

64839-0

64839-0

NO. 64839-0-I

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

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STATE OF WASHINGTON,

Respondent,

v.

NAVEED HAQ,

Appellant.

---

APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE PARIS KALLAS

---

**BRIEF OF RESPONDENT**

---

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TABLE OF CONTENTS

	Page
A. <u>ISSUES PRESENTED</u> .....	1
B. <u>STATEMENT OF THE CASE</u> .....	3
1. PROCEDURAL FACTS .....	3
2. SUBSTANTIVE FACTS .....	5
a. Planning .....	6
b. July 28, 2006 .....	7
c. Motive .....	11
d. Mental Defenses .....	15
i. Defense case .....	15
ii. State's rebuttal of mental defenses ....	20
C. <u>ARGUMENT</u> .....	24
1. NO SPECIFIC BURDEN OF PROOF AS TO INSANITY IS MANDATED BY THE STATE CONSTITUTIONAL GUARANTEE OF A JURY TRIAL .....	24
2. RECORDINGS OF HAQ'S AUGUST 2006 JAIL PHONE CALLS WERE LEGALLY OBTAINED AND WERE PROPERLY ADMITTED ON THE ISSUE OF HIS MOTIVES AND MENTAL STATE ...	36
a. Relevant Facts .....	36
b. Recording Jail Phone Calls To Family Members Did Not Violate Haq's Sixth Amendment Right To Counsel .....	39

c.	Haq Has Not Established A Violation Of Equal Protection Based On Alleged Different Handling Of The Release Of Phone Recordings Of State Prisoners .....	44
d.	This Court Has Rejected The Claim That Jail Calls Recorded Under These Circumstances Are Constitutionally Protected Private Affairs .....	48
e.	The Supreme Court Has Rejected The Claim That Recording Jail Calls Under These Circumstances Is A Violation Of The Washington State Privacy Act.....	51
f.	The Trial Court Did Not Abuse Its Discretion To Admit Relevant Evidence Over A Claim Of Unfair Prejudice .....	56
3.	THE COURT PROPERLY ORDERED AN EXAMINATION BY A STATE EXPERT PURSUANT TO CrR 4.7.....	59
4.	STATEMENTS MADE BY HAQ TO A STATE PSYCHOLOGIST WERE PROPERLY ADMITTED TO REBUT HAQ'S INSANITY AND DIMINISHED CAPACITY DEFENSES .....	61
a.	Relevant Facts .....	61
b.	All Of Haq's Statements To Dr. Wheeler Were Admissible To Rebut Haq's Insanity And Diminished Capacity Defenses .....	66
c.	Even If There Is A General Rule That Incriminating Statements Be Excluded From State Experts' Testimony, The Testimony Was Admissible Because The Defense Experts' Reliance On Haq's Statements Opened The Door To All Of Haq's Statements About The Crimes .....	70

d.	All Of Haq's Statements To Dr. Wheeler Were Properly Admitted To Impeach Haq's Statements Admitted Through His Own Expert .....	78
5.	HAQ WAIVED ANY CHALLENGE TO THE CONSTITUTIONALITY OF RCW 10.77.020(5) BY FAILING TO RAISE THAT ISSUE IN THE TRIAL COURT .....	80
6.	THE TRIAL COURT PROPERLY DENIED A PROPOSED INSTRUCTION AND SPECIAL VERDICT FORM THAT WERE INACCURATE STATEMENTS OF THE LAW REGARDING THE AGGRAVATING CIRCUMSTANCE.....	83
7.	HAQ'S CLAIM THAT HE WAS DENIED A FAIR TRIAL BECAUSE WITNESSES IMPROPERLY TESTIFIED TO THEIR OPINION OF HIS GUILT IS WITHOUT MERIT .....	91
a.	Haq Waived His Right To Object To The Statements Of Officers Collins And Pasternak, Which Were Not Opinions As To Guilt .....	93
b.	The Challenged Statement Of Detective Cruise, Which Was Elicited On Cross- Examination And Was Stricken By The Trial Court, Is Not Reversible Error .....	98
c.	The Expert Opinion Testimony Of Dr. Reus And Dr. Wheeler Was Properly Admitted.....	101
d.	Any Error Was Harmless.....	107

8.	DR. REUS'S TESTIMONY THAT HE KNEW OF SPECIFIC PEOPLE WITH MENTAL DISORDERS WHO FUNCTIONED IN RESPECTED PROFESSIONS, STRICKEN BY THE TRIAL COURT, DID NOT DEPRIVE HAQ OF A FAIR TRIAL .....	111
9.	THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN ADMITTING EXPERT TESTIMONY ABOUT THE RELEVANT DEFINITIONS THAT THE EXPERTS APPLIED IN REACHING THEIR OPINIONS .....	114
10.	THE TRIAL COURT DID NOT ABUSE ITS DISCRETION BY EXCLUDING HEARSAY EVIDENCE THAT WAS OF MINIMAL PROBATIVE VALUE .....	117
11.	THE EVIDENCE SUPPORTING HAQ'S CONVICTION OF MALICIOUS HARASSMENT WAS OVERWHELMING.....	121
12.	BECAUSE NO ERROR OCCURRED, THE DOCTRINE OF CUMULATIVE ERROR DOES NOT APPLY.....	124
D.	<u>CONCLUSION</u> .....	125

TABLE OF AUTHORITIES

Page

Table of Cases

Federal:

Ake v. Oklahoma, 470 U.S. 68,  
105 S. Ct. 1087, 84 L. Ed. 2d 53 (1985)..... 119

Arney v. Simmons, 26 F. Supp. 2d 1288  
(D. Kan. 1998) ..... 46

Bell v. Wolfish, 441 U.S. 520,  
99 S. Ct. 1861 , 60 L. Ed. 2d 447 (1979)..... 46, 47, 48

Chambers v. Mississippi, 410 U.S. 284,  
93 S. Ct. 1038, 35 L. Ed. 2d 297 (1973)..... 119

Estelle v. Smith, 451 U.S. 454,  
101 S. Ct. 1866, 68 L. Ed. 2d 359 (1981) ..... 66

Felde v. Blackburn, 795 F.2d 400  
(5<sup>th</sup> Cir. 1986) ..... 79

Kuhlmann v. Wilson, 477 U.S. 436,  
106 S. Ct. 2616, 91 L. Ed. 2d 364 (1986) ..... 41, 43

Leland v. Oregon, 343 U.S. 790,  
72 S. Ct. 1002, 96 L. Ed. 1302 (1952)..... 25

Maine v. Moulton, 474 U.S. 159,  
106 S. Ct. 477, 88 L. Ed. 2d 481 (1985)..... 39, 42

McGinnis v. Royster, 410 U.S. 263,  
93 S. Ct. 1055, 35 L. Ed. 2d 282 (1973)..... 46

Powell v. Texas, 492 U.S. 680,  
109 S. Ct. 3146, 106 L. Ed. 2d 551 (1989) ..... 66

Turner v. Safley, 482 U.S. 78,  
107 S. Ct. 2254, 96 L. Ed. 2d 64 (1987)..... 46

<u>United States v. Hearst</u> , 563 F.2d 1331 (9 <sup>th</sup> Cir. 1977) .....	42
<u>United States v. Henry</u> , 447 U.S. 264, 100 S. Ct. 2183, 65 L. Ed. 2d 115 (1980) .....	41
<u>Washington State:</u>	
<u>Armunrud v. Board of Appeals</u> , 158 Wn.2d 208, 143 P.3d 571 (2006) .....	26
<u>Asarco Inc. v. Dept of Ecology</u> , 145 Wn.2d 750, 43 P.3d 471 (2002) .....	83
<u>City of Pasco v. Mace</u> , 98 Wn.2d 87, 653 P.2d 618 (1982) .....	29, 30
<u>City of Seattle v. Patu</u> , 147 Wn.2d 717, 58 P.3d 273 (2002) .....	58, 117
<u>Dreiling v. Jain</u> , 151 Wn.2d 900, 93 P.3d 861 (2004) .....	25
<u>First United Methodist Church v. Hearing Examiner</u> , 129 Wn.2d 238, 916 P.2d 374 (1996) .....	83
<u>In re Estate of Singer</u> , 166 Wn.2d 120, 206 P.3d 665 (2009) .....	26
<u>In re Pers. Restraint of Atwood</u> , 136 Wn. App. 23, 146 P.3d 1232 (2006) .....	46
<u>In re Pers. Restraint of Benn</u> , 134 Wn.2d 868, 952 P.2d 116 (1998) .....	40, 41, 43
<u>In re Pers. Restraint of Powell</u> , 117 Wn.2d 175, 814 P.2d 635 (1991) .....	82
<u>Kadoranian v. Bellingham Police Dept.</u> , 119 Wn.2d 178, 829 P.2d 1061 (1992) .....	82

<u>LaMon v. Butler</u> , 112 Wn.2d 193, 770 P.2d 1027 (1989).....	79
<u>McAllister v. Territory of Washington</u> , 1 Wash. Terr. 360 (1872) .....	31, 32, 33, 35
<u>Palmer v. Jensen</u> , 81 Wn. App. 148, 913 P.2d 413 (1996).....	50, 53, 56, 60
<u>Sofie v. Fibreboard Corp.</u> , 112 Wn.2d 636, 771 P.2d 711, 780 P.2d 260 (1989).....	30
<u>State v. Alexander</u> , 64 Wn. App. 147, 822 P.2d 1250 (1992).....	124
<u>State v. Archie</u> , 148 Wn. App. 198, 199 P.3d 1005 (2009).....	48, 49, 51
<u>State v. Bourgeois</u> , 133 Wn.2d 389, 945 P.2d 1120 (1997).....	116, 118
<u>State v. Box</u> , 109 Wn.2d 320, 745 P.2d 23 (1987).....	25, 26
<u>State v. Brewton</u> , 49 Wn. App. 589, 744 P.2d 646 (1987).....	73
<u>State v. Brockob</u> , 159 Wn.2d 311, 150 P.3d 59 (2006).....	116, 118
<u>State v. Brown</u> , 132 Wn.2d 529, 940 P. 2d 546 (1997).....	28, 29, 34
<u>State v. Camarillo</u> , 115 Wn.2d 60, 794 P.2d 850 (1990).....	122
<u>State v. Carneh</u> , 153 Wn.2d 274, 103 P.3d 743 (2004).....	67, 73
<u>State v. Cheatam</u> , 150 Wn.2d 626, 81 P.3d 830 (2003).....	50

<u>State v. Clark</u> , 34 Wash. 485, 76 P. 98 (1904).....	33
<u>State v. Clark</u> , 129 Wn.2d 211, 916 P.2d 384 (1996).....	51
<u>State v. Coe</u> , 101 Wn.2d 772, 684 P.2d 668 (1984).....	124
<u>State v. Deal</u> , 128 Wn.2d 693, 911 P.2d 996 (1996).....	107
<u>State v. Delmarter</u> , 94 Wn.2d 634, 618 P.2d 99 (1980).....	122
<u>State v. Demery</u> , 144 Wn.2d 753, 30 P.3d 1278 (2001).....	92
<u>State v. Golladay</u> , 78 Wn.2d 121, 470 P.2d 191 (1970), <u>overruled on other grounds</u> , <u>State v. Arndt</u> , 87 Wn.2d 374 (1976) .....	87, 88
<u>State v. Gunwall</u> , 106 Wn.2d 54, 720 P.2d 808 (1986).....	27, 30
<u>State v. Hachenev</u> , 160 Wn.2d 503, 158 P.3d 1152 (2007).....	85-91
<u>State v. Hamlet</u> , 133 Wn.2d 314, 944 P.2d 1026 (1997).....	67
<u>State v. Hartzell</u> , 153 Wn. App. 137, 221 P.3d 928 (2009), <u>remanded on other grounds</u> , 168 Wn.2d 1027 (2010).....	78
<u>State v. Hawkins</u> , 70 Wn.2d 697, 425 P.2d 390 (1967).....	49
<u>State v. Heckel</u> , 143 Wn.2d 824, 24 P.3d 404 (2001).....	26

<u>State v. Heddrick</u> , 166 Wn.2d 898, 215 P.3d 201 (2009).....	60
<u>State v. Hobbie</u> , 126 Wn.2d 283, 892 P.2d 85 (1995).....	28
<u>State v. Howland</u> , 66 Wn. App. 586, 832 P.2d 1339 (1992).....	86, 89
<u>State v. Hughes</u> , 106 Wn.2d 176, 721 P.2d 902 (1986).....	56
<u>State v. Huson</u> , 73 Wn.2d 660, 440 P.2d 192 (1968).....	68
<u>State v. Hutchinson</u> , 111 Wn.2d 872, 766 P.2d 447 (1989).....	70-73, 75, 78
<u>State v. Hutchinson</u> , 135 Wn.2d 863, 959 P.2d 1061 (1998).....	59, 70-73, 75, 78, 80, 82
<u>State v. Jackson</u> , 102 Wn.2d 689, 689 P.2d 76 (1984).....	58
<u>State v. Johnson</u> , 60 Wn.2d 21, 371 P.2d 611 (1962).....	100
<u>State v. Johnson</u> , 119 Wn.2d 167, 829 P.2d 1082 (1992).....	50
<u>State v. Kirkman</u> , 159 Wn.2d 918, 155 P.3d 125 (2007).....	81, 92, 96, 102, 118
<u>State v. Lopez</u> , 74 Wn. App. 456, 874 P.2d 1979 (1994).....	79
<u>State v. Lundquist</u> , 60 Wn.2d 397, 374 P.2d 246 (1962).....	82
<u>State v. Mak</u> , 105 Wn.2d 692, 718 P.2d 407 (1986).....	118

<u>State v. Mason</u> , 160 Wn.2d 910, 162 P.3d 396 (2007).....	90, 91, 101
<u>State v. Mays</u> , 65 Wn.2d 58, 395 P.2d 758 (1964).....	68
<u>State v. McDonald</u> , 89 Wn.2d 256, 571 P.2d 930 (1977), <u>overruled on other grounds</u> , <u>State v. Sommerville</u> , 111 Wn.2d 524 (1988).....	26, 33, 68
<u>State v. McFarland</u> , 127 Wn.2d 322, 899 P.2d 1251 (1995).....	76, 77, 81, 92
<u>State v. Meggysey</u> , 90 Wn. App. 693, 958 P.2d 319 (1998), <u>overruled on other grounds</u> , <u>State v. Recuenco</u> , 154 Wn.2d 156 (2005).....	28, 29, 30, 34
<u>State v. Miles</u> , 73 Wn.2d 67, 436 P.2d 198 (1968).....	100
<u>State v. Miller</u> , 66 Wn.2d 535, 403 P.2d 884 (1965).....	96
<u>State v. Modica</u> , 136 Wn. App. 434, 149 P.3d 446 (2006), <u>aff'd on other grounds</u> , 164 Wn.2d 83 (2008).....	55
<u>State v. Modica</u> , 164 Wn.2d 83, 186 P.3d 1062 (2008).....	52, 53, 54, 55
<u>State v. Montgomery</u> , 163 Wn.2d 577, 183 P.3d 267 (2008).....	97
<u>State v. Ortega</u> , 134 Wn. App. 617, 142 P.3d 175 (2006).....	78
<u>State v. Ortiz</u> , 119 Wn.2d 294, 831 P.2d 1060 (1992).....	93

<u>State v. Osman</u> , 157 Wn.2d 474, 139 P.3d 334 (2006).....	45
<u>State v. Pawlyk</u> , 115 Wn.2d 457, 800 P.2d 338 (1990).....	66, 67, 73
<u>State v. Puapuaga</u> , 164 Wn.2d 515, 192 P.3d 360 (2008).....	50
<u>State v. Ross</u> , 141 Wn.2d 304, 4 P.3d 130 (2000).....	36
<u>State v. Russell</u> , 125 Wn.2d 24, 882 P.2d 747 (1994).....	100, 114
<u>State v. Salinas</u> , 119 Wn.2d 192, 829 P.2d 1068 (1992).....	122
<u>State v. Sanders</u> , 66 Wn. App. 380, 832 P.2d 1326 (1992).....	92
<u>State v. Schaaf</u> , 109 Wn.2d 1, 743 P.2d 240 (1987).....	30
<u>State v. Shawn P.</u> , 122 Wn.2d 553, 859 P.2d 1220 (1993).....	44
<u>State v. Smith</u> , 150 Wn.2d 135, 75 P.3d 934 (2003).....	27, 28, 30, 34
<u>State v. Stenson</u> , 132 Wn.2d 668, 940 P.2d 1239 (1997).....	116, 118
<u>State v. Strasburg</u> , 60 Wash. 106, 110 P. 1020 (1910).....	33
<u>State v. Swan</u> , 114 Wn.2d 613, 790 P.2d 610 (1990).....	96, 100, 107, 114
<u>State v. Warren</u> , 134 Wn. App. 44, 138 P.2d 1081 (2006), <u>aff'd on other grounds</u> , 165 Wn.2d 17 (2008).....	96

<u>State v. Whitaker</u> , 133 Wn. App. 199, 135 P.3d 923 (2006).....	41
--------------------------------------------------------------------------	----

Other Jurisdictions:

<u>Lanari v. People</u> , 827 P.2d 495 (Colo. 1992).....	79
-------------------------------------------------------------	----

<u>People v. Green</u> , 27 Cal. 3d 1, 609 P.2d 468 (1980), <u>overruled on other grounds by</u> <u>People v. Martinez</u> , 20 Cal. 4 <sup>th</sup> 225 (1999) .....	88, 89
--------------------------------------------------------------------------------------------------------------------------------------------------------------------------------	--------

<u>State v. Craney</u> , 347 N.W.2d 668 (Iowa 1984) .....	71, 73, 74
--------------------------------------------------------------	------------

Constitutional Provisions

Federal:

U.S. Const. amend. IV .....	49
U.S. Const. amend. V .....	66
U.S. Const. amend. VI .....	1, 28, 39, 40, 42, 43, 47
U.S. Const. amend. XIV .....	44

Washington State:

Const. art. I, § 7.....	1, 48, 49, 50, 51
Const. art. I, § 12.....	44
Const. art. I, § 21.....	27, 28, 29
Const. art. I, § 22.....	27, 28

## Statutes

### Washington State:

RCW 9.73.030.....	52
RCW 9.73.095.....	46, 47
RCW 9A.04.110 .....	122
RCW 9A.08.010 .....	122
RCW 9A.12.010 .....	25, 26
RCW 9A.36.080 .....	122
RCW 9A.52.020 .....	84
RCW 9A.52.030 .....	84
RCW 10.77.....	60, 80
RCW 10.77.020.....	2, 67, 80, 81
RCW 10.77.030.....	25, 26
RCW 10.77.060.....	59, 60
RCW 10.95.020.....	83, 84, 86

## Rules and Regulations

### Washington State:

CrR 4.7.....	2, 59, 82
ER 403 .....	56
ER 702 .....	93
ER 704 .....	101, 103

ER 806 ..... 79  
RAP 10.3..... 50, 53, 56, 60  
RAP 2.5..... 59, 76, 81, 92, 101, 118

Other Authorities

Washington State Privacy Act..... 48, 52, 55, 56

A. ISSUES PRESENTED

1. Where the issue of insanity was decided by the jury, and where the burden of proof applied was the same as that applicable when the state constitution was adopted, placing the burden on the defendant, has Haq established that the burden of proof as to insanity violated the right to a jury trial guaranteed by the Washington Constitution?
2. Were recordings of Haq's jail calls legally obtained and properly admitted at trial as evidence of his state of mind at the time of the crimes?
  - a. Was there no violation of the Sixth Amendment right to counsel because a passive recording device is not a state agent and does not deliberately elicit statements?
  - b. Has Haq failed to establish a violation of equal protection?
  - c. Should this court follow its own precedent and hold that jail phone calls made with knowledge that they are recorded do not constitute private affairs protected by Washington Constitution Article I, Section 7?

d. Should this court follow Supreme Court precedent and hold that inmates do not have an expectation of privacy in calls that they know are being recorded?

e. Did the trial court properly exercise its discretion in admitting Haq's own statements about his motive for committing these crimes?

