

NO. 84614-6

JUL 03 2014

Ronald R. Carpenter
Clerk

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

CONNER MICHAEL SCHIERMAN,

Appellant.

BRIEF OF RESPONDENT

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I. ISSUES PRESENTED

1. Has Schierman failed to establish that his constitutional right to be present was violated when the court clerk administratively excused jurors for hardship after consulting with counsel, or when the court conferred with the parties in chambers about legal questions of whether to excuse jurors for cause, which had earlier been argued in his presence?

2. Has Schierman failed to establish that his right to a public trial was violated by the court clerk's administrative excusal of jurors for hardship, or by the court's further consideration in chambers of legal arguments supporting challenges for cause, earlier argued in open court?

3. Has Schierman failed to establish that his constitutional right to counsel was violated when counsel delegated the administrative task of reviewing hardship requests—a non-critical stage of the proceedings—to a paralegal?

4. Was the statutorily mandated notice of special sentencing proceeding properly filed in a timely manner, when it was timely filed after the original charges and again after the charges were amended?

5. Did the trial court apply the correct legal standards and properly exercise its discretion in ruling on challenges for cause?

6. Has Schierman failed to establish that cumulative error in jury selection warrants reversal of his convictions or sentence?

7. Where the prosecutor in closing argument properly drew the jury's attention to evidence relevant to Schierman's motive to commit the charged offenses, and that evidence was provided in discovery and admitted without objection, has Schierman failed to establish that his right to due process was violated?

8. Did the trial court act within its discretion by finding that the attendance at Schierman's trial of a few soldiers dressed in fatigues who supported Leonid Milkin but did not communicate any message to the jury was not inherently prejudicial, and by denying Schierman's motion for a mistrial when Leonid mentioned he was stationed in Iraq but the court struck the testimony and instructed the jury to disregard it?

9. Did the trial court correctly instruct Schierman's jury regarding the definition of premeditation and voluntary intoxication, and did it properly refuse to instruct the jury regarding the included offenses of first and second degree manslaughter?

10. Did the trial court properly exercise its discretion in limiting the mitigation evidence at the penalty phase based on its lack of probative value, excluding only irrelevant and cumulative testimony?

11. Did the trial court properly exercise its discretion in admitting limited victim impact testimony and a silent victim impact video at the

penalty phase, which, as a whole, did not deprive Schierman of a fundamentally fair proceeding?

12. In the penalty phase, did the trial court properly permit cross-examination of a witness to Schierman's peaceful character with Schierman's own description of his prior violent acts while drinking?

13. In the penalty phase, did the trial court properly refuse to strike cross-examination of a character witness offered in mitigation, as to statements that he relayed to the police shortly after Schierman's arrest?

14. Has Schierman failed to establish prosecutorial misconduct in the penalty phase closing arguments?

15. Has Schierman failed to establish cumulative error that would warrant reversal of convictions or sentence?

16. After conducting the mandatory statutory review, should this Court uphold Schierman's death sentence because the evidence justified the jury's finding that there were not sufficient mitigating circumstances to merit leniency, and the sentence for these crimes was not disproportionate or brought about through passion or prejudice?

II. STATEMENT OF THE CASE

A. PROCEDURAL FACTS

On July 24, 2006, the State charged the defendant, Conner Michael Schierman, with four counts of aggravated murder in the first degree and

one count of arson in the first degree. CP 1-3. After two agreed extensions of the time period allowed, CP 152-53, 1021, the State filed a Notice of Special Sentencing Proceeding on January 30, 2007. CP 1220.

The matter proceeded to trial before the Honorable Gregory Canova on October 28, 2009. 29RP 2.¹ On November 3, 2009, the State moved to amend the Information to correct a scrivener's error in the charging language relating to the aggravating circumstances. 32RP 99-105. The motion was granted over Schierman's objection. 32RP 105-15; CP 6764-68. The State then immediately refiled the Notice of Special Sentencing Proceeding. 32RP 120; CP 6769.

Jury selection began on November 13, 2009, when the court swore in the venire and the prospective jurors completed questionnaires particular to Schierman's case; the jury panel was finally seated on January 12, 2010. 34RP; 59RP 84. After hearing nearly three months of testimony, the jury convicted Schierman as charged on April 12, 2010, and found that each of the charged aggravating circumstances had been proved. CP 7857, 7859, 7861, 7863, 7865-69; 101RP 4-10. The penalty phase began a week later, and lasted nearly a month. 102RP 108; 111RP 163. The jury returned a verdict on May 5, 2010, finding that the State had met its burden of proving beyond a reasonable doubt that there

¹ The Verbatim Record of Proceedings will be cited by volume, consecutively numbered. A table listing the volumes and the dates included in each is attached as Appendix 1.

were not sufficient mitigating circumstances to merit leniency, and imposing the death penalty. CP 8322; 113RP 4-8. On May 27, 2010, the trial court imposed sentence consistent with the jury's verdict. CP 8441-48; 105RP 148-51. This appeal timely followed. CP 8452.

B. SUBSTANTIVE FACTS²

On Sunday evening, July 16, 2006, Schierman played video games at home in his duplex apartment on Slater Avenue in Kirkland with his roommate, Isaac Way, and his next door neighbor, Sean Winter. 71RP 76-77, 85-90; 72RP 86, 89, 95-96. At one point the men were outside and Schierman made a comment that was sexual, referring to the women in Olga Milkin's house across the street; he identified the women by using a Russian accent and by gesturing toward their home. 71RP 105-07; 72RP 57-58. When Schierman had asked two weeks earlier about the blond woman across the street (Olga Milkin), he was told she was married with two children and her husband was overseas. 71RP 85.

The three young women who lived across from Schierman's apartment were sisters who were Ukrainian immigrants. 60RP 103-04; 61RP 29-31. Olga Milkin and her husband Leonid Milkin owned the home, but Leonid was in the Army and was deployed overseas that

² All facts referred to in this section were presented to the jury in the guilt phase of trial.

summer; Olga's sister Lyubov Botvina,³ a college student, was staying at the house to help care for the Milkins' two sons, Justin, age 5, and Andrew, age 3.⁴ 60RP 100-03; 61RP 32-33.

Between midnight and 1 a.m., Isaac Way went to bed and Sean Winter went home. 71RP 90-91; 72RP 96, 115. Before Winter left, Schierman gave him a key to the apartment so that Winter could install a router for Schierman's computer the next day, while Schierman was at work. 71RP 98-99. Early the next morning, Monday, July 17, Way left for jury duty in Seattle. 72RP 98. Schierman called in sick to work at about 10:30 that morning. 80RP 115-16.

At about 10:30 a.m., two women pulled out of their driveway on Slater Avenue, and as they drove slowly down the street, a man walked across the street in front of them, from in front of the Milkin home. 61RP 85-86, 124, 127-29. The man was remarkable, as he wore ill-fitting pants, was wearing no shirt, and was carrying a gas can. 61RP 86-87, 127-28, 133. The women saw a tattoo on his left upper arm, and one noticed what appeared to be a large scar or slash on his cheek. 61RP 92, 132. The man walked purposefully and without difficulty. 61RP 91, 143. At trial, both

³ All references to Lyubov Botvina in this brief refer to this victim, unless specified otherwise. Her mother, a witness in the penalty phase, shares the name. 102RP 108.

⁴ A third sister, Alla Botvina, lived in the daylight basement of the Milkin home but was not there the night of July 16, 2006. 60RP 113; 61RP 33, 41-42.

women identified Schierman as the man they had seen. 61RP 101-04; 142. They also identified his distinctive tattoo. Ex. 26G; 61RP 101, 141.

At 10:56 a.m., Schierman bought two gas cans at an AM/PM gas station nearby, and filled them with gas; the purchases were captured on videotape. Ex. 186; 80RP 146; 81RP 27-31; 83RP 62, 67-71. He used a debit card. 83RP 67.

The fire. At about 11:30 a.m. that day, Michael Murphy was working on road construction and saw a plume of smoke nearby; he quickly drove toward it. 62RP 124-27. He arrived at the Milkin home and saw the rear of the building engulfed in fire; the fire was quickly progressing to the sides and toward the front. Ex. 31A; 62RP 128-29. He called 911. 62RP 129.

The first firefighter arrived at 11:40 a.m. 62RP 31, 37. Firefighting vehicles arrived within minutes, and firefighters began to put out the fire. 62RP 44-46. Fire was coming out of every opening in the house. Ex. 31C; 62RP 187. One firefighting crew entered the daylight basement from a back door to look for survivors. Ex. 1N; 62RP 85-88. The bed in the basement and clothing on the floor were on fire. 62RP 97-98, 111, 122.

When the fire had been suppressed enough to allow safe entry, firefighters entered the upper floors and continued their search for

survivors or victims. 63RP 95-101. The main floor and second floor of the house were gutted by the fire, and fire debris⁵ was six to eighteen inches deep. Ex. 39A-V; 63RP 104-08, 115-19, 150-57, 193; 69RP 80. The main stairway was burned almost completely away. Ex. 39Q-R; 62RP 194. In some places, the floor on the upper level was burned completely through; it was necessary to shore up part of the home with structural lumber to safely enter it. Ex. 45O-P; 62RP 194; 64RP 191-92.

Victims are found. Firefighter Richard Sinclair found the bodies of Olga⁶ and Lyubov on the second floor, in a room just to the right of the landing at the top of the stairs.⁷ 64RP 109-12; 65RP 105, 153-55. They were burned beyond recognition, and completely buried in fire debris. 64RP 41, 111-12, 114-20. Lyubov's body was partially resting on the body of Olga. 65RP 155. No clothing remnants were found underneath Olga's body (where it would be protected from fire), and only the remains of a tank top was recovered underneath Lyubov's body, bunched up above her breasts. 61RP 53-54; 65RP 121, 157-58; 66RP 53-54; 80RP 24-25.

⁵ The fire debris consisted of drywall, insulation, fixtures, and ceiling material that had been damaged and fell onto the floor, as well as the burnt remains of the contents of the house. Ex. 39J, K, N; 63RP 108, 156.

⁶ Because this case involved multiple members of the Milkin and Botvina families, after the initial reference to each, they will be referred to by their first names for clarity. No disrespect is intended to any of these individuals.

⁷ The room was described by some witnesses as an office, but was used by Lyubov Botvina as a bedroom that summer. 61RP 54.

Sinclair found the body of 5-year-old Justin under the debris in the second floor hallway, slightly to the left of the landing, just outside the room where Olga's and Lyubov's bodies were found. Ex. 260; 60RP 104; 64RP 112, 130-31; 66RP 26-28. He found the body of 3-year-old Andrew five to six feet farther down the hallway to the left. 60RP 104; 64RP 112; 66RP 38-41. The boys' bodies also were extremely badly burned. 64RP 56-57; 66RP 30, 42. Under the boys' bodies, the unburned remains of pajamas and underwear were found. 66RP 31-32, 35, 42, 44.

On Tuesday morning, King County Medical Examiner Dr. Richard Harruff began autopsies of the victims. 65RP 111. On Olga's body, he discovered stab wounds, smelled gasoline in her trachea, and found no soot in her airway; he told the detective it was likely a homicide. 73RP 62-68. Each of the victims suffered fatal injuries not related to the extreme charring caused by the fire.

Olga had at least three sharp force injuries to the back of her head and neck. 65RP 127-28. The most severe wound was on the front of her neck, a lethal wound at least four inches deep that cut two arteries in her neck. 65RP 133-38. That injury went in two directions, straight back into her spine and downward into her lung, so it evidenced separate thrusts of a knife. 65RP 139-43. The injury to her spine cut into the bone in several places, which would have required a significant amount of force.

66RP 127-33. Harruff noticed a smell of petroleum around her neck, lungs, and heart. 65RP 148.

Lyubov had nine sharp force injuries to the back of her head and neck. Ex. 69; 65RP 163. One of these was a fatal wound that cut her internal jugular vein. 66RP 13-18. There was another deep stab wound to the front of her neck that cut through her larynx (her airway) and esophagus. 66RP 18. At least three stab wounds damaged her spine, which would have required considerable force. 66RP 136-39.

Justin had a fatal stab wound completely through his neck from side to side. 66RP 35-37. It cut his left internal jugular vein and carotid artery. 66RP 36-37.

Andrew had at least four horizontal cuts to the front of his neck, which cut through his entire neck structure, cutting his carotid arteries, jugular veins, airway, and esophagus. 66RP 46-50. The cuts left grooves on the bone of his spine. 66RP 47-48, 144-47. These wounds virtually decapitated Andrew and were fatal. 66RP 49.

Because the victims did not have soot in their airways or carbon monoxide in their blood, Harruff concluded that all of them were dead before the fire. 65RP 72, 150-51; 66RP 23-24, 37. Gasoline was confirmed in lung tissue of Olga and in clothing on each of the other bodies. 84RP 66, 74, 86, 88.

Schierman's activity after the fire. Winter went to Schierman's apartment about 1:30 p.m. on the afternoon of the fire to check on him. 71RP 121-24. Schierman did not answer the door. 71RP 123. Winter let himself in and found Schierman on his bed in his darkened room with a pillow over his head; Schierman said he was sick. 71RP 124-29. They talked for about five minutes, but Schierman never removed the pillow. 71RP 129. Police also knocked on Schierman's door that afternoon, as they canvassed the neighborhood; no one answered. 68RP 155-56.

Isaac Way got home from jury duty on Monday about 4:30 p.m. and saw the Milkin house burned. 72RP 100. Schierman's truck was outside, but he did not answer Way's knock on his bedroom door. 72RP 105. Schierman briefly came out of his bedroom later that night and told Way that, after Way had gone to bed the night before, Schierman went to an AM/PM store and intervened when he saw a man "smacking" a woman. 72RP 108-09, 115-18. Schierman said that both the man and the woman turned on him and attacked him, scratching him and causing a puncture wound to his arm. 72RP 109, 118.

Detective Goguen saw Way as he arrived home from jury duty the next afternoon, Tuesday, July 18. 73RP 74-77. Asked about Monday's events, Way mentioned that his roommate had been home because he called in sick to work; he also said his roommate had gotten into a fight

Sunday night and had scratches to his face and neck. 72RP 126-27; 73RP 78-79. Way took detectives to the apartment, where they interviewed Schierman. 72RP 128; 73RP 82, 97.

Schierman repeated his story that he had intervened in a domestic incident about 2 a.m. Monday and had been attacked by the man and the woman; he said the woman stabbed him with her keys. 73RP 100-02. Detectives took pictures of Schierman's injuries, which included large scratches on his face and neck, cuts on his nose and lip, a puncture wound to his forearm, a ligature mark around the back of his neck, and scratches on his right arm and shoulder. Ex. 26G-I, 121; 73RP 97-98, 103-10.

Tuesday night, the women who saw the man with a gas can walk across Slater on Monday morning each helped build a composite sketch of the man. Ex. 26D, 29; 61RP 98-99, 136-39. One depicted a scar in the same place and of the same shape as the deep scratch on Schierman's face. Ex. 26H, 29, 121.

Wednesday morning, detectives contacted Schierman at his workplace and asked him to come to the station to talk about the incident at the store. 73RP 117-20. Schierman drove himself to the station and made three taped statements. Ex. 122-23, 327-31; 73RP 126-32;

98RP 143-47, 158-59.⁸ In his first, he detailed the purported domestic violence incident at the AM/PM and said he drank a little Sunday night after he got home from work about 9:20 p.m. Ex. 122 at 2-14. After the first statement ended, Schierman was arrested. 73RP 143.

In his second statement, Schierman was confronted with the absence of any altercation on security videos at the AM/PM. Ex. 327 at 4. He said he was not sure what he did in the early morning hours of Monday, July 17, but eventually admitted that the story about breaking up a fight at the AM/PM was a lie. Ex. 327 at 8-10, 19-20. He said he must have been in a fight, given his injuries, including scratches on his face, a fat lip, injuries to his arms, and sore knuckles. Ex. 327 at 16, 20, 23-24.

In his final statement, Schierman said he woke up Monday morning covered in blood, lying in a bed upstairs in the master bedroom of the Milkins' home; he claimed he had no memory of what had happened before that. Ex. 330 at 1-2, 7, 11. He walked into the hallway and saw the bodies of two children. Ex. 330 at 2. He walked around the house, including the basement. Ex. 330 at 3-4. Then he went back upstairs and saw two women in another bedroom; blood was everywhere and they were not moving; he thought that they were naked. Ex. 330 at 4-5. He did not look for injuries, but assumed that they were not "okay." Ex. 330 at 4-5.

⁸ Exhibits 122, 327, and 330 are transcripts used to assist the jury in listening to the taped interviews but were not admitted as evidence. They will be cited for ease of reference.

Schierman said he took off his bloody clothes and showered at the Milkin home, then put on a pair of pants that he found. Ex. 330 at 5-6. He decided to burn the house down, took a gas can from the Milkin property, went across the street to his home, changed into his own clothes, and got his wallet. Ex. 330 at 6-7. He drove to the convenience store and filled gas cans, then returned to the Milkin home and poured gas on all three floors, lighting fires on each floor before he left. Ex. 330 at 8-9.

Schierman's statement to defense expert Saxon. Schierman told defense psychiatrist Andrew Saxon that he started drinking at work on Sunday, July 16, continued drinking all evening, and went into an alcohol blackout. 97RP 30-32. He said he woke up, bloody, on a strange bed. 97RP 32, 35. He said that when he walked downstairs, he saw a woman's body in a pool of blood. 97RP 33. He continued to wander the house, then sat on the couch and drank some vodka. 97RP 34. Schierman said that he then carried the woman's body upstairs, where he saw another woman's body, and placed the first one next to it. 97RP 35. The remainder of his story about the events of that day was fairly consistent with the story he gave to police. 97RP 35-37. In closing argument, Schierman conceded that he had committed arson. 100RP 141-44.

Additional evidence collected at the Milkin home. A fire-damaged knife was found under the debris at the base of the main stairway in the

Milkin home. Ex. 89B-D, 255; 69RP 77-81; 89RP 43. It was a Maxam hunting knife, sold in a set with an axe. 81RP 34; 87RP 31-33. The matching axe was found in the debris in the kitchen of the Milkin home, also heavily fire-damaged. Ex. 101AA; 70RP 142-43; 87RP 63-64. The Milkins did not own this type of knife or axe. 60RP 155-59.

In the master bath, investigators found a pair of men's shorts, a T-shirt, and two socks. 69RP 93-102. A pair of gloves was found, both very fire-damaged, one in the master bath and one near Olga's body. 68RP 21-27; 86RP 154-55; 87RP 44-45. A flashlight also was found near Olga's body. 69RP 163-64; 70RP 145. The gloves found were Custom Leathercraft Tradesman work gloves. Ex. 81K; 84 RP 167. Sean Winter recognized these as gloves that he had seen Schierman wearing when he met Schierman in May 2006 and again in July. 71RP 141-44.

A pair of women's pink and white pajama bottoms was found inside the bottom vent of the kitchen microwave, which had fallen from its mounting during the fire. 87RP 89-95. Lyubov's sister, Yelena Shidlovsky, had given her the pajamas for Christmas in 2005. 61RP 44. Shidlovsky had been to the Milkin home for a picnic on Sunday, the day before the fire, and when she left at 9 p.m., hours before the murders, Lyubov was wearing them. 61RP 36, 41, 44, 52. Blood on the pajamas included the DNA profiles of Lyubov and of Justin. 75RP 5, 16-18.

When the house was returned to Leonid on September 6, 2006, he began to look through the debris that had been taken out of the house and deposited on the lawn as the investigators searched. 60RP 22. He discovered a fire-damaged Humvee-brand knife that did not belong to his family; it was in a pile of debris from the master bedroom. Ex. 1DD-JJ; 60RP 110, 124-26; 87RP 109-12. Schierman's debit card had been used to purchase a set of Humvee knives including one of this type on December 18, 2005. Ex. 195; 83RP 33-36. Leonid also pointed out a pair of men's shoes that were not his. 87RP 105-08. They were undamaged World Industries Skullbo brand shoes, size 12, which had been in the basement of the house, near the back door, when fire investigators went inside. Ex. 33A, 249; 71RP 26-27; 83RP 41-43; 87RP 107-08. Schierman's debit card was used to purchase a pair of shoes of that brand, style and size, on November 11, 2005. Ex. 194; 83RP 26-33, 48-55.

Shoes in Schierman's bedroom. On Wednesday, July 19, two days after the murders, police served a search warrant on Schierman's apartment. 86RP 188. When they entered his bedroom, there was a strong odor of a petroleum product. 86RP 190. An accelerant detection dog alerted on a pair of New Balance shoes. 86RP 191-92. Later testing determined that there was gasoline on the shoes. 84RP 97-103. The right

New Balance shoe had blood in the tread that matched Olga's DNA profile. 79RP 93-96; 90RP 28-30.

Fire investigation. After a thorough investigation, fire investigator Mark Jones concluded that the fire was an arson fire for the purpose of crime concealment and destruction of evidence. 71RP 24. Factors contributing to his conclusion included multiple separate areas of origin of the fire, the presence of ignitable liquids and gas cans, blood on window latches downstairs (indicating an effort to ventilate the fire), that the basement door was forced, and that the victims were killed prior to the fire. 71RP 20-23. Ignitable liquid was confirmed on samples taken from the house. 84RP 103-09. Jones noted that fires set near sources of power (like an electrical outlet) indicated an attempt to make it appear those power sources were the cause of the fire. Ex. 101S, T, U; 70RP 104-06; 71RP 19-21.

Additional forensic evidence. A large pool of blood at the base of the stairs on the main floor was near the Maxam knife and had dripped through to the basement. 69RP 37; 87RP 36-39; 88RP 88-99. That blood matched Lyubov's DNA profile. 90RP 43-45.

Schierman was wearing a necklace when he bought the gas at the AM/PM on Monday, again when detectives took pictures of his injuries on Tuesday, and when he was arrested on Wednesday. Ex. 121, 186;

87RP 82. A partial genetic profile consistent with Olga was found on a segment of that necklace; the likelihood that someone other than Olga shared the same genetic profile was one in 142 million persons. 75RP 27-42; 77RP 18-19, 55-61. Schierman's DNA profile was throughout the necklace, in a much larger quantity. 75RP 27-36; 77RP 55-61.

The bloody shorts from the master bath contained Schierman's DNA profile, along with material consistent with the DNA profiles of Lyubov, Olga, and Justin. 75RP 65-70, 76-78. Schierman's DNA profile was found on the bloody T-shirt from in the master bath, along with material consistent with the DNA profiles of Lyubov and Olga. 75RP 55-58; 79RP 33-40.

Blood on the Tradesman glove from the master bath included a DNA match to Schierman and genetic material consistent with Lyubov and Olga. Ex. 81K; 75RP 54-56.

Blood was throughout the daylight basement of the Milkin home, on the doors, windows, walls, and stairwell. 68 RP 12. Samples taken contained DNA consistent with Schierman, Lyubov, and Olga. 76RP 44-45; 79RP 49, 52-56, 70-73, 80-81, 86-87. A blood flake removed from a window in the basement was a DNA match to Schierman. 79RP 90-92. Fabric patterns found in blood in the basement (on a door, a door frame,

a light switch, basement windows, and two columns) were consistent with the various fabrics in the Tradesman gloves. 86RP 39-60, 111-12.

In summary, the evidence established that Schierman went to his neighbors' home across the street, armed with multiple knives, a small axe, a flashlight, and gloves. He went inside and killed everyone there: Lyubov, her sister Olga, and Olga's young sons Justin and Andrew. Afterward, Schierman bought gas cans and filled them with gasoline, then returned to the Milkin home and burned it down.

III. ARGUMENT

A. STANDARD OF REVIEW.

Claimed errors in the guilt phase of a capital case are reviewed the same as such errors in a noncapital case. State v. Benn, 120 Wn.2d 631, 648, 845 P.2d 289 (1993). Because the death penalty is qualitatively different from other punishments, however, heightened scrutiny is given to claims of error in the penalty phase, so that the determination that death is the appropriate sentence is a reliable one. Id. Heightened scrutiny means a closer, more careful look at the record; it is not a raised standard of review. Id. For the same reasons, procedural rules regarding arguments raised for the first time on appeal are construed more liberally for claims relating to the penalty phase of a capital trial. State v. Gregory, 158 Wn.2d 759, 849, 147 P.3d 1201 (2006).

B. THE TRIAL COURT DID NOT VIOLATE SCHIERMAN'S RIGHT TO BE PRESENT.

A defendant has a due process right under the state and federal constitutions to be present to defend himself against criminal charges.⁹ U.S. CONST. amend. VI, XIV; Kentucky v. Stincer, 482 U.S. 730, 745, 107 S. Ct. 2658, 96 L. Ed. 2d 631 (1987); WASH. CONST. art. I, §§ 3, 22; State v. Rice, 110 Wn.2d 577, 757 P.2d 889 (1988) (applying Stincer). The core right is the right to be present when evidence is presented. United States v. Gagnon, 470 U.S. 522, 526, 105 S. Ct. 1482, 84 L. Ed. 2d 486 (1985); In re Lord, 123 Wn.2d 296, 306, 868 P.2d 835 (1994). The right also attaches whenever the defendant's presence has a reasonably substantial relationship to the fullness of his opportunity to defend. Stincer, 482 U.S. at 745; Lord, 123 Wn.2d at 306. The right is not guaranteed when the defendant's presence would be useless, but is limited to those times when a fair hearing would be thwarted by the defendant's absence, or those critical stages where the defendant's presence would contribute to the fairness of the proceedings. Stincer, 482 U.S. at 745.

A violation of the right to be present is analyzed under the constitutional harmless error standard. E.g., Rushen v. Spain, 464 U.S. 114, 104 S. Ct. 453, 78 L. Ed. 2d 267 (1983); In re Benn, 134 Wn.2d 868,

⁹ Although Schierman cites to the Washington Constitution in his briefing on this issue, he makes no claim that our constitution provides broader or different protection than the federal constitution in this context.

921, 952 P.2d 116 (1998). Under that standard, the State bears the burden of showing the error was harmless beyond a reasonable doubt. State v. Guloy, 104 Wn.2d 412, 425, 705 P.2d 1182 (1985). However, the defendant has the obligation to first raise the possibility of prejudice. State v. Caliguri, 99 Wn.2d 501, 509, 664 P.2d 466 (1983).

A defendant's claim that his right to be present has been violated is a question of law, subject to de novo review. State v. Irby, 170 Wn.2d 874, 880, 246 P.3d 796 (2011).

Schierman contends that his constitutional right to be present was violated first when the parties reviewed requests for hardship excusals by prospective jurors to determine whether to object to their administrative release, and again when the trial court heard argument and ruled in chambers on six defense challenges for cause. But Schierman failed to preserve either issue for review. Moreover, his right to be present did not attach to either the hardship excusal process or the in-chambers legal rulings on challenges for cause. And, any error was harmless.

1. The Release Of Jurors For Hardship Did Not Violate Schierman's Right To Be Present.

Prior to the trial date of October 28, 2009, jury summonses were sent to 3,000 prospective jurors directing them to appear on November 13, CP 23710. The summonses advised the jurors how to seek excusal for

hardship, but provided no other information about the case. CP 23699.

The process of requesting an excusal required the juror to provide information under penalty of perjury about the nature of the hardship, but the juror was not sworn for the particular case or examined. In accordance with RCW 2.36.100 and King County Superior Court policy, the trial court provided written criteria to the jury services manager, Gregory Wheeler, to apply to requests for excusal received prior to November 6.¹⁰ CP 21347-50, 23698-701, 23710. The trial court also permitted the attorneys for both parties to review the requests for hardship excusal and to object before the release of any juror; the parties met with Wheeler independently of each other. 24RP 34-35; 25RP 18-22; 26RP 21-23; 28RP 38-50; CP 21348, 23710-11. Any objections would then be resolved by the trial court in a proceeding on the record in Schierman's presence. CP 21348; 29RP 13-18 (example of such a hearing). If everyone agreed that the hardship request should be denied, however, it was denied without the court's intervention. E.g., 29RP 4-5, 25-26; 33RP 50-52. Absent an objection, the trial court did not participate in the administrative hardship review process.¹¹ CP 21348, 23710; 29RP 24-25. Schierman now claims that his right to be present was violated because he

¹⁰ A copy of this document, CP 21350, is attached as Appendix 2.

¹¹ Schierman's contrary assertion is incorrect. App. Br. at 25.

was not present when his attorneys reviewed jurors' requests for excusal and decided whether to object.

- a. Schierman failed to preserve his claim for review.

Schierman failed to object to the trial court's process of permitting his lawyers to oversee Wheeler's application of the court's written criteria. Thus, any error stemming from his absence from the process is not reviewable on appeal unless he demonstrates an error of constitutional magnitude and prejudice to his trial rights. He has not shown either.

Generally, an appellate court will not consider an issue raised for the first time on appeal. RAP 2.5(a); State v. Kirkman, 159 Wn.2d 918, 926, 155 P.3d 125 (2007). The policy underlying the rule is to encourage the efficient use of judicial resources: where an objection would have given the trial court an opportunity to correct any error and avoid an appeal, the appellate court should not sanction a party's failure to timely object. State v. O'Hara, 167 Wn.2d 91, 98, 217 P.3d 756 (2009).

RAP 2.5(a)(3), however, permits the defendant to raise a claim of error for the first time on appeal if it is a manifest error affecting a constitutional right. Kirkman, 159 Wn.2d at 926. The purposes of this exception are to correct any "serious injustice to the accused" and to preserve the fairness and integrity of the judicial proceedings.

State v. McFarland, 127 Wn.2d 322, 333, 899 P.2d 1251 (1995). To warrant review, however, any alleged error must be truly of constitutional magnitude. Id.; Kirkman, 159 Wn.2d at 926. Moreover, the constitutional error must be manifest, meaning that the defendant must demonstrate actual prejudice to his rights at trial, and that prejudice must appear in the record. Kirkman, 159 Wn.2d at 926-27; McFarland, 127 Wn.2d at 334. Actual prejudice, in turn, means that the alleged error had practical and identifiable consequences in the trial. O'Hara, 167 Wn.2d at 99. This exception to the ordinary requirement that an error be preserved by a timely objection must be construed narrowly. Kirkman, 159 Wn.2d at 935. The contemporaneous-objection rule has been applied to preclude review of a right-to-be-present claim in the context of voir dire. State v. Love, 176 Wn. App. 911, 920-21, 309 P.3d 1209 (2013), petition for rev. pending (No. 89619-4).

Here, Schierman failed to object to this alleged error, even though the trial court discussed its proposed method of handling initial requests for hardship at least four times on the record in Schierman's presence. 24RP 34-35; 25RP 18-22; 26RP 21-23; 28RP 38-50. Thus, he bears the burden of demonstrating that this procedure constituted an error of constitutional magnitude and that it had practical and identifiable consequences in the trial. He can do neither.

First, there was no error, let alone one of constitutional magnitude. As will be discussed in greater detail below, the ministerial act by court staff of excusing jurors for hardship is not a proceeding to which the constitutional right to be present attaches. The trial court neither held a hearing nor considered any evidence. Instead, Wheeler provided information to the parties about hardship requests, so that they could decide whether to seek a hearing. Under these circumstances, Schierman's presence would not contribute to the fairness of the process.

Schierman makes no serious claim that it would. Instead, he says merely that he “was entitled to know that the hardship determinations being made out of his view were eliminating many women and low income wage earners.” App. Br. at 25. Yet Schierman offers no authority for this claim of entitlement, nor evidence that low income wage earners and women were in fact disproportionately removed from the venire.¹² Neither does he explain why his firsthand, personal knowledge of those “facts”—as opposed to being apprised of that information by counsel—would be anything other than useless.¹³

Second, even if Schierman's absence from the pre-trial hardship reviews were constitutional error, review is not appropriate because it had

¹² Schierman makes no claim that the venire did not meet constitutional standards.

¹³ Schierman had already unsuccessfully litigated a request for the trial court to authorize higher pay for jurors, and he does not assign error to the trial court's refusal to pay jurors more than the statutory \$10 per day. 26RP 19-20.

no practical or identifiable consequences in this case. In order to establish a constitutional violation, it is the defendant's burden to demonstrate how his absence affected the outcome; prejudice will not be presumed. Lord, 123 Wn.2d at 307; State v. Wilson, 141 Wn. App. 597, 605, 171 P.3d 501 (2007). Speculation that the defendant's presence might have affected the outcome is insufficient. Wilson, 141 Wn. App. at 605-06. Schierman has not attempted to show how he was prejudiced when his attorneys appeared on his behalf to oversee Wheeler's administrative evaluation of hardship requests. He points to no juror who might have been retained if only he were present. Moreover, a criminal defendant is not entitled to any particular juror; he is entitled to an impartial jury. State v. Gentry, 125 Wn.2d 570, 615, 888 P.2d 1105 (1995); State v. Phillips, 65 Wash. 324, 327, 118 P. 43 (1911). Schierman has not demonstrated how the release of any juror for hardship impacted his right to an impartial jury, nor does any such prejudice appear in the record. See Kirkman, 159 Wn.2d at 926-27; McFarland, 127 Wn.2d at 334; Lord, 123 Wn.2d at 307.

- b. Schierman had no constitutional right to be present for the administrative review of juror hardship excusals.

If this Court reaches the constitutional claim raised by Schierman despite his failure to preserve it, the claim should nonetheless be rejected. The administrative review of hardship requests was not a hearing at which judicial decisions were made. An evaluation of claimed hardship is specific to each juror's personal needs but generic as to any defendant's case. Irby is readily distinguishable.

First, the right to be present at those proceedings at which a fair and just hearing would be thwarted by the defendant's absence, or at those critical stages where the defendant's presence would contribute to the fairness of the proceedings, presupposes a hearing or a proceeding. Here, no hearing or proceeding took place. Instead, the parties reviewed information identified by Wheeler to determine whether to have such a hearing. As such, it was akin to the parties independently conferring to try to resolve disputes, reach stipulations, or settle the case. No court hearing was needed.¹⁴ Because the court did not participate in the process of reviewing hardships until the parties brought a disagreement to its

¹⁴ A trial judge may delegate the authority to excuse jurors for hardship to court staff. State v. Rice, 120 Wn.2d 549, 559-62, 844 P.2d 416 (1993); RCW 2.36.100; GR 28(b)(1). The trial judge here did so. Thus, the hardship excusals appropriately did not involve the judge.

attention, the process was not a proceeding to which the constitutional right to be present could attach.¹⁵

Second, the administrative process of excusing jurors for hardship does not implicate the right to be present, because the defendant's presence would not contribute to the fairness of the proceedings. Voir dire is a critical stage to which a defendant's right to be present attaches, because "[j]ury selection is the primary means by which a court may enforce a defendant's right to be tried by a jury free from ethnic, racial, or political prejudice . . . or predisposition about the defendant's culpability." Gomez v. United States, 490 U.S. 858, 873, 109 S. Ct. 2237, 104 L. Ed. 2d 923 (1989). But this critical stage of voir dire is the process of evaluating the fitness of a juror to sit on a particular case. Compare CrR 6.4(b); Gomez, 490 U.S. at 874-75. Thus, the right to be present extends to voir dire and those portions of jury selection that examine the qualifications of potential jurors relevant to the case to be tried. Irby, 170 Wn.2d at 882; State v. Wilson, 174 Wn. App. 328, 348-49, 298 P.3d 148 (2013), petition for rev. pending (No. 88818-3). It attaches when jurors are sworn and

¹⁵ For an example of how the involvement of the trial judge, or lack thereof, makes a difference to whether a violation of the right to be present has occurred, compare Gregory, 158 Wn.2d at 847-48 (finding no violation of the right to be present when a deliberating jury viewed a videotape in the courtroom, at least in part because the jury was alone during the viewing) with Caliguri, 99 Wn.2d at 505, 508 (finding a violation of the defendant's right to be present when tapes were replayed for a deliberating jury in the presence of the judge and an FBI agent, but not the defendant).

complete questionnaires or otherwise provide answers to case-specific questions. Irby, 170 Wn.2d at 884.

By contrast, the administrative evaluation of hardship requests examines only a juror's claimed inability to attend court on a particular date or to serve as a juror generally; it does not address the qualifications of the juror to sit in a particular case. The limited nature of the information that a prospective juror provides in support of his hardship request does not provide any information about that juror's prejudices or predispositions. Thus, administrative hardship evaluations differ from the evaluation of jurors who have appeared in court and been sworn for a particular case. Irby, 170 Wn.2d at 882-84; Wilson, 174 Wn. App. at 349.

Here, the hardship reviews did not examine the potential jurors' fitness to serve as jurors on Schierman's trial, but rather their availability to appear for court on a certain day and perform as a juror generally.¹⁶

CP 23740-25089. In fact, the administrative review of hardships here,

¹⁶ Schierman contends that, for many jurors, "there were initial denials, further communication with jurors and then reconsideration of the [hardship] request, many of which were not transmitted to defense counsel." App. Br. at 24. However, each example that he provides shows that the further communication with the juror was provided to defense counsel, who then either agreed or objected to the juror's release. E.g., CP 24932 (agreed); CP 24935 (objected); CP 24940 (agreed); CP 24945 (objected). Moreover, the documents further support the State's contention that the requests for hardship bore no relationship to any fact or issue in Schierman's case, only to the juror's ability to appear on the particular date or serve at all. E.g., CP 24932 (in Arizona for NASCAR races); CP 24935 (conflicts with work and school); CP 24940 (studying abroad in Ecuador); CP 24945 (work commitments). Further, even if Schierman's contention were supported by the record, it is unclear how counsel's lack of involvement in a routine administrative excusal is relevant to Schierman's right-to-be-present claim.

based on facts unrelated to Schierman's case, is as benign as the jury services manager's excusal of jurors as statutorily ineligible to serve, which Schierman does not challenge. See, e.g., CP 23829-31 (showing jurors disqualified because they no longer reside in King County or have died).

Schierman relies heavily on Irby to argue that hardship excusals are a critical stage of the proceedings. This reliance is misplaced. In Irby, the hardship excusals were done by the trial judge via email after the jurors had appeared, been sworn for the particular case, and provided substantive information about their views on issues pertinent to Irby's trial. The Irby excusals thus were not administrative. Here, however, the hardship excusals were done by court staff applying written criteria—provided in advance by the trial judge—to prospective jurors who had not yet appeared, had not been sworn, had not provided any case-specific information about their views on any issues at all, and did not know anything about the case for which they were summoned.

Schierman's suggestion that Irby can be interpreted to apply to administrative hardship reviews—despite that case's clear language that the work of empanelling the jury began on the day that the jurors "were sworn and completed their questionnaires," Irby, 170 Wn.2d at 884—would bring Irby into conflict with a number of other cases and statutes.

These include RCW 2.36.100 and GR 28(b)(1) (allowing delegation to court staff of the authority to excuse a juror for hardship); State v. Rice, 120 Wn.2d 549, 844 P.2d 416 (1993) (interpreting RCW 2.36.100); In re Pirtle, 136 Wn.2d 467, 484, 965 P.2d 593 (1998) (concluding a defendant has no right to be present for discussion of ministerial matters); and Lord, 123 Wn.2d at 306 (holding no right to be present during conferences on legal matters). Further, having a defendant present for an administrative hardship review is wholly impractical, as the reviews take place before the jurors appear at the courthouse or are assigned to a case or courtroom.

In short, Schierman's presence while the parties read letters and emails to decide whether to seek a hearing would not have contributed to the fairness of that process. His opportunity to fully defend himself was adequately protected by having him present when the jurors were sworn and examined regarding their qualifications to sit on his particular case.

c. Any violation of Schierman's right to be present was harmless.

Even if Schierman had a right to be present when his attorneys reviewed hardship requests, any violation of this right was harmless beyond a reasonable doubt. The right of a defendant during jury selection is the right to reject a juror, not select him. Howard v. Kentucky, 200 U.S. 164, 174, 26 S. Ct. 189, 50 L. Ed. 421 (1906). Moreover, a defendant is

not entitled to any specific juror; he is entitled to an impartial jury. Gentry, 125 Wn.2d at 615; Phillips, 65 Wash. at 327. Schierman does not contend that his absence from the hardship reviews resulted in the seating of a biased jury.¹⁷ If the jury that tried him was impartial, any error in excluding him from the administrative review of hardship requests was harmless. Spain, 464 U.S. at 120; State v. Finlayson, 69 Wn.2d 155, 157, 417 P.2d 624 (1966). Schierman does not identify a single hardship excusal as improperly granted. A review of the record demonstrates that the granting of excusals was proper. Even if there were minor errors, however, if the selection process substantially complied with the statutes governing hardships, the defendant must show prejudice to be granted relief. Rice, 120 Wn.2d at 562 (citing State v. Tingdale, 117 Wn.2d 595, 817 P.2d 850 (1991)).

Although harm should be determined on the basis of whether the defendant had an impartial jury, Irby appears to conclude that the question of whether a defendant's absence from a hardship determination was harmless depends on whether an excused juror could have been seated on the defendant's jury. Irby, 170 Wn.2d at 886-87. To the extent that this is the holding of Irby, it should be overruled. This Court should abandon an

¹⁷ Schierman does contend that he was denied an impartial jury because the trial court erred in excusing one juror for cause and failing to excuse two others for cause, see section III.F, infra, but this claim is wholly independent from the claim that his absence from the hardship reviews violated his constitutional right to be present.

established rule of law only when that rule is incorrect and harmful. State v. Devin, 158 Wn.2d 157, 168, 142 P.3d 599 (2006).

First, the decision is incorrect. It fails to follow either federal or this Court's own constitutional law that premises harmless error on whether the defendant was tried by an unbiased jury. Spain, 464 U.S. at 120; Phillips, 65 Wash. at 327. The Irby court failed to either distinguish these cases or indicate why they should not apply. In fact, the Irby opinion cited no cases at all in concluding that the mere fact that an excused juror could have been seated on the defendant's jury precluded a finding of harmless error. Irby, 170 Wn.2d at 886-87. Nor does the Irby decision even examine the correctness of the trial court's hardship determination.

Second, the decision is harmful. Application of a rule that a juror removed for hardship outside of the defendant's presence is never harmless if the juror could have been seated on the defendant's jury effectively eviscerates the role of harmless error review in this context.

