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NO. 29965-8-II

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

STATE OF WASHINGTON,

Respondent/Cross-Appellant,

v.

NICHOLAS HACHENEY,

Appellant/Cross-Respondent.

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ON APPEAL FROM THE SUPERIOR COURT OF
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Superior Court No. 01-1-01311-2

BRIEF OF RESPONDENT/CROSS APPELLANT

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I. CROSS-ASSIGNMENT OF ERROR

The trial court erred in finding a lack of probable cause for the “concealment” aggravating circumstance, RCW 10.95.020(9).

II. COUNTERSTATEMENT OF THE ISSUES

1. Whether the trial court properly instructed the jury on the arson aggravating circumstance where the arson and the murder were intimately related?
2. Whether the jury instruction on the arson aggravator properly defined “in the course of”?
3. Whether the jury instruction on the arson aggravator improperly commented on the evidence?
4. Whether the trial court properly described the *actus reus* of premeditated murder as an “assault”?
5. Whether the trial court properly gave the jury a limiting instruction on the purposes for which it could consider evidence admitted under ER 404(b)?
6. Whether any error regarding the trial court’s response to the jury inquiry is invited?
7. Whether the trial court properly found that State made a good-faith effort to secure the presence of three overseas witnesses before admitting

their video deposition testimony?

8. Whether the exclusion of Hachenev's father from the taking of three depositions did not violate Hachenev's right to a public trial because a deposition is not a trial?

9. Whether the trial court properly admitted ER 404(B) evidence regarding Hachenev's sexual relationships with several women around the time of his wife's murder?

10. Whether the trial court properly admitted the state toxicology lab's test results?

11. Whether the trial court properly declined to dismiss the charges or exclude evidence where there was no discovery violation relating to a witness uncovered at the beginning of trial where the defense was offered and declined a continuance to prepare for the witness?

12. Whether the State properly sought to elicit during voir dire whether the jurors could follow the law?

13. Whether the trial court properly admitted Glass' prior consistent statements after Hachenev implied that her subsequent immunity agreement gave her a motive to fabricate, and whether the trial court properly excluded irrelevant evidence of Nickell's marital status?

14. Whether Hacheny has failed to demonstrate cumulative error warranting reversal?

III. CROSS-APPEAL ISSUE

Whether the trial court erred in refusing to find probable cause for the existence of the aggravating circumstance that Hacheny committed the murder to conceal his identity?

IV. STATEMENT OF THE CASE

For ease of reference the State will use the abbreviations indicated in its appendix to refer to the various reports of proceedings involved in this appeal.

Given the space limitations due to the unusually large number of issues Hacheny has raised, the State will forego a separate factual statement and acknowledge that Hacheny's recitation of the facts is largely accurate, if reflective of his take on the case. Because the issues raised are primarily legal in nature, the State will confine itself to addressing specific points of fact or procedure that require further elaboration in the argument section of its brief.

V. ARGUMENT

A. THE TRIAL COURT PROPERLY INSTRUCTED THE JURY ON THE ARSON AGGRAVATING CIRCUMSTANCE WHERE THE ARSON AND THE MURDER WERE INTIMATELY RELATED.

Hacheney's first contention is that the evidence was insufficient for the jury to find the aggravating circumstance that the murder was committed in the course of a first-degree arson under RCW 10.95.020(11)(e). He contends that because the arson was committed *after* he killed his wife, the murder was not committed in the course of the arson. The Supreme Court, however, has refused to read this provision literally, and has held that the evidence is sufficient if the murder and the aggravating crime are part of the same *res gestae*. Here there is no doubt that the arson was committed to conceal the murder and such was intimately connected with it. The evidence was therefore sufficient to send the issue to the jury.

In challenges to the sufficiency of the evidence to prove an aggravating factor, this Court must view the evidence most favorably toward the prosecution to determine whether any rational trier of fact could have found the presence of the aggravating factor beyond a reasonable doubt.¹ All reasonable inferences from the evidence are drawn in favor of the State and

¹ *State v. Finch*, 137 Wn.2d 792, 835, 975 P.2d 967 (1999).

interpreted against the defendant.²

To establish that a killing occurred in the course of, in furtherance of, or in immediate flight from a felony, there must be an “intimate connection” between the killing and the felony.³ An intimate connection is established if the killing is part of the *res gestae* of the felony, *i.e.*, in “close proximity in terms of time and distance.”⁴ To be part of the *res gestae*, “more than a mere coincidence of time and place is necessary.”⁵ A “causal connection” must clearly be established between the two crimes.⁶

In *Brown*, the Supreme Court notes that in *Leech* it had declined to apply a literal reading of “in furtherance of.” In that case, a fire fighter died while fighting a fire set by the defendant. The defendant, charged with felony murder, argued his act of arson ended once he set the fire and that any death caused by the fire was not within the *res gestae* or “in furtherance of” that crime. *Leech* nevertheless held that because the fire fighter died while the arson fire was still engaged, his death was sufficiently close in time and

² *Finch*, 137 Wn.2d at 831.

³ *State v. Brown*, 132 Wn.2d 529, 608, 940 P.2d 546 (1997), *citing State v. Golladay*, 78 Wn.2d 121, 132, 470 P.2d 191 (1970).

⁴ *Brown*, 132 Wn.2d at 608, *quoting State v. Leech*, 114 Wn.2d 700, 706, 790 P.2d 160 (1990); *and citing State v. Dudrey*, 30 Wn. App. 447, 450, 635 P.2d 750 (1981), *review denied*, 96 Wn.2d 1026 (1982).

⁵ *Brown*, 132 Wn.2d at 608.

⁶ *Brown*, 132 Wn.2d at 608, *citing Golladay*, 78 Wn.2d at 130.

place to the arson to be within the *res gestae* of that felony.

Brown, however, found that none of the Court's earlier cases addressed the specific issue of whether a killing that occurred "hours" after the rape or robbery were committed or completed could be within the *res gestae* of those crimes, or committed to "further" those crimes.⁷ In *Leech*, *Dudrey* and *Golladay*, the killings and related felonies occurred within close proximity of time and place, while in *Brown*, the felonies occurred sometime within a two-day period, presumably "hours" before the actual killing.⁸

Brown nevertheless rejects the contention that the defendant's killing of his victim did not "further" the rape, robbery or kidnapping.⁹ Instead, the Court followed the rule of *Leech* that the Court would not apply too literal an interpretation of "in furtherance of," but would look instead to whether the killing was part of the *res gestae* of the felony.¹⁰ *Brown* concludes that where the defendant's crimes were linked by his motive to obtain money to pay for a trip, his robbing the victim, holding her captive, torturing and raping her and ultimately killed her to eliminate her as a witness, the killing and the other felonies were intimately connected.¹¹

⁷ *Brown*, 132 Wn.2d at 609.

⁸ *Brown*, 132 Wn.2d at 609.

⁹ *Brown*, 132 Wn.2d at 609.

¹⁰ *Brown*, 132 Wn.2d at 610.

¹¹ *Brown*, 132 Wn.2d at 610.

Hacheny relies heavily on the observation in *Golladay* that the theft in that case occurred after the death.¹² But the reasoning of *Golladay* was not based on a simplistic timeline analysis. To the contrary, the problem in *Golladay* was that the theft was essentially accidental and occurred when the defendant “disposed of the victim’s property *mistakenly* in his possession” after the fact.¹³ The fatal flaw in *Golladay* thus was the State’s failure to establish the requisite “intimate connection” because the evidence showed that “the larceny established by the evidence was entirely separate, distinct, and independent from the homicide.”¹⁴ Here, on the other hand, there is no evidence whatsoever that that the arson had any purpose distinct or separate from the killing, but instead was an essential component of Hacheny’s plan to kill his wife.

Hacheny’s comparison of the incidental nature of the theft in *Golladay* with the arson here¹⁵ is thus also flawed. While the defendant in *Golladay* was no doubt seeking to dispose of the evidence, it was at best an afterthought. As Hacheny phrases it, “[h]aving been in a one car accident, confronted with several passers-by, and discovering the victim’s property in

¹² Brief at 20.

¹³ *Golladay*, 78 Wn.2d at 132 (emphasis supplied).

¹⁴ *Golladay*, 78 Wn.2d at 132.

¹⁵ Brief at 21.

his car, [Golladay] decided to get rid of the evidence.”¹⁶ The arson in the instant case is in no way comparable. Hacheny did not toss his wife’s shoes into a field. He set fire to his house, well before any onlookers arrived, not to avoid a connection with the murder, but to obliterate, nearly successfully, any evidence that a murder had occurred *at all*. The burning of the house was thus “intimately connected” with the murder.

Hacheny’s reliance on *Dudrey* is also misplaced. He asserts that the Court in that case “emphasized” that the felony had to precede the killing.¹⁷ That case in no way addressed that issue. Instead, the dispositive fact was that the killing was part of the *res gestae* of the burglary in which the defendant participated. Indeed, the Court began its “analysis by noting a homicide is deemed committed during the perpetration of a felony, for the purpose of felony murder, if the homicide is within the ‘res gestae’ of the felony.”¹⁸ Because the burglary in that case was already in progress at the time of the killing,¹⁹ *Dudrey* cannot be read as requiring that the felony precede the murder.

¹⁶ Brief at 21.

¹⁷ Brief at 21 (Hacheny mistakenly refers to the case as “*Dudley*” but the citation is clearly to *Dudrey*).

¹⁸ *Dudrey*, 30 Wn. App. at 450.

¹⁹ *Dudrey*, 30 Wn. App. at 449.

In re Andress,²⁰ cited by Hacheney, does not call into doubt the rule set forth in *Leech*. To the contrary, that case reaffirmed the rule:

In *State v. Leech*, ... we concluded that the “in furtherance of” language must be construed to mean that the death “was sufficiently close in time and place to the arson to be part of the *res gestae* of that felony.” ... Although *Andress* contends that we should accept a different interpretation of the “in furtherance of” language in this case, we decline to do so. The reasons for the construction of that language in *Leech* are still as compelling today as when *Leech* was decided.^[21]

The Court went on to conclude that assault could not be a predicate felony because it was “nonsensical to speak of a criminal act--an assault--that results in death as being part of the *res gestae* of that same criminal act since the conduct constituting the assault and the homicide are the same.”²²

The trial court properly concluded that there was sufficient evidence to instruct the jury on the arson aggravating circumstance. The jury’s finding of it should be affirmed.

²⁰ *In re Andress*, 147 Wn.2d 602, 56 P.3d 981 (2002).

²¹ *Andress*, 147 Wn.2d at 609-610 (citations omitted).

²² *Andress*, 147 Wn.2d at 610.

B. THE JURY INSTRUCTION ON THE ARSON AGGRAVATOR PROPERLY DEFINED “IN THE COURSE OF.”

Hacheny next asserts that the trial court erred in defining the term “in the course of” with regard to the arson aggravating circumstance. Hacheny’s argument is premised on the notion that the instruction was an erroneous statement of the law for the reasons presented in his first contention. Because his first point lacks merit, his second must fail as well.

C. THE JURY INSTRUCTION ON THE ARSON AGGRAVATOR DID NOT IMPROPERLY COMMENT ON THE EVIDENCE.

Hacheny next contends that the trial court improperly commented on the evidence because Instruction 12, which addressed the meaning of “in the course of” as used in the arson aggravating circumstance, used the term “killing.” This claim is without merit because the jury was not instructed to even consider the aggravating circumstance unless it had already determined that Hacheny had committed premeditated murder.

