herself in the head and he was standing away from her at the time this occurred “[b]ecause at the time it seemed like that to me. He could not explain why he did not tell about the alleged struggle other than to state he was afraid of being accused of something that he had not done. RP 1435. He stated that it was an accident. RP 1436.

On cross-examination Powell stated he did speak to Mr. Jennings, he did not draw the body and the gun into the diagram of his home, that he took the gun from Ms. Flores’ left hand after she allegedly shot herself, that he saw there was blood on Ms. Flores’ left hand but he had no idea how it got there. RP 1443-4. He also reiterated that he had a bad back and that the injury to his thumb was from moving furniture for a friend, clarifying that he was wearing a back brace while doing that moving. RP 1445.

When asked on cross examination about what hand Ms. Flores allegedly had the gun in when he came down the stairs he reconfirmed that she had the gun in her left hand. Upon further questioning Powell stated that he did not know if Ms. Flores was right handed, but then when he was confronted with the statement he had made to the detective he had to

admit that he in fact did know that Ms. Flores was right handed. RP 1456-60.

Powell was cross examined about the fact that his testimony was that after Ms. Flores allegedly shot herself by accident Powell rolled her body over and checked her for a pulse and yet when he made his statement to the detectives about what occurred he never mentioned he had moved her body and had in fact stated he had not touched her. RP 1460-1.

On cross examination Powell agreed that he had stated that he loved Ms. Flores and had stated that they were soul mates and then he admitted that he did not call 911 first after she was shot. RP 1463-4.

Powell was also asked about what he had stated to the detectives regarding how Ms. Flores was struck by his car in the earlier incident. In the statement to the officer he had indicated that Ms. Flores had slipped when she was getting out of the car and on direct examination that story changed to, she was struck when Powell's foot slipped off the clutch. RP 1484-6

Det. Levesque was called on rebuttal to address the location of Powell's holster at the time he was interviewed by the police. The detective testified that he inquired of Powell where the holster was and Powell pulled back his coat and state it's right here. The detective seized it from Powell, it was located on his left side and the detective testified

that this was a left side holster, not a cross draw holster. RP 1497-8, 1500-01.

III. ARGUMENT

Response to allegation one – Powell’s right to a public trial was not violated.

Criminal defendants have a right to a public trial under both the *United States Constitution* and the Washington State Constitution. State v. Lormor, 172 Wn.2d 85, 90-91, 257 P.3d 624 (2011); *U.S. Const, amend. VI*; *Wash. Const. art. I, § 22*. Whether a defendant's public trial right has been violated is a question of law reviewed de novo. State v. Wise, 176 Wn.2d 1, 9, 288 P.3d 1113 (2012).

To answer that question, this court engages in a three-part inquiry: "(1) Does the proceeding at issue implicate the public trial right? (2) If so, was the proceeding closed? And (3) if so, was the closure justified?" State v. Smith, 181 Wn.2d 508, 521, 334 P.3d 1049 (2014). If the court concludes that the right to a public trial does not apply to the proceeding at issue, it need not reach the second and third steps in the analysis. Smith, 181 Wn.2d at 521.

"[N]ot every interaction between the court, counsel, and defendants will implicate the right to a public trial or constitute a closure if closed to the public." State v. Sublett. 176 Wn.2d 58, 71, 292 P.3d 715 (2012). To

determine whether the public trial right attaches, this court will apply the "experience and logic" test. Under the experience prong, this court will consider whether the proceeding at issue has historically been open to the public. Under the logic prong, this court is tasked with asking, "whether public access plays a significant positive role in the functioning of the particular process in question." Sublett. 176 Wn.2d at 73 (quoting Press-Enterprise Co. v. Superior Court, 478 U.S. 1, 8, 106 S.Ct. 2735, 92 L.Ed.2d 1 (1986)). Only if both prongs are satisfied, the public trial right attaches. Sublett. 176Wn.2dat73.

In Smith, the defendant argued that multiple sidebar discussions following evidentiary objections during trial violated his right to a public trial. Our Supreme Court held, based on the experience and logic test, that "reasonable and traditional sidebars used to avoid interruption of a trial do not implicate the public trial right." Smith. 181 Wn.2d at 521. As to the experience prong, the court noted that sidebar conferences have historically occurred outside the view of the public, because of the practical difficulties involved with interrupting trial to send the jury to the jury room every time an evidentiary objection arose. Smith. 181 Wn.2d at 515. As to the logic prong, the court concluded that evidentiary rulings during traditional sidebars "do not invoke any of the concerns the public trial right is meant to address regarding perjury, transparency, or the

appearance of fairness." Smith. 181 Wn.2d at 518. In a footnote, the court emphasized: "We caution that merely characterizing something as a "sidebar" does not make it so. To avoid implicating the public trial right, sidebars must be limited in content to their traditional subject areas, should be done only to avoid disrupting the flow of trial, **and must either be on the record or be promptly memorialized in the record.**" Smith, 181 Wn.2d at 516 n.10. (Emphasis added.) The Smith court also observed, "Critically, the sidebars here were contemporaneously memorialized and recorded, thus negating any concern about secrecy." Id at 518.

There is no question that the sidebars or as the VRP calls them bench conferences, in question in this case were "proper" sidebars. Powell acknowledges that traditional sidebar conferences do not implicate public trial rights under Smith and agrees that one of five alleged "unrecorded" sidebars was in fact done for a proper purpose. (Apps brief at 16).