When jurors are routinely dismissed for hardship before they report for service—and therefore before they are assigned to a trial and put in numbered order—it will never be possible to show that a particular juror could not have been seated on the defendant's case. Further, it assumes that the granting of certain requests for excusal outside of the defendant's presence is prejudicial, even when a request was so plainly deserving that

his presence could not possibly have made a difference. E.g., CP 23825 (stay-at-home mom breastfeeding newborn baby and unable to leave her in childcare); CP 23823 (full-time college student in Los Angeles); CP 23816 (significant dementia, cannot travel without assistance). Yet eviscerating harmless error review was clearly not what the Irby court intended, as it purported to apply harmless error analysis in that opinion. Irby, 170 Wn.2d at 885-87.

A review of the hardship excusals granted during the administrative review process in this case shows that the court's written criteria were properly applied. No jurors were, or could have been, excused for reasons relating to the issues in Schierman's case. This process resulted in the seating of an impartial jury. Any error in Schierman being absent from the process was undoubtedly harmless.

2. Schierman's Right To Be Present Was Not Violated
When The Trial Court Ruled On Six Defense
Challenges For Cause In Chambers.

After two months of individual voir dire of over 200 jurors—all conducted in Schierman's presence—the remaining 67 jurors were gathered for general voir dire on January 11, 2010. 58RP 112. At the end of the day, Schierman challenged six jurors for cause: Jurors 25, 44, 58,

76, 104, and 171.¹⁸ 58RP 263-65. Each of those six jurors had been extensively questioned in Schierman's presence. 38RP 35-61, 181-94; 39RP 137-68; 40RP 69-91; 42RP 73-95; 46RP 212-29; 58RP 129-242; 59RP 3-14. Both parties argued the merits of the challenges, but the court deferred ruling until the State had an opportunity to further voir dire those jurors in light of the defense challenges. 58RP 263-69. The next day, the State further questioned Jurors 25 and 58. 59RP 3-14. The court then addressed the six defense challenges for cause on the record but in chambers. 59RP 15-22. The State reiterated its arguments made the previous afternoon, as did the defense. 59RP 15-22. The court then ruled, granting two of the six challenges. 59RP 17-18, 20-22. Schierman now claims that the in-chambers legal argument on his six for-cause challenges violated his right to be present.¹⁹

- a. Schierman failed to preserve his claim for review.

Schierman failed to object when the trial court indicated that it would consider several challenges for cause in chambers. 59RP 15-16.

¹⁸ Schierman asserted that the six challenges for cause addressed in chambers were made by the State. App. Br. at 21. This is incorrect. All six were made by Schierman; the State challenged no jurors for cause during general voir dire. 58RP 269-70.

¹⁹ At the same in-chambers conference, the trial court considered and ruled on a number of requests for hardship excusal. 59RP 22-41. Schierman does not assign error to or offer analysis regarding his absence from that portion of the proceeding.

Thus, he bears the burden of showing that an error truly of constitutional magnitude had practical and identifiable consequences in his case.

First, no error occurred because, as discussed in more detail below, a defendant has no right to be present “during in-chambers or bench conferences between the court and counsel on legal matters” if those matters do not require a resolution of disputed facts. Lord, 123 Wn.2d at 306. The chambers conference at issue was such a conference.

Second, Schierman has not even attempted to show prejudice. Nor could he. He was well aware which challenges were at issue, as his attorney had made and argued each of the challenges in his presence the day before. The proceedings in chambers were not substantively different from the proceedings for which Schierman had been present. Thus, he could not have been prejudiced. See Gagnon, 470 U.S. at 526-27 (“[T]he exclusion of a defendant from a trial proceeding should be considered in light of the whole record.”). This Court should decline to reach the merits of Schierman’s claim.

- b. Schierman did not have a constitutional right to be present for the in-chambers argument on challenges for cause.

Schierman again relies on Irby to argue that this Court must find that the in-chambers consideration of six defense challenges for cause violated his right to be present. But an in-chambers conference addressing

only legal matters does not implicate the right to be present; Irby is distinguishable.

First, a criminal defendant does not have the right to be present for a discussion between the court and counsel on legal matters. Lord, 123 Wn.2d at 306; Pirtle, 136 Wn.2d at 484; see also State v. Sublett, 176 Wn.2d 58, 77, 292 P.3d 715 (2012) (holding that formulating an instruction to the jury “is not a proceeding so similar to trial itself that the same rights attach, such as the right to appear”). Here, the resolution of the defense challenges for cause was purely a legal matter. The redundant arguments in chambers addressed solely the legal question of whether the jurors’ responses, elicited in Schierman’s presence, met the legal standard to excuse them for cause. Love, 176 Wn. App. at 918.

Moreover, Schierman’s presence bore no relation, let alone a substantial one, to the fullness of his opportunity to defend against the charge. Stincer, 482 U.S. at 745. Instead, his presence would have been useless, as counsel had already made and argued in Schierman’s presence the same challenges that the court considered in chambers. A fair and just hearing was not thwarted by his absence.

Finally, Irby, 170 Wn.2d 874, is again distinguishable. In that case, jurors completed a juror questionnaire outside the presence of the parties. Id. at 877. Shortly thereafter, and without reconvening in court,

the trial judge emailed the parties seeking to release several jurors for hardship and for cause; defense counsel and the prosecutor promptly responded and agreed to many of the excusals. Id. at 877-78. It appeared that trial counsel had not had an opportunity to consult with his client before so agreeing. Id. at 878, 884. Here, Schierman had had months to review the individual jurors' questionnaires, and had been present when the jurors were questioned both individually and together. He was also present, and thus available to confer with or even overrule his lawyers, when they first made and argued these challenges for cause, as well as immediately before and after the chambers conference. Id. at 883.

In short, Schierman had no right to be present at the trial court's in-chambers consideration of the six defense challenges for cause. He had been present for the testimony of each juror, had the opportunity to consult with counsel, and was present when the challenges for cause were made and substantively argued. The right to be present did not extend to the court's in-chambers resolution of the legal merits of the challenges.

- c. If Schierman's exclusion from the in-chambers conference violated his right to be present, the error was harmless.

If this Court concludes that Schierman had a right to be present for the parties' legal arguments on his challenges for cause, any violation of this right was harmless beyond a reasonable doubt. The arguments made

in Schierman's presence and in chambers were substantively the same. Further, five of the six jurors that Schierman challenged did not sit on his jury. 59RP 17-18 (Jurors 25 and 58 excused for cause); 59RP 39 (Juror 104 excused for hardship); CP 7290-91 (Jurors 44 and 171 excused with peremptory challenges). Only Juror 76 deliberated on Schierman's case.

Schierman had a right to an impartial jury. Gentry, 125 Wn.2d at 615; Phillips, 65 Wash. at 327. He has not alleged that Juror 76 was biased, nor is there any evidence in the record that he was. See 59RP 21 (“[The court does] not find that this juror's answers in any way indicated that this juror could not be a fair and impartial juror.”). Indeed, Schierman made no assignment of error to the trial court's refusal to excuse Juror 76 for cause. He has not even raised the possibility of prejudice; his absence from the hearing in chambers, if error, was harmless beyond a reasonable doubt. Caliguri, 99 Wn.2d at 509; Guloy, 104 Wn.2d at 425.

C. SCHIERMAN'S RIGHT TO A PUBLIC TRIAL WAS NOT VIOLATED.

Schierman contends that his right to a public trial was violated on two occasions: Wheeler's excusal of jurors for hardship, and the trial court hearing argument and ruling in chambers on six challenges for cause. But Schierman failed to preserve any error. Moreover, pretrial

hardship determinations and legal arguments on challenges for cause need not be open to the public.

A criminal defendant has a constitutional right to a public trial. U.S. CONST. amend. VI; WASH. CONST. art. I, § 22; State v. Brightman, 155 Wn.2d 506, 514, 122 P.3d 150 (2005). The public also has a constitutional right to attend court proceedings.²⁰ U.S. CONST. amend. I; WASH. CONST. art. I, § 10; Press-Enterprise Co. v. Superior Court, 478 U.S. 1, 7, 106 S. Ct. 2735, 92 L. Ed. 2d 1 (1986); State v. Easterling, 157 Wn.2d 167, 174, 137 P.3d 825 (2006). Whether the right to a public trial has been violated is reviewed de novo. Brightman, 155 Wn.2d at 514.

1. Hardship Excusals Did Not Violate Schierman's Right To A Public Trial.

Schierman contends that the administrative excusal of jurors for hardship violated his right to a public trial. But Schierman failed to object to this procedure, and has failed to show a manifest constitutional error with practical and identifiable consequences for his trial. Further, under the experience and logic test, the administrative hardship excusal process was not a proceeding to which the public trial right attached.

²⁰ This Court has not resolved the question of whether a criminal defendant has standing to assert the public's right to open proceedings under article I, section 10. E.g., In re Copland, 176 Wn. App. 432, 448, 309 P.3d 626 (2013). However, Schierman must establish a violation of article I, section 22 to obtain the remedy he seeks: reversal of his conviction. E.g., State v. Beskurt, 176 Wn.2d 441, 446, 293 P.3d 1159 (2013) ("If there is no section 22 violation, then the new trial remedy . . . does not apply."); Beskurt, 176 Wn.2d at 458-59 (Stephens, J., concurring).

- a. Pursuant to RAP 2.5(a), this court should decline to reach the merits of Schierman's claim.

This Court has concluded in several cases that public trial claims are exempt from RAP 2.5(a)'s requirement that a defendant must either make a timely objection in order to preserve an issue for review or show that a constitutional error had practical and identifiable consequences to his trial. E.g., State v. Bone-Club, 128 Wn.2d 254, 257, 906 P.2d 325 (1995); State v. Strode, 167 Wn.2d 222, 229, 217 P.3d 310 (2009); State v. Wise, 176 Wn.2d 1, 16-18, 288 P.3d 1113 (2012). But this failure to apply RAP 2.5(a) to alleged violations of the right to a public trial is inconsistent with Washington precedent on the preservation of error, is not constitutionally required, and leads to unfair reversals of convictions that are otherwise untainted. This Court should conclude that its cases refusing to apply RAP 2.5(a) to public trial right claims are incorrect and harmful, and overrule them.²¹ Devin, 158 Wn.2d at 168.

First, the conclusion that a defendant need not object in order to preserve a public trial claim is incorrect. On its face, the contemporaneous objection rule applies to all claims of error. RAP 2.5(a)(3); Sublett, 176 Wn.2d at 151 (Wiggins, J., concurring). In public trial rights cases,

²¹ This issue has been raised in six cases currently pending before this Court: State v. Grisby, No. 87259-7; State v. Shearer, No. 86216-8; State v. Smith, No. 85809-8; State v. Applegate, No. 80727-2; State v. Njonge, No. 86072-6; and State v. Sliert, No. 87844-7; all were argued between October 15 and 17, 2013.

however, this Court has not applied that rule, relying on Bone-Club, 128 Wn.2d at 257, and its reference to State v. Marsh, 126 Wash. 142, 146-47, 217 P. 705 (1923), to summarily conclude that no objection is necessary in this context to preserve a claim for review. E.g., Strode, 167 Wn.2d at 229; Wise, 176 Wn.2d at 16-18. But Marsh predated the adoption of the Rules of Appellate Procedure, and it is clear that application of the current RAP 2.5(a) to Marsh's claims would have resulted in relief, as the constitutional violations at issue in fact involved manifest error affecting a constitutional right. Thus, nothing in Marsh requires this Court to avoid applying RAP 2.5(a) to claimed public trial violations.

Second, the policy behind RAP 2.5(a) is to avoid the waste of precious resources that occurs when unpreserved errors are raised on appeal. State v. Lynn, 67 Wn. App. 339, 344, 835 P.2d 251 (1992). Categorically refusing to apply this rule frustrates this policy.

Third, a consistent and principled application of the Rules of Appellate Procedure is needed to avoid either nullifying the rules or permitting courts to act arbitrarily in deciding whether to enforce them. See Hill v. City of Tacoma, 40 Wn.2d 718, 719-20, 246 P.2d 458 (1952).

Fourth, automatic review of unpreserved public trial claims is not constitutionally compelled. Federal courts do not entertain claims of public trial right violations in the absence of an objection. E.g., Waller v.

Georgia, 467 U.S. 39, 40-42 & n.2, 104 S. Ct. 2210, 81 L. Ed. 2d 31 (1984) (remanding one defendant's public trial claim to determine whether it was procedurally barred); Levine v. United States, 362 U.S. 610, 80 S. Ct. 1038, 4 L. Ed. 2d 989 (1960); see also Johnson v. United States, 520 U.S. 461, 469-70, 117 S. Ct. 1544, 137 L. Ed. 2d 718 (1997) (structural error not reviewed on appeal where the defendant failed to preserve it).

Not only has this Court's approach been incorrect, its harmfulness has now become apparent. When the results of an otherwise fair trial are overturned, victims and witnesses must endure retrials, courts must bear significant costs, and the passage of time may render retrial difficult, possibly costing society the ability to punish offenders. United States v. Mechanik, 475 U.S. 66, 72, 106 S. Ct. 938, 89 L. Ed. 2d 50 (1986). Moreover, this Court's approach encourages defendants to remain silent, knowing that an insignificant closure—one that could easily have been avoided—will result in a windfall reversal on appeal. Public faith in the justice system is undermined when an otherwise sound verdict is overturned merely because the court clerk randomly drew the alternate jurors' names during a court recess, State v. Jones, 175 Wn. App. 87, 303 P.3d 1084 (2013), or the court made a brief inquiry in chambers into whether a prospective juror—who was never seated—had a conviction

that could disqualify him from service, State v. Grisby, No. 87259-7 (argued Oct. 15, 2013).

Here, the administrative review of hardships was not constitutionally required to be open. Additionally, Schierman has not even attempted to show that the lack of a public forum for the excusal of jurors for hardship had practical and identifiable consequences that negatively impacted his trial. RAP 2.5(a) should foreclose his claim.

- b. Schierman has not met his burden to show that experience and logic require pretrial administrative hardship assessments to be open to the public.

A defendant's public trial right is implicated when "the place and process have historically been open to the press and general public," and "public access plays a significant positive role in the functioning of the particular process in question." Sublett, 176 Wn.2d at 73 (quoting Press-Enterprise, 478 U.S. at 8). The defendant bears the burden of demonstrating both prongs of this experience and logic test. In re Yates, 177 Wn.2d 1, 29, 296 P.3d 872 (2013).

Schierman has not carried his burden of proving that administrative excusals for hardship have traditionally been open to the public. While he contends that "[h]istorically, all phases of jury selection have been open to the public," he cites no authority to support this

proposition. App. Br. at 27. Certainly, this Court has repeatedly found a violation of the public trial right when the courtroom was closed during the questioning under oath of prospective jurors by the court or counsel. See, e.g., Wise, 176 Wn.2d at 11 (“[T]he public trial right in voir dire proceedings extends to the questioning of individual prospective jurors.” (emphasis added)); In re Orange, 152 Wn.2d 795, 100 P.3d 291 (2004). But “whether pretrial administrative juror excusals implicate a defendant’s public trial right is one of first impression.” Wilson, 174 Wn. App. at 338.

The weight of the evidence demonstrates that administrative hardship excusals have been conducted by the court clerk in a non-public forum. In Rice, 120 Wn.2d 549, this Court upheld the trial court’s authority to delegate hardship excusals to court staff pursuant to RCW 2.36.100. In doing so, this Court observed that the Yakima County clerk’s office often excused such jurors by telephone. Id. at 560. King County follows a similar procedure. CP 21347-49. Similarly, in reversing a defendant’s conviction due to an improper excusal for cause done by a court clerk, this Court observed that Jefferson County relied on the clerk to excuse jurors prior to voir dire. Tingdale, 117 Wn.2d 595. Other examples of pretrial hardship excusals being approved by the court clerk include Yates, 177 Wn.2d at 21-22, and State v. Langford, 67 Wn. App. 572, 582, 837 P.2d 1037 (1992).

Statutes and court rules also reflect that pretrial administrative hardship excusals are done by the court clerk. RCW 2.36.100 permits the court to delegate to the clerk the evaluation of juror hardships. A related statute also permits the superior court to perform jury management activities for courts of limited jurisdiction, so those activities do not occur in the limited-jurisdiction courtroom. RCW 2.36.052. The statute and related court rule governing jury selection contemplate that some jurors will be excused prior to being selected for a particular venire, presumably by court staff as trial will not yet have begun. RCW 4.44.120 (“When the action is called for trial, a panel of potential jurors shall be selected at random from the citizens summoned for jury service who have appeared and have not been excused.” (emphasis added)); CrR 6.3 (similar). Similarly, GR 31 explicitly provides that juror information, other than name, is presumptively private. If pretrial administrative hardships were routinely done in open court, this information could never be private.

In short, Schierman has not met his burden of showing that administrative hardship excusals lawfully conducted by court staff have traditionally been open to the public. In fact, experience—as reflected in caselaw, court rules, and statutes—shows that they have not.

Second, logic suggests that such excusals need not be open to the public. The purposes of a public trial are to “ensure a fair trial, to remind

the prosecutor and judge of their responsibility to the accused and the importance of their functions, to encourage witnesses to come forward, and to discourage perjury.” Sublett, 176 Wn.2d at 72. None of the values served by the public trial right is undermined by having administrative hardship excusals done in the clerk’s office out of public view. “No witnesses are involved at this stage, no testimony is involved, and no risk of perjury exists.” Id. at 77. Similarly, the judge is entirely uninvolved in the process, beyond providing written criteria to the jury services manager, so there is no need for public presence to remind the court of its responsibility to the accused.²² The prosecutor also need not be so reminded because the prosecutor and the defense are ordinarily uninvolved in that process. While here the trial court allowed both the prosecutor and the defense to oversee the administrative process, no juror could be excused for hardship unless the prosecutor, the defense, and Wheeler unanimously agreed that the hardship request met the court’s carefully drafted written guidelines. CP 21347-48, 23709-12.

Finally, forcing the hardship review process into a public forum would not enhance a defendant’s right to a fair trial. A clerk may

²² Indeed, the lack of court involvement raises the question of whether there was a closure at all. A “closure” has been defined by this Court to mean a situation “when the courtroom is completely and purposefully closed to spectators so that no one may enter and no one may leave.” State v. Lormor, 172 Wn.2d 85, 93, 257 P.3d 624 (2011). When the clerk evaluates requests for hardship excusal, there is no courtroom to close.

administratively excuse potential jurors only for non-debatable reasons unrelated to any particular case. As discussed above in section III.B.1.b, the jurors seeking an administrative hardship excusal here provided no information about their views on Schierman's case; they could not have, as they were unaware for which case they had been summoned. See also 29RP 12 (defense counsel complaining that it was hard to evaluate jurors' pretrial requests for hardship excusal because "we don't know what their views are with respect to the death penalty, so we're working in a bit of a vacuum"). To the extent that Schierman thought that his right to a fair trial was impacted, he had only to object to the juror being excused to obtain review in open court. CP 21348. Opening the administrative hardship excusal process to the public would not have furthered the values that the public trial right was designed to protect.

Nevertheless, Schierman contends that opening the process of excusing jurors for hardship would guard against the parties' colluding to exclude entire juror populations, allow the public to consider whether the decisions are arbitrary, and make the public aware that many people cannot sit on a jury due to financial hardship. App. Br. at 30-33. These contentions are unavailing.

As to Schierman's new-found concern that he and the State could collude to exclude jurors based on race or gender, he ignores that no juror

could be administratively excused for hardship unless he, the prosecutor, and the jury services manager all agreed that the juror's request met the court's written criteria for excusal, and that the parties met separately with Wheeler to review the hardship requests. Nor does Schierman even speculate as to why such collusion would occur.²³ His examples are unpersuasive. For instance, Schierman points out that Jurors 377252 and 655648 both requested excusal for the same reason—recent jury service within the last twelve months. CP 23763. But whether a prospective juror in fact served within the previous twelve months is uniquely within the knowledge of the jury services manager and his staff, as well as the juror requesting excusal. Thus, Wheeler may have refused to excuse the first juror and not the second based on his own records—or those submitted by the jurors themselves—neither of which is in the record. This single example is inadequate to prove Schierman's point. Similarly, Juror 297203 requested excusal because he was going to be in Europe working; his request was denied. CP 23757. Juror 228062 requested excusal because he was going to be out of town at a sporting event for his birthday; his request was approved. CP 23758. These different rulings are not "hard to explain." App. Br. at 30. Juror 228062 described a personal

²³ Schierman does not assign error to any excusal or failure to excuse on the basis of hardship, nor does he make any claim of error based on the jury venire's failure to be constituted of a fair cross-section of the community.

hardship and a trip that could not be rescheduled, while Juror 297203 described a potential hardship to his employer, with no evidence that the trip could not be rescheduled or someone else could not go instead.

Second, the court provided clear, written guidelines to the manager—adapted from those used for all other King County Superior Court cases—to govern its decisions on hardship excusals. CP 21347-50. The guidelines are decidedly not arbitrary; they are more specific than the statutory provisions governing excusals. Compare CP 21350 with RCW 2.36.100.

Third, the public need not be privy to individual hardship excusal requests to realize that jury service may be financially difficult for many. The statutory pay is \$10 per day. Further, Schierman’s recitation of the entire hardship request of a single juror to argue that many jurors could not afford “\$10 a day for a capital trial that lasted four months” is disingenuous. App. Br. at 31-32. That juror, who apparently did not appear for voir dire, would have been wholly unaware that the trial was for a capital case or was likely to last four months. While making more information available to the public about jury service and its hardships may make for improved public policymaking, that is separate from the question of whether it enhances the fairness of the individual trial or

furthering any of the other goals that the right to a public trial is in fact intended to serve.

Schierman has failed to carry his burden to show that both logic and experience require administrative hardship excusals to be open to the public. His claim that his public trial right was violated must be rejected.

2. The Trial Court's Consideration Of Six Challenges For Cause In Chambers Does Not Require Reversal.

Schierman next argues that the trial court's ruling in chambers on six defense challenges for cause violated his public trial right.²⁴ But, as argued above, he failed to object to this proceeding on any basis, so has failed to preserve error. And, experience and logic demonstrate that a ruling on a purely legal matter need not be done in open court.

a. Schierman has not preserved error.

Schierman failed to object below to the trial court's consideration of his six challenges for cause in chambers. Pursuant to RAP 2.5(a), this Court should refuse to reach the merits of his claim unless he demonstrates constitutional error that had practical and identifiable consequences to his rights at trial.

First, as discussed below, the court's resolution of six challenges for cause was not a proceeding to which the right to a public trial attaches.

²⁴ During the in-chambers conference, the trial court also addressed a number of hardship requests. 59RP 22-41. Schierman does not assign error to or offer any analysis regarding the court's consideration of these requests in chambers.

Second, Schierman has not attempted to show practical and identifiable consequences from these rulings. As discussed above in section III.B.2, all of the questioning of the six jurors and the making and initial arguing of the six challenges occurred in open court. Once in chambers, the court heard no new arguments, a contemporaneous record was made, and five of the six jurors were ultimately excused. Schierman does not allege that the sixth, Juror 76, was in fact biased. Schierman's claim is procedurally barred.

- b. The public trial right did not attach to the trial court's in-chambers conference.

Neither experience nor logic require such a ruling on for-cause challenges already argued in open court to be done in public. First, experience does not demand that each and every legal argument and ruling occur in public. Although Washington courts have repeatedly held that the public trial right attaches to the questioning of individual jurors, no court has held that the parties' challenges for cause or the court's ruling on those challenges must be done in open court. The two courts that have applied the experience and logic test to the question of whether challenges must be done in open court have concluded that they need not be. Love, 176 Wn. App. at 919; State v. Dunn, ___ Wn. App. ___, 321 P.3d 1283

(2014).²⁵ Nor does Schierman cite any historical examples to suggest that such challenges have traditionally been done in open court. The one court in Washington to have analyzed the question in depth concluded that the historical record of 140 years of practice shows “little evidence of the public exercise of [cause and peremptory] challenges, and some evidence that they are conducted privately.” Love, 176 Wn. App. at 919.

Further, the current and prior statute governing the exercise of challenges for cause suggest that the practice was not historically done in open court. The current version of RCW 4.44.250 provides that the challenge for cause, any exception, and the court’s ruling “may be made orally,” and that the judge “shall enter the same upon the record.” The previous version, adopted in 1881, provided that the “challenge, the exception, and the denial may be made orally. The judge of the court shall note the same upon his minutes” See 2003 Wash. Laws ch. 406, § 13. Both the prior version, which predated our constitution, and the current version of the statute imply that challenges for cause could occur in writing or out of public view, so long as a record was ultimately made. Compare Sublett, 176 Wn.2d at 76-77 (where court rule requires that a

²⁵ In a third case, two members of Division II concluded, on a confused record, that the dismissal of four jurors for cause after an in-chambers conference with counsel violated the defendant’s right to a public trial. State v. Slett, 169 Wn. App. 766, 282 P.3d 101 (2012). However, Slett was decided before this Court adopted the experience and logic test articulated in Sublett, 176 Wn.2d 58. Further, this Court granted review in Slett, No. 87844-7, and heard argument October 17, 2013.

jury question and the court’s answer “be made a part of the record” but does not specify how, an open court proceeding is not required).

Moreover, the trial court hearing argument on the defense challenges for cause and issuing a ruling on them in chambers—addressing solely legal issues—was functionally a sidebar.²⁶ BLACK’S LAW DICTIONARY 1414 (8th ed. 2004) (defining “sidebar” as “[a] position at the side of the judge’s bench where counsel can confer with the judge beyond the jury’s earshot”). The court did not in fact exclude anyone from the courtroom, but merely heard legal argument and made legal rulings out of the hearing of the individuals—specifically the jurors under discussion—who were present in the courtroom. 59RP 15-22. Sidebar conferences are a longstanding practice in Washington, even nationally, and their purpose is to address legal issues outside the hearing of the jury. See State v. Koloske, 100 Wn.2d 889, 896, 676 P.2d 456 (1984) (observing that the purpose of a sidebar is to resolve uncomplicated issues without removing the jury from the room, and warning that unrecorded sidebars may preclude review), overruled on other grounds by State v. Brown, 113 Wn.2d 520, 782 P.2d 1013, 787 P.2d 906 (1989); In re Ticeson, 159 Wn. App. 374, 384-86, 246 P.3d 550 (2011) (discussing over

²⁶ The issue of whether recorded sidebar conferences during trial violate the defendant’s public trial right is pending before this Court in State v. Smith, No. 85809-8 (argued Oct. 15, 2013).

100 years of precedent establishing that judges may make legal rulings in chambers), declined to follow on other grounds by Sublett, 176 Wn.2d 58; see also Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555, 598 n.23, 100 S. Ct. 2814, 65 L. Ed. 2d 973 (1980) (Brennan, J., concurring) (“[W]hen engaging in interchanges at the bench, the trial judge is not required to allow public or press intrusion upon the huddle.”); Lord, 123 Wn.2d at 305-07 (providing examples of in-chambers and sidebar conferences); Popoff v. Mott, 14 Wn.2d 1, 9, 126 P.2d 597 (1942) (providing an older example of a sidebar conference). Additionally, the conference at issue here was substantively similar to the conference to discuss the response to a jury question that was challenged in Sublett, which this Court concluded need not be open to the public. Sublett, 176 Wn.2d at 77. The evidence shows that conferences like the one at issue here have not historically been conducted in public. Schierman has failed to carry his burden to show otherwise.

Second, Schierman has not demonstrated that logic requires a publicly announced ruling. The purposes of the right to a public trial are not furthered by requiring the court to hear argument and issue rulings on challenges for cause in open court. As with the administrative excusals for hardship discussed above, or the consideration of a response to a jury question at issue in Sublett, no witnesses or testimony are involved, so

there is no risk of perjury, nor a need to encourage witnesses to come forward. See id. The judge and the prosecutor did not need the presence of the public to remind them of their responsibilities to protect the defendant's rights; the proceedings were contemporaneously reported. 59RP 15-22; Sublett, 176 Wn.2d at 77 (observing that the prosecutor and judge are reminded of their responsibility to the defendant when their actions are reduced to writing and made part of the public record "subject to public scrutiny and appellate review"); id., 176 Wn.2d at 100 n.3 (Madsen, C.J., concurring); Wise, 176 Wn.2d at 22 (Madsen, C.J., dissenting); Love, 176 Wn. App. at 919-20.

Further, the court's hearing of brief argument on six defense challenges for cause in chambers did not threaten Schierman's right to a fair trial. The entire voir dire and the challenges themselves were made and argued in open court; the later argument in chambers was redundant. The court's ruling excusing a number of jurors was reiterated in open court minutes later, and recorded in the minutes. 59RP 42; CP 10402.

More generally, a summation of counsel's legal argument and the court's oral announcement of its rulings thereon should not require a public proceeding. Indeed, where parties could raise and argue legal issues on paper, and the court could issue a written ruling without holding

oral argument at all, permitting oral argument could not establish a constitutional right to an open proceeding that did not otherwise exist.

Schierman has failed to meet his burden of proving that experience and logic require that the argument of and ruling on challenges for cause take place in open court. Schierman must prove both to prevail. His argument should be rejected.

Alternatively, this Court should conclude that the hearing in chambers was so insignificant that it does not rise to the level of a constitutional violation. While this Court has vigilantly safeguarded the right to a public trial, it has also recognized that some courtroom closures do not undermine the values secured by public trials. State v. Momah, 167 Wn.2d 140, 150, 217 P.3d 321 (2009) (“not all courtroom closure errors are fundamentally unfair”); Sublett, 176 Wn.2d at 102 (“not all courtroom closures violate the right to a public trial”). Additionally, this Court has left open the possibility that a trivial closure may not violate a defendant’s public trial right. Brightman, 155 Wn.2d at 517; Easterling, 157 Wn.2d at 182-85 (Madsen, C.J., concurring); State v. Lormor, 172 Wn.2d 85, 96, 257 P.3d 624 (2011). The nature of the closed proceeding and its length should be considered when determining whether a closure is de minimis. E.g., United States v. Ivester, 316 F.3d 955, 960 (9th Cir. 2003).

Here, the trial court's final consideration in chambers of six defense challenges previously litigated in public must be considered trivial. The brief proceeding was repetitive and reported, and the results were announced in open court as soon as the conference ended. This in-chambers consideration of the for-cause challenges did not implicate any of the core values of the public trial right. This Court should conclude that any closure was de minimis and decline to find a constitutional violation.

D. SCHIERMAN WAS NOT DENIED HIS RIGHT TO COUNSEL.

A criminal defendant has a Sixth and Fourteenth Amendment right to the assistance of counsel in his defense. U.S. CONST. amend. VI, XIV; Gideon v. Wainwright, 372 U.S. 335, 83 S. Ct. 792, 9 L. Ed. 2d 799 (1963). Our state constitution also provides an accused with the right to defend through counsel.²⁷ WASH. CONST. art. I, § 22. The main purpose of the right to counsel is to ensure the defendant a fair trial. State v. Roberts, 142 Wn.2d 471, 515, 14 P.3d 713 (2000).

A defendant's constitutional right to counsel attaches at the initiation of adversarial criminal proceedings. Kirby v. Illinois, 406 U.S. 682, 688, 92 S. Ct. 1877, 32 L. Ed. 2d 411 (1972); State v. Earls, 116

²⁷ Schierman does not argue that the rights provided by the two constitutions are different. This Court has never interpreted the state right to counsel as providing broader protection than the federal right does. See, e.g., State v. Earls, 116 Wn.2d 364, 373 n.5, 805 P.2d 211 (1991).

Wn.2d 364, 373 & n.5, 805 P.2d 211 (1991). This right continues through all critical stages of a criminal proceeding. State v. Robinson, 153 Wn.2d 689, 694, 107 P.3d 90 (2005). A critical stage is one “in which a defendant’s rights may be lost, defenses waived, privileges claimed or waived, or in which the outcome of the case is otherwise substantially affected.” State v. Heddrick, 166 Wn.2d 898, 910, 215 P.3d 201 (2009) (quoting State v. Agtuca, 12 Wn. App. 402, 404, 529 P.2d 1159 (1974)).

Schierman asserts that “[o]n two occasions jurors were dismissed without any consultation with Schierman’s lawyers.” App. Br. at 35. This reference is to the two jurors whom jury coordinator Pat Rials excused for “Age Related Reasons.” App. Br. at 19 (citing CP 24703). But counsel explicitly agreed to excuse those two jurors. In an email to Wheeler on October 22, 2009, Schierman’s lawyer Pete Connick referenced the two jurors identified by Rials by name, indicated their claimed hardship was “adv. age,” and wrote “the defense agrees to exemption/excusing [those] prospective jurors.” CP 25068. Because Schierman’s assertion is flatly contradicted by the record, the State will not address it further.

Schierman also contends that he was denied his constitutional right to counsel when a paralegal acting at the direction of his attorney approved the excusal for hardship of approximately 100 jurors. If there were any error, Schierman invited it by sending a paralegal to act on his

behalf. And, Schierman was not denied counsel. To the extent that he was, the administrative excusal of jurors for hardship is not a critical stage of the proceedings, so any error is evaluated for harmlessness. Schierman's attorney's use of a paralegal was harmless beyond a reasonable doubt.

1. Schierman Has Failed To Preserve Any Error.

This Court should decline to reach the merits of Schierman's claim because he has either invited or failed to preserve any error. Counsel chose to send his paralegal to act on Schierman's behalf, and did not seek a remedy when the opportunity arose.

It is well established that a defendant may not set up an error in the trial court and then complain of it on appeal. State v. Henderson, 114 Wn.2d 867, 869-71, 792 P.2d 514 (1990). The invited error doctrine applies even when the alleged error is of constitutional magnitude.

E.g., City of Seattle v. Patu, 147 Wn.2d 717, 720, 58 P.3d 273 (2002).

The doctrine requires an affirmative act on behalf of the defendant.

In re Thompson, 141 Wn.2d 712, 724, 10 P.3d 380 (2000).

Here, Schierman invited any error. His lawyers took the affirmative step of sending a paralegal to review prospective jurors' requests for hardship excusal. The paralegal had previously attended, with counsel, a meeting with Wheeler to learn how to agree to an excusal.

28RP 7. As Schierman's and his attorneys' agent, the paralegal then either acted within the scope of her authority by approving the hardship excusals, or acted beyond the scope of her actual authority but with apparent authority. If the latter is the case, under fundamental principles of agency, Schierman ratified the acts of the paralegal. E.g., 3 Am. Jur. 2d Agency § 175 (2014) (“[The principal] may ratify the act [of an agent] through conduct justifiable only on the assumption that the person consents to be bound by the act’s legal consequences. An intention to ratify may be inferred by words, conduct, or silence on the part of the principal that reasonably indicates a desire to affirm the unauthorized act and is inconsistent with any other purpose.”) When counsel’s actions were brought to the court’s attention and discussed in chambers, counsel did not indicate that Schierman was seeking any remedy. 28RP 7.

The failure to object cannot be based on the assumption that no remedy was available. The evidence is to the contrary. On at least one occasion, Wheeler electronically rescinded an administrative excusal that was made in error. CP 25005. Similarly, the court retracted a hardship excusal that Wheeler mistakenly thought had been approved. 32RP 174-75. Here, where all action now complained of was taken by Schierman, and the court explicitly noted that he was not pursuing any

remedy, any resulting error must be said to have been invited by the defense.

Even if this Court does not find invited error, Schierman did not preserve this claim for review. He did not object below. The claim is not truly of constitutional dimension: as discussed below, he had counsel, and the process of reviewing juror hardship requests was not a critical stage. Nor has Schierman even attempted to meet his burden of demonstrating any practical and identifiable effect on his trial. Pursuant to RAP 2.5(a), this Court should decline to reach this issue.

2. Schierman Had Counsel.

Schierman had an attorney at every stage of the proceedings. Two attorneys, including trial counsel Jim Conroy, entered notices of appearance for Schierman on July 25, 2006, the day after the Information was filed. CP 16-19. Pete Connick, the other attorney who represented Schierman at trial, joined the defense team on November 25, 2008.

21RP 19. Conroy and Connick represented Schierman throughout the pretrial hearings and at trial; at every court hearing, at least one attorney was present, and usually both.

Further, Schierman had counsel for the administrative hardship review process. The court specifically opened that process to oversight by both parties. E.g., 24RP 34-35. Conroy and Connick, together with a

defense-team paralegal, met with Wheeler to learn how the process would work. 29RP 5. Counsel then chose to send the paralegal—a non-lawyer agent of the defense team—to review the hardship requests. It is unclear in what way this abrogated Schierman’s right to counsel.

To the extent that Schierman contends that a paralegal cannot act on his behalf in an administrative matter, the argument should be rejected. First, he fails to develop that argument or cite any authority in support of it; it should not be considered. State v. Goodman, 150 Wn.2d 774, 781-82, 83 P.3d 410 (2004).

Second, the assistance of a lawyer was not necessary to ensure that Wheeler was correctly applying the court’s written criteria to administrative hardship excusals. After all, the court itself routinely and properly delegates the task of evaluating pretrial juror hardship requests to a nonlawyer. RCW 2.36.100; Rice, 120 Wn.2d at 559-62; GR 28(b)(1); CP 23710. Schierman never explains why his attorney could not have done the same. Experience suggests that the delegation of administrative tasks to an administrative professional is wholly appropriate.

Third, counsel’s choice to employ a paralegal to perform this task, and any miscommunication between them, cannot fairly be imputed to the State. See Bell v. Cone, 535 U.S. 685, 696 n.3, 122 S. Ct. 1843, 152 L. Ed. 2d 914 (2002) (citing cases where the Court had found a Sixth

Amendment violation without requiring a showing of prejudice, and noting that each “involved criminal defendants who had actually or constructively been denied counsel by government action” (emphasis added)). Indeed, it is unclear in what way the court erred under Schierman’s vaguely articulated theory. He does not argue that the court clerk erred in relying on the paralegal’s apparent authority. Nor does Schierman contend that the trial court failed to provide a remedy. In the absence of an error attributable to State action, Schierman cannot show that his right to counsel was violated.

Fourth, even if the paralegal acted beyond the scope of her authority, a suggestion that the record does not support,²⁸ Schierman’s attorneys ratified their paralegal’s actions by declining to seek a remedy when given the opportunity. Accordingly, if counsel erred by using a paralegal to review administrative hardship excusals, that error must be reviewed under the rubric of ineffective assistance of counsel, a claim Schierman does not raise.

²⁸ In later summarizing the events for the record, the court indicated that Wheeler was under the impression that the paralegal was authorized to act on behalf of the defense, and had been present with counsel Conroy and Connick when he explained how the process of excusing jurors would work. 29RP 7-8. There would be little reason for the paralegal to have attended that meeting had she not been authorized to act for Schierman. Further, although the court stated that Connick had explained in chambers that there was a miscommunication between him and his paralegal, implying that she did not have authority to act, the court also noted that when the issue was first brought to the court’s attention via email, counsel made no claim that the paralegal had exceeded her authority. 28RP 4-7. Although the email itself does not appear to be in the record, counsel made no objection to the court’s characterization of the events.

In short, Schierman had two lawyers who delegated an administrative task to a paralegal. Schierman has failed to show how this action violated his constitutional right to counsel.

3. The Right To Counsel Did Not Attach To The Review Of Juror Requests For Excusal Due To Hardship.

Even if Schierman was denied counsel, the administrative excusal process was not a critical stage at which the right to counsel is guaranteed. As discussed above in section III.B.1.b, the process here involved examining hardship excusal requests that contained no case-specific information to determine if the request met the written criteria for excusal prepared by the court. It involved no judicial decisionmaking; rather, the parties separately reviewed the materials to decide whether to involve the court. Further, the review process cannot be likened to other proceedings that have been found to be a critical stage. Hamilton v. Alabama, 368 U.S. 52, 82 S. Ct. 157, 7 L. Ed. 2d 114 (1961) (arraignment, at least when certain pleas or objections must be made then or lost); Coleman v. Alabama, 399 U.S. 1, 90 S. Ct. 1999, 26 L. Ed. 2d 387 (1970) (preliminary hearing where witnesses testify and may be cross-examined, probable cause to hold the defendant for trial is evaluated, and bail is set); White v. Maryland, 373 U.S. 59, 83 S. Ct. 1050, 10 L. Ed. 2d 193 (1963) (per curiam) (preliminary hearing where a plea of guilty is entered);

Mempa v. Rhay, 389 U.S. 128, 88 S. Ct. 254, 19 L. Ed. 2d 336 (1967) (sentencing, where a guilty plea may be withdrawn at any time prior, and where imposition of the sentence starts the time limit within which a notice of appeal must be filed). In short, the hardship review process was not a stage at which Schierman’s “rights may be lost, defenses waived, privileges claimed or waived, or in which the outcome of the case is otherwise substantially affected.” Heddrick, 166 Wn.2d at 910.

Because the administrative hardship review process is not a critical stage, the absence of counsel need not void the proceeding. Garrison v. Rhay, 75 Wn.2d 98, 102, 449 P.2d 92 (1968). Instead, a deprivation of the right to counsel is subject to harmless error analysis, “unless the deprivation, by its very nature, cannot be harmless.” Spain, 464 U.S. at 117 n.2. Prejudice is presumed only where “circumstances [exist] that are so likely to prejudice the accused that the cost of litigating their effect in a particular case is unjustified.” United States v. Cronin, 466 U.S. 648, 658, 104 S. Ct. 2039, 80 L. Ed. 2d 657 (1984). Such circumstances exist when there is a complete denial of counsel, or when there are comparable circumstances such as the denial of counsel at a critical stage, counsel fails to subject the prosecution’s case to meaningful adversarial testing, the

circumstances are such that no lawyer could provide effective assistance, or counsel has an actual conflict of interest. Id. at 559-62; In re Davis, 152 Wn.2d 647, 674-75, 101 P.3d 1 (2004). None of these applies here, so any deprivation of counsel must be evaluated for harmless error. The State bears the burden of showing that the error was harmless beyond a reasonable doubt once the defendant has raised the possibility of prejudice. Guloy, 104 Wn.2d at 425; Caliguri, 99 Wn.2d at 509.