Trial judges are prohibited from commenting upon the evidence presented at trial.²³ “An impermissible comment is one which conveys to the jury a judge’s personal attitudes toward the merits of the case or allows the jury to infer from what the judge said or did not say that the judge personally

believed the testimony in question.”²⁴ The determination of whether an instruction constitutes a comment on the evidence depends on the facts and circumstances of each case.²⁵ One of the factors to be considered is whether the trial court specifically instructed the jury that it was not intending to comment on the evidence, and that any such inference should be disregarded.²⁶ A jury instruction that does no more than accurately state the law pertaining to an issue does not constitute an impermissible comment on the evidence by the trial judge.²⁷ The Court reviews alleged instructional errors under a *de novo* standard of review.²⁸

First it should be noted that the jury was specifically instructed to disregard any statement by the court that could be perceived as a comment on the evidence.²⁹ In any event, the instruction given here was significantly different from those found improper in the cases cited by Hacheney.

Most importantly, the jury was instructed that they were only to consider whether the aggravating circumstance existed *if* they determined

²³ Const. art. 4, § 16; *State v. Deal*, 128 Wn.2d 693, 703, 911 P.2d 996 (1996).

²⁴ *State v. Swan*, 114 Wn.2d 613, 657, 790 P.2d 610 (1990), *cert. denied*, 498 U.S. 1046 (1991).

²⁵ *State v. Stearns*, 61 Wn. App. 224, 231, 810 P.2d 41 (1991).

²⁶ *State v. Ciskie*, 110 Wn.2d 263, 283, 751 P.2d 1165 (1988).

²⁷ *State v. Woods*, 143 Wn.2d 561, 591, 23 P.3d 1046, *cert. denied*, 534 U.S. 964 (2001).

²⁸ *Woods*, 143 Wn.2d at 590.

²⁹ CP 1342.

that Hachenev was guilty of premeditated first-degree murder. Instruction 12 followed and defined the terms set forth in Instruction 11, of which Hachenev does not complain. Instruction 11 tracked WPIC 30.03, and provided in pertinent part::

If you find the defendant guilty of premeditated murder in the first degree as defined in Instruction No. 7, you must *then* determine whether the following aggravating circumstance exists:

The murder was committed in the course of arson in the first degree.^[30]

That the jurors were not to consider the aggravating circumstance unless they had already determined the defendant had murdered his wife was again emphasized in the instructions on using the verdict forms:

If you find the defendant guilty of murder in the first degree as charged, you will complete the Special Verdict Form. If you find the defendant not guilty of murder in the first degree as charged, do not use the Special Verdict Form.^[31]

Finally, the verdict and special verdict forms themselves *again* reiterated that the jury was to consider the special verdict only if it was satisfied beyond a reasonable doubt that Hachenev was guilty of first-degree murder.³²

The jury was told to consider the aggravating circumstance only if *it*

³⁰ CP 1352; *see* WPIC 30.03 (2d ed. 1998).

³¹ CP 1357.

³² CP 1361-62.

had determined beyond a reasonable doubt that there had indeed been a killing. It therefore cannot reasonably be supposed that jury would have considered the court's contingent instructions on what to do in the event that *the jury* made that finding a signal from the court that the court believed a killing had occurred.

Moreover, the "to-convict" instruction on first-degree murder specifically required that the jury had to find, *inter alia*, that Hachenev assaulted his wife, that he intended to kill her and that she died from his acts.³³ Nothing in *that* instruction in any way intimated that a "killing," as opposed to an accidental death, had occurred.

The present issue is not unlike that raised in *Woods*. There, the defendant asserted on appeal that the trial court's beginning-of-trial statement of what would occur "[d]uring the sentencing phase proceedings" indicated that the judge believed the defendant was guilty. The Supreme Court rejected this claim, however, pointedly noting that the defendant failed to mention that from the entire context of the instructions, it was clear that there would only be a sentencing phase if the jury found the defendant guilty beyond a reasonable doubt of aggravated first degree murder.³⁴ Such is the

³³ CP 1348.

³⁴ *Woods*, 143 Wn.2d at 591-593.

case here. The jury was clearly only to consider if the “killing” was in the course of an arson if it first found Hachenev guilty of premeditated murder. The judge did not impermissibly offer her opinion of the evidence.

Finally, the instructions in the cases upon which Hachenev relies are fundamentally different from the these. In *Becker*, a drug case involving a school-zone enhancement, the trial court instructed the jury to determine whether the defendant “was within 1000 feet of the perimeter of school grounds, to-wit: Youth Employment Education Program School at the time of the commission of the crime.”³⁵ The error lay in referring to the program as a “school” when whether the program was in fact a school was a central issue before the jury.³⁶ Here, however, the issue of whether there was a killing was, by the very structure of the instructions, put to the jury to decide before Instruction 12 was even to be considered.

Similarly, in *Painter*, the jury was instructed that “great bodily harm” meant “an injury of a more serious nature than an ordinary striking with the hands or fists.” Because, however, the only evidence by which the jury could find a justifiable homicide was a threatened striking with hands or fists, this Court found that “the trial court clearly indicated to the jury that the evidence

³⁵ *State v. Becker*, 132 Wn.2d 54, 64, 935 P.2d 1321 (1997).

³⁶ *See State v. Akers*, 88 Wn. App. 891, 897, 946 P.2d 1222 (1997).

presented at trial was insufficient to support the theory of self-defense,” and the instruction constituted an impermissible comment on the evidence.³⁷ Here, again, the trial court in no way required the jury to find a killing. To the contrary, it instructed the jury to consider arson *only if* it concluded there had been a premeditated murder. *Painter* is inapt.

None of the remaining cases cited even addresses instructions relating to the charged offense and therefore shed no light on the issue presented. Two involved the trial court making actual comments on the evidence during trial. In *Bogner*, the court chastised defense counsel for following a line of questioning designed to call into question whether the crime even occurred, suggesting that the only issue was the identity of the perpetrator, and characterizing counsel’s inquiry as “a little ridiculous.”³⁸ In *Lampshire*, the court, while sustaining a State objection, went on to comment in front of the jury that “[w]e have been from bowel obstruction to sister Betsy, and I don’t see the materiality.”³⁹ Finally, in *Lane*, despite a request from the State not to go into the matter, the court informed the jury of the reason one of the State’s witnesses had received a reduced sentence.⁴⁰ The court thus went far beyond commenting on the evidence, it essentially testified. These cases

³⁷ *State v. Painter*, 27 Wn. App. 708, 714, 620 P.2d 1001 (1980), *review denied*, 95 Wn.2d 1008 (1981).

³⁸ *State v. Bogner*, 62 Wn.2d 247, 249, 382 P.2d 254 (1963).

³⁹ *State v. Lampshire*, 74 Wn.2d 888, 891, 447 P.2d 727 (1969).

bear no resemblance to the present one.

**D. THE TRIAL COURT PROPERLY DESCRIBED
THE *ACTUS REUS* OF PREMEDITATED
MURDER AS AN “ASSAULT.”**

Hacheny next asserts that the use of the word “assault” in the to-convict instruction on first-degree murder, and a second instruction defining “assault” were “similarly” an abuse of discretion.⁴¹ Given that Hacheny’s argument below was the instruction should have been *less* general and more tied to the evidence presented, it is difficult to see how this instruction was an improper comment on the evidence. Moreover, Hacheny otherwise fails to demonstrate how this instruction was not a proper statement of the law, or even if it were not, how the purported error could have been harmful.

As noted above, a jury instruction that does no more than accurately state the law pertaining to an issue does not constitute an impermissible comment on the evidence by the trial judge.⁴² Hacheny fails to explain how the instruction in question misstates the law.

Hacheny correctly notes that *State v. Roberts* holds that RCW 9A.32.030(1)(a) requires a *mens rea* of premeditated intent to kill and an

⁴⁰ *State v. Lane*, 125 Wn.2d 825, 837, 889 P.2d 929 (1995).

⁴¹ Brief at 31.

⁴² *Woods*, 143 Wn.2d at 591.

actus reus that causes the death of the victim.⁴³ He fails to explain how instruction 7 fails to meet these requirements. It informed the jury that to convict Hachenev, it had to find (1) that he assaulted his wife; (2) that he acted with an intent to kill her; (3) that that intent was premeditated; and (4) that she died as a result.⁴⁴ The jury was further informed that “[a]n assault is an intentional touching or striking of another person that is harmful.”⁴⁵

Neither *State v. Olson* or *State v. Clark*, cited by Hachenev, shed any light on the issue raised.⁴⁶ Both stand for the unremarkable proposition that a conviction cannot stand where State fails to prove that the defendant committed the act prohibited by the statute under which the defendant was charged. Thus proof of auto theft did not prove joyriding,⁴⁷ and proof of misuse of computer data by a person authorized to use the data did not prove unauthorized access of such data.⁴⁸ The same cannot be said here. If a person assaults another with a premeditated intent to kill that person, and as a result, that person dies, it cannot be said that premeditated first-degree murder has not been proven.

⁴³ Brief at 31; *State v. Roberts*, 142 Wn.2d 471, 502, 14 P.3d 713 (2000).

⁴⁴ CP 1348.

⁴⁵ CP 1349.

⁴⁶ Brief at 32; *State v. Clark*, 96 Wn.2d 686, 638 P.2d 572 (1982); *State v. Olson*, 47 Wn. App. 514, 735 P.2d 1362 (1987).

⁴⁷ *Clark*, 96 Wn.2d at 691.

⁴⁸ *Olson*, 47 Wn. App. 518-19.

In re Andress thus is instructive, although not for the reasons argued by Hacheney. The holding in *Andress* was not based on any problems with defining the degree of assault.⁴⁹ Rather, the Supreme Court concluded that a felony murder requires a felony and a death arising from the same *res gestae*. This construct could not be applied to an assault however, because the *actus reus* of the homicide and the assault are the same:

It is nonsensical to speak of a criminal act -- an assault -- that results in death as being part of the *res gestae* of that same criminal act since the conduct constituting the assault and the homicide are the same.^[50]

Likewise, the Supreme Court has also observed that while assault is not a lesser included offense of *attempted* premeditated murder in the first degree, this is because the attempt may be committed without an assault; assault is, however, a lesser included offense of actual premeditated murder.⁵¹

Finally, Hacheney fails to explain what “hopeless morass of legal definitions” the trial court entered by the use of the term “assault.”⁵² The precedent suggests otherwise. Assault need not even be defined in jury instructions because “‘assault’ is not exclusively of legal cognizance, and an

⁴⁹ See Brief at 32.

⁵⁰ *In re Andress*, 147 Wn.2d 602, 610, 56 P.3d 981 (2002).

⁵¹ See *State v. Harris*, 121 Wn.2d 317, 321, 849 P.2d 1216 (1993).

⁵² Brief at 32.

understanding of its meaning can fairly be imputed to laymen.”⁵³ Moreover, Hacheny does not suggest that the trial court’s definition of “assault” was incorrect. This claim should be rejected.

E. THE TRIAL COURT PROPERLY GAVE THE JURY A LIMITING INSTRUCTION ON THE PURPOSES FOR WHICH IT COULD CONSIDER EVIDENCE ADMITTED UNDER ER 404(B).

Hacheny next alleges that the “trial court erred by instructing the jury on the definition of ‘consciousness of guilt.’” The trial court did nothing of the kind. The court gave a WPIC 5.30 limiting instruction regarding evidence admitted under ER 404(b). As will be discussed, *infra*, the ER 404(b) evidence was properly admitted as probative of, *inter alia*, Hacheny’s consciousness of guilt. The instruction was therefore proper.

Hacheny proposed an instruction based on WPIC 5.30:

Evidence has been introduced in this case on the subject of the Defendant’s relationship with several women solely for the question of whether the Defendant acted with motive, intent, or premeditation. You must not consider this evidence for any other purpose.^[54]

At the charge conference, the State objected that the ER 404(b) evidence was expressly admitted to show Hacheny’s consciousness of guilt, and that it

⁵³ *State v. Pawling*, 23 Wn. App. 226, 233, 597 P.2d 1367 (1979).