But Powell contends the other four sidebar conferences do not fall within the definition of traditional sidebars. He also emphasizes that these sidebars were not **recorded** however, Smith and cases such as the very recently decided State v. Schierman, _ Wn.2d _, 415 P.3d 106, 126. (Wash. 2018) do not limit the memorialization of what occurred to merely recording. Schierman, which also determined for the first time in this state

that there are cases where an actual violation has occurred but that violation de minimis, states as follows:

As noted above and elaborated in Justice Yu's concurrence/dissent, the de minimis error inquiry asks to what extent the particular closure in question undermined the values furthered by the public trial right. Peterson, 85 F.3d at 43. While this inquiry is necessarily case specific, courts applying it have considered the length of and reason for the closure (e.g., whether it was inadvertent), Brightman, 155 Wn.2d at 517, 122 P.3d 150 (collecting cases); the substance of the closed proceedings, United States v. Ivester, 316 F.3d 955, 960 (9th Cir. 2003); and whether that substance was contemporaneously transcribed or timely memorialized in open court, Peterson, 85 F.3d at 43.

Here the first two sidebars that occur at VRP 524-5 occurred at 12:21 and 12:22 p.m. The next line after "End of Bench Conference" is a brief discussion on the record, juror Sylvie Perrault is excused because "...someone related to you is going to testify in this case..." RP 525 clearly the bench conference addressed an issue involving this juror and the obvious issue that this juror would probably be a juror who should not sit on Powell's jury. Powell was in the courtroom; the public was obviously not excluded and this is the very type of issue that is commonly addressed in a sidebar.

This is a ministerial matter, it allowed Powell to have a juror who was apparently related to a detective who was part of the investigation, to

be removed without need to use a cause or preemptory challenge. Powell also clearly did not object, the sidebar was literally one minute long and when this matter was remanded to the trial court for the parties to further address these specific sidebars Powell's attorney and the court both indicated that this was the reason for the sidebar. (Record settlement - VRP 9-15) Literally 12 lines later on page 525 the court indicates for the record, memorializes, what occurred in those two sidebars.

JUDGE: Sure. I'll also put on the record that we had a brief side bar during the time that the jurors were filling out the instructions. We discussed one of our potential jurors who is related to one of the witnesses and was excused. Juror Perrault. And, see if I can find the number.

GUZMAN: Number forty-eight, Your Honor.

JUDGE: Thank you. Number forty-eight. Yes, Sylvie Elsie Perrault has been excused. Also we discussed timing and agreed the jurors will come back tomorrow at nine and then we will meet before we bring them back in here to discuss the questionnaires or make any challenges for cause.

The State is uncertain how much more contemporaneously memorialized the actions of the parties could have been.

This court need only read the declaration of Powell's own trial attorney to understand that the actions in the trial were in fact "proper" sidebars and that there was never any violation of Powell's rights by the parties conducting court business in this manner. CP 1053-63. This declaration along with the brief supplemental transcript from the remand

hearing which addressed this very issue combine to quash any and all of Powell's claims. It should be noted that at the time the hearing was conducted Powell was a telephonic participant and not once did he dispute that statements of his own attorney or the court. Settlement VRP 4.21.2017 pgs. 5-38. The notes from the clerk have also been submitted and they too support the State's position. CP 1041-45

There were findings and conclusions which were entered after this hearing to settle the record, none of the findings nor the conclusions have been challenged in this appeal. CP 001070-001110. See, State v. Hubbard, 200 Wn.App. 246, 402 P.3d 362 (2017) See also, State v. O'Neill, 148 Wn.2d 564, 571, 62 P.3d 489 (2003); State v. Brockob, 159 Wash.2d 311, 343, 150 P.3d 59 (2006).

On the record at the time those were entered Powell was again present and when asked by the court if he objection to the entry of the findings order and he indicated that he did not object. (Settlement RP 9.28.2017, pge.,7.)

Powell cites to State v. Whitlock, 188 Wn.2d 511, 513-14, 396 P.3d 310 (2017) alleging that case is determinative, however Whitlock was a bench trial and the "sidebars" were actually the in-chambers conference that took place and lasted approximately 10 minutes. Whitlock, at 513, 519, 522-23. In Whitlock, a bench trial, one of the

defendants attempted to cross-examine a State witness about whether she had previously acted as a confidential informant. That in-chamber conference lasted for 10 minutes and the matter was not memorialized until later. The court and counsel described the content of the in-chambers discussion on the record. Our Supreme Court held that the conference was not a proper sidebar and violated the right of the defendants to a public and open trial. State v. Whitlock, 188 Wn.2d 511, 522-23, 396 P.3d 310 (2017).

Whitlock was not a jury trial, so there was "no expediency justification for holding an evidentiary conference outside the courtroom," and "no reason for any delay in memorialization at all." State v. Whitlock, 195 Wn.App. 745, 753, 381 P.3d 1250 (Div. 3 2016); Whitlock, 188 Wn.2d at 523. This distinction is critical.

In this case, the context (supported by the later declarations by court and counsel and the remand hearing, clearly indicates that the trial court used sidebars in order to avoid disrupting the flow of the jury trial.

A key reason why the in-chambers conference in Whitlock was not a sidebar was because the court concluded that the conference did not involve a traditional subject area of sidebars, such as "legal challenges and evidentiary rulings, " but instead concerned a "factual" issue that was "easily accessible to the public." Whitlock. 188 Wn.2d at 522-23.

Here, on the other hand, the first sidebar involved allowing a juror to be removed without further discussion on the record of who that person was and who they were related to, it is easy to surmise that this type of conversation could easily lead to information being placed in front of the jury that should not be presented to the jurors in voir dire.

The second was procedure with regard to when the jurors were to return, about a ministerial as anything a trial court does.