Here, Schierman has not claimed any prejudice, and there is no question that counsel's absence from the administrative excusal process was harmless beyond a reasonable doubt. First, counsel is routinely excluded from that process; pretrial hardship excusals are typically conducted by court staff with no input from the parties. It is hard to imagine how having a paralegal act on Schierman's behalf at his lawyer's direction to oversee court staff's review of administrative hardship excusals, when ordinarily no such oversight would be permitted, could have been to his detriment.

Second, the available information demonstrates that hardship excusals were evaluated fairly. For example, of the hundreds of jurors identified as excusable for hardship, Schierman objected to the jury

services manager's proposed action only a tiny fraction of the time.²⁹ His routine acquiescence in Wheeler's decisions suggests that the court's criteria for excusal were correctly applied.³⁰ To the extent that Wheeler erred in applying the court's criteria, case law requires Schierman to

²⁹ Of those hardship requests that Schierman contested, all the prospective jurors were ultimately excused either for hardship or by a peremptory challenge, had too high a number to be seated, or did not respond to the summons at all. Specifically, on October 28, 2009, Schierman objected to one proposed excusal for hardship; the court excused the juror. 29RP 13-18.

On November 4, 2009, Schierman objected to sixteen proposed excusals for hardship. CP 6720; 32RP 172. The court observed that of those sixteen, one did not exist (no. 2 on defense list), seven had previously been denied excusal by the jury services manager based on the agreement of the parties (nos. 1, 5, 6, 7, 11, 12, and 14 on the defense list), and two had been previously excused based on the agreement of the parties (nos. 9 and 10 on defense list). 32RP 172-74. However, the court rescinded one of those excusals (no. 9, Smith). 32RP 174-75. Of the remaining defense objections to excusal, none of the jurors could ultimately have been seated on Schierman's jury. The court granted the hardship excusal to no. 16 (Tomlinson). 32RP 178-79. The court denied the hardship excusal for no. 3 (Ferguson), but she was later assigned too high a jury number to even be questioned on an individual basis. 32RP 175; compare CP 7314 (Ferguson assigned number 462) with 58RP 94 (last juror questioned individually was Juror 424). The court denied the hardship excusal for no. 4 (Holyan), but Schierman exercised a peremptory challenge to eliminate her. 32RP 176; CP 7303 (Holyan assigned number 224), 7291 (defense excused Juror 224). The court denied the hardship excusal as to juror no. 13 (Johnson), but Schierman later indicated that he had no further objection to the excusal of that juror. 32RP 177; CP 7308 (Johnson assigned number 330); CP 6893 (no defense objection to excusing Juror 330). Johnson did not show up for individual voir dire as scheduled. 55RP 59. The court did not excuse the remaining three jurors (nos. 8, Babcock, 9, Smith, and 15, Esquivel), but it appears that the three never appeared for jury service. 32RP 174-78; CP 7292-7321.

On November 9, 2009, Schierman objected to seven proposed excusals for hardship. However, of the seven, one did not exist, and the other six had already had their requests denied by the jury services manager based on the agreement of the parties. 33RP 50-52.

On November 10, 2009, Schierman had no objections to any of the hardship requests. 33RP 55-57.

³⁰ Indeed, counsel indicated broad agreement with the court's policies, telling Wheeler that "the defense agrees to excuse/exempt prospective jurors who claim hardship because of pre-paid plane tickets, travel plans and show proof of tickets, itinerary to the Jury Administrator. In addition, the defense agrees to excuse/exempt prospective jurors who are students and attend school non-locally and show proof of school enrollment [to the] Jury Administrator." CP 25068.

establish prejudice unless there was a gross departure from the guidelines. Rice, 120 Wn.2d at 562. He has not attempted to do so.

Third, prejudice should be measured by whether the seated jury was fair and impartial. E.g., Gentry, 125 Wn.2d at 615; Phillips, 65 Wash. at 327. Indeed, the purpose of the right to counsel is to secure the fundamental right to a fair trial. Roberts, 142 Wn.2d at 515. Counsel's physical absence from Wheeler's office—but presence through his representative—could not possibly have affected the fairness and impartiality of Schierman's jury when the hardship requests were being evaluated not based on any criteria relating to the specifics of the case, but solely on the juror's ability to attend court on the day summoned and to participate as a juror at all. If Schierman was improperly denied counsel at the administrative review of requests for hardship excusals, any error was harmless beyond a reasonable doubt.

**E. THE STATUTORILY MANDATED NOTICE OF
SPECIAL SENTENCING PROCEEDING WAS
PROPERLY FILED IN A TIMELY MANNER.**

Schierman contends that the notice of special sentencing proceeding was invalid because there was a defect in the charging language in the original Information, which therefore failed to charge him with aggravated murder, and because the notice of special sentencing proceeding filed after the State corrected the defect was untimely. Both of

these cannot be true. If the original Information charged Schierman with aggravated murder, an offense eligible for the death penalty, then the State timely filed the notice because it was filed within the period required. On the other hand, if the defect in the original Information failed to charge Schierman with aggravated murder, then the State timely filed the notice, because it was filed the same day that the State filed an Amended Information correcting the defect.

RCW 10.95.040(2) provides that a written notice of a special sentencing proceeding to determine whether the death penalty should be imposed must be filed and served on the defendant or his attorney within 30 days after arraignment, unless the court for good cause extends or reopens the period for filing.

The State filed charges against Schierman by Information, stating that the charges in counts one through four were “Aggravated Murder in the First Degree.” CP 1-3. As to each of these counts, the State alleged “that further aggravating circumstances exist, to-wit: there was more than one victim.”³¹ CP 1-3. The State alleged that these four crimes were contrary to RCW 9A.32.030(1)(a) and 10.95.020(10). CP 1-3. The State filed and served a notice of special sentencing proceeding on January 30,

³¹ As to counts two through four, the State alleged that these crimes “were part of a common scheme or plan” with another crime charged. CP 1-3.

2007, within the required time limit, which had been extended at Schierman's request. CP 1021, 1220; 8RP 44; 11RP 1-2.

At the omnibus hearing on October 23, 2009, the State moved to amend the information by adding the remainder of the statutory language defining the aggravating circumstance charged on each count: "and the murders were part of a common scheme or plan or the result of a single act of the person." CP 6766-68; 22RP 126-27. Over Schierman's objection, the court granted the motion to amend on November 3, 2009, and Schierman was arraigned on the amended information. CP 6764-65; 32RP 115-20. The State filed and served another written notice of special sentencing proceeding at the same hearing. CP 6769; 32RP 120.

The trial court concluded that the original Information both charged aggravated murder and specified the aggravating circumstance that was being charged, and that the original notice was properly given. 33RP 24. On that basis, the court denied Schierman's motion to strike the notice of special sentencing proceeding. 33RP 24-25.

Schierman relies on two cases in which this Court has found that a notice of special sentencing proceeding was untimely filed and, as a result, invalid. Both are inapposite. In State v. Dearbone, the analysis and holding was limited to interpretation of the statutory term "good cause" for purposes of extension of the time limit for filing a notice. 125 Wn.2d

173, 182, 883 P.2d 303 (1994). The court held that substantial compliance with the statute did not constitute good cause or excuse compliance with the time limit, noting that a time limit was met or it was not. Id. In State v. Luvene, the holding also was limited to interpretation of “good cause” for extending the time limit. 127 Wn.2d 690, 719, 903 P.2d 960 (1995).

In contrast, Schierman argues that a defect in the charging language precludes filing a notice of special sentencing proceeding at all. Nothing in the statutory language of RCW 10.95.040 warrants that conclusion. Schierman argues that a defect in the charging language establishes that he was not “charged with aggravated first degree murder,” but that ignores the State’s ability to cure any defect pretrial, as the State did in this case. CrR 2.1(d); see State v. Vangerpen, 125 Wn.2d 782, 790, 888 P.2d 1177 (1995) (amendment to correct missing element would have been permissible until State rested). It is clear that the State intended to file charges of aggravated murder in this case, and the State was obliged to file a notice under RCW 10.95.040 because it intended to seek a death sentence. The State filed the notice in compliance with that statute. The notice was not rendered void because a possible defect in the charging language was later corrected.

If, as Schierman argues, the State did not charge him with aggravated murder when it filed the original Information in 2006, the time

limit of RCW 10.95.040 was not triggered until the amended charges of aggravated murder were filed on November 3, 2009. In that case, the State's notice of special sentencing proceeding filed that day was timely.

F. THE TRIAL COURT PROPERLY EXERCISED ITS DISCRETION IN RULING ON CHALLENGES FOR CAUSE.

Schierman contends that the trial court erred in granting the State's challenge for cause to Juror 280, and by applying an asymmetric standard to its evaluation of state and defense challenges for cause, leading it to erroneously deny Schierman's challenges for cause to Jurors 59 and 140. As to Juror 280, the court did not abuse its discretion in finding that her opposition to the death penalty would prevent or substantially impair her ability to fulfill her responsibilities as a juror. With respect to the defense challenges to Jurors 59 and 140, the trial court applied the proper standard and correctly found that Schierman failed to meet his burden to show that the two jurors would automatically impose the death penalty upon conviction. Moreover, the trial court explicitly found that Schierman failed to meet even the lower standard he advocates, determining that Jurors 59 and 140 were not prevented or substantially impaired from fulfilling their duties as jurors. These findings were within the trial court's broad discretion. Finally, Juror 59 was removed midtrial as unfit to serve

and never deliberated. Thus, the trial court's failure to excuse him could not have denied Schierman his right to an impartial jury.

Every criminal defendant has a right under the Sixth and Fourteenth Amendments to a trial by an impartial jury.³² U.S. CONST. amend. VI, XIV; Morgan v. Illinois, 504 U.S. 719, 726, 112 S. Ct. 2222, 119 L. Ed. 2d 492 (1992); State v. Yates, 161 Wn.2d 714, 742, 168 P.3d 359 (2007). In a capital case, the trial court may "death qualify" the jury to ensure that only jurors capable of adhering to the state's capital sentencing scheme sit on the jury. Gregory, 158 Wn.2d at 813; State v. Brown, 132 Wn.2d 529, 593, 940 P.2d 546 (1997). The burden is on the party seeking exclusion to show that the challenged juror lacks impartiality. Wainwright v. Witt, 469 U.S. 412, 423, 105 S. Ct. 844, 83 L. Ed. 2d 841 (1985).

When a prospective juror opposes the death penalty, the trial court may grant a State's challenge for cause only if the juror is unable or unwilling to impose the death penalty despite the State carrying its burden of proof. Yates, 161 Wn.2d at 742; State v. Hughes, 106 Wn.2d 176, 181, 721 P.2d 902 (1986). Specifically, the court may excuse a juror for cause if his opposition to capital punishment "would 'prevent or substantially

³² This Court has already determined that, in this context, Article I, section 22's guarantee of an impartial jury provides no broader protection than the Sixth Amendment. Brown, 132 Wn.2d at 598.

impair the performance of his duties as a juror in accordance with his instructions and his oath.” Witt, 469 U.S. at 424 (quoting Adams v. Texas, 448 U.S. 38, 100 S. Ct. 2521, 65 L. Ed. 2d 581 (1980)); Yates, 161 Wn.2d at 742. Juror bias against the imposition of capital punishment need not be proven with unmistakable clarity; rather, when “the trial judge is left with the definite impression that a prospective juror would be unable to faithfully and impartially apply the law,” the juror may be excused for cause. Witt, 469 U.S. at 426; Yates, 161 Wn.2d at 742.

When a prospective juror is challenged for cause based on his support for the death penalty, a different standard is employed: the juror must be excused only if he “will automatically vote for the death penalty in every case.” Morgan, 504 U.S. at 729.³³

A determination regarding a prospective juror’s bias is a finding of fact that turns not only on the juror’s answers, but also on the juror’s demeanor (such as tone, hesitation in speech, and body language) and credibility. Uttecht v. Brown, 551 U.S. 1, 7, 127 S. Ct. 2218, 167 L. Ed. 2d 1014 (2007); Witt, 469 U.S. at 428-29; Gregory, 158 Wn. 2d at 814; State v. Cross, 156 Wn.2d 580, 595, 132 P.3d 80 (2006). The trial court is indisputably in the best position to make such a finding, so its decision to excuse a juror due to his views about the death penalty will be reversed

³³ Schierman’s challenge to this standard is addressed fully in section F.2.a, infra.

only if the court has abused its discretion. Brown, 551 U.S. at 7; Yates, 161 Wn.2d at 743; Gregory, 158 Wn.2d at 814. An abuse of discretion occurs when the trial court's decision is manifestly unreasonable, or its discretion is exercised on untenable grounds or for untenable reasons. State v. Rohrich, 149 Wn.2d 647, 654, 71 P.3d 638 (2003).

The remedy for the erroneous exclusion of a juror who opposes the death penalty but is not substantially impaired in his ability to function as a juror is reversal of the defendant's sentence, but not of his conviction. Ross v. Oklahoma, 487 U.S. 81, 85, 108 S. Ct. 2273, 101 L. Ed. 2d 80 (1988); Gentry, 125 Wn.2d at 633 n.98. Likewise, the presence on the jury of a single juror who would automatically impose capital punishment in the event of conviction requires reversal of the death sentence. Morgan, 504 U.S. at 729, 739 n.11.

1. The Trial Court Properly Granted The State's Challenge To Juror 280, Who Said She Could Not Follow The Law.

Schierman claims that the trial court improperly granted the State's challenge for cause to Juror 280. But that juror repeatedly indicated that she could only support the death penalty in certain narrow circumstances, and would hold the State to a higher burden of proof than that provided by law. Thus, her opposition to capital punishment would have substantially

impaired her ability to carry out her responsibilities as a juror. Witt, 469 U.S. at 424. The trial court did not abuse its discretion in excusing her.

All the jurors completed an eighteen-page questionnaire regarding their qualifications to serve as jurors in Schierman's case. In hers, Juror 280 rated herself a "2" on a scale of one to seven, where "1" represents a person "STRONGLY OPPOSED to the death penalty" and "7" represents a person "STRONGLY IN FAVOR of the death penalty." CP 15528. She indicated that she had never held a different view of capital punishment, and wrote that the death penalty is used "too often," because she was aware of cases where people were convicted and later exonerated.

CP 15528. Juror 280 supported a penalty of life imprisonment without the possibility of release, writing, "This seems appropriate." CP 15528.

When asked what she would want to consider in selecting between the two possible penalties available for a person "convicted of the premeditated and intentional killing of two women and two children," Juror 280 wrote, "If this was one incident or more of a serial killer with multiple victims that would kill again if let out." CP 15529.

During individual voir dire by the court, Juror 280 reaffirmed what she wrote in the questionnaire regarding her views on the death penalty. 53RP 20-22. She elaborated by saying that, for a variety of reasons, "I find it pretty difficult to choose [the death penalty] as an option unless it

was—I don't know, it would have to be really clearcut and circumstances where I'm—if the person was let out they would kill again, it would be pretty hard for me to do.” 53RP 22. When questioned at length by Schierman, Juror 280 reiterated that she thought she could only vote for capital punishment for serial killers like Charles Manson, Jeffrey Dahmer, and Gary Ridgway, or in cases where the defendant would kill again if released. 53RP 23-24.

Juror 280 also explained that she had a higher standard for imposing the death penalty than the law provided. When asked if she could “give full and serious consideration to the imposition of the death penalty,” she said, “I don't know, because I think I might have a little higher standards than the—.” 53RP 27. She further stated, “I think my opinion on the bar that would have to be met is there already—so I don't know if the facts of the case meet that bar, so my bar may be different than what the court instructs. I think I've already stated what my bar is.”

53RP 29. Upon further questioning, she again stated that she could vote for the death penalty only if “the person was likely to kill again . . . if they got out,” 53RP 30, and that she “couldn't go lower than that.” 53RP 31.

The trial court granted the State's challenge for cause and excused Juror 280. 53RP 40. It cited Juror 280's consistently repeated view that she could impose the death penalty only in the case of a serial killer or an

individual who would kill again if he got out. 53RP 38. The court observed that such a limitation on the circumstances under which she would vote for the death penalty “added to the State’s burden of proof not simply just [dis]proving the existence of sufficient mitigating circumstances to merit leniency, but requiring the State to prove affirmatively something that is not part of its burden of proof.” 53RP 39; compare RCW 10.95.060(4). Because the State would not present evidence that Schierman was a serial killer, and the court expected to instruct the jury that life without parole would mean that Schierman would never be released, RCW 10.95.030(1), WPIC 31.06, Juror 280 gave “the definite impression that [she] would be unable to faithfully and impartially apply the law.” 53RP 39-40; Witt, 469 U.S. at 426.

The trial court did not abuse its discretion in excusing Juror 280 for cause on this record. Where a juror expresses willingness to impose the death penalty, but only in a narrowly circumscribed set of circumstances, a challenge for cause is properly granted.

This Court has repeatedly held, on facts nearly identical to those presented here, that the trial court did not abuse its discretion in excusing a juror for cause. In Brown, this Court examined the excusal of a juror, Richard Deal, who stated that he felt most comfortable imposing the death penalty if the defendant was incorrigible and “would reviolated if released.”

Brown, 132 Wn.2d at 604; see also Brown v. Lambert, 451 F.3d 946, 949 (9th Cir. 2005) (providing additional facts about Deal’s voir dire, referring to him as “Juror Z”), reversed by Brown, 551 U.S. at 13-15, 22-34 (providing more details and a transcript of the voir dire of Juror Z). Because the juror’s restrictive viewpoint “was not a correct statement of the law,” this Court determined that the trial court properly exercised its discretion in excusing Deal for cause. Brown, 132 Wn.2d at 604, 631. The United States Supreme Court agreed. Brown, 551 U.S. at 13-18, 21-22 (noting that a juror basing his vote on the death penalty on whether the defendant would kill upon release “is equivalent to treating the risk of recidivism as the sole aggravating factor”). See also Cross, 156 Wn.2d at 599-600 (no abuse of discretion in excusing juror who “put significant limitations on the cases where he would find the death penalty appropriate,” and who cited Hitler as someone who should be executed); Gregory, 158 Wn.2d at 814-15 (affirming excusal of juror who would not vote for the death penalty unless “it was a serial murder type of case”).

This case is virtually indistinguishable from Brown, Cross, and Gregory. Juror 280 said that she would impose the death penalty only if the person could be released and kill again or was a serial killer. She explicitly acknowledged that her personal “bar” that would have to be met for her to impose the death penalty was not the same bar set by the law.

As a result, the trial court did not abuse its discretion when it found that Juror 280 was substantially impaired in her ability to follow the court's instructions on the law. 53RP 39; Witt, 469 U.S. at 424.

Schierman implies that, because the trial court failed to discuss Juror 280's "demeanor, body language or any other factor other than her answers to the questions," the trial court's ruling does not merit deference. App. Br. at 60, 65. This argument is wrong in both fact and law.

First, the trial court specifically remarked upon Juror 280's demeanor. It characterized her as "very thoughtful in trying to answer all of defense counsel's questions," 53RP 40, described her opposition to the death penalty as "very strong," 53RP 39, and thanked her for sharing her "heartfelt views." 53RP 40.

Second, the claim that the trial court did not generally focus on "such subtleties" as demeanor is false. To the contrary, the trial court frequently made reference to the prospective jurors' demeanor, body language, and credibility during the 23 days of voir dire. E.g., 40RP 39-41 (describing Juror 70 as "articulate," "balanced," "concerned," and "thoughtful[.]" and explicitly mentioning her "demeanor"); 40RP 191-95 (describing Juror 84, in considering "the answers she gave and the way she gave them," as "wrestling with her conscience" and "engaged in serious reflection"); 48RP 147-50 (describing Juror 195 as "sincerely" and

“truthfully” “wrestling” with the questions, noting a pause she made in response to a particular question, and commenting that the court observed the juror and her demeanor “very closely”).³⁴

Third, the trial court is not required to put its reasons for excusing a particular juror on the record in order for its decision to be accorded deference. Witt, 469 U.S. at 430; Brown, 132 Wn.2d at 602 (observing that “the manner of the juror while testifying is oftentimes more indicative of the real character of his opinion than his words,” but that the juror’s manner “cannot always be spread upon the record”). The trial court is accorded deference precisely “because determinations of juror bias cannot be reduced to question-and-answer sessions which obtain results in the manner of a catechism,” but rather involve issues of whether the prospective juror’s answers should be believed. Witt, 469 U.S. at 423-24.

Because Juror 280 repeatedly expressed that she would vote to impose the death penalty only in limited circumstances, and would require a different burden of proof than that established by law, the trial court properly granted the State’s challenge for cause.

³⁴ Although only a few examples are provided here, the record is replete with dozens of the trial court’s references to the prospective jurors’ demeanors.

2. The Trial Court Did Not Abuse Its Discretion In Denying The Defense Challenges For Cause To Jurors 59 And 140.

Schierman also claims that the trial court erred by applying the wrong standard throughout voir dire to its evaluation of the defense challenges for cause, leading it to improperly deny his challenges to Jurors 59 and 140. But the trial court was correct to apply the Morgan standard, rather than the Witt standard, to Schierman's challenges for cause. This Court need not reach that question, though, because even if the trial court was incorrect about which standard applies, it explicitly ruled that it was also denying the challenges under the Witt standard advocated by Schierman. Under either standard, the court acted well within its discretion. And, as to Juror 59, that juror was excused prior to closing argument and never participated in deliberations, so any error regarding the denial of Schierman's challenge for cause was cured.

- a. The trial court properly used the Morgan standard to evaluate challenges for cause to capital punishment supporters.

Schierman argues that the trial court erred by applying the Morgan standard in ruling on his challenges for cause, instead of the Witt standard for which he advocated. But the fact that different standards apply to the trial court's assessment of challenges for cause is firmly grounded in Supreme Court caselaw. Moreover, it is immaterial that the standards are

“asymmetrical.” Each serves, in a different way, to protect a defendant’s right to an impartial jury by excluding jurors who are biased in favor of the death penalty and by preventing the State from excluding jurors who do not support, but could nonetheless vote for, capital punishment.

As an initial matter, Schierman’s contention that the trial court erred by using the incorrect standard “throughout” jury selection is immaterial to this Court’s analysis. Where a trial court erroneously denies a challenge for cause, but the defendant uses a peremptory challenge to remove that juror and is then convicted by an impartial jury, he has not been deprived of any constitutional right—even if he exhausts his peremptory challenges to obtain that impartial jury. United States v. Martinez-Salazar, 528 U.S. 304, 120 S. Ct. 774, 145 L. Ed. 2d 792 (2000); State v. Fire, 145 Wn.2d 152, 34 P.3d 1218 (2001). Accordingly, if this Court concludes that the trial court erred in applying Morgan rather than Witt to its evaluation of challenges for cause to death penalty supporters, it then must determine only whether the trial court abused its discretion in denying Schierman’s challenge to a juror who ultimately deliberated, not whether the trial court abused its discretion on any of the myriad challenges the trial court refused. Moreover, Schierman’s contention that he used every peremptory challenge on a juror whom he had challenged

for cause is inaccurate. App. Br. at 54-55. The record discloses exactly which jurors were peremptorily excused by each party. CP 7290-91.

An understanding of the Supreme Court's adoption of two different standards to safeguard a defendant's constitutional right to an impartial jury requires a thorough review of its jurisprudence on the topic. The Court first examined the appropriate standard governing challenges for cause to capital punishment opponents in the seminal case of Witherspoon v. Illinois, 391 U.S. 510, 88 S. Ct. 1770, 20 L. Ed. 2d 776 (1968). There, the Court addressed the application of an Illinois statute that excluded from service in capital cases any juror who had "conscientious scruples against capital punishment, or [who was] opposed to the same." Id. at 512 (quoting 38 Ill. Rev. Stat. ch. 38 § 743 (1959)). The Court invalidated this statutory scheme under the Sixth and Fourteenth Amendments, holding that "a sentence of death cannot be carried out if the jury that imposed or recommended it was chosen by excluding veniremen for cause simply because they voiced general objections to the death penalty or expressed conscientious or religious scruples against its infliction." Id. at 522. In reaching this holding, the Witherspoon Court said that only a prospective juror who "state[d] unambiguously that he would automatically vote against the imposition of capital punishment no matter what the trial might reveal" was excludable

for cause. Id. at 515 n.9 (emphasis added); see also id. at 522 n.21 (again referring to an automatic vote against the death penalty).

Over the next ten years, the Supreme Court repeatedly adhered to the Witherspoon standard when defendants raised claims that jurors with doubts about the wisdom of the death penalty had been excluded from their juries by State challenges for cause. E.g., Boulden v. Holman, 394 U.S. 478, 484, 89 S. Ct. 1138, 22 L. Ed. 2d 433 (1969); Maxwell v. Bishop, 398 U.S. 262, 264, 90 S. Ct. 1578, 26 L. Ed. 2d 221 (1970) (per curiam); Davis v. Georgia, 429 U.S. 122, 97 S. Ct. 399, 50 L. Ed. 2d 339 (1976) (per curiam); Lockett v. Ohio, 438 U.S. 586, 98 S. Ct. 2954, 57 L. Ed. 2d 973 (1978).

In 1980, the Supreme Court re-examined this jurisprudence in the context of Texas's capital sentencing scheme and jury selection process. Adams v. Texas, 448 U.S. 38. Writing for the Adams majority, Justice White—who had dissented in Witherspoon—described that case and its progeny as standing for the proposition “that a juror may not be challenged for cause based on his views about capital punishment unless those views would prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath.” Id. at 45. The Court then invalidated Adams's capital sentence, as jurors who opposed capital punishment had been excluded from service because the

imposition of the death penalty could “affect” their deliberations, rather than because the jurors were unwilling or unable to follow the court’s instructions and obey their oaths. Id. at 49-50.

Five years later, the Supreme Court decided Wainwright v. Witt, 469 U.S. 412. In that case, building on the language in Adams, the Court explicitly modified its holding in Witherspoon. Specifically, the Court noted that “the standard applied in Adams differs markedly from the language of footnote 21” of Witherspoon, which provided that a juror was excludable only if he would “automatically” vote against the death penalty. Id. at 421. The Court then identified several reasons to prefer the Adams standard over the Witherspoon standard: post-Furman and Gregg,³⁵ sentencing juries did not have as much discretion as they did when Witherspoon was decided; the “automatically” vote against the death penalty language in Witherspoon was dicta; and the Adams standard was more consistent with traditional reasons for excluding jurors. Id. at 421-23. The Witt Court then rejected the Witherspoon standard and reaffirmed the Adams standard: the trial court may exclude a juror challenged for cause only if “the juror’s views would ‘prevent or substantially impair the performance of his duties as a juror in accordance

³⁵ Furman v. Georgia, 408 U.S. 238, 92 S. Ct. 2726, 33 L. Ed. 2d 346 (1972) (invalidating capital punishment imposed under statutes that gave juries unfettered discretion); Gregg v. Georgia, 428 U.S. 153, 96 S. Ct. 2909, 49 L. Ed. 2d 859 (1976) (approving Georgia’s post-Furman statutory scheme for imposing capital punishment).

with his instructions and his oath.’” Id. at 424. Over the next several years, the Supreme Court applied the Witt standard to defendants’ claims that jurors had improperly been excused for cause by the State on the basis of those jurors’ opposition to the death penalty. E.g., Darden v. Wainwright, 477 U.S. 168, 106 S. Ct. 2464, 91 L. Ed. 2d 144 (1986); Gray v. Mississippi, 481 U.S. 648, 107 S. Ct. 2045, 95 L. Ed. 2d 622 (1987).

Critically important to understanding the evolution of the for-cause challenge standard throughout the Witherspoon-Adams-Witt line of capital cases is the fact that the Court’s reasoning applied only to jurors who opposed the death penalty. Although the Witt test is stated in neutral terms, the Court was only addressing—and had only ever addressed in its jurisprudence—the for-cause removal by the State of those jurors who did not support capital punishment. In fact, in the footnote appended to its “prevent or substantially impair” sentence in Witt, the Court wrote: “[W]e simply modify the test stated in Witherspoon’s footnote 21 to hold that the State may exclude from capital sentencing juries that ‘class’ of veniremen whose views would prevent or substantially impair the performance of their duties in accordance with their instructions or their oaths.” Witt, 469 U.S. at 424 n.5 (emphasis added).

Then in 1992, the Court turned its attention to the standard that should apply when the defendant, instead of complaining that a State’s

challenge for cause was improperly granted, complains that his own challenge for cause was improperly denied. Morgan v. Illinois, 504 U.S. 719. Justice White, again writing for the Court, concluded that “[a] juror who will automatically vote for the death penalty in every case” is not an impartial juror, and if “even one such juror is empaneled and the death sentence is imposed, the State is disentitled to execute the sentence.” Id. at 729 (emphasis added). This reversion to the Witherspoon standard to govern challenges for cause to supporters of capital punishment was not mere sloppy drafting; it was plainly intentional.

The language of Morgan itself makes clear that the Court was setting a different standard for evaluating challenges for cause depending on whether the jurors support their state’s capital punishment scheme or oppose it. Most significantly, throughout its opinion, and despite references to the Witt standard, the Court repeatedly and consistently said that the standard governing defense challenges was whether a juror would “automatically” vote to impose capital punishment upon conviction, i.e., the Witherspoon standard.³⁶ Id. at 726, 729, 733, 734, 735, 736, 738. By contrast, all references to the Witt standard in the opinion—that jurors could be excluded only if their views would prevent or substantially

³⁶ Indeed, in reaching its conclusion, the Morgan court characterized the issue as raising a “reverse-Witherspoon” question, not a reverse-Witt question. See, e.g., Morgan, 504 U.S. at 724, 731.

impair their duties as a juror in accordance with their instructions and oath—were limited to discussions of the standard governing challenges for cause aimed at jurors opposed to capital punishment. Id. at 728, 734-35. Further, Justice Scalia’s dissenting opinion explicitly observed that the majority’s holding created two standards, one for challenges to jurors strongly opposed to capital punishment, and one for challenges to jurors who strongly support it. Id. at 750 n.5. The majority opinion did not dispute this characterization.

In addition, following Morgan, cases and academics have acknowledged these differing standards. For instance, in Brown, 551 U.S. 1, the Supreme Court rephrased the Witt standard by altering its previously neutral language to insert a reference to anti-death penalty jurors.³⁷ Id. at 9 (“[A] juror who is substantially impaired in his or her ability to impose the death penalty under the state-law framework can be excused for cause; but if the juror is not substantially impaired, removal for cause is impermissible.” (emphasis added)). More explicitly, the Ninth Circuit has applied both standards in a single case to evaluate challenges for cause depending on whether the juror supported or opposed capital punishment. United States v. Mitchell, 502 F.3d 931, 954 (9th Cir. 2007) (applying the Morgan “automatic” standard in examining the court’s

³⁷ Brown appears to be the only case after its decision in Morgan in which the Supreme Court has substantively revisited either the Witt or the Morgan standard.

refusal to excuse for cause several jurors challenged by the defense); id. at 955 (applying the Witt “prevent or substantially impair” standard in examining the court’s excusal for cause of a juror challenged by the United States). The Georgetown Law Journal’s annual criminal procedure review describes the standards governing the two types of challenges as merely “similar.” Capital Punishment, 42 Geo. L.J. Ann. Rev. Crim. Proc. 845, 867-68 (2013) (describing the two standards and citing cases). See also Linda E. Carter et al., Understanding Capital Punishment Law 84-87 (3d ed. 2012) (describing the two standards and citing cases).

Schierman points to two cases in support of his contention that a uniform standard applies to for-cause challenges based on the prospective juror’s views regarding capital punishment. First, he cites Ross v. Oklahoma, 487 U.S. 81, and the Morgan court’s failure to modify or overrule it, as an example of the Court applying the Witt standard to a defense challenge for cause. App. Br. at 50-51. Ross represents the only occasion, prior to its decision in Morgan, that the Court examined a case in which the defendant complained that his for-cause challenge to a juror biased in favor of the death penalty was improperly denied. However, Ross addressed the issue of whether the defendant’s use of a peremptory challenge to strike a juror who should have been excused for cause implicated the defendant’s Sixth and Fourteenth Amendment rights to an

impartial jury. In concluding that it did not, the Court accepted Oklahoma's concession that the juror at issue should have been excused pursuant to Witt, although the Court itself said that the juror should have been excused pursuant to Witherspoon. Compare id. at 85 (describing concession) with id. at 83 (stating the issue in the case); see also id. at 84 (juror was "unequivocally . . . unwilling to follow the law during the penalty phase by considering a life sentence"); Morgan, 504 U.S. at 728 (juror in Ross "would vote to impose death automatically if the jury found the defendant guilty"). In any event, because the question of whether the juror should have been excused for cause was not at issue in Ross, any comment in that opinion as to which standard applies to a challenge to a death penalty supporter is dicta.

Second, Schierman points to a California case, People v. Whalen, 56 Cal. 4th 1, 25, 152 Cal. Rptr. 3d 673, 294 P.3d 915 (2013), that concludes that the analysis of a for-cause challenge "is the same whether the claim is the failure to exclude prospective jurors who exhibited a prodeath bias, or wrongful exclusion of prospective jurors who exhibited an antideath bias." But when the Whalen court made that statement, it offered no analysis, only citations to other California cases. Those cases all trace back to People v. Coleman, 46 Cal. 3d 749, 764-65, 251 Cal. Rptr. 83, 759 P.2d 1260 (1988), which concluded that the standards were

the same based on nothing more than the neutral language in Witt. Most importantly, Coleman predates the Supreme Court's decision in Morgan, which plainly indicated that the two standards were different.

Not only is it clear that the Supreme Court has adopted two different standards governing the excusal of jurors harboring differing views of capital punishment, but this approach is not at all “unfair” as Schierman claims. App. Br. at 49. Indeed, such an argument rests on a misunderstanding of the purpose of the two standards. The law does not create two different rights to exclude jurors, one for the defendant and one for the State. To the contrary, the Supreme Court has repeatedly reiterated that the Witt standard—far from granting the State a right to eliminate jurors who oppose capital punishment—is a limit on the State's ability to exclude those jurors. Adams, 448 U.S. at 47-48; Witt, 469 U.S. at 423 (describing the Adams standard as limiting the power of the State to exclude jurors to those who would “frustrate the State's legitimate interest in administering constitutional capital sentencing schemes by not following their oaths”); Gray, 481 U.S. at 658 (State may excuse only “those jurors who would ‘frustrate the State's legitimate interest in administering constitutional capital sentencing schemes by not following their oaths.’” (citation to Witt omitted)); Morgan, 504 U.S. at 731-32 (“Witherspoon conferred no ‘right’ on a State, but was in reality a

limitation of a State's making unlimited challenges for cause to exclude those jurors who 'might hesitate' to return a verdict imposing death. . . . Witherspoon constrained the State's exercise of challenges for cause.""). Instead, both standards are grounded in and vindicate the defendant's constitutional right to an impartial jury.

Thus, the Morgan standard provides the defendant a sword by which to eliminate all prospective jurors who would automatically vote to impose death upon his conviction. The Witt standard, by contrast, provides the defendant a shield to preclude the State from eliminating, via a challenge for cause, any prospective juror opposed to capital punishment unless he is substantially impaired in fulfilling his duties as a juror. Stated differently, the Morgan standard provides the capital defendant a right to exclude certain jurors; the Witt standard provides him a right to include certain other jurors. Thus, both standards act to secure the defendant's right to an impartial jury, rather than to provide the State a broader right to exclude jurors than that afforded the defendant. That these rights belong exclusively to the defendant cannot be seriously debated. An erroneous exclusion of a juror opposed to the death penalty or the erroneous inclusion of a death penalty supporter results in automatic reversal of the

death sentence. Gentry, 125 Wn.2d at 633 n.98; Morgan, 504 U.S. at 729, 739 n.11. By contrast, if a juror opposed to the death penalty is erroneously included or a juror who supports the death penalty is erroneously excluded, the State has no remedy.³⁸

Further, nothing in the caselaw discussed above precludes a trial court from more narrowly limiting the state's challenges for cause to those jurors who would "automatically" refuse to impose the death penalty, or from expanding defense challenges for cause to jurors beyond those who would "automatically" impose the death penalty, based on the statutory

³⁸ Not only does the State have no remedy for a court's erroneous decision to include a death penalty opponent on a jury, but the presence of that juror can have outsized consequences in states that have capital punishment schemes like those in Washington and Illinois, the source of both Morgan and Witherspoon. In our state, the death penalty may be imposed only if the jury unanimously agrees that the State has proven beyond a reasonable doubt that there are not sufficient mitigating circumstances to merit leniency. RCW 10.95.060(4), .080(1). If the jury does not unanimously agree—if even a lone juror disagrees—the result is not a hung jury, but a life sentence. RCW 10.95.080(2). Thus, a single anti-death penalty juror has absolute veto power over the judgment of the other jurors who would conclude that the State has met its burden of proof in the individual case. Because of this asymmetry of power, it was not unreasonable for the Supreme Court to settle on asymmetric standards to evaluate whether the trial court's decision on a challenge for cause based on the juror's views regarding capital punishment constituted an abuse of discretion. Indeed, the Court has repeatedly recognized in its jurisprudence the State's unique interests "in obtaining a single jury that could impartially decide all of the issues in [a capital] case," Morgan, 504 U.S. at 733 (quoting McCree, 476 U.S. at 180) (alteration in Morgan), and in seating "jurors who are able to apply capital punishment within the framework that state law prescribes," Brown, 551 U.S. at 9 (citing Witt, 469 U.S. at 416). Asymmetric standards thus protect the vital constitutional rights of a capital defendant to an impartial jury while also ensuring that the State may seat a jury that can adjudicate both guilt and punishment and carry out state law. Compare Morgan, 504 U.S. at 750-51 (Scalia, J., dissenting); but see id. at 734 n.8.

standard.³⁹ Rather, Witt and Morgan establish the constitutionally required boundaries that constrain a trial court's discretion in evaluating challenges for cause. Cf. State v. Deskins, 180 Wn.2d 68, 79, 322 P.3d 780 (2014) (distinguishing, in a different context, between what a trial court must do and what it may do).

Accordingly, the trial court correctly concluded that Morgan, not Witt, provides the constitutional framework for exercising its discretion in evaluating challenges for cause to jurors who support capital punishment. This Court need not reach this question, however, because even if the trial court was mistaken as to the proper standard, it did not err in denying Schierman's challenges to Jurors 59 and 140. In both cases, the trial court refused Schierman's challenge under both the Morgan standard and the Witt standard. Further, Juror 59 was later excused as unfit to serve, so he never deliberated on Schierman's fate.

b. The trial court did not abuse its discretion in denying Schierman's challenge to Juror 140.

Schierman contends that the trial court erred in refusing to dismiss Juror 140 for cause. But the juror's views did not support a challenge for

³⁹ RCW 4.44.150-.190 provides a unitary standard for determining whether a juror should be excused for cause. In particular, a challenge for cause should be granted when the prospective juror has a state of mind regarding the action or either party that "satisfies the court that the challenged person cannot try the issue impartially and without prejudice to the substantial rights of the party challenging," and the court is satisfied that the juror cannot "disregard such opinion and try the issue impartially." RCW 4.44.170(2), .190. Schierman did not raise below, and does not argue here, that the trial court's application of the Witt and Morgan standards ran afoul of chapter 4.44 RCW.

cause. Juror 140 would not automatically vote for capital punishment if Schierman were convicted, so she was not excludable under Morgan. Under Witt, which the trial court explicitly referenced, Juror 140's ability to carry out her responsibilities as a juror was not substantially impaired.

In her juror questionnaire, when asked about her opinions regarding the death penalty, Juror 140 wrote, "I think that they should get it if convicted." CP 21508. With respect to life imprisonment without parole, she expressed a similar opinion: "That would be fine to[o] as long as they get help to better themselves + know they did wrong." CP 21508. This statement was consistent with her opinions about the criminal justice system generally, of which Juror 140 wrote, "We need more ways for people to get better."⁴⁰ CP 21504. When asked what she would want to consider in deciding between the death penalty and life in prison without parole, Juror 140 answered simply, "All the facts." CP 21509.

During individual voir dire, Juror 140 adhered to these answers.

45RP 28-29. When asked by Schierman whether the death penalty was the only appropriate penalty under the facts of the case, Juror 140 said that she could support life in prison "if there is some sort of a program, you know, in prison, that betters them in some way." 45RP 31. When led

⁴⁰ Juror 140 wrote this statement in response to a question asking her opinion of the "three best things about our criminal justice system today." CP 21504 (emphasis added). It appears the juror misread the question, as she provided both this answer regarding the need for treatment and also wrote "[o] many crimes." CP 21504.

further by defense counsel, she agreed that capital punishment would be “the only appropriate penalty for a guilty murderer like that.” 45RP 32-33 (quoting defense counsel’s question).

After being further informed about the legal principles applicable to a capital case, however, Juror 140 refined her views. She agreed that, prior to being in court that day, she had not understood that the guilt and penalty phases of the trial were separate, that the penalty phase involved the presumption of a life sentence, and that the burden of proof was on the State to show beyond a reasonable doubt that there were not sufficient mitigating circumstances to warrant leniency. 45RP 34-36. When provided additional explanation about these principles, Juror 140 stated that she thought she could follow the court’s instructions on the law, because “there might be hope” for Schierman. 45RP 36-37. She said that she could consider the sentence of life in prison “if he could better himself, if he really feels bad for what he did.” 45RP 37-38. In other words, Juror 140 was able to consider facts about Schierman—remorse and the potential for self-improvement—in determining the appropriate punishment. Further, the juror expressed that she was open to considering fairness, mercy, and mitigating circumstances, as discussed in the court’s instructions, “because we don’t know the whole story yet. . . . [Schierman is] still a person, he might have realized that he did something really

wrong, he wants to change.” 45RP 39. Juror 140 summarized her responsibility as a juror as “listening” and learning the facts, because “I can’t go with what my heart tells me, I’ve got to listen to the facts of the whole thing and be open, you know.” 45RP 39-40.