3. Has Haq failed to preserve any objection to the State's choice of an expert to complete a mental examination ordered pursuant to CrR 4.7?

4. Did the trial court properly admit Haq's statements to the State's psychologist to rebut Haq's mental defenses?

5. Did Haq fail to preserve any challenge to RCW 10.77.020(5), which was not applied in this case?

6. Did the trial court properly reject Haq's request to add an element to the crime of aggravated murder, that a burglary that is an aggravating circumstance must have a purpose independent of the murder?

7. Has Haq failed to establish reversible error in specific witness statements because he did not preserve the errors and because they did not constitute impermissible opinion as to guilt?

8. Was testimony that was stricken and that was identical to that presented through defense witnesses so prejudicial that it denied Haq a fair trial?

9. Did the trial court abuse its discretion in allowing state experts to testify to the legal definitions they relied upon in reaching their opinions, when the defense experts had done the same?

10. Did the trial court abuse its discretion in excluding hearsay evidence that was of minimal probative value on a proposition thoroughly explained by other testimony?

11. Was the evidence supporting Haq's malicious harassment conviction more than sufficient, where he does not dispute that he targeted the victims because of their perceived religion and that he shot them?

12. Has Haq failed to establish cumulative error that would warrant a new trial where he has shown none?

B. STATEMENT OF THE CASE

1. PROCEDURAL FACTS

The defendant, Naveed Haq, was charged by amended information with eight counts related to a shooting incident at the

Jewish Federation of Greater Seattle on July 28, 2006. CP 877-81. Count 1 charged aggravated murder in the first degree of Pamela Waechter. CP 877. Counts 2 and 3 charged attempted murder in the second degree, of Carol Goldman and Cheryl Stumbo, respectively. CP 878. Counts 4, 5, and 6 charged attempted murder in the first degree, of Dayna Klein, Layla Bush, and Christina Rexroad. CP 880. Count 7 charged unlawful imprisonment of Dayna Klein and count 8 charged malicious harassment as to all of the named victims. CP 880-81. Firearm enhancements were charged as to all counts. CP 877-81. The State did not seek imposition of the death penalty.<sup>1</sup>

Haq asserted an insanity defense as to all charges. Haq asked the trial court to make an independent finding as to the insanity defense before it was presented to the jury; the judge twice concluded that Haq had not sustained his burden of proving insanity. CP 8569; 50RP 125, 159-60.

The jury found Haq guilty as charged on all counts and rejected the insanity defense as to all charges. CP 2156-91.<sup>2</sup>

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<sup>1</sup> The Verbatim Record of Proceedings related to this trial will be cited by volume, consecutively numbered. A table listing the volumes and the dates included in each is attached as Appendix 1.

<sup>2</sup> A previous trial resulted in a hung jury. CP 739-42.

Haq requested an exceptional sentence on all counts, claiming that his capacity to appreciate the wrongfulness of his conduct or conform his conduct to the law was significantly impaired. CP 2283-87. The trial court rejected this claim. 50RP 205-06. The defendant was sentenced to the mandatory term of life without the possibility of early release on the aggravated murder conviction, plus consecutive sentences for the five additional counts of attempted murder and consecutive firearm enhancements as to all charges. CP 2346-50.

## 2. SUBSTANTIVE FACTS

On July 27, 2006, Naveed Haq selected a Jewish target. 43RP 23-27. On July 28<sup>th</sup>, he drove from the Tri-Cities to the Jewish Federation of Greater Seattle. 41RP 41. He got through the security door by holding a teenager at gunpoint, and demanded to see the manager. 24RP 92-98; 25RP 35-37. When Cheryl Stumbo told Carol Goldman to call 911, Haq started shooting. 24RP 115, 150-54. He shot six women who worked at the Jewish Federation, killing one of them and seriously injuring the other five. 24RP 116-17, 153-56; 25RP 39-41, 75, 80-87; 29RP 124; 31RP 87-88; 33RP 106, 123, 125.

a. Planning.

In July of 2006, conflict in the Middle East escalated and on July 13<sup>th</sup>, Israel bombed Lebanon. 46RP 167-68. Haq, who lived in the Tri-Cities, was watching these events on the news. 36RP 156; 41RP 28; 42RP 105, 135. He responded by buying three guns in the next week, at three separate stores: a .40 caliber semi-automatic Ruger pistol, a .45 caliber semi-automatic Ruger, and a shotgun. 28RP 98-103; 32RP 87-89; 43RP 106; 46RP 168. He lied so he would pass the background checks. 28RP 107-09, 121; 46RP 169. He also bought a combat knife. 30RP 35.

On July 25<sup>th</sup>, Haq lied to his current therapist about the guns, denying that he had access to firearms. 45RP 168; 46RP 58, 183.

On July 27<sup>th</sup>, Haq investigated Jewish targets for what he described as his "political activism." 31RP 65-77; 41RP 11; 43RP 48. He found the web page of the Jewish Federation of Greater Seattle (Jewish Federation), found its address in downtown Seattle, and got directions using Mapquest. 31RP 72-78. He thought that targeting the Jewish Federation would be likely to result in greater publicity. 47RP 8-9. He memorized the location. 42RP 135. Haq told his parents that he was going to Seattle the next day, but lied about his plans. 36RP 160; 42RP 139.

b. July 28, 2006.

The morning of July 28, 2006, Haq took his two new pistols and his combat knife in a laptop computer case and set out for Seattle. 27RP 152; 28RP 26, 126-37; 29RP 32-41, 80-82, 152; 32RP 69. Haq had decided not to bring the shotgun because it was cumbersome and would draw unwanted attention on the streets of Seattle. 42RP 142. Haq stopped on the way to Seattle and test-fired the two pistols in the woods. 42RP 140; 43RP 58-59. He decided to use the .40 caliber pistol at the Jewish Federation, because he could fire it easily with one hand. 43RP 51, 58.

Haq was stopped for a traffic infraction on Third Avenue in downtown Seattle shortly before 4 p.m. 26RP 106. There was nothing abnormal in his interaction with the motorcycle officer who made the stop. 26RP 121. After he was allowed to move on, he parked in a garage near the Jewish Federation. 26RP 133, 146. He brought his guns and walked to the address, arriving at 3:56 p.m. 33RP 85<sup>3</sup>. He discovered that inside a vestibule, a locked security door with an intercom barred his way. 25RP 28-29.

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<sup>3</sup> The times on the security tape are 6 minutes behind actual time. 33RP 45.

Haq waited until a 14-year-old girl, KB<sup>4</sup>, came into the vestibule, then pointed a pistol at her and forced her to allow him access. 24RP 92-98. While KB talked with the Jewish Federation receptionist over the intercom, Haq stepped out of view of the security camera that monitored the vestibule. 25RP 33; Ex. 46.

The offices of the Jewish Federation were up a flight of stairs, and Haq forced KB up the stairs ahead of him. 24RP 94, 98. He told her that he was doing this to make a statement. 24RP 99. As they reached the reception area at the top of the stairs, Haq turned to the receptionist, Layla Bush, and KB continued down the hall and hid in a bathroom. 24RP 99-100. Pointing his pistol at Bush, Haq said that he was upset about what was happening in Israel and Lebanon, upset about the Jews and what they were doing in Lebanon. 25RP 35. Haq demanded to see the manager, so Bush backed away and went back to the office of Cheryl Stumbo. 25RP 35-37.

Haq had followed Bush back into the office area, however, and when Stumbo saw Haq with his gun she told Carol Goldman, who was sitting nearby, to call 911. 24RP 110, 115. Before Goldman could do that, Haq leveled the gun at Goldman and shot

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<sup>4</sup> The State will use her initials in this brief in an effort to protect her privacy.

her. 24RP 115, 150-54. Goldman was hit in the knee, and dove under her desk. 24RP 153-56.

Haq then turned to Bush and Stumbo and continued firing. 24RP 115. He shot Bush in the side, shattering a vertebra, so Bush fell into Stumbo's office. 25RP 39-41. Haq shot Stumbo in the abdomen, at very close range, causing substantial internal injuries. 24RP 116-17, 133-34. Haq then pointed his gun at Stumbo's face and she hit the floor of her office, believing she was going to die. 24RP 118.

Haq moved to the next office and shot Pamela Waechter. 28RP 21-23. Apparently Waechter turned as Haq shot at her, as the shot went through her breast and then through her chair and into the wall. 28RP 21-23; 29RP 140-41; 33RP 106, 123, 125.

Haq then moved to the next office, where Dayna Klein had come to the door to see what was happening. 31RP 86. Haq appeared to aim at the middle of Klein's body; Klein, who was pregnant, instinctively put her arm up to protect her abdomen and was shot through the arm. 29RP 124; 31RP 87-88. There was massive damage to her arm. 31RP 109-11. Haq walked away and Klein crawled to her phone and called 911. 31RP 89-90.

Pamela Waechter tried to escape the shooting, running from her office toward the stairs. 25RP 44. Haq saw her running down the hall and chased after her. 25RP 44. Waechter got only partway down the first flight of stairs when Haq leaned over the stairwell railing and shot her from above, in the head, killing her. Ex. 46; 33RP 106, 123, 125. Haq later said that he shot Waechter because he was afraid that she would get out of the building and alert police. 41RP 31.

Haq returned to the office area and leaned over a cubicle wall to locate Goldman, aimed the gun and shot at her again. 25RP 47, 55. He then turned back to Stumbo's office and saw Bush sitting against the wall. 25RP 47. He aimed his gun at her head and shot it, but hit her in the shoulder. 25RP 47-48, 55.

Christina Rexroad heard noise from the reception area, but did not recognize the sounds as shots. 25RP 73-74. She came to see what was happening and came upon Haq, who turned and shot her in the abdomen, severing her femoral artery and causing other internal injuries. 25RP 75, 80-87. Rexroad fled, but Haq pursued her. 25RP 75. Haq pulled the trigger to shoot her again but the gun was empty, so he returned to the reception area to reload. 47RP 103-04. Rexroad escaped down the back stairs. 25RP 75.

As Haq was reloading his gun, he heard Klein in her office, talking on the phone with a 911 operator. 47RP 106-07. He went back to her office, pointed his gun at her head and yelled at her that now he was going to hold her as his hostage. 31RP 92-93. When Klein offered Haq the phone to talk to the 911 operator, Haq took it. 31RP 92-95. He kept his gun pointed at Klein's head as he spoke to the operator. 31RP 95-96; Ex. 1 (track 4).

Eventually the 911 operator persuaded Haq to surrender. 31RP 99; Ex. 1 (track 4). He put his gun down and went outside, where he was arrested. 25RP 129-31; 26RP 59-62; 31RP 99.

Police recovered Haq's .40 caliber pistol in Klein's office, and his .45 caliber pistol, loaded with hollow-point bullets, in the reception area. 27RP 152; 28RP 26; 29RP 32-41, 80-82, 152. Boxes of .45 caliber hollow-point ammunition were on the floor in the reception area. 27RP 157-58. Inside a computer bag, police found .40 caliber ammunition, a combat knife, and a business card bearing Haq's name. 28RP 126-37.

c. Motive.

Haq told KB that he was there to make a statement. 24RP 99. The first thing Haq said when he got into the Jewish

Federation office was that he was upset about what was happening in Israel and Lebanon; that he was upset about the Jews and what they were doing in Lebanon. 25RP 35. While he was inside, he talked about being angry with Jewish people, angry at Israel and at Iraq. 25RP 97, 100, 106.

Haq told Klein to tell the 911 operator that this was his Hezbollah and a statement he was making, that the United States needed to get out of Iraq and out of the war and that he wanted to be patched in to CNN. 31RP 94.

When he got on the phone with 911, with his gun to Klein's head, he told the 911 operator: "This is a hostage situation. I want these Jews to get out." Ex. 7 at 4; Ex. 1 (track 4). He said, "These are Jews. I'm tired of getting pushed around and our people getting pushed around [...] by the situation in the Middle East." Id. He said, "This is to make a point." Ex. 7 at 6. He said, "I just want you to call the media and tell them ...that Muslims are very upset ... at you sending bombs to Israel." Ex. 7 at 7 (interruptions by operator). He told the operator that he did not care if he died, that "this is just to make a point." Ex. 7 at 8, 10. When the operator asked him, "You've just been thinking about all this and decided this was what you needed to do?", Haq responded, "Exactly." Ex. 7 at 9.

When the operator asked Haq if he thought this would solve the problem, Haq responded:

I just was going to make a fucking point. I'm tired of everyone not listening to our point of view. All these Jewish senators and Jewish representatives and Jewish Supreme Court - - Stephen Breyer, Rudeth [sic] Ginsberg, Joseph Lieberman - - all of them taking the side of the war, taking - - and then all the media being controlled by Jews. I'm sick and tired of it, and I want there to be some fairness here in this country.

Ex. 7 at 10; Ex. 1 (track 4).

Immediately after his arrest, Haq told police that he was making a statement and said, in part:

This is about the Jews. This is about getting the U.S. out of Iraq. This is about the Jews are running the country.

30RP 18, 29.

When Haq called his family from the King County Jail on August 7<sup>th</sup>, he told them they should be proud of him, "I got the Jews," "they were enemy." Ex. 212, Pretrial Ex. 12 at 10-12. In a call on August 10<sup>th</sup>, he said this did not happen because he was ill, but because he wanted to be a martyr. Id. at 22-24, 26. Haq said he was a "soldier of Islam," and "did my job." Id. at 27-28. Many times he repeated, "I am a Jihadi," saying that was the path that he had chosen. Id. at 29, 33-35, 36. He said he did it on purpose and

wanted to "die on the battlefield." Id. at 30. When told that the Quran does not tell you to kill to get into heaven, Haq said, "These people are guilty," later saying they were guilty because they were supporting Israel, the enemy of Islam. Id. at 33, 37. In a call on August 15<sup>th</sup>, Haq said that maybe the woman he killed deserved to die because she was an Israeli collaborator. Id. at 48-49.

The parties stipulated that the FBI conducted an investigation in this case to determine whether Haq had any connection to any known terrorist group and concluded that no such connection existed. 42RP 78.

Police obtained search warrants and seized a laptop computer from Haq's apartment and another computer from the home of Haq's parents. 30RP 31-32, 38; 32RP 71-72. The latter computer contained two documents written by Haq, "Sources of Muslim Anger" and a khutbah<sup>5</sup>, both noting political issues relating to Israel and Muslim people, and that Jews are over-represented in American politics. 31RP 47-57, 134-36; 32RP 7-18; 36RP 37-39; Ex. 126, 127. The "Sources of Muslim Anger" makes a reference to Muslim anger growing and boiling over. 32RP 16.

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<sup>5</sup> A public prayer to be read at a mosque.

Haq's laptop computer revealed a history of internet searches on July 27<sup>th</sup> relating to the AIPAC (American Israel Public Affairs Committee), and then the Jewish Federation. 31RP 65-77. The computer history shows a visit to a Jewish Federation webpage that included the street address, and then a request for directions on Mapquest, from Pasco to the address of the Jewish Federation. 31RP 72-78.

d. Mental Defenses.

The State did not dispute that Haq had a history of mental illness and was mentally ill at the time of these crimes. 44RP 117.

i. Defense case.

Haq's claim was that he was manic and psychotic at the time of these crimes, and as a result, was unable to understand right from wrong or to appreciate the nature and quality of his acts. 24RP 87; 42RP 79-81.

The defense called five mental health professionals who had evaluated Haq's mental condition prior to 2006. Dr. McLean, a psychiatrist at the University of Pennsylvania, treated Haq between 1998 and 2000, when Haq had diagnoses alternating between

bipolar disorder with psychotic features or schizoaffective disorder.  
37RP 59-60, 67, 80-81.

Counselor Jana Gordon treated Haq briefly in 1998 and 1999. 39RP 5-6, 19. She could not decide whether to diagnose him with bipolar disorder or schizoaffective disorder. 39RP 14. Haq reported being angry and moody, and struggling with paranoia. 39RP 12, 17. Haq said that he had once purchased a gun with the idea of killing himself. 39RP 32; 40RP 128. He also reported that on one occasion he was feeling aggressive and thinking about killing people although he never formed a plan or tried to do it. 39RP 10; 40RP 128.

Dr. Dye, a psychiatrist, treated Haq in 2001 and 2002 and diagnosed him with bipolar disorder. 34RP 68, 75, 105.

Dr. Barnard, a psychologist, evaluated Haq in September 2005, when Haq applied for disability benefits. 35RP 127. After written testing and a 20-30 minute interview, Dr. Barnard concluded that Haq was not fit to work; he described Haq as delusional and psychotic, with paranoid ideation. 35RP 127, 141.

Dr. Bennett, a psychiatrist, saw Haq twice, first in August 2005 when Haq was hospitalized but was stable. 37RP 18-21. Dr. Bennett next saw Haq on March 14, 2006, and concluded that

Haq might better be diagnosed as having schizoaffective disorder, as he observed that Haq had paranoia. 37RP 27-32. Haq was reporting a lot of anger and thought he was being surveilled because he was Middle Eastern. 37RP 32, 48.

Three mental health professionals from the King County Jail testified about their contacts with Haq after the shootings.

Psychiatric Evaluation Specialist Feldman conducted an intake evaluation of Haq on July 29<sup>th</sup>, within 16 hours of the shootings at the Jewish Federation. 39RP 112-13. Haq was lucid, articulate, responsive, and aware of his situation. 39RP 129-30. His thinking was reality based and organized. 39RP 123-24. Feldman observed nothing that would indicate that Haq was psychotic or manic. 39RP 126, 135.

When Feldman saw Haq on August 4, 2006, Haq was mildly depressed but showed no unusual speech patterns, hyperactivity, or any indication of unusual thoughts. 39RP 141-45. On August 5<sup>th</sup>, Haq was polite and cooperative and asked for reading and writing materials. 39RP 103.

On August 11<sup>th</sup>, Haq reported his mood was stable and Feldman saw no evidence of hallucinations or hyperactivity. 39RP 148-50. When asked about his plans for the future, however, Haq

stated that he wanted to be a martyr, he wanted to be executed. 35RP 66; 39RP 92. On August 25<sup>th</sup>, Haq was depressed, but Feldman saw no hyperactivity, unusual speech or thought content, or hallucinations. 39RP 151-52.

Dr. Waiblinger, a psychiatrist at the jail, also saw Haq on August 4, 2006, and saw no evidence of psychosis or mania. 35RP 58-59, 91. Haq said he was feeling good and denied auditory or visual hallucinations. 35RP 59. On August 18<sup>th</sup>, Haq again denied hallucinations or paranoia. 35RP 62-63. Dr. Waiblinger saw no signs of psychosis. 35RP 91.

Dr. Hall, a physician at the jail, saw Haq several times between August 25 and October 4, 2006. 35RP 17-29. Haq at times complained about his medications, and at times did not take them. 35RP 23, 28-29. Dr. Hall observed no signs of psychosis or mania. 35RP 44-48.

Haq's family is Muslim and he was raised in that faith. 34RP 34. Haq's parents testified to Haq's longstanding mental problems. 34RP 17-25, 45-47; 36RP 104-12. They described his psychiatric hospitalization in July of 2005. 34RP 114-24; 36RP 90. Haq's mother described seeing unusual behavior by Haq in the week before the shootings, describing him as both manic and

depressed, agitated but calm, and laughing strangely. 36RP 41-42. Haq had dinner with his parents on July 27<sup>th</sup> and ran an errand with his father. 36RP 56-59. When Haq's father talked to Haq the morning of July 28<sup>th</sup>, he did not notice anything unusual; the conversation and Haq's speech were normal. 36RP 64.