Parties to an unrecorded sidebar are obligated to ensure that a record of the ruling is made for appeal purposes and failure to make a record may preclude review. State v. Koloske, 100 Wn.2d 889, 896, 676 P.2d 456 (1984), overruled on other grounds by State v. Brown, 111 Wn.2d 124, 761 P.2d 588 (1988).

The next three bench conferences that have been challenged by Powell occur in the record at RP 748-50, RP 751- 60 and RP 760, this is the bench conference/sidebar that Powell has labeled as a “proper” sidebar even though it too was not memorialized. He surmises from the context of the VRP that this conference addressed the final selection of jurors. (Appellant’s brief at 16)

The first of these three occurs when Powell’s trial counsel states that he has something that “...I do have some comments that I would like to make in follow up to some previous motions. May I do that either at

side bar or how do you want me to handle that?”

The court then conducts the following colloquy with counsel:

JUDGE: Is it relevant to jury selection?

SCOTT: It is. I'll put it out on open record if that's what you want me to do.

JUDGE: Well, I have no idea what you're talking about.

Why don't you come over here for a side bar for a moment and I'll decide.

Immediately after this Powell's counsel, on the record in open court makes a lengthy challenge to a juror seated in the panel. Once again it is clear from the context, the remand hearing transcript and Mr. Scott's declaration that this apparently brief sidebar briefly addressed this challenge to this specific juror and after that information was imparted to the court the court had that challenge done in open court. (CP 1059, 1060, 1093-94. Settlement VRP 21-30

In the second sidebar challenged from this day the State's attorney addresses the court outside the presence of the jury regarding the State making a "Batson" challenge. The record following this bench conference/sidebar make it very clear that the State had stated it was going to make this challenge, a challenge that clearly should not be argued before the jury. While there is no indication of the length of this sidebar, either from the record or from Powell's brief, it can be surmised from the context of the VRP that it was short, and the immediate discussion

addressed the issue that was raised in the bench conference. RP 751- 60 (CP 1060, 1096).

There were two additional occasions where the State's attorney brought to the court and counsel's attention that there had been sidebar conferences that had not been memorialized on the record at the time the occurred. RP 703-4 1664-6. There is no doubt that the court and the parties were well aware of the need to make a record of these sidebar conferences. The first of these two sidebars was addressed by the State's attorney. He notes for the record that there had been a sidebar earlier and he was concerned the following discussion occurred:

GUZMAN: Your Honor, I just remembered one other thing. We had a side bar earlier?

JUDGE: Yes.

GUZMAN: And I guess my understanding is, and it's a concern for me because of the, the Bone-Club analysis and cases from that, when we're having these side bars, it's my understanding a lot of the judges in our superior courts aren't even doing those anymore ---

JUDGE: Right.

GUZMAN: ---because of those cases and it causes concern about what's said there, even if it's being recorded over there versus just putting it on the record here, that people in, you know, these courtrooms are open to the public, that we shouldn't even be doing that at all anymore. That if we're gonna say something, we just do it outside the presence of the jury on the record instead of doing the side bar kind of how we did the last one.

JUDGE: And I have no problem at all with that once we get the jury we can send them out, but when we have this group of people I don't know how we do that. But I do appreciate what you're saying and I'm, and I don't disagree with it. Basically what we did during that side bar, and I'll put it on the record right now, and also another point to that is that the defendant is sitting over here

and can't necessarily hear what we're saying although I trust that counsel would have reviewed it. I believe it had to do with letting one of our jurors go, which one was it?

SCOTT: Mr. Keck, I think.

JUDGE: Keck, oh yes, it was Mr. Keck who's daughter had been raped and then committed suicide and everyone agreed that he'd be a great juror but, on the other hand, it was a very emotional and traumatic experience for him and that there was high likelihood really that it would sidetrack him and distract him from the presentation of the evidence and everyone agreed to take him off. So, thank you for bringing that to my attention, I appreciate it.

GUZMAN: Thank you, Your Honor. RP 703-4

The State would direct this court, pursuant to GR 14.19(a) to consider as nonbinding authority and accord such persuasive value as this court deems appropriate:

State v. Roberson, 74539-5-I (WACA, Division 1 May 14, 2018) three sidebars, memorialized 30 minutes and 20 minutes after occurrence and the last there was no record. The first discussed evidence, the second scope of victim's testimony and the final, contextually occurred regarding admission of evidence. That court affirmed the conviction.

See also pursuant to GR 14.19(b): State v. Key, 76136-6-I (WACA, Division 1 June 25, 2018), unrecorded sidebar during voir dire; State v. Baker, 48839-6-II (WACA, Division 2 June 12, 2018) discussion off the record but in open courtroom; State v. Guevara, 34636-6-III (WACA March 6, 2018); State v. Planque, 76213-3-I (WACA April 30, 2018)

The State firmly stands behind its argument that all of the bench conferences/sidebars were addressed on the record in a manner contemplated by case law cited above and therefore there was no violation of any parties right to have an open courtroom.

However, even if this court were to determine that one or more of the sidebars at issue here were violative of the law set forth above, Schierman’s de minimis analysis would apply. This recent and truly important case shifts the analysis of this type of claim significantly. State v. Schierman, _ Wn.2d _, 415 P.3d 106, 126-127 (2018):

Thus, unlike the closures we have held to be reversible error in the past, the closure at issue here— although error— did not fundamentally taint the process by which the court established the facts necessary to assemble the jury or decide the case.” Id at 125.

