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NO. 66229-5-I

IN THE COURT OF APPEALS – STATE OF WASHINGTON
DIVISION ONE

STATE OF WASHINGTON
Respondent,

v.

MICHEL GLEN OAKES,
Appellant.

2013 MAY 13 PM 1:10
COURT OF APPEALS
STATE OF WASHINGTON
DIVISION ONE

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON, FOR SKAGIT COUNTY

The Honorable Michael E. Rickert, Judge

RESPONDENT'S BRIEF

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I. SUMMARY OF ARGUMENT

Mark Stover was a well-known dog trainer who went missing. His body was never found. Oakes had denied being involved when confronted by officers. Michiel Oakes was tried for the premeditated murder. Oakes testified claiming he went to Stover's house to talk to him and Stover had shot at him first. Oakes said he responded by taking Stover's gun away and shooting Stover. Oakes admitted to shooting Stover, cleaning up Stover's house, disposing of the body and firearm and lying to police.

Oakes appeals from the conviction contending the trial court erred in denying the admission of a few facts known to his girlfriend about the victim to support his self defense claim, the jury was required to return a verdict of guilty on his self-defense claim, the trial court should have suppressed a bag he threw away in the presence of an officer, the trial court erred in admitting a previously suppressed text to contradict Oakes assertion, the trial court erred in denying admission of statements of the victim as hearsay, the appearances in a district court upon his arrest violated his right to an open public trial and his right to counsel and the trial court erred in denying a motion for a new trial based upon the juror tweeting.

Oakes claim of self-defense was predicated upon the claim that Stover used deadly force first and that he turned Stover's own gun on him.

However, Oakes was able to get the trial court to admit past conduct of Stover to explain the reason why Oakes was dealing with Stover and why he prepared for the meeting the way he did. The trial court's decision to suppress two alleged confrontations remote in time and not established to have been known to Oakes was not an abuse of discretion. Given the jury was free to disbelieve Oakes' claim of self-defense, and there was sufficient evidence of premeditation, a rational trier of fact could have found Oakes guilty. The trial court also did not err in suppressing a bag that Oakes took out of his vehicle after officers were present to secure the vehicle and Oakes knew he was a suspect when he threw the bag away from the house where he was visiting. The trial court also did not err in admitting a text Oakes had received because even though previously suppressed, it impeached Oakes' denial that he expected to be paid for his actions. The trial court did not abuse its discretion in denying statements of the victim as hearsay. The preliminary matters on initial arrest were not hearings relating to trial process and any error in closure does not merit a new trial. Those hearings meant to assure access to counsel were not a violation of the right to counsel. Furthermore, the trial court did not abuse its discretion in denying a motion for new trial based upon a juror's use of social media, where it was not done during trial and no information or opinions about the trial were made.

Finally, any error would have been harmless beyond a reasonable doubt given the claim of self-defense and the over-whelming evidence of a planned, concealed homicide.

II. ISSUES

1. Did the trial court err in denying the admission of facts not shown as known to the defendant which were too remote in time?
2. Where the defense of self-defense was predicated upon the fact the victim shot at the defendant first, are the facts remote in time relevant to the claim of self-defense?
3. Where there was significant evidence of a planned homicide, is a jury free to disbelieve a defendant's claim of self-defense?
4. When the defendant tossed away a bag from his vehicle, which officers were present to secure, did the trial court err in finding there was no expectation of privacy in the area away from a house where the defendant was a social guest?
5. Did the trial court err that there were sufficient exigent circumstances to allow seizure of the bag given the defendant's apparent attempts to actually conceal evidence of a crime given the location and timing of the disposal?

6. Did the trial court err in admission of texts of the defendant which impeached the defendant which had been previously suppressed?
7. Where the texts which had been suppressed cumulative of statements of the person who had received the texts and related their content?
8. Did the trial court abuse its discretion in admission of statements of the deceased as hearsay?
9. Where the preliminary matters in district court were for the magistrate to evaluate probable cause, was the proceeding an adversarial proceeding which was part of the trial process?
10. Was a courtroom closed where it could be accessed by members of the public at early morning hours by buzzing an intercom for access into the building?
11. Where the preliminary matters in district court were to assure that a defendant was seeking counsel, was there violation of the right to counsel by having the hearings?
12. Where a juror used social media during the trial but did not provide any information about the case or discuss the case in any

way, was there a prejudicial violation of the trial court's order not to use the internet?

13. If any error occurred, was the error harmless beyond a reasonable doubt given the overwhelming evidence of the planned attack and concealment, the defendant's ability to place the victim's past with his ex-wife before the jury to support the self defense claim and where the self-defense claim was predicated on the fact that the victim shot at him first?

III. STATEMENT OF THE CASE

The State provides a statement of the case in sharp contrast to the defense statements. The defense focuses solely on Oakes' self defense claims relying on testimony from Oakes to describe the shooting and the victim's ex-wife Linda Opdycke. The defense omits reference to the extensive facts surrounding Oakes' preparations in advance and cover-up after he shot Mark Stover.

The State is attaching a full statement of the trial testimony as Appendix A providing precise citations to the record. The body of the argument section of this brief includes precise citations to the record for relevant facts to the issues addressed in each section.

1. Summary of Trial Testimony.

Theodore Mark Stover was a well-known dog trainer. Stover went missing on October 28, 2009. Known as a person who was always punctual and kept appointments, Stover missed a number of appointments and his girlfriend and employees were worried. 9/29/10 RP 10, 47-8. The employees working at the dog kennels had seen a person that day wearing Stover's signature hat loading things into his station wagon from his house before leaving quickly at about 8:00 a.m. 9/29/10 RP 68-70. They did not actually see Stover. 9/29/10 RP 72-3, 209.

Around noon, two women saw a person loading what appeared to be a large roll of plastic from a station wagon into a black Suzuki SUV behind a grange building about a mile from Stover's house. 10/1/10 RP(2) 51-56. They saw a single man in the SUV. 10/1/10 RP(2) 56. The station wagon was behind a chain behind a grange building and the women were concerned about trespassing given one woman was the grange master. 10/1/10 RP(2) 53, 64-6. They saw the man drive away in the SUV and took down the license plate to give to deputies. 10/1/10 RP(2) 59-60, 75-6. The responding deputy met the women and found the black SUV on the road a short distance away. 10/4/10 RP 87. The deputy stopped the SUV. 10/4/10 RP 88-9. The driver was Michiel Oakes. 10/4/10 RP 89. He said he was lost and had

stopped at the grange to use his phone. 10/4/10 RP 90-3. The deputies could not see well into the back of the vehicle, but it appeared to have clothes and camping gear inside. 10/4/10 RP 93. The deputies asked Oakes to move the station wagon and warned him about trespassing. 10/4/10 RP 91. He was allowed to leave. 10/4/10 RP 92-33.

Oakes called his ex-wife at about 12:30 p.m. and arranged to meet in Everett. 10/1/10 RP(2) 99-100. At the meeting Oakes told his ex-wife that he was in trouble and was facing a felony and ten to fifteen years. 10/4/10 RP 18-9. He said he had done a job that all went wrong, something that was not planned happened, the people who were helping him were not going to help him and that he was all on his own. 10/4/10 RP 18-9. He went on to say that two old ladies had called him in and he had been pulled over by the Sheriff and this was bad because his name was associated with the area. 10/4/10 RP 19-21. He said he needed to leave the area. 10/4/10 RP 21. Oakes left his ex-wife at about 3:30 or 4:00 p.m. 10/4/10 RP 25.

The next day Stover was reported missing. 9/29/10 RP 82. Officers arrived and found blood stains both outside and inside the house. Stover's protection dog was found and had been shot with three bullets, but was alive. 9/29/10 RP 115-9. Inside the house, in a hallway near a bathroom blood stains were located on the walls and floor. 9/30/10 RP 76. There was

evidence of smears and the strong smell of bleach showing attempt to clean up the scene. 9/30/10 RP 76, 115. Months later, .22 shell casings were found outside the house, near the back entry door. 10/4/10 RP 105-9.

On the day Stover was reported missing, deputies went looking for Oakes, his vehicle and Stover's station wagon. 9/30/10 RP 123. Officers found out that Oakes was in Winthrop at the house of Linda Opdycke, Stover's ex-wife. Surveillance video from her house showing Oakes left Opdycke's home on October 28, 2009, at 2:34 a.m. and returned at 11:31 p.m. 10/1/10 RP 71-78. Other surveillance videos from that day were located showing his actions in between. Oakes arrived at Walmart in Mount Vernon at 5:16 a.m. where he purchased anchor rope, camouflage clothing, shin guards and ankle weights before leaving at 5:37 a.m. 10/6/10 RP 11-20. Videos from the Mount Vernon Lowe's showed Oakes arriving at 9:43 a.m. purchasing a pair of bolt cutters and leaving the store. 10/4/10 RP 201-5. He returned them later at 4:51 p.m. 10/4/10 RP 201-5. The station wagon was found at a casino parking lot three miles from Stover's house. 9/30/10 RP 123. A surveillance video from the casino shows that the vehicle was driven there at 6:30 p.m. on October 28, 2009. 10/11/10 RP 88.

Okanogan deputies were sent to secure Oakes' vehicle pending service of a search warrant. 10/4/10 RP 127-8. Oakes was contacted with

Opdycke inside the house. 10/4/10 RP 129-30. At one point, Opdycke distracted one of the two officers and Oakes slipped out to his SUV. 10/4/10 RP 139-40. Oakes removed a plastic bag from the SUV and when confronted about what he was doing, tossed the bag away, claiming it was garbage. 10/4/10 RP 156. The bag was recovered and found to contain receipts, carpet pieces and a .22 caliber semi-automatic handgun. 10/4/10 RP 167. The casings from outside Stover's house showed being fired by the handgun. 10/6/10 RP 105.

At trial Oakes first contended that the State could not prove that Stover was dead or that Oakes committed the offense. After the motion to dismiss was denied at the close of the State's case, Oakes pursued a self-defense claim.

Oakes claimed he had been contacted by Stover to obtain wedding photographs of Opdycke and Stover. 10/12/10 RP 143. Oakes claimed he went to Stover's house to tell him that he could not locate certain wedding photographs over which he claimed Stover was still obsessing. 10/12/10 RP 189. Oakes claimed Stover opened the door allowing him inside, said virtually nothing, then shot at Oakes. 10/12/10 RP 198-204. Oakes said he responded by turning Stover's own gun back on him, shooting him dead. 10/12/10 RP 204. Oakes claimed he then cleaned up the scene, disposing of

the body, and moving Stover's car so that he could get some more time with his children before being arrested. 10/12/10 RP 217. Oakes claimed his preparations in advance were to try to be able to get away if Stover attacked him. 10/12/10 RP 185. Oakes claimed he knew all of Stover's past history of threatening behavior from information related to him by Opdycke and by information contained in a file provided by Opdycke. 10/12/10 RP 118-9.