Dr. Robert Julien, a retired anesthesiologist who has written a text on pharmacology, was retained by the defense as an expert on pharmacology. 37RP 120-22, 156-57. Dr. Julien testified that the medications that were prescribed to Haq in 2005 and 2006 were not appropriate for his disorder. 37RP 150-53. He opined that if Haq's medications had been different, the shootings at the Jewish Federation would not have occurred. 37RP 156. He offered no opinion as to whether Haq had the capacity to form intent or premeditation, or whether Haq was legally insane at the time of the shootings. 37RP 159-60.

Dr. James Missett, a psychiatrist, was retained by the defense to evaluate Haq's mental state at the time of the crimes. 38RP 39. Dr. Missett interviewed Haq at length, over the course of more than two years. 38RP 41-44. He diagnosed Haq as having bipolar disorder with psychotic features, with a secondary note to rule out schizoaffective disorder. 38RP 49. He testified at trial for

seven days. 38RP 12 to 44RP 48. In his opinion, on July 28, 2006, Haq had a significant impairment in his ability to form the mental states of intent and premeditation. 38RP 51; 42RP 98-99. His opinion as to sanity at the time of the shootings was that as a result of mental disorder, Haq was unable to and did not know the nature and quality of his acts, and was unable to and did not have the ability to distinguish between right and wrong. 38RP 51; 40RP 95; 42RP 86-90.

Dr. Missett testified that he believed that Haq was insane at the time of the shootings. 42RP 110. Dr. Missett was unable to recall details of the shootings, including how many women were shot, where they were shot, Haq's recognition that his pistol was empty and reloading, or Haq's statements to the police immediately afterward. 42RP 116, 122, 152-73.

Dr. Missett agreed that another psychiatrist or psychologist could reasonably come to the conclusion that Haq was not insane based on the evidence available. 43RP 94-95.

ii. State's rebuttal of mental defenses.

The State called the two treatment providers who met with Haq on July 25, 2006, three days before the shootings. Brian

Jones was Haq's counselor from August 2005 through July of 2006. 45RP 154-55. Deborah Lusch was Haq's medication nurse from January through July of 2006. 46RP 41, 51.

Haq's last session with Jones was on July 25, 2006. 45RP 164. Among other concerns, Haq expressed some stress related to the conflict in the Middle East and the policies of Israel. 45RP 167. Jones saw no signs of psychosis or mania. 45RP 169. Haq said he was feeling more confident and his manner was consistent with that statement. 45RP 169.

Lusch reported that Haq at times had problems taking his medications. 46RP 55. Lusch's last meeting with Haq also was on July 25, 2006. 46RP 51. Haq appeared to be doing well and reported that his mood was stable. 46RP 59-60. Haq denied any symptoms of psychosis and Lusch observed no signs of psychosis, depression, or mania. 46RP 61, 64-66.

The State retained Dr. Robert Wheeler, a psychologist, to evaluate Haq's mental state at the time of the crimes. 46RP 97. Dr. Wheeler interviewed Haq over three days in June 2007. 46RP 113. The interviews were audio recorded and were also attended by defense counsel and Dr. Missett. 46RP 117.

Dr. Wheeler diagnosed Haq as having schizoaffective disorder, bipolar type, with an alternative diagnosis to rule out bipolar disorder I. Dr. Wheeler opined that Haq was not manic during the week before the shootings, during the shootings, or during the month afterward. 46RP 153-54. Dr. Wheeler opined that Haq was able to tell right from wrong and perceive the nature and quality of his acts at the time of the shootings. 46RP 165-66. He also concluded that Haq had the capacity to form intent and to premeditate, and those capacities were not significantly impaired. 46RP 166-67.

Dr. Wheeler based his opinion on a review of the established facts and Dr. Missett's notes of his interviews, along with Haq's description of events. 46RP 121-23; Ex. 294. Dr. Wheeler considered significant to his conclusion Haq's purchase of the guns in response to the Middle East situation, Haq's statement that he was feeling enraged and suicidal, and Haq's writings. 46RP 168-71, 174-76. Dr. Wheeler relied upon the observations of Jones and Lusch on July 25<sup>th</sup>, and on the observations of Haq's parents. 46RP 177-84; 47RP 5-6, 12-14.

Dr. Wheeler also found significant Haq's explanation of selecting a target, made to Dr. Missett in October 2006. 47RP 6-9.

Dr. Wheeler noted that on July 27<sup>th</sup>, Haq went to three stores to pick up the pistols that he had ordered and ammunition for the shotgun, suggesting purposeful behavior. 47RP 9-11, 15-16.

Dr. Wheeler described the aspects of planning, preparation, and travel to the Jewish Federation that indicated purposeful behavior and awareness that what he was doing was wrong. 47RP 15-61.

Haq said that it was a suicide mission. 47RP 41.

Dr. Wheeler explained how Haq's behavior during the crime indicated that he was aware of the nature of his actions and was acting with purpose. 47RP 61-137. Dr. Wheeler also explained how Haq's descriptions of his thoughts and feelings were significant, including Haq's statement that he was feeling anger and rage as he was shooting. 47RP 108-12.

Dr. Wheeler also noted that Haq's behavior as he surrendered indicated his awareness of the nature of his acts and that they were wrong: that he asked Klein to confirm that he had left his gun in her office, that he raised his hands as he left, that he knew the police would be concerned about their safety and assumed the position that he knew criminals took so he would not be shot. 47RP 142-49.

The State retained Dr. Victor Reus, a psychiatrist who specialized in bipolar disorder and its treatment, to address the role medications may have played in Haq's mental state. 44RP 109. Dr. Reus believed there was nothing inappropriate about Haq's medication. 44RP 153, 159. He opined that the medications did not relate to the shooting because Haq did not have significantly impaired capacity at the time. 45RP 13-15. He opined that Haq had the capacity to intend and premeditate, although he might have had slight impairment because of his chronic mental condition. 45RP 48. Dr. Reus concluded that Haq was able to perceive the nature and quality of his acts and tell right from wrong. 45RP 49.

C. ARGUMENT

1. NO SPECIFIC BURDEN OF PROOF AS TO INSANITY IS MANDATED BY THE STATE CONSTITUTIONAL GUARANTEE OF A JURY TRIAL.

Haq contends that the jury trial guarantee of the Washington Constitution requires that the State disprove a defense of insanity beyond a reasonable doubt. This challenge to the burden of proof is unrelated to the constitutional right to a jury trial. The jury trial guarantee was satisfied here because the issue of insanity was

determined by the jury. The fundamental fairness of this allocation of the burden of proof already has been determined by state and federal courts, under due process analysis. No specific burden of proof is mandated by the constitutional right to a jury trial. In any event, the burden of proof applied in this case was the same as the burden that was applied in 1889, when the constitution was adopted.

Two statutes establish insanity as an affirmative defense that the defendant has the burden of proving by a preponderance of the evidence. RCW 9A.12.010; RCW 10.77.030(2).<sup>6</sup> Allocation of the burden to the defendant satisfies federal and state due process requirements. Leland v. Oregon, 343 U.S. 790, 798-801, 72 S. Ct. 1002, 96 L. Ed. 1302 (1952); State v. Box, 109 Wn.2d 320, 330, 745 P.2d 23 (1987). As a question of law, the proper allocation of the burden of proof is subject to de novo review. Dreiling v. Jain, 151 Wn.2d 900, 908, 93 P.3d 861 (2004). Appellate courts have not previously addressed the argument that this allocation of the

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<sup>6</sup> RCW 9A.12.010 provides the definition of insanity and subsection (2) states: "The defense of insanity must be established by a preponderance of the evidence." RCW 10.77.030(2) provides: "Insanity is a defense which the defendant must establish by a preponderance of the evidence."

burden of proof violates the jury trial guarantee of the Washington Constitution.

Sanity is not an element of a crime. State v. McDonald, 89 Wn.2d 256, 271, 571 P.2d 930 (1977), overruled on other grounds, State v. Sommerville, 111 Wn.2d 524 (1988). The current statutory allocation of the burden of proof of insanity “codifies the common law rule in existence in this state from territorial days.” Box, 109 Wn.2d at 328. The defense of insanity in a homicide case precludes criminal punishment but it does not legally authorize a person to kill another human being, and it does not negate any element of the crime. In re Estate of Singer, 166 Wn.2d 120, 129-30, 206 P.3d 665 (2009).

RCW 9A.12.010 and RCW 10.77.030 are presumed constitutional, and Haq bears the burden of proving their unconstitutionality beyond a reasonable doubt. State v. Heckel, 143 Wn.2d 824, 832, 24 P.3d 404 (2001). Although a court may hold views inconsistent with the wisdom of a law, the law may not be annulled unless it is palpably in excess of legislative power. Armunrud v. Board of Appeals, 158 Wn.2d 208, 215, 143 P.3d 571 (2006). Haq has not met his burden.

This Court must consider the Gunwall<sup>7</sup> factors to determine whether the Washington Constitution provides greater protection of a right than the federal constitution. The six Gunwall factors are (1) text of the state provision, (2) differences between the federal and state texts, (3) constitutional and common law history, (4) preexisting state law, (5) structural differences between the federal and state constitutions, and (6) matters of particular state or local concern. 106 Wn.2d at 61-62. If these factors point to greater protection under the state constitution, the court then must determine the extent of that protection. State v. Smith, 150 Wn.2d 135, 149, 75 P.3d 934 (2003).

(1) Text of the State Provisions. Two state constitutional provisions relate to the right to a jury trial. Article I, Section 21 provides in relevant part: “The right of trial by jury shall remain inviolate, but the legislature may provide for a jury of any number less than twelve in courts not of record....” Wa. Const. art. I, § 21. Article I, Section 22 provides in relevant part: “In criminal prosecutions the accused shall have the right . . . to have a speedy public trial by an impartial jury of the county in which the offense is charged to have been committed . . . .” Wa. Const. art. I, § 22.

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<sup>7</sup> State v. Gunwall, 106 Wn.2d 54, 58, 720 P.2d 808 (1986).

This factor is neutral when there is nothing in the language addressing the question presented. State v. Brown, 132 Wn.2d 529, 595, 940 P. 2d 546 (1997); State v. Meggysey, 90 Wn. App. 693, 701, 958 P.2d 319 (1998), overruled on other grounds, State v. Recuenco, 154 Wn.2d 156 (2005). There is no reference to burdens of proof or defenses in either provision, so this factor is neutral in this analysis.

(2) Differences Between the State and Federal Texts. Both the Sixth Amendment and Article I, Section 22 grant the right to an impartial jury. U.S. Const. amend. VI<sup>8</sup>; Wa. Const. art. I, § 22. The provision in Article I, Section 21, that the right of trial by jury shall remain “inviolable” has no federal counterpart. “Inviolable” means there should be no incursion on the right as it existed in 1889. Smith, 150 Wn.2d at 157.

The right to trial by jury in Washington is not coextensive with the federal right. State v. Hobbie, 126 Wn.2d 283, 298, 892 P.2d 85 (1995). The difference in language indicates the importance of the right, but generally does not provide guidance as to the scope of the right. Smith, 150 Wn.2d at 151. This factor is of

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<sup>8</sup> The Sixth Amendment provides, in relevant part: “In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed . . . .”

little relevance when there is nothing in the language addressing the question presented. Brown, 132 Wn.2d at 595; Meggysey, 90 Wn. App. at 702. Because the difference in language does not relate to burdens of proof or defenses, the difference is of little relevance here.

Haq's reliance on the adoption of an independent interpretation in City of Pasco v. Mace, 98 Wn.2d 87, 653 P.2d 618 (1982), is misplaced. The court relied on language in Article I, Section 21 that specifically addressed the right to a jury trial in courts not of record. Id. at 96-97. That case is inapposite when there is no specific language that addresses the question presented in this case. Meggysey, 90 Wn. App. at 702.

(3) Constitutional and Common Law History. That in some instances the jury trial right under the state constitution is greater than the federal constitution does not establish that it will be greater in every instance. Brown, 132 Wn.2d at 596. The Supreme Court has concluded that "the constitutional history shows there is no indication the framers intended the state constitutional right to a jury to be broader than the federal right." Id. at 596 & n.180. The Court concluded that earlier cases finding a greater state right to a jury trial were irrelevant to whether the scope of that right extended to

the issue of death qualification of jurors in a capital case. Id. at 596. “[T]he third Gunwall factor does not support an argument that the state constitution provides a broader right to trial by jury than does the federal right.” Meggysy, 90 Wn. App. at 702.

(4) Preexisting State Law. Haq has cited no authority for the proposition that the right to a jury trial as enacted in 1889 was intended to include the perpetual right to application of the same legal standards upon which juries were instructed in 1889. Then as now, Washington has had a system of evolving legal standards, with a combination of common law principles and statutory provisions.

The cases interpreting the constitutional right to a jury trial upon which Haq relies address the question of whether a particular type of proceeding can be conducted without a jury<sup>9</sup>; none suggest that the law as it existed in 1889 would control the legal principles upon which a jury must be instructed in perpetuity. Because the issue of insanity was presented to the jury, there was no violation of the constitutional right to a jury trial.

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<sup>9</sup> E.g., Smith, supra (proof of prior convictions of persistent offender); Sofie v. Fibreboard Corp., 112 Wn.2d 636, 771 P.2d 711, 780 P.2d 260 (1989) (determination of damages); State v. Schaaf, 109 Wn.2d 1, 743 P.2d 240 (1987) (juvenile offenses); City of Pasco, supra (petty crimes).

Moreover, in 1889 the allocation of the burden of proof on mental defenses was the same as it is now. Haq relies upon the 1872 case of McAllister v. Territory of Washington, 1 Wash. Terr. 360 (1872). McAllister and Walker argued in a saloon, Walker hit McAllister in the head with a beer mug and fled. Id. at 363-64. McAllister fired a single shot at Walker and then Ward intervened to prevent him from firing again. Id. at 364. As McAllister and Ward scuffled, McAllister shot and killed Ward. Id. McAllister was charged with murder and claimed that by reason of a head wound caused by the blow with the beer mug, "he was deprived of his reasoning faculties, and was not conscious of what he was doing, and did not know that he was committing a crime." Id. at 365. The trial court instructed the jury that the law "presumes a man sane and possessed of his reasoning faculties until the contrary is proved," and that if "the killing" was proved,

Then the defendant in order to excuse the same by reason of his being deprived of his reason at the time of said act, must satisfy you by the evidence of such fact, to wit: That at the time of the commission of said act, he was deprived of his reasoning faculties in so far as to be unconscious that he was committing a crime.

Id. at 366.

The Supreme Court concluded that the instruction was incorrect "if the facts upon which it is based could properly be considered as part of the res gestae" but the court held that there was no evidence to support an insanity instruction, so the defendant was not prejudiced. Id. at 367. The court held: "But if insanity is set up as a separate and distinct defense, and its proof does not consist of the facts attending the killing, then the proof must be made out by the defendant, the legal presumption of sanity being sufficient for the indictment in the absence of all evidence to the contrary." Id.

Essentially, McAllister holds that the defendant's culpable mental state, which is part of the res gestae, must be proved by the State, but the defendant's separate claim that he was insane must be proven by the defendant. Thus, using the language of the day, McAllister recognized the same principles recognized today: diminished capacity must be disproved by the State in order to establish the culpable mens rea of the crime; insanity, however, is unrelated to the elements of the crime, and the defendant has the burden of proof.<sup>10</sup>

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<sup>10</sup> Id. The trial court in this case indicated its opinion that the McCallister standard was not very clear but that it at least provided that in some instances the defendant carried the burden of proof. 5RP at 4.

The Supreme Court in McDonald, *supra*, construed McAllister as holding that insanity was an affirmative defense for the defendant to plead and prove by a preponderance of the evidence. McDonald, 89 Wn.2d at 271. It noted, "This was established before we were a state." Id. Although a 1904 case expressed confusion about the distinction being made in McAllister, it also explicitly affirmed the rule that the defendant has the burden of disproving insanity by a preponderance of the evidence. State v. Clark, 34 Wash. 485, 495-97, 76 P. 98 (1904).

Haq's reliance on State v. Strasburg, 60 Wash. 106, 110 P. 1020 (1910), is unwarranted. Strasburg involved a challenge to a statute that prohibited a defendant from introducing evidence of insanity, delegating consideration of insanity to the sentencing judge. Id. at 111-12, 121-22. The court concluded that the guarantee of due process, "in connection with" the state constitutional right to a jury trial, required that the defendant be permitted to prove his insanity to a jury. Id. at 116-17. Haq's right to have his insanity defense adjudicated by a jury was respected in this case.

(5) Differences in Structure. This factor always favors an independent analysis because the federal constitution is a grant of

limited power from the states, while state constitutions limit the power of the state. Smith, 150 Wn.2d at 152. However, the difference in structure does not address the scope of the right that is guaranteed. Id.

(6) Particular State Interest or Local Concern. Haq does not identify any particular state or local concern in support of adding a new component to the constitutional guarantee of a jury trial that would require application of principles of liability in the state as it existed in 1889, and none is apparent. This Court has concluded that there is no particular state or local concern in the propriety of a jury nullification instruction. Meggysy, 90 Wn. App. at 703. Haq claims that this is a matter of particular state or local concern because the right to a jury trial appears in two state constitutional provisions, but that is of no particular relevance to whether the scope of the right should include the right claimed here. See Brown, 132 Wn.2d at 597-98 (state control of capital sentencing does not necessarily establish that greater protection will be provided by the state constitution).

Haq has failed to present sufficient evidence that the broader protection of the right to jury provided by the state constitution guarantees application of the same burdens of proof that applied at

the time of the enactment of the constitution. There is no reason to believe that the drafters of the state constitution, by guaranteeing the right to a jury trial in criminal cases, intended to permanently halt the progress of the law as it existed in 1889. Thus, even if the state had the burden of disproving insanity in 1889, the trial judge properly concluded that the statutorily mandated burden of proof on the affirmative defense of insanity did not violate the state constitutional right to a jury trial.

Finally, the trial judge noted that even if the McAllister court established a stricter standard that is constitutionally mandated, the insanity defense in this case arguably would fall within the category for which the defendant carries the burden of proof. 5RP 5. The judge observed that the evidence of insanity included “ten years of a mental health history and evidence of medical changes in the year before the instant events.” Id. There was no outward evidence of insanity during the shooting incident at the Jewish Federation. The insanity defense in this case was not related to the res gestae of the crimes, so Haq would have the burden of proof under any interpretation of that case.

The jury trial guarantee establishes the trier of fact, not a burden of proof. Even if the legal standards of 1889 are applied

under the auspices of the right to a jury trial, the proper burden of proof was applied in this case. The court's instruction on that standard was not error.

2. RECORDINGS OF HAQ'S AUGUST 2006 JAIL PHONE CALLS WERE LEGALLY OBTAINED AND WERE PROPERLY ADMITTED ON THE ISSUE OF HIS MOTIVES AND MENTAL STATE.

a. Relevant Facts.

The trial court entered findings of fact and conclusions of law relating to its order denying suppression of the recordings of the jail phone calls admitted at trial. CP 1157-67. The court entered two more written orders denying reconsideration of that ruling. CP 1139-44. Haq has not assigned error to any of the trial court's findings of fact, so they are verities on appeal. State v. Ross, 141 Wn.2d 304, 309-11, 4 P.3d 130 (2000). The following facts are included in the court's findings.