The trial court denied Schierman’s challenge for cause to Juror 140. 45RP 48. Applying the Morgan standard, the court observed that Juror 140 never indicated that she would automatically impose the death penalty. 45RP 45. Rather, she premised her initial position in support of the death penalty on the proposition that a defendant “had thought about it and really planned it,” 45RP 32, an aggravating circumstance beyond the requirements of premeditation. RCW 9A.32.030(1)(a) (defining murder in the first degree); RCW 9A.32.020 (requiring premeditation to occur over “more than a moment in point of time”). Further, Juror 140’s original strong support for capital punishment was clearly influenced by defense counsel’s questions, which suggested that the only facts about the case were that Schierman committed aggravated murder by killing two women and two children. Compare 45RP 30-33 (defense counsel’s questioning suggests that there are no mitigating circumstances) with 45RP 35 (Juror 140 agrees that defense counsel’s phrasing colored her answers). When asked more nuanced questions, Juror 140 indicated that she could apply the jury instructions to her consideration of the appropriate penalty,

45RP 36, she would want to hear all of the facts before she decided on a sentence, 45RP 38, she was open to the idea of mitigating circumstances, fairness, and mercy, 45RP 39, and she would need to base her decision on the facts rather than what her heart tells her, 45RP 39-40. The trial court's determination that Juror 140 would not automatically vote for the death penalty was not an abuse of discretion.

Moreover, even if the Witt standard were the appropriate standard to apply, the trial court did not abuse its discretion in denying Schierman's challenge for cause, because the court also explicitly found that Schierman failed to show that Juror 140 was substantially impaired.⁴¹ If Witt applies to defense challenges for cause, then just as "those who firmly believe that the death penalty is unjust may nevertheless serve as jurors in capital cases so long as they state clearly that they are willing to temporarily set aside their own beliefs in deference to the rule of law," Lockhart v. McCree, 476 U.S. 162, 176, 106 S. Ct. 1758, 90 L. Ed. 2d 137 (1986), those jurors who strongly support capital punishment may also serve as jurors so long as they state clearly that they are willing to set aside their own beliefs in deference to the rule of law. Juror 140 did just that. As set forth above,

⁴¹ E.g., 45RP 44-45 ("[E]ven under the Witt v. Wainwright standard of substantial impairment, this court does not believe this juror reaches that standard . . ."); 45RP 48 ("In the court's view, this juror is not disqualified under either of those standards, and as the court is clearly applying the standard from Morgan v. Illinois, I'm going to deny the challenge for cause on both grounds, both, under Witt and under Morgan.").

she said that she would apply the jury instructions, would want to hear all the facts, and was open to mitigation, fairness, and mercy. 45RP 36-39. Most tellingly, when asked if she had any concerns about her ability to follow the court's instructions of law, Juror 140 stated, "Not really. It's just listening, listening and the facts, you've got to have the facts. I can't go with what my heart tells me, I've got to listen to the facts of the whole thing and be open, you know." 45RP 39-40 (emphasis added). In the face of this sworn answer from Juror 140, coupled with the trial court's ability to evaluate the juror's demeanor, the court did not abuse its discretion in concluding that Schierman had failed to meet his burden to show that the prospective juror was substantially impaired in her ability to carry out the duties of a juror.

- c. The trial court properly denied Schierman's challenge for cause to Juror 59, and because Juror 59 was excused before deliberations, any error was cured.

The impartiality of a jury is determined by examining the jurors who deliberated, not those who were excused. Ross, 487 U.S. at 86. Thus, whether a biased juror was excused for cause or by peremptory challenge, if no biased juror sat, there was no constitutional violation. Id. at 88; Martinez-Salazar, 528 U.S. 304; accord Fire, 145 Wn.2d at 158-59. The rule can be no different if the juror is removed for other reasons.

Here, Juror 59 was dismissed by the trial court before closing arguments because he was chronically late. 98RP 5-7. Thus, even if the trial court should have excused Juror 59 for cause, the juror's removal for a different reason cures any error.

But the trial court did not err in refusing Schierman's for-cause challenge to Juror 59. In his juror questionnaire, Juror 59 listed the three biggest problems facing the criminal justice system today as "untruthful statements, deciding whether a possible mental condition constitutes a different charge, and evidence intentionally altered, removed, or created to influence an outcome." CP 21396. He opined that the three best things about our criminal justice system are: "Trial by jury of your peers. Right to a fair trial, presumed innocent until proven guilty." CP 21396. When asked about his views on the death penalty, Juror 59 wrote, "I believe it is a fair and appropriate punishment, and/or solution." CP 21400. He explained that he had "limited knowledge on how much [capital punishment] is used," so had no strong opinion on whether it was used too often, too seldom, or about right (although he checked the "About right" box). CP 21400. When asked his views on life imprisonment without the possibility of release or parole, Juror 59 wrote, "With circumstances such as mental disorders and possible other factors, I am for it." CP 21400. In deciding between the two penalties, the juror indicated that he would want

to consider “[a]ll aspects of reasoning, mental disorders, and influences.” CP 21401. Finally, in response to a question about how he would handle a situation in which an instruction of law conflicts with his personal beliefs or opinions, Juror 59 responded, “Follow the instruction. The judge[?]s knowledge on law and punishment far exceeds my own.” CP 21401.

Juror 59’s oral answers during individual voir dire echoed the open-mindedness about capital punishment reflected in his questionnaire responses. He confirmed he maintained his views. 44RP 89. In response to defense questioning about whether the death penalty would be appropriate in a situation of “four counts of aggravated, intentional, premeditated murder, two women/two children,” Juror 59 responded, “From where I stand right now, yes.” 44RP 92-93. However, he acknowledged that there may be “circumstances to merit leniency . . . extenuating circumstances” such as “[m]ental disorders that were actually medically recognized,” that could support a vote for a life sentence.⁴²

44RP 94. Although he supported the death penalty, he told the prosecutor, “I understand that there probably are circumstances that would justify leniency. That’s the only thing that is more of an unknown, but I’m saying—keeping the option open, I’m not going to be absolutely

⁴² In fact, Juror 59 harbored a favorable view of mental health professionals generally, and he and others close to him received treatment for mental disorders. CP 21393, 21398.

bullheaded in that direction.” 44RP 97. Upon further questioning by the State, he said that he was open to the possibility of mitigating circumstances generally. 44RP 98. Of his response in the questionnaire that he would want to consider “all aspects of reasoning, mental disorders, and influences” when deciding between the penalties, he indicated that he assumed that the items he listed were the kind of mitigating circumstances that the judge meant. 44RP 100.

More generally, Juror 59 articulated that he was capable of following the law, even if it conflicted with his opinions on the death penalty. He said, “I handle extreme circumstances very well, I can think very well, from a logical standpoint, think only with my head, without opinions and emotions and feelings getting involved in that[.]” 44RP 94-95. He reiterated that he “would have to go off of what the laws would mitigate or support for that. . . . [T]he way I see it is it’s about even if my opinion might go in one direction, if it is proof that as far as what the law states as what’s acceptable and what’s not, I would have to go off of what the law would say.” 44RP 98.

The trial court did not abuse its discretion when it denied Schierman’s challenge for cause to Juror 59. Under the Morgan standard, the court reasonably found that Juror 59 would not automatically vote for the death penalty upon conviction. 44RP 106-09. To the contrary, Juror

59 would not be “bullheaded in that direction,” but would consider “all aspects of reasoning, mental disorders, and influences” in coming to a decision. 44RP 97; CP 21401. Schierman does not contest this finding.

Further, even if the Witt standard applies, the trial court explicitly referenced that standard in making its ruling, saying, “Moving to the Witt/Wainwright standard, I don’t find that [the juror’s] views about capital punishment, assuming for the sake of discussion this is the appropriate standard for this juror, I don’t find that his views about capital punishment, in favor of it, impair substantially or prevent his performing his duties as a juror in accordance with his instructions and his oath.” 44RP 108. This conclusion was not an abuse of discretion. Juror 59 had repeatedly indicated that he would follow the law, expressed that the court knew far more about the law than he did, and stated that he understood he needed to set his opinions, emotions, and feelings aside and make a logical decision based on the evidence. This is exactly what the Witt standard, if applicable, requires. Compare McCree, 476 U.S. at 176. The trial court did not abuse its discretion.⁴³

⁴³ Schierman again attacks the court’s failure to consider the prospective juror’s demeanor. But as discussed above in section F.1, the trial court is not required to provide a reason for its ruling on the record in order to be accorded deference. Moreover, the trial court in fact provided a lengthy explanation of its decision, and commented that it found Juror 59 to be “fully candid.” 44RP 106-09.

G. ALLEGED CUMULATIVE ERROR IN THE SELECTION OF THE JURY DID NOT DENY SCHIERMAN A FAIR TRIAL.

Schierman contends that cumulative errors in selecting a jury denied him his right to a fair trial by an impartial jury. He is incorrect.

Under the cumulative error doctrine, this Court may overturn a conviction where the combined effect of errors, each harmless in its own right, worked to deny the defendant a fair trial. State v. Weber, 159 Wn.2d 252, 279, 149 P.3d 646 (2006). “The doctrine does not apply where the errors are few and have little or no effect on the trial’s outcome.” Id.

Here, as argued above, there was no error. Even if there was, the touchstone for evaluating jury selection is whether a fair and impartial jury was seated. Morgan, 504 U.S. at 726-27. The jury’s impartiality is judged by examining the jurors who deliberated, not those who were excused. Ross, 487 U.S. at 86. The only juror who deliberated that Schierman identifies as biased was Juror 140. The trial court was well within its discretion to deny Schierman’s challenge for cause to that juror. There is no evidence or claim that any of the other deliberating jurors were biased.

Further, in his brief argument regarding cumulative error, Schierman mentions that “the vast majority of the jurors summoned did not appear for trial.” App. Br. at 66. Schierman has predicated no claim

of error on this statement, does not support the assertion with any evidence,⁴⁴ and makes no argument that he should be entitled to any relief. This Court should disregard the statement.

There was no error in seating Schierman's jury. Any possible error was inconsequential to the outcome of the case. Cumulative error in the selecting of Schierman's jury does not warrant a new trial.⁴⁵

H. SCHIERMAN'S RIGHT TO DUE PROCESS WAS NOT VIOLATED BY THE PROSECUTOR'S ARGUMENT THAT HE ACTED WITH SEXUAL MOTIVATION.

Schierman claims that his Fourteenth Amendment right to due process⁴⁶ was violated when the prosecutor made prejudicial statements unsupported by the record, and when the court allowed the State to argue a theory of sexual motivation after the State misled the defense into

⁴⁴ Wheeler indicated in his declaration that 604 jurors of the 3,000 summoned appeared as directed. CP 23712. However, numerous jurors were excused for hardship or as statutorily unqualified to serve. CP 23712. Wheeler does not quantify the number of jurors so released, but a review of the 1340 pages of documentation attached to his declaration establishes that the number was substantial. CP 23741-25089. The first ten pages alone show the excusal of 55 prospective jurors for hardship. CP 23741-50.

⁴⁵ Schierman also states, "These errors also led to an arbitrary and capricious death penalty in violation of the Eighth Amendment." App. Br. at 67. Schierman does not include an Eighth Amendment violation in his assignments of error relating to jury selection, and his statement is unsupported by argument or citation to the record or to any authority. This argument is waived. Goodman, 150 Wn.2d at 781-82.

⁴⁶ Schierman does not raise a separate claim under the Washington constitution in his assignments of error. In argument, he makes passing reference to the Washington constitution, but makes no suggestion that its provisions bestow greater protections on a criminal defendant than the federal constitution does. App. Br. at 76. In the absence of such an argument accompanied by analysis pursuant to State v. Gunwall, 106 Wn.2d 54, 720 P.2d 808 (1986), this Court does not independently analyze the Washington constitutional claim. State v. Lee, 135 Wn.2d 369, 387, 957 P.2d 741 (1998).

believing that the same would not be an issue at trial. But the State neither committed misconduct in closing nor misled the defense.

1. Nothing In The Prosecutor's Closing Argument Constituted Misconduct Or Warrants Reversal.

Schierman argues that the prosecutor improperly argued inferences that were not supported by the record. The State understands this claim to be one of prosecutorial misconduct.⁴⁷ The prosecutor's argument discussed evidence admitted in the trial, suggested reasonable inferences to be drawn therefrom, and connected that evidence to motive. Schierman did not object. He has failed to demonstrate either that the prosecutor committed misconduct or that the argument was flagrant and ill-intentioned, and evinced such enduring prejudice that there was a substantial likelihood that the outcome of the case would have been different. Schierman's claim is without merit.

A conviction should be reversed for prosecutorial misconduct when a defendant demonstrates both improper conduct and resulting prejudice. State v. Russell, 125 Wn.2d 24, 85, 882 P.2d 747 (1994). To determine whether a prosecutor's closing argument was improper, a

⁴⁷ Schierman never uses the words "prosecutorial misconduct," nor does he provide this Court the proper standard to evaluate such a claim. But the heading describing this part of his argument refers to the prosecutor. All of the cases he cites, State v. Jones, 144 Wn. App. 284, 183 P.3d 307 (2008), Weber, 159 Wn.2d 252, State v. Rose, 62 Wn.2d 309, 382 P.2d 513 (1963), and State v. Boehning, 127 Wn. App. 511, 111 P.3d 899 (2005), address claims of prosecutorial misconduct. The State thus surmises that Schierman is raising a claim of prosecutorial misconduct.

reviewing court must examine the entire argument, the issues in the case, the evidence addressed in the argument, and the court's instructions to the jury. Russell, 125 Wn.2d at 85-86; State v. Graham, 59 Wn. App. 418, 428, 798 P.2d 314 (1990). A defendant is prejudiced if a substantial likelihood exists that the misconduct affected the jury's verdict. State v. Belgarde, 110 Wn.2d 504, 508, 755 P.2d 174 (1988); State v. Neslund, 50 Wn. App. 531, 561-62, 749 P.2d 725 (1988).

Even if a defendant was prejudiced by prosecutorial misconduct, however, defense counsel's failure to object constitutes waiver. Russell, 125 Wn.2d at 86. In the absence of an objection, a conviction will not be reversed for prosecutorial misconduct unless the misconduct was so flagrant and ill-intentioned that it evinces an enduring and resulting prejudice that could not have been obviated by a curative instruction or other action. State v. Stenson, 132 Wn.2d 668, 719, 940 P.2d 1239 (1997); Belgarde, 110 Wn.2d at 507; Russell, 125 Wn.2d at 86. Counsel for the defendant may not remain silent, hoping for a favorable verdict, and then claim misconduct for the first time on appeal. Russell, 125 Wn.2d at 93.

Here, Schierman claims that "the prosecutor was reaching to draw sexual conclusions from testimony that simply did not support it." App. Br. at 75. The prosecutor's only substantive discussion of motive

during closing argument spanned fewer than three pages in the middle of a lengthy argument.⁴⁸ 100RP 77-79. He began by pointing out that motive is not an element of the crime that the State had to prove. 100RP 77. He then marshalled the evidence that tended to show motive: Schierman's mind was on sex in the hours before the murder, as he was engaging in sexual banter with his friends and sending sexually charged emails; Alla Botvina's underwear and bras had been strewn throughout her bedroom, Schierman's point of entry to the house; Olga's body was found naked; Lyubov's body was found naked except for a tank top, which was pushed up over her breasts; and the back of Schierman's neck had a ligature marking on it that corresponded to his necklace, which had Olga's DNA on it—making it likely that the injury was inflicted when Schierman was in a face-down, prone position over her. 100RP 77-79. The prosecutor concluded this section of his argument by stating, "We may never know the motive in this case, but we do know what the evidence is." 100RP 79.

Schierman made no objection to this portion—or any portion—of closing argument, nor did he raise any objections at a later time. Thus, the closing argument is evaluated to determine whether any impropriety was flagrant and ill-intentioned, causing Schierman enduring prejudice that

⁴⁸ The State's entire closing argument, not including rebuttal, spanned about 85 pages. 100RP 28-113. It was over 90 minutes long. 100RP 102 (court advises the prosecutor he's been arguing for 90 minutes). Rebuttal spanned another 13 pages. 100RP 188-201. The question of motive was not readdressed by the State during rebuttal argument.

affected the jury's verdict and could not have been obviated with a curative instruction.

The argument was not improper. The prosecutor's summary of the evidence was accurate. Sean Winter, Schierman's neighbor and Kinsey's roommate, testified that when he moved in 17 days earlier, Schierman asked whether there were any good-looking women in the neighborhood, and specifically referenced the blond woman across the street. 71RP 84-85, 163-64. He also stated that he, Isaac Way, and Schierman had engaged in "locker room" talk in the hours preceding the murder, describing their conversations as referencing a pornographic movie and a blow-up doll, among other comments.⁴⁹ 71RP 90, 169-70; 72RP 52-54, 65-66. And, at some point that evening, Schierman had made a sexual joke about the woman across the street, referencing her by speaking with a Russian or Eastern European accent. 71RP 104-07; 72RP 38-40, 54-58. Evidence was also introduced of emails Schierman had been sending and receiving in the hours before the murders; they referenced having sex at work and similar topics. 84RP 29-39.

⁴⁹ Schierman's only objection to this line of questioning came after the substance was already in evidence. He made a single objection as to relevance and hearsay when Winter was asked about the specifics of a particular joke that Schierman had made. 72RP 66. The objection was overruled, and Schierman does not assign error to that ruling.

Several witnesses testified that women's undergarments were strewn on the floor of the basement bedroom, usually occupied by Alla. 62RP 101-03, 112-16; 68RP 59-63, 143-44; 69RP 102-06; 70RP 161-62; 71RP 69-70; 81RP 31-33; 86RP 152, 186-87; 89RP 32; Ex. 33I, 33J. That was likely where Schierman entered the house. 62RP 86-88, 92-93; 69RP 57; 71RP 21, 49; 86RP 95-96; 90RP 37-38.

Dr. Harruff, the medical examiner, testified that, at the crime scene, he observed that Olga's body was partially under Lyubov's body. 65RP 85-87, 90-94, 98, 155; Ex. 64F. When he saw Olga's body at the scene, it was unclothed. 65RP 105-06. No clothing was found at the autopsy either. 65RP 121; 66RP 55. At the scene, Harruff also noted that Lyubov's body was largely naked, with only a single item of clothing on her top that was pushed up over her breasts.⁵⁰ 65RP 156-58; Ex. 68B. Further, pajama bottoms that Lyubov had been wearing shortly before the murders, and a piece of a bra, were found in the microwave in the kitchen with blood from Lyubov and Justin on them, indicating that someone had removed them from her body. 61RP 44-45; 74RP 23-25, 162-70; 75RP 4-18; 87RP 89-90; 90RP 36, 40-42, 47-49, 81, 88; Ex. 237KK.

⁵⁰ By contrast, the remains of pajamas and underwear were recovered from the undersides of Justin's and Andrew's bodies. 66RP 31-32, 35, 42, 44.

About two days after the murders, Corporal Goguen saw and photographed an injury to the back of Schierman's neck that looked like scratches and a ligature mark. 73RP 103-13; Ex. 121H, 121I.⁵¹ Sean Winter saw Schierman wearing a necklace before the murders, and it appears on the video of Schierman at the AM/PM shortly after. 71RP 168; Ex. 186 (CAM 01 2:00-2:44). The necklace was recovered from Schierman's property, and was available for the jury to view. 87RP 81-82. It had debris in it that appeared to be skin tissue. 75RP 30-31; 77RP 55-62; Ex. 132. The necklace was analyzed to develop any DNA profiles. The major profile was matched to Schierman, including the portions that had skin tissue in them; a small portion of the DNA—found only in the wash from one section of the necklace—was compatible with Olga's. 75RP 27-42; 77RP 18.

In closing argument, the State is accorded wide latitude to argue the evidence and reasonable inferences from that evidence. State v. Dhaliwal, 150 Wn.2d 559, 577, 79 P.3d 432 (2003); Brown, 132 Wn.2d at 565. Schierman challenges two inferences: the characterization of the ligature mark on Schierman's neck and how it was inflicted, and the

⁵¹ In the photos depicting the injuries to his neck, Schierman is wearing the necklace in question. The pattern of links in the necklace appears to match the ligature mark.

suggestion that Schierman was motivated by lust. Both of the inferences that the prosecutor drew were proper.

With respect to the ligature mark, as summarized above, the officer who observed and photographed the injury described it as a ligature mark. Its pattern matches that of Schierman's necklace, which the jury could view and assess for itself. The ligature mark was high on Schierman's neck, far above where a necklace would normally rest, and mostly in a horizontal plane—it could not have been inflicted by a person pulling downward on the necklace while Schierman was in an upright position. Had Schierman been prone, facing downwards over Olga, however, the necklace would naturally have slid farther up his neck and been dangling downwards, both aligning with the documented injury and allowing Olga easy access to grab at it. The necklace had chunks of flesh in it, also consistent with the necklace causing an injury to Schierman's neck. And, the flesh was far more likely to be Schierman's than Olga's, both because it was skin and not blood, and because Schierman's DNA was present in substantially larger quantities than Olga's. Had the skin been Olga's, one would have expected the lab to have been able to develop a more complete genetic profile of Olga from the necklace than it did. Although Schierman complains that no expert supported the State's theory, he fails to explain

why expert testimony was needed⁵²; the conclusion urged by the State was obvious from the admitted evidence, and was based on a combination of admitted expert testimony, a visual assessment of the evidence, and lay experience with how necklaces fit around a person's neck, rather than on any "scientific, technical, or other specialized knowledge." ER 702. In short, the prosecutor's inferences about how the ligature mark got on Schierman's neck were based on the admitted evidence, and were reasonable, common-sense inferences from that evidence.

With respect to the inference that Schierman was motivated by lust, this was also an obvious inference from the record. It is well established that motive is relevant to establish the element of premeditation. State v. Pirtle, 127 Wn.2d 628, 644, 904 P.2d 245 (1995). Accordingly, the evidence rules permit the admission of even prior crimes or bad acts in order to establish motive, even though motive is not an element of the crime. ER 404(b); State v. Mee, 168 Wn. App. 144, 155-57, 275 P.3d 1192 (2012) (citing cases). Here, of course, all of the evidence cited by the prosecutor was admitted as res gestae evidence of

⁵² The DNA expert did explain that he divided the necklace into portions to look for DNA because, if a person were to grab a necklace worn by another person, the grabber would be expected to leave DNA on only that portion of the necklace she grabbed, most likely whichever portion was dangling in front. 75RP 29-30.

the crime itself, not pursuant to ER 404(b): Schierman's state of mind immediately before the murders, the use of underwear to start the fires, the removal of clothing from Olga and Lyubov, and the likelihood that Schierman was prone above Olga while she was still alive and fighting for her life. In fact, the evidence of Olga and Lyubov's naked and mostly naked bodies was powerful evidence standing alone of Schierman's motive in committing the offenses. The trial court agreed. 59RP 147-49.

Evaluating the prosecutor's entire argument, the issues in the case, the evidence addressed in the argument, and the court's instructions to the jury, this Court should conclude that the prosecutor's closing argument was not improper. It addressed an issue in the case: motive as it pertains to the element of premeditation. It discussed the evidence admitted in the case and drew reasonable inferences from that evidence.

Even if the prosecutor's argument was somehow improper, Schierman has failed to demonstrate flagrant or ill-intentioned conduct resulting in enduring prejudice to Schierman. The evidence at issue was all admitted without objection. The court explicitly advised the parties that the State's theory was supported by the evidence, and did not prohibit the State from making the argument. 59RP 147-50. The prosecutor did

not appeal to the passions or prejudices of the jury.⁵³ Instead, he merely marshalled the evidence relevant to motive and left it at that. The prosecutor did not even utter the word “sex” except when referencing the “sex party,” 100RP 78, did not suggest that Schierman’s engagement in “locker room talk” reflected on his character, 100RP 78, did not claim that Schierman committed rape or another sexual assault, and did not even characterize what motive could be drawn from the evidence, leaving the jury to do so for itself, 100RP 79 (“We may never know the motive in this case, but we do know what the evidence is.”). The closing argument was not flagrant and ill-intentioned.

And, had Schierman objected and such objection been reasonably warranted, the trial court could have cut off the argument early, or instructed the jury to disregard it.

The trial court instructed the jury that it was its responsibility to decide the facts of the case, including the credibility of witnesses and the weight to be given to the evidence. CP 7822-23. It also told the jury:

The lawyers’ remarks, statements, and arguments are intended to help you understand the evidence and apply the law. It is important, however, for you to remember that

⁵³ In fact, the prosecutor called the jury’s attention to the court’s instruction that the jury must not allow itself to be influenced by sympathy or prejudice, 100RP 110 (“Here’s what I’m asking. I want you to keep in mind that last sentence of jury instruction number one. You must reach your decision based on the facts proved to you, you don’t need sympathy or prejudice or personal preference here, just based on the facts, and that’s what juries do and that’s what they’ve been doing for hundreds of years.”).

the lawyers' statements are not evidence. The evidence is the testimony and the exhibits. The law is contained in my instructions to you. You must disregard any remark, statement, or argument that is not supported by the evidence or the law in my instructions.

CP 7824. Further, the court told that jurors that they

are officers of this court. You must not let your emotions overcome your rational thought process. You must reach your decision based on the facts proved to you and on the law given to you, not on sympathy, prejudice, or personal preference. To assure that all parties receive a fair trial, you must act impartially with an earnest desire to reach a proper verdict.

CP 7825. Jurors are presumed to follow the court's instructions. State v.

Lough, 125 Wn.2d 847, 864, 889 P.2d 487 (1995).

Schierman has failed to demonstrate that he was unfairly prejudiced, or that any lingering prejudice could not have been cured by a timely objection or an additional jury instruction. Nor, in light of the overwhelming evidence of guilt described elsewhere, e.g., section Q.1, was there a substantial likelihood that any misconduct affected the verdict.

Schierman's citation to House v. Bell, 547 U.S. 518, 540-41, 126 S. Ct. 2064, 165 L. Ed. 2d 1 (2006), is unavailing. In that case, the Supreme Court determined not that evidence of sexual contact—later determined to be wrong—was unfairly prejudicial, but that it was material to the defendant's guilt or innocence, even though sexual motive was not

an element of the offense. In short, Schierman's citation to House proves the State's point—evidence of sexual motive is highly probative.

Similarly, Schierman's contention that crimes committed with a sexual motivation are considered more heinous does not advance his cause. Evidence of motive is relevant and highly probative. Schierman never argued to exclude the evidence at issue on the basis that it was irrelevant or more prejudicial than probative, CP 7198-7211; 59RP 126-33, 141-43, and does not assign error to the admission of any of the evidence at issue in this argument. To the extent that that is his argument, he articulates no theory under which the evidence should have been excluded, and this Court should not reach the question.⁵⁴ Goodman, 150 Wn.2d at 781-82. That the State suggested as a motive for committing the crimes that Schierman was sexually interested in Olga or Lyubov could hardly have made the actual crimes committed—the brutal knife attacks on four unarmed people, including two young children, in the middle of the night—any more heinous. And to the extent that the jury was convinced of a sexual motive for committing the crimes, it was entitled to consider that motive in determining whether the State had proved beyond

⁵⁴ Schierman provides no standard under which to address his single-sentence mention of the Eighth Amendment and article I, section 14, App. Br. at 76, neither of which is referenced in his assignments of error or issue statements related to this claim. Instead, he mentions only the Fourteenth Amendment guarantee of due process. App. Br. at 2. The Court thus should not consider any Eighth Amendment claim arising out of these facts either.

a reasonable doubt that there were insufficient mitigating circumstances to merit leniency. RCW 10.95.060(4); Pirtle, 127 Wn.2d at 666 (nonstatutory aggravating factors that the jury may consider in sentencing include “evidence that would have been admissible at the guilt phase” (citing State v. Bartholomew, 101 Wn.2d 631, 642, 683 P.2d 1079 (1984) (Bartholomew II)). There was no error and no likelihood that the prosecutor’s argument regarding Schierman’s motive, even if error, affected the verdict.

2. Schierman’s Right To Due Process Was Not Violated When The State Did Not Explicitly Articulate Its Theory Of The Case Prior To Trial.

Schierman argues that he was denied due process because the State and the trial court misled the defense regarding the State’s theory of the case. But the State did not mislead Schierman, and it was not required to articulate its theory of the case prior to trial. Moreover, the trial court did not err in permitting the theory to be argued. Reversal is unwarranted.

Schierman’s claim of error is predicated on the assertion that the State and the trial court misled him. This is factually and legally insupportable. The only statement that Schierman points to as misleading was a stipulation—offered by the State in its opposition to Schierman’s motion to independently test vaginal swabs from Olga and Lyubov for DNA to show he did not rape them—that there was no physical evidence

of sexual assault. CP 4449 (“[T]he State will stipulate that there is no physical evidence of sexual assault of any of the victims.” (emphasis in original)). At no time that Schierman has identified or the State has found did the prosecutor suggest to the defense that Schierman’s motive for the crime or his sexual interest in the adult victims would not be argued.

Instead, as jury selection drew to a close, the State filed a document addressing which scene and autopsy photographs it intended to offer at trial and why, in response to the trial court’s order. CP 7226-49; 33RP 3. In response to that filing, Schierman moved to dismiss the jury panel. CP 7195-7211; see also 58RP 3-5; 59RP 126-33. In support of his motion, Schierman contended that the State had disclosed new evidence regarding sexual motivation in its filing (specifically new expert opinions), noted that the State had not sought to introduce any evidence of sexual motivation pursuant to ER 404(b), argued that the State had untimely disclosed the allegation of an aggravating circumstance, and complained that the jury had not been voir dired on the topic of sexual crimes. 59RP 126-30. The trial court denied the motion. 59RP 143-50.

In fact, the filing regarding the photographs contained no new evidence that was admitted at trial. The only possibly new evidence was a suggestion by Dr. Harruff that the bodies of the women were posed. 59RP 143-47. This evidence was not offered at trial.

Further, no motion pursuant to ER 404(b) was required. Evidence Rule 404(b) governs the admission into evidence of “other crimes, wrongs, or acts.” The State was not offering evidence of other crimes, wrongs, or acts. Rather, it was using evidence of the crime itself—Schierman’s state of mind immediately before the murders, the underwear in Alla’s bedroom, the nude state of the victims’ bodies, and the nature of the injury Schierman suffered while committing the crimes—to argue motive. And, despite having full knowledge of all of the evidence that the State ultimately offered at trial on this issue, Schierman himself made no pretrial motion to exclude any of it.

A suggestion that Schierman’s right to due process was violated because the State did not timely disclose its theory of sexual motivation is also without foundation. A criminal defendant is constitutionally entitled to notice of the charges against him. E.g., Gray v. Netherland, 518 U.S. 152, 167, 116 S. Ct. 2074, 135 L. Ed. 2d 457 (1996). As the State never charged Schierman with having committed the offenses with a sexual motivation, as defined and provided by RCW 9.94A.835, he was not denied such notice. In contrast, a criminal defendant is not constitutionally entitled to notice of the evidence that the State will rely on to prove the charges against him. Gray, 518 U.S. at 168 (observing that “there is no general constitutional right to discovery in a criminal case”

(quoting Weatherford v. Bursey, 429 U.S. 545, 97 S. Ct. 837, 51 L. Ed. 2d 30 (1977)); see also Wardius v. Oregon, 412 U.S. 470, 474, 93 S. Ct. 2208, 37 L. Ed. 2d 82 (1973) (“[T]he Due Process Clause has little to say regarding the amount of discovery which the parties must be afforded.”). Schierman had notice of all of the evidence that the State used—far more than due process requires. His only complaint is that the State failed to explain its view of that evidence to him. But if the Constitution does not require the State to disclose the evidence it intends to use, it surely does not require the State to disclose its theory of the case. Schierman cites no case to support a claim that he is entitled to notice of the State’s work product. He is not. CrR 4.7(f)(1) (exempting work product containing opinions, theories, or conclusions from discovery); see also State v. Coe, 101 Wn.2d 772, 784-85, 684 P.2d 668 (1984) (prosecutor’s work product not discoverable); State v. Pawlyk, 115 Wn.2d 457, 475-79, 800 P.2d 338 (1990) (defense opinions, theories, or conclusions not discoverable).

Finally, Schierman’s contention that the trial court promised that sexual motivation would not be at issue, and reneged on that promise when it was too late to voir dire the jury, must be rejected. Schierman is correct that the trial court said in passing, before the issue was thoroughly briefed or argued, “I will advise the parties, there will be no evidence presented of sexual motivation or sexual assault, consistent with this

Court's prior rulings and the prior representations of counsel for the State that that was not an issue in this case." 58RP 7. But the trial court's reference to sexual motivation—as opposed to sexual assault—was inaccurate; the State never represented that it did not intend to argue that a possible motive for Schierman's commission of the crimes was his sexual interest in the adult victims. Moreover, the court immediately followed its statement with the comment that it would "await the State's briefing and the reply from the defense before discussing this matter any further," 58RP 7, indicating its ruling was subject to revision. E.g., State v. Collins, 112 Wn.2d 303, 308, 771 P.2d 350 (1989) (ruling is final only after it is signed by the trial judge in the minutes or issued in a formal court order).

Moreover, the trial court's inaccurate statement did not mislead Schierman to fail to voir dire the jurors on this topic. Months before that statement, Schierman had proposed, and the court had adopted and used, a jury questionnaire that did not touch on any sexual issues. In-depth individual voir dire had been conducted with all but a few jurors, and sexual motivation was not raised with any of them. None of this voir dire relied on the trial court's later statement that no evidence of sexual motivation would be permitted. Most tellingly, on January 10—before the court said there would be no evidence of sexual motivation—Schierman sought to waive his right to conduct any general voir dire of the jury panel,

claiming that he had obtained enough information from individual questioning and there was no useful purpose to be served by further voir dire. 57RP 144-48. Yet, Schierman was aware by that point that the State intended to offer evidence of a sexual motive for the crime. Any argument that Schierman would have conducted a different voir dire if he had known the State's theory is belied by the actual record.

Thus, the trial court's single, inaccurate statement cannot be said to have affected Schierman's trial strategy in regards to voir dire in any way. He made no attempt to voir dire jurors on motive either before or after he understood the State's argument, nor has he demonstrated that he would have been entitled to do so.

Schierman was not entitled to notice of the State's theory of motive. The State timely provided all the evidence it ultimately offered. It did not affirmatively mislead Schierman. The trial court's passing comment that it would not admit evidence of sexual motive was based on a misunderstanding—later corrected—that the State had promised not to use such evidence, and did not affect Schierman's voir dire. Schierman has failed to demonstrate that his due process rights were violated.

I. THE PRESENCE OF UNIFORMED SOLDIERS AND LEONID MILKIN'S REFERENCE TO SERVING IN A COMBAT ZONE DID NOT DENY SCHIERMAN A FAIR TRIAL.

1. Uniformed Soldiers At Schierman's Trial Did Not Cause Inherent Prejudice.

Schierman argues his right to a fair trial was violated when uniformed soldiers attended trial. But the silent and unobtrusive attendance of two or three servicemen sent no message to the jury beyond—possibly—their support for Leonid, a message this Court has found to be entirely unprejudicial. Schierman's speculation that the jury was improperly influenced by the presence of uniformed soldiers is without merit. His argument should be rejected.

The Fourteenth Amendment's guarantee of due process requires that a defendant have a fair trial in a fair tribunal.⁵⁵ Turner v. Louisiana, 379 U.S. 466, 471-72, 85 S. Ct. 546, 13 L. Ed. 2d 424 (1965). The right to a fair trial encompasses the right to be presumed innocent and the right to confront and cross-examine witnesses. Estelle v. Williams, 425 U.S. 501, 503, 96 S. Ct. 1691, 48 L. Ed. 2d 126 (1976); Pointer v. Texas, 380 U.S. 400, 403-04, 85 S. Ct. 1065, 13 L. Ed. 2d 923 (1965). To implement and safeguard these rights, courts must closely scrutinize practices that may

⁵⁵ With respect to the presence of uniformed soldiers or Leonid's testimony, Schierman does not assert any violation of his rights under the Washington constitution.

threaten the factfinding process of the trial. Holbrook v. Flynn, 475 U.S. 560, 568, 106 S. Ct. 1340, 89 L. Ed. 2d 525 (1986).

When the State creates courtroom arrangements that inherently prejudice the factfinding process, due process is violated unless the arrangements are required by an essential State interest. Flynn, 475 U.S. at 568-72; Williams, 425 U.S. at 503-07. An arrangement is inherently prejudicial if it creates an unacceptable risk of impermissible factors influencing the jury's verdict. Flynn, 475 U.S. at 570; Williams, 425 U.S. at 505. The Supreme Court has yet to articulate a standard by which to judge whether conduct by private actors deprived a defendant of a fair trial. Carey v. Musladin, 549 U.S. 70, 76, 127 S. Ct. 649, 166 L. Ed. 2d 482 (2006). Nonetheless, this Court has applied the principles of Williams and Flynn in assessing whether spectator conduct in the courtroom inherently prejudiced a defendant's right to a fair trial. State v. Lord, 161 Wn.2d 276, 165 P.3d 1251 (2007); In re Woods, 154 Wn.2d 400, 114 P.3d 607 (2005).

A defendant claiming a due process violation bears the burden of showing either actual prejudice or inherent prejudice. Woods, 154 Wn.2d at 418. The trial court's determination that particular spectator conduct does not violate a defendant's due process rights is reviewed for abuse of discretion. Lord, 161 Wn.2d at 283.

Here, Schierman has made no attempt to prove actual prejudice, nor is there any evidence in the record to support such an allegation. Thus, he must prove inherent prejudice to prevail. This Court has previously held that “a silent showing of sympathy or affiliation in a courtroom, without more, is not inherently prejudicial.” Id. at 284. In both Woods and Lord, this Court concluded that spectators wearing signs of affiliation with the homicide victims—black and orange “remembrance ribbons,” and buttons with an in-life photograph of the victim—did not prejudice the defendants’ rights to a fair trial. Woods, 154 Wn.2d at 417-18; Lord, 161 Wn.2d at 283-91. In Woods, the ribbons contained no words, and did not express any conclusion about the defendant’s guilt or innocence. Woods, 154 Wn.2d at 417 (contrasting the ribbons with “Women Against Rape” buttons worn at a sexual assault trial, disapproved of in Norris v. Risley, 918 F.2d 828 (9th Cir. 1990)). Further, the Woods court reasoned that the presence of grieving victims at a homicide trial would not be surprising to the jury. Id. In Lord, this Court explicitly reaffirmed Woods, again distinguished Norris, and noted that buttons with the victim’s photograph did not bear any message regarding guilt or innocence. Lord, 161 Wn.2d at 287-90. Rather, the buttons were “an ambiguous message that would be reasonably understood as a show of sympathy and support for the victim’s family.” Id. at 288.

The reasoning of Woods and Lord applies here. The uniformed soldiers present at Schierman's trial, at most, silently showed their sympathy for or affiliation with Leonid. Their presence was not inherently prejudicial. Neither the presence of the servicemen nor their attire communicated any message about Schierman's guilt or innocence to the jury. They did not bear signs or wear buttons with inscriptions. Contrast Norris, 918 F.2d at 830 (spectators wore two-and-a-half inch buttons reading "Women Against Rape," with the word "Rape" emphasized with a broad red stroke). There is no evidence that they intended to communicate with the jury. Contrast id. at 832 & n.3. Instead, their presence and their uniforms were a show of sympathy and support that did not urge the jury to convict and expressed no opinion as to guilt; there was no inherent prejudice. Indeed, this Court has suggested that the jury's knowledge of the presence of interested individuals may improve the fairness of the proceedings. Orange, 152 Wn.2d at 812 (quoting Watters v. State, 328 Md. 38, 48, 612 A.2d 1288 (1992)).

Additionally, the record shows that the uniformed officers were not an outsized presence at the trial. At most, two or three uniformed soldiers were present in court on any given day. E.g., 61RP 8; 76RP 10-11. Numerous other people, including media representatives, were present. For instance, for opening statement, the courtroom was so full that it was

40 people over the limit set by the fire code. 60RP 10-11. Schierman's supporters were also pointed out for the jury. E.g., 71RP 162; 72RP 123-24. And, there is no evidence that the uniformed soldiers interacted with jurors in any way.⁵⁶ Indeed, the trial court specifically noted that there had been no improper contact between the soldiers and the jury, or any other conduct that would prejudice Schierman. 76RP 11; see also 33RP 17 (defense counsel acknowledges no inappropriate conduct by the servicemen); contrast Norris, 918 F.2d at 829-31. There is also no evidence that the soldiers ever interacted with Leonid.

Schierman's arguments about the likely influence of the soldiers on the jury, on the other hand, are unsupported by "reason, principle, [or] common human experience." Williams, 425 U.S. at 504. For instance, Schierman's contention that the presence of uniformed soldiers "reinforced the notion that our armed services supported Milkin's efforts to achieve justice, and that the jury should support him as well," App. Br. at 82, is entirely inconsistent with ordinary experience. See Flynn, 475 U.S. at 569 ("Our society has become inured to the presence of armed guards in most public places; they are doubtless taken for granted so long as their numbers or weaponry do not suggest official concern or alarm.").

⁵⁶ Schierman's attorney alleged that uniformed soldiers were both present in court and sitting outside the courtroom in the morning as jurors came in. 76RP 10. Not only is waiting directly outside the courtroom for the court session to begin wholly appropriate, but the trial court disputed defense counsel's characterization. 76RP 10-11.

No reasonable person would believe that the mere presence of two or three men in fatigues⁵⁷ at a trial signaled that the United States government, through its military, had a particular interest in the outcome of the case. Indeed, if the U.S. government had such an interest, surely it would have acted through some more effective measure than sending a few anonymous service personnel to physically observe the proceedings. Schierman's argument also defies reason because it ignores the highly controversial nature of this country's military engagements at the time of the trial, so servicemembers might not have been universally viewed in a positive light.

Similarly, the rank speculation that "some of the jurors may have interpreted the presence of the soldiers as part of the court's security for the trial," App. Br. at 82, is inconsistent with common sense. The jurors were present in a county courthouse for a case captioned State of Washington v. Conner Michael Schierman. It is hard to imagine that jurors would thus have surmised that the United States Army was providing inconsistent and unarmed security from the third row. See Flynn, 475 U.S. at 571 (finding no "unacceptable risk of prejudice in the spectacle of four [uniformed and armed policemen] quietly sitting in the first row of a courtroom's spectator section"); 61RP 8.