...In light of these competing concerns, we hold that the doctrine of de minimis error can apply to the proceeding at issue in this case, which involved no juror questioning, witness testimony, or presentation of evidence. We also hold, for the reasons given below, that the closure at issue here was a de minimis error and therefore does not warrant the remedy of automatic reversal. Id at 126. ...the de minimis error inquiry asks to what extent the particular closure in question undermined the values furthered by the public trial right. Peterson, 85 F.3d at 43. While this inquiry is necessarily case specific, courts applying it have considered the length of and reason for the closure (e.g., whether it was inadvertent), Brightman, 155 Wn.2d at 517, 122 P.3d 150 (collecting cases); the substance of the closed proceedings, United States v. Ivester, 316 F.3d 955, 960 (9th Cir. 2003); and whether that substance was contemporaneously transcribed or timely memorialized in open court, Peterson, 85 F.3d at 43

...in this case, the 10-minute meeting in chambers, which was contemporaneously memorialized and publicly announced immediately afterward, and occurred without testimony and without objection, cannot be said to have meaningfully undermined public confidence or participation in the judicial system. Indeed, it is more realistic to say that reversing four convictions for aggravated murder resulting from a months-long trial on the basis of a 10-minute in-chambers discussion— which the parties apparently agreed to and which resulted in no testimony, no evidence, and no secrets— would be more likely to diminish public confidence in the judiciary.

For these reasons, we adopt a limited de minimis exception to our rule of automatic reversal for all violations of the public trial right. We reject Shearer 's dicta foreclosing the possibility of de minimis violations altogether, and we hold that the 10-minute closure at issue here— to which there was no objection and which involved no juror questioning, witness testimony, or presentation of evidence, and was simultaneously transcribed and immediately afterward memorialized in open court— was a de minimis violation of the right to a public trial.

Response to allegation two - The State proved beyond a reasonable doubt that Powell committed the crime of Second Degree Murder.

The original criminal charge in this case was charged out as First Degree Murder under RCW 9A.32.030(1)(a), RCW 1 0.99.020, RCW 9.94A.535(3)(h)(i), RCW 9.94A.533(3), 9.94A.825, RCW 9.94A.570, and RCW 9.94A.030. CP 57-8. The court allowed a lesser included instruction for murder in the second degree to be given to the jury. The jury acquitted the defendant of first degree murder and found him guilty of second degree murder. CP 242-3, 255

There were three primary instructions which the jury were given

that address this verdict. Instruction 9 states:

A person commits the crime of Second Degree Murder when with intent to cause the death of another person but without premeditation, he causes the death of such person.

The elements or to convict instruction, number 10, for that crime states the following:

To convict the defendant of the lesser crime of Second Degree Murder, each of the following elements of the crime must be proved beyond a reasonable doubt:

- (1) That on or about October 23, 2010, the defendant shot Sabrina Flores;
- (2) That the defendant acted with intent to cause the death of Sabrina Flores;
- (3) That Sabrina Flores died as a result of the defendant's acts; and
- (4) That the acts occurred in the State of Washington.

If you find from the evidence that each of these elements has been proved beyond a reasonable doubt, then it will be your duty to return a verdict of guilty.

On the other hand, if, after weighing all of the evidence, you have a reasonable doubt as to any one of these elements, then it will be your duty to return a verdict of not guilty.

And finally, instruction 22 reads, in part, as follows:

If you find the defendant guilty on verdict form A, do not use verdict form B. If you find the defendant not guilty of the crime of First Degree Murder, or if after full and careful consideration of the evidence you cannot agree on that crime, you will consider the lesser crime of Second Degree Murder. If you unanimously agree on a verdict, you must fill in the blank provided in verdict form B the words "not guilty" or the word "guilty", according to

the decision you reach. CP 237.

Appellate courts review sufficiency of the evidence challenges to see if there was evidence from which the trier of fact could find each element of the offense proved beyond a reasonable doubt. State v. Green, 94 Wn.2d 216, 221-222, 616 P.2d 628 (1980) (citing Jackson v. Virginia, 443 U.S. 307,319, 99 S. Ct. 2781, 61 L. Ed. 2d 560 (1979)).

Issues of witness credibility are to be determined by the trier of fact and cannot be reconsidered by an appellate court. State v. Camarillo, 115 Wn.2d 60, 71, 794 P.2d 850 (1990). A reviewing court will consider the evidence in a light most favorable to the prosecution. Id. It also must defer to the finder of fact in resolving conflicting evidence and credibility determinations. Camarillo, 115 Wn.2d at 71.

A challenge to the sufficiency of the evidence requires that the defendant address the evidence and all reasonable inferences drawn in favor of the State, with circumstantial evidence and direct evidence considered equally reliable. State v. Salinas, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992); State v. Delmarter, 94 Wn.2d 634, 638, 618 P.2d 99 (1980). The elements of a crime can be established by both direct and circumstantial evidence. State v. Brooks, 45 Wn. App. 824, 826, 727 P.2d 988 (1986). One is no less valuable than the other. There is sufficient evidence to support the conviction if a rational trier of fact could

find each element of the crime proven beyond a reasonable doubt.

A challenge to the sufficiency of evidence admits the truth of the State's evidence and all inferences that can be reasonably be drawn therefrom. State v. Theroff, 25 Wn. App. 590, 593, 608 P.2d 1254 (1980). This court must defer to the trier of fact on issues of conflicting testimony, credibility of witnesses, and the persuasiveness of the evidence. State v. Thomas, 150 Wn.2d 821, 874-75, 83 P.3d 970 (2004) (citing State v. Cord, 103 Wn.2d 361, 367, 693 P.2d 81 (1985)). The jury, alone, has had the opportunity to view the witnesses' demeanor and to judge their veracity. Deference must be given to the trier of fact. It is the trier of fact who resolves conflicting testimony, evaluates the credibility of witnesses and generally weighs the persuasiveness of the evidence. State v. Longuskie, 59 Wn. App. 838, 844, 801 P.2d 1004 (1990).