The primary purpose of the King County Jail recording system is to facilitate "a safe and secure facility." CP 1158. In addition, the automated system is a "great resource as an investigative tool for past, ongoing, and future crimes." CP 1158. Every inmate housed in the jail is treated similarly regarding their

access to the jail phone system and the recording of calls.

CP 1159.

There are over 220 phones in the jail, located in the common areas (dayrooms), with no privacy partitions separating the phones from other inmates. CP 1159. Posted next to each phone is an 8½ x 11 inch notice that advises inmates that "All calls are subject to monitoring and recording." CP 1159. The inmate handbook also provides notice that jail phone calls are recorded. CP 1159.

From April 2005 through December 2008 each phone call began with a recorded message, as follows (inserting the defendant's name):

Hello. This is a collect call from Naveed Haq, an inmate at the King County detention facility. This call will be recorded and subject to monitoring at any time. To accept the charges, dial three. To deny the charges, dial nine or hang up now. Thank you for using Public Communications Services. You may begin speaking now.

CP 1159. Attorney-client phone calls are not recorded. CP 1160.

Law enforcement and prosecutors can obtain copies of the recorded jail telephone calls by oral or written request. CP 1160. Defense counsel can obtain recorded jail phone calls but only by means of a subpoena. CP 1160.

Defendant Haq was arrested on July 28, 2006, and his phone calls from jail to his parents were recorded. CP 1161. Through January of 2008, Haq was confined to his cell for 23 hours a day and for one hour was allowed access to the dayroom into which multiple cells opened. CP 1161. The telephone used by Haq was in that day room. CP 1161. During that one hour, Haq was the only inmate with physical access to the dayroom, although a jail officer would walk through the dayroom at least three times during the hour to complete a cell check. CP 1161. The cells that open into the dayroom are not soundproof. Inmates in the cells closest to the phone could have heard Haq's words during any phone conversation. CP 1161.

There were no security concerns about Haq with regard to his jail phone calls, so there was no active or real time monitoring of Haq's calls. CP 1161. The recordings at issue, of calls that began on August 3, 2006, were requested by the prosecutors after the first trial. CP 1161.

Haq's parents testified that they were concerned about their son's mental health and his safety while in jail. CP 1161-62. They were not able to make frequent visits. CP 1162. Both parents were aware that the calls were being recorded and/or monitored and

understood that a third party could listen to their phone calls with their son and monitor those calls. CP 1162.

During a jail phone call on August 19, 2006, both parents were on the phone talking to the defendant when Nahida Haq reminded the defendant not to discuss specific facts during phone calls because the calls were recorded. CP 1162. Defendant Haq then added that transcripts from the phone calls were provided to the prosecutor. CP 1162. The parents' testimony that they were shocked to learn that their phone calls could be offered at trial was not credible. CP 1162.

b. Recording Jail Phone Calls To Family Members Did Not Violate Haq's Sixth Amendment Right To Counsel.

The Sixth Amendment guarantees the right to counsel at all critical stages of a criminal case. U.S. Const. amend. VI; Maine v. Moulton, 474 U.S. 159, 170, 106 S. Ct. 477, 88 L. Ed. 2d 481 (1985). After a defendant has been charged with a crime, it is a violation of the Sixth Amendment for an agent of the State to confront the defendant and deliberately elicit incriminating statements from the defendant about the charged crime without the presence of counsel. Moulton, 474 U.S. at 176-80. The jail phone

calls at issue were made beginning on August 3, 2006, after Haq was charged with these crimes. CP 1, 1161.

The trial court concluded that no State agent deliberately elicited the statements in the jail phone calls. CP 1143; 12RP 24, 33. For there to be an agency relationship, there must be at least an implicit agreement as to the undertaking and the principal must have the ability to control the undertaking. In re Pers. Restraint of Benn, 134 Wn.2d 868, 912, 952 P.2d 116 (1998). The calls in question were made by Haq to his parents and there has been no suggestion that Haq's parents acted on behalf of the State. CP 1143, 1161-62.

In the trial court, Haq argued that the trial prosecutors acted as State agents when they eventually listened to the recordings of the calls. 12RP 25. On appeal, Haq has abandoned that argument and does not identify any alleged State agent, nor does he identify any case in which a Sixth Amendment violation was recognized absent the action of a State agent in eliciting statements from the defendant. Because no State agent was involved, no Sixth Amendment violation occurred.

Even when an inmate who has a history of acting as a police informant is placed in the same cell as the defendant, and expects

a benefit if information is provided to the State, the inmate is not an agent of the State if there is no prior agreement. Benn, 134 Wn.2d at 912. When the other inmate encourages a defendant to talk about a charged crime, that inmate is not acting as a State agent when there has not been at least an implicit agreement with the State that the inmate should do so. State v. Whitaker, 133 Wn. App. 199, 219-22, 135 P.3d 923 (2006).

The trial court's conclusion that no statements of Haq were deliberately elicited also defeats this claim. The United States Supreme Court in United States v. Henry<sup>11</sup> held that an informant inmate may deliberately elicit information about the crime without directly questioning the defendant about it, but that Court recognized that if the "listening post" is an inanimate electronic device, it has no capability of leading the conversation. 447 U.S. at 271 & n.9. The Court later held in Kuhlmann v. Wilson<sup>12</sup> that to establish a violation of the right to counsel, the defendant "must demonstrate that the police and their informant took some action, beyond merely listening, that was designed deliberately to elicit incriminating remarks." 477 U.S. at 459. The Ninth Circuit has

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<sup>11</sup> 447 U.S. 264, 100 S. Ct. 2183, 65 L. Ed. 2d 115 (1980).

<sup>12</sup> 477 U.S. 436, 106 S. Ct. 2616, 91 L. Ed. 2d 364 (1986).

specifically addressed the use of secret listening devices and concluded that use of such a device does not violate the Sixth Amendment right to counsel because the statements recorded were not deliberately elicited. United States v. Hearst, 563 F.2d 1331, 1347-48 (9<sup>th</sup> Cir. 1977). If in this case the recording device was the listening post, the device took no action to elicit incriminating remarks, and the explicit notice that the calls were subject to recording would have the opposite effect.

It is not a Sixth Amendment violation "whenever - by luck or happenstance - the State obtains incriminating statements from the accused after the right to counsel has attached." Moulton, 474 U.S. at 176 (citation omitted). Recording calls made from jail by a defendant to persons who have no relationship with the State (who are not defendant's counsel), has no Sixth Amendment implications.

The argument that recording Haq's calls was not justified by security concerns is frivolous. Haq was charged with aggravated murder in the first degree and five counts of attempted murder, along with other crimes. He was alleged to have targeted the Jewish Federation for violence in an effort to get media attention for his political views. He was mentally ill. Contrary to his claim on

appeal, Haq was subject to a no-contact order, prohibiting direct or indirect contact with the women he shot, with KB, and with the staff of the Jewish Federation. CP 24. If the jail had obtained information that Haq was contemplating or instigating further violence, or was attempting contact with the victims, reference to the contents of his jail calls would have been critical. As Sgt. Pierson testified, the recordings are also used after prisoner escapes, in order to locate the prisoner. 11RP 9. Although after the fact it appears that Haq did not create any security problems, that could not be known as the recording occurred.

Moreover, the argument that recording Haq's calls was not justified by security concerns is irrelevant to his Sixth Amendment claim. The government may make use of a defendant's post-charging statements without running afoul of the Sixth Amendment. E.g., Kuhlmann, 477 U.S. at 459-61 (statements to cellmate); Benn, 134 Wn.2d at 911-13 (statements to another prisoner). Haq has cited no authority for the proposition that the government must have a security concern before it can investigate statements the defendant may have made. The Sixth Amendment is not violated simply because the State continues to search for relevant evidence after a case is charged. Although Haq might have been better

served if counsel were present to advise him as he spoke to his parents, that does not establish that the State impermissibly circumvented his right to counsel by recording those conversations.

c. Haq Has Not Established A Violation Of Equal Protection Based On Alleged Different Handling Of The Release Of Phone Recordings Of State Prisoners.

Haq contends that the manner in which recorded calls of State Department of Corrections (DOC) prisoners are released constitutes disparate treatment in violation of the equal protection clause. That argument fails because Haq has not established either that he is similarly situated with DOC prisoners or that there is any difference in how recordings of phone calls are released by DOC or the King County Jail.

The constitutional right to equal protection of the law requires that persons who are similarly situated with respect to the legitimate purpose of a law be similarly treated. U.S. Const. amend. XIV, § 1; Wa. Const. art. I, § 12; State v. Shawn P., 122 Wn.2d 553, 559-60, 859 P.2d 1220 (1993). A defendant claiming a violation of equal protection "must establish that he received disparate treatment because of membership in a class of similarly

situated individuals and that the disparate treatment was the result of intentional or purposeful discrimination." State v. Osman, 157 Wn.2d 474, 484, 139 P.3d 334 (2006). The type of class and the nature of any constitutional right affected determines the level of scrutiny applied to the classification. Id. If the state action does not threaten a fundamental right or involve a suspect class, a rational basis test is applied. Id. If the state action threatens a fundamental right or involves a suspect class, the court will apply strict scrutiny. Id.

Haq has not established state action that involves disparate treatment of a class of similarly situated individuals. Haq has not alleged that he was treated differently than any other inmate at the King County Jail with respect to phone calls. CP 1167. The trial court found that every jail inmate is treated similarly, and that finding has not been challenged. CP 1159. The court concluded that Haq, as a county jail inmate, was not similarly situated to prisoners at the DOC, so the statutory rights afforded to DOC prisoners did not establish an equal protection violation.<sup>13</sup>

CP 1167.

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<sup>13</sup> The trial court also rejected Haq's claim that as a pretrial detainee, he was a member of a semi-suspect class based on wealth. CP 1166. Haq has abandoned that claim in this appeal.

In reviewing prison regulations in light of due process and liberty interests, the United States Supreme Court has held that prisons within a state are not required to have identical regulations of inmates. Turner v. Safley, 482 U.S. 78, 93 n.\*, 107 S. Ct. 2254, 96 L. Ed. 2d 64 (1987) (restrictions on prison mail), citing Bell v. Wolfish, 441 U.S. 520, 554, 99 S. Ct. 1861, 60 L. Ed. 2d 447 (1979) (regulations on mail, inmate and cell searches); see also Arney v. Simmons, 26 F. Supp. 2d 1288, 1295 (D. Kan. 1998) (restrictions on phone access need not be the least restrictive alternative available). That Court also has recognized that prisons are institutions of a different nature than jails and need not have identical policies. McGinnis v. Royster, 410 U.S. 263, 271, 93 S. Ct. 1055, 35 L. Ed. 2d 282 (1973) (as to award of good time); accord, In re Pers. Restraint of Atwood, 136 Wn. App. 23, 28-29, 146 P.3d 1232 (2006).

Even if Haq were similarly situated with DOC prisoners, Haq does not dispute that phone calls<sup>14</sup> made by DOC prisoners may be recorded. Pursuant to RCW 9.73.095(3)(b), recordings of the calls of DOC prisoners "shall be divulged . . . in the prosecution or

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<sup>14</sup> Phone conversations with attorneys are not recorded in either institution. CP 1160; RCW 9.73.095(4).

investigation of any crime." Haq's suggestion that this provision is limited to prosecution of crimes committed while in the institution is without any support in the language of the statute, which refers to "the prosecution . . . of any crime," or by any other authority or facts in the record. The recording and release of Haq's phone calls complied with the requirements of RCW 9.73.095, which is applicable to DOC prisoners.

Even if there were a difference in the way that the King County Jail released recorded phone calls, compared to the procedures of DOC, the State's decision to allow local control of security procedures does not violate equal protection: it is rationally related to a legitimate state interest.<sup>15</sup> As Haq concedes, security of institutions is a legitimate state interest. Bell, 441 U.S. at 540. Haq has not challenged the factual finding of the trial court, that "the primary purpose of the jail recording system is to facilitate 'a safe and secure facility.'" CP 1158. While the presumption of innocence is part of the foundation of our criminal justice system, it

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<sup>15</sup> Haq claims that strict scrutiny must be applied because the right to counsel and to a fair trial are implicated. He does not explain how the difference in release procedures that he identifies would affect either of those rights. Because DOC prisoners generally do not have a Sixth Amendment right to counsel and because the DOC procedure that Haq speculates would apply would not involve the courts, it does not appear that either of these rights would be implicated.

is irrelevant to a determination of the rights of pretrial detainees during their confinement. Bell, 441 U.S. at 533; accord, State v. Archie, 148 Wn. App. 198, 203-04, 199 P.3d 1005 (2009). The legislature exempted State correctional institutions from the general provisions of the Privacy Act and separately specified the limitations that apply to recording and intercepting communication in those institutions. It was rational for the legislature to decide that security provisions for local institutions, including provisions for phone recording, are best left to local jail administrators, within the limitations of the Privacy Act.

d. This Court Has Rejected The Claim That Jail Calls Recorded Under These Circumstances Are Constitutionally Protected Private Affairs.

Haq's challenge to the jail phone recordings under Article I, Section 7 of the Washington Constitution<sup>16</sup> has been rejected by this Court, in State v. Archie, supra. The trial court relied on Archie in rejecting this argument, concluding that Haq had no expectation of privacy in the jail phone calls and that Haq and his parents consented to the recording of the calls. CP 1165. Whether

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<sup>16</sup> Article I, Section 7 provides that "No person shall be disturbed in his private affairs, or his home invaded, without authority of law."

undisputed facts constitute a violation of this constitutional provision is a question of law reviewed de novo. Archie, 148 Wn. App. at 201.

This Court concluded in Archie that jail phone calls made under circumstances virtually identical to those in this case were not "private affairs" protected by Article I, Section 7. Id. at 204. The Court noted that the Washington Supreme Court has found no invasion of privacy when other forms of inmate communication are inspected, as long as inmates have been informed of that practice. Id. at 204, citing State v. Hawkins, 70 Wn.2d 697, 704, 425 P.2d 390 (1967).

Haq's argument that the analysis in Archie was faulty because it relied too heavily on Fourth Amendment analysis is frivolous. The court articulated its careful consideration of the State Constitution and cases interpreting it. Archie, 148 Wn. App. at 201-05. Haq identifies no constitutional flaw in the analysis.

Haq's argument that Archie is factually distinguishable is irrelevant to the constitutional analysis of the scope of "private affairs." The actual content of the calls recorded by an individual inmate does not define the constitutional protection provided. The jail records all inmate calls and cannot know until afterward whether

security issues are implicated, an escape is planned, or other crimes (such as intimidating a witness or violating a no contact order) are committed during the calls. Haq was prohibited from contacting the surviving victims of this shooting, contrary to his claim that he was not subject to a no contact order. CP 24. That he did not actually attempt to contact those victims does not render the jail phone call recordings unconstitutional.

Haq offers no authority for his claim that a recording properly obtained by the jail can still be a "private affair" protected by Article I, Section 7. To the contrary, the Washington Supreme Court has concluded that once the State has properly seized an item, an inmate no longer has a privacy interest in it. State v. Puapuaga, 164 Wn.2d 515, 523-24, 192 P.3d 360 (2008); State v. Cheatam, 150 Wn.2d 626, 641-43, 81 P.3d 830 (2003). Because Haq's claim that the release of recordings from the jail to the prosecutor warrants separate constitutional protection under Article I, Section 7 is unsupported by analysis or authority, the court should refuse to consider this claim. RAP 10.3(a)(6), (g); Palmer v. Jensen, 81 Wn. App. 148, 153, 913 P.2d 413 (1996) (citing State v. Johnson, 119 Wn.2d 167, 171, 829 P.2d 1082 (1992)).

Finally, the alternative holding of Archie was that when a call recipient who is informed of the recording presses a button to continue the call, as was required in each call in this case, that party has expressly consented to the recording and there is no constitutional violation. Id. at 204. It is well established that if one party in a conversation consents to a recording, the recording does not violate Article I, Section 7. State v. Clark, 129 Wn.2d 211, 221, 916 P.2d 384 (1996). The trial court here concluded that Haq and his parents consented to the recording of these calls. CP 1165. Both of Haq's parents were aware that the calls were being monitored or recorded and they both understood that a third party could listen to the calls. CP 1162. They had to press a button on the phone to accept them; as the court concluded in Archie, they expressly consented to the recording. Because at least one party consented to each recording, there was no constitutional violation.

- e. The Supreme Court Has Rejected The Claim That Recording Jail Calls Under These Circumstances Is A Violation Of The Washington State Privacy Act.

The Washington Supreme Court has concluded that recording inmates' phone calls from jail under circumstances

virtually identical to those in the case at bar does not violate the Washington State Privacy Act, RCW 9.73.030.<sup>17</sup> State v. Modica, 164 Wn.2d 83, 186 P.3d 1062 (2008). The Court concluded that inmates making phone calls from the King County Jail, who receive notice that calls are subject to recording through posted notices and an automatic warning at the beginning of every call, do not have a reasonable expectation of privacy in those calls. Id. at 89. Therefore, recording of the calls did not violate the Privacy Act. Id. at 90.

The trial court relied upon the holding in Modica in rejecting Haq's challenge under the Privacy Act. CP 1163-65. The court concluded that the facts in this case were virtually identical to the facts in Modica. CP 1163. The court cited additional evidence in this case that supports the conclusion that there was no expectation of privacy in Haq's calls: the phone used by Haq was in a room without privacy from officers (who regularly walked through) or from inmates (who could hear conversations from their cells nearby). CP 1159 , 1161, 1164.

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<sup>17</sup> "(1) Except as otherwise provided in this chapter, it shall be unlawful . . . to intercept, or record any: (a) Private communication transmitted by telephone . . . without first obtaining the consent of all the participants in the communication . . . ." RCW 9.73.030.

Haq asserts that this case is distinguishable from Modica for three reasons "argued at trial": because Haq was mentally ill, because there was coerced consent, and because the monitoring was not related to crimes being committed. App. Br. at 71. There is no analysis, argument, or authority presented on appeal with respect to the first two arguments, so there is no basis for consideration of these claims and the court should refuse to consider them for that reason.<sup>18</sup> RAP 10.3(a)(6), (g); Palmer, 81 Wn. App. at 153.

Haq's claim that the holding of Modica is premised on the content of the calls made by an inmate is without merit. Haq claims that the analysis of Modica is inapplicable here because there were no security issues and the calls in this case were not used to investigate ongoing crimes. As argued in the previous subsection of this brief, the argument that recording Haq's calls was not justified by security concerns is frivolous. If the jail had obtained information that Haq was contemplating or instigating further violence or an escape, or was attempting contact with the victims,

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<sup>18</sup> Haq also refers to an argument he made in the trial court that a position taken by the Civil Division of the King County Prosecutor's Office, rejecting a public disclosure request for the calls, was determinative. App. Br. at 71. No further reference is made to that position; it has been abandoned.

reference to the contents of his jail calls would have been critical. Although after the fact it appears that Haq did not create any security problems, that could not be known as the recording occurred.

The need for jail security is part of the Modica court's conclusion that there is no expectation of privacy in calls made under these circumstances. 164 Wn.2d at 89. There is no previous reference to the need for jail security and this reference in that opinion follows the clause, "because Modica was in jail," so it appears to refer to the reduced expectation of privacy of inmates because of the needs of jail security. Notably, Modica's calls were not recorded because of any allegation of an ongoing violation of the law; the witness tampering was reported and then evidence of it was recovered from previously recorded calls. Id. at 87. The expectation of privacy is not dependent on whether law enforcement has a previously existing individualized security concern as to each specific inmate before recordings are made. Haq has offered no authority in support of that position.