⁵⁷ As spectators, the servicemen could not have been armed. RCW 9.41.300(1)(b) (prohibiting weapons in court).

And, the jury was specifically instructed by the trial court that it should permit neither sympathy nor prejudice to enter into its deliberations. CP 7825. The jury is presumed to have followed the instructions of the court. Lough, 125 Wn.2d at 864.

Schierman's citations to cases "where the offense was against a police officer or prison guard and uniformed colleagues of the victim made their presence known," App. Br. at 83, are easily distinguished. In Woods v. Dugger, 923 F.2d 1454 (11th Cir. 1991), the court reversed a conviction for killing a prison guard. Approximately half of the 40 or so spectators were wearing prison guard uniforms, and the prison industry was the major industry of the rural county where the crime and the trial occurred. One-third of the 10,000 residents were prisoners, and the four nearby prisons employed 2,200 workers and injected \$71 million into the local economy. The deceased guard had been quoted in the paper describing unsafe conditions at the prison, and a petition circulated by the victim's sister after his death calling for the death penalty for the defendant had 5,000 signatures by the time of trial. Many members of the jury had heard of the murder, and a number had either worked in the prison themselves or had relatives who did so. Id. at 1457-58.

In Shootes v. State, 20 So.3d 434 (Fla. Dist. Ct. App. 2009), the court overturned the defendant's conviction for murdering a police officer.

In that case, as many as 70 uniformed officers from the victim's department attended the later stages of trial. The appearance of the victim at the time of the crime—and whether he was readily identifiable as an officer—was an issue at trial. The presence of multiple officers dressed in highly visible uniforms thus served as “a live demonstration of the appearance of the officers involved” at the time of the crime. Id. at 440.

In United States v. Johnson, 713 F. Supp. 2d 595 (E.D. La. 2010), the defendant had been convicted of participating in an attempted bank robbery that caused the death of a bank security officer who was also a deputy sheriff. In addressing Johnson's motion for a new trial, the court concluded that it had erred by allowing as many as forty sheriff's deputies and the sheriff himself to attend trial in uniform, although it determined that the error was not sufficiently prejudicial to warrant a new trial. Id. at 615-17. The court did grant a new penalty-phase trial, but determined that the presence of the uniformed officers played only a small part in the totality of the circumstances justifying a new penalty hearing. Id. at 617.

In contrast to these three cases, only two or three soldiers attended Schierman's trial on any given day, amidst numerous other spectators. Nothing about the soldiers' appearance was relevant to an issue at trial. And, unlike in Johnson, this Court must review the trial court's decision

not to exclude the uniformed soldiers under an abuse of discretion standard, deferring to that court's superior ability to observe the actual effect of the presence of the servicemembers.⁵⁸

Additionally, if Schierman truly believed that the presence of uniformed soldiers threatened his right to a fair trial, he had other avenues of relief beyond seeking exclusion of the soldiers from a public trial. He had the opportunity to voir dire the jury panel on the topic, but chose not to do so. Compare 33RP 9 (defense counsel acknowledging he can explore in voir dire prejudice caused by uniformed officers) with 58RP 156-80, 205-16 (defense voir dire). He also could have sought an instruction advising the jury to disregard or to draw no inferences from the soldiers' presence. He did not. It thus appears that Schierman did not truly believe that prejudice was likely.

In summary, the trial court was in the best position to assess the effect that the quiet presence of two or three servicemen had on the jury.

It concluded that there was no such prejudice. The trial court did not

⁵⁸ The presence of a few servicemembers also cannot reasonably be compared to the prejudice created by the State's actions in the other cases Schierman cites, such as holding a trial in a jail, State v. Jaime, 168 Wn.2d 857, 233 P.3d 554 (2010), or requiring a defendant to wear prison garb at trial, Williams, 425 U.S. 501.

abuse its discretion in refusing to bar officers of the United States Armed Services from attending Schierman's trial in uniform.⁵⁹

2. Leonid's Reference To Being Stationed In A Combat Zone At The Time Of The Murders Did Not Impair Schierman's Right To A Fair Trial.

In his issues pertaining to assignments of error, Schierman raises the claim that the trial court should have granted a mistrial after Leonid testified that, at the time of the murders, he was deployed in a combat zone. App. Br. at 7. He did not assign error to this testimony, he has not presented this Court with the proper standard for evaluating a motion for a mistrial or citation to any authority, and he makes only passing argument regarding this issue. This Court should disregard it. Goodman, 150 Wn.2d at 781-82.

Further, a trial court should grant a mistrial only when an irregularity so prejudices the defendant that only a new trial can ensure that the defendant will receive a fair trial. State v. Mak, 105 Wn.2d 692, 701, 718 P.2d 407 (1986), overruled on other grounds by State v. Hill, 123 Wn.2d 641, 645, 870 P.2d 313 (1994); State v. Gilcrist, 91 Wn.2d 603, 612, 590 P.2d 809 (1979). Only those errors that affect the outcome of the

⁵⁹ In a single sentence, Schierman alleges that any error in allowing the soldiers to attend trial violated the Eighth Amendment by rendering his death sentence arbitrary and capricious. App. Br. at 84. He did not assign error on this basis. App. Br. at 2. Nor does he provide any citations to authority or any argument. This Court must disregard this claim. Goodman, 150 Wn.2d at 781-82.

trial will be considered prejudicial. Mak, 105 Wn.2d at 701; Gilcrist, 91 Wn.2d at 612. In evaluating whether an irregularity prejudiced a defendant, the trial court should consider (1) the seriousness of the irregularity, (2) whether the evidence at issue was cumulative, and (3) whether the court instructed the jury to disregard the evidence. Mak, 105 Wn.2d at 701; State v. Hopson, 113 Wn.2d 273, 284, 778 P.2d 1014 (1989). Because the trial court has broad authority to conduct a trial and deal with irregularities that arise and is in the best position to make observations of the effect of an irregularity on the proceedings, Gilcrist, 91 Wn.2d at 612, Mak, 105 Wn.2d at 701, a trial court's denial of a defendant's motion for mistrial is reviewed for abuse of discretion. State v. Rodriguez, 146 Wn.2d 260, 269-70, 45 P.3d 541 (2002). The court abuses its discretion when no reasonable jurist would have reached the same conclusion. Id.

Here, in response to Schierman's motion for a mistrial, the trial court struck Leonid's testimony regarding being stationed in a combat zone at the time of the murders, admonished the witness, directed the prosecutor to re-review with Leonid the limits of his testimony, and instructed the jury to disregard the evidence. 60RP 172-75; 61RP 4-8, 12. Jurors are presumed to follow the court's instructions. Lough, 125 Wn.2d at 864. The testimony was never mentioned or referred to again by any

witness or party. It constituted a sentence or two out of a three-month trial, was on a tangential issue not related to Schierman's guilt or innocence or even his conduct, and did not tend to inflame the passions of the jury. As described elsewhere in this brief, the evidence of Schierman's guilt was overwhelming. The trial court acted well within its discretion in denying the motion for a mistrial.

J. THE JURY WAS CORRECTLY INSTRUCTED.

A defendant has a due process⁶⁰ right to jury instructions that make clear that the State bears the burden of proving every essential element of the crime charged beyond a reasonable doubt. Middleton v. McNeil, 541 U.S. 433, 437, 124 S. Ct. 1830, 158 L. Ed. 2d 701 (2004) (per curiam); Pirtle, 127 Wn.2d at 656. It is reversible error to instruct the jury in a way that would relieve the State of the burden of proof. Pirtle, 127 Wn.2d at 656. Jury instructions are sufficient if they correctly and clearly state the applicable law, are not misleading, and allow each party to argue his theory of the case. State v. Riley, 137 Wn.2d 904, 909, 976 P.2d 624 (1999).

Not every deficiency in a jury instruction rises to the level of constitutional error. McNeil, 541 U.S. at 437. The question is whether the

⁶⁰ Schierman's assignment of error with respect to the jury instructions is predicated solely on the Fourteenth Amendment's Due Process Clause. He does not invoke the protections of the Washington Constitution. App. Br. at 3 n.2, 98-99.

erroneous instruction so infected the trial that the resulting conviction violates due process. Id. Each challenged instruction must be evaluated in the context of the instructions as a whole. Id.; Sublett, 176 Wn.2d at 81. Where the instructions as a whole are ambiguous, the question is whether there is a reasonable likelihood that the jury applied an erroneous instruction in an unconstitutional manner. McNeil, 541 U.S. at 437.

Whether a jury instruction accurately states the law is reviewed de novo. Pirtle, 127 Wn.2d at 656. However, a trial court has broad discretion in determining the wording of a particular instruction. State v. Dana, 73 Wn.2d 533, 536, 439 P.2d 403 (1968). Additionally, the “trial court’s refusal to give a requested instruction, when based on the facts of the case, is a matter of discretion and will not be disturbed on review except upon a clear showing of abuse of discretion.” State v. Lucky, 128 Wn.2d 727, 731, 912 P.2d 483 (1996), overruled on other grounds by State v. Berlin, 133 Wn.2d 541, 947 P.2d 700 (1997). When the refusal is based upon questions of law, however, it is reviewed de novo. Id.

Errors in jury instructions are subject to harmless error review. State v. Brown, 147 Wn.2d 330, 58 P.3d 889 (2002). Instructional error is harmless if the jury verdict would have been the same absent the error, or if the element at issue is supported by uncontroverted evidence. Brown, 147 Wn.2d at 341.

Here, Schierman contends that the court erred in its instructions regarding premeditation and voluntary intoxication, and by failing to give his proposed included offense instructions. None of these arguments has merit.

1. The Trial Court Properly Instructed The Jury On The Definition Of Premeditation.

Schierman claims that the trial court's instruction to the jury defining premeditation eviscerated the distinction between premeditation and intent, thereby making the crimes of first and second degree murder indistinguishable. He is wrong. The court's instruction has been repeatedly upheld by this Court as a correct statement of the law. It adequately defined premeditation as distinct from intent, and it was not misleading. And, because the evidence in support of premeditation was simply overwhelming, any error in the instruction was harmless beyond a reasonable doubt.

Schierman sought to have the jury instructed regarding the definition of premeditation in language that substantively varied from the pattern instruction. Specifically, Schierman proposed an instruction that read:

Deliberation is consideration and reflection upon the preconceived design to kill; turning it over in the mind; giving it second thought.

Although formation of a design to kill may be instantaneous, as quick as thought itself, the mental process of deliberating upon such a design does require that an appreciable time elapse between formation of the design and the fatal act within which there is, in fact deliberation.

The law prescribes no particular period of time. It necessarily varies according to the peculiar circumstances of each case. Consideration of a matter may continue over a prolonged period—hours, days or even longer. Then again, it may cover but a brief span of minutes. If one forming an intent to kill does not act instantly, but pauses and actually gives second thought and consideration to the intended act, [he] [she] has, in fact, deliberated. It is the fact of deliberation that is important, rather than the length of time it may have continued.

CP 7652.⁶¹ The trial court rejected Schierman's request, and instead instructed the jury regarding premeditation in accordance with WPIC 26.01.01:

⁶¹ Later, Schierman proposed two additional instructions regarding premeditation. The first read:

Premeditation means thought over beforehand. When a person, after deliberation, forms an intent to take human life, the killing may follow immediately after the formation of the settled purpose and it will be premeditated. The law requires more than a moment in point of time in which a design to kill is deliberately formed.

It is not enough that a person intended to kill or had the opportunity to deliberate; premeditation requires that a person actually engage in the process of reflection and meditation.

Premeditation may be proved by circumstantial evidence only where the circumstantial evidence is substantial.

CP 7814. Additionally, or perhaps alternatively, Schierman proposed that the jury be instructed:

Premeditation must involve more than a moment in point of time; but, mere opportunity to deliberate is not sufficient to support a finding of premeditation.

Premeditated means thought over beforehand. When a person, after any deliberation, forms an intent to take human life, the killing may follow immediately after the formation of the settled purpose and it will still be premeditated. Premeditation must involve more than a moment in point of time. The law requires some time, however long or short, in which a design to kill is deliberately formed.

CP 7834; 99RP 13-17. Schierman also proposed that the court strike the phrase “and it will still be premeditated” from the pattern instruction; the court refused. 99RP 15-17.

The court’s instruction was proper. It was a correct statement of the law. It included the only statutory provision defining premeditation. See RCW 9A.32.020(1). This Court has repeatedly held that this instruction is correct. State v. Clark, 143 Wn.2d 731, 770-71, 24 P.3d 1006 (2001) (“[F]urther challenge to the instruction is frivolous.”); Lord, 123 Wn.2d at 317; Benn, 120 Wn.2d at 658 & n.4, 661; Rice, 110 Wn.2d at 603-04 (“The judge’s instructions were more than sufficient in covering this point of law.”).

Rather, premeditation is 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.

CP 7815. Schierman did not argue that the court should have given these instructions, nor did he take exception to the court’s failure to give these instructions. 99RP 13-17. Accordingly, the issue is waived. Benn, 120 Wn.2d at 660. Even if it is not waived, most of the language from these proposed instructions was actually used in the court’s instruction to the jury; of the remainder, nearly identical language was rejected by this Court in Benn, id. at 658 & n.3. In any event, the remainder of the State’s argument with respect to the instruction set forth in the main text applies equally to these instructions.

Schierman nonetheless argues that the instruction eviscerates the difference between intent and premeditation. It does not. “A person acts with intent or intentionally when he or she acts with the objective or purpose to accomplish a result which constitutes a crime.” RCW 9A.08.010. The jury instruction on intent was consistent with this definition. CP 7833. Premeditation, on the other hand, requires both deliberation and some length of time in which that deliberation may occur. State v. Brooks, 97 Wn.2d 873, 876, 651 P.2d 217 (1982) (“[T]he verb ‘premeditate’ encompasses the mental process of thinking beforehand, deliberation, reflection, weighing or reasoning for a period of time, however short.”)⁶²; State v. Arata, 56 Wash. 185, 187-88, 105 P. 227 (1909). In other words, premeditation requires both intent and the deliberative process of arriving at a settled intent.

The jury instruction on premeditation was consistent with this meaning. It included the words “thinking beforehand” and “deliberation,” as suggested in Brooks, as well as another analogue, “a design to kill is deliberately formed.” Not every synonym for “deliberation” must be included for an instruction to be accurate. The instruction also made clear that some passage of time is required. It included the language “after any

⁶² The Brooks language cited came from an uncontested jury instruction used in that case. 97 Wn.2d at 876 n.3.

deliberation,” “more than a moment in point of time,” and “however long or short.” By including these concepts, the court’s instruction to the jury defining premeditation did not conflate it with intent.⁶³ Compare Arata, 56 Wash. at 189 (approving portion of instruction defining premeditation).

By contrast, this Court has found that the distinction between intent and premeditation was eviscerated when the jury was instructed that no appreciable time need elapse between the formation of the intent to kill and the killing. State v. Shirley, 60 Wn.2d 277, 278-79, 373 P.2d 777 (1962); Arata, 56 Wash. at 189. Schierman’s jury was not so instructed.

In related arguments, Schierman attacks Clark as inconsistent with this Court’s precedents and tries to distinguish it. App. Br. at 89-92. First, Clark is not inconsistent with precedent. It explicitly relied on three prior cases that reached the identical result examining identical or very similar instructions. Id. (citing Lord, 123 Wn.2d 296, Benn, 120 Wn.2d 631, and Rice, 110 Wn.2d 577). Further, the three cases Schierman cites, Arata, 56

⁶³ Schierman contends that the prosecutor’s baseball analogy illustrates how the jury instruction elided the concepts of intent and premeditation. App. Br. at 90-91; 100RP 68-70. But a pitcher thinks over beforehand and deliberates—considering such factors as input from his catcher, knowledge about the batter’s abilities, how many runners are on base, how many outs there are, how the pitcher has been throwing that day, his gut feeling, etc.—before he throws his pitch. A batter, on the other hand, may have a specific goal when he steps to the plate—bat in a runner, extend the pitch count, or just don’t get an out—but cannot meaningfully consider how he will respond to the pitched ball until the ball is released. Thus, while swinging or not swinging the bat—or bailing out of the batter’s box when the ball is coming at the batter’s head, as in the prosecutor’s example—is acting with the object or purpose of accomplishing a particular result, the decision to act is made instantaneously, on the basis of experience, rather than after any deliberation. It is intentional, not premeditated.

Wash. 185, State v. Bingham, 40 Wn. App. 553, 699 P.2d 262 (1985), and State v. Robtoy, 98 Wn.2d 30, 653 P.2d 284 (1982), overruled on other grounds by State v. Radcliffe, 164 Wn.2d 900, 194 P.3d 250 (2008), provide a definition of premeditation that is substantially similar to the repeatedly approved WPIC, and provide that definition in the context of evaluating the sufficiency of the evidence, not in approving jury instructions. And Arata, upon which Bingham and Robtoy rely, involved a different first degree murder statute. Compare Arata, 56 Wash. at 185-86 and Ballinger's Ann. Codes & St. § 7035 (mens rea is “purposely, feloniously, and of his deliberate and premeditated malice”) with RCW 9A.32.030(1)(a) (mens rea is acting “[w]ith a premeditated intent to cause the death”).

Second, Clark cannot be distinguished on the ground that Schierman is making a different argument here. Clark's argument was that the instruction used here places an overemphasis on the briefness of the time necessary to premeditate and minimizes the amount of deliberation that must occur before intent becomes premeditation. Clark, 143 Wn.2d at 770-71. But Rice, on which Clark relied, addressed exactly the argument Schierman makes and rejected it, stating, “The proposed instruction [offered by Rice] was more specific in making clear that ‘intent’ is not synonymous with ‘premeditation’, but the instructions given

by the judge, when read as a whole, made this abundantly clear.” Rice, 110 Wn.2d at 604. Further, Clark specifically rejected much of the same language that Schierman proposed, indicating that it “was hard to tell from the face of the WPIC instruction how Clark’s proposed language adds anything of substance.” Clark, 143 Wn.2d at 771; compare CP 7815.

Schierman also implies that the instruction is erroneous because it does not follow the dictionary definition of premeditation. App. Br. at 89. He does not provide a definition from a dictionary in use when the State began to define first degree murder as requiring premeditation. In any event, as discussed above, this Court has repeatedly approved the jury instruction defining premeditation at issue here beginning in at least 1988. Rice, 110 Wn.2d 577. The legislature’s failure to modify this Court’s repeatedly affirmed definition of premeditation constitutes legislative acquiescence in and approval of the definition. See State v. Coe, 109 Wn.2d 832, 845-46, 750 P.2d 208 (1988).

Schierman suggests that the trial court erred by including the phrase “more than a moment in point of time” in the instruction, claiming it is confusing. App. Br. at 90 n.16. But this language is drawn directly from the statute, and Schierman does not argue that the statute is invalid. Further, Schierman never made this argument below. In fact, this complained-of language was included in two of the instructions that

Schierman proposed. CP 7814-15. Any error was thus both invited and waived.⁶⁴ RAP 2.5(a); Benn, 120 Wn.2d at 660 (where issue of wording of instruction was not raised below, the court need not address it on appeal); Henderson, 114 Wn.2d 867, 869-71 (discussing invited error).

Lastly, Schierman's proposed instructions added little. Two of them were substantively similar to the WPIC instruction actually given. CP 7814-15. The elements of the third, although not its wording, were captured in the given instruction. CP 7652. See Clark, 143 Wn.2d at 771; Benn, 120 Wn.2d at 657. The trial court did not abuse its considerable discretion in rejecting Schierman's proposed wording in favor of an instruction that has been repeatedly approved by this Court.

In short, the WPIC instruction used here correctly stated the law. It did not invite the jury to believe that the law was something other than it was, so it was not misleading. Clark, 143 Wn.2d at 771 ("It is not misleading, and it remains a correct statement of the law."). And, it allowed Schierman to argue his theory of the case, namely, that he was too intoxicated either to form specific intent or to premeditate, e.g., 100RP 119-29, 184-85, or that someone else may have committed the offenses, e.g., 100RP 135-40.

⁶⁴ Much of the language in one of Schierman's proposed instructions was identical to the WPIC instruction given by the court. Compare CP 7834 (instruction given) with CP 7814 (proposed instruction). To the extent that Schierman now complains of this language in the instruction given, any error is either invited or waived.

Finally, if there was any error in giving the WPIC instruction or failing to give the definitions of premeditation proposed by the defense, it was harmless beyond a reasonable doubt. The evidence established overwhelmingly that Schierman acted with premeditated intent. He went to the Milkin house late at night, to decrease the likelihood he would be seen and so that he could find his victims at their most vulnerable. He armed himself with two different knives and an axe. Schierman also took along a flashlight and a pair of gloves. He entered from the rear, again so he would not be seen. Once inside, he took off his shoes so that he could creep up the stairs quietly. Finally, he killed the four separate victims in different locations in a lengthy and brutal attack. Schierman killed Lyubov on the main floor, stabbing her nine times. He killed Olga upstairs in a bedroom, stabbing her at least four times, including two to the front of her neck. Justin was stabbed once through his neck, through the carotid artery and jugular vein, and Andrew suffered cuts caused by a sawing motion, severing most of the structures in his neck. The two boys were killed several feet apart from each other in the upstairs hall. Under these facts, no rational jury could conclude that the killer—Schierman—had acted with any mental state other than premeditated intent.

The trial court did not err in instructing the jury as to the definition of premeditation. The instruction was a correct statement of the law, was

not misleading, and allowed Schierman to argue his theory of the case. The court did not abuse its discretion in rejecting Schierman's proposed instructions that made the same point in different language, much of which had previously been rejected by this Court. And, any error was harmless beyond a reasonable doubt.⁶⁵

2. The Trial Court's Voluntary Intoxication Instruction Did Not Violate Due Process.

Schierman next contends that the trial court erred by failing to give his proposed jury instruction defining voluntary intoxication. But the trial court did instruct the jury about Schierman's defense of voluntary intoxication; it just used the WPIC instruction, not Schierman's. The WPIC instruction was correct, not misleading, and permitted both parties to argue their theory of the case. Even if the trial court abused its discretion in its choice of wording, any error was harmless.

⁶⁵ In passing, Schierman makes a suggestion that the prosecutor's baseball analogy was "improper." App. Br. at 92. By "improper," Schierman presumably means "misconduct," but he makes no argument to that effect. Goodman, 150 Wn.2d at 781-82.

Even if this reference to prosecutorial misconduct is adequate, however, the claim lacks merit. For the standard governing the evaluation of claims of prosecutorial misconduct, see section III.H.1 above. Schierman failed to object to the prosecutor's baseball analogy. 100RP 68-70. The analogy was not flagrant and ill-intentioned. Rather, it was an attempt to put into concrete terms the definitions of premeditation and intent provided by the instructions. By arguing that the prosecutor's argument "demonstrates how the pattern instructions do not differentiate between premeditation and intent," App. Br. at 90, Schierman acknowledges that the argument tracked the instructions. There was no misconduct. Further, the analogy was not inflammatory or an improper appeal to passion or prejudice. It was a concrete and neutral explanation of an abstract concept. Schierman cannot show that the explanation was flagrant and ill-intentioned misconduct, nor has he attempted to do so.

Schierman asked the court to instruct the jury regarding voluntary intoxication as follows:

The prosecution must prove that the defendant committed Aggravated First Degree Murder with premeditation and/or Murder in the Second Degree with intent. The defendant contends that he did not have the required intent and mental state due in whole or part to his intoxication. However, the defendant does not need to prove that he did not have the required intent and mental state.

If you have a reasonable doubt about whether the defendant committed the crime with premeditation, intent, criminal recklessness or criminal negligence, you must find the defendant not guilty.

CP 7654. Later, Schierman proposed an additional instruction on voluntary intoxication:

Evidence of intoxication may be considered by you in determining whether the defendant acted with premeditation or the intent to commit Murder in either the First or Second Degree.

CP 26438-39. The court instead instructed the jury in accordance with WPIC 18.10:

No act committed by a person while in a state of voluntary intoxication is less criminal by reason of that condition. However, evidence of intoxication may be considered in determining whether the defendant acted with intent or premeditation.

CP 7849. Schierman objected only to the first sentence. 99RP 17-18.

Schierman asserts that the instruction given was contradictory and ambiguous. This is not the standard. The instruction must accurately state

the law, not be misleading, and allow the defense to argue its theory of the case. Riley, 137 Wn.2d at 909. Here, the entire instruction given by the court is a correct statement of the law. It closely tracks the language of the governing statute:

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

RCW 9A.16.090. Further, the Court of Appeals has previously approved the instruction as a correct statement of the law.⁶⁶ State v. Corwin, 32 Wn. App. 493, 498 & n.4, 649 P.2d 119 (1982); see also State v. Fuller, 42 Wn. App. 53, 55, 708 P.2d 413 (1985) (indicating that an instruction following RCW 9A.16.090 and similar to WPIC 18.10 was correct), cited with approval in State v. Coates, 107 Wn.2d 882, 890-91, 735 P.2d 64 (1987).

This Court has explained the statute means that evidence of voluntary intoxication cannot be the basis of an affirmative defense that admits the crime but excuses or mitigates the actor's criminality. Coates, 107 Wn.2d at 889; State v. Mriglot, 88 Wn.2d 573, 574-75, 564 P.2d 784

⁶⁶ The Corwin court also stated that WPIC 18.10 was preferable to a voluntary intoxication instruction proposed by the defendant that is similar to the instruction Schierman proposed here. Corwin, 32 Wn. App. at 497-98 & n.3.

(1977). Instead, evidence of intoxication is relevant to whether the State has proven the defendant's mental state required for the crime beyond a reasonable doubt. Coates, 107 Wn.2d at 889-90; Mriglot, 88 Wn.2d at 574-75. In other words, the fact that someone is intoxicated does not independently or per se mean that no crime was committed; instead, intoxication may have prevented the defendant from achieving the mental state required to commit the particular crime charged.

That meaning was adequately conveyed by the jury instruction. The first sentence focused on the act in question, and indicated that Schierman's claimed intoxication did not make the act of homicide not criminal. The second sentence focused on the mental state at issue, and informed the jury that intoxication could be relevant to assessing whether Schierman had the requisite mental state of intent and premeditation. It was a correct statement of the law, and was not ambiguous nor misleading.

Moreover, to the extent that there was ambiguity, the argument of the prosecutor resolved it. Specifically, the prosecutor told the jury in closing argument that "it's not a defense that you voluntarily got drunk; however, you may consider evidence of intoxication as it goes to someone's mental state." 100RP 106. The State then argued that there was no real evidence of intoxication, and that even if there was, the evidence of premeditation and intent—"the timing, the choice of weapons,

the choice of flashlight, the choice of gloves, the going in the middle of the night, the number, all of those things,” 100RP 106—demonstrated that Schierman not only was capable of but did in fact premeditate and intend the crime. When the prosecutor in closing argument addresses the meaning of a jury instruction in a manner that assists the defense, the reviewing court may conclude that the argument adequately clarified any ambiguity. McNeil, 541 U.S. at 438.

Nor did the language of the instruction preclude the defense from arguing its theory of the case. To the contrary, Schierman argued that he was intoxicated at the time of the crime, and that intoxication precluded him from formulating the intent necessary to commit the crimes charged. 100RP 127-28. And, his counsel correctly explained the instruction by saying,

We’re not just telling anyone in this courtroom, and I never will, that intoxication is an excuse for what has happened. It’s not an excuse. It is, however, something that has to be considered by you in making determinations with respect to what did or did not happen in this case.

100RP 184. The trial court’s choice of wording in the instruction supported Schierman’s argument, and was not an abuse of discretion.

Schierman also faults the court’s voluntary intoxication instruction for failing to apply it to the element of common scheme or plan found in the aggravating factor. App. Br. at 94-95. But Schierman never asked the

court to so instruct the jury, nor does he cite any authority for the proposition that common scheme or plan is a mental state. Any error is waived. Benn, 120 Wn.2d at 660-61.

Finally, even if the trial court's formulation of the voluntary intoxication instruction was an abuse of discretion, any error was harmless for two reasons. First, there was insufficient evidence in the record to support the giving of the voluntary intoxication instruction in the first place. "A defendant is entitled to have his theory of the case submitted to the jury under appropriate instructions when the theory is supported by substantial evidence in the record." State v. Griffith, 91 Wn.2d 572, 574, 589 P.2d 799 (1979). A defendant is not entitled to an instruction that is not supported by the evidence. State v. Ager, 128 Wn.2d 85, 93, 904 P.2d 715 (1995). To have a jury instructed on voluntary intoxication, the crime charged must require a particular mental state, there must be substantial evidence of drinking, and the defendant must show that the drinking affected the defendant's ability to acquire the requisite mental state. State v. Everybodytalksabout, 145 Wn.2d 456, 479, 39 P.3d 294 (2002) (citing State v. Gallegos, 65 Wn. App. 230, 238, 828 P.2d 37 (1992)).

Here, the crime of murder in the first degree includes the particular mental state of intent and premeditation. The evidence that Schierman was drinking was perhaps substantial, but there was no evidence in the

record explaining a connection between Schierman's drinking and the lack of ability to form the mental state of premeditation or intent. Schierman's expert Dr. Saxon did opine that, based on his interview with him, Schierman was in a state of alcoholic blackout at the time of the crimes. 97RP 39-41. He also explained that blackout was a state in which alcohol prevents the brain from encoding new memories. 97RP 15-28. Saxon, however, carefully avoided suggesting that Schierman was incapable, due to his state of intoxication, of forming the premeditated intent to kill.⁶⁷ 97RP 7-72, 104-70. Schierman himself said that he worked while he was purportedly blacked out, and Winter testified that, shortly before the murders, Schierman remembered a discussion they had had about a movie and came over to his apartment to lend it to him. 71RP 92-93.

Second, as discussed above, no rational jury could have found that the State failed to meet its burden of proving premeditated intent on the basis of Schierman's claim that he was intoxicated at the time of the murders. The extensive evidence of premeditation belies any claim that Schierman was incapable of premeditating. His claim that the trial court erroneously instructed the jury with respect to the defense of voluntary intoxication should be rejected.

⁶⁷ Schierman has never argued that he lacked the capacity to form the mental state necessary for the crime of first degree arson. In fact, he conceded during closing argument that he was guilty of that offense. 100RP 182.

3. Schierman Was Not Entitled To Have The Jury Instructed On The Included Offenses Of Manslaughter In The First And Second Degree.

Schierman contends that the trial court erred by refusing to instruct the jury on the included offenses of first and second degree manslaughter. But the evidence did not show that only the included offenses were committed to the exclusion of the charged offense. Any error was harmless both because the jury rejected the intermediate included offense of murder in the second degree in favor of a verdict of guilty as charged, and because the evidence overwhelmingly demonstrated that the killer acted with premeditated intent. The trial court did not abuse its discretion.

Schierman sought to have the jury instructed on the included offenses of manslaughter in the first degree and manslaughter in the second degree. CP 7641-51, 7655-56. The trial court refused the proposed instructions. 99RP 11-12. The court did, however, instruct the jury on the included offense of murder in the second degree. CP 7839-44. The jury convicted Schierman as charged of murder in the first degree (four counts). CP 7857, 7859, 7861, 7863.

Washington law permits a defendant charged with one offense to be convicted of another if commission of the second offense is necessarily

included within the offense charged in the Information.⁶⁸ RCW 10.61.006. A defendant has a statutory right to have the jury instructed on an included offense when each element of the included offense is a necessary element of the charged offense (the legal prong) and the evidence supports an inference that only the included crime was committed (the factual prong). State v. Nguyen, 165 Wn.2d 428, 434, 197 P.3d 673 (2008) (citing State v. Workman, 90 Wn.2d 443, 447-48, 584 P.2d 382 (1978)); State v. Tamalini, 134 Wn.2d 725, 728-29, 953 P.2d 450 (1998). The included offense also must arise from the same act or transaction supporting the greater offense. Nguyen, 165 Wn.2d at 435.

A person commits the crime of murder in the first degree, as charged here, when he has “a premeditated intent to cause the death of another person” and “causes the death of such person.” RCW 9A.32.030(1)(a); CP 6766-68. A person commits the crime of manslaughter in the first degree when he recklessly causes the death of another person. RCW 9A.32.060(1)(a). A person acts recklessly when he “knows of and disregards a substantial risk that a wrongful act”—here, a killing—“may occur, and his . . . disregard of such substantial risk is a gross deviation from conduct that a reasonable person would exercise in the same situation.” RCW 9A.08.010(1)(c). A person commits the crime

⁶⁸ Such offenses are routinely referred to as “lesser included offenses,” even though the word “lesser” does not appear in the statute.

of manslaughter in the second degree when, with criminal negligence, he causes the death of another person. RCW 9A.32.070(1). A person acts with criminal negligence when he “fails to be aware of a substantial risk that a wrongful act may occur” and his failure to be aware of that risk “constitutes a gross deviation from the standard of care that a reasonable person would exercise in the same situation.” RCW 9A.08.010(1)(d).

Here, the State agrees that the legal prong has been met. First and second degree manslaughter are offenses included in both murder in the first degree and murder in the second degree.⁶⁹ State v. Warden, 133 Wn.2d 559, 562-63, 947 P.2d 708 (1997); Berlin, 133 Wn.2d at 550-51. This is because both recklessness and criminal negligence are necessarily included in the mental state of intent required for murder in the first or second degree. RCW 9A.08.010(2). The State also agrees that the purported included offenses of manslaughter are based on the same acts as the charged offenses of murder.

The second prong of the Workman test has not been satisfied, however. In determining whether the factual prong has been met, the evidence must be construed in the light most favorable to the defendant, it

⁶⁹ Although the court stated that it did not “find that there is any legal or factual basis for giving the two requested lesser crimes proposed by the defense,” 99RP 12, the court’s analysis focused on whether Schierman had met the factual prong, not the legal prong. 99RP 11-12. When read in context, it appears that the court elided its acknowledgement that it had to find both the legal and factual prongs met in order to give the included offense instructions with its finding that Schierman had failed to meet the factual prong.

must be substantial, and it must raise an inference that only the included offense was committed. State v. Fernandez-Medina, 141 Wn.2d 448, 455-56, 461, 6 P.3d 1150 (2000). “[T]he evidence must affirmatively establish the defendant’s theory of the case—it is not enough that the jury might disbelieve the evidence pointing to guilt.” Id. at 456 (citation omitted).

Here, the trial court properly refused to instruct the jury on the included offenses of manslaughter in the first and second degree, because there is no evidence that only the included offenses were committed. As the trial court found, there is no evidence that Schierman acted only recklessly or negligently. 99RP 11. Instead, as described above, the evidence overwhelmingly showed that he acted with premeditated intent.

Schierman contends, however, that the factual basis was met because he acted recklessly by drinking to excess, risking blackout. But the substantial risk that a defendant must unreasonably disregard to be convicted of manslaughter is not the risk that he will become drunk or black out, but rather the risk that he will cause the death of another person. RCW 9A.32.060(1)(a), .070(1); State v. Gamble, 154 Wn.2d 457, 467-68 & n.8, 114 P.3d 646 (2005) (holding that “to prove manslaughter the State must show Gamble ‘[knew] of and disregard[ed] a substantial risk that a [homicide] may occur.’” (alterations in original)). Fortunately, drinking to excess does not pose a substantial risk that the intoxicated person will stab

people to death. Indeed, Schierman recognized as much at trial. He did not seek to have the jury instructed that he recklessly or negligently acted in some fashion, and four deaths then occurred, but that he recklessly or negligently “inflicted sharp force injury to” each of the four victims.⁷⁰ CP 7643-51.

Schierman also argues that his drinking could have impaired his ability to form the intent to kill, thus lessening his culpability. App. Br. at 97. But the cases he cites in support of his argument are distinguishable. In Berlin, 133 Wn.2d at 549-52, the evidence affirmatively supported the defense theory that both the defendant and his friend were drinking heavily, they struggled over a gun, and the defendant accidentally discharged the gun a single time, killing his friend. In Warden, 133 Wn.2d at 564, the defendant presented expert testimony that she suffered from post-traumatic stress disorder and lacked the mental capacity to form the intent to kill.

By contrast, Schierman systematically executed an entire family with three weapons that he brought from his home to the crime scene. Moreover, the jury rejected Schierman’s voluntary intoxication defense

⁷⁰ Even this formulation does not comport with the requirement of Gamble that the defendant know of and disregard a substantial risk that a homicide may occur. Gamble, 154 Wn.2d at 467-68.

when it rejected the included offense of murder in the second degree in favor of murder in the first degree, which requires both intent and the higher mental state of premeditation. The trial court did not abuse its discretion in determining that the facts and evidence in this case did not support an instruction on the included offenses of manslaughter in the first and second degree.

Even if the trial court did err, any error was harmless. Because the right to an included offense instruction derives from RCW 10.61.006, nonconstitutional harmless error analysis applies.⁷¹ Tamalini, 134 Wn.2d at 728; State v. Southerland, 109 Wn.2d 389, 390-91, 745 P.2d 33 (1987). That analysis requires the State to show that the error did not materially affect the outcome of the trial. Southerland, 109 Wn.2d at 391. Here, any error was harmless for two reasons.

⁷¹ Citing to Beck v. Alabama, 447 U.S. 625, 100 S. Ct. 2382, 65 L. Ed. 2d 392 (1980), Schierman claims that refusal to instruct the jury on an included offense violates the federal constitutional right to due process. App. Br. at 97. But in Beck, the Supreme Court held that due process concerns precluded a state from prohibiting a court, through legislation, from giving a lesser included offense instruction in a capital case. That scenario is not present in this case. Washington statutory law specifically provides for the possibility of an included offense instruction in any case, and Schierman's jury was in fact instructed on such a lesser. CP 7840-44. There is thus no reason to think that constitutional due process analysis applies.

First, the failure to instruct on an included offense is harmless when the jury's verdicts demonstrate an implicit rejection of the included offense.⁷² State v. Guilliot, 106 Wn. App. 355, 368-69, 22 P.3d 1266 (2001); State v. Hansen, 46 Wn. App. 292, 297-98, 730 P.2d 706 (1986). In Guilliot, the defendant was charged with murder in the first degree. 106 Wn. App. at 358. He presented a diminished capacity defense based upon his doctor's opinion that he may have been hypoglycemic at the time of the killing. Id. at 359, 362. The trial court instructed the jury on the crime charged and the included offense of murder in the second degree, but refused to instruct on the included offenses of first and second degree manslaughter. Id. at 368. On appeal, Guilliot argued that the trial court erred by refusing to instruct the jury on manslaughter. Id. at 366. The court agreed, but concluded that the error was harmless because the jury had rejected the included offense of murder in the second degree in favor of the charged offense. Id. at 367-69.

The Hansen court reached a similar conclusion in a case involving the charged offenses of kidnapping in the first degree and rape in the first degree. That court concluded that the trial court had erred in failing to give an instruction on the included offense of unlawful imprisonment, but found the error harmless because the jury had rejected the intermediate

⁷² This theory of harmless error is presented in a case currently pending before this Court. State v. Condon, No.88854-0 (argued Feb. 25, 2014).

included offense of kidnapping in the second degree.⁷³ Hansen, 46

Wn. App. at 295-98.

Here, Schierman's jury was instructed on the included offenses of murder in the second degree as well as murder in the first degree, and it implicitly rejected all lesser offenses when it convicted Schierman as charged. Thus, the failure to instruct the jury on the included offenses of manslaughter in the first and second degree did not affect the outcome of the trial.

Second, the evidence overwhelmingly established that Schierman acted not with recklessness or negligence, but with premeditated intent. No rational juror could conclude that a killer who armed himself with three weapons, a flashlight, and gloves, crept into a darkened house in the middle of the night through a back door, took off his shoes to travel more quietly through the home, and repeatedly stabbed four people to death in four different locations in the home acted with mere recklessness, let alone negligence. Error, if any, was harmless.

⁷³ The Hansen court distinguished State v. Parker, 102 Wn.2d 161, 683 P.2d 189 (1984), in which this Court found it was error not to instruct on the included offense of reckless driving when the defendant presented evidence that his intoxication made him incapable of forming the intent to commit the charged offense of attempting to elude. In reversing Parker's conviction, this Court noted that due to the absence of an instruction on the included offense, the jury was given no way to consider that defense short of complete acquittal. Hansen, by contrast, did not present the jury with such an all-or-nothing choice. Nor does Schierman.

K. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN LIMITING THE MITIGATION EVIDENCE BASED ON ITS LACK OF PROBATIVE VALUE.

Schierman claims that limitations placed on evidence that he intended to offer as mitigation violated federal and state constitutional due process and prohibitions on cruel punishment.⁷⁴ This argument should be rejected. The trial court applied the correct legal standards and did not abuse its discretion in its evidentiary rulings. Because Schierman chose not to call Dr. Cunningham to testify within the limits the court imposed, Schierman cannot establish that Cunningham would have been unable to testify effectively as to Schierman's future dangerousness or as to his alleged diminished moral culpability. Further, there was no error in the limits placed on the scope of Cunningham's testimony; the limitations were minor and reasonable. Schierman chose not to present Dr. McClung's testimony as to the subjects specified when McClung first was endorsed by the defense; the court did not err in precluding speculative testimony on a new subject. The limitation on the number of mitigation witnesses was reasonable, and Schierman has not established any subject that could not be adequately addressed due to the trial court's limitations. Even if some portion of these limitations was error, it was harmless

⁷⁴ U.S. CONST. amend. VIII, XIV; WASH. CONST. art. I, §§ 3, 14.

beyond a reasonable doubt, given the four brutal murders Schierman committed and the full opportunity to present mitigation evidence that Schierman was afforded.