Linda Opdycke, who had refused to be interviewed prior to trial, was interviewed during trial and later testified. She testified to her relationship with Stover and his activities after the break-up which she related to Oakes.

2. Statement of Procedural History

On October 29, 2009, Michiel Oakes was arrested. CP 15.

On October 30, 2009, Oakes appeared before a magistrate in Skagit County District Court, advised he was under arrest for investigation of murder and that he had the right to an attorney and bail was set at \$500,000. CP 14, 922. Oakes was charged by complaint within seventy-two hours with second degree murder and bail was set at \$5,000,000. CP 20, 922. On November 2, 2009, Oakes appeared in Skagit County District Court. CP 20, 923. Oakes was again advised of the crime he was facing and the bail amount. CP 20, 923.

On February 13, 2009, Michiel Oakes was charged in Superior Court with Premeditated Murder in the First Degree for the death of Theodore Mark Stover on or about October 28, 2009. CP 1-2.

On September 24, 2010, the trial court conducted motion hearings pursuant to CrR 3.5 and CrR 3.6.¹

On September 27, 2010, the case proceeded to trial. 9/27/10 RP 3. After two days dealing with motions and jury selection, the testimony started on September 29, 2010. Testimony was taken over the course of 13 days over three weeks. The defendant testified claiming he was shot at first by Stover, disarmed Stover and killed Stover with Stover's own gun. 10/12/10 RP 201, 204. The victim's ex-wife, Linda Opdycke had refused to be interviewed before trial. However, towards the end of the State's case, she relented in being interviewed. 10/8/10 RP 13. She testified for the defense. 10/13/10 RP 227 – 10/14/10 RP 143.

On October 22, 2010, the jury returned a verdict finding Oakes guilty of premeditated murder in the first degree. CP 670.

On November 30, 2010, the trial court heard and denied post-trial motions filed by Oakes. 11/3/10 RP 3, 27-52. The trial court then proceeded

¹ The State will refer to the verbatim report of proceedings by using the date followed by "RP" and the page number. The transcript of October 1, 2010, has two portions. The first portion is referred to as "10/1/10 RP" and the second as "10/1/10 RP(2)."

to sentence Oakes to 320 months in prison for premeditated murder in the first degree. 11/3/10 RP 119.

On November 20, 2010, Oakes filed a notice of appeal. CP 811-22.

On July 26, 2012, the trial court heard post-trial motions related to the courtroom closure and a juror using social medial during trial. 7/26/12 RP 3-89. The trial court denied those motions for new trial. CP 822-5, 926-8. On September 21, 2012, Oakes filed a notice of appeal from those rulings. CP 929-37.

IV. ARGUMENT

1. Self defense was properly applied in the trial court.

Oakes contends the trial court placed an improper “temporal” limitation on the admission of certain past conduct of the victim related to Oakes by his girlfriend, the victim’s ex-wife, Linda Opdycke. Brief of Appellant at pages 23, 27.

The State contends Oakes was able to testify about numerous statements and records provided by Opdycke about past conduct of the victim. Furthermore, Oakes’ testimony established self-defense based upon his claim that Stover shot at him first. Oakes also offered the information through Opdycke rather than his own assertion as to knowledge.

The trial court properly instructed the jury on self defense.

It is a defense to a charge of murder that the homicide was justifiable as defined in this instruction.

Homicide is justifiable when committed in the lawful defense of the slayer:

1) the slayer reasonably believed that the person slain intended to inflict death or great personal injury;

2) the slayer reasonably believed that there was imminent danger of such harm being accomplished; and

3) the slayer employed such force and means as a reasonably prudent person would use under the same or similar conditions as they reasonably appeared to the slayer, taking into consideration all the facts and circumstances as they appeared to him, at the time of and prior to the incident.

The State has the burden of proving beyond a reasonable doubt that the homicide was not justifiable. If you find that the State has not proved the absence of this defense beyond a reasonable doubt, it will be your duty to return a verdict of not guilty.

CP 64, 11 Wash. Prac., Pattern Jury Instr. Crim. WPIC 16.02 (3d Ed).

The justification of self-defense must be evaluated from the defendant's point of view as conditions appeared to her at the time of the act. State v. McCullum, 98 Wn.2d 484, 656 P.2d 1064 (1983).

State v. Allery, 101 Wn.2d 591, 594, 682 P.2d 312, 314 (1984).

- i. The defendant was allowed to testify extensively as to his knowledge of the past acts of the victim to establish why the defendant acted a certain way.**

Oakes testified he had a meeting with Linda Opdycke at the end of July 2008, where she asked Oakes if he would help her get someone to look into her stalking claims. 10/12/12 RP 81. He next met with her in August

2008 at her home where she provided Oakes with photographs, videos, and audio tapes regarding her stalking situation. 10/12/12 RP 82. Oakes identified exhibits 627 through 653 and 655 through 662 as documents that he had reviewed in the file from Opdycke. 10/12/12 RP 85-89. She also showed Oakes a CD or DVD showing a man approaching her home, and audio recordings of Stover left for Opdycke. 10/12/12 RP 90-1.

The trial court expressed concern that just because Oakes knew something that Opdycke told him did not make the fact relevant. The facts had to suggest some sort of danger or that Mr. Stover was dangerous. 10/12/12 RP 94. After an extended discussion about the admission of the exhibit, the trial court indicated that it anticipated that defense would be asking Oakes about statements that Opdycke made and that a limiting instruction would be appropriate.

As far as when we're going to read that, we could read it at any time probably in the very near future because it sounds like you're going to start asking Mr. Oakes questions about conversations he had with Ms. Opdycke wherein Ms. Opdycke was relating to Mr. Oakes her issues with Mr. Stover that suggest a dangerous propensity.

...

It goes to the state of mind. At that point in time the jury needs to know the purpose that evidence is not for the proof of the matter asserted or not to prove that Mr. Stover was a bad guy or did these bad things or any of that.

It goes to Mr. Oakes' state of mind and what he believed at the time and what he was aware of regarding the alleged behavior that would lead to his awareness, that would

lead him to a reasonable believe that he was in imminent danger at the time on October 28th of bodily harm from Mr. Stover and therefore it plays into self defense.

10/12/12 RP 105. Defense counsel agreed to the instruction: “We anticipate that and have no objection to it.” 10/12/12 RP 105. The trial court appeared to be evaluating how Oakes would testify as to the self-defense prior to his testimony.

Oakes went on to testify about things that Opdycke had done to protect herself from Stover. 10/12/12 RP 118-9. Counsel then asked Oakes:

If you can characterize generally what Ms. Opdycke told you about her fear of Mr. Stover, and then I’ll get into some specifics.

10/12/12 RP 119. Oakes related her description of Stover as obsessive and highly intelligent and that she was concerned that his mental state would deteriorate and that he would snap one day and pursue a violent course of action with her. 10/12/12 RP 119. He gave Opdycke’s description about Stover’s entry into her home without permission on three occasions and what she believed was him watching her from outside on another day. 10/12/12 RP 120-2. He described how Opdycke said in January or February of 2008 that Stover had approached her and discussed how they need to get back together and exposed himself to her and tried to touch her. 10/12/12 RP 122. Oakes testified about Opdycke’s belief that Stover tapped her phone.

10/12/12 RP 123. Opdycke also described to Oakes how she had a relationship with a long time friend of Stover's which Stover found out about. 10/12/12 RP 124-5. Opdycke believed that Stover had been watching them at her residence. 10/12/12 RP 125. Oakes described how Opdycke told him that Stover had gone through her garbage. 10/12/12 RP126-7. Oakes testified he was aware of a protection order against Stover and that he had been convicted of stalking of Opdycke. 10/12/12 RP 128. Opdycke told Oakes that because of Stover, she wore a bullet proof vest. 10/12/12 RP 129. Oakes claimed he started carrying a rifle in his vehicle at all times because of Stover. 10/12/12 RP 130. Oakes said that Opdycke told him that two old friends of Stover had ceased their relationship with him because of Stover's threatening behavior. 10/12/12 RP 133.

At one point Oakes was asked if Opdycke told him about Stover's aggressiveness with trespassers on Kiket Island. 10/12/12 RP 134. The prosecutor made an objection. 10/12/12 RP 134. There was a sidebar conference and Stover's counsel went on to ask Oakes when Opdycke left Kiket Island. 10/12/12 RP 134. Oakes answered in the spring of 2007. 10/12/12 RP 134. Oakes was not further questioned about Kiket Island and no record was made about the court's ruling. Oakes went on to describe that Opdycke said Stover was always armed with at least one firearm. 10/12/12

RP 135. Oakes went on to say he had read a letter that Opdycke had written to the judge who heard the stalking case. 10/12/12 RP 126. Opdycke expressed to Oakes her concerns that Skagit County authorities would not help her. 10/12/12 RP 136. Oakes described all the firearms that Opdycke kept around the residence in Winthrop. 10/12/12 RP 138-40.

Oakes went on to describe five meetings he had with Stover before October 28, 2009, all supposedly related to the wedding photographs. 10/12/12 RP 143. Despite those occurrences and the information from Opdycke, Oakes went to contact Stover at his house providing a description of the incident. 10/12/12 RP 180.

However, once Oakes testified the true basis for self defense became clear. Oakes' claimed Stover shot at Oakes and that Oakes disarmed Stover turning Stover's own gun back on him. The description by Oakes provides more detail.

ii. Oakes' claim of self-defense was based upon Stover shooting him first.

Oakes claimed he parked his vehicle nearby and had scouted a place at a nearby water tower that he intended to go back to if Stover came after him. 10/12/12 RP 185. Oakes admitted the purchases from Wal-Mart in advance of confronting Stover, contending the items purchased were to try to set up a secure place at the water tower. 10/12/12 RP 186.