In addition, as the trial court concluded, there was no evidence presented that Haq had even a subjective expectation of privacy in the calls. CP 1163-64. Haq was recorded telling his

parents that transcripts of the calls were being provided to the prosecutors. CP 1162; 11RP 62-63. The trial court found that both of Haq's parents "were actually aware" that the prosecutor would have access to the phone calls. CP 1162, 1165.

Finally, the Privacy Act permits recording if both parties consent, as all parties did in this case. Haq made the calls knowing that they could be recorded, and telling his parents that transcripts were going to the prosecutor. His parents were required to press a number on the phone to accept the call, after having been given notice that it was subject to monitoring and recording. CP 1159. Under these circumstances, the court of appeals in Modica concluded that the parties consented to any recording. 136 Wn. App. 434, 450, 149 P.3d 446 (2006), aff'd on other grounds, 164 Wn.2d 83 (2008). The Supreme Court in Modica did not reach the issue of consent because it found no expectation of privacy, and the trial court in this case took the same position. CP 1164. However, consent to the recordings is established in the record<sup>19</sup> and is an alternative basis to conclude that the recordings did not violate the Privacy Act.

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<sup>19</sup> CP 1159 (notice beginning each call recorded requires action by the party receiving the call to accept the call, having been notified that it is being recorded); CP 1162 (both parents were aware the calls were being recorded).

The concluding statement in this section of Haq's brief, that even if the calls lacked protection under the Privacy Act, the prosecution should not have access to the calls,<sup>20</sup> also includes no authority or analysis and the court should refuse to consider it for that reason. RAP 10.3(a)(6), (g); Palmer v. Jensen, 81 Wn. App. at 153.

f. The Trial Court Did Not Abuse Its Discretion To Admit Relevant Evidence Over A Claim Of Unfair Prejudice.

The trial court properly exercised its discretion when it refused to redact the specific lines of jail phone calls identified on appeal as unfairly prejudicial. ER 403 grants the court broad discretion to exclude relevant evidence if its probative value is substantially outweighed by the danger of unfair prejudice, confusion, or misleading the jury. State v. Hughes, 106 Wn.2d 176, 201, 721 P.2d 902 (1986). The decision to admit relevant evidence will not be reversed absent a manifest abuse of discretion. Id. at 202.

Haq objects to the failure to redact two statements referring directly or indirectly to terrorists, in a call made on August 10, 2006.

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<sup>20</sup> App. Br. at 72.

Beyond the challenged statements, that call includes Haq's statements that he was a Muslim soldier and wanted to be a martyr and his repeated additional statements that he was a Jihadi. Ex. 212, Pretrial Ex. 12, pp. 21-39. In that call Haq also said he was a "soldier of Islam," and "did my job." Id. at 27-28.

The trial court concluded that the challenged statements of Haq himself were highly probative evidence of Haq's mindset at the time, as the call was shortly after the crime, and were not unfairly prejudicial because his mindset was the heart of the case. 22RP 17; 26RP 168-69. Other jail calls included references to Waechter deserving to die because she may have been an Israeli collaborator and that Jews were the enemy of Islam. Ex. 212, Pretrial Ex. 12, pp. 33, 37, 48, 49. Haq elicited three times that Haq told a mental health evaluator in August 2006 that he wanted to be a martyr. 35RP 63, 66; 39RP 92; 42RP 73-77. Finally, Dr. Missett testified that in February 2008, Haq told him that although many Muslims would think the shootings were wrong because the women were innocent victims, jihadists would say it was right because they do not distinguish civilians and military. 43RP 75. Haq has not established that the admission of these statements from Haq's own

mouth about his motive and his mental state at the time of the crime was a manifest abuse of discretion in the context of this trial.

Haq has invited any error in the admission of the other two challenged statements, as the call in which they occur was admitted only upon Haq's request. City of Seattle v. Patu, 147 Wn.2d 717, 720-21, 58 P.3d 273 (2002); 26RP 180; 27RP 166. Moreover, the defense had referred to the reference to hate mail in opening statement, prior to the court's ruling as to the redactions, and intended to argue that it was evidence of delusions. 24RP 84; 27RP 169-71. The court overruled the objection to the reference to hate mail because the defense intended to rely on it. 27RP 169-71.

Even if failure to redact any of the challenged statements was error, it was harmless. Evidentiary errors that are not of constitutional magnitude are harmless unless within reasonable probabilities the outcome of the trial would have been different if the error had not occurred. State v. Jackson, 102 Wn.2d 689, 695, 689 P.2d 76 (1984). In the context of Haq's many other statements to police, in jail calls, and during interviews, and his statements and behavior during the shootings, these remarks would not have changed the outcome.

3. THE COURT PROPERLY ORDERED AN EXAMINATION BY A STATE EXPERT PURSUANT TO CrR 4.7.

Haq claims that the court impermissibly permitted the State's expert to examine him because the expert was not appointed by the Court pursuant to RCW 10.77.060. This claim was not raised in the trial court and this court should decline to consider it on appeal. RAP 2.5(a)(3).

The examination ordered was pursuant to CrR 4.7 discovery rules. CrR 4.7(b)(2)(viii) provides that a court may require the defendant to "submit to a reasonable physical, medical, or psychiatric inspection or examination." The State's request for an examination and the court's order authorizing it were pursuant to the rule. CP 57; 2RP 18, 22. When a defendant asserts a diminished capacity defense, a state psychiatric examination must be ordered under CrR 4.7(b)(2), not RCW 10.77.060. State v. Hutchinson, 135 Wn.2d 863, 877-78, 959 P.2d 1061 (1998) (Hutchinson II).

In the trial court, Haq conceded that CrR 4.7 and current Washington law authorized the court to order Haq to participate in a

mental examination. CP 39. He did not request appointment of an expert to consider the defense of insanity pursuant to RCW 10.77.060. CP 36-41. A defendant may waive the procedural requirements of RCW Chapter 10.77. State v. Heddrick, 166 Wn.2d 898, 906-07, 215 P.3d 201 (2009). Haq has waived any error in following the statutory procedure.

Haq also claims that because the State's expert was not court-appointed, Haq's assertion of a mental defense did not constitute waiver of the privilege against self-incrimination, attorney-client privilege, or physician-patient privilege. There is no analysis, argument, or authority presented on appeal with respect to the argument that the waiver is limited to court-appointed experts, and that the State is not permitted to retain its own expert to evaluate the mental defense asserted. Thus, there is no basis for consideration of the claim and the court should refuse to consider it for that reason. RAP 10.3(a)(6), (g); Palmer v. Jensen, 81 Wn. App. at 153.

4. STATEMENTS MADE BY HAQ TO A STATE PSYCHOLOGIST WERE PROPERLY ADMITTED TO REBUT HAQ'S INSANITY AND DIMINISHED CAPACITY DEFENSES.

a. Relevant Facts.

Defense psychiatrist Dr. Missett first interviewed Haq over two days in October of 2006 and asked Haq about details of the crimes at the Jewish Federation. 40RP 86-88, 92; 43RP 23-39. At that time, Haq told Dr. Missett that after he forced his way in to the Jewish Federation at gunpoint, he asked to see a manager, but when someone mentioned calling 911, that "set me off" and he shot a woman. 43RP 28-29. He claimed that he declared that the woman was a hostage, but no one cooperated, so he started shooting people. 43RP 29-32. Haq did not mention hearing God speak to him, receiving thoughts from God, or the phrase "go on a mission." 43RP 37-38. He does not mention thinking or hearing the words "awesome" or "murder," or that he did not have control of his trigger finger. 43RP 38-39.

Dr. Missett interviewed Haq again in January of 2007 and again Haq told Dr. Missett about details of the crimes. 43RP 44-53. At that time, Haq first mentions having an overwhelming feeling that he had to complete a mission. 43RP 44, 47. Haq did not say that

the thought of a mission came from God or any other outside source. 43RP 47. He said the mission was to do some political activism because of the "Jewish-Lebanese" war. 43RP 48. On this date, Haq first said that he heard the word "awesome" from Bush. 43RP 44.

State psychologist Dr. Wheeler interviewed Haq in June of 2007. 46RP 113. During these interviews, for the first time Haq reported that when he passed by Pamela Waechter's body on the stairs he heard the word "murder." 43RP 59. He also for the first time states that someone else was controlling his trigger finger. 43RP 60. Haq did not say anything about God being involved. 43RP 60; 47RP 21. Dr. Wheeler's interviews were recorded. 46RP 117.

Dr. Missett interviewed Haq again in February of 2008, when defense counsel suggested that Dr. Missett should talk to Haq again before Dr. Missett was interviewed by the prosecutors. 43RP 61-63. During this interview, Haq for the first time said he heard a voice say "go on a mission." 43RP 64-65. Haq said that he did not recognize it as the voice of God at the time, but later concluded it must have been God. 43RP 64-72. For the first time, Haq attributed control of his trigger finger to God. 43RP 73. For the first

time, he claimed he did not aim at Waechter's head; the accuracy was divine intervention. 43RP 74.

Dr. Missett interviewed Haq again over two days in July of 2009. 43RP 77. Now Haq clearly stated that it was God who told him to go on the mission. 43RP 77. None of Dr. Missett's interviews with Haq was recorded. 38RP 44.

The trial court initially stated that it would exclude Haq's statements to Dr. Wheeler as to preparation, planning, and commission of the attack at the Jewish Federation, but that if the defense expert testified about statements relating to particular activity, the court would not exclude Haq's statements to Dr. Wheeler on the same topic. 8RP 10-13, 26-27. The transcript of the court's final ruling, which occurred after Dr. Missett's testimony in the first trial, has not been provided in this appeal. Supp. CP \_\_\_ at 103-04 (clerk's minutes for May 13, 2008). Before the second trial, the court repeated its prior ruling, which was that all of the topics that Haq discussed with Dr. Wheeler were admissible based on the scope of Dr. Missett's testimony. CP 8566. Defense counsel did not indicate that the scope of Dr. Missett's testimony would be any different in the second trial.

In his opening statement, defense counsel began by admitting that Haq was the person who committed the shootings at the Jewish Federation, claiming that because of his mental illness, Haq believed that taking hostages at the Jewish Federation would bring positive change. 24RP 49. Defense counsel conceded that Haq shot and killed an innocent woman and shot and maimed five others, and that the damage that Haq did was horrific. 24RP 75. Counsel stated that if Haq was not mentally ill, “what you would have is a cold-blooded killing.” 24RP 76. Counsel asserted that Haq was not sane at the time. 24RP 76.

Defense counsel in his opening also referred to a statement that Haq made to Dr. Wheeler, that Haq had the statement “go on a mission” in his mind as he planned this attack. 24RP 79. Counsel then described his version of the thoughts going through Haq’s mind as he bought the guns used in the shooting and as he drove to Seattle on his way to attack the Federation. 24RP 79-80.

No testimony was presented concerning the mental health experts’ interviews or Haq’s statements made during those interviews until the defense case, when Haq presented the testimony of Dr. Missett. Dr. Missett spent about 40 hours interviewing Haq. 38RP 44. He also was present during

Dr. Wheeler's interviews of Haq. 38RP 46. Dr. Missett stated that Haq's statements to Dr. Wheeler were very similar to what Haq told Dr. Missett. 38RP 47.

During direct examination, Dr. Missett testified at length about statements made by Haq describing events leading up to July 28, 2006. Dr. Missett testified to Haq's descriptions of his state of mind when he bought and loaded the guns used in this shooting. 41RP 36-37. He related Haq's statements about why he chose to target the Jewish Federation and his motives for the attack. 41RP 11-12, 31, 33-34, 47-48. Dr. Missett repeated Haq's description of his state of mind as he drove to Seattle, and as he stopped and test-fired the guns. 41RP 41, 43, 55. Dr. Missett repeated Haq's descriptions of his state of mind throughout the course of his forced entry into the Jewish Federation and the shootings inside. 41RP 10, 28, 31, 41-44, 51-52, 56, 80-121.

Dr. Wheeler testified regarding statements Haq made about the crime and his planning of the crime and the significance of those statements to Dr. Wheeler's opinions. E.g., 46RP 168-72; 47RP 6-9, 15-17, 20-25, 36-51, 58-72, 79-109; Ex. 293, 294 (Powerpoint CD and paper copy). He testified about the significance of the changes in Haq's description of events from his

initial interview with Dr. Missett in October 2006, through his interviews with Dr. Wheeler and the final interviews with Dr. Missett in July 2009. E.g., 47RP 83-84; 48RP 8, 46-47, 93.

b. All Of Haq's Statements To Dr. Wheeler Were Admissible To Rebut Haq's Insanity And Diminished Capacity Defenses.

As a general rule, statements made by a defendant during a psychiatric examination are outside the protection of the Fifth Amendment when the defendant raises a mental defense, such as insanity or diminished capacity, and introduces psychiatric expert testimony in support of that defense. State v. Pawlyk, 115 Wn.2d 457, 465, 800 P.2d 338 (1990); Powell v. Texas, 492 U.S. 680, 109 S. Ct. 3146, 106 L. Ed. 2d 551 (1989). Under those circumstances, the defendant no longer has a right to remain silent because “his silence may deprive the State of the only effective means it has of controverting his proof on an issue that he interjected into the case.” Id. at 466, quoting Estelle v. Smith, 451 U.S. 454, 465, 101 S. Ct. 1866, 68 L. Ed. 2d 359 (1981). In Washington, a statutory privilege against self-incrimination formerly applied to evaluations relating to an insanity defense (but not a diminished capacity defense), but that statute was amended before

this crime occurred, not only eliminating that statutory privilege, but also providing that failure to cooperate in an insanity evaluation will result in exclusion of defense expert testimony on that issue. RCW 10.77.020(5); State v. Carneh, 153 Wn.2d 274, 282-86, 103 P.3d 743 (2004).

The Supreme Court explicitly extended the rule of waiver of the privilege against self-incrimination to presentation of a defense of diminished capacity in State v. Hamlet, 133 Wn.2d 314, 319, 944 P.2d 1026 (1997). The court observed that the rule of Pawlyk was based on the State's need for the evidence that "may be the best and most accurate evidence of a defendant's mental state, once the defendant places that mental state in issue." Id. at 320. The court noted that allowing the defendant asserting a mental defense to rely upon the privilege would deprive the jury of important evidence on the issue. Id. at 320-21.

The experts who evaluated the defendant's mental condition at the time of these crimes, for the State and for the defense, relied upon the statements Haq made after the crime, primarily during experts' interviews, describing his motives and his thoughts as the shootings occurred, as well as his mental condition in the weeks before the shootings.

Defense psychiatrist Dr. Missett relied very heavily on Haq's description of delusions that he claimed to have experienced during the shootings to establish that Haq was out of touch with reality (psychotic) at that time and, therefore, not responsible for his behavior. The State did not dispute that Haq suffered from a serious mental illness at the time of the crimes, but was able to establish that nevertheless, at the time of the crimes, he was able to form the intent necessary to commit the crimes and committed the crimes fully aware of his actions and their consequences.

The test for insanity applied in this state is very rigorous, and our Supreme Court has observed that many defendants who are regarded as "unsound" or "deranged" would not qualify. McDonald, 89 Wn.2d at 272-73. The Court opined that many of those being treated in mental institutions under involuntary civil commitments would not meet the test for insanity. Id. at 273. The general rule with respect to mental defenses is that anything said or done by a defendant is relevant to his mental condition and admissible. State v. Huson, 73 Wn.2d 660, 667-68, 440 P.2d 192 (1968); State v. Mays, 65 Wn.2d 58, 62-63, 395 P.2d 758 (1964). The state of mind of a defendant at the time the crime occurred is critical to analysis of a mental defense.

Dr. Missett testified to Haq's descriptions of his state of mind when he bought and loaded the guns used and when he chose to target the Jewish Federation. 41RP 11-12, 31, 33-37, 47-48.

Dr. Missett repeated Haq's descriptions of his state of mind as he drove to Seattle and throughout the course of his forced entry into the Jewish Federation and the shootings inside. 41RP 10, 28, 31, 41-44, 51-52, 55-56, 80-121. Under these circumstances, the trial court did not abuse its discretion in allowing Dr. Wheeler to testify to statements Haq made to Dr. Wheeler about the same events. CP 8566.

This case illustrates how important to a fair resolution of the facts it can be for the jury to know the specific statements that a defendant has made to a state expert. Dr. Missett's opinion was based in large part on Haq's description of claimed delusions during the shootings and, because Haq initially described no delusion but in later interviews claimed to have experienced delusions, the statements that Haq made in each interview show how his reports evolved over time, and affect the credibility of his reports. Dr. Missett himself stated that he did not necessarily believe that Haq experienced the delusions that he first reported years after the shootings. 43RP 80. He testified that the late

reports of delusions could be the result of rationalization or simply fabrication. 43RP 81-83. In order for the jury to evaluate the defense experts' conclusions that are based on Haq's statements, the State must be permitted to offer statements made by the defendant himself, to the State's expert, that contradict those conclusions. To hold otherwise would grant the defendant an unfair advantage and deprive the jury of important evidence. The trial court did not abuse its discretion in reaching that conclusion and admitting the evidence of Haq's statements to Dr. Wheeler.

- c. Even If There Is A General Rule That Incriminating Statements Be Excluded From State Experts' Testimony, The Testimony Was Admissible Because The Defense Experts' Reliance On Haq's Statements Opened The Door To All Of Haq's Statements About The Crimes.

Haq's argument that the testimony should have been excluded under the Supreme Court's holdings in the two Hutchinson decisions<sup>21</sup> is without merit. Those cases would prohibit use of Haq's statement in the State's case-in-chief, and call for a balancing of interests in a trial court's determination of

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<sup>21</sup> State v. Hutchinson, 111 Wn.2d 872, 766 P.2d 447 (1989) (Hutchinson I); Hutchinson II, supra.

whether statements of the defendant during a compelled examination should be admitted at trial. In this case, because Haq, during opening statement, admitted committing the actus reus of these crimes and the State offered Haq's statements only in rebuttal after the defense expert testified about Haq's description of the events, the trial court did not abuse its discretion in concluding that use of the statements was fair rebuttal.

The issue presented in the first Hutchinson decision was whether a defendant who asserted a defense of diminished capacity could be compelled to submit to a psychiatric examination by a State's expert and whether by asserting the defense he waived his privilege against self-incrimination. Hutchinson I, 111 Wn.2d at 874. The court concluded that the defendant was required to submit to an examination. Id. at 875, 880-81. The court stated that use of a defendant's "incriminating statements" must be restricted to the extent they are "confessional," through a balancing of interests by the trial court. Id. at 883. The court stated that it was following the holding to that effect in State v. Craney, 347 N.W.2d 668 (Iowa 1984). Hutchinson I, 111 Wn.2d at 883.

The pertinent issue presented in Hutchinson II was whether the trial court abused its discretion in excluding defense expert

testimony because Hutchinson refused to speak to the State's expert. Hutchinson II, 135 Wn.2d at 876. The court held that a defendant does not have a right to refuse to answer incriminating questions during a State's interview and the State's expert may ask the defendant about charged and uncharged crimes. Id. at 879. The court approved the remedy of exclusion of defense experts, observing that otherwise the defendant would enjoy a windfall, if he is allowed to present his expert while refusing to be examined by the State's expert. Id. at 882. The court reiterated its holding in Hutchinson I, that the State's expert should not be allowed to testify to a defendant's "incriminating statements." Id. at 878.

The meaning of the term "incriminating statements" as used in the Hutchinson cases is unclear. The only direct guidance the cases provide is that a statement is not incriminating just because it tends to show capacity to commit the crime, but that an expert should not be permitted to testify to a defendant's confessions that he or she committed the crime. Hutchinson I, 111 Wn.2d at 883;

Hutchinson II, 135 Wn.2d at 878. Because Hutchinson did not speak to the State's expert, neither decision applied the test.<sup>22</sup>

More recent decisions have not referred to the balancing Hutchinson I articulated. See Pawlyk, 115 Wn.2d at 465-66; Carneh, 153 Wn.2d at 282-86.