1. A Trial Court Properly May Limit Mitigation Evidence.

In a capital case, the sentencer must be allowed to consider any mitigating evidence that is relevant to “any aspect of a defendant’s character or record and any circumstances of the offense.” Eddings v. Oklahoma, 455 U.S. 104, 110, 102 S. Ct. 869, 71 L. Ed. 2d 1 (1982) (adopting plurality rule of Lockett, 438 U.S. at 604). Relevant mitigating evidence is evidence that tends logically to prove or disprove some fact or circumstance that a fact-finder could reasonably find warrants a sentence less than death. Tennard v. Dretke, 542 U.S. 274, 284-85, 124 S. Ct. 2562, 159 L. Ed. 2d 384 (2004). Gravity has a place in relevance analysis; evidence of a trivial aspect of a defendant’s character or a trivial aspect of the circumstances of the crime is unlikely to have any tendency to mitigate culpability. Id. at 286. There is no federal constitutional imperative to admit cumulative or irrelevant evidence. Sheppard v. Bagley, 657 F.3d 338, 345-46 (6th Cir. 2011).

RCW 10.95.060(3) provides that a trial court shall admit “any relevant evidence which it deems to have probative value regardless of its

admissibility under the rules of evidence.” This Court has held that “only ‘those circumstances that arise in connection with the specific crime and defendant’ are relevant.” Gregory, 158 Wn.2d at 856 (quoting State v. Lord, 117 Wn.2d 829, 914, 822 P.2d 177 (1991)). Further, this Court has held that the trial court retains “its traditional ability to control the reliability of mitigating evidence.” State v. Davis, 175 Wn.2d 287, 321, 290 P.2d 43 (2012).

Mitigating evidence is not defined as any evidence, regardless of its relevance, that would disincline the jury to impose the death penalty. Pirtle, 127 Wn.2d at 671. It is defined as “that which ‘in fairness and mercy, may be considered as extenuating or reducing the degree of moral culpability.’” Id. (quoting Bartholomew II, 101 Wn.2d at 647).

2. The Trial Court Did Not Abuse Its Discretion In Excluding Some Proffered Expert Testimony Under ER 401 Because It Was Speculative And Irrelevant.

On December 14, 2009, Schierman filed a list of anticipated mitigation witnesses with this description of Dr. Mark Cunningham’s testimony: “Dr. Cunningham will testify concordant with his interviews of Conner in so far as they relate to Alcoholic Blackout/Propensity/History.” CP 26403. Dr. Mark McClung’s testimony was described as follows: “Dr. McClung will testify regarding the phenomena of ‘alcoholic

blackout' and its application to Conner Schierman on the day of the incident." CP 26405.

The guilt-phase closing arguments were completed on April 8, 2010. 100RP 201-07. On Friday April 9, after 4 p.m., the defense filed a supplemental disclosure of anticipated mitigation witnesses. CP 26422-34; 101RP 27. This document again stated that Cunningham would "testify concordantly with his interviews of Conner" and his "testimony will relate to alcoholic blackout." CP 26424. The testimony of McClung was described as relating to "alcoholic blackout," its application to Schierman on the day of the crimes, and Schierman's history of alcoholism and blackouts. CP 26428-29. The jury returned its guilty verdicts on Monday, April 12, 2010. 101RP 4-10.

On April 19, in his opening statement in the penalty phase, Schierman for the first time stated that Cunningham would testify to what types of criminal behavior are predictive of prison behavior, that an aging inmate poses a diminishing risk of prison violations, and that institutional conduct is the best predictor of future behavior in an institution. 102RP 86-87. The court noted that these subjects had not been disclosed. 102RP 97. Defense counsel conceded that he may have failed to do so. 102RP 97; 103RP 12-13. The trial court concluded that defense counsel

intentionally violated the court's discovery order for his own tactical advantage. 103RP 12-16; 106RP 155.

On April 22, after Schierman had begun presenting evidence in the penalty phase, he stated that a July 2009 brain image (MRI) had been reinterpreted and that Cunningham and McClung might incorporate in their testimony the information that, according to a new analysis, the image suggested a prior injury. 105RP 10-14.

The court ultimately ruled that McClung would be permitted to testify as to the subjects included in the original summary of his testimony. 106RP 58; 109RP 7. The court excluded testimony by McClung relating to reinterpretation of the MRI, concluding that it was speculative. 109RP 6-20. McClung's declaration stated that brain injury may have had no impact, but that it was possible that it did. 109RP 19.

The court ruled that Cunningham's testimony on future dangerousness would be limited to factors tailored to Schierman's situation, his background, "everything that would relate to, in Dr. Cunningham's opinion, his ability to not present a risk of violence in the future" or danger to others if sentenced to life without parole in the Washington Department of Corrections (DOC). 109RP 24. The court excluded portions of a proposed slide presentation on this topic that were generic, that referred to statistics that were not comparable to Schierman,

and that repeated testimony of Eldon Vail, who was the director of DOC at the time of trial. 109RP 24-26. Cunningham was permitted to incorporate the details of Vail's testimony to the extent that it was relevant to his analysis. 109RP 25-26.

The court ruled that Cunningham would be allowed to testify to issues relating to moral culpability associated with Schierman's development as a child and adolescent, his drug and alcohol addiction issues, alcohol treatment and recovery, and institutional adjustment in the jail. 110RP 10-11. The court excluded any reference to the legal concept of diminished capacity as it related to these subject areas. 110RP 6-10. Testimony by Cunningham relating to reinterpretation of the MRI was excluded, based on the court's previous ruling that it was speculative. 110RP 5-6. As to Cunningham's slides entitled "Adverse Developmental Factors," the court concluded that they would not assist the jury to understand the testimony, because they were simply repetitive of his testimony, and excluded them. 110RP 3-4.

Schierman eventually chose not to call either Cunningham or McClung as a witness. 111RP 2.

- a. The trial court properly limited Dr. Cunningham's testimony as to future dangerousness, and any error was not preserved.

Schierman claims that the trial court improperly excluded "actuarial evidence" regarding future dangerousness proffered through Cunningham. Schierman failed to preserve this claim when he chose not to call Cunningham, because without that testimony, the claimed error cannot be effectively reviewed on appeal. Further, Cunningham did not intend to rely on an accepted actuarial instrument—the material excluded was simply references to studies of various groups of prisoners in other prison systems. The trial court did not abuse its discretion when it excluded those references as irrelevant, allowing Cunningham to testify as to any characteristics of Schierman that in his expert opinion decreased the risk of future violence. It was the defense strategy to forgo Cunningham's testimony, and that is not a basis for reversal.

One of the statutory factors that the jury was instructed it could consider as a mitigating circumstance, if supported by the evidence, was "The defendant is unlikely to pose a danger to others in the future." CP 8318; RCW 10.95.070(8). The Supreme Court in Skipper v. South Carolina held that evidence that the defendant would not pose a danger if spared (but incarcerated), based on the defendant's past conduct in

custody, must be considered potentially mitigating. 476 U.S. 1, 5, 106 S. Ct. 1669, 90 L. Ed. 2d 1 (1986). The Court held that it was error to exclude evidence of the defendant's good behavior in jail because "consideration of a defendant's past conduct as indicative of his probable future behavior" is an inevitable part of criminal sentencing.⁷⁵ Id.

There was extensive testimony in this case regarding Schierman's conduct in the King County Jail in the two years he was awaiting trial.⁷⁶ The trial judge stated it would allow testimony by Cunningham regarding future dangerousness, including Schierman's development as a child and adolescent, his addictions, his alcohol treatment and recovery, and his institutional adjustment in jail, to the extent they were relevant. 109RP 27. Thus, Schierman's suggestion that he had no opportunity to address future dangerousness is without merit.

The trial court properly concluded that most of the statistics cited by Cunningham related to offenders in other jurisdictions under circumstances not relevant to Schierman's situation. 109RP 24-25. The statistics excluded by the court related to other categories of prisoners and

⁷⁵ Schierman's citations to Duckett v. Godinez, 67 F.3d 734 (9th Cir. 1995), and State v. Finch, 137 Wn.2d 792, 975 P.2d 967 (1999), are inapposite, as the issue addressed in both of those cases was the use of restraints at a sentencing proceeding.

⁷⁶ Two jail witnesses, and family and friends who visited and otherwise communicated with him. E.g., 103RP 111-14; 104RP 22-53, 76-77, 177-78, 188-89; 105RP 49-83; 106RP 39, 53, 67-68, 122, 107RP 115-26.

different prison systems.⁷⁷ The court did permit Cunningham to testify that past violence in the community is not strongly associated with prison violence, that the current offense is only weakly associated with prison violence, and that the severity of an offense is not a good predictor of prison adjustment. CP 8306 (contents of slide 26); 109RP 24. The court also permitted him to testify that serious violence is rare in prison (slides 27-28), to the low rates of inmate assaults and homicide in the Washington DOC (slides 29-30), and to the number and proportion of inmates convicted of homicide in Washington prisons (slide 31). CP 8306-07; 109RP 24-25. The court also permitted testimony as to slide 35, which states that nothing about Schierman increased his risk of serious violence in prison, and listed five specific factors that decreased his risk of serious violence. CP 8307; 109RP 25. The court relied on Morva v. Virginia⁷⁸ because, when it affirmed exclusion of the same expert's testimony in that case, that court articulated the applicable limitation: that conditions of

⁷⁷ E.g., slide 6, juvenile prisoners who averaged less than 3 years in prison; slides 7 & 18, federal prison (inmates in prison an average of 6 years); slides 8 & 9, all prisoners; slide 11, all maximum security prisoners in one Missouri prison; slide 16, Florida prisons in 2003; slide 17, a 2000 study of murderers sent to prison between 1990-98; slides 19-20, all Texas prisoners convicted of capital murder; slides 21-22, comparing undefined group of capital inmates in prison for an average of 4 years to all inmates in federal prison; slide 23, 228 capital inmates for which there were opposing predictions of dangerousness on record, sentence unspecified; slide 24, all life-without-parole and death-sentenced inmates in a high security Missouri prison from 1991-2002; slide 25, Florida prisons over 6 years; slide 36, all Florida inmates over one year; slide 37, life-sentenced prisoners in Texas who had served an average of 2.37 years; slide 38, capital murderers who obtained reductions of their sentences, who had served an average of 18 years. CP 8302-08.

⁷⁸ 278 Va. 329, 683 S.E.2d 553 (2009).

prison life and prison security measures are not relevant to future dangerousness unless they are relevant to the specific defendant's ability to adjust. 109RP 23. The court here correctly concluded that conditions related to prisoners who are not comparable to Schierman or who are in other prison systems were not relevant.

Schierman misplaces his reliance on an Oklahoma case, Rojem v. Oklahoma,⁷⁹ asserting that the trial court there was reversed because it prevented Dr. Cunningham from referencing a Department of Justice (DOJ) study. The trial court in that case did not exclude the DOJ study because it was irrelevant. Rojem, 207 P.3d 390-91. Rather the court demanded that there be no reference to federal law in his courtroom and, during Cunningham's testimony in that case, excluded his entire slide presentation, upon which defense counsel had predicated his ongoing examination regarding future dangerousness. Id. at 389-90. The appellate court held that the blanket exclusion of relevant demonstrative evidence was error. Id. at 391. Notably, the court held that the error was not reversible, citing the remainder of Cunningham's testimony regarding mitigation, including review of the defendant's family background, development, and behavior while incarcerated. Id. at 391-92.

⁷⁹ 207 P.3d 385 (Ok. Crim. App. 2009).

Schierman's citation to two other cases in which Cunningham testified as to risk lends no weight to his argument. In one case, the district court, in denying a motion to vacate a conviction, stated that Cunningham testified about several studies; there is no indication there was ever any challenge to admitting the testimony. Robinson v. United States, 2008 WL 4906272 (N.D. Tex. Nov. 7, 2008). In the second, the appellate court stated that Cunningham provided a risk assessment, but the court did not state the basis of Cunningham's opinion; there also is no indication that there was any challenge to Cunningham's testimony on this topic. United States v. Barnette, 211 F.3d 803, 810 (4th Cir. 2000).

Schierman argues that the court erred because actuarial instruments are regularly admitted in other cases, but that argument fails for two reasons. First, Cunningham did not apply an actuarial model—a validated method of prediction that has been relied on in civil commitment proceedings for sexual predators. An actuarial model uses statistical analysis to identify a limited set of risk factors that assist in predicting dangerousness, then combines them using a “predetermined, numerical weighting system to determine future risk,” which may be adjusted by experts who incorporate other important factors. In re Thorell, 149 Wn.2d 724, 753, 72 P.3d 708 (2003). Cunningham's proffer does not identify risk factors that predict dangerousness in prison and he refers to no

numerical weighting system. Second, testimony that is based on actuarial instruments that have not been generally accepted by experts in the field is properly excluded as unreliable. In re McGary, 175 Wn. App. 328, 340, 306 P.3d 1005 (2013) (excluding instrument used only by its creator and six other experts). There was no reference to any validated actuarial instrument in Cunningham's proffer, and thus no indication that any other expert would reasonably rely on the construct created by Cunningham. Unreliable expert testimony is not helpful to the trier of fact and is properly excluded as irrelevant, as it does not tend logically to prove or disprove anything.

Schierman has failed to preserve for review his argument that after the exclusion of some of his slides, Cunningham was left with "little of any use to the defense." App. Br. at 107. Schierman's offer of proof alone does not preserve any error. As described above, the trial court ruled that Cunningham could testify as to future dangerousness and the relevance of Schierman's history, the crimes, and his institutional adjustment to such a prediction. Because Cunningham did not testify, this Court is unable to evaluate the effect of the trial court's limitation. In similar situations, Washington courts have concluded that any claimed error in the ruling cannot be reviewed. Brown, 113 Wn.2d at 533-40 (defendant must testify to preserve claim that ER 609 ruling was error);

State v. Mezquia, 129 Wn. App. 118, 127-32, 118 P.3d 378 (2005) (by failing to offer other suspect evidence, thus precluding State's use of ER 404(b) evidence, defendant did not preserve claim that ruling in limine as to admissibility of ER 404(b) evidence in rebuttal was error); State v. Kimp, 87 Wn. App. 281, 283-85, 941 P.2d 714 (1997) (witness must testify to preserve claim that ER 608 ruling was error).

As this Court observed in Brown, an offer of proof is insufficient, as actual testimony may differ and is necessary to provide a record for meaningful appellate review. Brown, 113 Wn.2d at 538. This preservation rule also assures that the defendant does not "plant" error. Id. In the context of ER 609, the court noted that assessing the impact of an error is "necessarily speculative" without the testimony and introduction of the prior conviction. Id. Likewise here, it is impossible to determine what effect the court's limitation had without a record of testimony and cross-examination. For example, if the prosecutor had challenged the basis of Cunningham's opinions, it is entirely possible that the trial court would have concluded that the door was opened to admission of some or all of the studies the court initially excluded.

Schierman contends that the State took advantage of the exclusion of Cunningham's testimony, citing two paragraphs of the State's closing remarks as argument that Schierman posed a danger to others in the future.

App. Br. at 115. In that excerpt, the prosecutor refers to testimony of Schierman's stepfather that Schierman has a problem with authority figures; that is an issue that Cunningham did not purport to address. 111RP 52. The prosecutor also pointed out that Schierman will be in contact with other inmates in prison. 111RP 52-53. Appellant's brief closes its quotation before the State completed its point:

The reason that I mention it, remember the picture that was painted in the opening statements by the defense counsel that the defendant would be isolated and alone for the rest of his life. That is not true. That is disproved by the witness called by the defense.

111RP 53; see 102RP 83-87 (defense opening remarks regarding isolation). There is no indication that Cunningham would dispute that an inmate in contact with other inmates presents a greater risk of danger. The State did not argue that Schierman will be dangerous; it just rebutted the defense picture that he would not have access to other people in prison and that isolation during his imprisonment would be severe punishment.

The trial court properly concluded that Cunningham's testimony as to statistics relating to a variety of samples not comparable to Schierman's situation was not relevant or helpful to the jury.

- b. The trial court properly limited Dr. Cunningham's testimony regarding diminished capacity, and any error was not preserved.

Schierman next claims that the trial court precluded testimony from Dr. Cunningham on the subject of the statutory mitigating factor that represents a failed insanity defense. RCW 10.95.070(6). That is incorrect. The court did exclude reference to the legal defense of diminished capacity in the sentencing proceeding. The trial court did not abuse its discretion in prohibiting testimony on the subject of Schierman's legal responsibility for these crimes, which the jury already had found. The court did permit Cunningham to testify as to Schierman's moral culpability, which Cunningham himself agreed was the issue that was properly before the jury in the sentencing proceeding. Further, Schierman failed to preserve this claim when he chose not to call Cunningham, because without that testimony the claimed error cannot be effectively reviewed.

A capital defendant does not have a right to relitigate guilt through new evidence presented at a sentencing proceeding. Oregon v. Guzek, 546 U.S. 517, 523, 126 S. Ct. 1226, 163 L. Ed. 2d 1112 (2006); Holland v. Anderson, 583 F.3d 267, 274-80 (5th Cir. 2009). A diminished capacity defense asserts that a mental disorder impaired the defendant's ability to

form the culpable mental state of the crime charged. State v. Atsbeha, 142 Wn.2d 904, 914, 16 P.3d 626 (2001). It defeats the proof of a specific element of the offense, precluding a finding of guilt. Thus, evidence of diminished capacity was properly excluded.

The mitigating factor set out in RCW 10.95.070(6), on the other hand, refers to the components of an insanity defense, not a diminished capacity defense. That factor is, in pertinent part:

Whether, at the time of the murder, the capacity of the defendant to appreciate the wrongfulness of his or her conduct or to conform his or her conduct to the requirements of law was substantially impaired as a result of mental disease or defect.

RCW 10.95.070(6). It corresponds to the Model Penal Code definition of insanity,⁸⁰ which is broader than the Washington insanity defense.⁸¹ It also corresponds to a mitigating factor under the Sentencing Reform Act that is described by Boerner as “designed to parallel the insanity defense.” RCW 9.94A.535(1)(e); D. Boerner, Sentencing in Washington §9.12(c)(3). The mental state of ‘insanity’ does not negate any element of a crime, but instead goes to the ultimate culpability of the accused. State v. Box, 109 Wn.2d 320, 329-30, 745 P.2d 23 (1987).

⁸⁰ Model Penal Code §4.01.

⁸¹ The defense of insanity under Washington law requires a showing that as a result of mental disease or defect, the defendant was unable to perceive the nature and quality of the act charged or was unable to tell right from wrong. RCW 9A.12.010.

Because the statutory mitigating factor is in the nature of an insanity defense, exclusion of testimony regarding diminished capacity did not impair Schierman's ability to offer evidence as to the mitigating factor.

Schierman agrees that the court accurately portrayed the nature of Cunningham's proffered testimony as testimony related to the legal concept of diminished capacity. App. Br. at 116. That testimony was irrelevant. As the trial court found, it would not shed light on the manner in which the crimes were committed. 110RP 9-10. Although the court referred to "diminished control" as an improper subject, elsewhere it made clear that it was precluding only evidence relating to diminished capacity. 110RP 7-8. The Court specifically ruled that Cunningham would be permitted to testify about Schierman's moral culpability, based on his background—including his addictions—and how the offense was committed. 110RP 10-12.

Even if the trial court's limitation was error, Schierman has failed to preserve for review his argument that the court prohibited Cunningham from testifying about this statutory mitigating factor. The trial court ruled that Cunningham could testify as to Schierman's moral culpability, but could not refer to diminished capacity, the legal concept of inability to form a mental state that is an element of the charged crime. Because Cunningham did not testify, this Court is unable to evaluate the effect of

the trial court's limitation. As a result this claimed error has not been preserved. Brown, 113 Wn.2d at 533-40; Mezquia, 129 Wn. App. at 127-32; Kimp, 87 Wn. App. at 283-85.

Schierman's claim is also barred under ER 103(a)(2), which requires an adequate offer of proof to preserve an error as to a ruling excluding evidence. State v. Benn, 161 Wn.2d 256, 268-69, 165 P.3d 1232 (2007). The trial court's ruling allowed evidence of moral culpability. The trial court excluded a list of issues related to legal responsibility shown on three of Cunningham's slides, but within Cunningham's proffered presentation itself, Cunningham actually struck that list as irrelevant to the issues at sentencing. CP 8288; 110RP 6-7. The fourth slide begins a lengthy series addressing choices and moral culpability. CP 8288-8301. A reviewing court cannot determine what testimony was excluded by the ruling and what testimony would have been properly elicited, so the issue has not been preserved.

- c. The trial court properly excluded speculation by Dr. McClung that went beyond his medical opinions.

Schierman argues that the trial court erred in concluding that "all of Dr. McClung's testimony should be excluded" because there was no evidence of serious head injuries and because the testimony was not based on a reasonable medical certainty. App. Br. 122-24. This argument is

without merit. The court excluded only the newly proffered testimony referred to in a letter dated April 27, 2010, not the originally proffered testimony related to alcohol blackout. 109RP 6-7, 20. The newly offered testimony was mere speculation and was properly excluded on that basis.

On April 27, more than a week after the penalty phase began, McClung provided a statement of “the effect of the new medical information” on his testimony. CP 8259. He stated that the MRI indicated a past brain injury, quoting Dr. Cohen as stating the appearance was suggestive of a prior insult. Id. He stated the findings were “suggestive of ongoing brain function changes as a result of a brain injury.” CP 8260. In McClung’s opinion, that brain injury may have had no impact on Schierman’s emotions or behavior, but it was “possible that it had an impact” on mood problems, the intensity of substance abuse, or when Schierman was intoxicated, it “may have contributed to worsening any problems with loss of inhibitions, interpreting his surroundings, and controlling anger/ aggression.” Id.

The court excluded testimony by McClung relating to reinterpretation of the MRI, concluding that it was speculative. 109RP 6-20. The court noted that because juries give more weight to expert opinion, there must be a foundation for that opinion; the opinion must be

expressed to a reasonable medical certainty to avoid being speculative.

109RP 6.

The trial court's conclusion is consistent with the Supreme Court's definition of relevant evidence as evidence tending logically to prove or disprove a fact or circumstance that a fact-finder could reasonably find warrants a sentence of less than death. Tennard, 542 U.S. at 284-85. The mere possibility that an apparent mild concussion from years before these crimes "may have contributed to worsening any problems with loss of inhibitions, interpreting his surroundings, and controlling anger/aggression" does not tend to prove any fact of significance to the jury's decision.

Further, Schierman presented evidence from a number of witnesses that when he was drinking, he did not have trouble controlling aggression.⁸² 103RP 168 (Hawkinson); 104RP 81-82 (O'Brien); 105RP 91 (Holley); 106RP 23 (Yantis), 131 (Kelman); 107RP 31 (McGavran). McClung's speculation thus was actually contradicted by the many defense witnesses to Schierman's behavior while intoxicated.

Schierman relies on opinions expressed by Dr. Connor and Dr. Adler to argue that the court excluded relevant evidence, but those

⁸² McClung had suggested that Schierman's references to his own violent behavior in his treatment journal were fabricated. 103RP 127; 104RP 127; 111RP 93. If those references were fabrications, McClung's reliance on them in forming his opinion was entirely unwarranted, and rendered his opinion even less reliable.

witnesses were not endorsed and those opinions were not excluded by the court. Perhaps for the reasons expressed by the trial court,⁸³ McClung did not endorse those opinions. Although those witnesses referred to multiple head traumas, McClung referenced only one injury. CP 8257-60; 109RP 8-9, 16-17. The new MRI analysis also indicated only that there was some evidence of one injury.⁸⁴ CP 8252 (“Appearance is suggestive of a prior insult which involved a component of hemorrhage.”) Connor offered no opinion to a reasonable medical certainty. CP 8254-58. Adler’s opinion was “with reasonable medical certainty, that these findings are of the kind that courts may wish to consider in exploring criminal mitigation.” CP 8251. That is a legal conclusion, however, not a medical opinion. In any event, neither Connor nor Adler was endorsed as a witness, so their opinions that were not adopted by McClung are irrelevant.

This Court has concluded that expert medical evidence that is not based on a reasonable degree of medical certainty is simply speculation, conjecture, or mere possibility. Anderson v. Akzo Nobel Coatings, 172

⁸³ 109RP 8-19.

⁸⁴ There was evidence that Schierman was physically abused by his father, but not that the abuse resulted in multiple head injuries, as Schierman claims. The only evidence of abuse-related head injuries was of a slap to Schierman’s face that left bruising, and of an incident where his father slammed Schierman to the floor where Schierman hit his head on a stone hearth, leaving him disoriented for an unstated period. 107RP 77-83; 105RP 110; CP 26935-38. As the trial court suggested, the symptoms of head injury cited by Adler are also consistent with alcohol and drug abuse. 109RP 18. Schierman was drinking and using drugs by the time he was in 8th grade. 105RP 112; 106RP 125-28.

Wn.2d 593, 609-10, 260 P.3d 857 (2011). A trial court is not required to admit any and all evidence offered as mitigation – the evidence must be reliable and relevant. Sallahdin v. Gibson, 275 F.3d 1211, 1237-38 (10th Cir. 2002); Davis, 175 Wn.2d at 321. Speculation meets neither standard. McClung’s statement that a brain injury may or may not have had any continuing impact at all, and that any impact related to these crimes is just a possibility, makes this evidence irrelevant and unhelpful. It was properly excluded.

3. The Trial Court Did Not Abuse Its Discretion In Controlling The Number Of Cumulative Witnesses And The Proper Scope Of Mitigation Testimony.

Even a capital defendant does not have license to present cumulative, repetitive, or questionably relevant evidence. Matthews v. Parker, 651 F.3d 489, 520-21 (6th Cir. 2011), rev’d on other grounds, 132 S. Ct. 2148 (2012) (citing Guzek, 546 U.S. at 526). The trial court’s decision to admit or exclude evidence is reviewed for abuse of discretion. Stenson, 132 Wn.2d at 701.

Pursuant to the trial court’s discovery schedule, on December 14, 2009, Schierman filed a list of 31 anticipated mitigation witnesses. CP 6948-51, 26403-06. The guilt-phase closing arguments were completed April 8, 2010. 100RP 201-07. On Friday, April 9, after 4 p.m., the defense filed a supplemental disclosure of anticipated mitigation

witnesses, totaling 79, including experts.⁸⁵ CP 26422-34; 101RP 27. The jury returned its guilty verdicts on Monday, April 12. 101RP 4-10.

On April 13, the trial court addressed the defense proposed list of witnesses, observing that the proposed testimony of the lay witnesses included opinions that they were not qualified to offer. 101RP 29. After a review of the applicable legal standards, the court ruled that the probative value of much of the lay testimony was minimal and was substantially outweighed by consideration of needless presentation of cumulative evidence. 101RP 30-32. The court permitted the defense to select and call up to 12 of the listed family members, two of the five listed teachers or counselors from middle school or high school, up to 15 of the other lay witnesses, Dr. Cunningham, Dr. McClung, polygrapher David Raskin, and a treatment provider from Lakeside-Milam. 101RP 32-33, 52.

James Aiken was listed on the supplemental defense disclosure, to testify “regarding his knowledge of penal systems and his qualifications.” CP 26422. The court asked the relevance of his testimony to Washington prisons and potential sentences available in this case. 101RP 34, 37. The defense responded that Aiken’s expertise related to all prison systems, and he could address the Washington prison system. 101RP 34-37. On April 14 and 15, Schierman filed declarations of Aiken, explaining his

⁸⁵ The trial court observed that the April 9 list included 47 previously undisclosed defense witnesses and violated its previous discovery order. 101RP 27-28.

familiarity with the Washington prison system and Schierman's classification records at the jail. CP 7917-20, 7942-44. The court allowed the testimony proffered in these declarations. 101RP 100.

The trial court ruled that no witness in the penalty phase would be permitted to testify to their opinion as to what sentence the jury should impose. 101RP 40. It noted that under Washington case law, that matter is "solely and exclusively the function of the jury." *Id.* There was no objection to this ruling. None of the summaries of testimony included in the defense witness list referred to the impact of execution. CP 26422-33.

The trial court granted in part a defense motion for reconsideration of the limitations it had imposed; it allowed three additional witnesses from the King County Department of Adult and Juvenile Detention to testify regarding observations of Schierman's behavior in jail and his adjustment to incarceration. CP 7940-42; 101RP 101-02. It also allowed an additional pastor who met with Schierman and his parents at the jail (Reverend Tinney), an additional family counselor from the late 1990's (Ed Morrison), and two more family members of the defense choosing. CP 7897-99; 101RP 104. The court also later allowed a second professional witness from Lakeside-Milam, but Schierman did not call that additional witness. 104RP 113.

On April 19, the defense moved to substitute the Director of the Washington Department of Corrections (DOC), Eldon Vail, for one of the jail officers it had endorsed. 102RP 19. Because Vail would be testifying to the conditions of confinement at DOC, the court granted the motion but ruled that if Vail testified, Aiken would not be allowed to testify. 102RP 20-22. Schierman did not object to this exchange or suggest that Aiken had relevant testimony beyond what Eldon Vail could provide.

A slide show of 23 pictures of Schierman was admitted during the testimony of Kinsey Schierman. P.Ex. 6;⁸⁶ 105RP 121-27; 106RP 150. The defense proposed to offer 54 additional pictures of Schierman through his mother; the court limited it to an additional 12. 106RP 149-50.

Schierman eventually called only 12 family members, although 14 were allowed. He also did not call Raskin (polygraph), Rev. Tinney (pastor), and Eileen Little (teacher). CP 7895-99; 108RP 7, 29; 111RP 2. Phyllis Roderick, a counselor of Schierman in junior high, was substituted for Ed Morrison, who was unavailable. 106RP 157; 107RP 35-37.

⁸⁶ Penalty phase exhibits will be reference as "P.Ex. ___."

- a. Several claimed errors were not preserved for review.

Schierman's claim that execution impact evidence should have been permitted has not been preserved for review.⁸⁷ His lists of mitigation witnesses included summaries of their testimony; none included reference to the impact on others of Schierman's possible execution. CP 7889-7900; 26403-06, 26422-34. On April 14, when the trial court ruled that no witness would be permitted to testify to their opinion of the proper punishment or to the impact of an execution on the witness, the defense did not object. 101RP 88-89, 94. The issue has not been preserved for review. RAP 2.5(a)(3).

Schierman's claim that the judge improperly restricted witnesses "from discussing their own lives and relationships"⁸⁸ also has not been preserved for review. The trial court's ruling actually only excluded testimony about what the children of a witness did for a living and how many grandchildren they had.⁸⁹ 106RP 13-14. The ruling undoubtedly was a response to defense witnesses who had testified to their own

⁸⁷ The issue is without merit in any event, as the trial court properly relied on this Court's holding in Stenson that execution impact testimony may be excluded because it is irrelevant. 132 Wn.2d at 751-54. This Court will overrule its precedent only if there is a clear showing that it is both incorrect and harmful. Devin, 158 Wn.2d at 168. Schierman has not attempted to make such a showing.

⁸⁸ App. Br. at 130.

⁸⁹ At that point, 16 of Schierman's lay witnesses had already testified.

background and details of their own families at remarkable length.⁹⁰

Defense counsel asked whether testimony as to the witness's own employment would be permitted; the court said it would. 106RP 14.

Defense counsel did not object to this limitation on the testimony or claim that the excluded information would be relevant. 106RP 14. The issue has not been preserved for review. RAP 2.5(a)(3).

Schierman's claim that the defense was forced to choose between Eldon Vail and James Aiken regarding the conditions of confinement also has not been preserved. The ruling Schierman cites occurred when, on April 19, the defense first named Vail as a potential witness and offered him as a substitute for a corrections officer witness. 102RP 19-22. The trial court concluded that it would allow Vail to testify but that if he did, Aiken would not be allowed to testify as Aiken had little direct relationship with Washington, which was the only relevant part of his testimony. 102RP 22. There is no evidence that Schierman might be sent to a prison outside Washington, as he suggests on appeal. The arguments of counsel cited by Schierman regarding the relevance of Aiken's testimony occurred on April 13, when Aiken was the only defense witness proffered as to prison conditions. App. Br. at 132, citing 101RP 34-38. Schierman never objected to the later ruling of the court or suggested that

⁹⁰ E.g., 104RP 165-68.

Aiken had any relevant testimony to add beyond the scope of Vail's testimony. The issue has not been preserved for review. RAP 2.5(a)(3).

- b. Two of these claims are unsupported by the record.

Schierman's claim that the court excluded "any testimony" from Michael Christensen, one of Schierman's uncles,⁹¹ is contrary to the record. This witness did testify on Schierman's behalf.⁹² 106RP 35-40.

Schierman's claim that the court allowed the defense to present only 12 pictures of him⁹³ also is contrary to the record. Slides that included 23 pictures of Schierman were admitted through Kinsey Schierman and individually described by her. P.Ex. 6; 105RP 121-27; 106RP 150. When the defense proposed to offer 54 additional pictures of Schierman through his mother, the court limited it to an additional 12 pictures. 106RP 149-50. The defense thus admitted 35 pictures of Schierman throughout his life. P.Ex. 6, 9. The jury, of course, was able to see Schierman in court every day for many months, and he addressed them personally when he allocuted. 111RP 16-22. The court also ruled that

⁹¹ App. Br. at 132 (emphasis in original); also App. Br. at 128.

⁹² The court ruled that Christensen could not testify about his prior employment as a corrections officer and his opinion, based on that experience, that it was a positive thing that Schierman continued to reach out to his family. 106RP 10-11, 14. Schierman did not attempt to establish that Christensen was qualified as an expert by training or experience in either corrections or psychology, which might establish a foundation for that proffered testimony. See CP 26423 (proffer as to Christensen).

⁹³ App. Br. at 129.

Schierman could display 12 pieces of his artwork. 106RP 151. The pictures and art pieces were admitted, including samples of Schierman's origami and soap carvings. P.Ex. 9, 10; 107RP 110-14, 120-25.

- c. The court properly limited testimony about Kinsey Schierman's life.

The trial court excluded testimony from Kinsey Schierman about the effect of her father's behavior during her childhood on her. 105RP 15. She was permitted to testify to what observable impact her father's behavior had, and her parents' divorce had, on Schierman. 105RP 15-16.

Schierman's argument is that Kinsey's own experience was relevant because "it would be a reasonable inference that [Schierman] would be affected in a similar way." App. Br. at 132. There is no authority cited in support of that assertion. It defies logic, as Kinsey was four years younger than Schierman, testified that she had suffered an alcohol addiction but was successful in recovery, and apparently was not violent toward others. 105RP 107, 115. Presumably, children of different genders and with different personalities would be treated differently by family members and would be affected differently by their experiences. The trial court did not abuse its discretion in concluding that the difficulties that Kinsey Schierman personally suffered were not relevant.

- d. Lay testimony regarding effects of abuse and divorce was properly excluded.

The trial court observed that the summary of expected testimony of some defense witnesses included “the impact on the defendant of the effects of divorce, the impact [on] the defendant [of] abusive parenting.” 101RP 29. The court excluded lay opinions about the effect these situations had on Schierman. 101RP 29-30.

The case upon which Schierman relies does not address lay testimony concerning the psychological effects of abuse or divorce; it holds that a lay witness may testify to behavior changes. State v. Claflin, 38 Wn. App. 847, 854, 690 P.2d 1186 (1984). The trial court did not limit testimony by lay witnesses as to Schierman’s behavior during or after these times. For example, Dean Dubinsky testified that Schierman “has struggled for a long time to deal with what happened with him in his childhood, and has been dealing with that through emotional problems and through alcohol and drugs.” 103RP 44. Dubinsky testified that the “fallout” of Schierman’s father’s poor parenting was low self-esteem, deception, and a “huge” problem with authority figures. 103RP 70. An aunt testified that Schierman seemed anxious about facing his father and was protective of his sister. 105RP 23-25. Kinsey Schierman testified that Schierman had a hard time when his parents

separated and was really frustrated; he was arguing and smoking cigarettes, and drank even though he was only 12 or 13 years old. 105RP 112-13. Lois Tallman, a grandmother, testified that she did not observe Schierman have any struggles before the divorce, but afterward he had the anger and frustration that would be natural. 106RP 143. A junior high school counselor said that when Schierman's parents were divorcing, he was angry and depressed, so she referred him to counseling. 107RP 37, 41. Schierman's mother testified at great length about Schierman's childhood, and that when she and her husband separated, Schierman was angry at everyone, did not do as well in school, and was acting out. 107RP 84-86, 91. She described his behavior and mood problems in high school. 107RP 89-98.

The court in Clafin noted that the parent's testimony about a child victim's behavior was relevant, especially where an expert testified that the behavior described could indicate sexual assault. 38 Wn. App. at 854. There was no suggestion that the parent would be qualified to or permitted to testify to the psychological connection.

- e. The limitations on the number of witnesses, pictures, and art pieces were not an abuse of discretion.

Schierman frames this argument in terms of the court's exclusion of witnesses, but actually claims error because the court limited the number of witnesses the defense could call. The court did not abuse its discretion in limiting the number of lay witnesses to 14 family members and 17 other lay witnesses. In addition to those 31, the court allowed testimony from two teachers or counselors, two additional counselors from Lakeside-Milam treatment center, three jail officers, a witness as to prison conditions, and two psychological experts.

Schierman cites no aspect of his character that he was unable to address based on this allowance. He claims that his ability to form "pro-social relationships" could have been further developed. App. Br. at 129. But Schierman called only 12 of the 14 family members that he was permitted. Thus, the one example given, a cousin, would have been permitted to testify. Schierman does not claim that this aspect of Schierman's character was not presented to the jury through the other 29 witnesses who testified regarding his behavior before the crimes, instead asserting that it was error to limit in any way the number of witnesses he could present. This claim is perplexing, as the court must have some authority to control the trial proceeding.

Schierman relies upon State v. Davis, 175 Wn.2d 287, to establish that the sheer number of mitigation witnesses is relevant. That case is inapposite: only three mitigation witnesses testified, and the issue on appeal was exclusion of videotaped interviews of two of the defendant's aunts. Id. The court noted that when the prosecutor argued that the defendant could find only a few people from his large family to testify on his behalf, it underscored that only two family members did testify for the defendant. Id. By contrast, here the court allowed 37 witnesses who knew Schierman personally to testify (and Schierman called only 32 of them). The prosecutor here did not suggest any lack of character witnesses; quite the opposite, he argued that Schierman had very supportive family and friends in the past and still did, and that Schierman was smart and talented. 111RP 55-57. He agreed the defendant's "support system is impressive" and provided many resources for him (of which he did not take advantage). 111RP 57-60. The prosecutor then contrasted those images of Schierman's life with the image of the four human beings he had killed, left in the debris of their burned home. 111RP 57.

And, in any event, Schierman decided not to call all of the witnesses permitted by the trial court. He can hardly be heard to claim prejudice in the court's limitation on the number of mitigation witnesses when he did not avail himself of even those witnesses afforded to him.

Likewise, Schierman has not established that the 35 pictures of himself that he was permitted to show the jury was any real limitation on his ability to illustrate his character in the 24 years of his life before these killings, as it was relevant to mitigation in this case. See Sweet v. Delo, 125 F.3d 1144, 1158 (8th Cir. 1997) (photographs taken by defendant properly excluded; jury could not reasonably have found that they helped to warrant a sentence of less than death).

4. Any Improper Limit On The Mitigation Evidence Was Harmless Beyond A Reasonable Doubt.

The guilt phase of the trial in this case lasted more than two months;⁹⁴ the State's victim impact evidence took less than a full court day.⁹⁵ Schierman presented 33 mitigation witnesses.⁹⁶ He chose not to call Dr. Cunningham and Dr. McClung. He chose not to call six other witnesses that the court had permitted.⁹⁷

An error in limiting mitigation testimony is not reversible if the court concludes that the error was harmless beyond a reasonable doubt. Hitchcock v. Dugger, 481 U.S. 393, 399, 107 S. Ct. 1821, 95 L. Ed. 2d 347 (1987); see United States v. Bernard, 299 F.3d 467, 487 (5th Cir. 2002) (exclusion of one childhood incident of racial harassment harmless

⁹⁴ Evidence was presented January 20, 2010 (61RP) through April 6, 2010 (98RP).

⁹⁵ 102RP 109 (April 19, after lunch) to 103RP 40 (April 20, before first morning break).

⁹⁶ 103RP 42 to 107RP 135.

⁹⁷ Two family members, a teacher, a pastor, a Lakeside-Milam employee, and Raskin.

where jury had other evidence of racial harassment and was not precluded from considering that as a potential mitigating factor); Sweet, 125 F.3d at 1158 (if exclusion of photographs taken by defendant was error, it was harmless in light of the nature of the crime and other testimony that defendant was a good photographer). Given the four brutal murders that Schierman committed and the extensive evidence in mitigation that was presented, any error in limiting the testimony in mitigation was harmless beyond a reasonable doubt.

L. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN ADMITTING LIMITED VICTIM IMPACT TESTIMONY.

Schierman claims that the victim impact evidence admitted at the penalty phase of this trial was so inflammatory that it violated federal and state constitutional due process and Washington's prohibition on cruel and unusual punishment. This argument should be rejected. There was no objection in the trial court to any of the witnesses' testimony, so Schierman has not preserved his claim of error regarding the scope of that testimony. As to the video shown during Leonid's testimony, it was moving but not so inflammatory that it resulted in a fundamentally unfair proceeding. The victim impact evidence as a whole was brief in the context of the entire penalty phase, and it was proper evidence of the

personal characteristics of the victims and the emotional impact of the crimes on the victims' families.

1. Victim Impact Evidence Is Properly Admitted In A Capital Sentencing Proceeding.

Victim impact evidence is relevant to the jury's decision at the sentencing proceeding, providing information necessary to determine the proper punishment. Victim impact evidence is permitted under both the federal and state constitutions, and is properly admitted in a capital penalty proceeding.

The Eighth Amendment does not prohibit victim impact evidence. A state may allow evidence of the specific harm caused by the defendant to be presented to the jury, so that the jury can meaningfully assess the defendant's moral culpability and blameworthiness. Payne v. Tennessee, 501 U.S. 808, 825, 111 S. Ct. 2597, 115 L. Ed. 2d 720 (1991). The Supreme Court in Payne recognized that the State has a legitimate interest in counteracting the defendant's mitigation evidence "by reminding the sentencer that just as the murderer should be considered as an individual, so too the victim is an individual whose death represents a unique loss to society and in particular to his family." Id. (quoting Booth v. Maryland, 482 U.S. 496, 517, 107 S. Ct. 2529, 96 L. Ed. 2d 440 (1987) (White, J., dissenting)).