Oakes contended he was going to the house to tell Stover that he could not get the wedding photographs that Stover wanted. He said he went to the house and Stover opened the door letting him in. 10/12/12 RP 189. He claimed Stover told him to come inside. 10/12/12 RP 192. Oakes testified Stover had Oakes go stand in a washroom and they discussed the pictures. 10/12/12 RP 192. When Stover was told Oakes did not have the pictures, he waved Oakes off and went and put the dog outside. 10/12/12 RP 194. Oakes claimed he started worrying that Stover was “going to get some other people or going to get a gun, or something.” 10/12/12 RP 194. Oakes claimed he saw Stover outside with the dog and Stover was moving his van around. 10/12/12 RP 195. Oakes said he retreated, closed the bedroom door and went back to the washroom and waited. 10/12/12 RP 195. When Stover came back without the dog, he walked right past Oakes to another room. 10/12/12 RP 196. Oakes claimed he stood there waiting for Stover to come back. 10/12/12 RP 196. He claimed when Stover came back, Stover again asked about the pictures and acted very agitated. 10/12/12 RP 196. Oakes said he told Stover there weren’t any pictures. 10/12/12 RP 196. Oakes claimed that at one point when he was in the bathroom, there was a knock on the door. 10/12/12 RP 207. Oakes claimed that Stover came close to him before going back to another part of the house. 10/12/12 RP 197. Oakes

claimed Stover came back two or three minutes later. 10/12/12 RP 198. Oakes said he was in a bathroom with the door open when Stover approached him around the corner with a revolver in his hand. 10/12/12 RP 198. Oakes claimed Stover fired at Oakes from about three feet away, but the bullet struck Oakes' Kevlar vest. 10/12/12 RP 199, 201. Oakes claimed he lunged at Stover as the shot happened. 10/12/12 RP 201. Oakes proceeded to wrestle with Stover, in the process turning the gun on Stover shooting him. 10/12/12 RP 204. He claimed Stover fell down to a position lying in the hall. 10/12/12 RP 204. Oakes said he continued to cover Stover for a minute with the gun before taking off his glove to check for a pulse, finding none. 10/12/12 RP 205. Oakes then tried to figure out what to do. 10/12/12 RP 206. Oakes said Stover wasn't even bleeding and he couldn't see anything to clean up. 10/12/12 RP 206.

Oakes claimed he went outside to Stover's car to turn off the engine. 10/12/12 RP 207. He turned around and Stover's dog was standing not far away menacing Oakes. 10/12/12 RP 207. Oakes drew his .22 handgun shooting the dog a couple of times before it stopped coming towards Oakes and ran off. 10/12/12 RP 208. Oakes said he saw people down the driveway and they should be coming since the shots had just occurred and Oakes' ears were ringing from the shots outside. 10/12/12 RP 209.

Oakes claimed he went back inside and Stover was now bleeding from the face. 10/12/12 RP 209. Oakes claimed at one point Stover's gun fell to the floor, so he put it in Stover's vest. 10/12/12 RP 212. Oakes decided to move Stover into the bedroom, before deciding to take him outside to the station wagon. 10/12/12 RP 211. Oakes drove off, deciding to leave the station wagon at the grange and go to his car. 10/12/12 RP 212. Oakes got the bolt cutters from Lowe's to leave the station wagon at the grange and retrieve his car. 10/12/12 RP 215. Oakes decided not to leave Stover in his vehicle, instead deciding to put him in his vehicle. 10/12/12 RP 216. Oakes claimed he was doing things at that point to buy time to go see his kids. 10/12/12 RP 217. He claimed he went back to the water tower and got the rope and weights. 10/12/12 RP 218. He met up with his ex-wife in Everett before deciding to return to Anacortes. 10/12/12 RP 221. He saw Stover's vehicle still at the grange so he decided to move it to the casino. 10/12/12 RP 222-3. He returned to his car, deciding to drop Stover's body by a dock near the car. 10/12/12 RP 223. He claimed he concealed the evidence, throwing Stover's body, the firearm, the plastic, the camouflage clothing, some carpet and the rope in the water to buy him time to see his kids. 10/12/12 RP 217, 224.

The case of State v. Allery relied upon by Oakes is instructive as to the perceived threat based upon past conduct. In Allery, the defendant testified about past pistol whippings, assaults with knives and beatings from her husband including being hospitalized after being struck with a tire iron. State v. Allery, 101 Wn.2d 591, 592-3, 682 P.2d 312 (1984). The beatings increased and she finally sought a divorce. Id at 593. The defendant initiated divorce proceedings and got a restraining order. Id. On the night in question, she entered her house to find her husband and saw Mr. Allery lying on the couch. Id. He told her “I guess I’m just going to have to kill you sonofabitch.” Id. She went to the bedroom and tried to escape. When she heard a metallic sound like a knife, she loaded a shotgun shell and moved to the kitchen while her husband remained lying on the couch. Id. The court held the instructions were insufficient.

Defendant's theory of the case was that her intimate familiarity with her husband's history of violence convinced her that she was in serious danger at the time the shooting occurred. There was substantial evidence of the history of violence throughout the marriage between defendant and the victim. The jury should have been instructed to consider the self-defense issue from the defendant's perspective in light of all that she knew and had experienced with the victim.

State v. Allery, 101 Wn.2d 591, 595, 682 P.2d 312 (1984). As opposed to experience first-hand with the victim’s acts of physical violence requiring him to take action, Oakes’ claim of self-defense was predicated upon an

actual threat by Stover and actual discharge of a firearm. As opposed to a situation where Oakes is responding to less than deadly force based upon fear, based upon past actions of Stover, Oakes' actions were based upon his description of an actual attempt at physical harm.²

Put in the terms of the juror's evaluation of the evidence, had it believed that Stover had tried to shoot Oakes as Oakes describes, Oakes would have been justified in acting in self defense. Oakes' knowledge of past activities of Stover described to him by Opdycke may have been relevant to his other activities if not too remote in time. But it was not relevant to his claim of self defense on the early morning when he claimed to have gone to Stover's home where the shooting occurred.

iii. The limitation about past conduct of the victim too remote in time was not an abuse of discretion given the nature of the claim of self-defense in this case and the defense agreement.

The age of the past activities of Stover seen by Opdycke which she claimed to have provided to Oakes was addressed by the trial court. The State relied upon State v. Adamo for the position that activities too remote in time can be excluded.

² Oakes' description of the incident rises almost to the level of accident as opposed to self-defense. Although since Stover was "alleged" shooting at Oakes would have permitted to act with deadly force, the State believes addressing the case as self-defense is appropriate.

In State v. Adamo, 120 Wn. 268, 207 P. 7 (1922), the defendant sought to admit past incidents of conduct of the victim. But the court limited the evidence given the remoteness in time.

The appellant offered to prove by one of his witnesses that about the middle of 1916 the deceased, in a quarrel with the witness, made a movement to his hip as if to draw a gun and made threats of violence against the witness, and that such facts were related to the appellant and were known to him prior to the commission of the offense with which he is here charged. The court refused this offer. Generally speaking, we have no doubt that a defendant charged with homicide may show by third persons that they had previously had quarrels with the deceased, and show the conduct of the deceased on those occasions, if such prior occurrence or occurrences were made known to the defendant before the commission of the crime for which he is being tried, because such testimony tends to show the state of mind of the defendant at the time of the killing, and to indicate whether he at that time had reason to fear bodily harm. State v. Ackles, 8 Wn. 462, 36 P. 597; State v. Churchill, 52 Wn. 210, 100 P. 309; 21 Cyc. 961; Sneed v. Territory, 16 Okl. 641, 86 Pac. 70, 8 Ann. Cas. 354.

It does not follow, however, that the court erred in refusing to receive the testimony offered here. The occurrence connected with the offer happened five years before the commission of the offense charged, and we must hold that it is too remote. State v. Farris, 26 Wn. 205, 66 P. 412; State v. Palmer, 104 Wn. 396, 176 P. 547. We do not find any error in the court's ruling.

State v. Adamo, 120 Wn. 268, 269-70, 207 P. 7 (1922). The type of evidence in the present case was similarly remote to the actual events. Furthermore, Oakes' knowledge of what Opdycke told him was only relevant if Oakes recalled the statements.

The admission of relevant evidence is within the sound discretion of the trial court and will not be reversed unless there is a manifest abuse of that discretion. State v. Mak, 105 Wn. 2d 692, 702, 718 P.2d 407 (1986). “Relevant evidence is ‘evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.’ ” Mak, at 702-03, 718 P.2d 407 (quoting ER 401). The trial court may exclude relevant evidence if its probative value is substantially outweighed by the danger of unfair prejudice; such determinations are left to the sound discretion of the trial court. Mak, at 703, 718 P.2d 407.

State v. Smith, 115 Wn. 2d 434, 444, 798 P.2d 1146 (1990).

In the present case, the defense offered that the events they were “relying almost exclusively on” were from incidents from 2006 and on. 10/8/10 RP 30. The trial court held those were not too remote in time. 10/8/10 RP 30-1. The court and defense counsel agreed indicating that it was an “easy” resolution of the issue. 10/8/10 RP 32.

However, when Opdycke took the stand, defense sought to address incidents occurring prior to 2006. 10/13/10 RP 235. The prosecutor expressed that Oakes “did not testify about any such incidents that would relate to him. If she told him something and he’s forgotten about it, it becomes irrelevant.” 10/31/10 RP 237. Opdycke told the judge that the incidents involving Kiket Island occurred in 2006. 10/31/10 RP 241. By this point in the trial, Oakes had already testified his self-defense was based upon Oakes shooting at him first. The trial court had indicated that there

were lots of incidents occurring post 2006. 10/31/10 RP 241. And it was the fact that Oakes had said he was aware of them that made them relevant.

I just want to make sure that occasionally we clear up the point that the reason we're – the reason we're allowing Ms. Opdycke to talk about these incidents with Mr. Stover is because she related them to Mr. Oakes and Mr. Oakes was aware of them. If he wasn't aware of them, then we don't need the incidents to be testified in her in this case.

10/13/10 RP 243. The trial court concluded that there was an agreement regarding the pre-2006 events.

And we also made the deal that because there as such a wealth of incidents, according to you guys, that we were only going to hear about ones that were post-January 2006, and everybody said, that's fine, there's plenty of things going on after January 2006, I'm good with that. So that was the deal, and it still is.

Okay. so are well all happy now?

...

Is everybody okay now? Do we know where we're going?

Okay.

10/13/10 RP 243-4. To which defense counsel responded. "We've always been okay with that, your honor. 10/13/10 RP 244.

Counsel cannot, in the trial of a case, remain silent as to claimed errors, and later, if the verdict is adverse, urge his trial objections for the first time in his motion for new trial or appeal; (Sherman v. Mobbs, 55 Wn.2d 202, 207, 347 P.2d 189 (1959)); ...

State v. Hoff, 31 Wn. App. 809, 812, 644 P.2d 763 (1982).³

In ruling in a post-trial motion on the issue, the trial court pointed out that defense had put the limitation in effect.

That means that you agreed with 2006. It was brought up by your co-counsel, Mr. Volluz. 2006 never came from me. Line in the sand, yeah. It was drawn by you two.

11/30/10 RP 43.

As opposed to the other incidents that Oakes had testified about being aware of defense did not try to tie Oakes awareness of the incidents occurring on Kiket Island in 2005.⁴ The incidents that Opdycke offered to testify to occurred more than three years prior to the shooting and involved incidents not involving a quarrel or altercation but involved Stover confronting trespassers and thieves on his property.

The trial court's decision not to admit the evidence from the Kiket Island incidents was not an abuse of discretion.

³ The original goal of the invited error doctrine was to "prohibit[] a party from setting up an error at trial and then complaining of it on appeal." State v. Pam, 101 Wn.2d 507, 511, 680 P.2d 762 (1984), *overruled on other grounds by* State v. Olson, 126 Wn.2d 315, 893 P.2d 629 (1995). City of Seattle v. Patu, 147 Wn. 2d 717, 720, 58 P.3d 273, 274 (2002).