⁵⁴ CP 973.

would be unfair to limit the evidence from such a use.⁵⁵ Hacheny conceded that consciousness of guilt was one of the bases of the court's ER 404(b) ruling.⁵⁶ The court ultimately agreed and added the phrase "or as evidence of consciousness of guilt" after "premeditation" and before the final sentence of the proposed instruction.⁵⁷

When ER 404(b) evidence is admitted, the trial court should instruct the jury of the limited purpose of such evidence.⁵⁸ The trial court did so here, substantially in the form requested by Hacheny. This instruction no more instructed the jury to make inferences regarding consciousness of guilt than it instructed it to make inferences regarding motive, intent, or premeditation. Hacheny's real complaint seems to be the trial court's admission of the evidence for the purpose of showing his consciousness of guilt. That issue is addressed, *infra*. It follows that if the evidence was properly admitted for that purpose, the trial court did not abuse its discretion in instruction the jury not to consider the evidence for other purposes.

⁵⁵ 27RP 4972, 4976-77.

⁵⁶ 27RP 4975.

⁵⁷ 27RP 4980; CP 1355.

⁵⁸ *State v. Saltarelli*, 98 Wn.2d 358, 362, 655 P.2d 697 (1982).

F. ANY ERROR REGARDING THE TRIAL COURT'S RESPONSE TO THE JURY INQUIRY IS INVITED.

Hachenev next faults the trial court for refusing to elaborate on the instructions already given when three questions were posed by the jury during its deliberations. Because the trial court acceded to Hachenev's specific request in this regard, any error would have to be considered invited and may not now be raised on appeal.

The doctrine of invited error prevents an appellant from complaining about a trial court acceding to his request to give a certain instruction to the jury.⁵⁹ Here, over a State proposal to clarify the instruction in question, the trial court acceded to Hachenev's specific and repeated request that no further instruction be given.

When the jury posed these questions, Hachenev's immediate response was that the court should decline to respond to the questions:

MR. TALNEY: My position, Your Honor, would be to basically give the standard answer: That you have the instructions; you should reread them.^[60]

The Court inquired whether the parties wished a recess to consider the issue.⁶¹ Hachenev again reaffirmed his belief that no response should be

given: _____

⁵⁹ *State v. Studd*, 137 Wn.2d 533, 547, 973 P.2d 1049 (1999).

⁶⁰ JI 3.

⁶¹ JI 3.

MR. TALNEY: I think we just don't answer. Tell them to reread.^[62]

The State nevertheless requested the opportunity to research the issue, and the Court granted a brief recess.⁶³ After the recess, the *State* proposed giving a clarifying instruction.⁶⁴ Hacheny, however, continued to oppose any comment by the court:

MR. TALNEY: Your Honor, I don't think that's how either side argued the case or envisioned it going to the jury.

I think the instruction as written is understandable and comports with the evidence and the way it was argued to the jury and set up in opening statement and in the closing argument. So I don't believe any additional instructions should be given.^[65]

The court not only acceded to Hacheny's request, it inquired whether the response given was satisfactory to the parties.⁶⁶ Hacheny responded that he had no objection to the wording proposed by the court.⁶⁷ The jury was instructed accordingly.⁶⁸ Because Hacheny clearly invited the purported error, he may not seek reversal on these grounds.

Moreover, even were the alleged error not invited, Hacheny cites no

⁶² JI 3.

⁶³ JI 4.

⁶⁴ JI 5.

⁶⁵ JI 5-6.

⁶⁶ JI 9.

⁶⁷ JI 10.

⁶⁸ CP 1517.

authority that establishes that the trial court erred in referring the jury back to the instructions already given. As the appellant, Hachenev bears the burden of establishing that he is entitled to the relief he seeks.⁶⁹ His failure to cite legal authority that establishes that the trial court erred or to provide any argument in support of his claim is grounds for summarily rejecting his contentions.⁷⁰ “Where no authorities are cited in support of a proposition, the court is not required to search out authorities, but may assume that counsel, after diligent search, has found none.”⁷¹

Finally, it is within the sound discretion of the trial judge whether to give further instructions to the jury after it has retired for deliberations.⁷² A trial court abuses its discretion only when its decision is manifestly unreasonable or based on untenable grounds.⁷³ Questions from the jury are not final determinations, and questions from it, even if the trial court declines to answer them, may not be bootstrapped into a claim that a particular instruction was faulty.⁷⁴ Hachenev fails to establish any abuse of discretion.

⁶⁹ *Kane v. Smith*, 56 Wn.2d 799, 806, 355 P.2d 827 (1960).

⁷⁰ *State v. Benn*, 120 Wn.2d 631, 661, 845 P.2d 289, *cert. denied*, 510 U.S. 944 (1993); *State v. Lord*, 117 Wn.2d 829, 853, 822 P.2d 177 (1991), *cert. denied*, 506 U.S. 856 (1992).

⁷¹ *State v. Logan*, 102 Wn. App. 907, 911 n.1, 10 P.3d 504 (2000), *quoting DeHeer v. Seattle Post-Intelligencer*, 60 Wn.2d 122, 126, 372 P.2d 193 (1962).

⁷² *State v. Miller*, 40 Wn. App. 483, 489, 698 P.2d 1123, *review denied*, 104 Wn.2d 1010 (1985).

⁷³ *State ex rel. Carroll v. Junker*, 79 Wn.2d 12, 26, 482 P.2d 775 (1971).

⁷⁴ *State v. Bockman*, 37 Wn. App. 474, 493, 682 P.2d 925, *review denied*, 102 Wn.2d 1002 (1984).

G. THE TRIAL COURT PROPERLY FOUND THAT STATE MADE A GOOD-FAITH EFFORT TO SECURE THE PRESENCE OF THREE OVERSEAS WITNESSES BEFORE ADMITTING THEIR VIDEO DEPOSITION TESTIMONY.

Hachenev next claims that the trial court erred in finding three witnesses unavailable. This claim is without merit because the witnesses were under subpoena, they informed the State they would nevertheless be out of the country at the time of trial, and the trial court upon balancing the relative hardship to the witnesses against the relative importance of their testimony properly concluded that the State had made an adequate good-faith effort to secure their presence. Finally, any error would be harmless.

Hachenev initially refers to *Ohio v. Roberts*, and notes that the United States Supreme Court was, at the time he filed his brief, considering whether *Roberts* should be overruled.⁷⁵ Since then the Supreme Court has done just that.⁷⁶ This turn of events has no bearing on the issue presented however.

Under *Crawford v. Washington*, whether the admission of an out-of-court statement comports with the Sixth Amendment hinges on whether the absent witness is unavailable and whether the defendant had a prior

⁷⁵ Brief at 40 n.2.

⁷⁶ See *Crawford v. Washington*, ___ U.S. ___, 124 S. Ct. 1354, 1378, ___ L. Ed. 2d ___ (2004) (Rehnquist, C.J., concurring).

opportunity to cross-examine.⁷⁷ Hacheny clearly had an opportunity to cross-examine these witnesses, and does not claim otherwise. The only question, then, is whether they were unavailable. This is a question *Crawford* does not address.

A trial court's decision to admit evidence in this context, as in most others, is reviewed for abuse of discretion.⁷⁸ The question of "unavailability to testify at trial" is one of fact to be determined by the trial judge.⁷⁹

A declarant is "unavailable" if he or she is "absent from the hearing and the proponent of his statement has been unable to procure his attendance ... by process or other reasonable means."⁸⁰ In order to satisfy the Confrontation Clause in a criminal case, the State must establish that it made a good-faith effort to obtain the witness's presence at trial.⁸¹ Whether the State has made a good-faith effort necessarily depends on the particular facts of each case.⁸² "The lengths to which the prosecution must go to produce a witness ... is a question of reasonableness."⁸³ Where the witness is beyond

⁷⁷ *Crawford*, 124 S. Ct. at 1369.

⁷⁸ *State v. DeSantiago*, 149 Wn.2d 402, 411, 68 P.3d 1065 (2003).

⁷⁹ *State v. Allen*, 94 Wn.2d 860, 866, 621 P.2d 143 (1980), *abrogated on other grounds*, *State v. Vladovic*, 99 Wn.2d 413, 662 P.2d 853 (1983).

⁸⁰ ER 804(b).

⁸¹ *State v. Rivera*, 51 Wn. App. 556, 559, 754 P.2d 701 (1988).

⁸² *State v. Aaron*, 49 Wn. App. 735, 740, 745 P.2d 1316, 745 P.2d (1987).

⁸³ *State v. Goddard*, 38 Wn. App. 509, 512, 685 P.2d 674 (1984).

the legal reach of a subpoena, the State must show that it made an effort to secure the voluntary attendance of the witness at trial.⁸⁴

Here Julia and Michael DeLashmutt were living in Scotland and Robert Olson was doing field work in Bolivia at the time of trial. All three witnesses left Washington in October 2001, a month before trial began. The State asserted, and Hacheny accepted the assertion as adequate for the purposes of the court's ruling,⁸⁵ that it had subpoenaed the witnesses, but that they intended to be out of the country at the time of trial and to not honor their subpoenas.⁸⁶ The State did not offer to pay for plane tickets for the witnesses to return to the United States to testify.⁸⁷

Under similar circumstances, witnesses have been deemed to be unavailable. Contrary to Hacheny's assertions,⁸⁸ the trial court properly considered the relative importance of the witnesses' testimony and the hardship to them. In this regard, Hacheny faults the trial court for not considering *State v. Aaron*. Yet *Aaron* was thoroughly argued by the defense, and it cannot be concluded that the trial court did not consider it.

⁸⁴ *DeSantiago*, 149 Wn.2d at 412; *Rice v. Janovich*, 109 Wn.2d 48, 57, 742 P.2d 1230 (1987); see also *Mancusi v. Stubbs*, 408 U.S. 204, 211-12, 92 S. Ct. 2308, 33 L. Ed. 2d 293 (1972).

⁸⁵ 20RP 3825-26.

⁸⁶ 20RP 3824-25, 3827.

⁸⁷ 20RP 3825.

⁸⁸ Brief at 43.

Moreover, *Aaron* itself supports the trial court's weighing process:

To a certain extent, the State's efforts must also be measured by the importance of the witness' expected testimony.^[89]

In *Aaron* the State did not subpoena its "star witness." Nor can it be overlooked that there were other issues present in that case as well. The victim/witness left the country the day after the defendant was arraigned, and the deposition was taken the day of arraignment, just hours after defense counsel undertook the case over counsel's strenuous objections that he was not prepared.⁹⁰

Also, contrary to Hachenev's argument, *Aaron* does not set an absolute standard for unavailability, as *Aaron* itself recognizes:

We emphasize that the foregoing discussion is intended neither to delineate precisely how much the State was required to do in the instant case nor to exhaust the possible considerations that might affect the unavailability requirement of ER 804 when the witness is in a foreign country. We hold only that because the State made *no* effort to obtain [the witness'] presence, she was not "unavailable" for purposes of ER 804 and admission of her deposition testimony was error.^[91]

Thus, numerous cases have held that where the witness' testimony is relatively insignificant and/or there would be hardship to the witness, the State has met its burden of making a good-faith attempt to secure the witness' presence by properly subpoenaing the witness.

⁸⁹ *Aaron*, 49 Wn. App. at 743.

⁹⁰ *Aaron*, 49 Wn. App. at 738-39.

In *State v. Allen*, the Supreme Court concluded that given the damage that would have occurred to the witness' military career, the State met its burden by subpoenaing the witness, despite the witness' failure to honor the subpoena.⁹² Likewise sailors at sea have been deemed unavailable.⁹³

Similarly a number of cases have acknowledged that the trial court properly balances the importance of the witnesses' testimony and the hardship to the witnesses.⁹⁴ Thus in *Hobson*, even though the witness' testimony was "essential" to the conviction, subpoenaing the witness alone was deemed sufficient where the witness' testimony was not the sole evidence supporting the conviction.⁹⁵

On the other hand, the cases where the State's efforts were deemed inadequate all involved situations where the State failed to subpoena the witness and/or the State made no effort at all to secure the witness' attendance.⁹⁶

⁹¹ *Aaron*, 49 Wn. App. at 744-745 (emphasis added).