However, reference to Craney, supra, which the court in Hutchinson I declared it was following, makes it clear that Haq's statements to Dr. Wheeler were properly admitted because once the defense has conceded that the defendant committed the actus reus and relies solely on a mental defense, statements concerning commission of the crime are no longer considered incriminating for purposes of this rule. In Craney, the defendant admitted the homicide when he was interviewed by a defense expert and relied on defenses of insanity and diminished capacity at trial. 347 N.W.2d at 671. The State called the defense expert as a witness in its case in chief and elicited Craney's confession. Id. The court held that admission of the testimony was error but it would not have been error if during voir dire or opening statement

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<sup>22</sup> State v. Brewton, 49 Wn. App. 589, 744 P.2d 646 (1987), which referred to exclusion of "confessional statements" made to a defense expert, is not helpful either, because the facts of the case are not described in the opinion and the exclusion of the statements was not at issue on appeal.

Craney had conceded that he killed the child. Id. at 674. The court stated:

A defendant might, in a legally appropriate way prior to or at trial and before the expert is called to the stand by the State, concede that he committed the homicide and rest altogether on an insanity defense. Then a trial court could permit the State to interrogate the expert about defendant's statements that he killed the victim; that evidence would not have the effect of incriminating the defendant because the defendant had already conceded he killed the victim.

Id. The court concluded that admission of the statements in Craney's case was harmless beyond a reasonable doubt because the State's evidence was overwhelming and defense witnesses also testified to Craney's admissions that he killed the child, relying on evidence of the homicide to attempt to establish its only defense, a mental defense. Id. at 676.

The trial court in the case at bar applied a narrower standard than that applied in Craney, stating that it would exclude Haq's statements to Dr. Wheeler as to a wide range of topics including preparation, planning, and commission of the attack at the Jewish Federation, but that if the defense expert testified that he relied on the defendant's statements as to any particular topic, the court would not exclude Haq's statements to Dr. Wheeler on the same topic. 8RP 10-13, 26-27. It is clear that if the defense expert

already had testified to Haq's description of the crimes, mention by the State's expert would not be incriminating in the sense contemplated by Hutchinson I and Hutchinson II. As a result of the balance that the court adopted, it deferred ruling on what statements would be excluded until after the testimony of Dr. Missett. 8RP 13, 27. The transcript of the court's balancing, which occurred after Dr. Missett's testimony in the first trial, has not been provided in this appeal. Supp. CP \_\_\_ at 103-04 (clerk's minutes for May 13, 2008).

Before the second trial, the court repeated its prior ruling, that all of the topics that Haq discussed with Dr. Wheeler were admissible based on the scope of Dr. Missett's testimony. CP 8566. Defense counsel did not indicate that the scope of Dr. Missett's testimony would change in the second trial and indeed, Dr. Missett's testimony covered every aspect of the preparation for, planning of, and commission of these crimes as described by Haq. Under these circumstances, the court did not abuse its discretion in concluding that Haq's statements to Dr. Wheeler were admissible.

Haq claims that the testimony of Dr. Wheeler was "flush" with incriminating statements. Haq's statements were incriminating in the sense that they tend to prove Haq's state of mind as he

planned and executed these crimes, but that proves no more than that the statements were relevant to the issues at trial.

Haq also asserts that allowing the jurors to hear Haq himself uttering the statements was particularly incriminating. Haq claims that it was improper to allow this presentation of Haq's statements because no expert testified that the manner in which the statements were made was significant to their opinions. It is a matter of common sense that a person's tone and manner of delivery are significant to a listener's evaluation of the meaning and credibility of a statement. See Ex. 293 (CD with audio). Haq has offered no reason that the jurors should be deprived of that opportunity.

Moreover, no such objection was raised in the trial court and RAP 2.5(a) bars consideration of the issue. The only objection to use of audio clips that was raised in the trial court was a scheduling concern. 43RP 116. During Dr. Wheeler's testimony, the defense argued that one audio clip should not be played because it was cumulative. 48RP 25. The court overruled the objection, agreeing that the jury should be permitted to hear the statement as uttered by Haq. 48RP 26. A claim of error may be raised for the first time on appeal only if it is a "manifest error affecting a constitutional right." RAP 2.5(a)(3); State v. McFarland, 127 Wn.2d 322, 333,

899 P.2d 1251 (1995). The assertion that the audio clips were unduly prejudicial does not present any claim of constitutional error.

In any event, Dr. Missett testified that an audio recording is a more accurate preservation of responses in an interview, and agreed that a recording provides the benefit of being able to hear pauses, inflection, and the tone and volume of the interviewee's voice. 43RP 11. Defense surrebuttal witness Dr. Weinstock testified that a personal interview is important to an evaluator because there are some things that you cannot get from a transcript. 49RP 20, 21-22. The best evidence of the meaning and credibility of Haq's statements to Dr. Wheeler was the audio recording of those statements. Haq has established no error in providing that evidence to the jury.

At the least, once a defendant concedes the actus reus of the charged crimes, statements admitting the crime are not "incriminating" for purposes of the balancing of the defendant's right not to incriminate himself against the State's and the jury's need for complete information to evaluate a mental defense. The trial court conducted an even more restrictive balancing, and properly concluded that Haq's statements were not incriminating when his own expert testified concerning statements to the same effect.

Because Haq conceded during opening statement that he committed the actus reus of these crimes and rested entirely on mental defenses, and because his expert testified to his statements concerning the crimes, all of his statements were admissible.

- d. All Of Haq's Statements To Dr. Wheeler Were Properly Admitted To Impeach Haq's Statements Admitted Through His Own Expert.

Even if the trial court erred in ruling that the statements were admissible under the standards referred to by the Hutchinson decisions, the statements were properly admitted to impeach Haq's statements admitted through his own expert. The trial court in effect applied a rule allowing the statements only as impeachment, by restricting admissible statements to those on the same topics addressed by the defense expert.

A defendant opens the door to a topic by presenting testimony relating to that topic. State v. Hartzell, 153 Wn. App. 137, 154, 221 P.3d 928 (2009), remanded on other grounds, 168 Wn.2d 1027 (2010). Once the topic has been introduced, the State may be permitted to respond to draw a complete picture or to correct a misleading impression created. Id.; State v. Ortega, 134 Wn. App. 617, 626-27, 142 P.3d 175 (2006).

Likewise, under ER 806, when a hearsay statement is admitted, the credibility of the declarant may be attacked by any evidence that would be admissible if the declarant had testified.<sup>23</sup> If Haq had testified himself, he could have been impeached by these statements; he should not be permitted to avoid that impeachment by introducing the statements through his expert. Even if Haq had withdrawn the mental defenses, if he testified to the events surrounding the crimes, the State could impeach Haq directly with his statements to the examining mental health experts. State v. Lopez, 74 Wn. App. 456, 459-60, 874 P.2d 1979 (1994), citing Lanari v. People, 827 P.2d 495, 501 (Colo. 1992), and Felde v. Blackburn, 795 F.2d 400, 404 (5<sup>th</sup> Cir. 1986).

When Dr. Missett testified to Haq's description of these events in statements during his interviews of Haq, the State was properly permitted to complete the picture through Dr. Wheeler's testimony as to statements made to him.

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<sup>23</sup> The trial court did not rely on ER 806, but it may be affirmed on any basis supported by the record. LaMon v. Butler, 112 Wn.2d 193, 200-01, 770 P.2d 1027 (1989).

5. HAQ WAIVED ANY CHALLENGE TO THE CONSTITUTIONALITY OF RCW 10.77.020(5) BY FAILING TO RAISE THAT ISSUE IN THE TRIAL COURT.

Haq contends that RCW 10.77.020(5) violates the doctrine of separation of powers. This argument has been waived by failure to raise it in the trial court. In addition, Haq does not have standing to raise the challenge and the issue is not a justiciable controversy because Haq participated in the examination by the State's expert, so the statute was not applied and Haq was not harmed by it.

RCW 10.77.020(5) provides that in a sanity evaluation conducted under RCW Chapter 10.77, "if a defendant refuses to answer questions or to participate in an examination conducted in response to the defendant's assertion of an insanity defense, the court shall exclude from evidence at trial any testimony or evidence from any expert or professional person obtained or retained by the defendant." Haq raised both an insanity defense and a diminished capacity defense. The diminished capacity defense is outside the scope of RCW Chapter 10.77. Hutchinson II, 135 Wn.2d at 877-78.

Haq did not raise a separation of powers challenge to RCW 10.77.020(5) in the trial court, although he listed a variety of other constitutional challenges to the established law regarding the

State's right to discovery in response to the defendant's assertion of a mental defense. See CP 36-41. Because Haq participated in the examination by the State's expert, the court had no need to construe the statute, or to determine the constitutionality of the statute or its applicability to this case, where issues of diminished capacity as well as insanity were raised.<sup>24</sup>

Under RAP 2.5(a)(3), a claim of error may be raised for the first time on appeal only if it is a "manifest error affecting a constitutional right." McFarland, 127 Wn.2d at 333. Not every constitutional error falls within this exception; the defendant must show that the error occurred and caused actual prejudice to his rights. Id. It is the showing of actual prejudice that makes the error manifest, allowing appellate review. State v. Kirkman, 159 Wn.2d 918, 926-27, 155 P.3d 125 (2007). Haq cannot show actual prejudice to his rights simply by asserting a constitutional defect in a statute that was not applied to him. No evidence was excluded on the basis of the statute. Haq has alleged no harm to him as a result of the statute.

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<sup>24</sup> Because RCW 10.77.020(5) has no application to the examination of Haq or the testimony of his experts as to his diminished capacity defense, there is no way to determine whether and to what extent defense experts would be excluded, because the experts testified as to both insanity and diminished capacity.

Further, Haq lacks standing to challenge the statute on constitutional grounds based on the same lack of harm. "A litigant does not have standing to challenge a statute on constitutional grounds unless the litigant has been harmed by the particular feature of the statute which is claimed to be unconstitutional." Kadoranian v. Bellingham Police Dept., 119 Wn.2d 178, 191, 829 P.2d 1061 (1992), citing In re Powell, 117 Wn.2d 175, 197, 814 P.2d 635 (1991), and State v. Lundquist, 60 Wn.2d 397, 401, 374 P.2d 246 (1962). The harm must be "more than a general dissatisfaction" with the challenged statute, it must be actual injury. Kadoranian, 119 Wn.2d at 191. The statute has not been applied in this case, so Haq has suffered no injury as a result of it, and he has no standing to challenge it.<sup>25</sup>

Moreover, the challenge to the statute is not a justiciable controversy in the context of this case. The requirements of a justiciable controversy include "an actual, present and existing dispute, or the mature seeds of one, as distinguished from a possible, dormant, hypothetical, speculative, or moot disagreement"

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<sup>25</sup> While it might be argued that a defendant was injured because he decided to cooperate with an examination to avoid the application of the statute, that argument was not asserted here. The argument would carry little weight, in any event, because exclusion of the defense experts could be ordered for a refusal to cooperate pursuant to CrR 4.7. See Hutchinson II, supra.

and "interests that must be direct and substantial, rather than potential, theoretical, abstract or academic." Asarco Inc. v. Dept of Ecology, 145 Wn.2d 750, 760, 43 P.3d 471 (2002), quoting First United Methodist Church v. Hearing Examiner, 129 Wn.2d 238, 245, 916 P.2d 374 (1996) (further citations omitted). Because Haq complied with the statute and did not challenge it below, there is no record to establish how it might be construed or even if it would be applied, so the interest here is hypothetical and academic.

6. THE TRIAL COURT PROPERLY DENIED A PROPOSED INSTRUCTION AND SPECIAL VERDICT FORM THAT WERE INACCURATE STATEMENTS OF THE LAW REGARDING THE AGGRAVATING CIRCUMSTANCE.

Haq asserts that the trial court erred in refusing to submit his proposed instruction and special verdict to the jury regarding the aggravating circumstance for count 1, premeditated murder. The State alleged that Haq committed aggravated murder in the first degree by committing premeditated murder in the course of or in furtherance of a burglary. CP 877; RCW 10.95.020(11)(c). Haq submitted instructions that included an additional burden, that the State prove the burglary had an independent purpose and effect from the murder. CP 2085-86. The trial court properly refused

those instructions because they were inaccurate statements of the law.

RCW 10.95.020 provides that a person is guilty of aggravated first degree murder if he or she commits premeditated first degree murder and one or more of a list of aggravating circumstances exists. That list includes the circumstance that the murder was committed "in the course of, in furtherance of, or in immediate flight from . . . [b]urglary in the first or second degree...." RCW 10.95.020(11). Haq was charged with committing the premeditated murder of Pamela Waechter in the course of or in furtherance of a burglary in the first or second degree. CP 877. The court instructed the jury as to the definition of the aggravating circumstance, using the statutory language:

The murder was committed in the course of or  
in furtherance of Burglary in the First Degree, or  
The murder was committed in the course of or  
in furtherance of Burglary in the Second Degree.

CP 2143. A burglary occurs when a person unlawfully enters or remains in a building with intent to commit a crime against a person or property inside. RCW 9A.52.030. It is first degree burglary if the burglar is armed or assaults a person during or in immediate flight from the crime. RCW 9A.52.020. The jury returned a special

verdict finding the murder of Pamela Waechter was committed in the course of or in furtherance of burglary in the first degree.

CP 2159.

The trial judge rejected the following instruction proposed by Haq:

For the purposes of the aggravated circumstance, there must be more than a coincidence of time and place between the burglary and the murder. The murder must advance an independent felonious purpose of the burglary. The burglary must be independent of the underlying murder and not an integral part of the murder. The burglary must have an independent purpose and effect from the murder and not be merely incidental to the murder.

CP 2085. Haq proposed a special verdict form that posed the question: "Did the burglary have an independent purpose and effect from the murder, as opposed to being merely incidental to the murder?" CP 2086.

The scope of an aggravating circumstance listed in Washington's aggravated murder statute is a matter of statutory interpretation.<sup>26</sup> State v. Hacheney, 160 Wn.2d 503, 512, 158 P.3d 1152 (2007). Statutory interpretation is a matter of law, so it is subject to review de novo. Id.

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<sup>26</sup> Haq refers to "constitutional underpinnings" of the cases upon which he relies (in death penalty jurisprudence), but makes no argument that any particular constitutional provision mandates the interpretation he advocates.

The legal standard stated in Haq's proposed instruction was specifically disapproved in State v. Howland, 66 Wn. App. 586, 832 P.2d 1339 (1992). The court in Howland held that in an aggravated murder case predicated on a burglary, Washington's aggravated murder statute does not require that the murder and the burglary each have an independent purpose. Id. at 591-94. The court observed that when Howland decided to kill the victim and broke into the victim's apartment to do so, he formed an independent felonious intent to commit a burglary. Id. at 592-93. The court noted that other aggravating circumstances listed in the statute are based on the status of the victim (e.g., as a law enforcement officer or firefighter), or the status of the killer (e.g., as a prisoner or escaped prisoner), and do not require an intent independent of the premeditated intent to kill. RCW 10.95.020(1), (2); Howland, 66 Wn. App. at 593. It concluded that there is no indication that the legislature intended to require the burglary circumstance to involve a criminal intent separate or independent of the murder. Id.

Haq relies upon State v. Hachaney, supra, to justify the additional burden imposed by his proposed instruction but that case does not address the burglary aggravating circumstance and is

inapposite. The issue presented in Hacheney was whether an arson that Hacheney committed after he killed his wife, in order to conceal the murder, brought the murder within the scope of the aggravated murder statute. 160 Wn.2d at 512. The court addressed the connection necessary to establish that a killing occurred “in the course of, in furtherance of, or in the immediate flight from” a felony. The court noted that the distinguishing feature of that case, and of State v. Golladay,<sup>27</sup> was that in each the felony was committed “to cover up or facilitate escape from already completed murders.” Hacheney, 160 Wn.2d at 516. It concluded that “concealment of a murder,” even by arson, is not an aggravating circumstance under the Washington aggravated murder statute. Id. at 518-19.

Haq mistakenly asserts that the rule of Golladay is that in order to constitute a killing in the course of a felony, the killing must occur when the accused is acting with intent to commit some crime other than the murder. App. Br. at 93. Golladay involved interpretation of the former felony-murder statute. 78 Wn.2d at 128-29. Golladay established only that if the felony occurs entirely

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<sup>27</sup> 78 Wn.2d 121, 470 P.2d 191 (1970), overruled on other grounds, State v. Arndt, 87 Wn.2d 374 (1976) (addressing scope of felony-murder).

after the murder is complete, the killing did not occur during the commission of, or withdrawal from the scene of the felony. Id. at 128-32. The necessary connection is lacking because the felony is “entirely separate, distinct, and independent from the homicide.” Id. at 132. While Haq includes a broad quotation of Golladay that appears in the Hachenev opinion, he fails to note that the paragraph in which the quotation appears states that the controlling fact in Golladay was that the felony occurred after the killing. Hachenev, 160 Wn.2d at 514.

Both Hachenev and Golladay focus on the sequence of the crimes – far from suggesting that each crime must have a separate, independent intent, the cases conclude that the felony in each does not have an adequate connection to the commission of the murder because the crimes were not concurrently committed. The only support for the proposition that a felony aggravating circumstance must include an intent separate and independent of the murder is a California case to which Hachenev referred, People v. Green, 27 Cal. 3d 1, 609 P.2d 468 (1980), overruled on other grounds by People v. Martinez, 20 Cal. 4<sup>th</sup> 225 (1999). However, the court in Hachenev stated the holding of Green as only, “where murder was the primary crime and the felony was incidental because it was

intended only to conceal the murder, imposition of aggravating circumstances was inappropriate.” Hachenedy, 160 Wn.2d at 518, citing Green, 609 P.2d at 505-06.<sup>28</sup>

The court in Howland concluded that there is no indication that the legislature intended to require the burglary aggravating circumstance to involve a criminal intent separate or independent of the murder. 66 Wn. App. at 593. The Howland court rejected the argument that the California court's interpretation of the California statute in Green warranted such an interpretation of the Washington aggravated murder statute. The Howland decision distinguished Green on four grounds. First, factually, Green involved a felony committed after a killing, to conceal the crime, while Howland formed an independent intent to commit the crime of burglary in order to accomplish the murder that he intended to commit. Id. at 592-93. Second, California has adopted the merger doctrine in the context of felony murder, while Washington has not. Id. at 593. Third, other aggravating circumstances listed in the Washington statute are based on the status of the victim and do not require an intent independent of the premeditated intent to kill.

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<sup>28</sup> The facts of Green also involved a felony committed after the homicide was completed, in order to conceal the murder. Green, 609 P.2d at 475-76, 500.

Id. at 593. Finally, the Washington legislature has specifically indicated its intent to separately punish burglary when it is committed along with other crimes, by enacting the burglary anti-merger statute, and that statute applies to aggravating circumstances as well as separate crimes. Id. at 594.

In this case, Haq murdered Pamela Waechter while he was committing a burglary, and the burglary began before the murder occurred. These facts do not involve a felony occurring after a murder, only to conceal the murder, which would violate the rule of Hacheny. If there is a case in which a more detailed instruction is necessary to clarify the rule of Hacheny, it was not necessary in this case. In any event, the instruction proposed by Haq did not state the limited rule of Hacheny, but instead incorporated a rule without support in the Washington aggravated murder statute or case law interpreting it.