⁴ After trial, defense provided a declaration from Linda Opdycke contending that she related two incidents occurring in 2005, when Stover confronted different individuals who were on Stover's property without permission. CP 677. The declaration claims that Oakes knew of the incidents because she had "related them to Michiel Oakes prior to October 28, 2009." CP 677. Oakes had not indicated if he recalled her description of the events.

2. Where the defendant admitted he went to confront the victim at the victim's residence, shot the victim, hid the body and the firearm involved, a rational trier of fact could find the absence of self-defense.

Oakes testified at trial that he shot Stover with a gun after Stover shot at him. 10/12/10 RP 203-4. He claimed he turned Stover's own gun on him and the gun went off. 10/12/10 RP 204. Oakes contends on appeal, that given the evidence presented at trial, no reasonable juror could have found that he did not act in self defense. Appellant's Opening Brief at pages 30-1.

The State contends that Oakes' argument fails to take into account the key portion of the test for sufficiency of the evidence that all reasonable inferences shall be drawn in favor of the State. Here the jury could choose to disbelieve the defendant and thus find he did not act in self-defense.

The standard for determining whether a conviction rests on insufficient evidence is "whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *State v. Green*, 94 Wn.2d 216, 221, 616 P.2d 628 (1980) (emphasis omitted) (*quoting Jackson*, 443 U.S. at 319, 99 S.Ct. 2781). "**A claim of insufficiency admits the truth of the State's evidence and all inferences that reasonably can be drawn therefrom.**" *State v. Walton*, 64 Wn. App. 410, 415, 824 P.2d 533 (1992). This standard is a deferential one, and questions of credibility, persuasiveness, and conflicting testimony must be left to the jury. *Id.* at 415-16, 824 P.2d 533.

In re Pers. Restraint of Martinez, 171 Wn. 2d 354, 364, 256 P.3d 277 (2011) (emphasis added).

After a defendant presents sufficient evidence exists to justify the issue going to the trier of fact, the State bears the burden of disproving self-defense beyond a reasonable doubt. State v. Walden, 131 Wn.2d 469, 473, 932 P.2d 1237 (1997). The focus on review then becomes whether the State presented sufficient evidence to disprove beyond a reasonable doubt the defendant did not reasonably believe he was in danger of imminent harm. See State v. LeFaber, 128 Wn.2d 896, 899, 913 P.2d 369 (1996). Self-defense is a subjective standard.

The justification of self-defense must be evaluated from the defendant's point of view as conditions appeared to her at the time of the act. State v. McCullum, 98 Wn.2d 484, 656 P.2d 1064 (1983). The jurors must understand that, in considering the issue of self-defense, they must place themselves in the shoes of the defendant and judge the legitimacy of her act in light of all that she knew at the time.

State v. Allery, 101 Wn.2d 591, 594, 682 P.2d 312 (1984).

However, that application of the subjective standard does not require a jury to believe the defendant's version of the events.

The State's version of the events was that Oakes planned to kill Stover, purchasing camouflage clothing, tools to conceal the body in advance, arming himself and while wearing a Kevlar vest, attacking Stover

in his own home, thereafter cleaning up the crime scene, disposing of Stover's body and other evidence and denying any involvement when confronted by law enforcement. Additionally, here not only did the jury find the absence of self-defense, it also found the defendant acted with premeditation.

Because a reviewing court must defer to the determination of facts made by the jury, and the jury here chose to disbelieve Oakes' contention that he acted in self-defense, there was sufficient evidence for a rational trier of fact to find the absence of self-defense.

3. The firearm disposed of by Oakes was properly admitted.

Oakes' statement of the issue claims "[t]he trial court should have suppressed the gun found in a plastic bag at Opdycke's home." Appellant's Opening Brief at page 31. However the gun was not found in Opdycke's home. The State believes the more appropriate question is; should the trial court have suppressed the bag Oakes retrieved from his vehicle while detained by officers in connection with a shooting and thrown away when contacted by the detaining officer?

The State contends the trial court properly denied suppression because Oakes abandoned the property into an area in which there was no expectation of privacy. And furthermore, given the apparent actual

destruction of evidence, exigent circumstances merited seizure pending application of a search warrant which actually occurred.

i. The facts of the contact support the trial court findings.

Chief Deputy David Rodriguez spoke with Linda Opdycke on October 29, 2009, at about 6:20 p.m. 9/24/10 RP 90-1. Opdycke said she had heard what occurred with her ex-husband in Skagit County and that she and Oakes were packing and planning to immediately leave the area to Portland. 9/24/10 RP 90-1, 105. Rodriguez spoke to Sergeant Davis who told him that Skagit County detectives wanted to confirm that Oakes' car, a black Suzuki SUV, was there and that they were applying for a search warrant for the car in relation to a homicide case. 9/24/10 RP 90, 114. Rodriguez and Davis were asked to stand by for the search warrant and secure the vehicle and not allow the car to leave. 9/24/10 RP 91, 116. They went to the residence and contacted Opdycke and Oakes shortly after 7:40 p.m. 9/24/10 RP 92-4. Oakes came up the stairs from the lower level of the house. 9/24/10 RP 94. Oakes was told they were there in an official capacity to talk to him about Stover. 9/24/10 RP 94. Davis asked Oakes if he had any weapons on him and Oakes was found to have a 9 mm pistol in the back of his waist band. 9/24/10 RP 117-8. Davis used his Miranda warning card to advise Oakes of his rights. 9/24/10 RP 94-5, 119. Oakes

agreed to talk. 9/24/10 RP 95. Oakes was not placed in handcuffs or under arrest. 9/24/10 RP 95. Oakes was confronted with seeing his ex-wife and being in the area of Stover's residence. 9/24/10 RP 121. After the initial questions, Oakes stated, if we're at the point where my vehicle is getting searched, then I think it's my time for a lawyer. 9/24/10 RP 96. Rodriguez told Oakes he was free to call an attorney. 9/24/10 RP 97. Oakes was specifically told that they were standing by for word from Skagit County about the status of the search warrant on the vehicle. 9/24/10 RP 97. Sergeant Davis went outside to use his phone due to lack of cell phone service to check on the status of the search warrant. 9/24/10 RP 98-9, 123-4. Opdycke followed Davis outside. 9/24/10 RP 99. Oakes then made a statement about going to his car to close the windows because it was raining. 9/24/10 RP 100. Rodriguez replied it wasn't raining and he knew the windows were up. 9/24/10 RP 100. Almost immediately Oakes claimed the need to get some pills and began looking around. 9/24/10 RP 100. Oakes asked to go to look for some pills, or was he under arrest. 9/24/10 RP 100. Oakes was told he was not under arrest. 9/24/10 RP 101. Oakes remained in the area of the great room searching for pills while Rodriguez was watching. 9/24/10 RP 101. Opdycke came to ask Rodriguez a question and his attention was briefly diverted. 9/24/10 RP 102. When Rodriguez turned

back Oakes was gone and Rodriguez heard him downstairs. 9/24/10 RP 102. Rodriguez told Opdycke that Oakes had to remain in his sight for officer safety and asked where he went. 9/24/10 RP 102.

Meanwhile, Davis was outside trying to get cell phone service and when he walked out on the deck, observed Oakes at the rear of his vehicle. 9/24/10 RP 124. Oakes had the back hatch open with a white plastic bag in his hand. 9/24/10 RP 124. Davis ran down the stairs towards Oakes to see what he was doing, shined his flashlight on Oakes and asked what he was doing. 9/24/10 RP 124. Oakes at first didn't say or do anything. 9/24/10 RP 124. Oakes then stated he was looking for medication. 9/24/10 RP 125. He walked away from Davis toward the passenger side of the vehicle and as Davis approached and asked again what he was doing, Oakes threw the garbage bag down an embankment near his vehicle. 9/24/10 RP 124. Oakes then went to the driver's door and Davis confronted him. 9/24/10 RP 125. Davis again asked Oakes what he was doing, and Oakes responded, looking for pills. 9/24/10 RP 125. Davis told him what he was doing could be tampering with evidence and Oakes responded defensively by asking why he was being given the third degree, he had not done anything wrong, was just looking for medications and threw away trash that was in his car. 9/24/10 RP 125. Davis took control of Oakes escorting him into the house. 9/24/10

RP 126. Rodriguez went to go downstairs, when Oakes came up escorted by Davis. 9/24/10 RP 102. Shortly after that, Oakes was placed under arrest and handcuffed. 9/24/10 RP 103.

Davis returned two to three minutes later to the embankment to recover the bag from the rocks. 9/24/10 RP 171-2. The bag was about fifteen or twenty feet away and Davis had to go down the rocks to get the bag. 9/24/10 RP 172. The bag was a plastic grocery bag. 9/24/10 RP 177. Davis perceived that Oakes was destroying evidence by removing the bag. 9/24/10 RP 173. It was misting at that time. 9/24/10 RP 176. Davis and Rodriguez had also not done a sweep of the residence and did not know if any other individuals were present. 9/24/10 RP 173. Davis did not look in the bag, but secured it in the rear of his vehicle. 9/24/10 RP 178. Davis was going to wait for a search warrant before looking inside the bag. 9/24/10 RP 178. About fifty minutes to an hour and a half later, Davis turned the bag over to Detective Meyer. 9/24/10 RP 179. The day after Oakes' arrest, a search was conducted at Opdycke's residence. 9/24/10 RP 182.

Rodriguez had been to Opdycke's house on about five occasions and had only seen Oakes there twice. 9/24/10 RP 163. He had not seen any clothing or items showing Oakes was living there. 9/24/10 RP 155. Rodriguez knew there were multiple firearms in the house, that Opdycke

was a hunter and there were gun cases in the mud room. 9/24/10 RP 161-2. Opdycke also showed Rodriguez any new gun she received. 9/24/10 RP 161-2.

Rodriguez and Davis identified a series of photographs showing the layout of the driveway and house. 9/24/10 RP 155-160, 169, 181, (Ex. 1-8)

The trial court found Oakes was an overnight guest entitled to assert standing. 9/24/10 RP 186. The trial court distinguished cases involving privacy interest in garbage placed out for collection because of Oakes' abandonment of the property in the presence of an officer. 9/24/10 RP 207-8. The trial court viewing the photographs and hearing the testimony also considered the location where the bag was deposited as an open range. 9/24/10 RP 208. The trial court also found the unsecured scene and Oakes disposal of the property supported exigent circumstances. 9/24/10 RP 210.