In holding that evidence relating to the personal characteristics of the victim and the impact of the victim's death on the victim's family and community are admissible at a capital sentencing proceeding, Payne overruled the contrary holding of Booth v. Maryland, which is quoted at length by Schierman.⁹⁸ Payne, 501 U.S. at 830 & n.2. The Court concluded that Booth "deprives the State of the full moral force of its evidence and may prevent the jury from having before it all the information necessary to determine the proper punishment."⁹⁹ Id. at 825. The Court in Payne also held that a prosecutor may argue to a capital sentencing jury the human cost of the crimes of which the defendant has been convicted, overruling South Carolina v. Gathers.¹⁰⁰ Id. at 827.

The Court observed that in most cases, victim impact evidence serves entirely legitimate purposes, but if the evidence is "so unduly prejudicial that it renders the trial fundamentally unfair," the Fourteenth Amendment due process clause would be violated. Id. at 825.

⁹⁸ The Payne majority was comprised of six justices, so Schierman's claim that it is limited by the concurrence of Justice O'Connor is without merit. Payne, 501 U.S. at 810.

⁹⁹ Payne did not disturb the holding of Booth that admission of a victim family member's characterization and opinions about the crime, the defendant, or the appropriate sentence would violate the Eighth Amendment. Payne, 501 U.S. at 830 n.2. No such evidence was admitted in this case, and Schierman does not allege any violation of this rule.

¹⁰⁰ 490 U.S. 805, 109 S. Ct. 2207, 104 L. Ed. 2d 876 (1989).

Victim impact evidence is permitted in Washington; its admission does not violate the due process clause¹⁰¹ or the cruel punishment prohibition¹⁰² of the Washington Constitution. Gentry, 125 Wn.2d at 631. In Gentry, this Court harmonized the due process and cruel punishment provisions with the victim's rights amendment to the Washington Constitution. WASH. CONST. art. I, § 35. It held that evidence showing the victim's uniqueness as a human being and evidence about the impact of the murder on the victim's family is relevant to the jury's decision as to whether the death penalty should be imposed. Gentry, 125 Wn.2d at 627, 630-33.

The Gentry court noted that the trial court should apply Evidence Rule 403 and exercise discretion in deciding the scope of permissible victim impact evidence. Id. at 632-33. It adopted this description of the trial court's role:

On the one hand, it should allow evidence and argument on emotional though relevant subjects that could provide legitimate reasons to sway the jury to show mercy or to impose the ultimate sanction. On the other hand, irrelevant information or inflammatory rhetoric that diverts the jury's attention from its proper role or invites an irrational, purely subjective response should be curtailed.

¹⁰¹ WASH. CONST. art. I, § 3.

¹⁰² WASH. CONST. art. I, § 14.

Id. at 632 (quoting People v. Raley, 2 Cal. 4th 870, 916, 8 Cal. Rptr. 2d 678, 830 P.2d 712 (1992)). Due process protects against victim impact testimony that “so infects the sentencing proceeding as to render it fundamentally unfair.” Gregory, 158 Wn.2d at 852.

The trial court’s decision to admit evidence is reviewed for abuse of discretion. Stenson, 132 Wn.2d at 701. Discretion is abused only if its exercise is manifestly unreasonable or is based on untenable grounds or reasons. Id.

2. Relevant Facts.

The trial court permitted four victim impact witnesses to testify, one as a representative of each of the victims, Olga and Lyubov, who were sisters, and Justin and Andrew, the sons of Olga and Leonid. 102RP 52. These were the only witnesses called by the State at the penalty phase.

The elder Lyubov Botvina, the mother of victims Olga and Lyubov, related that her daughters came to the United States as children when the family emigrated from Ukraine in search of religious freedom. 102RP 109-11, 124. Much of her testimony described Lyubov’s personality, lifestyle, and goals. 102RP 112-17. She also described how she learned of the murders and the grief that she and her husband suffered as a result of the murders. 102RP 117-19.

Pavel Milkin, Leonid's father, testified to the circumstances of his family leaving the Soviet Union. 102RP 126-28. Leonid and Olga had lived in Pavel's home when the boys were born, until Justin was four years old and Andrew two; he briefly described the boys' personalities. 102RP 128-30, 142-43, 165. He described how he learned of the murders and how the loss of his grandsons had affected his life. 102RP 133-43.

Yelena Shidlovsky, Olga and Lyubov's older sister, generally described her sisters and her nephews. 102RP 145-47, 150-55. She explained that Olga had ties to two churches and read the Bible a lot. 102RP 151-52. Shidlovsky noted that her family left the Soviet Union because of religious persecution and treasured their religion. 102RP 152. She described the effect the murders have had on her own sense of security, and the grief she and her son suffered. 102RP 148, 157, 158-59.

Finally, Leonid, the husband of Olga and father of Justin and Andrew, briefly described Olga's strong personality and the individual personality of each of his young sons. 102RP 163-67; 103RP 20-33. He explained how he had learned that his wife and children were dead. 103RP 35. Leonid also described his feelings of loss. 103RP 36-40.

During Leonid's testimony, a 15-minute video was shown; it was a portion of a video played during the memorial service for the victims.

P.Ex. 1;¹⁰³ 101RP 113; 103RP 39-40. This video was the only part of the victim impact testimony to which Schierman objected. Schierman moved in limine to preclude use of the video, arguing that the jury should be shown only one in-life still photograph of each victim. 101RP 111-12; 102RP 3-10. The trial court disagreed, concluding that the video was not unduly prejudicial except for the audio portion of the recording. 102RP 9-10. When the video was played, it was played silently. 103RP 40.

The defense evidence in mitigation included testimony from twelve relatives,¹⁰⁴ three ex-roommates,¹⁰⁵ friends,¹⁰⁶ three coworkers,¹⁰⁷ and six other acquaintances of Schierman.¹⁰⁸ The defense also presented testimony of two employees of the King County Jail,¹⁰⁹ the Secretary of

¹⁰³ This video is described in detail in section L.4, *infra*.

¹⁰⁴ Schierman's mother, 107RP 63-126; his stepfather, 103RP 43-131; his maternal grandmother, 106RP 137-48; his maternal grandfather, 107RP 132-35 (video, P. Ex. 11); his sister, 105RP 107-27; five aunts, 104RP 161-99, 106RP 27-35, 40-55; an uncle, 106RP 35-40; and a cousin, 106RP 61-69. Roni Uyeda also testified – she was the girlfriend of Schierman's biological father for some time, and Schierman was a guest in her home every other weekend for a year and a half. 106RP 115-24.

¹⁰⁵ Amy Hawkinson, 103RP 151-69; Michael Holley, 105RP 89-97; and Isaac Way, 106RP 73-93.

¹⁰⁶ In addition to the roommates noted in n.8, Christopher O'Brien, 104RP 64-87; and Corey Anne Kelman, 106RP 124-36.

¹⁰⁷ Mark Nowak (a supervisor), 104RP 55-63; Jamie Yantis, 106RP 16-26; and Karl McGavran (a supervisor), 107RP 24-35.

¹⁰⁸ Peter O'Brien (father of a friend), 103RP 132-51; Charlotte Zachary-Klutchnikova (mother of a friend), 105RP 100-06; Kimberly Yantis (mother of a coworker), 106RP 70-72; Jerome Walsh (family friend), 106RP 108-14; Linda Kesler (family friend), 107RP 44-51; and Eugenia Allen-Vrablik, 107RP 52-60.

¹⁰⁹ James Ilika (psychiatric evaluation specialist), 104RP 10-53; and Candace Budhram, 105RP 45-83.

the Department of Corrections,¹¹⁰ a high school coach of Schierman,¹¹¹ his middle school counselor,¹¹² and a counselor during Schierman's 2004 substance-abuse treatment program.¹¹³

3. Any Error As To The Proper Scope Of The Victim Impact Testimony Was Not Preserved.

Because Schierman did not object in the trial court to any of the testimony of the four witnesses who testified as representatives of the four victims, he has not preserved for review any objection to the scope of their testimony. RAP 2.5(a)(3). The necessity of preserving error by objection in the trial court applies at the sentencing phase of a capital trial. Gregory, 158 Wn.2d at 853 n.43, 856 n.44. A defendant who for the first time on appeal argues that a victim impact statement violated due process has the burden of showing constitutional error that caused actual prejudice to his rights. RAP 2.5(a)(3); Gregory, 158 Wn.2d at 853 n.43.

Schierman suggests that the court should overlook his failure to object because the defense risked alienating the jury if it objected to this testimony. App. Br. at 155. However, there were many opportunities to object outside the presence of the jury. Notably, before any of these witnesses testified, the defense did ask the court to prohibit the witnesses

¹¹⁰ Eldon Vail, 104RP 138-60.

¹¹¹ Tim Driver, 105RP 35-44.

¹¹² Phyllis Roderick, 107RP 35-43.

¹¹³ Marilyn Lagerquist, 104RP 94-136.

from characterizing the crimes, and the court did so. 102RP 99-100. During the testimony of the second victim impact witness, an afternoon recess occurred; after the jury was excused, the court asked counsel if there were any matters to address, and defense counsel responded, “[N]ot from the defense.” 102RP 138-39. After that recess, the court asked the same question before the jury returned and got the same response. 102RP at 139. During direct examination of the fourth witness, the court recessed for the day; again after the jury was excused, defense counsel stated they had no issues to raise. 102RP 169. The next morning before the jury was brought in, there was lengthy discussion between counsel and the court related to defense witnesses; there was no objection to the nature of the testimony being elicited through the victim impact witnesses. 103RP 3-19. Schierman’s failure to object was a tactical choice, and it does not warrant an exception to the limits of RAP 2.5(a).

Schierman has not established manifest constitutional error. He does not identify specific statements that were improper, arguing instead that the testimony was improper because it was “extensive” and cast an “unrelenting focus” on the worth of the victims and their families. App. Br. at 150-51. He also objects to the “unrelenting focus on the victims’ Christian religion and their saintly nature.” App. Br. at 154. However, there is no impropriety in describing the role of religion in the life of a

victim, as explained in section L.4, below. While the victims were church-going, that was not an overwhelming theme of the testimony, and there was no suggestion that the death penalty was called for because they were religious. The jury already knew that the adult victims were church-going people. 61RP 33, 37, 71, 77; 72RP 102. Schierman has not shown how any of the testimony at the penalty stage was so inflammatory that it violated due process and caused actual prejudice to his rights, in light of the brief time spent on victim impact testimony (less than three-quarters of a court day) covering four victims, and in light of the evidence at trial concerning the four terrible murders that he committed.¹¹⁴

4. The Trial Court Did Not Abuse Its Discretion In Admitting The Silent Victim Impact Video.

The trial court properly exercised its discretion in admitting the victim impact video. It was relevant to the jury's decision at the penalty phase and was not inflammatory.

Evidence showing the victim's uniqueness as a human being and evidence about the impact of the murder on the victim's family is relevant to the jury's decision, admissible, and constitutionally permissible.

Gentry, 125 Wn.2d at 627, 630-33. The trial court concluded that the

¹¹⁴ A thorough discussion of the lack of inflammatory effect is at section L.5, infra.

video in this case was not unduly prejudicial with the exception of the audio portion, which was not played. 102RP 9-10; 103RP 40.

The video included pictures and brief home-video clips of all four of the victims; it was just under 15 minutes long—less than four minutes per victim.¹¹⁵ P.Ex. 1. Schierman argues that the video unduly evoked religious ideas, unfairly presented the victims as religious people, and improperly included childhood photos of the adult victims. None of these objections is well-founded.

There is no prohibition on references to religion in victim-impact testimony. Schierman cites none. Many cases have approved victim-impact testimony that included references to religious activities of the victim. E.g., Mitchell, 502 F.3d at 989-90; Bernard, 299 F.3d at 478-80; People v. Vines, 51 Cal. 4th 830, 124 Cal. Rptr. 3d 830, 251 P.3d 943, 986-87 (2011); People v. Pollock, 32 Cal. 4th 1153, 13 Cal. Rptr. 3d 34, 89 P.3d 353, 370-71 (2004); Pickren v. State, 269 Ga. 453, 500 S.E.2d 566, 568-69 (1998); State v. Reeves, 337 N.C. 700, 448 S.E.2d 802, 811-12 (1994).

In some cases, it is “difficult if not impossible to capture what [a victim’s] loss meant to her family” without reference to the significance of

¹¹⁵ Schierman contends that the video appeared to be professionally produced (App. Br. at 137, 152), but there is no indication in the record that it was, and Schierman does not explain how that is relevant to the legal argument.

religion in their lives. Mitchell, 502 F.3d at 990. In such a case, testimony about that religion is relevant victim impact evidence. Id. This case falls within that category.

Moreover, the video shown to the jury here was strikingly bare of religious images, given the significant role that religion played in the lives of these victims. The family pictures and video clips included none with religious images or in a religious setting.¹¹⁶ P.Ex. 1. The only religious images were shown briefly at the start of the video: a simple cross with pictures of the victims attached, and two notes from neighbors or friends (“our prayers go out for you,” and “You are in our hearts and prayers”), shown among flowers and balloons in what has become a common sight, a spontaneous crime scene memorial, and interspersed with images of the victims’ burned home. P.Ex. 1 at 00:10-01:48.

Schierman attributes symbolic religious meaning to images in the video depicting clouds in a blue sky. There is nothing in the video to suggest such an interpretation. Most of the transitions in the video are accomplished by one image fading into another. In several locations, the image fades to black before the next image appears. P.Ex. 1 at 1:48, 3:26, 9:33, 11:27. The first image of the sky appears when a home video of

¹¹⁶ One picture of Olga does have a Christmas tree in the background (P.Ex. 1 at 4:17) and another has a fireplace in the background with stockings hung. (P.Ex. 1 at 4:30). Schierman has not argued that either of these background images related to a Christian holiday were inappropriate. They are common in family pictures.

Olga hugging her infant son fades to an image of clouds, then to an image of Olga in the kitchen with her son. P.Ex. 1 at 5:55-6:08. The next image of the sky appears after a secular quote,¹¹⁷ and includes a sunset. P.Ex. 1 at 11:48-11:58. That image fades to a picture of smiling Lyubov at a shore with her arms stretched out to each side. P.Ex. 1 at 11:57-12:02. A glimpse of sky follows, changing to another photo of Lyubov standing at the shore. P.Ex. 1 at 12:11-12:18. Less than a minute later, there is an image of a landscape at the beach with a sun expanding; it is followed by a picture of Lyubov outdoors. P.Ex. 1 at 12:58-13:09. Later, after a short home video of Lyubov laughing in a kitchen, another video pans along bluffs at a body of water, then shows clouds in a blue sky; it is followed by a picture of Lyubov at a beach. P.Ex. 1 at 13:22-34. The last view of sky is at the end of the video. P.Ex. 1 at 14:53. Most of the images of Lyubov depict her outdoors, in nature. Images of clouds in the sky in this context may prompt thoughts of nature, impermanence, or emptiness, as well as thoughts of life after death. The victims are not depicted in a religious context before or after the images of the sky, and the images of the sky often include other natural features. The images were not inflammatory or unfairly prejudicial.

¹¹⁷ “You are gone but not forgotten[,] still alive in our hearts.” P.Ex.1 at 11:32.

There also is no prohibition on showing images of a victim as a child during victim impact testimony. *E.g.*, People v. Nelson, 51 Cal. 4th 198, 120 Cal. Rptr. 3d 406, 246 P.3d 301, 317 (2011); People v. Zamudio, 43 Cal. 4th 327, 75 Cal. Rptr. 3d 289, 181 P.3d 105, 134-37 (2008). None of the three cases cited by Schierman regarding childhood pictures holds that childhood pictures of an adult victim are impermissibly inflammatory. One described a 30-minute video, which the trial court had excluded, as including pictures from the sole victim's birth to college.¹¹⁸ Another case cited addressed the harm resulting from a video that a higher court had found inadmissible because it was "barely probative of the victim's life at the time of his death," where it was primarily pictures of the victim as an "angelic child," but the victim was a burglar and drug dealer when he was killed; the court believed it was misleading.¹¹⁹ The quoted language from the California Supreme Court is dicta stating that a lengthy video, a video emphasizing the childhood of an adult victim, or a video with stirring music should be carefully analyzed before it is admitted. People v. Prince, 40 Cal. 4th 1179, 57 Cal. Rptr. 3d 543, 156 P.3d 1015, 1091-93 (2007) (affirming use of 25-minute video interview of victim).

¹¹⁸ United States v. Sampson, 335 F. Supp. 2d 166, 192-93 (D. Mass. 2004).

¹¹⁹ Salazar v. State, 90 S.W.3d 330, 337-38 (Tex. Crim. App. 2002).

The video here included a section with a total of eleven pictures taken before Olga and Leonid were married. P.Ex. 1 at 01:50-03:26. Olga married when she was 20 years old. 60RP 104. Each of these pictures includes Olga, Lyubov, or both; in a few, the girls appear about 10 years old; in most they were teenagers or young adults. P.Ex. 1 at 01:50-03:26. That section, the only one in which there were any pictures of Olga or Lyubov as a child, lasted less than two minutes. Id. That short section of the video did not present a misleading depiction of the character of the victims when they were killed, when both were under 30 years old.

In a more recent California Supreme Court case, People v. Kelly, that court approved the admission of a 20-minute victim-impact videotape relating to one 19-year-old victim, which consisted of still pictures and video clips from the victim's infancy until shortly before her death. 42 Cal. 4th 763, 68 Cal. Rptr. 3d 531, 171 P.3d 548, 567-70 (2007) (noting that comments in Prince about childhood images were dicta). The court held that the material in the video was relevant to the penalty determination, was not unduly emotional, humanized the victim, did not emphasize any particular period of the victim's life, and helped the jury understand the loss to the victim's family and society that resulted from the defendant's crime. Id. at 570-71. The court found it significant that the video did not express outrage and contained no "clarion call for

vengeance”—it simply implied sadness. Id. at 571. The video in Kelly was presented with background music and a theatric reference at the end to the kind of heaven where the victim belonged; the court concluded that if those portions were irrelevant or unduly emotional, any error in allowing those portions was not prejudicial. Id. at 571-72.

Schierman relies on a quotation describing the video used in People v. Dykes,¹²⁰ a California case that upheld the use of that video. But the court in Dykes cited the Kelly decision with approval and stated that there is no bright-line rule regarding admissibility of video recordings in capital sentencing hearings. 209 P.3d at 48. It noted that the prosecution may present evidence showing that “the victim is an individual whose death represents a unique loss to society and in particular to his family.” Id. (quoting Payne, 501 U.S. at 825). It opined that a video montage may convey the family’s and society’s loss, and illustrate the gravity of the loss. Id. The California Supreme Court has observed that a factual chronology of a homicide victim’s life helps the jury to understand the family’s loss and the loss to society. Zamudio, 181 P.3d at 137.

Many other recent California cases have approved the use of videos as victim impact evidence, also citing Kelly with approval. E.g., People v. Montes, 58 Cal. 4th 809, 169 Cal. Rptr. 3d 279, 320 P.3d

¹²⁰ 46 Cal. 4th 731, 95 Cal. Rptr. 3d 78, 209 P.3d 1 (2009).

729, 787-88 (2014) (10-minute video depicted victim from infancy until he was killed at 16); People v. Garcia, 52 Cal. 4th 706, 129 Cal. Rptr. 3d 617, 258 P.3d 751, 783-84 (2011) (video included childhood photos of adult victim); People v. Booker, 51 Cal. 4th 141, 119 Cal. Rptr. 3d 722, 245 P.3d 366, 405-06 (2011) (videos of 4 to 7 minutes for each of three young victims; videos “overwhelmingly” depicted them in childhood); Zamudio, 181 P.3d at 134-37 (video was 14-minute picture montage, narrated by family member, depicting two elderly victims from childhood on).

The trial court did not abuse its discretion in admitting the victim impact video and allowing it to be played silently.

5. The Victim Impact Evidence As A Whole Did Not Deprive Schierman Of Fundamental Fairness.

The victim impact evidence presented in this case was properly presented and did not deny Schierman a fundamentally fair proceeding. It informed the jury about the lives of the people Schierman killed, but would not have interfered with the jury’s rational consideration of the appropriate penalty. The victim impact evidence presented was moving, as must be expected when four people are murdered, including a young mother and her two young sons. But the evidence was not inflammatory, and it included no improper comments concerning the nature of the crime,

the defendant, or the appropriate penalty. Schierman's argument that the evidence improperly invited the jury to consider the worth of the victims is a policy argument that has been rejected by the supreme courts of the United States and the State of Washington.

Victim impact evidence is a method of informing the jury about the specific harm caused by the defendant's crime. Payne, 501 U.S. at 825. The Supreme Court in Payne held that the conclusion that victim impact evidence leads to the arbitrary imposition of the death penalty is wrong. Id. (disapproving Booth, 482 U.S. 496). The Court noted that victim impact evidence is not offered to encourage comparative judgments of the worth of different victims. Payne, 501 U.S. at 823. The Court recognized the State's legitimate interest in reminding jurors that the victim is an individual whose death represents a unique loss. Id.; see also United States v. Lawrence, 735 F.3d 385, 435 (6th Cir. 2013) (comparison of victim to defendant is proper argument related to moral culpability and weighing of mitigating and aggravating factors).

This Court has agreed, holding that evidence about the victim and the impact of the murder on the victim's family is relevant to the jury's decision. Gentry, 125 Wn.2d at 627. This Court has concluded that harm to survivors is a foreseeable consequence of murder and has "direct moral relevance." Id. at 628. The court rejected the "victim worth" argument on

which Schierman relies. Id. at 629. It adopted the response of the Nevada Supreme Court: the key to a capital sentencing proceeding is the jury's ability to consider both individual characteristics of the defendant and the nature and impact of the crime committed, and the person who created the tragic consequences to the victim and survivors is not in a position to complain that the jury was given a fair exposure to it. Id. at 629-30 (quoting Homick v. State, 108 Nev. 127, 825 P.2d 600, 606-07 (1992)).

Any testimony about the death of two young adults and two very young boys would have an emotional effect, but that is not prohibited. Payne, 501 U.S. at 826 (majority), 832 (O'Connor, J., concurring); United States v. Rodriguez, 581 F.3d 775, 796-97 (8th Cir. 2009); United States v. McVeigh, 153 F.3d 1166, 1221 (10th Cir. 1998); Booker, 245 P.3d 406-07; see also Gentry, 125 Wn.2d at 620 (testimony about a surviving family's grief is permissible). A montage of photographs and video clips is not a eulogy. Booker, 245 P.3d at 405. There is no indication in the record that the survivors testified with excessive emotion, even in testifying about their overwhelming grief.

Although the testimony included references to the victims attending church and reading the Bible, this testimony simply reflected the lives of the victims. Having taken those lives, Schierman is not in a position to complain that the victims were religious or virtuous. See, e.g.,

Storey v. Roper, 603 F.3d 507, 516-19 (8th Cir. 2010) (emotional testimony about victim's good works permissible). Religion was not the overwhelming theme of the testimony and was not any part of the montage of pictures or video clips of their lives.¹²¹ Moreover, Schierman has not explained how reference to the religious views of the victims would inflame the passions of the jury more than the facts of the crimes. Likewise, the history of the victims as immigrants fleeing from religious persecution was calmly explained; it was a part of who the victims were and was relevant to the grief caused by the crimes. E.g., 102RP 123-24.

Schierman complains that the prosecutor in his closing argument emphasized the themes that were presented in the victim impact testimony. The prosecutor's discussion of that testimony was appropriate and it did not render the victim impact testimony inflammatory. The prosecutor properly may remind the jury that the victims were more than lifeless bodies, they were unique human beings. Payne, 501 U.S. at 832 (O'Connor, J., concurring); Humphries v. Ozmint, 397 F.3d 206, 219-23 (4th Cir. 2005). The Constitution does not prohibit a prosecutor's argument to the jury concerning the human cost of the crime committed. Payne, 501 U.S. at 827. The Supreme Court has emphasized the

¹²¹ As noted above in section L.4, only a few religious images were shown, and that was during the introductory pictures of the crime-scene memorial.

applicable principle of fairness: justice is due to the accuser as well as the accused, and it is the courts' responsibility to keep the balance true. Id.

The guilt phase of the trial in this case lasted more than two months¹²²; the victim impact evidence took less than a full court day.¹²³ The victim-impact evidence was followed by 33 defense mitigation witnesses.¹²⁴ Schierman also presented an expert witness at trial who testified at length regarding Schierman's addiction to alcohol, which was a theme of his mitigation case. 97RP 7-72, 104-70. In this context, the victim impact evidence depicting the four human beings Schierman killed did not deprive the defendant of fundamental fairness.

M. CROSS-EXAMINATION OF A MITIGATION WITNESS WITH SCHIERMAN'S STATEMENTS IN A TREATMENT JOURNAL WAS NOT ERROR.

Schierman claims that the prosecutor's use of Schierman's own statements in a treatment journal in cross-examination of Dean Dubinsky, a mitigation witness in the sentencing proceeding, was contrary to this Court's ruling in Bartholomew II, 101 Wn.2d 631. He also claims that the trial court's rulings on objections during re-direct examination of the witness violated both his right to present mitigating evidence and the Rules of Evidence. Schierman failed to preserve these claims, because he

¹²² Evidence was presented January 20, 2010, (61RP) through April 6, 2010 (98RP).

¹²³ 102RP 109 (April 19, after lunch) to 103RP 40 (April 20, before first morning break).

¹²⁴ 103RP 42 to 107RP 135.

did not raise any of these issues in the trial court. Because Dubinsky testified that Schierman was not violent when drinking, the trial court did not abuse its discretion when it allowed cross-examination under ER 405(a) about Schierman's own descriptions of specific instances of violent conduct that occurred when he was drinking. The trial court also did not abuse its discretion in sustaining objections to defense counsel testifying to the contents of a document Dubinsky had not seen and that was not in evidence, for lack of foundation.

1. The Claimed Error In Permitting
Cross-Examination Based On Schierman's
Journal Was Not Preserved.

Because Schierman did not object to the cross-examination on the grounds he raises on appeal, he has not preserved that issue for review. RAP 2.5(a)(3). The necessity of preserving error by objection in the trial court applies at the sentencing phase of a capital trial. Gregory, 158 Wn.2d at 853 n.43, 856 n.44. A defendant who for the first time on appeal argues that the admission of evidence at the penalty phase violated due process has the burden of showing constitutional error that caused actual prejudice to his rights. RAP 2.5(a)(3); Gregory, 158 Wn.2d at 853 n. 43 (as to victim impact evidence).

Schierman asserts that he objected to the introduction of the journal "citing Bartholomew II." App. Br. at 156. However, he provides

no citation to that objection and the State has found no such objection in the record. The citation following the next sentence in Schierman's brief is to an objection explicitly limited to lack of foundation for anticipated questions about the journal. 102RP 44-48. That discussion includes no reference to Bartholomew II, no argument that the acts described in the journal would not rebut the testimony of the mitigation witnesses, and no argument that the prejudicial effect of the evidence would outweigh its probative value. When the judge asked directly for the basis of the objection, defense counsel responded, "all of these witnesses have no knowledge of that journal, the treatment journal and what it involves and the context of any statements made." 102RP 48.

Schierman has not established manifest constitutional error. As described in the sections below, neither ruling was constitutional error. Even if an error occurred, Schierman has not established actual prejudice to his rights. The described acts were violent, but none involved weapons or apparently resulted in serious injury to those Schierman had attacked, although Schierman did claim to have stomped on his father's hand and broken it, and to have sent another man to the emergency room. 103RP 115-26. The effect of the statements was limited by Dr. Saxon's previous testimony that Schierman told another defense witness, Dr. McClung, that the things he said in this journal, which he described as an

“autobiography,” were not true; Saxon testified that Schierman told Saxon that his autobiography was “partly fictionalized.”¹²⁵ 97RP 66, 148.

A witness from Lakeside-Milam, where Schierman wrote the journal, also testified that patients sometimes exaggerate their history. 104RP 127.

Moreover, the information that Schierman was violent when drunk was not new. The jury already had heard Schierman’s statements to the police that when he was drinking he got into fights. For example he said, “I’ve broken hands on people’s [sic] heads and don’t remember it. You know. [How long ago?] Whenever I was drunk.” Ex. 327 at 23.

Describing what he thought when he saw the injuries to his face, he said “[B]ack when I was using and drinking every day this is what I looked like all the time. [Hm.] Getting in fights and falling down and what not.” Ex. 327 at 10. Asked how the injuries to his arms could have happened, he responded, “I don’t know. It seems so familiar, gettin’, gettin’ in a fight of some sort.” Ex. 327 at 16. Schierman has not shown how references to statements in his journal that he had behaved violently while intoxicated were so inflammatory that it violated due process and caused actual prejudice to his rights, in light of his own statements that he was violent when drunk and the evidence at trial concerning the four murders.

¹²⁵ Thus, although Schierman suggests that the authenticity of the treatment journal was not established, his own expert established that Schierman claimed to be the author.

2. Cross-Examination Of Dean Dubinsky Regarding Schierman's Violent Behavior While Drinking Was Proper Impeachment Of His Testimony That Schierman Was Not Violent When He Drank.

This Court in Bartholomew II limited the admissibility of evidence that had been authorized by statute to be used in a capital sentencing proceeding, based on constitutional principles. RCW 10.95.060(3) provides in relevant part: "The court shall admit any relevant evidence which it deems to have probative value regardless of its admissibility under the rules of evidence." Bartholomew II held that, based on considerations of due process and the need for a fundamentally fair proceeding based on reliable evidence, this provision applied only to evidence offered in mitigation. 101 Wn.2d at 640-43.

However, later cases have made clear that the State is entitled to cross-examine defense witnesses so that the jury receives a complete picture. Lord, 117 Wn.2d at 890. The court in Lord adopted dicta from Bartholomew II, holding that the scope of cross-examination is within the trial court's discretion, and cross-examination should be allowed unless its rebuttal value is substantially outweighed by the danger of unfair prejudice. Id. at 890-91; State v. Brett, 126 Wn.2d 136, 185-86, 892 P.2d 29 (1995). The court held that "defense witnesses may be cross-examined concerning anything relevant to a matter raised in mitigation by the

defendant, subject to the balancing test.” Lord, 117 Wn.2d at 892.

In both Lord and Brett, the court affirmed trial court rulings allowing cross-examination of mitigation witnesses as to specific instances of violence by the defendant. Id. at 892-96; Brett, 126 Wn.2d at 186-89.

The court in Lord specifically endorsed the application of the principle codified in ER 405(a) in the penalty phase of a capital trial: “A defendant’s character witness may be cross-examined about specific incidents of misconduct.” Lord, 117 Wn.2d at 891. A character witness may be asked not only whether he “has heard” a particular thing about the defendant, but also “do you know” a particular thing. Id. at 891-92 (quoting 5 Karl Teglund, Washington Practice, Evidence at 450 (3d ed. 1989)). That principle has its source in the common law. See State v. Renneberg, 83 Wn.2d 735, 738, 522 P.2d 835 (1974).

The prosecutor here said that he intended to ask about specific instances described in the treatment journal if the testimony of mitigation witnesses did not present the complete truth about Schierman’s past behavior. 102RP 45. The trial court referred to the need for the prosecutor to have a good faith belief that the act had occurred, which is considered a predicate for cross-examination with a specific instance of conduct. 102RP 46; 5A Karl Teglund, Washington Practice, Evidence §405.6 at 15 (4th ed. 1999). The defense argued that there must be a good

faith belief that the witness was aware of the incident, but there is no such requirement, and Schierman cites none on appeal. The trial court properly concluded that Schierman's description of his own behavior in the journal established a good faith basis to believe the behavior had occurred.

102RP 46-48.

Schierman contends that Dean Dubinsky's testimony would not be meaningfully impeached by Schierman's history of committing violent acts while drinking, because he "never made sweeping statements about Schierman's peacefulness." App. Br. at 166. However, Dubinsky did exactly that during direct examination:

Q. Did you ever fear that Conner, while being intoxicated, would harm someone else?

A. I didn't. You know, I had heard some stories, maybe one or two stories about Conner being in a fight at a bar or something, but, no, I never imagined that Conner would hurt anyone. He didn't have the history of hurting people or hurting things, or doing things that were violent, so I -- I was not worried about that.

103RP 104.

Dubinsky had read excerpts, provided by defense counsel, from the journal; the excerpts included all but two of Schierman's statements that the prosecutor used in cross-examination. Before Dubinsky testified, he knew that Schierman wrote: he was a good actor (103RP 118); he made short work of his father in a fight (103RP 120); he used a variety of drugs

and ended up “beating the shit out a homeless person” (103RP 123); he put his father’s head through a wall, then stomped on and broke his father’s hand so that he could convince his father that his father had punched the holes in the wall (103RP 123-24); he had brushes with the law but was not arrested (103RP 125); and in an episode at a bar, he sent one man to the emergency room and “just about broke another guy’s neck.” 103RP 126.

Dubinsky’s statement that Schierman did not have a history of hurting people was certainly misleading, given Schierman’s own repeated statements that he was violent when he was drunk. The jury was entitled to know that, even though Dubinsky had learned of Schierman’s description of violent attacks when he was provided excerpts of the journal, he maintained the opinion that Schierman did not have a history of being violent when he was drunk, and the jury was entitled to take that into account in assessing Dubinsky’s credibility. 103RP 123.

A trial court’s ruling as to the propriety of such cross-examination will not be disturbed unless it was a manifest abuse of discretion. Lord, 117 Wn.2d at 892 n.21. The trial court did not abuse its discretion when it concluded that cross-examination as to specific instances of conduct described by Schierman himself was proper. Schierman contends that the court erred because it did not explicitly balance prejudice against

probative value on the record, but there is no requirement that the balancing be articulated on the record. The court indicated that the cross-examination had a high probative value, as they were Schierman's own statements.¹²⁶ 102RP 47-48. It also noted that evidence of some prior acts of violence already had been referred to in Schierman's own statement to the police. 102RP 46. Schierman did not argue in the trial court that there was unfair prejudice in the cross-examination, let alone that it would outweigh the probative value of the cross-examination.

3. The Trial Court Was Not Required To Allow Defense Counsel To Testify As To The Contents Of A Document That Was Not Admitted In Evidence.

Schierman asserts that the trial court forbade him from rehabilitating Dubinsky with other portions of the journal and thereby deprived Schierman of the ability to present mitigation evidence. That argument is without a foundation in the record.

The treatment journal was marked as an exhibit but was not identified by any witness and was not admitted as evidence. P.Ex. 2; 103RP 115-17. On re-direct examination, defense counsel asked Dubinsky to read an entry from the exhibit, and the State objected based on lack of foundation. 103RP 128. The court sustained that objection and several more on the same grounds: that the witness would not be

¹²⁶ Schierman's argument that his own statements lacked probative value because the State did not corroborate them defies logic. App. Br. at 166.

permitted to testify to the contents of the journal without a foundation being laid. 103RP 129-30. The witness had not seen any of the contents to which defense counsel referred. 103RP 128-30.

Schierman cites no rule that would allow the witness to read for the jury portions of a document as to which he has no knowledge. Schierman might have had another witness, such as the witness from Lakeside-Milam who testified the next day, identify the document as Schierman's journal, and have it admitted into evidence. The court did not prohibit admission of the document, but it is clear that Schierman did not want the entire document before the jury.

Schierman's citation to the rule of completeness, ER 106, also is inapt. The prosecutor did not introduce any part of the journal into evidence; he cross-examined Dubinsky as to specific instances of conduct that were contained in the journal. Further, in order to rely on this rule, a party must explain how the additional portions of the document being offered are needed to explain or clarify the portion admitted. State v. Simms, 151 Wn. App. 677, 692-93, 214 P.3d 919 (2009). Although on appeal Schierman cites portions of the journal that could provide additional context to the incidents referred to on cross-examination, those were not the portions of the document to which Schierman referred on redirect; instead, he referred to a list of addresses, "resentments," "daily

reading,” and foods. 103RP 128-30. In any event, because Schierman did not raise ER 106 in the trial court, there was no showing of necessity.

Schierman argues that a witness may be rehabilitated with specific instances of conduct, but cites for that proposition authority that is limited to the situation when, “in context, the purpose of redirect examination is to impeach a party’s own witness.” App. Br. at 167-68 (quoting 5A Washington Practice §405.6 (5th ed.) (emphasis added)). Impeachment is the opposite of rehabilitation.

Finally, Schierman alleges that he was prevented from asking whether the violent acts referred to in cross-examination “changed Dean’s assessment of Schierman’s character.” App. Br. at 171. This contention, which is without basis in the record, should be rejected. That question was not asked. The question asked was, “[D]oes that change your opinion or your testimony about how this tragedy has impacted your family and Conner?” 103RP 131. The trial court properly sustained a relevance objection to his question, as the answer was not relevant to any aggravating or mitigating factor. 103RP 131.

4. Any Error In These Evidentiary Rulings Was Harmless.

Non-constitutional error is reversible only if it would have materially affected the outcome of the proceeding. State v. Brockob, 159

Wn.2d 311, 351, 150 P.3d 59 (2006). Even if Schierman's statements are considered an unreliable basis for cross-examination, such that reference to them was constitutional error, the error was harmless beyond a reasonable doubt. Given the evidence of violence already admitted at trial through Schierman's own statements to police, and the testimony that Schierman told the defense experts that he lied in his journal, the additional prejudicial effect of this cross-examination was harmless beyond a reasonable doubt.

N. CROSS-EXAMINATION OF O'BRIEN ABOUT HIS PRIOR STATEMENTS WAS PROPER.

Schierman claims that the cross-examination of Christopher O'Brien about a statement that he made to police was a violation of due process. He is incorrect. The trial court gave a proper limiting instruction as to the purpose of the cross-examination, and permitted Schierman to call a detective to testify to the additional information that he claims the jury should have known, although Schierman chose not to do that. Even if there was error, it was harmless.¹²⁷

¹²⁷ Schierman's passing argument that the cross-examination violated the federal or state confrontation clause is not supported by analysis and should be rejected for that reason. In any event, Schierman has made no showing that these statements of one friend to another would be testimonial statements that would fall within either confrontation clause. U.S. CONST. amend. VI; WASH. CONST. art. I, § 22; see *State v. Lui*, 179 Wn.2d 457, 472-74, 315 P.3d 493 (2014) (summarizing rule).

Schierman called O'Brien as a mitigation witness at the penalty phase. O'Brien testified that he is a close friend of Schierman and started drinking with him when they were in high school; Schierman seemed very honest and trusting, and they always had a great time. 104RP 66-67, 77. They drank together for several years. 104RP 67-68. On cross-examination, the prosecutor asked about O'Brien's statement to the police that when Schierman drank he was the life of the party, "hit on" a lot of women, and was quite promiscuous. 104RP 81-82. O'Brien testified that Schierman was not "extremely" promiscuous. Id. O'Brien agreed that he had called Detective Porter and relayed statements made by Mark Nanna, who had helped Schierman move. 104RP 82-87. He did not remember if he had said that Nanna had said Schierman had a "bucketful of knives." 104RP 83. O'Brien agreed he had said that Nanna reported that Schierman made a comment about "the hot chick across the street, washing her car in a bikini." 104RP 84. O'Brien refused to concede the exact words "without seeing the notes from it," so the prosecutor read the notes from the interview; O'Brien then conceded that was what Nanna had told him. 104RP 85-86. O'Brien later said he could not recall if Nanna was talking about the move into the house on Slater Avenue two weeks prior to the murders or another move. 104RP 86-87.

There was no objection to these questions, but after the witness was excused, Schierman moved to strike the questions and answers relating to Nanna's statements. 104RP 87-88. The court denied the motion, ruling that the statements were appropriate cross-examination and were not offered for the truth of the matters asserted by Nanna. 104RP 89-90. Schierman requested a limiting instruction and agreed to the specific wording of the limiting instruction that the court gave. 104RP 92-93. Later, Schierman renewed the motion to strike that portion of cross-examination. CP 8145. The court denied the motion again, but allowed Schierman to call the detective who eventually spoke to Nanna, to establish that Nanna did not remember those observations. 108RP 22-25. Schierman chose not to do so. 108RP 29. The court offered to give a written limiting instruction at Schierman's option. 109RP 4.

Even under Bartholomew II, the State is entitled to cross-examine defense witnesses so that the jury receives a complete picture. Lord, 117 Wn.2d at 890. The scope of cross-examination is within the trial court's discretion, and cross-examination should be allowed unless its rebuttal value is substantially outweighed by the danger of unfair prejudice. Id. at 890-91. As the trial court found, this questioning properly rebutted O'Brien's testimony as a character witness. 104RP 89. It was relevant that O'Brien heard the statements from Nanna and felt that they were

important for the police to know. 104RP 89-90. As the trial court noted, O'Brien's minimization of his report to the police also was relevant to his credibility. 108RP 22-23. The court did not abuse its discretion in denying the motion to strike.

The limiting instruction given by the court was specifically agreed to by Schierman. 104RP 92-93. It stated in part that the testimony as to Nanna's statement was "not admitted for the truth of the matters asserted by Mr. Nanna." Id. The jury is presumed to have followed that limiting instruction. Lough, 125 Wn.2d at 864.

There was nothing misleading about the cross-examination: it asked whether O'Brien had relayed Nanna's statements to the police; O'Brien conceded that he had. If Schierman had chosen, he could have called the detective who spoke to Nanna, to testify about Nanna's claim, two months later, that he did not recall making the statements. Schierman argues that he did not do so because the court advised him that the detective also would be allowed to testify to Nanna's repeated efforts to avoid talking to the police. 108RP 10-15, 24. However, he does not establish why it would be proper to offer Nanna's own disavowal while excluding information relevant to the credibility of that disavowal.

The challenge to O'Brien's testimony regarding his own statements about Schierman's promiscuity when he was drinking was not

raised in the trial court. It should not be considered in this appeal.

RAP 2.5(a)(3). Further, O'Brien did testify to Schierman's character, and was his drinking companion, so completing the picture of Schierman's behavior while drinking was fair cross-examination.