⁹² *Allen*, 94 Wn.2d at 866-867.

⁹³ *State v. Hewett*, 86 Wn.2d 487, 494, 545 P.2d 1201 (1976); *State v. Firven*, 22 Wn. App. 703, 591 P.2d 869 (1979).

⁹⁴ *State v. Hobson*, 61 Wn. App. 330, 338, 810 P.2d 70 (1991); *Rivera*, 51 Wn. App. at 561; *Aaron*, 49 Wn. App. at 744.

⁹⁵ *Hobson*, 61 Wn. App. at 338.

⁹⁶ See *State v. Sanchez*, 42 Wn. App. 225, 711 P.2d 1029 (1985), *review denied*, 105 Wn.2d 1008 (1986); *Goddard*, 38 Wn. App. at 511; *State v. Scott*, 48 Wn. App. 561, 566, 739 P.2d 742 (1987), *aff'd*, 110 Wn.2d 682 (1988).

Here, all three witnesses were subpoenaed. All three left the country and informed the State they did not intend to attend trial. The hardship to the witnesses would not have been insignificant. Mr. DeLashmutt was only a month into his doctoral studies in Scotland at the time of trial. Mr. Olson was in the Amazon jungle establishing a radio network.

Further, none of these witness' testimony could be described as critical. The deLashmutts' testimony was largely innocuous and cumulative.⁹⁷ Olson's testimony pertained to matters that the other experts relied upon in reaching their opinions.⁹⁸ His conclusions and reports would have thus been admissible under ER regardless of his deposition testimony. The trial court properly balanced these factors, properly concluded the State had made an adequate effort and properly allowed the videotaped depositions to be played for the jury.

Finally, "[i]t is well established that constitutional errors, including violations of a defendant's rights under the confrontation clause, may be so insignificant as to be harmless."⁹⁹ The Court applies the "overwhelming untainted evidence" test:

Under the "overwhelming untainted evidence" test, the appellate court looks only at the untainted evidence to

⁹⁷ See CP 1194-1321 as redacted by CP 1008-13.

⁹⁸ See CP 1015-1124 as redacted by CP 1007-08.

⁹⁹ *State v. Guloy*, 104 Wn.2d 412, 425, 705 P.2d 1182 (1985).

determine if the untainted evidence is so overwhelming that it necessarily leads to a finding of guilt.... The “overwhelming untainted evidence” test allows the appellate court to avoid reversal on merely technical or academic grounds while insuring that a conviction will be reversed where there is any reasonable possibility that the use of inadmissible evidence was necessary to reach a guilty verdict.¹⁰⁰

As noted above, the deposition testimony added little to the State’s case. Subtracting it from the evidence the jury heard over the course of seven weeks of trial (less than 140 pages of deposition compared to nearly 5000 pages of other testimony) would not have changed the verdict.¹⁰¹

Moreover, any error must be deemed harmless because the videotaped depositions in this case satisfied the purpose if not the letter of the Confrontation Clause:

The purpose of the guarantee is to provide a personal examination and cross-examination of the witness in which the accused has an opportunity, not only of testing the recollection and sifting the conscience of the witness, but of compelling him to stand face to face with the jury in order that they may look at him, and judge by his demeanor upon the stand and the manner in which he gives his testimony whether he is worthy of belief. *Mattox v. United States*, 156 U.S. 237, 242-243, 15 S. Ct. 337, 39 L. Ed. 409 (1895). In the instant case, [the witness] testified under oath, [the defendant] was present, and his attorney cross-examined [the witness]. Moreover, the jury had the opportunity to view [the witness’] demeanor and manner in which he testified against [the defendant] in [the defendant’s] presence. The only difference between admitting [the witness’] deposition and having him testify in person is that [the witness] did not give

¹⁰⁰ *Guloy*, 104 Wn.2d at 426.

¹⁰¹ *See State v. Scott*, 48 Wn. App. 561, 566-567, 739 P.2d 742 (1987).

his testimony in the presence of the jury. Although it would have been preferable to have [the witness] testify in person, we hold that admitting the videotaped deposition satisfied the “central concern” of the Confrontation Clause, which “is to ensure the reliability of the evidence against a criminal defendant by subjecting it to rigorous testing in the context of an adversary proceeding before the trier of fact.” *Maryland v. Craig*, 497 U.S. 836, 845, 110 S. Ct. 3157, 111 L. Ed. 2d 666, 678 (1990).^[102]

H. THE EXCLUSION OF HACHENEY’S FATHER FROM THE TAKING OF THREE DEPOSITIONS DID NOT VIOLATE HACHENEY’S RIGHT TO A PUBLIC TRIAL BECAUSE A DEPOSITION IS NOT A TRIAL.

Hachenev next claims that the trial court’s exclusion of his father from the depositions of the deLashmutts and Olson violated his right to a public trial. This claim is without merit because the taking of the depositions themselves was not a “trial,” and at the time they were presented as evidence to the jury, the court was open to all.

Hachenev’s argument is based on a false premise: that the public was excluded from his “trial.” Depositions, however, are not part of “trial.” After an exhaustive amount of research, the State has uncovered only two cases that address whether closure of a *deposition* contravenes a defendant’s right to an open trial. Both hold that it does not.

The First Circuit has concluded that exclusion of the public from the

¹⁰² *Hobson*, 61 Wn. App. at 334.

taking of a deposition did not implicate a criminal defendant's right to a public trial, where "was aired in public, via the videotape, at trial."¹⁰³ The federal district court for New Jersey has agreed. In that case the court concluded that the closure of the depositions did not violate the right to a public trial because they were subsequently offered into evidence at a public trial.¹⁰⁴ No case was located that held to the contrary.

While the precedent regarding whether a deposition is part of trial for purposes of assessing whether a defendant's right to public trial was improperly limited, there is abundant case law discussing whether closure of depositions violates the *public's* right to access trials. The courts uniformly hold that it does not.¹⁰⁵ This precedent is relevant because both the Washington and United States Supreme Courts employ the same standards in evaluating a defendant's right to a public trial under the Sixth Amendment and Const. art. 1, § 22, as they do when assessing the public's right to attend

¹⁰³ *United States v. Acevedo-Ramos*, 842 F.2d 5, 8 (1st Cir. 1988).

¹⁰⁴ *United States v. Bertoli*, 854 F. Supp. 975, 1019 (D.N.J. 1994), *vacated in part on other grounds*, 40 F.3d 1384 (3^d Cir. 1994).

¹⁰⁵ *See, e.g., Seattle Times Co. v. Rhinehart*, 467 U.S. 20, 33, 104 S. Ct. 2199, 81 L. Ed. 2d 17 (1984); *In re The Reporters Comm. For Freedom of the Press*, 773 F.2d 1325, 1338 (D.C. Cir. 1985); *Amato v. City of Richmond*, 157 F.R.D. 26, 27 (E.D. Va. 1994); *Kimberlin v. Quinlan*, 145 F.R.D. 1, 2 (D.D.C. 1992); *Times Newspapers, Ltd. v. McDonnell Douglas Corp.*, 387 F. Supp. 189, 197 (C.D. Cal. 1974); *Scollo v. Good Samaritan Hosp.*, 175 A.D.2d 278, 280, 572 N.Y.S.2d 730 (N.Y. App. 1991); *In re Westchester Rockland Newspapers v. Marbach*, 66 A.D.2d 335, 413 N.Y.S.2d 411 (NY App. 1979); *Lisa C.-R. v. William R.* 166 Misc.2d 817, 819, 635 N.Y.S.2d 449 (N.Y. Sup. 1995); *In re Finkelstein*, 112 N.J. Super. 534, 537, 271 A.2d 916 (1970).

trials under the First Amendment and Const. art. 1, § 10.¹⁰⁶ The rationale in the civil arena is that same as that in the criminal: exclusion of the press from depositions did not hinder the “public’s right to know,” because “that right is not being subverted, but is merely being delayed until the trial begins.”¹⁰⁷

Despite this precedent, Hacheney asserts that the Fourth Circuit reversed a conviction under “identical facts to those at issue here.”¹⁰⁸ Far from being identical, the facts bear no resemblance whatsoever to those in this case:

The facts show that court was convened in the Tazewell County Courthouse on August 21, 1961; that without any order of record, the judge, the prosecutor, the sheriff, court appointed defense counsel and the petitioner next appear at the home of the prosecutrix which was located near the Town of Pocahontas, an old and nearly abandoned mining village in a sparsely settled rural area of Virginia--some 25 to 30 miles from Tazewell. There, the judge (the petitioner had waived a jury) heard the testimony of the prosecutrix, who was 87 years old and bedridden; her nephew; and the accused, which was apparently all of the testimony taken in the case. There is uncontradicted testimony by the accused that neighbors were told to leave the tiny bedroom in order to make space for the court officials. The state concedes that the petitioner is of low intelligence and that ‘his comprehension of that which occurs is very poor.’ The petitioner was sentenced to serve thirty years in the Virginia State Penitentiary.

¹⁰⁶ *State v. Bone-Club*, 128 Wn.2d 254, 259, 906 P.2d 325 (1995), citing *Waller v. Georgia*, 467 U.S. 39, 47, 104 S. Ct. 2210, 81 L. Ed. 2d 31 (1984).

¹⁰⁷ *Scollo*, 175 A.D.2d at 280.

¹⁰⁸ Brief at 48, citing *Lewis v. Peyton*, 352 F.2d 791 (4th Cir. 1965).

The Virginia statutes (Section 18.1-47 Code of Virginia) permit the taking of the deposition of a prosecutrix in a rape case in the discretion of the court by court order with the usual formalities. No order was entered in this case, and we cannot accept the belated contention that the conduct here indulged was a harmless substitute for that procedure.^[109]

Here, there was a proper order for the taking of the depositions. And contrary to *Lewis*, they were taken in the Kitsap County Courthouse, not in a remote location. Both defendant and his counsel were present for the depositions. Thereafter, the videotapes of the depositions were played in open court before the finder of fact, in this case a jury, and in front of any member of the public (except properly excluded witness¹¹⁰) who chose to attend the trial.

None of the other cases cited by Hacheney hold that the closure of a *deposition* violates the right to a public trial. Nor are the situations in the cited cases analogous to the closure of a deposition. All involve the exclusion of the public from the viewing of the evidence upon which the trier of fact reached its verdict, such as a trial,¹¹¹ or contempt hearing,¹¹² or the evidence upon which it reaches a legal conclusion at a significant stage of the

¹⁰⁹ *Lewis v. Peyton*, 352 F.2d at 791.

¹¹⁰ *See State v. Johnson*, 77 Wn.2d 423, 428, 462 P.2d 933 (1969).

¹¹¹ *State v. Ortiz*, 91 Haw. 181, 189, 981 P.2d 1127 (1999), *Vidal v. Williams*, 31 F.3d 67, 68 (2^d Cir. 1994), *cert. denied*, 513 U.S. 1102 (1995).

¹¹² *In re Oliver*, 333 U.S. 257, 265, 68 S. Ct. 499, 92 L. Ed. 682 (1948).

proceeding, such as a suppression hearing.¹¹³

As noted in *Lewis*, “[t]he right to a public trial is not only to protect the accused but to protect as much the public’s right to know what goes on when men’s lives and liberty are at stake, for a secret trial can result in favor to as well as unjust prosecution of a defendant.” There was no secret trial here. *All* the evidence offered against Hacheney was presented to the jury in a courtroom open to the public. Moreover, because the deposition were videotaped, the jury and the public were able to gauge the witnesses’ credibility much as if they had been present in court:

[T]he presence of these other elements of confrontation -- oath, cross-examination, and observation of the witness’ demeanor -- adequately ensures that the testimony is both reliable and subject to rigorous adversarial testing in a manner functionally equivalent to that accorded live, in-person testimony. These safeguards of reliability and adversariness render the use of such a procedure a far cry from the undisputed prohibition of the Confrontation Clause: trial by *ex parte* affidavit or inquisition.^[114]

No error occurred and this claim should be rejected.