The facts set forth in Appellant's brief alone are sufficient for a jury to find the defendant guilty of murder in the second degree. The facts set forth in the State's statement of the case make the State's proof of the commission of this crime "beyond a reasonable doubt."

The defendant's initial statement was presented to the court through both officer testimony and Powell's own testimony under oath. In that testimony Powell was forced to admit that he lied to the officers in that initial statement. His stated reason was that he did not want to get

into trouble. His story evolved from Ms. Flores shot herself in the head to Ms. Flores was in the process of shooting herself in the head when he lunged at her. That he got hold of the weapon and they struggled until they fell over and during that fall Ms. Flores managed to shoot herself in the back of the head. Not only did Ms. Flores manage to shoot herself in the back of the head in this accidental shooting but she did it with her left hand even though she is right handed, and she shot herself on the left side of her head and then when she managed all of these feats of contortion she even managed to get her left hand to get the gun in at an angle such that the bullet traveled through her head upward from left to right.

Addressing this story on cross-examination Dr. Fino testified it was in the realm of possibility that Ms. Flores fell and hit the floor at or shortly before the time the bullet was fired. RP 1281-84. However, on redirect she testified that the hypothetical put to her by Powell's counsel was highly unlikely RP 1298-1301. She testified given that hypothetical the probability would be that the wound would go from front to back. RP 1301. In fact, the doctor testified that the second hypothetical put forth by Powell would put the wound path in the opposite direction of gravity. RP 1302.

The story told by Powell was clearly manufactured in an attempt to make this explanation match the testimony that had been submitted to the

jury. Simply put this story is ludicrous. Here the bullet was demonstrated to have enter the back left of the Ms. Flores' head and traveled in a slightly upward path exiting just above her right eyebrow then continuing to travel through her coat, causing two wounds to her arm and stopping inside her arm. The opinion of the doctor was that the way the wounds were situated and because of the way the wounds appeared that Ms. Flores right arm, the arm with the wound, was in contact with the front of her head when she was shot. She also opined that the arm was also supported such that the wounds had the margins that they did. She also determined that based on a defect, a hole, in the left side of Ms. Flores' coat that that portion of the garment was actually between the muzzle of the gun and the wound to the back left area of Ms. Lopes' head. RP 1267-9 Dr. Fino also testified that the right arm may have been up against a surface such as a wall, a corner, a table.

This correlated with the testimony of Mr. Jennings who testified that Powell told Jennings the murder occurred in the living room of his apartment. That he held her head down and that Flores was crying. Powell had Flores on her knees with her head down while he was killing her. RP 1150. Jennings testimony also fit the crime scene and the issues raised by Dr. Fino when regarding the location of the entrance wound and its path. Jennings testified that Powell told him he put the gun in the

wrong hand, that Powell was trying to make it look like a suicide and Powell stated that to Jennings on more than one occasion. Powell went so far as to say he had messed up and he forgot to put the gun into Flores' opposite hand from where the gunshot entered Flores' head. RP 1154

Once again from the statement of the case above Dr. Fino testified that "Flores' wound was not consistent with being self-inflicted. She opined that based on the position, the blood pattern and her final resting place did not matchup. The fact that her left hand was quite bloody, the back to front nature of the wound. The doctor testified that based on the nature of the holes in the coat and in Ms. Flores' arm that her right arm had to have been in contact with her head at the time she was shot. RP 1267-9. The doctor also opined that based on the evidence she observed that Ms. Flores could not have had the gun in her left hand. RP 1273.

The courts statements at the time of sentencing, while not evidence nor case law are clearly on point to this issue. The court stated the following at the time of sentencing:

And I stand by the decision that I made not to allow it (404b evidence) during the trial because quite frankly I think let me say that I think this jury deliberated for a little over two hours and were eating lunch part of the time. This jury came to a quick and determination; this wasn't evidence that they had to consider for even an entire day. But I think that if they had heard about the prior relationship and how Mr. Powell treated the other woman and the testimony regarding intimidation with the firearm

and so forth I think the jury would have been back in about ten minutes. So, I think that it was important that they didn't hear that so they could focus on this relationship and the facts in this case. And without hearing it as I've said it didn't take them very long. I think Mr. Guzman raises an important point what more does he have to do. He has proven to a jury of twelve people who were quite adamant as I polled them that it was their verdict and the verdict of the entire jury that he was in fact guilty of second degree intentional murder, that he armed with a firearm, that this was a domestic violence because they were in a domestic relationship and we say it's a people living together in a romantic relationship I guess it gives a whole new twist to the term romantic, it's quite ironic in a situation like this. But it was domestic violence and the jury further found that it was an aggravated instance based on the evidence that the jury was presented. So, the jury has made its decision here and beyond a reasonable doubt and I believe that the evidence was substantial and the the verdict is supported by the evidence that the jury was allowed to hear during this trial. (Alteration mine.) RP 1701-2.

Response to allegation three – Sentencing – exceptional sentence.

The State really need not address this issue in great detail other than to set forth what the sentencing court said, "...a jury of twelve people who were quite adamant as I polled them that it was their verdict and the verdict of the entire jury that he was in fact guilty of second degree intentional murder, that he armed with a firearm, that this was a domestic violence because they were in a domestic relationship and we say it's a people living together in a romantic relationship I guess it gives a whole new twist to the term romantic, it's quite ironic in a situation like this. **But it was domestic violence and the jury further found that it was an**

aggravated instance based on the evidence that the jury was presented.” RP 1702. **So now as it comes to sentencing and we have a standard range but with the finding that this is an aggravated act of domestic violence that court has grounds to go above the range and the State is asking that I do that.**... I guess what we know is a young vital woman with two children was murdered in her home by someone with whom she had an intimate relationship.... So, we have a young woman in a relationship with Mr. Powell and it appears that she was a vulnerable individual, she for whatever reason, and I don't know why, but she had something going on in her life so that she had lost her children. A horrible stressor for anyone.” RP 1702. (Emphasis added.)