The trial court entered written findings and conclusions. 9/24/10 RP 913-7. The court found the bag was both abandoned and there were exigent circumstances. CP 916, Conclusion 1. The court found Oakes threw the bag from the curtilage. CP 916, Conclusion 2.⁵

⁵ The trial court did not specifically rule whether Oakes had a privacy interest in the curtilage of Opdycke's home. CP 216. The trial court was not required to rule on that factor given the ruling the item was disposed outside of the curtilage.

ii. Oakes abandoned the bag when the officer went to contact him into an area in which he lacked a privacy interest.

Needing neither a warrant nor probable cause, law enforcement officers may retrieve and search voluntarily abandoned property without implicating an individual's rights under the Fourth Amendment or under article I, section 7 of our state constitution.

State v. Reynolds, 144 Wn.2d 282, 287, 27 P.3d 200 (2001) (footnote citations omitted).

In State v. Tidwell, 23 Wn. App. 506, 508, 597 P.2d 434 (1979) the court held that a defendant's abandonment of property into some bushes amounted to abandonment. Likewise here, Oakes abandoned the property and as described below this was not a location that he had interest in as a social guest.

Oakes attempts to draw the case within the case law applying to garbage under State v. Boland. However, that case dealt with property placed out for collection.

We find under the facts of this case that defendant Boland's private affairs were unreasonably intruded upon by law enforcement officers when they removed the garbage of his trash can and transported it to the police station in order to make it available to state and federal narcotics agents. Boland's trash was in his can and sitting on the curb in expectation that it would be picked up by a licensed garbage collector. This leads us to the conclusion that it falls squarely within the contemplated meaning of a "private affair".

State v. Boland, 115 Wn. 2d 571, 578, 800 P.2d 1112 (1990). In the present case, the property was not placed in a manner asserting any intent to retain possession of the property.

iii. Oakes abandoned the bag in an area to which there was no expectation of privacy.

In State v. Myrick, the court addressed the issue of the open field doctrine and instead evaluated the concept under the expectation of privacy within the Washington Constitution.

Thus, the question whether all warrantless aerial surveillance violates Const. art. 1, § 7 is not answered by looking to the nature of the property viewed, alone. This is but one factor in determining whether the aerial surveillance has unconstitutionally intruded into a person's "private affairs."

State v. Myrick, 102 Wn. 2d 506, 513, 688 P.2d 151 (1984). The State contends that even though the open field doctrine is not applied the availability of the analysis of whether the area is an open field still remains.

Several cases have dealt with the question of whether an officer's intrusion onto an "open field" is invalid under Const. art. 1, § 7. In Crandall, *supra*, Division Three of this court concluded that there was no unreasonable intrusion on to "open fields" when a deputy sheriff trespassed onto the defendant's property. In that case, the court noted that the "open fields" at issue were "not posted" and were "admittedly frequented by hunters". Crandall, 39 Wn. App. at 854, 697 P.2d 250. In Hansen, *supra*, Division Three similarly concluded that a police officer did not unreasonably intrude onto "open fields" because the fields were "not posted and were clearly visible to [the defendant's] neighbors

and to any passersby.” Hansen, 42 Wn. App. at 763, 714 P.2d 309.

State v. Johnson, 75 Wn. App. 692, 707, 879 P.2d 984 (1994).

Oakes also cites to State v. Sweeney. That case discussed that entry into the curtilage must be evaluated for reasonableness.

In Graffius, the court concluded that a police officer's intentional look into a partially-open garbage can placed on the curtilage was not an unreasonable intrusion into Mr. Graffius's privacy. The court did not limit its inquiry to the question of whether Mr. Graffius had placed his garbage in the can. Instead, the court examined whether the officer had legitimate business to enter the curtilage and whether the items discovered were in plain view. Id. at 31, 871 P.2d 1115. Graffius, like Boland, demonstrates that **the privacy right at issue here must be evaluated in terms of the reasonableness of the expectation of privacy and the reasonableness of the governmental intrusion.** Accordingly, this privacy right is not limited by the location of the garbage or the act of placing the garbage in the can.

State v. Sweeney, 125 Wn. App. 881, 887, 107 P.3d 1103 (2005) (emphasis added).

The State's contention is that Oakes' status as social guest must be evaluated in whether he would retain a privacy interest outside the home into an area in which he abandoned property. The State contends he does not have such a privacy interest in the area outside the curtilage.

No one factor is always determinative of the question of the scope of the curtilage:

Whether the place searched is within the curtilage is to be determined from the facts, including its

proximity or annexation to the dwelling, its inclusion within the general enclosure surrounding the dwelling, and its use and enjoyment as an adjunct to the domestic economy of the family.

Care v. United States, 231 F.2d 22, 25 (10th Cir.), *cert. denied*, 351 U.S. 932, 76 S.Ct. 788, 100 L.Ed. 1461 (1956).

State v. Niedergang, 43 Wn. App. 656, 660, 719 P.2d 576 (1986). As the trial court described and found, the abandonment here was into open range.
9/24/10 RP 208, CP 916.

iv. Exigent circumstances showing the defendant engaged in the actual removal or destruction of evidence permitted the officer to seize the bag for later application for a search warrant.

The exigent circumstances exception to the warrant requirement applies where “ ‘obtaining a warrant is not practical because the delay inherent in securing a warrant would compromise officer safety, facilitate escape or permit the destruction of evidence.’ ” State v. Smith, 165 Wn.2d 511, 517, 199 P.3d 386 (2009) (quoting State v. Audley, 77 Wn. App. 897, 907, 894 P.2d 1359 (1995)). This court has identified five circumstances from federal cases that “*could* be termed ‘exigent’ ” circumstances. State v. Counts, 99 Wash.2d 54, 60, 659 P.2d 1087 (1983) (emphasis added). They include “(1) hot pursuit; (2) fleeing suspect; (3) danger to arresting officer or to the public; (4) mobility of the vehicle; and (5) mobility or destruction of the evidence.” Id.

State v. Tibbles, 169 Wn. 2d 364, 370, 236 P.3d 885 (2010).

On the stipulated facts in this case, the State has not shown any need for particular haste. The suspect was not fleeing, nor has there been any showing that he presented a risk of flight. While there was probable cause that evidence

of contraband existed in the vehicle, Tibbles was outside the vehicle when Trooper Larsen searched it and the State has not established that the destruction of evidence was imminent.

State v. Tibbles, 169 Wn.2d 364, 371, 236 P.3d 885 (2010).

In contrast to the situation in Tibbles, here there was evidence that the suspect officers had detained engaged in the actual destruction of evidence. The item was thrown out into the misty weather of the night. The defendant was aware that Stover was dead, that a warrant was being pursued to search the vehicle and that he was a suspect. Furthermore, even though the defendant was in custody at the time the officer obtained the bag, Ms. Opdycke was not restrained and the possibility existed that other suspects were around. Furthermore, the court in Tibbles noted that the State had not shown that pursuing the warrant was impracticable. Id. In contrast, here the State had shown that the warrant would have been required to be pursued by another county where the underlying crime was committed and that the officers had difficulty in obtaining cellular service in the area.

Furthermore, officers later obtained and were granted a search warrant for both Opdycke's premises and to search through the bag which was seized.

The present case does establish adequate exigent circumstances for the officers to have seized the bag pending the application for the search warrant.⁶

4. The admission of Oakes' text messages after he testified differently was not an abuse of discretion.

Oakes claims the trial court erred in admission of a text message that he sent to his ex-wife four days before the homicide. The State contends the trial court did not err in admission of the text given Oakes' misrepresentation of the content of his text.

Oakes recounted contact and a meeting that he had with his ex-wife, Jennifer Thompson, four days before he shot Stover. 10/12/10 RP 163-4. Thompson had contacted him. 10/12/10 RP 164. Oakes recounted that Thompson had been in a car accident in early September, 2009, in a car that Oakes gave her. 10/12/10 RP 165. He said he had insurance on the car and had paid for it, even though she was using the car. 10/12/10 RP 165. He claimed they were meeting to talk about the car situation. 10/12/10 RP 166. Oakes told Thompson he was in the area because of an important meeting. 10/12/10 RP 167. He went on to offer that he provided her financial

⁶ Oakes did not contest the officer's actions in securing the weapon once it was observed in the bag.

assistance from time to time. 10/12/10 RP 167-8. Oakes claimed that after meeting with Thompson, he met with Stover at a church in Anacortes around 10:00 p.m. 10/12/10 RP 168-9. Oakes said that after meeting with Stover, he sent Thompson a text saying the meeting went okay. 10/12/10 RP 173. He claims she responded back about the meeting being about a job. 10/12/10 RP 173. He replied that the meeting did not go okay. 10/12/10 RP 17. He then said he responded with a response saying “no job means no pay.” 10/12/10 RP 173. Oakes claimed no one was paying him to meet Stover. 10/12/10 RP 173. He went on to offer that he and Thompson had a discussion about him getting her some money. 10/12/10 RP 174.

In bringing the matter to the court’s attention and moving to admit the text, the prosecutor explained the e-mail chain. 10/13/10 RP 7.

Wish you could somehow be here with me. Be safe. Praying for you. Good night sweet boy. That's October 25th presumably in the morning sometime. The next text from the Defendant on that date says, thank you. For everything. I am okay. Job failed. No pay or damage. The next text from Jennifer is, bummer about pay and thanks for the update.

10/13/10 RP 7-8. The prosecutor argued that the context of the texts showed that the conversation was not about money as Oakes had claimed. 10/13/10 RP 139.

The trial court approved admission noting that the text from the computer was inherently reliable as to the extent of the texts and admitted

the texts for impeachment. 10/13/10 RP 138. Defense offered the texts having Oakes read them into the record. 10/13/10 RP 151.

Going to sleep. Wish you could somehow be here with me. Be safe. Praying for you. Good night sweet boy.

Thank you. For everything. I am okay. Job failed. No pay or damage. (Smiley face).

Bummer about pay but thanks for the update. Boys are pre sick. I have three presentations in Seattle tomorrow. They are medicating

10/13/12 RP 152.

A trial court's admission of evidence is generally reviewed for abuse of discretion. State v. Pirtle, 127 Wn.2d 628, 648, 904 P.2d 245 (1995), *cert. denied*, 518 U.S. 1026, 116 S. Ct. 2568, 135 L.Ed.2d 1084 (1996).

i. Oakes misrepresented the content of the text.

In State v. Greve, 67 Wn. App. 166, 834 P.2d 656 (1992), *rev. denied*, 121 Wn.2d 1005, 848 P.2d 1263 (1993), the court held that if the impeaching evidence which flows from a constitutional violation is not inherently unreliable, the evidence may be admitted to impeach a witness. The crux of the basis is that the right to testify truthfully does not include the right to testify falsely.

Whatever the scope of a constitutional right to testify, it is elementary that such a right does not extend to testifying *falsely*. In Harris v. New York, we assumed the right of an

accused to testify “in his own defense, or to refuse to do so” and went on to hold:

“[T]hat privilege cannot be construed to include the right to commit perjury. See United States v. Knox, 396 U.S. 77 [90 S.Ct. 363, 24 L.Ed.2d 275] (1969); cf. Dennis v. United States, 384 U.S. 855 [86 S.Ct. 1840, 16 L.Ed.2d 973] (1966). Having voluntarily taken the stand, petitioner was under an obligation to speak truthfully....” 401 U.S., at 225, 91 S.Ct., at 645.