**I. THE TRIAL COURT PROPERLY ADMITTED
ER 404(B) EVIDENCE REGARDING
HACHENEY’S SEXUAL RELATIONSHIPS
WITH SEVERAL WOMEN AROUND THE
TIME OF HIS WIFE’S MURDER.**

Hacheney next claims that that the trial court erred in admitting

¹¹³ *Bone-Club*, 128 Wn.2d at 257; *Waller*, 467 U.S. at 42.

certain evidence pursuant to ER 404(b). A trial court's decision to admit evidence is reviewed for an abuse of discretion.¹¹⁵ ER 404(b) states:

Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

Before a court admits evidence under this rule, it must (1) identify the purpose for introducing the evidence, (2) determine relevancy to an element of the crime charged, (3) weigh the probative value against its prejudicial effect.¹¹⁶

The first two parts of this test are intertwined, because the non-character purpose of the evidence is usually the same thing that makes an item of evidence relevant.

1. Relevance

The starting place is the elements of the crime charged. The State must prove all of the elements of the crime in its case in chief, regardless of the nature of the defense.¹¹⁷ For example, the government need not await a defendant's denial of intent before offering evidence relevant to that issue,

¹¹⁴ *Maryland v. Craig*, 497 U.S. 836, 851, 110 S. Ct. 3157, 111 L. Ed. 2d 666 (1990).

¹¹⁵ *See State v. Carleton*, 82 Wn. App. 680, 684, 919 P.2d 128 (1996).

¹¹⁶ *State v. Saltarelli*, 98 Wn.2d 358, 362-63, 655 P.2d 697 (1982).

¹¹⁷ *State v. Eastabrook*, 58 Wn. App. 805, 813, 795 P.2d 151, *review denied*, 115 Wn.2d 1031 (1990); *State v. Anderson*, 15 Wn. App. 82, 84, 546 P.2d 1243 (1976).

particularly since the defendant is not necessarily bound by his pre-trial theory of the case.¹¹⁸

The charge of premeditated first degree murder includes elements of intent and premeditation. Hacheny's plea of not guilty placed into dispute each element of the crime charged. Hacheny interposed as defenses a general denial and alibi.¹¹⁹ The defense of general denial implied the material assertion that the fire was not intentionally set but was an accident. The defense of alibi implied that another person set the fire, if it was not accidental. These defenses supported the Court's consideration of evidence bearing on Hacheny's motives, and his intent and premeditation.

Premeditation is an essential element of murder in the first degree as charged herein. Premeditation must involve more than a moment in time; it is defined as the deliberate formation of and reflection upon the intent to take a human life and involves the mental process of thinking beforehand, deliberation, reflection, weighing or reasoning for a period of time, however short. Premeditation can be proved by circumstantial evidence where the inferences drawn by the jury are reasonable and the evidence supporting the jury's verdict is substantial.^[120]

Premeditation is almost always supported by circumstantial evidence of events leading up to the crime and by the defendant's behavior after commission of the crime.

¹¹⁸ See *United States v. Adcock*, 558 F.2d 397 (8th Cir. 1977), *cert. denied*, 434 U.S. 921 (1977).

¹¹⁹ CP 100.

2. Purpose

There are several non-character purposes for which evidence may be admitted under ER 404(b), including various purposes not explicitly listed in the language of the rule.¹²¹ Discussion of selected purposes follow:

a. Motive

Motive has been defined to mean “[a]n inducement, or that which leads or tempts the mind to indulge [in] a criminal act.”¹²² Proof of motive is a proper basis for the admission of prior bad acts evidence under ER 404(b).¹²³ This is true, despite the fact that motive is not the element of any crime.¹²⁴

The State’s theory of the case was that Hachenev murdered Dawn (1) to allow him to romantically pursue several women to whom he had access in his work as a church counselor and (2) to obtain a significant amount of money in the face of his grim financial circumstances.¹²⁵

This case did not involve the “typical” allegation of spousal murder,

¹²⁰ *State v. Hoffman*, 116 Wn.2d 51, 82-83, 804 P.2d 577 (1991) (citations omitted).

¹²¹ *State v. Grant*, 83 Wn. App. 98, 105, 920 P.2d 609 (1996), citing *State v. Lane*, 125 Wn.2d 825, 831, 889 P.2d 929 (1995).

¹²² *State v. Tharp*, 96 Wn.2d 591, 597, 637 P.2d 961 (1981) (citations omitted).

¹²³ *State v. Benn*, 120 Wn.2d 631, 653, 845 P.2d 289 (1993).

¹²⁴ *State v. Boot*, 89 Wn. App. 780, 789, 950 P.2d 964, review denied, 135 Wn.2d 1015 (1998).

¹²⁵ CP 169.

with instances of arguments, threats, and/or domestic violence, often considered under ER 404(b). However, Hachenev was involved in several sexual relationships with women other than his wife during the span of mid-1997 through the end of 1998. Hachenev knew each of these women through his church before the murder, and had a motive to eliminate his wife via a means other than divorce. As an associate pastor in an arguably conservative congregation, Hachenev was less free to pursue divorce than a person situated in an otherwise similar situation.

In the instance of Sandra Glass, he was sleeping with her for several months before and after December 26, 1997, and only formally ended the relationship with her via an e-mail he sent from Tanzania in December 1998, where he was sleeping with the Lindsey Smith. In the instance of Smith, Hachenev was treating her romantically (kissing, holding hands) within a week of his wife's death. This behavior is also relevant under intent and *res gestae* analysis, discussed *infra*, as it is entirely inconsistent with a grieving spouse. Regarding Nicole Mathisen, Hachenev and Mathisen were seen flirting in the summer of 1997, and they conducted a romantic relationship in 1998 that evolved, by the time of trial, into an engagement. This is strong motive evidence, because it supports the reasonable inference that Hachenev believed he would be able to pursue Mathisen romantically by eliminating his wife. Finally, Hachenev carried on a sexual relationship with Annette

Anderson during the first quarter of 1998, also inconsistent with the behavior of a grieving spouse.

Hacheny argues that these purposes were adequately demonstrated by showing his pre- and post-murder relationship with Glass. The problem with that theory is that almost from the time of his wife's death, Hacheny began to shed Glass in favor of greener fields. If only Glass' relationship had been presented the defense could have argued that Hacheny was indeed grieving as shown by his abandonment of the affair with Glass.¹²⁶ The evidence of his pursuit of these other women was therefore necessary to avoid this misperception -- Hacheny was not dumping Glass out of grief but, much as he did his wife, to pursue multiple sexual conquests.

Each of the romantic pursuits and attempted romantic pursuits of Nicholas Hacheny is made stronger motive evidence by his pre-murder statement, "I can't wait until I get to heaven, because there I can have sex with whoever I want."

b. Consciousness of guilt

A defendant's behavior may also be admissible to show his or her consciousness of guilt, so-called "admissions by conduct":¹²⁷

It is relevant to show the conduct of the defendant subsequent

¹²⁶ 12RP 2318-21.

¹²⁷ See e.g. *State v. McGhee*, 57 Wn. App. 457, 788 P.2d 603 (1990).

to the crime, when such conduct indicates a consciousness of guilt, an inconsistency with innocence, or the intent with which the act was committed.^[128]

Here, Hacheny's relationships with several women, within months of his wife's death, were relevant to his consciousness of guilt. Evidence of Hacheny's pre-murder statements of a prophetic nature and his gift of one of his prized dogs just prior to the fire (the admission of which Hacheny does not now challenge) also demonstrated his consciousness of guilt and were circumstantial evidence of his intent, motive and premeditation.

Hacheny asserts that the evidence of consciousness of guilt is not relevant because his actions are subject to other explanations or interpretations. This, however is not the standard of relevance. "Minimal logical relevancy is all that is required" for a piece of evidence to be admissible.¹²⁹ The evidence need only have "some tendency" to prove the crime charged.¹³⁰ ER 401 thus defines "relevant evidence" as "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." It is well-settled that discrepancies, inconsistencies, uncertainty or other arguments regarding relevant evidence goes to the weight and not the admissibility of the evidence.

¹²⁸ *State v. Messinger*, 8 Wn. App. 829, 836-37, 509 P.2d 382 (1973).

¹²⁹ *State v. Bebb*, 44 Wn. App. 803, 723 P.2d 512 (1986), *aff'd*, 108 Wn.2d 515 (1987).

3. *Res Gestae*

Another recognized basis for admissibility is the *res gestae* rule, under which evidence of other bad acts is admissible “[t]o complete the story of the crime on trial by proving its immediate context of happenings near in time and place.”¹³¹ Each act must be “a piece in the mosaic necessarily admitted in order that a complete picture be depicted for the jury.”¹³²

If admitted for other purposes, a trial court must identify that purpose and determine whether the evidence is relevant and necessary to prove an essential ingredient of the crime charged. Evidence is relevant and necessary if the purpose of admitting the evidence is of consequence to the action and makes the existence of the identified fact more probable.^[133]

4. *ER 403*

The final step was for the trial court to determine on the record whether the danger of undue prejudice substantially outweighs the probative value of such evidence, in view of the other means of proof and other factors, applying the standards of 403 in conducting the ER 404(b) balancing.¹³⁴

Evidence is presumed admissible under ER 403.¹³⁵ To exclude evidence pursuant to ER 403 requires more than “mere prejudice.” The

¹³⁰ *State v. Burkins*, 94 Wn. App. 677, 973 P.2d 15 (1999).

¹³¹ *State v. Powell*, 126 Wn.2d 244, 263, 893 P.2d 615 (1995) (citations omitted).

¹³² *Powell*, 126 Wn.2d at 263.

¹³³ *Grant*, 83 Wn. App. at 105, *citing Powell*, 126 Wn.2d at 258-59 (citations omitted).

¹³⁴ *Powell*, 126 Wn.2d at 264.

¹³⁵ *Carson v. Fine*, 123 Wn.2d 206, 225, 867 P.2d 610 (1994).

courts have recognized “nearly all evidence will prejudice one side or the other in a lawsuit. Evidence is not rendered inadmissible under ER 403 just because it may be prejudicial.”¹³⁶ In addition, Tegland has pointed out that “nothing in Rule 403 authorizes the exclusion of evidence merely because it is ‘too probative.’”¹³⁷

Rather, ER 403 sets forth the specific grounds upon which relevant evidence may be excluded:

Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

The rule thus requires *unfair* prejudice. “If its probative value is not ‘substantially’ outweighed by the danger of unfair prejudice the court has no discretion to exclude the evidence; it must be admitted.”¹³⁸ “[E]ffective use of voir dire and cross examination, proper instructions to the jury concerning its duty to weigh credibility, and the standard admonition not to permit sympathy or prejudice to affect the verdict are the tools to direct the jury to a proper consideration of the evidence.”¹³⁹

¹³⁶ *Carson*, 123 Wn.2d at 224.

¹³⁷ 5 K. Teglund, *Wash. Prac., Evid.* § 403.3 at 354 (4th ed. 1999).

¹³⁸ *Lockwood v. AC & S, Inc.*, 44 Wn. App. 330, 350 722 P.2d 826 (1986).

¹³⁹ *Carson*, 123 Wn.2d at 225.

The trial court addressed the balancing equation for each item of ER 404(b) evidence the State sought to admit, allowing some, finding others either of marginal relevance or too prejudicial and excluding them. Given the relative importance of the evidence the court allowed to the State's theory of the case, it cannot be said the trial court abused its discretion in finding the evidence more probative than prejudicial. For the same reason, any error would be harmless.