State v. Alexander, 125 Wn.2d 717, 722-31, 888 P.2d 1169 (1995):

In reviewing a challenge to an exceptional sentence imposed pursuant to RCW 9.94A.120(2), this court applies a three-prong test. /9

First, we examine whether the record supports the findings of fact used to justify the exceptional sentence. RCW 9.94A.210(4)(a). Appellate courts ordinarily review a finding of fact to see whether the finding is "clearly erroneous". ...

Second, we examine whether each factual finding constitutes a "substantial and compelling" reason for departing from the standard range as a matter of law. RCW 9.94A.210(4)(a); RCW 9.94A.120(2);

...

9 RCW 9.94A.210(4) provides: "To reverse a sentence which is outside the sentence range, the reviewing court must find: (a) Either that the reasons supplied by the sentencing judge are not supported by the record which was

before the judge or that those reasons do not justify a sentence outside the standard range for that offense; or (b) that the sentence imposed was clearly excessive or clearly too lenient." (Some footnotes omitted, citations omitted.)

This court has noted in many other matters that an "abuse of discretion" is considered to have occurred when the discretion is "manifestly unreasonable, or exercised on untenable grounds, or for untenable reasons". State ex rel. Carroll v. Junker, 79 Wn.2d 12, 482 P.2d 775 (1971)

The court went on:

He would say but they were sole mates but admitted to calling her a fucking bitch. The neighbors heard that. If you want to know what this relationship was like, because Sabrina can't tell us, we can hear about it from people that witnessed it. And like a lot of acts of domestic violence, there often are not very many witnesses and that's done by design. People get isolated, people are cut off from family, from friends, they're not allowed to leave. In this case, it's pretty clear that she was packed up. All of her belongings, her personal effects were out of the bedroom, they were piled in bags and suitcases and plastic bags in the kitchen. She'd been apparently looking for a way to get her stuff out of the house. The yellow pages were turned to a page that showed U-Haul, if I'm not mistaken. So, she intended to leave. Mr. Powell testified that she was free to go anytime;

that he never stopped her didn't ring true. Obviously, she wanted to leave that's why her things were packed up and she never was able to get out. The neighbors testified that, and they lived in a duplex so they were as close as neighbors can possible be, with thin walls between the living rooms, and they heard screaming and crying as often as three times a week. The gentleman that lived in the house actually heard the incident that led up to this homicide; and heard screaming, crying; he turned up the TV and tried to get away from it."

Even where a trial court's written findings are incomplete or inadequate, this court can look to the trial court's oral findings to aid its review. State v. Robertson, 88 Wn.App. 836, 843, 947 P.2d 765 (1997), review denied, 135 Wash.2d 1004, 959 P.2d 127 (1998).

The sentencing court:

So, we know that there is an ongoing pattern of abuse here by what was heard by the neighbors. But we also have an incident that is very interesting and that's the incident with the car...Mr. Powell's description of how he hit Sabrina with the car just doesn't make any sense... I think it says a lot about Sabrina's state of mind and her relationship with Mr. Powell because she was terrified, and she was not, she didn't think that anybody could help her. Apparently, she didn't think that her parents could help her, she didn't think that Miss McCoy could help her, she was

terrified of Mr. Powell. RP 1705-6

Findings of fact and conclusions of law were entered regarding the imposition of the exceptional sentence and they also address the issue of same course of conduct. CP 267-8. Those findings and conclusions have not been challenged by Powell. State v. Hubbard, 200 Wn.App. 246, 402 P.3d 362 (2017) “We review the superior court's findings of fact to determine whether they are supported by substantial evidence. Evidence is "substantial" when it is enough to persuade a fair-minded person of the truth of the stated premise. Unchallenged findings of fact are verities on appeal. We review the superior court's conclusions of law de novo to determine whether they are supported by the superior court's findings of fact.” (Citations omitted.) See also, State v. O'Neill, 148 Wn.2d 564, 571, 62 P.3d 489 (2003); State v. Brockob, 159 Wash.2d 311, 343, 150 P.3d 59 (2006).

Here the sentencing court judge was also the judge who had sat through the preliminary hearings, the trial and had then been presented with the verdict of the jury, which found beyond a reasonable doubt that the State has proven the three alleged aggravators, firearm, domestic relationship – members of the same family or household and aggravated domestic violence offense. CP 244-46. When the judge spoke regarding the sentence to be imposed he went into detail of the acts that Powell had

committed and the basis for his reasoning that there had to be an exceptional sentence imposed. RP 1701-07, 1711-12. (Appendix A)

The judge stated when he imposed sentence; “I think that an exceptional sentence is warranted and try to be fair to all parties. I think that the appropriate sentence here is three hundred and forty months in prison, including the sixty months for the firearm enhancement.” RP 1707.

There is no doubt that the law supports the imposition of an exceptional sentence in this case. This is not some arbitrary action on the part of the court. It is an imposition of the will of the jury, a jury which was tasked with not just determining that Powell was guilty beyond a reasonable doubt, but also determination, beyond a reasonable doubt, that Powell had been in a domestic relationship with the woman he executed and further that this was not just domestic violence but aggravated domestic violence. This court must uphold the sentence imposed.