In Harris we held the defendant could be impeached by prior contrary statements which had been ruled inadmissible under Miranda v. Arizona, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966). Harris and other cases make it crystal clear that there is no right whatever-constitutional or otherwise-for a defendant to use false evidence. See also United States v. Havens, 446 U.S. 620, 626-627, 100 S.Ct. 1912, 1916-1917, 64 L.Ed.2d 559 (1980).

Nix v. Whiteside, 475 U.S. 157, 173, 106 S. Ct. 988, 997, 89 L. Ed. 2d 123 (1986).

Oakes argues that Greve requires that the court must assess whether that statement is so reliable that the defendant would necessarily be committing perjury if he contradicted it. Appellant’s Opening Brief at page 47. In fact Greve reads:

Police misconduct was adequately penalized and the right of privacy was adequately protected, in the present case, by the prohibition against the use of the illegally obtained evidence in the State's case in chief. It is likely that appellant's conviction of the lesser included offense occurred because the State was prevented from using appellant's statements made after the illegal arrest and entry in its case in chief. **Furthermore, the introduction of suppressed evidence to discourage a defendant from perjuring himself directly furthers the goal of preserving the dignity**

of the judicial process, as long as the police misconduct in question is not of such a degree that the previously suppressed statement is inherently unreliable. We can envision situations in which police misconduct may be so egregious as to bar all use of suppressed evidence. A different set of facts might lead to a different result. For example, we could not countenance the use of a physically coerced statement at any stage of a trial.

State v. Greve, 67 Wn. App. 166, 174-75, 834 P.2d 656, 661 (1992) (bold emphasis added). It is the police misconduct which must be evaluated in terms of unreliability. Proven perjury is not required to establish admission. As indicated by the trial court here, a text as stored on the computer has adequate reliability. 10/13/10 RP 138. Oakes sought to minimize the motive for his meetings with Stover. He was properly impeached with reliable evidence.

ii. The expansion of the application of article 1, section 7 of the Washington Constitution should not be used to enable a witness to give false testimony.

Oakes seeks an expansion of the protection of article 1, section 7 of the Washington Constitution based upon recent case law indicating the state constitution has been held to provide greater protection than the Fourth Amendment to the United States Constitution. Appellant's Opening Brief at page 50, citing, State v. McKinney, 148 Wn.2d 20, 26, 60 P.3d 46 (2002). The State recognizes that the Washington Supreme Court has provided greater protection under article 1, section 7 than under the Fourth

Amendment. However, the State contends those protections dealing with the fundamental purpose of the truth-seeking function of the court would be inhibited by a rule that permits false testimony. see Nix v. Whiteside supra.

iii. The text message was cumulative of information presented from the defendant's ex-wife.

Oakes conclude that he was prejudiced by the prosecutor's use of the texts during closing argument to establish a different motive for the "meeting" that Oakes was supposed to have on October 24, 2009. Appellant's Opening Brief at page 53.

However, Jennifer Thompson had already testified in a manner showing that Oakes meeting was not about getting a job but instead was about doing a job.

On October 24th, Oakes contacted Thompson in person. 10/1/10 RP(2) 93. Oakes had told Thompson he would be back in the area that day and they met at Thompson's house in Everett about 7:00 p.m. where they had dinner and talked for about two hours. 10/1/10 RP(2) 94. Oakes told Thompson that he had some side work and that it was a dangerous job which made him a little concerned. 10/1/10 RP(2) 94. Thomson got a text after Oakes left telling her he was done. 10/1/10 RP(2) 95. The text read: "no worries. I'm safe. Job failed." 10/1/10 RP(2) 96. Thompson texted back

that she was glad to hear. 10/1/10 RP(2) 96. Oakes texted back: “yeah, but no job means no pay.” 10/1/10 RP(2) 96. Oakes also sent an e-mail back saying he made it home, and all is well. 10/1/10 RP(2) 96.

Thus the evidence from the texts was cumulative and not prejudicial.

5. The trial court did not abuse its discretion in denying the victim’s prior statements as hearsay.

Oakes contended the trial court erred in admitting two statements of the deceased victim to a former employee, one pertaining to seeing Oakes and Opdycke together at a Costco in Kennewick, and the other pertaining to Stover asking the employee to carry bullets.⁷ The State contends they were properly excluded as hearsay. A trial court’s determination of whether a statement is admissible is reviewed for abuse of discretion. State v. Woods, 143 Wn. 2d 561, 595, 23 P.3d 1046 (2001).

i. The offer of proof showed the matters were being offered for the truth of the matter asserted.

Oakes sought admission of statements of Stover ostensibly to show the state of mind of Stover. However, the manner in which they were sought

⁷ As quoted in the offer of proof below, Mataya did not indicate he asked her to carry a firearm. Instead, she said she would not carry a firearm for him.

to be admitted showed the true purpose: to place Stover at locations where he was claimed to be seen by Oakes.

MR. BROWNE: Meghan Mataya worked for Mr. Stover, accused by Leigh Hearon and Mark Stover of planting drugs. We're staying completely away from that. I want to let you know where we're going and counsel know where we're going. So we want to have the Court's guidance before we maybe do anything that you might think would open the door.⁸

She talked about in August on occasion when he asked her to go to Montana with him. These are in the reports she made to him to the police department, by the way.

THE COURT: Well, we already have some evidence of him going to Montana.

MR. BROWNE: During that same period of time when she said I will not, within a day or two when she said I will not go to Montana with you nor am I interested in -- nor will I carry a gun for you to Montana, he dropped some bullets, full bullets, not just casings, in her car. Of course, he wasn't supposed to be possessing bullets; the domestic violence protection order prohibits that.

Oh, the most critical one, I saw that look from counsel. Ms. Mataya told law enforcement officers during the investigation of this case that Mark Stover had told her that he had been to the Costco store in Kennewick and had observed Ms. Opdycke and Mr. Oakes together and made a comment to her that he thought it was odd that she was so tall and he was so short. That places him at the Costco store where he eventually confronted Mr. Oakes, according to Mr. Oakes' testimony.

⁸ The State had previously sought to admit the planting of drugs in the vehicle by Mataya as alleged in the letter discharging Mataya as an employee of Stover. Mataya was subject to that potential impeach for bias if she had been called by defense.

10/14/10 RP 108-9. Defense's stated basis was to place Stover both in Montana and at the Kennewick Costco. It was not initially offered to show Stover's state of mind regarding his pursuit of Opdycke and the photographs. Once confronted with the stated basis, the defense changed the purpose to argue it was relevant to Stover's state of mind in his obsession with Opdycke. 10/14/10 RP 110.

The trial court did not prohibit Mataya from testifying even inviting her to testify about facts that the defendant knew about.

Ms. Mataya can testify that she saw him with weapons and that he always had a weapon during this period. I'm just not letting her testify to the things that Mr. Oakes did not have knowledge of.

10/14/10 RP 119.

In addressing the motion for new trial brought by Oakes and heard November 30, 2010, the trial court explained the reason for the ruling.

THE COURT:..

I believe that you immediately told me that the reason you wanted that in is because it went to – it was an assertion and, two, it went to Mark Stover's state of mind. But let's face it, the real reason you wanted that in is because it substantiated Mr. Oakes' story that Mark Stover was in Kennewick, and that goes to the truth of the matter asserted. That goes to supporting and substantiating what Mr. Oakes said.

Our discussion about it started one afternoon when Ms. Kaholokula says, speak of Ms. Mataya, that was my other issue. I don't see anything relevant that she has to offer in this case. Mr. Browne says, Well, probably just the fact that she saw Mark armed with a weapon every day she saw him

might be relevant. That one perked me up, that we had a witness who was going to testify that she saw Mark Stover armed a weapon every day she saw him. That's the last we ever heard of that. That wasn't true.

MR. BROWNE: Well, that is true.

THE COURT: She never saw Mr. Stover with a weapon every day that she saw him. If she did, she could have testified about it. She didn't testify about it.

I said -- immediately on that statement of Mr. Browne, I said, that would be relevant because there's been testimony to the opposite of that. Right to the heart of the matter. We didn't hear anything more about that particular testimony, that she could testify that she saw Mark Stover armed with a weapon every day she saw him. We didn't hear any more about that until the very end of our discourse with Ms. Mataya which happened about an hour later, and I'll get to that. It won't take an hour to get to that. I'll get to it in about two minutes, but it happened an hour later in real time.

So we go on, and Mr. Browne says, this is outside the presence of the jury, Ms. Mataya told law enforcement officers during the investigation of this case that Mark Stover had told her that he'd been to Costco in Kennewick and observed Ms. Opdycke and Oakes together and made a comment to her that he thought it was odd she was tall and he was short. So that places him at the Costco store where he eventually confronted Mr. Oakes, according to Mr. Oakes' testimony. I said, is that the extent of testimony? Mr. Browne says, yes. Ms. Kaholokula says, sounds like hearsay. Mr. Browne immediately says, it goes to the state of mind. Ms. Kaholokula says, it's hearsay because that's being offered for the truth of the matter asserted. I said, it is being offered for the truth. It's being offered to prove the fact that Mr. Stover was in Kennewick at Costco, right? Mr. Volluz says, it's offered as corroboration of Mr. Oakes' version of the events. That's the truth of the matter asserted. Ms. Kaholokula says, that sounds like a yes. It's offered to show he was in Kennewick at Costco. And I say, how do you beat that hearsay? Because it truly is being offered for the purpose of

the fact that Mr. Stover was in Kennewick Costco, not any state of mind, but for the fact that he was there. So that's what I believe then. That's what the record says. That's what I believe now, that it wasn't as to Mr. Stover's state of mind. It was to prove that Mr. Stover was in Costco, which is what Mr. Oakes had previously testified to.

11/30/10 RP 33-6.

ii. The statements were not an implied assertion of the victim's state of mind.

Stover did not intend to assert by making the statements that he was continuing in the claimed stalking behavior.

ER 801 defines hearsay as a statement offered to prove the truth of the matter asserted in that statement. The rule itself does not differentiate between express and implied assertions. However, the Advisory Committee's Notes to Federal Rule 801 expressly exclude implied assertions from the hearsay rule. “[V]erbal conduct which is assertive but offered as a basis for inferring something other than the matter asserted, [is] excluded from the definition of hearsay”. ER 801 Advisory Committee's Notes to Subdivision (a), at 136; United States v. Zenni, 492 F.Supp. 464, 469 (E.D.Ky.1980). **“The key to the definition is that nothing is an assertion unless intended to be one.”** ER 801 Advisory Committee's Notes to Subdivision (a), at 135. **A person does not normally intend to assert an implied belief.**

State v. Collins, 76 Wn. App. 496, 499, 886 P.2d 243 (1995). Although Stover was claimed to make statements that may show he was at the alleged locations, it is a large leap of logic to reach the claimed “implied assertion” that defense draws that he was continuing to stalk Opdycke and Oakes. That

may be an inference that Oakes wanted to draw from the alleged statements. But to assert that Stover intended to assert that he was stalking them as a result of the statements is not a tenable argument.