Even if the trial court erred in refusing to strike references to the statements made by Nanna, the error was harmless beyond a reasonable doubt. There was no dispute that Schierman owned knives: Way testified that Schierman owned multiple knives (73RP 16-19), including one that looked like the type of Humvee knife found in the debris at the Milkin home (87RP 111-12); Schierman admitted that he owned a few pocket knives, a fold-out knife, and a Leatherman knife (Ex. 327 at 34); a knife was recovered from his truck (83RP 102); and a Washington State Patrol investigator testified that numerous knives were collected from Schierman's residence (94RP 104, 133-37). There also was no dispute that Schierman was sexually attracted to women; he had referred to his interest in the women across the street (71RP 85, 105, 107, 163; 72RP 49-52, 55); and he exchanged electronic messages about sexy parties and baby oil with a person named Candy on the night of the murders, between 9:30 p.m. on July 16 and 1:05 a.m. on July 17, 2006 (84RP 35-38). Neither topic has an inflammatory connotation. In the context of the

entire trial, these brief remarks, as to which the jury received a limiting instruction, were harmless beyond a reasonable doubt.

O. THE PROSECUTOR DID NOT COMMIT MISCONDUCT IN THE PENALTY PHASE CLOSING ARGUMENTS.

Schierman claims that the prosecutor's closing argument in the penalty phase was an improper effort to inflame the passion of the jury by comparing these crimes to the Holocaust. He also claims that the rebuttal argument was an improper personal attack on defense counsel. Both arguments should be rejected. The prosecutor's closing argument was not an improper appeal to emotion; it accurately characterized these crimes as a mass murder and did not compare Schierman's crimes to the Holocaust. Further, any error in mentioning that a quotation was on a plaque in front of the Holocaust Museum was cured when the trial court struck the reference and instructed the jury to disregard any related argument. As to Schierman's second claim, the statements that defense counsel had cast the prosecutor in the role of Satan and that defense counsel himself did not believe that comparison were a proper response to defense counsel's argument. Schierman did not object to this argument. Even if improper, any prejudice could have been cured by an instruction to the jury, so the error is not reversible.

The standards for evaluation of a claim of prosecutorial misconduct in closing argument are set out above in section III.H. In short, a conviction will be reversed for prosecutorial misconduct only when a defendant demonstrates both improper conduct and resulting prejudice—a substantial likelihood that the misconduct affected the verdict. Russell, 125 Wn.2d at 85-86; Belgarde, 110 Wn.2d at 508. To determine whether an argument was improper, a reviewing court must examine the entire argument, the issues in the case, and the jury instructions. Russell, 125 Wn.2d at 85-86. In the absence of an objection, a conviction will not be reversed unless the misconduct was so flagrant and ill-intentioned that it evinces an enduring and resulting prejudice that could not have been obviated by a curative instruction or other action. Id.

Prosecutors have an obligation to seek verdicts based on reason and free of prejudice. State v. Charlton, 90 Wn.2d 657, 664-65, 585 P.2d 142 (1978). Appeals to racial, ethnic, or religious prejudice are prohibited;¹²⁸ no claim of any such error is made in this case. It is the “prosecutor’s responsibility to aid the jury in comprehending the brutality of the crime” in a penalty phase argument. Davis, 175 Wn.2d at 339.

¹²⁸ State v. Monday, 171 Wn.2d 667, 676-81, 257 P.3d 551 (2011) (racial prejudice); State v. Perez-Mejia, 134 Wn. App. 907, 918, 143 P.3d 838 (2006) (ethnic prejudice).

1. The Prosecutor's Closing Argument Was Not An Improper Appeal To Passion Or Prejudice.

Schierman has not established that the prosecutor's closing argument was an improper effort to inflame the passions of the jury. As the trial court noted, it is accurate and proper for a prosecutor to argue that the jury is the conscience of the community. 102RP 105. The prosecutor correctly characterized these crimes as a mass murder and did not compare Schierman's crimes to the Holocaust.

Arguments to the jury that they are acting as the conscience of the community are not improper unless they are specifically designed to inflame the jury. State v. Davis, 141 Wn.2d 798, 873, 10 P.3d 977 (2000); see State v. Finch, 137 Wn.2d 792, 842, 975 P.2d 967 (1999) (citing federal cases). Examples of such impropriety include exhorting the jury to send a message to society, or telling the jury that they would be violating their oath as jurors if they do not render a verdict in favor of the State. Finch, 137 Wn.2d 840-42. Here, the context of the references made by this prosecutor show that use of the phrase was not an effort to inflame the jury, but an observation as to their role.

In his penalty phase opening statement, the prosecutor argued:

You, members of the jury, will be called upon at the conclusion of this penalty phase to make a decision, not based on emotion, but based upon reason, based upon the evidence, and based upon the testimony that you hear.

You, in this case more than any other, you are truly the conscience of the community in this case, and the decision you make will be, in a very real sense, one that goes to moral culpability and to moral judgment, and that's why that language is in the definition of mitigating circumstances, whether there are facts about the crime or the defendant that reduce the defendant's moral culpability.

102RP 58-59. In the defense opening statement, it responded:

Mr. O'Toole has said that you are the conscience of the community. In the context of this case and your job, that's an incorrect argument to make.

102RP 66. Later in its opening, defense counsel continued:

Will killing Conner bring them back? It will never bring them back. Will it satisfy the State's needs or what they want to convince you as the collective community conscience to kill him? We hope not.

102RP 91-92. After the defense argument was completed, and after several other matters were discussed, Schierman moved for a mistrial based on alleged misconduct by the State in its opening. 102RP 94-100.

The trial court rejected Schierman's claim that it was improper for the State to refer to jurors acting as the conscience of the community.

102RP 105. The court ruled that the reference was not offensive or improper, that "the jury is, in fact, acting as the conscience of the community." *Id.* The court noted that defense counsel was similarly correct in his characterization of the role of the jurors: that while acting as

the conscience of the community, the jurors act on their own conscience after consultation with the other jurors. Id.

Schierman again objected when the prosecutor in his closing argument referred to the jurors acting as the conscience of the community.

111RP 27. The objection was overruled. Id.

Part of the prosecutor's theme in closing was that the jury's decision was difficult and that they should not shrink from making it.

E.g., 111RP 29-31. Far from exhorting jurors that their duty was to impose the death penalty, the prosecutor stated:

You stepped forward, as members of the community. You were called upon and you have served. That is all that anybody else in this courtroom can ask.

111RP 30.

The other references that Schierman cites as evidence of an inflammatory theme—references to mass murder, the butterfly effect, and true terror—also were components of proper argument; they were not appeals to passion. The arguments were compelling because these crimes were horrific, not because of any improper effort to inflame the jury.

This Court in Davis held that it was proper for the prosecutor to refer to that victim's bathtub as her "death chamber." Davis, 175 Wn.2d at 336-37. That remark, the court observed, was strong, but accurate and grounded in fact because that was where she may have died: "The

comment did not incite the jury to make a decision based on improper grounds, but on a legitimate aggravating factor: the circumstances of the crime itself.” Id. The court held that it is the prosecutor’s responsibility to help the jury understand the brutality of the crime. Id. at 339.

The prosecutor’s arguments here included many references to literature and other cultural sources.¹²⁹ They do not evidence an appeal to passion, but an effort to describe these crimes and their consequences. For example, the trial court properly rejected the claim that the reference to 9/11 was inflammatory because, as it found, the prosecutor was not likening these crimes to terrorism, but describing “what terror is and how it was experienced in this case.” 111RP 75. The prosecutor’s reference to 9/11 was made to illustrate that since that date (more than eight years prior to this trial), the word “terror” has been overused, and used almost too casually. 111RP 68-69. The prosecutor then turned to the dictionary definition of the word “terror” and argued that what happened to the victims in this case, in their own home, “was pure and absolute terror.” 111RP 70. He described Lyubov being attacked on the main floor of the house and repeatedly stabbed, all the while aware that her sister and nephews were upstairs. Id. He described Olga being stabbed “over and

¹²⁹ E.g., in the guilt phase closing, the prosecutor referred to Robert Louis Stevenson, Robinson Crusoe, TV shows, John Grisham novels, a movie, Daniel Webster, Hamlet, and Martin Luther King, Jr. 100RP 29, 36, 81, 91, 111; in penalty phase arguments, he referred to Robert Louis Stevenson and two books. 102RP 55; 111RP 37, 64.

over” and the virtual certainty that she fought for her life, based on the scratches on Schierman’s face and Olga’s DNA on Schierman’s necklace. 111RP 71. He described Olga’s knowledge, as she was being attacked, that her sons were in mortal danger, even if she was not alive when Schierman cut their throats. 111RP 71-73. He noted that the bodies of Justin and Andrew were discovered not in bed, but in the hallway just outside the doorway to the room where the bodies of their mother and aunt were found, and they undoubtedly died in absolute terror. 111RP 72-73. This description of the impact of these crimes on the victims was proper.

Likewise, the description of these crimes as “mass murder” was a fact, not an appeal to passion. The prosecutor described these events as a “mass murder” or “obliteration of a family” in his opening statement at the guilt phase of trial. 60RP 70. Schierman moved for a mistrial afterward, arguing that the opening statement was inflammatory. 60RP 77. The trial court denied that motion, concluding that these references were not “made in a fashion or in the context that makes them unduly prejudicial or inflammatory in the context of opening statement.” 60RP 85. The court noted that the jury had already been instructed that the statements of the attorneys are not evidence. Id.

A “mass murder” is defined as “A murderous act or series of acts by which a criminal kills many victims at or near the same time, usu[ally]

as part of one act or plan.” BLACK’S LAW DICTIONARY 1043 (8th ed. 2004). Scholars debate the number of deaths that warrant the label “mass murder,” but the narrowest definition includes the murder of four victims. J. Fox & J. Levin, Multiple Homicide: Patterns of Serial and Mass Murder, 23 Crime & Just. 407, 408, 429 (1998); Congressional Research Service, Public Mass Shootings in the United States: Selected Implications for Federal Public Health and Safety Policy, R43004, p. 4 (2013) (surveying literature) (available at <https://www.hsdl.org/?view&did=735915> (visited June 24, 2014)).

Schierman’s claim that use of the term “mass murder” was inflammatory fails because the term is an accurate description of what occurred in this case: the killing of four people. While a mass murder is abhorrent, Schierman is in no position to complain that his decision to murder four people may have had a negative influence on the jury’s consideration of the appropriate penalty.

Further, a prosecutor is not prohibited from describing the defendant based on the crimes proven in the current case. This Court has held that a defendant charged with child rape is properly referred to as a rapist if the evidence supports that inference. State v. McKenzie, 157 Wn.2d 44, 57-58, 134 P.3d 221 (2006). Certainly the prosecutor is not prohibited from accurately labelling the crimes.

Contrary to Schierman's claim, the prosecutor did not draw comparisons between Schierman's crimes and the Holocaust. The reference to the plaque outside the Holocaust Museum, as the trial court recognized, was merely intended to give a source for the quotation used. 111RP 75. The quotation exhorted the listener not to be a victim, or a perpetrator, or, most important, a bystander. 111RP 74. This was not a reference to genocide, as Schierman argues; it was part of the prosecutor's theme that the jury's decision was difficult and that they should not shrink from making it. E.g., 111RP 29-31.

Nevertheless, exercising an abundance of caution, the court suggested that the defense might move to have the comments relating to the Holocaust Museum plaque stricken. 111RP 78. When Schierman did so move, the court struck the reference and instructed the jury to disregard any related argument. Id. The trial court's conclusion that this remedy was sufficient was not an abuse of discretion.

Schierman's argument that the prosecutor's explanation of the source of the cultural reference to "the butterfly effect" evoked a theme of genocide also is without merit. The prosecutor's argument was that the consequences of the loss of these four human beings were far-reaching and unforeseeable. The Supreme Court in Payne held that a prosecutor may argue to a capital sentencing jury the human and societal cost of the

crimes of which the defendant has been convicted. Payne, 501 U.S. at 827, 830. Referring to the impact of the loss of young victims on their family is proper argument. Gentry, 125 Wn.2d at 644.

In the first of its written instructions for the penalty proceeding, the trial judge instructed the jury to act impartially and based on reason, as follows:

As jurors, you are officers of the court. To assure that all parties receive a fair trial, you must act impartially with an earnest desire to reach a proper verdict. You should bear in mind that your verdict must be based upon reason and not upon emotion. You must reach your decision based on the facts proved to you and on the law given to you, not on sympathy, prejudice, or personal preference. You may find mercy for the defendant to be a mitigating circumstance.

CP 8313. In Instruction 7, the jurors were directed to “consider the evidence impartially with your fellow jurors.” CP 8319.

The Court’s first instruction also informed the jurors:

It is your duty to decide the facts in this case from the evidence produced in court. It also is your duty to accept the law from my instructions You must apply the law from my instructions to the facts, and in this way decide the case.

...

The lawyers’ remarks, statements, and arguments are intended to help you understand the evidence and apply the law. ... You must disregard any remark, statement, or argument that is not supported by the evidence or the law in my instructions.

CP 8310-12. The jury was properly instructed and is presumed to have followed its instructions. State v. Warren, 165 Wn.2d 17, 28, 195 P.3d 940 (2008).

The prosecutor's arguments about the number of victims, the terror they would have experienced, and the effect of the loss of these four human beings were proper. That they were compelling arguments is a consequence of the brutality and enormity of the crimes Schierman committed. The prosecutor's presentation was not an exhortation to the jury to act on emotion but a proper discussion of the moral balance involved in making their decision. These arguments did not thwart fundamental fairness.

2. The Prosecutor's Rebuttal Argument Did Not Improperly Impugn Defense Counsel By Responding To The Defense Closing, Which Characterized The Prosecutor As Satan.

Schierman has not established that the prosecutor's response to the defense in rebuttal improperly impugned defense counsel. Moreover, because he did not object to any of the remarks he now complains of, any error is not reversible unless Schierman establishes that it was flagrant and ill-intentioned misconduct that could not have been cured. The prosecutor reasonably inferred that defense counsel had assigned the prosecutor the

role of Satan in a biblical parable, and it was a fair response to suggest that not even defense counsel believed that comparison.

In closing argument, defense counsel referred to a “death penalty sentencing proceeding in the Bible” that was “reported by a court reporter” named John. 111RP 132-33. He then read and described a story from the King James version of the Christian Bible. 111RP 132-38. The story was of a woman “taken for adultery” and brought to Jesus for judgment; Jesus responds, “he who is without sin among you, let him first cast the stone on her”; those present left without throwing a stone. 111RP 133-36. Defense counsel referred to those who left as “jurors,” and said “we know” who the preacher was who changed their minds, “who touched their hearts and how and why.” 111RP 136-37. He said, “this might be the test of your moral courage that you only you alone can assess, just [as] the jurors did when Jesus spoke.” He conceded there were differences between the law in this case and the law that applied in “Jerusalem nearly 2000 years ago.” 111RP 138-39. He repeatedly told the jurors that they were facing a “test” just as the “jurors in front of the temple that day were tested.” 111RP 138-41.

After recounting this story for ten minutes of his argument,¹³⁰ defense counsel brought the prosecutor into the story:

¹³⁰ The time is noted as to each line of the transcript of this volume.

One thing that is not present with the transcript according to John of that trial is any indication that there was a prosecutor there, much like the prosecutor with the one that you have just heard.

Who knows had there been a prosecutor like Mr. O'Toole reminding everybody of the harm or horror that had been done, who knows what the outcome may have been, who knows that the result may have been different, that woman would have died under the pile of rocks.

The episode would be one more million of episodes of man's inhumanity to man that would never have made it into the Bible and none of us would have heard from it.

111RP 141. He repeated that the jurors could do what the "jurors" did in Jerusalem, two thousand years ago. 111RP 142. In concluding, he returned to the Bible story, stating that the "jurors in that Bible story" did not rely on "the facts of the crime" to decide not to impose the death penalty, they just realized it was wrong. 111RP 143.

In rebuttal, the prosecutor addressed Schierman's biblical argument.

111RP 149. He stated:

Having the prosecutor being compared to the person, I guess is Satan would oppose Christ in that little parable may be offensive or not, but I didn't object, because I wanted to see how far that Mr. Conroy had to go to convince you to pause or question.

I don't think that he has convinced himself. To compare me, as the person, who deposed a biblical story like that, I think that is all I need to say about the credibility or the weight that you should give it.

Because Mr. Conroy brings out the point that the parable, or the saying that comes out of that is, "do not judge [lest] ye be judged."

Unfortunately with Mr. Conroy that ship has sailed. That you and I have sat through a trial phase here, and guilt phase, you have found him guilty beyond any reasonable doubt of four counts of aggravated murder in the first degree.

111RP 149-50.

Schierman did not object to this argument at any point. The absence of an objection by defense counsel “strongly suggests to a court that the argument or event in question did not appear critically prejudicial to an appellant in the context of trial.” McKenzie, 157 Wn.2d at 53 n.2 (emphasis in original) (quoting State v. Swan, 114 Wn.2d 613, 661, 790 P.2d 610 (1990)). It is apparent that defense counsel was not at all surprised to hear that the prosecutor understood that he had been characterized as Satan in the argument.

Schierman claims that the prosecutor was arguing that the defense made an improper, personal attack on him because defense counsel knew the defense had no case. Read in the context of the statements before and after, however, the statement can be interpreted only as referring to the biblical story—the prosecutor objected to being compared to Satan and did not think that even the defense attorney believed that the prosecutor was Satan. Indeed, a fair interpretation of the prosecutor’s argument would be that, after noting that impugning the integrity of opposing counsel was objectionable

(as surely comparing him to Satan was intended), the prosecutor sought to reassure the jury that no offense was taken.

Further, the prosecutor's defense of himself being case in the role of Satan was a fair reply to the defense argument. The prosecutor is "entitled to make a fair response to the arguments of defense counsel." Russell, 125 Wn.2d at 87. When the defense uses biblical stories in argument, the State may respond with religious references. Gentry, 125 Wn.2d at 644; see also Yates, 161 Wn.2d at 780 (reliance on religious commitment in mitigation invited challenge to that appeal as "a shameful ... attempt to play upon spiritual beliefs"). Even improper arguments are not grounds for reversal if they were provoked by defense counsel and are a pertinent reply, unless they are so prejudicial that a curative instruction would be ineffective. Gentry, 125 Wn.2d at 643-44.

Schierman argues that the prosecutor turned his entire rebuttal into "a personal attack on defense counsel's arguments." App. Br. at 194. However, rebuttal argument is intended to be a response to the arguments of the defense. The only citations to allegedly personal attacks are the use of defense counsel's name in connection with the words "says," "talks about," or "complains." Id. at 186. Schierman cites no authority that suggests that use of an attorney's name is a personal attack or is derogatory. Nor is there

any suggestion of impropriety in the words the prosecutor used to describe the arguments made.¹³¹

In the context of the entire trial and special sentencing proceeding, the prosecutor's brief defense of his role in the case was not an attack on the role of defense counsel or an attack on defense counsel personally. Schierman did not consider it prejudicial, as he did not object at trial. He has not established that the comment was flagrant and ill-intentioned or that it could not have been effectively cured by an instruction.

P. THE DOCTRINE OF CUMULATIVE ERROR DOES NOT WARRANT REVERSAL.

Schierman claims that cumulative error, from jury selection through the penalty phase, denied him a fair trial. On this basis, he apparently seeks reversal of his convictions and the sentences imposed. No error has been shown, so the cumulative error doctrine is inapplicable. If there were multiple errors that this Court has found to be harmless, there is no reason to conclude that their cumulative effect warrants reversal.

This Court may overturn a conviction where the combined effect of errors, each harmless in its own right, worked to deny the defendant a fair trial. Weber, 159 Wn.2d at 279. Schierman asserts that errors at the

¹³¹ While use of the word "complain" might be derogatory in some circumstances, here the prosecutor used it only to reference defense counsel's description of conditions in jail. 111RP 158-59. In that context, the word is consistent with both parties' agreement that conditions in jail are unpleasant.

guilt phase must be cumulated with errors at the penalty phase. App. Br. at 196. However, the case cited did not so hold: it held that a guilt-phase error may carry over, but because of the procedural and temporal distance of the penalty proceeding, the chance or degree of carry-over may be attenuated. Cargle v. Mullin, 317 F.3d 1196, 1208 (10th Cir. 2003). The Supreme Court also has observed that when an error occurred at the guilt phase, it greatly reduced the chance that the error had any effect at all on sentencing. Darden, 477 U.S. at 183 n.15.

In this case, any error in selecting a jury stands independently—if an impartial jury was seated no procedural error remains relevant. Likewise, no error in the jury instructions or the State’s argument about those instructions would carry over to the decision made at the penalty phase. Finally, any error in the penalty phase would have no significance to the guilty verdicts returned.

Schierman’s arguments as to cumulative error are unpersuasive. Both specific arguments refer to errors that have not been alleged. First, he argues that even if “evidence and argument” regarding sexual motivation was harmless error at the guilt phase, it should also be considered error in the penalty phase. App. Br. at 196. However, there has been no claim of error regarding the introduction of evidence relevant to sexual motivation. Second, he claims that “the trial court repeatedly

held the defense on a short leash while giving the prosecution free rein.”

Id. But it is not a legal claim of error that the court sometimes ruled against Schierman; for example, the number of State’s witnesses at the guilt phase is irrelevant to the limitation of cumulative mitigation witnesses. The claim of cumulative error is without merit.¹³²

Q. AFTER CONDUCTING THE MANDATORY STATUTORY REVIEW, THIS COURT SHOULD UPHOLD SCHIERMAN’S DEATH SENTENCE.

This Court is statutorily required to determine:

- (a) Whether there was sufficient evidence to justify the affirmative finding to the question posed by RCW 10.95.060(4); and
- (b) Whether the sentence of death is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant. ...;
- (c) Whether the sentence of death was brought about through passion or prejudice; and
- (d) Whether the defendant had an intellectual disability within the meaning of RCW 10.95.030(2).

RCW 10.95.130(2). This statutory review provides no basis for reversal of the sentence imposed in this case. Schierman makes a token argument that this Court should reverse its many prior holdings that Washington’s death penalty does not constitute cruel and unusual punishment and should abolish the death penalty in Washington; this claim also is without merit.

¹³² Schierman also states, “The errors also rendered the imposition of the death penalty arbitrary and capricious in violation of Eighth Amendment and Article I, §14.” App. Br. at 197. This statement is unsupported by argument, citation to the record, or authority; thus, it is waived. Goodman, 150 Wn.2d at 781-82.

1. Sufficient Evidence Justified The Jury's Finding That There Were Not Sufficient Mitigating Circumstances To Merit Leniency.

The first statutory inquiry is whether there was sufficient evidence to justify the jury's affirmative answer to the question "Having in mind the crimes of which the defendant has been found guilty, are you convinced beyond a reasonable doubt that there are not sufficient mitigating circumstances to merit leniency?" CP 8316, 8322; RCW 10.95.060(4), 10.95.130(2)(a). This Court's test is "whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found sufficient evidence to justify that conclusion beyond a reasonable doubt." Davis, 175 Wn.2d at 346 (quoting Yates, 161 Wn.2d at 786). The mere presence of mitigating factors is not controlling; a rational jury may conclude that leniency is not merited if it is convinced that the circumstances of the crime outweigh the mitigating factors. Yates, 161 Wn.2d 786 (citing State v. Dodd, 120 Wn.2d 1, 25, 838 P.3d 86 (1992)). Schierman does not mention this statutory inquiry or argue that there was insufficient evidence to justify the jury's finding that there were not sufficient mitigating circumstances to merit leniency.

The jury was presented the question and unanimously answered "yes." CP 8316, 8322. Its verdict was supported by sufficient evidence.

The murders Schierman committed were calculated and horrifying. He armed himself with at least two knives and a small axe, and brought gloves and a flashlight along, when he went to his neighbors' home in the night. He knew Olga lived there with her two young children, and he knew that her husband, serving in the military overseas, would not be at home. 71RP 85; 72RP 49-52; 98RP 163-64.

The killings themselves were brutal; Schierman murdered two of the victims by stabbing them repeatedly in the head and neck. He stabbed Lyubov at least ten times, including twice through the neck. 65RP 163; 66RP 13-18, 136-39. He stabbed Olga at least four times in the head and neck, including a lethal wound that involved two thrusts to the front of her neck: one thrust downward into a lung, the other straight back into her spine through two arteries. 65RP 127-28; 65RP 133-43; 66RP 127-33. These women fought for their lives, as is evidenced not only by their numerous injuries, but also by the injuries they inflicted on Schierman. Ex. 121; 73RP 97-98, 103-10.

Schierman also brutally murdered two especially vulnerable victims, young brothers Andrew and Justin. Three-year-old Andrew had at least four horizontal cuts to the front of his neck, which cut through his entire neck, leaving grooves on his spine and virtually decapitating him.

66RP 46-50, 144-47. Five-year-old Justin was impaled through his neck.
66RP 35-37.

After the murders, Schierman discarded his blood-soaked clothing, showered in the victims' home, and took clean clothing to wear back to his own home. He drove to a gas station, bought gas cans and filled them, returned to the victims' home, soaked the home with gas, and set fires on all three floors. He conceded that he did this to destroy evidence of the murders, although he never admitted to the killings. Ex. 330.

The State presented testimony of Leonid (Olga's husband and the boys' father), one sister of Olga, and a grandparent of Justin and Andrew from each side of the family; each testified to the effect of their loss.

The mitigation evidence presented by Schierman is discussed in detail in section K, supra. In summary, relatives and friends testified that Schierman suffered abuse in his childhood from his father. His father was an alcoholic and Schierman began to abuse drugs and alcohol by the time he was a teenager; that escalated until he entered a treatment program in November of 2004. He apparently was sober while living in a rooming house that was an extension of treatment and required all residents to be sober and adhere to strict rules. He moved out on July 1, 2006, into the duplex on Slater, two weeks before these murders. He was 24 years old at the time of the murders. 97RP 40.

Schierman presented expert testimony concerning his alcohol abuse in the guilt phase of trial; the jury was instructed to consider evidence admitted in the first phase in considering the penalty. CP 8310. The expert, Dr. Saxon, testified to Schierman's family and personal history of alcoholism and the likelihood that at the time of the murders, Schierman was in an alcohol blackout, defined as a period of time for which a person lacks memory due to alcohol intoxication. 97RP 14-15, 28, 38-39. Schierman claimed to have no memory of events that occurred between midnight and when he awoke covered in blood in a house with four dead people.¹³³ Various family members testified about the family history of alcohol abuse and Schierman's problems with substance abuse.

Schierman presented testimony regarding his generally good adjustment to life in the King County Jail. Eldon Vail testified about conditions of confinement in the Washington Department of Corrections.

Schierman presented a coworker, multiple supervisors, and others who observed him at work, all testifying that he generally was a good employee, except when he was abusing alcohol and drugs.

Twelve relatives and a number of acquaintances of Schierman expressed their positive feelings toward him, described their visits with him in jail, expressed admiration for his origami pieces produced while in

¹³³ Schierman's version of events was presented through Saxon's testimony and via his final statement to the police. Ex. 330; 97RP 31-37.

custody, and said they would continue to support him when he is in prison. In his allocution, Schierman read a statement requesting mercy but not accepting responsibility for the crimes. 111RP 16-22.

The jury was given a list of five statutory mitigating factors to consider if supported by the evidence, and was told it could consider any other mitigating factor it found relevant, including mercy. CP 8318.

The jury was justified in finding that the evidence offered in mitigation was not sufficient to merit leniency in light of the four brutal murders that Schierman committed.

2. The Sentence Was Not Disproportionate,
Considering The Crimes And The Defendant.

This Court's goal in proportionality review is to "ensure that the death penalty's imposition is not 'freakish, wanton, or random[] and is not based on race or other suspect classifications.'" Davis, 175 Wn.2d at 348 (quoting Cross, 156 Wn.2d at 630). The court considers four factors: the nature of the crime, the aggravating circumstances, the defendant's criminal history, and the defendant's personal history. Davis, 175 Wn.2d at 348. In addition, the court will consider any additional substantive challenges to proportionality. Id.

Nature of the crimes. Many aspects of these crimes weigh in favor of the choice of the death sentence in this case. First, the number of

victims is high. See id. at 350 (noting cases in which the court has found a death sentence proportional when the crime involved only one victim).

Second, Schierman selected victims who were vulnerable in several respects: they were in their own home, in the middle of the night, when the husband and father of the family was overseas; Andrew was three years old; Justin was five years old. See Yates, 161 Wn.2d at 789 (selection of vulnerable victims weighs in favor of choice of death).

Third, these crimes evidence cruelty in the nature and number of injuries, and the struggles of the adult victims. See id. (cruelty weighs in favor of choice of death); Davis, 175 Wn.2d at 349 (same, citing cases).

Aggravating circumstances. There was one aggravating circumstance submitted to and found by the jury as to each murder conviction: that the crime involved the murder of multiple victims as part of a common scheme or plan. CP 7856, 7866-69. The existence of a single aggravating factor does not weigh for or against proportionality. Davis, 175 Wn.2d at 349. It is the nature of the aggravators that is central to the inquiry. Yates, 161 Wn.2d at 790. That the common scheme or plan included four victims adds weight in favor of the jury's choice of sentence here.

Prior convictions. Schierman has no prior criminal convictions. That does not weigh in favor of a death sentence, but does not establish

that the sentence was disproportionate. State v. Rupe, 108 Wn.2d 734, 770, 743 P.2d 210 (1987).

Schierman's personal history. A summary of Schierman's personal history as presented to the jury is described in section Q.1, supra. Schierman argues that multiple mitigating factors were presented to the jury but does not explain how any of these alleged mitigating factors compels a conclusion that imposition of a death sentence in this case is wanton or arbitrary. While Schierman claims he lived in a home with at least one parent abusing alcohol when he was a youngster, had a family history including alcoholism, and had problems with substance abuse, these alleged mitigating factors do not establish that imposition of the death sentence was arbitrary, given the nature of the crimes.

Schierman argues that the imposition of a death sentence under the circumstances of this case would be disproportionate because others who have killed more people are currently serving life terms. This argument has been repeatedly rejected as a measure of proportionality. See Davis, 175 Wn.2d at 350-51; Yates, 161 Wn.2d at 793; Cross, 156 Wn.2d at 624. Moreover, two of the cases upon which he relies are cases in which the jury did impose the death penalty, but the sentences were later reduced for

reasons unrelated to proportionality.¹³⁴ However, this Court has held that later reversal of the jury's choice of a death sentence is not relevant to proportionality analysis; the base line is the sentences rendered by juries. Cross, 156 Wn.2d at 637.

Schierman has not argued, and there is no evidence to suggest, that the choice of sentence in this case was based on race or any other suspect classification.

Schierman asserts generally that the death penalty is imposed in a wanton and freakish manner in Washington, in violation of federal and state constitutional prohibitions on cruel or unusual punishment. That argument has repeatedly been rejected by this court. In re Cross, No. 79761-7 (Wash. S. Ct. June 26, 2014), slip op. at 63-66; Davis, 175 Wn.2d at 353-73; Yates, 161 Wn.2d at 792-93; Cross, 156 Wn.2d at 636-39 (affirming validity of proportionality review). Article I, section 14 does not extend greater protection than the Eighth Amendment. Dodd, 120 Wn.2d at 20-22. This Court will overrule its precedent only if there is a clear showing that it is both incorrect and harmful. Devin, 158 Wn.2d at

¹³⁴ Mak v. Blodgett, 970 F.2d 614 (9th Cir. 1998) (habeas relief reversing sentence); Rice v. Wood, 77 F.3d 1138, 1139 (9th Cir. 1996) (en banc), vacating in part 44 F.3d 1396 (remanding for reference hearing).

168. Schierman has not cited that standard or included any analysis supporting such a conclusion.¹³⁵

What Schierman has argued is that this Court should follow the decision to abolish the death penalty that has been made by legislatures in several other states in recent years. But the mandate of the people of this state is to have the death sentence available as a sentencing option. This court should decline the invitation to step into the legislative role, as it has declined to do in the past. State v. Campbell, 103 Wn.2d 1, 34, 691 P.2d 929 (1984).

3. The Sentence Was Not Brought About Through Passion Or Prejudice.

A sentence of death will be vacated if this Court concludes it was:

the product of appeals to the passion or prejudice of the jury, such as arguments intended to incite feelings of fear, anger, and a desire for revenge and arguments that are irrelevant, irrational, and inflammatory . . . that prevent calm and dispassionate appraisal of the evidence.

Davis, 175 Wn.2d at 373 (quoting Cross, 156 Wn.2d at 634-35) (ellipsis in original) (internal quotation marks and citations omitted).

¹³⁵ The dissents in Davis, upon which Schierman relies, were explicitly limited to the specific facts of that case. 175 Wn.2d at 375 (Fairhurst, J., dissenting) (imposition of death sentence for similar crimes questioned, where there was a single victim and defendant suffered a difficult childhood, low intelligence, and personality disorders); 175 Wn.2d at 388 (Wiggins, J., dissenting) (would remand for inquiry as to the effect of race on imposition of death sentences; defendant was African-American).

With one exception, Schierman's argument as to this issue is a list of claims that have been addressed in earlier sections of the brief, without further analysis. Limited information about the victims and their families was properly before the jury, and the prosecutor did not err in discussing that victim impact evidence. The prosecutor properly noted the possibility of a sexual motive because the evidence supported such an inference. The prosecutor did not compare these crimes to the Holocaust, and any error in mentioning a plaque in front of the Holocaust Museum was cured when the judge instructed the jury to ignore that reference. The State will not repeat the analysis of those issues here.

One new claim is mentioned in this list: that many gruesome photographs were displayed. There is no citation to the record included with this reference and no error has been assigned on appeal to the admission of any photograph in this case based on its gruesome character. The trial court carefully considered the admissibility of the photographs of the bodies of the victims taken at the scene and during forensic analysis afterward, based on the State's declarations from expert witnesses concerning their need to refer to the photographs. 59RP 90-118; 66RP 116-18. A defendant who commits brutal crimes cannot object that the jury has had the opportunity to see the gruesome results. State v. Crenshaw, 98 Wn.2d 789, 807, 659 P.2d 488 (1983). All post-mortem

pictures of the victims were admitted in the guilt phase; they were admitted because they were probative of guilt and necessary to the jury's understanding of the testimony. The jury's exposure to the nature of the brutal crimes committed, during the guilt phase of trial, is not an improper appeal to passion.

In the absence of evidence to the contrary, this Court will presume that the jury followed the trial court's instructions directing it not to be influenced by passion, prejudice, or sympathy. Yates, 161 Wn.2d at 787. This jury was so instructed, and Schierman has not pointed to any evidence that the jury was improperly influenced. CP 8313 (Sentencing Phase Instruction 1).

The choice of sentence was a reasonable one, and Schierman has made no argument that the sentence was inappropriate in light of the crimes he committed. There is no evidence that the jury's verdict was brought about by passion or prejudice.

4. There Is No Evidence That Schierman Had An Intellectual Disability.

Schierman makes no claim that he had an intellectual disability within the meaning of RCW 10.95.130(2)(d), conceding that this "does not apply" to him. App. Br. at 197 n.43. There was no testimony or other

evidence that he was intellectually disabled. Thus, this aspect of the statutory review provides no basis to reverse the sentence.

IV. CONCLUSION

For the foregoing reasons, the State respectfully asks this Court to affirm Schierman's convictions and sentence.

DATED this 2 day of July, 2014.

Respectfully submitted,

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Office WSBA #91002

Appendix 1

APPENDIX 1

State v. Conner Schierman, Supreme Court Cause Number 84614-6
Table of Volumes of Verbatim Report of Proceedings

<u>Volume</u>	<u>Dates Included</u>
1	July 31, 2006
2	August 3, 2006
3	August 7, 2006
4	August 9, 2006
5	August 29, 2006
6	September 7, 2006
7	September 14, 2006
8	October 20, 2006
9	November 9, 2006
10	November 21, 2006
11	January 30, 2007
12	February 1, 2007
13	February 23, 2007
	March 2, 2007
	March 23, 2007
	April 30, 2007
14	May 2, 2007
	May 14, 2007
	July 23, 2007
	August 23, 2007
15	September 21, 2007
	October 19, 2007
	October 26, 2007
	October 31, 2007
16	November 16, 2007
	December 11, 2007
	March 7, 2008
	March 20, 2008
17	February 21, 2008
18	June 6, 2008
	July 24, 2008
	August 7, 2008
	September 4, 2008
19	September 11, 2008
20	October 24, 2008
	November 21, 2008
	December 9, 2008
	December 15, 2008
21	November 25, 2008

22 August 21, 2009
October 23, 2009
23 September 3, 2009
24 September 17, 2009
25 September 24, 2009
26 October 1, 2009
27 October 8, 2009
28 October 14, 2009
29 October 28, 2009
30 October 29, 2009
31 November 2, 2009
32 November 3, 2009
November 4, 2009
33 November 5, 2009
November 9, 2009
November 10, 2009
November 12, 2009
34 November 13, 2009
35 November 20, 2009
36 November 23, 2009
37 November 30, 2009
38 December 1, 2009
39 December 2, 2009
40 December 3, 2009
41 December 4, 2009 (morning)
42 December 4, 2009 (afternoon)
43 December 7, 2009
44 December 8, 2009
45 December 9, 2009
46 December 10, 2009
47 December 11, 2009
48 December 14, 2009
49 December 15, 2009
50 December 16, 2009
51 December 17, 2009
52 December 18, 2009
53 December 21, 2009
54 December 22, 2009
55 December 28, 2009
56 December 29, 2009
57 December 30, 2009
January 10, 2010
58 January 11, 2010
59 January 12, 2010
January 15, 2010
January 19, 2010

60	January 20, 2010
61	January 21, 2010
62	January 25, 2010
63	January 26, 2010
64	January 27, 2010
65	January 28, 2010
66	February 1, 2010
67	February 2, 2010
68	February 3, 2010
69	February 4, 2010
70	February 8, 2010
71	February 9, 2010
72	February 10, 2010
73	February 11, 2010
74	February 16, 2010
75	February 17, 2010
76	February 18, 2010
77	February 22, 2010
78	February 23, 2010
79	February 24, 2010
80	February 25, 2010
81	March 1, 2010 (morning)
82	March 1, 2010 (afternoon)
83	March 2, 2010
84	March 3, 2010
85	March 4, 2010
86	March 8, 2010
	March 9, 2010
87	March 10, 2010
88	March 11, 2010
89	March 15, 2010
90	March 16, 2010
91	March 17, 2010
92	March 18, 2010
93	March 22, 2010
94	March 23, 2010
95	March 24, 2010
96	March 25, 2010 ¹
	March 31, 2010
97	April 1, 2010
98	April 5, 2010
	April 6, 2010
99	April 7, 2010
100	April 8, 2010

¹ There is one volume of the Verbatim Report of Proceedings dated March 26, 2010. This cover sheet is incorrect; the hearing reported occurred on April 26, 2010. That volume has been numbered 106.

101	April 12, 2010
	April 13, 2010
	April 14, 2010
	April 15, 2010
102	April 19, 2010
103	April 20, 2010
104	April 21, 2010
105	April 22, 2010
	May 27, 2010
	June 2, 2010
106	April 26, 2010
107	April 27, 2010
108	April 28, 2010
109	April 29, 2010
110	April 30, 2010
111	May 3, 2010
112	May 4, 2010
113	May 5, 2010
114	November 18, 2010
115	November 9, 2011
116	May 23, 2012
117	March 27, 2013

Appendix 2

Jury staff is authorized to postpone service and excuse jurors for hardship, in addition to excusing jurors who are statutorily unqualified or incompetent. Jury staff shall not excuse jurors summoned to special panels absent approval from the assigned judge.

Jurors who request to be excused and who are otherwise eligible to serve may be excused using the following standards:

Financial burden. Jurors who are not being paid for jury service by their employer may be excused if the juror will be unable to meet the basic needs of the juror and the juror's family. Jurors who are paid by their employer during jury service but who are requesting to be excused because they will not earn overtime must serve. The mere fact that a juror is not paid for service is not, by itself, a basis to excuse a juror. Jurors requesting excuses should be offered the alternative of a postponement to a date of the juror's choosing.

Illness. Jurors who are too disabled to serve may be excused upon request. Jurors who are temporarily ill or injured shall be rescheduled rather than excused. Jurors who need minimal assistance, such as the need to stand due to lower back pain, shall not be excused. Aged jurors who request excuses should be evaluated in the same manner.

Employment. Jurors who are essential to their employers should be rescheduled rather than excused. Self-employed individuals should be rescheduled rather than excused unless there are other employees of the business and the business would shut down during the employer's jury service. Teachers may be rescheduled to a school vacation period.

Students. Full time students who request to be excused may be rescheduled to a school vacation period. Students who go to school out of Western Washington and who aver that they will not return to Western Washington during vacation over the next year may be excused.

Children and Caregivers. Single parents with children younger than school age lacking day care or equivalent child care arrangements may be excused. Single parents with school age children who personally care for their children after school may be excused. Jurors who care for permanently disabled adults in the juror's home may be excused.

Vacation and Business Travel. Jurors may reschedule but shall not be excused for vacation and travel plans.

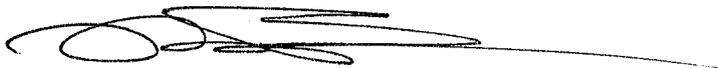
Prior service. A juror who has served in any court during the prior twelve months may be excused upon request.

Certificate of Service by Mail

Today I deposited in the mail of the United States of America, postage prepaid, a properly stamped and addressed envelope directed to Suzanne Lee Elliott and David B. Zuckerman, the attorneys for the appellant, at 1300 Hoge Building, 705 Second Avenue, Seattle, Washington 98104, containing a copy of the BRIEF OF RESPONDENT, in STATE V. CONNER MICHAEL SCHIERMAN, Cause No. 84614-6, in the Supreme Court, for the State of Washington.

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

Dated this 2 day of July, 2014

A handwritten signature in black ink, consisting of several loops and a long horizontal stroke extending to the right.

Name
Done in Seattle, Washington