IV. CONCLUSION

The facts presented at trial support the charge of murder in the second degree, the facts support the determination of the jury that Powell was in possession of a firearm, that he was in a domestic relationship with the woman he murdered, that this was a case of aggravated domestic abuse, and the facts presented support the trial courts imposition of an exceptional sentence.

Powell's rights to an open trial were not violated by any of the short and procedural actions done in the side bars he claims were not done in a manner that allowed the public proper access. For reasons set forth above, this court should deny this appeal.

Respectfully submitted this 27th day of August 2018,

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APPENDIX A

JUDGE: Alright preliminary the State in its brief has raised a very interesting legal issue. And it may be a matter of first impression and that is to what extent would it be lawful for the court to consider the 404b evidence and specifically the evidence of the prior relationship that I think had been within a year of Sabrina's death, I think it was fairly recent. There were some similarities I felt that it would be unwise to allow the jury to hear that information I found that the State had proven by preponderance that it did occur but then the question was what's the proper use of 404b evidence and if we can find some than does the prejudicial affect outweigh the probative value. And I stand by the decision that I made not to allow it during the trial because quite frankly I think let me say that I think this jury deliberated for a little over two hours and were eating lunch part of the time. This jury came to a quick and determination; this wasn't evidence that they had to consider for even an entire day. But I think that if they had heard about the prior relationship and how Mr. Powell treated the other woman and the testimony regarding intimidation with the firearm and so forth I think RP 1701 the jury would have been back in about ten minutes. So I think that it was important that they didn't hear that so they could focus on this relationship and the facts in this case. And without hearing it as

I've said it didn't take them very long. I think Mr. Guzman raises an important point what more does he have to do. He has proven to a jury of twelve people who were quite adamant as I polled them that it was their verdict and the verdict of the entire jury that he was in fact guilty of second degree intentional murder, that he armed with a firearm, that this was a domestic violence because they were in a domestic relationship and we say it's a people living together in a romantic relationship I guess it gives a whole new twist to the term romantic, it's quite ironic in a situation like this. But it was domestic violence and the jury further found that it was an aggravated instance based on the evidence that the jury was presented. So the jury has made its decision here and beyond a reasonable doubt and I believe that the evidence was substantial and the the verdict is supported by the evidence that the jury was allowed to hear during this trial. So now as it comes to sentencing and we have a standard range but with the finding that this is an aggravated act of domestic violence that court has grounds to to go above the range and the State is asking that I do that. And the State is in fact asking for an additional ten year sentence. The firearm enhancement will add five years to the standard range and then we have the standard range and then the request now is for ten years more. So I have to focus on not what happened previously in the 404b type information but what RP 1702 happened here. And although I think it's a fascinating intellectual discussion and analysis as to whether it would be appropriate to

include the 404b evidence it's not necessary in this case and so I'm not going to turn this into a test case for sentencing. Because the it's not necessary that I consider that, the evidence is right here before us it was laid out I guess it ended about two weeks ago and it was before the jury for almost two weeks. So I think that the evidence is very clear. I guess what we know is a young vital woman with two children was murdered in her home by someone with whom she had an intimate relationship. And the forensic evidence really does support the comments of Deputy Levitt (sp) that she was in fact executed as she was held against the floor against her will. The court rejects as did the jury the notion that this was an accidental struggle and the gun went off. Of course the initial story by the defendant that this was a suicide has long been proven to be incorrect and he admitted on the stand a number of times that he had falsified that information because in his words he was afraid he would get into trouble. So we have a young woman in a relationship with Mr. Powell and it appears that she was a vulnerable individual she for whatever reason and I don't know why but she had something going on in her life so that she had lost her children. A horrible stressor for anyone. According to Mr. Powell's grandmother she had been living in a car so she was very vulnerable. Mr. Powell befriends her he described them as sole mates yet there was so much that he couldn't describe about her that it just didn't ring true that that's the way he really felt or if he did his RP 1703 understanding of what that term really means is almost hard to

comprehend. He would say but they were sole mates but admitted to calling her a fucking bitch. The neighbors heard that. If you want to know what this relationship was like because Sabrina can't tell us, we can hear about it from people that witnessed it. And like a lot of acts of domestic violence there often are not very many witnesses and that's done by design. People get are isolated, people are cut off from family from friends they're not allowed to leave. In this case it's pretty clear that she was packed up. All of her belongings her personal effects were out of the bedroom, they were piled in a bags and suitcases and plastic bags in the kitchen. She'd been apparently looking for a way to get her stuff out of the house. The yellow pages were turned to a page that showed U-Haul if I'm not mistaken. So she intended to leave. Mr. Powell testified that she was free to go anytime; that he never stopped her didn't ring true. Obviously she wanted to leave that's why her things packed up and she never was able to get out. The neighbors testified that and they lived in a duplex so there was close as neighbors can possible be, thin walls between the living room and they heard screaming and crying as often as three times a week. The gentlemen that lived in the house actually heard the incident that led up to this homicide. And heard screaming crying he turned up the TV and tried to get away from it. Imagine living in your home and not being able to escape the horrible arguments the cussing the screaming the crying that's happening just within inches of your own living space. Luckily that bullet didn't travel through the wall