The Supreme Court's decision in State v. Mason, 160 Wn.2d 910, 162 P.3d 396 (2007), illustrates that Haq's proposed instruction is an inaccurate statement of Washington law. The oral argument in the Supreme Court in the Mason case was on October 26, 2006, two days after the oral argument in Hacheny. Mason, 160 Wn.2d at 910; Hacheny, 160 Wn.2d at 503. Hacheny was

decided on May 31, 2007. 160 Wn.2d at 503. Less than two months later, the court in Mason held that there was sufficient evidence that the aggravated murder in that case was committed in the course of a burglary, when the evidence indicated that Mason broke into the victim's home in order to kill the victim, and did so. 160 Wn.2d at 936. It is inconceivable that the court would ignore a rule that Haq claims the court adopted in Hacheney in deciding another aggravated murder case during the same term.

The instruction proposed by Haq and the related special verdict form included an inaccurate statement of Washington law and were properly rejected by the trial court.

7. HAQ'S CLAIM THAT HE WAS DENIED A FAIR TRIAL BECAUSE WITNESSES IMPROPERLY TESTIFIED TO THEIR OPINION OF HIS GUILT IS WITHOUT MERIT.

Haq claims that testimony of three police officers and two of the State's expert witnesses included impermissible opinions as to Haq's guilt. That claim should be rejected. The challenged statements were not improper opinions as to guilt. Moreover, Haq did not object to most of the testimony in the trial court and has waived any error. The two statements to which he did object were

stricken by the trial judge. In the context of all of the evidence and the jury instructions, if any of the statements were improper opinion evidence, it was not reversible error.

As to the testimony which was admitted without objection in the trial court, RAP 2.5(a) bars consideration of this issue. These claims are not manifest errors affecting a constitutional right. RAP 2.5(a)(3); McFarland, 127 Wn.2d at 333. Haq has not shown either constitutional error or the actual prejudice necessary to merit review for the first time on appeal.

Generally, testimony will not be deemed an opinion as to the defendant's guilt unless it relates directly to the defendant. State v. Sanders, 66 Wn. App. 380, 387, 832 P.2d 1326 (1992). Testimony regarding the veracity of a victim may be improper depending on the circumstances, considering the type of witness, the challenged testimony, the charges, the type of defense, and the other evidence. Kirkman, 159 Wn.2d at 928 (citing State v. Demery, 144 Wn.2d 753, 759, 30 P.3d 1278 (2001)). The jury is presumed to follow the court's instruction that it is the sole judge of credibility. Kirkman, 159 Wn.2d at 928. The Supreme Court has noted that "the assertion that the province of the jury has been invaded may often be simple rhetoric." Id.

A trial court has discretion to allow expert opinion evidence if it will assist the jury to understand the evidence or to determine a fact in issue. ER 702; State v. Ortiz, 119 Wn.2d 294, 310, 831 P.2d 1060 (1992). Admission of expert opinion evidence is within the discretion of the trial court. Ortiz, 119 Wn.2d at 310. The parties here agreed that experts could offer opinions as to Haq's capacity to form intent or to premeditate, but did not address conclusions as to insanity at the time of the crimes. CP 1910, 8567.

- a. Haq Waived His Right To Object To The Statements Of Officers Collins And Pasternak, Which Were Not Opinions As To Guilt.

Haq did not object to the challenged testimony of Officer Collins or Officer Pasternak and has waived any error. As to each officer, Haq argues that constitutional error occurred during their description of their response to the scene of an ongoing crisis – a mass shooting with a gunman inside an occupied office building.

Officer Collins testified that he responded to a radio call of a gunman at the Jewish Federation, and that numerous people had called 911 saying that they had been shot. 26RP 53. The police radio broadcast was that "a gunman was loose and holding hostages and basically being an active shooter, which means he

was hunting for people and shooting people as he found them." Id.

After hearing this broadcast, Collins went to the scene.

When Officer Collins went inside, he saw a dead woman (Waechter) on the landing of the stairs, with a major gunshot wound to her head. 26RP 74. Later, he described assisting the other victims, including this statement:

As we were bringing the women down the stairs, obviously the woman that had been executed was still lying on the stairs on the first landing[,] so I was basically having them either shut their eyes or look up, because you basically had to - she had drained out a lot of blood and brain matter, so I was trying to have them look up so that they wouldn't see it.

26RP 77-78. Haq did not object at the time, but the following day he did say it caused him some concern. 27RP 3. The court added the word "execute" to those the witnesses were not permitted to say. 27RP 4. Haq did not ask to strike the word or ask for a curative instruction. 27RP 3-4.

Officer Pasternak testified that he is a member of the SWAT unit and heard about the shootings on the radio, which was "on fire." 27RP 5, 8. He described preparing to go inside the building, considering the situation as one involving an "active shooter," who normally is well armed, has a good plan that occasionally includes their own death, and who will continue to look for and shoot people

randomly until there is some intervention. 27RP 15. Pasternak had no facts about the shooting incident at this time and Haq already had surrendered, but police were entering the building to look for other gunmen. 27RP 15-17.

The officers' testimony was not improper opinion as to guilt. The witnesses were police officers, who described the nature of their response to a mass shooting at an organization that was a possible terrorist target. They testified to the basic information they received about the shooting as it was occurring, and the general assumptions that they made about the shooter based on the information available. Many witnesses testified that the scene was chaotic, and two of the witnesses testified that the police received at least some information that turned out to be incorrect (that there was a shooter on the roof of a nearby building). 27RP 34-35, 63. Neither Collins nor Pasternak was involved in any investigation of the incident after their response at the scene. Neither saw any portion of the shooting or met Haq.

Finally, the defense did not dispute that Haq shot multiple victims inside the Jewish Federation, including everyone he saw after he reached the reception area. He did not dispute that he pursued the injured Pamela Waechter as she attempted to flee and

shot her in the head, killing her. Referring to the unidentified shooter as an “active shooter” did not convey any opinion about Haq’s ability to form the mental states at issue or about his insanity defense. Referring to a person who had been shot in the head and chest as “executed” was not an unreasonable characterization and because the word was used by an officer who knew nothing about how the shootings occurred, would not have been understood as a comment about Haq’s mental state when he killed Waechter.

Even if the testimony was an improper opinion as to guilt, Haq has not established that it was manifest error. Admission of testimony as to a defendant’s guilt, without objection, is not necessarily manifest constitutional error. Kirkman, 159 Wn.2d at 936. When a witness does not expressly state his or her belief in the defendant’s guilt, the testimony does not constitute manifest constitutional error. State v. Warren, 134 Wn. App. 44, 55, 138 P.2d 1081 (2006), aff’d on other grounds, 165 Wn.2d 17 (2008).

The failure of the defense to object to these statements indicate that they did not believe that they were unduly prejudicial. State v. Swan, 114 Wn.2d 613, 661, 790 P.2d 610 (1990); State v. Miller, 66 Wn.2d 535, 537-38, 403 P.2d 884 (1965). Haq in fact

developed Pasternak's testimony about the nature of "active shooters" on cross-examination. 27RP 40-42. Sergeant Coomes previously used the same term, describing an "active shooter situation" as a type of situation that police have been trained to respond to. 26RP 83-84. There was no objection to that testimony either. The witness following Pasternak was another SWAT team member, who testified that the general description of the incident led him to believe that there was some planning involved but "that's not something that we knew." 27RP 49.

The jury was instructed that it was the sole trier of fact and the sole judge of the credibility of the witnesses. CP 2088-89. In considering the possible prejudicial effect of opinion testimony, the jury is presumed to follow instructions when there is no evidence that they were confused or unfairly influenced. State v. Montgomery, 163 Wn.2d 577, 595-96, 183 P.3d 267 (2008). The defendant has cited no such evidence in this case.

This preliminary, general testimony about the response to this mass shooting did not convey an opinion about Haq's mental state or his guilt. Because the defendant has not established manifest constitutional error, he has waived this claim.

- b. The Challenged Statement Of Detective Cruise, Which Was Elicited On Cross-Examination And Was Stricken By The Trial Court, Is Not Reversible Error.

Haq argues that a detective's use of the phrase "not acutely insane" during cross-examination, which was stricken by the court, is incurable constitutional error. The use of the word "insane" by non-expert witnesses had been prohibited by pretrial order but its improper utterance was not incurable in the context of the witness's own testimony or the trial as a whole.

Detective Cruise had contact with Haq while he transported Haq from the crime scene to the homicide office, and then spoke to Haq briefly at the homicide office. 30RP 13-30. He described Haq as cooperative, non-combative, coherent, making eye contact, and "quite normal" as Haq was taken to the detective's car immediately after his arrest. 30RP 13. Cruise described Haq's conversation on the way to the office as very coherent and understandable. 30RP 20. Cruise described Haq at the office as speaking very normally, making normal eye contact, and as functionally communicative. 30RP 30.

On cross-examination, Cruise was asked whether Haq's demeanor at the scene seemed normal for a person Cruise

believed had just shot people, and Cruise answered "yes."

30RP 43. The exchange continued:

Q: And when you say normal, do you mean like this where we're just sort of talking with normal voices?

A: "Pretty much, but probably more normal in terms of - I mean I had a sense that he had just committed something atrocious, and he seemed normal in that regard, normal for the situation. I had no idea what may have motivated him to do what he had done at that point, but it was apparent to me that he wasn't acutely insane. You know, I am not a psychologist - - [Defense counsel]: Objection.

A: - - or a psychiatrist - -

The Court: Sustained. Stricken.

30RP 43.

Any use of the word "insane" by persons other than the expert witnesses was enjoined by pretrial orders, on agreement of both parties. CP 8564-65. While Haq appears to suggest that Cruise's use of the word "insane" was the fault of the prosecutor for not properly instructing the witness about the prohibition, the prosecutor assured the court at the time that she had done so.

30RP 68. Notably, witnesses called by the defense in their direct testimony provided the jury with information that it was entirely prohibited from hearing: a reference to the case as a capital case, a reference to the prior trial, and a reference to the advice Haq was given (actually by his attorneys) not to reveal personal information.

35RP 60; 37RP 160; 42RP 32-37. There can be no guarantee of a perfect trial when human beings are involved. State v. Johnson, 60 Wn.2d 21, 29-30, 371 P.2d 611 (1962). The comment by Cruise was an effort to answer a question repeatedly pursued on cross-examination, not elicited by the prosecutor. When a pretrial order is violated, a party may object and have the answer stricken, as was done here.

The jury is presumed to follow the court's instruction to disregard stricken testimony. State v. Russell, 125 Wn.2d 24, 84, 882 P.2d 747 (1994), citing Swan, 114 Wn.2d at 661-62. The trial court also informed the jury at the beginning of the trial, mid-trial, and in its written instructions that it should disregard any evidence that was stricken. 24RP 5; 41RP 47; CP 2088. While a statement that is irrelevant and inflammatory may be so inherently prejudicial that a fair trial is impossible<sup>29</sup>, this reference is not such an inflammatory statement in the context of the entire trial.

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<sup>29</sup> E.g., State v. Miles, 73 Wn.2d 67, 71, 436 P.2d 198 (1968) (testimony that the defendant was implicated in another robbery similar to the charged crime).

c. The Expert Opinion Testimony Of Dr. Reus  
And Dr. Wheeler Was Properly Admitted.

Haq claims that comments made by Dr. Reus about Dr. Wheeler's report were impermissible opinion testimony but offers no reason that those comments would be considered constitutional error. While the comments probably were irrelevant, Haq did not object in the trial court and thus has waived any nonconstitutional objection. RAP 2.5(a)(3).

The testimony of Dr. Reus and Dr. Wheeler was properly admitted. "Testimony in the form of an opinion or inferences otherwise admissible is not objectionable because it embraces an ultimate issue to be decided by the trier of fact." ER 704; see, e.g., Mason, 160 Wn.2d at 932 (2007) (presumptive death certificate in no-body murder). While Haq's state of mind was an ultimate issue, the expert testimony was admitted specifically to address that issue.

During preliminary testimony, Dr. Reus testified that he did not know Dr. Wheeler but had been given Dr. Wheeler's report to review. 44RP 109. He went on to state:

I was struck really by its beauty in how outstanding a report I thought it was. It was a 49-page report that was incredibly detailed and informative and - you know, I thought remarkable in its detail and logic.

44RP 109-10.

There is no legal support for the proposition that a comment about the quality of another expert's report constitutes an improper opinion as to the defendant's guilt that would deprive him of a fair trial. There must be a nearly explicit statement as to an ultimate issue of fact for improper opinion testimony to be manifest error. Kirkman, 159 Wn.2d at 936. The compliment about Dr. Wheeler's report is not even close to a comment about an ultimate issue of fact and is not manifest constitutional error.

Further, the jury was instructed that it was the sole judge of the credibility of the witnesses. CP 2088-89. It is presumed to have followed the court's instructions to that effect. Kirkman, 159 Wn.2d at 928.

Haq next claims that most of the testimony of Dr. Reus was improper opinion testimony because Dr. Reus described facts in evidence that supported Dr. Reus's conclusion that Haq had the capacity to form intent and to premeditate and that Haq was able to understand the nature and quality of his acts and to tell right from wrong. Counsel objected only to one statement, that Haq was

"shooting I think with intent at - " and that was immediately stricken.

45RP 29. The court then gave a curative instruction:

Ladies and gentlemen, before you stepped out, I granted the defense objection and struck the testimony as to whether or not Dr. Reus concluded that Mr. Haq acted with intent or not. I did that because witnesses, experts or otherwise, are not allowed to testify as to whether Mr. Haq actually premeditated or formed any specific mental state. That's a question reserved solely for the jurors in this case. Instead an expert's testimony is limited to whether a defendant has the capacity or ability to form a specific mental state.

45RP 35-36.

The nature of expert testimony is to express an opinion and to explain how the facts in the case support that opinion. This was not impermissible opinion because it related to ultimate facts - that was the purpose of the testimony. ER 704. The court explicitly allowed the experts to testify to Haq's capacity to form mental states. CP 1910, 8567.

Notably, Dr. Missett also testified at length about specific facts before and during these crimes, and how they supported his ultimate opinions, based on his own conclusions as to Haq's state of mind. For example, Dr. Missett opined as to the significance of Haq's statements during the 911 call. 41RP 80-125. He testified that when Haq said he shot people, that is evidence that Haq did

not go there to shoot them. 41RP 85. Dr. Missett testified that when Haq said he did not care that the injured woman he held at gunpoint needed an ambulance, it was not that Haq was evil, but was emotional blunting. 41RP 91-92.

The claim that Dr. Reus reinforced the stricken testimony is based on a statement that would fall outside the court's order. The statement is: "I think that he understood [what he was doing] at the time." 45RP 37. That would refer to understanding the nature and quality of his acts, not the existence of a particular mental state. In any event, defense counsel objected and that phrase was stricken.

Haq objects to what he characterizes as comments from both experts regarding Haq's credibility. He cites Dr. Reus's testimony that he did not "place much credence" in Haq's later statements that he was going on a mission and had heard the words "awesome" and "murder" during the shootings. That testimony does not appear at the location cited in the record. Six pages earlier, however, Dr. Reus was asked what weight he gave to Haq's statement, made in his 2009 interview with Dr. Missett, that the idea "go on a mission" was a statement from God. 12.2RP 43. Dr. Reus responded:

[T]o my mind, the most informative descriptions of mental state come out of observations and reports that are closest in time to the shooting. So the fact that even after extensive mental health assessment of what his mental state was that these statements about what was going on in his mind did not occur until many, many months later after these preliminary interviews. I have to say I did not place much credence on - - because as I mentioned, the story became more elaborated as to what was going on in his - - mind as time went by.

45RP 43-44. The significance of Haq's evolving reports of his mental state was an appropriate subject for the experts to address. It can hardly been interpreted as a nearly explicit statement as to Haq's guilt.

Haq also cites statements regarding his credibility from Dr. Wheeler's testimony that are not at the location cited and the State has been unable to locate. App. Br. at 103 (could not take at "face value," "retroactive rationalization"). At the cited location, Dr. Wheeler is not talking about Haq, but is describing the importance of knowing the facts about the criminal incident alleged in order to evaluate the credibility of a person being evaluated.

46RP 121-22.

Moreover, defense expert Dr. Missett testified that when Haq's description of his state of mind included alleged delusions about God that were not mentioned until months and years after the

events at issue, it may have been "a way of either rationalizing it or trying to excuse it to himself or accepting less responsibility." 43RP 82-83. Dr. Missett testified that "It could have been a dream, it could have been a rationalization or a wish. It also could be a fabrication on his part to help his insanity claim." Id. Under these circumstances, Haq cannot show how similar statements of the State's experts caused him the actual prejudice that is necessary to establish manifest constitutional error.

The final claim of improper opinion as to guilt is as to Dr. Wheeler's explanation of the significance of Haq's report that when he "saw the dead woman on the way out, [he] had the word 'murder' in [his] head." 47RP 134-35. In a lengthy response, Dr. Wheeler explained that it was difficult to know what it meant, that it could have been a thought or self-talk by Haq, or it could have been a hallucination, but "It certainly was an accurate characterization of what had happened." 47RP 134-35. Again, there was no objection. Haq used the word "murder" in asserting that he heard it when he stepped over Waechter's body to surrender to the police. Id. Dr. Wheeler had no other option but to explain the significance that word had to his opinion that Haq was not delusional.

All of the testimony challenged was proper opinion testimony. It was testimony relating to an ultimate issue - Haq's mental state - but did not convey the opinion that the witnesses believed that Haq was guilty of the charged crimes. Given defense counsel's readiness to quickly object to the testimony of Dr. Reus as to actual intent, it is clear that defense counsel did not perceive that the remainder of the testimony was outside the scope of the pretrial order regarding admissibility of expert testimony or outside the scope of proper expert opinion testimony. At the least, the failure to object indicates that defense counsel did not believe that this testimony was unduly prejudicial. Swan, 114 Wn.2d at 661.

d. Any Error Was Harmless.

A constitutional error is harmless if the reviewing court is convinced beyond a reasonable doubt that the same result would have been reached in the absence of the error. State v. Deal, 128 Wn.2d 693, 703, 911 P.2d 996 (1996). Any constitutional error in the testimony at issue was harmless beyond a reasonable doubt.

There is no reason to believe that the brief comments by Officers Collins and Pasternak about an unknown shooter would lead the jury to conclude, as Haq claims, that the officers had

determined that Haq was sane when he committed these crimes and that he premeditated the murder of Waechter. Likewise, Officer Collins's description of a woman who had been shot in the head as the "executed" woman could not be considered an opinion as to Haq's mental state when Officer Collins never met Haq or heard any description of the events that occurred. The jury would undoubtedly have been much more focused on the description of her coworkers having to be guided around the brain matter that had been blown from her head than the use of that word.

The objectionable statement by Detective Cruise was immediately stricken. The facts underlying his conclusion were detailed in the remainder of his testimony. Defense counsel tried to suggest that the detective was wrong to call Haq "normal" because Haq had just shot a number of people. 30RP 43. The detective was simply trying to respond to the implication in the question by pointing out that Haq was not overtly irrational. Any reasonable juror would not confuse this testimony with the technical question of insanity.

Although Haq argues that the words used by Cruise were likely to remain in the minds of the jury, in this trial the use of the words "not acutely insane" would hardly stand out. The simple

observation by a lone police officer would not be a remarkable comment in light of the many days of testimony of expert witnesses about Haq's state of mind that day. None of the police witnesses at the scene saw any overt signs that Haq was experiencing delusions, and Cruise's statement that Haq did not appear "acutely insane" is simply another way to express those observations. A Psychiatric Evaluation Specialist who interviewed Haq in the jail 18 hours after the shootings testified that there were no obvious signs of psychosis or mania and that Haq reported no delusions at that time. 39RP 112-3, 123-26, 129-30. Dr. Missett explained that a person who is manic may not be obviously manic and that mania can come on at any time,<sup>30</sup> so Cruise's observation was not inconsistent with the defense theory of Haq's mental state.