J. THE TRIAL COURT PROPERLY ADMITTED THE STATE TOXICOLOGY LAB'S TEST RESULTS.

Hachenev next claims that the trial court erred in allowing state toxicologist Dr. Logan to testify regarding testing by a subordinate who died prior to trial, and in allowing other experts to use these results. This claim is without merit because the records were properly admitted as business records, thus obviating any Confrontation Clause issue, and because the chain of custody was sufficiently established, and any deficiencies in that regard went to the evidence's weight, not its admissibility.

1. Confrontation clause

Without much explanation, Hachenev alludes to *Lilly*,¹⁴⁰ and alleges that the admission of the hearsay did not meet the "particularized guarantees

of trustworthiness” required by that case and ultimately *Ohio v. Roberts*.¹⁴¹ Although *Crawford v. Washington* had little effect on the deposition issue discussed above, it utterly changes the landscape of the present claim. The entire “particularized guarantees of trustworthiness” analysis has been jettisoned by *Crawford*:

Roberts conditions the admissibility of all hearsay evidence on whether it falls under a “firmly rooted hearsay exception” or bears “particularized guarantees of trustworthiness.” This test departs from the historical principles identified above in two respects. First, it is too broad: It applies the same mode of analysis whether or not the hearsay consists of ex parte testimony. This often results in close constitutional scrutiny in cases that are far removed from the core concerns of the Clause. At the same time, however, the test is too narrow: It admits statements that do consist of ex parte testimony upon a mere finding of reliability.^[142]

Crawford sets forth a clearer rule: to satisfy the Sixth Amendment, if a hearsay statement is “testimonial,” then the declarant must be unavailable and the defendant must have had a prior opportunity to cross-examine the declarant.¹⁴³ The Court intimates, on the other hand, that non-testimonial statements are outside the purview of the Sixth Amendment, and should be left “to regulation by hearsay law.”¹⁴⁴ “Thus, under *Crawford*, a Sixth Amendment Confrontation Clause analysis will usually turn on whether a

¹⁴⁰ Presumably *Lilly v. Virginia*, 527 U.S. 116, 119 S. Ct. 1887, 144 L. Ed. 2d 117 (1999).

¹⁴¹ Brief at 54, 58.

¹⁴² *Crawford*, 124 S. Ct. at 1369 (citation omitted).

¹⁴³ *Crawford*, 124 S. Ct. at 1374.

particular statement is testimonial or not.”¹⁴⁵

Here, although Weiss, having died, was clearly unavailable at the time of trial, it is equally clear that Hacheney did not have an opportunity to cross-examine her. Thus, if her reports are deemed “testimonial” then they should have been excluded under *Crawford*.

Crawford, unfortunately, does not precisely define what “testimonial” means:

We leave for another day any effort to spell out a comprehensive definition of “testimonial.” Whatever else the term covers, it applies at a minimum to prior testimony at a preliminary hearing, before a grand jury, or at a former trial; and to police interrogations. These are the modern practices with closest kinship to the abuses at which the Confrontation Clause was directed.^[146]

Significantly, however, the Court does specifically exclude business records from its meager definition of “testimonial.”¹⁴⁷ In the only case yet to address the issue in a context other than clear black-and-white situations such as police interrogations on one hand and conspiratorial statements on the other, the Alabama Court of Criminal Appeals has concluded that autopsy reports and related documents are likewise not “testimonial” under *Crawford*.¹⁴⁸ The

¹⁴⁴ *Crawford*, 124 S. Ct. at 1370.

¹⁴⁵ *Bunton v. State*, 2004 WL 1065490, *11 (Tex. App. May 13, 2004).

¹⁴⁶ *Crawford*, 124 S. Ct. at 1374 (footnote omitted).

¹⁴⁷ *Crawford*, 124 S. Ct. at 1367.

¹⁴⁸ *Perkins v. State*, 2004 WL 923506, *6 (Ala. Crim. App. Apr. 30, 2004).

Court's analysis was premised primarily on the fact that such documents qualify as business records, which as noted, *Crawford* specifically cites as being non-testimonial.¹⁴⁹ This Court has similarly concluded that autopsy reports are business reports.¹⁵⁰ As will be discussed *infra*, the trial court properly admitted Weiss' reports as business records. The Confrontation Clause is therefore satisfied.

2. *Hearsay*

It should be noted that in light of *Crawford*, Hachenev's reliance on *State v. Neal*,¹⁵¹ is misplaced. That case's strict construction of CrR 6.13 was based on the Supreme Court's reasonable belief under *Roberts* that admission of nontestimonial hearsay "implicates the constitutional confrontation rights of the accused."¹⁵² Even were that not the case, however, Hachenev's reliance would be misplaced because Weiss' reports were admitted as business records under RCW 5.45.020, not as self-authenticating documents under CrR 6.13.¹⁵³

Although the trial court's order does not explicitly cite the business-

¹⁴⁹ *Perkins*, 2004 WL 923506 at *6.

¹⁵⁰ *State v. Heggins*, 55 Wn. App. 591, 596, 779 P.2d 285(1989).

¹⁵¹ *State v. Neal*, 144 Wn.2d 600, 30 P.3d 1255 (2001).

¹⁵² *Neal*, 144 Wn.2d 608.

¹⁵³ See *State v. Walker*, 83 Wn. App. 89, 96, 920 P.2d 605 (1996), *review denied*, 130 Wn.2d 1027 (1997).

records exception, both the factors the trial court considered and the argument of the parties make clear that that provision, not the court rule was at issue.¹⁵⁴

Great weight is given to the trial court's decision to admit or exclude evidence under the business records exception.¹⁵⁵ Accordingly, its ruling will not be reversed unless there has been a manifest abuse of discretion.¹⁵⁶

“The testifying witness need not have conducted nor personally observed all of the tests ... contained in the report, so long as it was prepared under the witness' supervision.”¹⁵⁷ As state toxicologist, Dr. Logan was both the custodian of the records Weiss produced, *and* her supervisor; he was thus competent to testify regarding her reports regardless of whether he personally supervised her performance of the particular tests at issue here.¹⁵⁸

There are five requirements for the admission of business records, all of which are satisfied here. (1) The evidence must be in the form of a “record.”¹⁵⁹ Here, the record in question, the toxicology report, was

¹⁵⁴ See 4PTL 575-80; CP 708-11.

¹⁵⁵ *State v. Ziegler*, 114 Wn.2d 533, 538, 789 P.2d 79 (1990).

¹⁵⁶ *Ziegler*, 114 Wn.2d at 538.

¹⁵⁷ *Heggins*, 55 Wn. App. at 596.

¹⁵⁸ *State v. Garrett*, 76 Wn. App. 719, 724, 887 P.2d 488 (1995).

¹⁵⁹ *State v. Kreck*, 86 Wn.2d 112, 118, 542 P.2d 782 (1975).

admitted into evidence.¹⁶⁰ A laboratory report meets this requirement.¹⁶¹ The absence of such a report having been admitted was the primary basis for the Court rejecting the business record exception in *State v. Nation*, upon which Hacheney relies.¹⁶²

Second, the record must be of an “act, condition or event”; accordingly, entries in the form of opinions or statements as to cause are not admissible.¹⁶³ The finding of the presence or absence of a substance during a lab test is not an opinion or statement of cause within the meaning of this rule, but an objective fact.¹⁶⁴

Third, the record must be made in the regular course of business.¹⁶⁵ Reports made in the regular course of the business of the State Toxicological Laboratory meet this requirement.¹⁶⁶ Moreover, Logan testified that it was and Judge Laurie agreed.

Fourth, the record must be made “at or near the time of the act, condition or event.”¹⁶⁷ This is not contested.

¹⁶⁰ CP 716 (Exhibit 323).

¹⁶¹ *Kreck*, 86 Wn.2d at 118.

¹⁶² *State v. Nation*, 110 Wn. App. 651, 666, 41 P.3d 1204 (2002).

¹⁶³ *Kreck*, 86 Wn.2d at 118.

¹⁶⁴ *Kreck*, 86 Wn.2d at 118-19.

¹⁶⁵ *Kreck*, 86 Wn.2d at 119.

¹⁶⁶ *Kreck*, 86 Wn.2d at 119.

¹⁶⁷ *Kreck*, 86 Wn.2d at 119.

Finally, the court must be satisfied that “the sources of information, method and time of preparation were such as to justify its admission.”¹⁶⁸ Here, based extensive testimony by Dr. Logan, the trial court was satisfied that this requirement was met. Dr. Logan testified that he routinely relied on data and reports of staff scientists when forming opinions.¹⁶⁹ Egle Weiss’s academic background was in chemistry and she was trained by the lab to be a forensic toxicologist.¹⁷⁰ She had a master’s in chemistry.¹⁷¹ She was trained in gas chromatography.¹⁷² She underwent peer review and proficiency testing.¹⁷³ Logan reviewed all of her work at that time.¹⁷⁴ Logan worked with Weiss throughout his entire career with the lab; he was familiar with her habits and the quality of her work.¹⁷⁵ He reviewed the file in the context of his experience with her professionalism.¹⁷⁶

Because Weiss’ reports were properly admitted into evidence through Logan, he and the other experts who relied upon them were properly allowed

¹⁶⁸ *Kreck*, 86 Wn.2d at 119.

¹⁶⁹ 4PTL 476.

¹⁷⁰ 4PTL 477.

¹⁷¹ 4PTL 478.

¹⁷² 4PTL 478.

¹⁷³ 4PTL 479.

¹⁷⁴ 4PTL 479.

¹⁷⁵ 4PTL 540.

¹⁷⁶ 4PTL 540.

to base their expert opinions on her findings. As noted in *Nation*, expert testimony under ER 703 may properly be allowed if the underlying data are of a kind reasonably relied upon by experts in the particular field in reaching conclusions, and the data are not relied upon only in preparing for litigation.¹⁷⁷

In *Ecklund*, which *Nation* discusses, an FBI serology expert was permitted to give opinion testimony based upon results of laboratory tests performed by his subordinate technician and recorded on laboratory work sheets and a final report not introduced into evidence.¹⁷⁸ Although the expert based his conclusions significantly on the opinion of the technician, he was also the laboratory supervisor with knowledge and ultimate responsibility for all office testing procedures and decisions. There was also testimony that information furnished by the laboratory was relied upon by law enforcement officials for investigations when no particular suspect is involved. Although such investigations may eventually result in a criminal prosecution, the tests were not being specifically prepared for use in litigation.¹⁷⁹ The court thus upheld admission of the testimony under ER 703 because both prongs of the second sentence of the rule were met.¹⁸⁰ *Ecklund* is indistinguishable from

¹⁷⁷ *Nation*, 110 Wn. App. at 663.

¹⁷⁸ *State v. Ecklund*, 30 Wn. App. 313, 318, 633 P.2d 933 (1981).

¹⁷⁹ *Ecklund*, 30 Wn. App. at 318.

¹⁸⁰ *Ecklund*, 30 Wn. App. at 318-19.

the present case.

Logan was also the supervisor. The lab also performs work when no particular suspect is involved -- indeed in this very case, at the time the testing was done, it was believed that Dawn Hacheney had suffered an accidental death. Moreover, as the court noted, at the time the testing was done the lab was affiliated with the University of Washington. This evidence was properly admitted and properly considered by the experts in forming their opinions.

3. *Chain of custody*

This Court has held that brief lapses in the chain of custody of physical evidence goes only to the evidence's weight not its admissibility,¹⁸¹ and the Supreme Court has likewise held that where officers testified items found at the scene of a crime were in same condition when collected, evidence that there were short periods of time when the items were not in police custody went to the weight, not the admissibility of the items.¹⁸²

The cases Hacheney cites do not control here. In *Roche*,¹⁸³ this court reversed two convictions because a lab technician, who was using the drugs he was charged with testing, broke the chain of custody and tainted the integrity of two trials. The court expressed concern that if the convictions

¹⁸¹ *State v. Saunders*, 30 Wn. App. 919, 639 P.2d 222 (1982)

¹⁸² *State v. Music*, 79 Wn.2d 699, 712-13, 489 P.2d 159 (1971), *vacated on other grounds*, 408 U.S. 940 (1972).

were not overturned, the integrity of the criminal justice system might suffer.¹⁸⁴ No such threat to the system existed in this case.