6. The preliminary hearings in district court were not closed, were not a part of the superior court trial.

Our Supreme Court recently issued several public trial cases on the same day, including Paumier, Wise, and Sublett. Collectively, these opinions appear to articulate two steps for determining the threshold issue of whether a particular proceeding implicates a defendant's public trial right, thereby requiring a Bone-Club analysis before the trial court may “close” the courtroom: First, does the proceeding fall within a specific category of trial proceedings that our Supreme Court has already established implicates the public trial right? Second, if the proceeding does not fall within such a specific category, does the proceeding satisfy Sublett's “experience and logic” test?

State v. Wilson, ___ Wn. App, 298 P.3d 148, 152 (2013). The State contends the right to open public trial does not extend to district court advisement of probable cause in advance of a Superior Court proceeding.

i. Facts pertaining to District Court proceedings.

On October 30, 2009, at about 7:00 a.m. in the morning, Oakes appeared before a magistrate in Skagit County District Court. CP 14, 922. Oakes was advised that he was under arrest for investigation of murder, he had the right to an attorney and bail was set at \$500,000. CP 14, 922. The

court found there was probable cause for murder based upon the declaration filed. CP 14, finding 3. Oakes had been held since Thursday, October 29th at 11:00 p.m. CP 14, finding 2. The court's order indicated that Oakes had been informed of his constitutional rights, including the right to counsel and that Oakes told the court he chose to retain private counsel. CP 14, finding 4. The defendant ordered the release of the defendant if no complaint or information was filed by Tuesday, November 3, 2009. CP 14.

On October 30, 2009, Oakes was charged by complaint within seventy-two hours with second degree murder. CP 44. The district court issued a warrant and bail was set at \$5,000,000. CP 42, 922. Oakes appeared in Skagit County District Court at about 7:00 a.m. on November 2, 2009. CP 20, 923. Oakes was again advised of the crime he was facing and the bail amount. CP 20, 923. The defendant was advised of his constitutional rights and indicated he would be obtaining a private attorney. CP 20. On November 4, 2009, two separate attorneys filed notice of appearances for Mr. Oakes. CP 33, 34. That same day the case was noted two days later for a hearing seeking release or bail reduction. CP 31. Further a hearing for a preliminary hearing on felony complaint was noted to be heard November 13, 2009, at 1:30 p.m. CP 32. On November 13, 2009,

prior to the hearing the State charged Oakes in Skagit County Superior Court with Premeditated Murder in the First Degree. CP 1.

The District Court hearings were held in the public safety building which includes the jail and sheriff's office. CP 923. The building opens officially with security at 8:00 or 8:30 a.m.. CP 923. Prior to that time of the day, the outer doors are locked but the building can be accessed including visiting inmates by use of a buzzer outside of the building. CP 923. The trial court determined that members of the public have accessed and can access the 7:00 a.m. appearances. CP 924.

The trial court determined that the hearings in Oakes' case were not closed to the public. CP 924. The trial court further found that the hearings were ministerial or purely legal proceedings and were not adversarial proceedings which were required to be open to the public. CP 924. The first hearing involved a bail determination, while the second hearing was merely advising Oakes of bail which had already been set. CP 925. The trial court also concluded that the preliminary appearances were not a critical stage of the proceeding. CP 924. The trial court also concluded that Oakes was not denied the right to counsel at the appearances. CP 925.

ii. There was no evidence that anyone was excluded resulting in a closure.

These preliminary appearances occurred around 7:00 a.m. While the courthouse and jail are locked at this hour for security reasons, the district court did allow an individual interested in attending court to access the courtroom by buzzing the intercom outside of the building. 7/26/12 RP 28. The individuals do not have to be associated with the case. 7/26/12 RP 28. The court administrator testified that there have been members of the public who have been present for the hearing in that manner. 7/29/12 RP 28. Although the counsel who testified for Oakes indicated that he had heard anecdotally that people have been denied access, there were no witnesses testifying to that fact. 7/29/12 RP 29. Oakes did not present any evidence of any individuals who had tried to access the hearings and could not.

Rather, a “closure” of a courtroom occurs when the courtroom is completely and purposefully closed to spectators so that no one may enter and no one may leave. This does not apply to every proceeding that transpires within a courtroom but certainly applies during trial, and extends to those proceedings that cannot be easily distinguished from the trial itself. This includes pre- and posttrial matters such as voir dire, evidentiary hearings, and sentencing proceedings.

State v. Lormor, 172 Wn.2d 85, 93, 257 P.3d 624 (2011). Here the record showed that the public had the ability to access the proceedings, and that it

had occurred in the past. There was also no showing that any individual who wanted to appear was actually prevented from appearing.

iii. The appearances were not part of the Superior Court trial proceedings.

The Sixth Amendment to the United States Constitution and Article I, section 22, of the Washington Constitution guarantee a criminal defendant a right to a public trial. The public trial right extends to pretrial criminal proceedings such as preliminary hearings, voir dire, suppression hearings, and motions to sever. State v. Easterling, 157 Wn. 2d 167, 174, 137 P.3d 825 (2006) (*citing* Press-Enterprise Co. v. Superior Court, 478 U.S. 1, 106 S.Ct. 2735, 92 L.Ed.2d 1(1986), In re Pers. Restraint of Orange, 152 Wn.2d 795, 812, 100 P.3d 291 (2004), State v. Bone-Club, 128 Wn.2d 254, 257, 906 P.2d 325 (1995)); State v. Strobe, 167 Wn.2d 222, 217 P.3d 310 (2009).

Article 1, section 10, of the Washington Constitution provides for the public and the press to have open access to court proceedings. Seattle Times Co. v. Ishikawa, 97 Wn.2d 30, 36, 640 P.2d 716 (1982). The public's right also extends to pretrial hearings such as a motion to dismiss. Easterling, 157 Wn.2d at 174 (*citing* Ishikawa, 97 Wn.2d at 36).

These are separate but related rights which both protect the right to a public proceeding. State v. Momah, 167 Wn. 2d 140, 147, 217 P.3d 321

(2009). “[T]he purposes underlying a *public* trial include ensuring that the public can see that the accused is dealt with fairly, Waller, 467 U.S. at 46, 104 S.Ct. 2210, and reminding officers of the court of their responsibilities to assure that the defendant receives a fair trial.” State v. Sadler, 147 Wn. App. 97, 116, 193 P.3d 1108 (2008).

The right to a public trial, however, does not encompass every single hearing held or issue addressed by the court.

Rather, public trial rights apply to “adversary proceedings,” including presentation of evidence, suppression hearings, and jury selection. The resolution of “ ‘purely ministerial or legal issues that do not require the resolution of disputed facts’ ” is not an adversary proceeding.

In Detention of Ticeson, 159 Wn. App. 374, 384, 246 P.3d 550 (2011) (citations omitted). *See also* State v. Rivera, 108 Wn. App. 645, 653, 32 P.3d 292 (2001); State v. Castro, 159 Wn. App. 340, 343, 246 P.3d 228 (2011); State v. Koss, 158 Wn. App. 8, 17-18, 24 P.3d 415 (2010).

Those pre-trial proceedings that have not implicated the right to a public trial have included “(1) a deferred ruling on an ER 609 motion, (2) a defense motion for funds to get [the defendant’s] hair cut and to provide him with clothing for trial, (3) questions regarding the wording of the jury questionnaires and pretrial instructions, (4) a time limit for testing certain evidence, (5) the trial court’s announcement of its rulings on previously

argued evidentiary matters, (6) a decision allowing the jurors to take notes during trial, and (7) an order directing the State to provide the defense with summaries of its witnesses' testimony”, Sadler, 147 Wn. App. at 116-117, *citing* In re Pers. Restraint of Lord, 123 Wn.2d 296, 306, 868 P.2d 835 (1994); the wording of jury instructions or whether the jury should be sequestered, Sadler, 147 Wn.App. at 117, *citing* In re Pers. Resraint of Pirtle, 136 Wn.2d 467, 484, 965 P.2d 593 (1998); the trial court’s address of a juror’s complaint about another juror’s hygiene, Rivera, 108 Wn. App. at 653; and an in-chambers conference on how to answer a jury question, Koss, 158 Wn. App. at 17-18; State v. Sublett, 156 Wn. App. 160, 181, 231 P.3d 231, *rev. granted*, 170 Wn.2d 1016, 245 P.3d 775 (2010).

Where a pre-trial hearing “involves factual and credibility determinations and is relevant to the fairness and integrity of the judicial process as a whole” then the right to public trial exists. Sadler, 147 Wn. App. at 118. Thus, Batson⁹ hearings implicate the right to a public trial:

Even though the trial court is not taking sworn testimony from witnesses, the attorney's explanation itself constitutes new facts not previously before the public, and the court's decision involves an evaluation not only of whether the attorney's explanation is consistent with what the trial court observed during voir dire, but also of the challenging attorney's credibility. *See* Snyder, 128 S.Ct. at 1208; State v.

⁹ Batson v. Kentucky, 476 U.S. 79, 106 S.Ct. 1712, 90 L.Ed.2d 69 (1986).

Hicks, 163 Wn.2d 477, 493, 181 P.3d 831 (2008) (quoting Batson, 476 U.S. at 98 n. 21, 106 S.Ct. 1712). As the Court recently reiterated, “ ‘the best evidence [of discriminatory intent] often will be the demeanor of the attorney who exercises the challenge.’ ” Snyder, 128 S.Ct. at 1208 (alteration in original) (quoting Hernandez, 500 U.S. at 365, 111 S.Ct. 1859).”

Additionally, the purposes underlying a *public* trial include ensuring that the public can see that the accused is dealt with fairly, Waller, 467 U.S. at 46, 104 S.Ct. 2210, and reminding officers of the court of their responsibilities to assure that the defendant receives a fair trial. Few aspects of a trial can be more important to these goals than whether the prosecutor has excused jurors because of their race, an issue in which the public has a vital interest. And the court cannot serve this vital interest by hearing and evaluating the prosecutor's justification for excusing the jurors behind closed doors. Rather, the prosecutor's explanation must be tested in a forum open to the public.

Sadler at 116.