RP 1704

and hurt someone else. I guess if there's anything to be grateful for at least we could say that much. So we know that there is an ongoing pattern of abuse here by what was heard by the neighbors. But we also have an incident that is very interesting and that's the incident with the car. Where Miss McCoy was so concerned that she called the police and then came in to testify. Twice actually in pre-trial and then again during the trial. And Mr. Powell's description of how he hit Sabrina with the car just doesn't make any sense. Now it's possible that Miss McCoy's description of how fast he was going was off, luckily she wasn't seriously injured but she did sustain injury. Officers that went to the house that finally tracked this down through I believe the car registration did note that she had scrapes and they were recent and that she'd been crying. Apparently she didn't tell the police what happened because if she had I don't think Mr. Powell would have been left in that home. He said that he had tapped her with the car, that she had kind of slipped in front of the car I believe and that it was very minor. But Miss McCoy's testimony was compelling. She was outside she sees this young woman walking down the road crying so it captures her attention, she watches as this car comes at this young woman and intentionally hits her knocking her off the road. Miss McCoy goes and tries to help the young woman who's crying who's down helps her get up and then Mr. Powell turns that car around and comes back. Miss McCoy tried to help Sabrina; she did everything that she really could under the circumstances. You know come with me come into the house maybe I can help you. I think it says a lot about Sabrina's

RP 1705

state of mind and her relationship with Mr. Powell because she was terrified and she was not she didn't think that anybody could help her. Apparently she didn't think that her parents could help her, she didn't think that Miss McCoy could help her, she was terrified of Mr. Powell. And there's lots of evidence to support that. So based on, one more thing I guess, the Deputies testified as to Mr. Powell's emotional state when they arrived on scene, when Sabrina was still lying on the living room floor. And that he was sobbing that he appeared hysterical that he was acting like he was going to throw up but that he didn't that they didn't really notice tears and so forth. That's a very subjective thing and you never know, is that really what happened how does a person know that, is it sort of a gut feeling? Of course they have lots of experience with people that are in great emotional stress and have seen witnessed horrible things, and they have probably seen a complete range of emotion. But I also saw Mr. Powell testify in court and saw his emotional reaction when he talked about what happened. And it didn't ring true to me either. And I don't think it rang true to the jury. So he indicates now that he's remorseful but I am not so sure that he is. I think he's sorry for the situation he's found himself in and now that he understands that even with no criminal history he's likely to spend almost the rest of his life in prison he has every reason to feel sad about that. We have a young woman who's lost her life, parents who have lost their daughter, and two children that will never know their mother anymore. If she had

the capacity and the ability someday to get visitation with them to
RP 1706

have a relationship with them, I hope that that's possible. I would
say at this point I would have to speculate on that. But these
children will always know that their mother was murdered. And they'll
never have the opportunity to have a relationship with them as either
children or as adults. With her. So I find that there are many
aggravating factors to consider here. The State is asking for four
hundred months. The standard range is a hundred and eighty three to
two hundred and eighty and I think that that includes the sixty month
firearm enhancement correct?

DEFENSE: Yes Your Honor.

JUDGE: Alright, I am not considering the 404b evidence
here, there's no need for additional briefing. I think that an
exceptional sentence is warranted, and try to be fair to all parties.
I think that the appropriate sentence here is three hundred and forty
months in prison, including the sixty month for the firearm
enhancement. Do you have sentencing papers ready?

RP 1707

...

JUDGE: Before he leaves the room. Alright obviously Mr.
Powell had no criminal history so he has an offender's score of zero,
he has been found guilty by a jury of the crime of second degree
murder domestic violence. He was also armed with a firearm when this
occurred and this also involved or is an aggravated domestic violence

offense as found by the jury. The seriousness level of this offense is fourteen, the standard range is a hundred and twenty three to two hundred and twenty months plus the sixty month enhancement makes the makes the enhanced range one hundred and eighty three to two hundred and forty with the maximum term of life. The jury returned a ---

DEFENSE: Your Honor I am sorry you misspoke, it's a hundred and eighty three to two hundred and eighty.

JUDGE: What did I say?

DEFENSE: Two hundred and forty.

JUDGE: It is two hundred and eighty, hundred and eighty three to two hundred and eighty months on the enhanced range with maximum of life. The court made the exceptional sentence finding giving the court the legal authority to sentence above the range and for the reasons that I've just stated this morning I find that to be totally appropriate. I am sentencing to Mr. Powell to a term of three hundred and forty months which is above that enhanced range. Let me look just at this for a moment.

DEFENSE: I believe that works out to sixty months for the domestic violence circumstance.

JUDGE: Yes it does. So that's two hundred and twenty

RP 1711

months base sentence plus sixty months for the firearm enhancement plus sixty months for the domestic violence aggravating circumstance total of three hundred forty months. Alright it looks like Mr. Powell will be subject to community custody for a period of thirty six months

on his release, dna testing will be completed because of his conviction, there are conditions of community custody that are located in this document at paragraph 4c2 and given how much time is going to go by before he's there I am not going to read this into the record right now, he'll have a copy and I am certain that he will review it and he will also I am certain have an opportunity to have this to discuss this with a community custody officer when he gets out. The jail here will give credit for time served, I note, I note that that's been left blank, is it normally just left blank and they'll certify it to the DOC.

DEFENSE: I think usually you just put TBD Your Honor to be determined.

JUDGE: Okay. Legal financial obligations in paragraph 4d3 no total \$1751 across, I capped the cost of incarceration at \$5000, alright there are several means of appeal here Mr. Powell, one is collateral attack but you have to file that type of a petition no later than one year from today's date. That's not a direct appeal that's something else. A direct appeal and you have every right to do this you may appeal your conviction to the court of appeals and if you choose to do that you have the right to be represented by an attorney if you can't afford one which I don't believe you can, so an attorney
RP 1712

DECLARATION OF SERVICE

I, David B. Trefry state that on August 27, 2018 emailed a copy, by agreement of the parties, of the Respondent's Brief, to: Mr. Ken Kato at khkato@comcast.net

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

DATED this 27th day of August, 2018 at Spokane, Washington.

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