In *Hefferman*, a vaginal slide that was examined by a laboratory technician contained “no identifying marks” whatsoever.¹⁸⁵ Such was certainly not the case here and the cases cited above should control. To the extent this case can be read as deviating from authorities cited above, one cannot help but notice that in the forty-two years since it was issued, *not a single case*, in this State or anywhere else in the nation, has cited *Hefferman*. To the extent that it is contrary to controlling authority, it should be disregarded.

K. THE TRIAL COURT PROPERLY DECLINED TO DISMISS THE CHARGES OR EXCLUDE EVIDENCE WHERE THERE WAS NO DISCOVERY VIOLATION RELATING TO A WITNESS UNCOVERED AT THE BEGINNING OF TRIAL WHERE THE DEFENSE WAS OFFERED AND DECLINED A CONTINUANCE TO PREPARE FOR THE WITNESS.

Hacheny next claims that the trial court erred in allowing the testimony of Eduard Krueger. The trial court did not abuse its discretion, where although he was disclosed after trial began, the defense had two weeks

¹⁸³ *State v. Roche*, 114 Wn. App. 424, 437, 59 P.3d 682 (2002).

¹⁸⁴ *In re Brennan*, 117 Wn. App. 797, 803, 72 P.3d 182 (2003).

¹⁸⁵ *State v. Hefferman*, 59 Wn.2d 413, 415, 367 P.2d 848 (1962).

notice before his testimony was actually given, the defense received a summary of his testimony the day the witness was disclosed, the State offered to set up an interview at any time, and the defense declined the opportunity for any further continuance to prepare for his testimony.

On November 18, 2002, the State informed the court and the defense that it had located Krueger, who had recently retired from Garrett, the company that had manufactured the propane canisters found in the Hachenev bedroom after the fire.¹⁸⁶ The State explained that it had been trying for some time in vain to get current employees of the company to respond to its inquiries.¹⁸⁷ Hachenev confirmed that the company's employees had been uncooperative.¹⁸⁸ Krueger, who retired from the company three years earlier was willing to testify.¹⁸⁹

The next day, on November 19, 2001, the State announced that it had provided a summary of Krueger's expected testimony.¹⁹⁰ The defense acknowledged having received the report on November 18.¹⁹¹ The State also indicated that although Krueger was then in Wisconsin, it would be happy to

¹⁸⁶ 8RP 1428.

¹⁸⁷ 8RP 1429.

¹⁸⁸ 8RP 1430, 12RP 2228.

¹⁸⁹ 8RP 1429.

¹⁹⁰ 9RP 1622.

¹⁹¹ 9RP 1623.

arrange a telephonic interview if the defense wished to speak with him before he arrived in Washington.¹⁹²

In its analysis, the trial court addressed two issues: (1) whether there was a discovery violation, and (2) what sanction, if any, should be applied.¹⁹³

The trial court found there was no discovery violation.¹⁹⁴ That conclusion is supported by the record.

The State does not violate CrR 4.7 where it has no knowledge of the matter to be disclosed.¹⁹⁵ Such was the case here. The State explained that until a few weeks before trial all parties believed the propane canisters had been manufactured by Coleman, and accordingly the State listed a representative of that company, Rick Wigand, as a witness.¹⁹⁶ Just before trial, Wigand examined the photos of the canisters (the canisters themselves were not saved after the fire), and informed the parties that they were Garrett, not Coleman, canisters.¹⁹⁷ The State then immediately contacted Garrett manager Ron Raboin, who referred it to Garrett's counsel, Milwaukee attorney Mark Foley.¹⁹⁸ Foley eventually put the State in contact with

¹⁹² 9RP 1622.

¹⁹³ 17RP 3303.

¹⁹⁴ 17RP 3304.

¹⁹⁵ *In re Pirtle*, 136 Wn.2d 467, 485-486, 965 P.2d 593 (1998).

¹⁹⁶ 17RP 3277.

¹⁹⁷ 17RP 3277.

¹⁹⁸ 17RP 3278.

Krueger.¹⁹⁹ The State as soon as possible asked its fire expert, Dane Whetsel to interview Mr. Krueger, and as soon as Whetsel did that, the State notified the court and the defense, even before it had even received a copy of the report of Whetsel's interview that Krueger would be a witness.²⁰⁰ As noted, the defense received the report later the same day. Hacheny himself conceded, repeatedly, that the State had been diligent and was not at fault.²⁰¹ The trial court properly declined to find a discovery violation. Despite the lack of any violation of the discovery rules, the trial court, out of a concern for Hacheny's due process rights, nevertheless offered to continue the trial, which Hacheny declined.²⁰²

Moreover, a trial court's decision concerning the appropriate remedy for a discovery violation under CrR 4.7(h) is discretionary.²⁰³ Dismissal for a discovery violation is an extraordinary remedy, available only when the alleged misconduct has materially affected the accused's right to a fair trial and the prejudice cannot be remedied by granting a new trial.²⁰⁴ Hacheny's suggestion that the trial court would have been within its discretion in dismissing the case is not well taken.

¹⁹⁹ 17RP 3278.

²⁰⁰ 8RP 1428, 17 RP 3279.

²⁰¹ 17RP 3286, 3288, 3296, 3301.

²⁰² 17RP 3301, 3306.

²⁰³ *State v. Smith*, 67 Wn. App. 847, 851, 841 P.2d 65 (1992).

In the area of discovery violations the courts uniformly require “that in order to show prejudice justifying dismissal, *the defendant must establish* ‘by a preponderance of the evidence that interjection of new facts into the case when the State has not acted with due diligence will compel him to choose between prejudicing either’” his right to speedy trial and or to effective assistance of counsel.²⁰⁵

Here, as noted, Hacheny has not shown that that the State failed to act with due diligence. Indeed, he conceded below that it had. He fails to meet his burden of showing that dismissal was appropriate.

Finally, even there had been a discovery violation, Hacheny fails to show prejudice. Hacheny fails to suggest, beyond conclusory statements, how his ability to be prepared for trial was impaired. Whether the canisters were manufactured by Garrett or Coleman, the issues were the same.²⁰⁶ Below, counsel made much of how he needed to consult experts and engage in voluminous discovery from an out-of-state corporation in order to prepare for the witness.²⁰⁷ These contentions ring hollow. As noted, the parties believed, up until a week or so before trial, that the canister was

²⁰⁴ *State v. Jacobson*, 36 Wn. App. 446, 450, 674 P.2d 1255 (1983).

²⁰⁵ *State v. Cannon*, 130 Wn.2d 313, 329, 922 P.2d 1293 (1996), quoting *State v. Price*, 94 Wn.2d 810, 814, 620 P.2d 994 (1980).

²⁰⁶ 17RP 3207.

²⁰⁷ 17RP 3266-74.

manufactured by Coleman, and the State had endorsed Wigand as Coleman's representative. There is no evidence whatsoever that Hacheney consulted with experts or engaged in extensive discovery of the records of the Coleman Company (which is located in Kansas) in preparation for Wigand's testimony. Presumably if these procedures were so crucial, counsel would have engaged in them more than a week or two before trial.

Moreover, the issues involved were not new. It was the defense that raised the whole propane theory, more than six months before trial, in the first place.²⁰⁸ Indeed, the defense had contacted Garrett, at a time when the canisters were still assumed to be Coleman products.²⁰⁹ The State supplied numerous documents regarding the issue in discovery.²¹⁰ Another State witness, Vassallo, also was affiliated with Garrett.²¹¹ And, as Hacheney himself pointed out, the testimony was largely cumulative in any event.²¹² Hacheney has failed to show any error.

²⁰⁸ 17RP 3277, 3281, 3285.

²⁰⁹ 17RP 3287.

²¹⁰ 17RP 3275.

²¹¹ 17RP 3276.

²¹² 17RP 3289.

L. THE STATE PROPERLY SOUGHT TO ELICIT DURING VOIR DIRE WHETHER THE JURORS COULD FOLLOW THE LAW.

Hachenev next claims that the State improperly attempted to indoctrinate the jury by asking during voir dire whether any jurors would have an issue with convicting the defendant solely upon circumstantial evidence. This claim is without merit because the State had a right to ferret out jurors that would not be willing to convict based upon such evidence.

The limits and extent of voir dire examination fall within the trial court's discretion.²¹³ The trial court's exercise of discretion is limited only by the need to assure a fair trial by an impartial jury.²¹⁴ The trial court found that because the State's inquiry was tied to questions about the reasonable doubt standard, it was proper.²¹⁵ It did not abuse its discretion.

A juror may be challenged for cause if the prospective juror's views would prevent or substantially impair the performance of that person's duties as a juror according to instructions and the oath taken by jurors.²¹⁶ Part of that oath is a duty to follow the court's instructions on the law.²¹⁷ The jury in

²¹³ *State v. Laureano*, 101 Wn.2d 745, 757, 682 P.2d 889 (1984).

²¹⁴ *State v. Frederiksen*, 40 Wn. App. 749, 752, 700 P.2d 369, review denied, 104 Wn.2d 1013 (1985), citing *United States v. Jones*, 722 F.2d 528, 529 (9th Cir.1983).

²¹⁵ 4VD 617.

²¹⁶ *State v. Brown*, 132 Wn.2d 529, 602, 940 P.2d 546 (1997).

²¹⁷ *Brown*, 132 Wn.2d at 603.

this case was properly instructed that under Washington law, circumstantial evidence is of no greater or lesser value than direct evidence.²¹⁸ Clearly if any juror had responded that he or she would be unable to convict the defendant if circumstantial evidence alone proved the defendant's guilt beyond a reasonable doubt, the juror would have been excusable for cause. Especially because its case was entirely circumstantial, the State was thus entitled to inquire of the jurors whether they would be able to convict the defendant based solely on that type of evidence. That is all its questions asked, and the trial court, which had the ability to observe the tone of the questions when they were asked, did not abuse its discretion in allowing the questions.

M. THE TRIAL COURT PROPERLY ADMITTED GLASS' PRIOR CONSISTENT STATEMENTS AFTER HACHENEY IMPLIED THAT HER SUBSEQUENT IMMUNITY AGREEMENT GAVE HER A MOTIVE TO FABRICATE, AND THE TRIAL COURT PROPERLY EXCLUDED IRRELEVANT EVIDENCE OF NICKELL'S MARITAL STATUS.

Hachenev next claims that the trial court allowed evidence of prior consistent statements made by Sandra Glass, and in refusing to allow the defense to inquire about Glass' boyfriend's marital status when they met. This claim is without merit because the prior consistent statements were

²¹⁸ CP 1345; *see State v. Delmarter*, 94 Wn.2d 634, 638, 618 P.2d 99 (1980).

made before Glass' execution of an immunity agreement gave her a reason to fabricate, and because Hachenev failed to demonstrate that there was any illicit aspect to Glass' most recent relationship that would impeach her assertion that she came forward with Hachenev's confession to .

1. Prior consistent statements

On appeal, this Court reviews the trial court's decision to admit evidence for abuse of discretion.²¹⁹ An abuse of discretion will be found only where the trial court's determination is "manifestly unreasonable or based upon untenable grounds or reasons."²²⁰

ER 801(d)(1) provides that a statement is not hearsay if:

The declarant testifies at the trial or hearing and is subject to cross examination concerning the statement and the statement is ... (ii) consistent with the declarant's testimony and is offered to rebut an express or implied charge against the declarant of recent fabrication or improper influence or motive....

If there is an inference raised in cross examination that the witness changed her story in response to an external pressure, then whether that witness gave the same account of the story prior to the onset of the external pressure becomes highly probative of the veracity of the witness's story given while

²¹⁹ *State v. Stenson*, 132 Wn.2d 668, 701, 940 P.2d 1239 (1997), *cert. denied*, 523 U.S. 1008 (1998).