There can be no doubt that the jurors who heard exhaustive testimony from experts and cross-examination of those experts would not be swayed by the simple statement of Dr. Reus that he was impressed with Dr. Wheeler's lengthy, detailed report.

The statement of Dr. Reus to which Haq objected in the trial court was stricken and the court's immediate curative instruction specified the limited role of the expert testimony in this case, and

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<sup>30</sup> 42RP 26, 31-32.

the jury's exclusive role in determining the facts. The doctor's testimony about Haq's capacity to form the mental states at issue was properly admitted, and was consistent with the agreement of the parties pretrial that the experts would be permitted to testify to that capacity. The jury received a written instruction that they were the sole triers of fact and that expert testimony was to be considered by them as any other testimony and the jury is presumed to have followed that instruction.

Finally, the two remarks of Dr. Wheeler to which Haq objects did not appear to be prejudicial error to defense counsel at trial as no objection was made at the time. Dr. Wheeler's reference to "murder" as an accurate characterization of what had happened to Waechter would not have affected the jury's ability to fairly determine the issue of the defendant's mental state at the time of these crimes. Haq himself characterized his behavior as murder in a conversation with his parents shortly after the crimes. Ex. 212, Pretrial Ex. 12 at 64.

Dr. Wheeler's reference to the lack of credibility of Haq's delayed report that God told him to go on a mission was echoed by the defense expert and was a subject properly within the role of the experts for the State and the defense who were asked to render

opinions about Haq's ability to understand the nature and quality of his acts on July 28, 2006, and the difference between right and wrong.

There is no doubt that the same result would have been reached in the absence of these alleged errors.

8. DR. REUS'S TESTIMONY THAT HE KNEW OF SPECIFIC PEOPLE WITH MENTAL DISORDERS WHO FUNCTIONED IN RESPECTED PROFESSIONS, STRICKEN BY THE TRIAL COURT, DID NOT DEPRIVE HAQ OF A FAIR TRIAL.

Haq claims that the testimony of Dr. Reus that he knew of specific people with mental disorders who functioned in a few respected professions, which was stricken by the trial court, was unfairly prejudicial because it "improperly implied Dr. Reus's opinion that Mr. Haq was legally sane at the time of the shooting." App. Br. at 105. Haq cannot establish such unfair prejudice for three reasons: Dr. Reus already had testified that people with bipolar disorder, if properly treated, could function at a very high level and that testimony was not objected to or stricken; Dr. Reus properly and explicitly testified that in his opinion Haq did not meet either definition of insanity; and, defense witnesses also testified

that persons with bipolar disorder could function at a high level, including in specific professions. Haq has not established that the judge's decision to strike the testimony and give a curative instruction was not sufficient to ameliorate any prejudice caused by Dr. Reus's reference to specific professions held by some persons with bipolar disorder.

The testimony of Dr. Reus that he knew of persons with these disorders who functioned as professionals, such as a surgeon, a judge, and members of Congress, was part of his description of the range of functioning of people with bipolar disorders. 44RP 125-28. In response to a previous question, he had testified that with treatment, some persons with these disorders can function at a very high level. 44RP 125. Some time after the following question, in response to which Dr. Reus provided examples of specific persons functioning at the reference to specific examples, defense counsel objected to the reference to specific individuals as irrelevant. 44RP 139. The judge disagreed, finding that the testimony was relevant but that it should be stricken because the defense could not inquire about the specific people mentioned due to privacy laws. 44RP 139. Thus, the court struck the reference to the level at which those specified individuals may

function. 44RP 146. The defense agreed to the court's curative instruction that directed jurors to disregard it. 44RP 144.

Defense witnesses previously had testified that persons with bipolar or schizoaffective disorders can function well. Defense witness Dr. McLean had testified that she was treating Haq for bipolar disorder in 1998 and 1999, trying to help Haq stabilize his moods and stay in dental school. 37RP 60, 69. Dr. McLean stated that persons with bipolar disorder or schizoaffective disorder can learn how to handle their illness and have a normal life. 37RP 69-70. Defense witness Dr. Bennett testified that a person can function and be mentally ill but that he believed that Haq would need to be medicated forever. 37RP 40. Defense witness Dr. Dye testified that he has a lot of patients who are very bright, a lot of them engineers and scientists, who have bipolar disorder and they can appear very normal. 34RP 119. Thus, the fact that some persons with these mental disorders could function at a high level was not a matter of dispute in the case.

In any event, the unfair prejudice now claimed by Haq is the implication that Dr. Reus believed that Haq was sane. However, Dr. Reus was properly permitted to explicitly state that opinion, just as Dr. Missett testified to the opposite opinion. 38RP 51-52;

40RP 95; 42RP 85-90, 110-11. Defense counsel specifically asked Dr. Missett, "Do you have an opinion . . . as to whether Mr. Haq was insane at the time of these events?" and Dr. Missett answered that he did, and his opinion was "[t]hat he was." 42RP 109-10. Given Dr. Reus's proper, explicit testimony to his opinion, any implication of his opinion from the stricken testimony is irrelevant.

Finally, the challenged statement was stricken by the trial court. The jury is presumed to follow the court's instruction to disregard stricken testimony. Russell, 125 Wn.2d at 84, citing Swan, 114 Wn.2d at 661-62. The trial court also informed the jury at the beginning of the trial, mid-trial, and in its written instructions that it should disregard any evidence that was stricken. 24RP 5; 41RP 47; CP 2088.

9. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN ADMITTING EXPERT TESTIMONY ABOUT THE RELEVANT DEFINITIONS THAT THE EXPERTS APPLIED IN REACHING THEIR OPINIONS.

Haq claims that the testimony of the State's experts invaded the province of the jury or the judge because the experts explained the legal standards upon which they relied in forming their opinions about Haq's capacity to form intent and to premeditate, and their

opinions about whether Haq's mental state satisfied the definitions of insanity. The experts properly testified as to their opinions -- allowing the experts to provide jurors with the definitions they used to reach their conclusions was necessary to establish the relevancy of their opinions. See, e.g., Ex. 294, pp. 2-5. If the jurors were not informed of the definitions applied by the experts, they could not know whether the experts' conclusions were relevant to the definitions the jury was instructed to apply. Moreover, as the trial court noted, the defense had previously elicited legal definitions from their own expert witness, opening the door to similar testimony from the State's witnesses. 44RP 95-96.

The trial court read instructions to the jury before the trial began, including definitions of intent, premeditation and insanity. CP 1866-67, 1879; 24RP 8. Haq has identified no inaccuracies in the written definitions that were included in each witness's power-point presentation. The prosecutors and the witnesses repeatedly stated that the definitions that they used were provided by the prosecutor to guide their assessments. 44RP 130, 132; 46RP 127-28, 131-32. The jury was reminded that the judge's instructions as to the law would control their deliberations. 44RP 132.

The court's decision to allow the experts to refer to the definitions they used was an evidentiary ruling. Evidentiary rulings will be reversed only for an abuse of discretion. State v. Stenson, 132 Wn.2d 668, 701, 940 P.2d 1239 (1997). Discretion is abused only if its exercise is manifestly unreasonable or is based on untenable grounds or reasons. Id. Evidentiary error is reversible only if "within reasonable possibilities, the outcome of the trial would have been materially affected had the error not occurred." State v. Brockob, 159 Wn.2d 311, 351, 150 P.3d 59 (2006) (quoting State v. Bourgeois, 133 Wn.2d 389, 403, 945 P.2d 1120 (1997)).

While it would be impermissible for the witnesses to testify to their conclusions about what the law is or should be if the legal standard was in dispute, the court did not abuse its discretion in permitting the experts to testify to the legal definitions that they applied, to provide a context for their conclusions. It is difficult to see how the testimony of the witnesses could be relevant at all if the jury did not know what definitions they applied. While Haq now complains that particular paraphrasing of Dr. Reus while discussing his opinions were not accurate, he did not object to that testimony at trial. Any significant inaccuracy in the definitions used would have been fodder for cross-examination.

Even if witness testimony regarding legal definitions applied in forming their opinions could be considered constitutional error in some instances, Haq invited any such error in this case and cannot now complain of it. Patu, 147 Wn.2d at 720-21. Haq elicited testimony from his own witnesses about the legal definitions that they applied. Dr. Missett was asked if he understood “the legal definition of insanity in the State of Washington” and provided that legal definition. 42RP 85. Haq invited any error in the State's experts similarly relying upon legal definitions in their testimony.

10. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION BY EXCLUDING HEARSAY EVIDENCE THAT WAS OF MINIMAL PROBATIVE VALUE.

Haq objects to the trial court's exclusion of testimony by his experts regarding two specific points that he claims bolster their opinions that the antidepressant Effexor could have caused Haq's mood to change from depression to mania, which they opined was his mental condition at the time of these crimes. The trial court's rulings, that a survey article was not admissible because the expert did not rely on it, and that anecdotal reports from unidentified

sources were unreliable and therefore of no probative value, were not an abuse of its discretion.

Evidentiary rulings will be reversed only for an abuse of discretion. Stenson, 132 Wn.2d at 701. Evidentiary error is reversible only if "within reasonable possibilities, the outcome of the trial would have been materially affected had the error not occurred." Brockob, 159 Wn.2d at 351 (quoting Bourgeois, 133 Wn.2d at 403). If grounds for the objection were specified, the claim of error on appeal may only be based on the specific ground stated below. State v. Mak, 105 Wn.2d 692, 718-19, 718 P.2d 407 (1986).

Haq does not argue that the trial court's rulings based on the Rules of Evidence were an abuse of discretion. Haq's claim that the evidentiary rules should have been ignored because exclusion of this testimony deprived him of the ability to put on a defense should not be considered, as he did not raise this objection in the trial court and has not established any actual prejudice by the exclusion of these two minor points. RAP 2.5(a)(3); Kirkman, 159 Wn.2d at 926-27.

The defendant does not have the right to admit all evidence it would like to simply by invoking a claim of deprivation of due

process. The cases cited by Haq involve the complete deprivation of the ability to address a critical issue, not minor evidentiary matters. In one case, the defendant was precluded from offering evidence that another person had repeatedly confessed to a murder. Chambers v. Mississippi, 410 U.S. 284, 93 S. Ct. 1038, 35 L. Ed. 2d 297 (1973). In another, a defendant who asserted an insanity defense could not afford a psychiatrist to support it, and the court refused to appoint any expert. Ake v. Oklahoma, 470 U.S. 68, 105 S. Ct. 1087, 84 L. Ed. 2d 53 (1985). Exclusion of the specific references here cannot be considered a deprivation of due process given the massive amount of evidence presented by Haq on his mental defenses, and the substantial evidence he submitted on this specific point.

In hearings concerning the admissibility of the survey article, the defense conceded that Dr. Missett did not rely on the article in forming his opinions. 41RP 133-35. Haq conceded that there was nothing new in the article, it was just updated research about the propensity of Effexor to induce mania in persons with bipolar disorder. 41RP 135.

The excluded anecdotal evidence of Dr. Julien was completely unreliable. He testified in the hearing as to its

admissibility, that he lectures about the connection between Effexor and tells the people who attend those lectures that if they see “funny behaviors, altered mentation, aggression, agitation, confusion, to consider that as being induced by Effexor until proven otherwise.” 37RP 110. After the lectures, unidentified individuals have approached him and reported that they have seen aggressive behavior in patients given Effexor, though they had not attributed the cause of that behavior to Effexor until Dr. Julien told them about that connection. 37RP 110-11, 114-15.

There was repeated testimony from Dr. Julien, Dr. Missett, and other defense witnesses, that studies showed, and they had observed in their own experience, that sometimes people who have a bipolar disorder and are depressed move into a manic state when they take an antidepressant. 34RP 110-12 (Dr. Dye); 37RP 39-40 (Dr. Bennett); 37RP 75 (Dr. McLean); 37RP 134-35, 137, 150-52 (Dr. Julien); 39RP 158-60, 40RP 117-19, 41RP 63, 41RP 130-32, 42RP 9-17 (Dr. Missett). The State's psychiatrist did not dispute this point. 44RP 164-67; 45RP 65.

The point that antidepressants could induce mania in some bipolar individuals was made repeatedly through other testimony and was conceded by the State. The court did not abuse its

discretion in excluding two specific items relating to that point, and Haq was not deprived of his right to present a defense.

11. THE EVIDENCE SUPPORTING HAQ'S  
CONVICTION OF MALICIOUS HARASSMENT  
WAS OVERWHELMING.

Haq challenges the sufficiency of the evidence supporting his conviction of malicious harassment but effectively concedes the evidence was sufficient. His argument is based on the theory that there was no evidence that Haq was motivated by religious bigotry. His argument fails: there is no such element necessary to prove the crime and there was overwhelming evidence that Haq targeted and attacked the Jewish Federation and its employees because of his perception of their religion.

The jury was instructed on one means of committing malicious harassment, causing physical injury:

(1) A person commits the crime of malicious harassment if he or she maliciously and intentionally commits one of the following acts because of his or her perception of the victim's ... religion ... :

(a) Causes physical injury to the victim or another person;

...

(3) It is not a defense that the accused was mistaken that the victim was a member of a certain ... religion . . . .

RCW 9A.36.080; CP 2125, 2126. As the jury was instructed, "[m]alice and maliciously mean an evil intent, wish, or design to vex, annoy, or injure another person." RCW 9A.04.110(12); CP 2127. A person acts intentionally when he or she acts with the objective or purpose to accomplish a result which constitutes a crime. RCW 9A.08.010(1)(a); CP 2100.

When there is a claim that evidence is insufficient to support a conviction, the evidence is reviewed in a light most favorable to the State, and all reasonable inferences that can be drawn from the evidence must be drawn in favor of the State and interpreted most strongly against the defendant. State v. Salinas, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). A trier of fact may infer a mental state where it is a logical probability. State v. Delmarter, 94 Wn.2d 634, 638, 618 P.2d 99 (1980).

A conviction will be affirmed if any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. Salinas, 119 Wn.2d at 201. The trier of fact is the sole arbiter of credibility determinations and those credibility decisions cannot be reviewed on appeal. State v. Camarillo, 115 Wn.2d 60, 71, 794 P.2d 850 (1990).

Haq concedes that there was sufficient evidence for the jury to find that Haq injured the employees because of his perception they were Jewish. App. Br. at 118. Those facts establish the elements of malicious harassment. Haq offers no support for his suggestion that a political grudge against a protected group would be insufficient to establish that the victim was targeted because of membership in the group.

Moreover, there was overwhelming evidence that Haq targeted the Jewish Federation and its employees because of his perception of their religion. The first thing Haq said when he got into the Jewish Federation office was that he was upset about the Jews and what they were doing in Lebanon. 25RP 35. Inside, he talked about being angry with Jewish people. 25RP 97, 100. When he talked to the 911 operator, he complained about Jewish officials and Jewish media, and Muslims being pushed around in the Middle East. Ex. 7 at 4-7, 10; Ex. 1 (track 4). He told police that this was "about the Jews." 30RP 18, 29.

In phone calls from the jail, Haq said that his family should be proud of him because he "got the Jews," who were the enemy. Ex. 212, Pretrial Ex. 12 at 10-12. In another call, he repeated many times that he was a Jihadi and said "These people are guilty"

because they were supporting Israel, the enemy of Islam. Id. at 33, 37. Haq said that maybe the woman he killed deserved to die because she was an Israeli collaborator. Id. at 48-49.

It could hardly be clearer that Haq targeted the victims because of their perceived religion.

12. BECAUSE NO ERROR OCCURRED, THE DOCTRINE OF CUMULATIVE ERROR DOES NOT APPLY.

Cumulative trial errors may deprive a defendant of a fair trial. State v. Coe, 101 Wn.2d 772, 789, 684 P.2d 668 (1984). The cases in which courts have found that cumulative error justifies reversal include multiple significant errors. E.g., Coe, 101 Wn. 2d 772 (discovery violations, three types of bad acts evidence improperly admitted, impermissible use of hypnotized witnesses, improper cross-examination of the defendant); State v. Alexander, 64 Wn. App. 147, 822 P.2d 1250 (1992) (improper hearsay as to details of child sex abuse and identity of abuser, court challenged defense attorney's integrity in front of jury, counselor vouched for credibility of victim, prosecutor misconduct).

No trial error has been shown, so the cumulative error doctrine is inapplicable in this case.

D. CONCLUSION

For the foregoing reasons, the State respectfully asks this Court to affirm Haq's convictions and sentence.

DATED this 24<sup>th</sup> day of March, 2011.

Respectfully submitted,

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**State v. Naveed Haq, No. 64839-0-I**  
**Table of Volumes of Report of Proceedings**

- 1

RP volume - Date(s)

1	August 10, 2006
2	June 14, 2007 and February 28, 2008
3	March 31, 2008
4	April 1, 2008
5	April 2, and April 9, 2008
6	April 10, April 14, and April 15, 2008
7	April 24, 2008
8	April 29 and May 20, 2008
9	July 15, 2008
10	November 19, 2008
11	February 17, April 7, July 9, July 21, August 20, and September 17, 2009
12	June 11, 2009
13	September 28, 2009
14	September 29, 2009
15	September 30, 2009
16	October 1, 2009
17	October 5, 2009
18	October 6, 2009
19	October 7, 2009
20	October 12, 2009
21	October 13 and October 15, 2009
22	October 19, 2009
23	October 20, 2009
24	October 21, 2009
25	October 22, 2009
26	October 26, 2009
27	October 27, 2009
28	October 28, 2009
29	October 29, 2009
30	November 2, 2009
31	November 3, 2009
32	November 4, 2009

**APPENDIX 1**

**State v. Naveed Haq, No. 64839-0-I**  
**Table of Volumes of Report of Proceedings**

- 2

RP volume - Date(s)

33	November 5, 2009
34	November 9, 2009
35	November 10, 2009
36	November 12, 2009
37	November 16, 2009
38	November 17, 2009
39	November 18, 2009
40	November 19, 2009
41	November 23, 2009
42	November 24, 2009
43	November 30, 2009
44	December 1, 2009
45	December 2, 2009
46	December 3, 2009
47	December 7, 2009
48	December 8, 2009
49	December 9, 2009
50	December 10, December 14, December 15, 2009 and January 14, 2010
51	December 11, 2009

**APPENDIX 1**

Certificate of Service by Mail

Today I deposited in the mail of the United States of America, postage prepaid, properly stamped and addressed envelopes directed to the attorneys for the appellant,

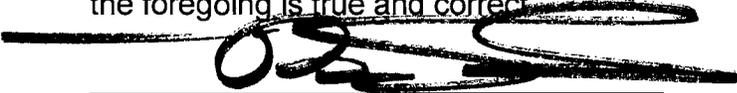
Rita J. Griffith  
4616 25<sup>th</sup> Avenue NE, #453  
Seattle, WA 98105

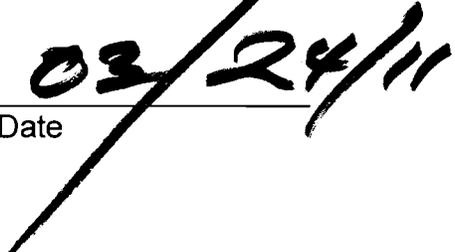
and

Mark Larranaga  
Walsh & Larranaga  
705 Second Avenue, #405  
Seattle, WA 98104-1781

containing a copy of the Brief of Respondent, in STATE V. NAVEED HAQ, Cause No. 64839-0-I, in the Court of Appeals, Division I, 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.

  
\_\_\_\_\_  
Name  
Done in Seattle, Washington

  
\_\_\_\_\_  
Date