²²⁰ *Stenson*, 132 Wn.2d at 701.

testifying.²²¹ Accordingly, the proponent of the testimony must show that the witness's prior consistent statement was made before the witness's motive to fabricate arose in order to show the testimony's veracity and for ER 801(d)(1)(ii) to apply.²²²

Here, the trial court found that one of the implications of the Hachenev's cross-examination of Glass was that her immunity agreement with the State, into which she entered after making the statements to Nickell, gave her a motive to fabricate Hachenev's confession.²²³ (When she actually testified, LeGendre was unable to actually offer a prior consistent statement.)²²⁴ This conclusion is not an abuse of discretion.

On cross, Hachenev extensively examined Glass about her immunity agreement with the State.²²⁵ He pointed out that she arranged a meeting with the prosecutor's office through her attorney.²²⁶ He pointed out that she had never spoken to the prosecutor, the fire investigators, or "any kind of law enforcement individual of any kind" before that meeting.²²⁷ He reiterated that her first contact "with anyone in a law enforcement role" was the day she

²²¹ *State v. Thomas*, 150 Wn.2d 821, 865, 83 P.3d 970 (2004).

²²² *Thomas*, 150 Wn.2d at 865.

²²³ 13RP 2495, 2497.

²²⁴ 13RP 2573-74.

²²⁵ 12RP 2367-73.

²²⁶ 12RP 2368.

²²⁷ 12RP 2367.

entered the agreement.²²⁸ He described the first thing they did was to “negotiate this immunity agreement.”²²⁹ He insinuated that the State in essence bought a pig in a poke, because she was “never required to write out any kind of proffer about what [she] might say” before getting the agreement, and that she never actually gave any statements until after the agreement was executed.²³⁰ It was brought out that “in [her] mind, [she] believe[d] that this document [gave her] absolute immunity from prosecution for anything [she] might have told the investigators throughout this investigation.”²³¹ Hachenev pointed out that she was never asked to take a polygraph or submit to a voice stress analyzer.²³² Hachenev suggested that in order for the immunity to hold, she had to “*completely blame somebody else* for what happened to Dawn Hachenev.”²³³ Finally, before departing the topic of the immunity agreement, Hachenev pointed out that once she had the agreement, she was interviewed by the chief deputy prosecutor, Mr. Casad, that she was then interviewed by trial deputies Bradley and Wachter, and prosecutor’s office investigator Roy Kitchen, and then by Bradley and Bremerton detective Sue Shultz, and then again by prosecutor’s office investigator Dick Kitchen,

²²⁸ 12RP 2368.

²²⁹ 12RP 2368.

²³⁰ 12RP 2368, 2370.

²³¹ 12RP 2369.

²³² 12RP 2370.

²³³ 12RP 2371.

before she submitted to an interview by the defense.²³⁴

This course of examination certainly left the trial court with the impression that Hacheny was suggesting that the immunity agreement gave Glass a reason to concoct the story of Hacheny's confession and or its details. The implication that Glass fabricated the story because of the immunity agreement was certainly more thoroughly explored and implied than the brief inquiry in *Thomas*, which the Supreme Court recently held established an adequate predicate for the admission of the prior consistent statements.²³⁵ Since this motive to fabricate arose after Glass made her prior consistent statements to Nickell, the out-of-court statements were properly admitted.

2. *Nickell's marital status*

A trial court's decision to exclude evidence will only be reversed if it abused its discretion.²³⁶ The defendant's right to present evidence in support of her case is limited by the requirement that the proffered evidence not be "otherwise inadmissible."²³⁷ Further, "a criminal defendant has no

²³⁴ 12RP 2372-74.

²³⁵ *Thomas*, 150 Wn.2d at 865-66.

²³⁶ *State v. Picard*, 90 Wn. App. 890, 899, 954 P.2d 336, *review denied*, 136 Wn.2d 1021 (1998).

²³⁷ *State v. Rehak*, 67 Wn. App. 157, 162, 834 P.2d 651 (1992), *review denied*, 120 Wn.2d 1022, *cert. denied*, 508 U.S. 953 (1993).

constitutional right to have irrelevant evidence admitted.”²³⁸

Here, Hachenev proposed to impeach Glass’ testimony that she came forward with Hachenev’s confession because she was tired of the secrets and lies with supposed evidence that Glass’ present boyfriend, Scott Nickell, had been married when their romantic relationship began.²³⁹ Defense counsel candidly admitted however, that he did not actually know what Nickell’s marital status was at the time.²⁴⁰ Counsel could not say whether or not Nickell and his former wife were still living together at the time he became romantically involved with Glass.²⁴¹ Counsel subsequently averred that Nickell had separated from his wife in February 2001.²⁴² Glass’ divorce from her ex-husband had become final in March 2001.²⁴³ There was never any suggestion that Glass’ and Nickell’s relationship was ever secret.²⁴⁴ As of March 2001, Glass and Nickell were still just friends.²⁴⁵ Glass reported Hachenev’s confession in April of 2001, and Glass and Nickell did not become sexually involved until May.²⁴⁶ Nickell testified that in March 2001

²³⁸ *State v. Hudlow*, 99 Wn.2d 1, 15, 659 P.2d 514 (1983).

²³⁹ 12RP 2361.

²⁴⁰ 12RP 2361.

²⁴¹ 12RP 2362.

²⁴² 12RP 2363.

²⁴³ 12RP 2362.

²⁴⁴ 12RP 2363.

²⁴⁵ 12RP 2363.

²⁴⁶ 12RP 2363.

he was living in bachelor officer's quarters, and that his relationship with Glass did not become physical until May of that year.²⁴⁷

The trial court ruled that there was insufficient evidence presented that Glass was having a secret affair to make the inquiry relevant impeach. The fact that at the time of the confession to Commander Nickell he was newly separated from his wife, is absolutely of no relevance. It's tenuous at best. And at this point my order in limine stands.^[248]

Before Hachenev's cross-examination of Nickell, the court invited him to revisit the issue if he had anything further to say on the issue, and he did not.²⁴⁹

The trial court did not abuse its discretion. Hachenev's premise was that Nickell's marital status would have impeached Glass' claim that she revealed Hachenev's confession because she was tired of living with lies. Because Hachenev failed to demonstrate that Glass and Nickell had an illicit affair, his premise failed as a factual matter. Regardless of Nickell's legal marital status, there was no evidence that he and Glass were carrying on any secret affair. The legal status was thus irrelevant and properly excluded.

3. *Harmless error*

Finally, any error would be harmless. Glass was extensively cross-

²⁴⁷ 13RP 2533, 2551.

²⁴⁸ 12RP 2365.

examined, *inter alia*, on her immunity agreement, at great length on her inability to keep dates straight, whether and when she various permutation of sexual relations with Hacheny, her belief in prophesies and her inability to distinguish them from her desires or hallucinations, that she was aware of many of the details of Hacheny's confession from the media, the autopsy report, and other sources before Hacheny confessed to her, and finally, her love for Hacheny and his spurning of her.²⁵⁰ Neither the admission of Nickell's marital status nor the exclusion of his testimony would have significantly affected the jury's weighing of Glass' testimony.

N. HACHENY HAS FAILED TO DEMONSTRATE CUMULATIVE ERROR WARRANTING REVERSAL.

Hacheny next claims that the cumulative error doctrine warrants reversal in this case. The application of that doctrine is limited to instances when there have been several trial errors that standing alone may not be sufficient to justify reversal but when combined may deny a defendant a fair trial.²⁵¹ Examples include a cases in which there were five evidentiary errors along with discovery violations;²⁵² in which there were three instructional

²⁴⁹ 13RP 2539.

²⁵⁰ 12RP 2367-2416, 13RP 2420-2477, 2483-85.

²⁵¹ *State v. Greiff*, 141 Wn.2d 910, 929, 10 P.3d 390 (2000).

²⁵² *State v. Coe*, 101 Wn.2d 772, 789, 684 P.2d 668 (1984).

errors and improper remarks by the prosecutor during voir dire;²⁵³ in which a witness impermissibly suggested the victim's story was consistent and truthful, the prosecutor impermissibly elicited the defendant's identity from the victim's mother, and the prosecutor repeatedly attempted to introduce inadmissible testimony during the trial and in closing;²⁵⁴ and in which the court severely rebuked the defendant's attorney in the presence of the jury, the court refused to allow the testimony of the defendant's wife, and the jury was permitted to listen to a tape recording of a lineup in the absence of court and counsel.²⁵⁵ Here, Hachenev has not established any error at all, and certainly even if he has, none of it combined is of the magnitude appearing in the cited cases.²⁵⁶

²⁵³ *State v. Badda*, 63 Wn.2d 176, 183, 385 P.2d 859 (1963).

²⁵⁴ *State v. Alexander*, 64 Wn. App. 147, 158, 822 P.2d 1250 (1992).

²⁵⁵ *State v. Whalon*, 1 Wn. App. 785, 804, 464 P.2d 730 (1970).

²⁵⁶ *Greiff*, 141 Wn.2d at 929.

VI. CROSS APPEAL

THE TRIAL COURT ERRED IN REFUSING TO FIND PROBABLE CAUSE FOR THE EXISTENCE OF THE AGGRAVATING CIRCUMSTANCE THAT HACHENEY COMMITTED THE MURDER TO CONCEAL HIS IDENTITY.

In the first amended information, the State charged Hacheny with first-degree premeditated murder with the aggravating circumstances of arson and concealment. The trial court found probable cause for the arson aggravator, but refused to arraign Hacheny on the concealment circumstance.²⁵⁷

RCW 10.95.020(9) provides that it is an aggravating circumstance that:

The person committed the murder to conceal the commission of a crime or to protect or conceal the identity of any person committing a crime

In *State v. Brett*,²⁵⁸ the Washington Supreme Court held that the concealment aggravator is established if “the jury is presented with evidence which suggests that the killing was intended to postpone for a significant period of time the discovery of the commission of the crime.”²⁵⁹

Committing the murder “to conceal the commission of a crime” or “to

²⁵⁷ CP 349-50.

²⁵⁸ *State v. Brett*, 126 Wn.2d 136, 892 P.2d 29 (1995), *cert. denied*, 516 U.S. 1121 (1996).

²⁵⁹ *Brett*, 126 Wn.2d at 167.

protect or conceal the identity of any person committing a crime” may include concealment of the crime of murder itself. In *Brett*, where the aggravating circumstances included crimes of robbery, kidnapping and burglary, the Court rejected the argument that the concealment “[inhered] in the overall plan to kill with premeditated intent for purposes of committing a robbery/kidnap/burglary.”²⁶⁰

Intent to conceal a crime or the identity of the perpetrator does not “inhere” in premeditated murder, robbery, kidnapping, or burglary. It is a separate intention from an intent to kill, or from the intent necessary for a robbery, burglary, or a kidnapping.^[261]

In the instant case, probable cause exists to support the concealment aggravator, because Hacheney committed the murder as he did to conceal the commission of the crimes of murder and arson, and to conceal his identity as the perpetrator of these crimes. The trial court should have arraigned Hacheney on this aggravating circumstance as well.

²⁶⁰ *Brett*, 126 Wn.2d at 168.

²⁶¹ *Brett*, 126 Wn.2d at 168.

VII. CONCLUSION

For the foregoing reasons, Hacheny's conviction and sentence should be affirmed.

DATED June 21, 2004.

Respectfully submitted,

RUSSELL D. HAUGE
Prosecuting Attorney

A handwritten signature in black ink, appearing to read 'RAS', with a long horizontal line extending to the right.

RANDALL AVERY SUTTON
WSBA No. 27858
Deputy Prosecuting Attorney

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APPENDIX

State v. Nicholas Hacheny

No. 29965-8-II

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*Except as marked by asterisk, volume numbers are those assigned by the court reporter.