When a warrantless arrest is made, and the arrestee detained, then various provisions in the Criminal Rules for Courts of Limited Jurisdiction to protect the detainee's rights come into effect. CrRLJ 3.1 provides for the right to and assignment of a lawyer. CrRLJ 3.2 sets forth factors to be considered in determining whether a detained accused should be released and on what conditions. CrRLJ 3.2.1 provides for the procedure to be followed when an individual is arrested without a warrant. It provides for a “probable cause determination” within 48 hours of arrest (if the person remains in custody), a “preliminary appearance” before the close of business

on the next court day following the arrest (if the person remains in custody), and a “preliminary hearing” if a felony complaint is filed, within thirty days.

Subsections (a) and (b) provide for a “probable cause” determination and the procedures to be followed. “A person who is arrested shall have judicial determination of probable cause no later than 48 hours following the persons arrest”. CrRLJ 3.2.1(a). This subsection was added in 1992 to ensure compliance with the 48 hour rule announced in the United States Supreme Court decision Riverside v. McLaughlin, 500 U.S. 44, 111 S. Ct. 1661, 114 L. Ed. 2d 49 (1991). 4B Wash. Prac., Rules Practice CrRLJ 3.2.1 (7th ed.).

Subsection (b) provides that the probable cause determination will be made by the court based on “an affidavit, a document as provided in RCW 9A.72.085 or any law amendatory thereto, or sworn testimony.” CrRLJ 3.2.1(b).

The 48 hour probable cause determination is a hearing that the Court of Appeals has already determined can take place in the absence of the defendant, without participation of defense counsel, and via telephone conference with the prosecutor, under oath, reading the reports to the judge. The court in State v. K.K.H., citing Gerstein v. Pugh, 420 U.S. 103, 120, 95 S. Ct. 854, 43 L.Ed. 54 (1975), recognized that this hearing is an “informal,

nonadversary procedure” that “does not require the fine resolution of conflicting evidence that a reasonable-doubt or even a preponderance standard demands, and credibility determinations are seldom crucial in deciding whether the evidence supports a reasonable belief in guilt.” State v. K.K.H., 75 Wn. App. 529, 534-35, 878 P.2d 1255, 1258 (1994), *see also State v. Dion*, 131 Wn. App. 729, 733, 129 P.3d 805 (2006) *affirmed*, 160 Wn.2d 605, 159 P.3d 404 (2007) (probable cause determination prior to filing of information does not start juvenile court proceeding).

CrRLJ 3.2.1(d) provides for a “preliminary appearance”. This is a proceeding where “any accused detained in jail” is brought before a court of limited jurisdiction before the close of business on the court day following the arrest. At the preliminary appearance, the court ensures compliance with CrRLJ 3.1 and 3.2. Also at the preliminary appearance, the court advises the accused of the nature of the charge, his right to counsel, and his right to remain silent.

Subsection (g) provides for a “preliminary hearing on felony complaint.” “When a felony complaint is filed, the court may conduct a preliminary hearing to determine whether there is probable cause to believe that the accused has committed a felony unless an information or indictment is filed in superior court prior to the time set for the preliminary hearing.”

CrRLJ 3.2.1(g)(emphasis added). This hearing, if held, “shall be conducted as follows:”

- (1) the defendant may as a matter of right be present at such hearing;
- (2) the court shall inform the defendant of the charge unless the defendant waives such reading;
- (3) witnesses shall be examined under oath and may be cross-examined;
- (4) the defendant may testify and call witnesses in the defendant’s behalf.

CrRLJ 3.2.1(g)(4). At the conclusion of the hearing, the court makes a determination based on the evidence adduced, whether probable cause supports the felony complaint.

In Skagit County, the probable cause determination mandated by CrRLJ 3.2.1(a) – (c) occurs at the same hearing mandated by CrRLJ 3.2.1 (d)-(e) (Preliminary Appearance). The preliminary hearing provided for in CrRLJ 3.2.1(g) rarely occurs because the State, as a rule, initiates prosecutions by filing an information directly in Superior Court within 72 hours of the arrest of the defendant. On occasion, the State will file a felony complaint in District Court. On those occasions, the State has up to thirty days to file charges in Superior Court unless the defendant requests a preliminary hearing sooner. On those occasions where a felony complaint is initially filed, if warranted, the State will typically file an information in Superior Court prior to any preliminary hearing being held.

Here, Oakes was arrested without a warrant and detained. Pursuant to CrRLJ 3.2.1 (a)-(d), he was brought before the court of limited jurisdiction for his probable cause determination and his preliminary appearance. Neither counsel for the State nor counsel for the defense were present. Probable cause was determined via an affidavit of the Skagit County Sheriff's Office in compliance with CrRLJ 3.2.1(a) and (b). In compliance with CrRLJ 3.2.1 (d), Oakes was advised of the nature of the charge, his right to counsel and his right to remain silent. Bail and conditions of release were ordered. Within the 72 hours from arrest, the State filed a felony complaint in the District Court and a warrant was issued and served on the petitioner in custody. Pursuant to CrRLJ 3.1 after the trial court had issued the arrest warrant and set bail upon the felony complaint, Oakes was again addressed by the District Court. This hearing was a preliminary appearance on a new arrest where the court again ensured compliance with CrRLJ 3.1 by again advising Oakes what he had been charged with and the bail that was set on the warrant. The court reiterated that Oakes had the right to a lawyer and the right to remain silent. The court again asked some questions intended to ascertain whether Oakes would attempt to hire his own lawyer or if he would like one appointed. The court set a date by which the case would be transferred to the Superior Court or dismissed.

The 48 hour probable cause portion of the proceeding has already been determined to be a non-adversarial hearing and can be held by a telephonic call between the prosecutor and the judge and the defendant need not be present. K.K.H., 75 Wn.App. at 534-35.

As to the preliminary appearance portion of the proceeding, there is nothing about that proceeding, either, that would place it in the category of pre-trial criminal proceedings that must be public. It is not an adversarial proceeding. Indeed in this particular case and in almost every other case at this stage, neither the prosecutor nor defense counsel are present. There is no “presentation of evidence”, just a review of a probable cause affidavit from an officer who also is not present at the proceedings. There are no disputed facts that need to be resolved by the court. There are no factual or credibility determinations that the court makes. Indeed, the preliminary appearance portion of the proceeding is nothing more, or less, than ensuring probable cause is in the affidavit, advising the detainee of his rights and setting into motion the appointment of counsel, and the setting of new dates and conditions of release.

CrRLJ 3.2.1(g) provides for a preliminary hearing. That hearing, certainly, is required to be open to the public. It involves the taking of testimony, the evaluation of credibility, and the making of factual

determinations. It is, in essence, a mini-trial. However, that situation did not arise here because charges were filed in Superior Court prior to the expiration of the thirty days from the date of filing of the complaint.

The preliminary appearances provided for in CrRLJ 3.2.1(d)-(e) are not hearings that implicate the constitutional right to an open and public trial.

iv. The remedy of automatic retrial would be a windfall in no way linked to the alleged violation.

The case law cited by Oakes, in which Washington Courts have reversed convictions is limited to actual trial proceedings or to evidentiary hearings. No Washington case has extended the analysis to preliminary district court appearances. And not every open courtroom violation must result in a reversal of conviction.

If, on appeal, the court determines that the defendant's right to a fair public trial has been violated, it devises a remedy appropriate to that violation. If the error is structural in nature, it warrants automatic reversal of conviction and remand for a new trial. An error is structural when it " ' necessarily render[s] a criminal trial fundamentally unfair or an unreliable vehicle for determining guilt or innocence.'" Washington v. Recuenco, 548 U.S. 212, 218-219, 126 S.Ct. 2546, 165 L.Ed.2d 466 (2006) (alternations in original) (quoting Neder v. United States, 527 U.S. 1, 9, 119 S.Ct. 1827, 144 L.Ed.2d 35 (1999)).

State v. Momah, 167 Wn.2d 140, 149-150, 217 P.3d 321 (2009). Not all erroneous court room closures are structural error subject to automatic

reversal. The court should look to, *inter alia*, whether the closures impacted the fairness of the defendant's proceedings. Momah, 164 Wn.2d at 151, 217 P.3d 321 (2009), *see also* State v. Coleman, 151 Wn. App. 614, 617, 623–24, 214 P.3d 158 (2009) (holding a trial court erred by sealing jury questionnaires without conducting a Bone–Club analysis, but that the error was not structural).

Here, the defendant has not shown, nor can he show, what the unfairness is inherent in the proceedings here. Even if the courtroom was improperly closed during the two initial appearances, those closures had absolutely no relation to, nor impact on, the trial that occurred a year later.

7. The hearing at which the district court was assuring the right to counsel, did not violate the right to counsel.

Oakes contends that he had the right to have counsel present at the appearances in District Court. Appellant's Opening Brief at page 82. Although Oakes could have had counsel present, the appearances were actually held to assure Oakes that he was either going to retain counsel or be appointed counsel and to inform him of the status of his detention. It would be counter-intuitive to hold that the hearings which are meant to assure that a defendant is made aware of the right to counsel would end up being a violation of the right to counsel.

Under both the Washington and United States Constitutions, a criminal defendant is entitled to the assistance of counsel at critical stages in the litigation. U.S. CONST. amend. VI; WASH. CONST. art. 1, § 22; State v. Everybodytalksabout, 161 Wn.2d 702, 708, 166 P.3d 693 (2007). A critical stage is one “in which a defendant's rights may be lost, defenses waived, privileges claimed or waived, or in which the outcome of the case is otherwise substantially affected.” State v. Agtuca, 12 Wn. App. 402, 404, 529 P.2d 1159 (1974). A complete denial of counsel at a critical stage of the proceedings is presumptively prejudicial and calls for automatic reversal. United States v. Cronin, 466 U.S. 648, 658–59, 659 n. 25, 104 S.Ct. 2039, 80 L.Ed.2d 657 (1984).

State v. Heddrick, 166 Wn. 2d 898, 909-10, 215 P.3d 201 (2009).

CrRLJ 3.1 (b) provides:

(1) The right to a lawyer shall accrue as soon as feasible after the defendant has been arrested, appears before a committing magistrate, or is formally charged, whichever occurs earliest.

(2) A lawyer shall be provided at every critical stage of the proceedings.

CrRLJ 3.1(d) provides that a lawyer will be provided to a defendant “unless waived”. If the defendant indicates he wants a lawyer, then the court shall provide one if the defendant is unable to financially afford one himself. If the defendant is in custody, then these determinations are made at the preliminary appearance pursuant to CrRLJ 3.2.1(e)(1).

While the right to counsel attaches at the earliest possible moment, pursuant to CrRLJ 3.1(b)(1), that right is activated only after the accused requests an attorney. State v. Corn, 95 Wn. App. 41, 62-63, 975 P.2d 520

(1999), *see also* State v. K.K.H., 75 Wn. App. 529, 536-37, 878 P.2d 1255, 1259 (1994) (probable cause hearing is not an adversary proceeding and defense counsel need not be given permission to participate).

The purpose of the preliminary appearance (and, in Skagit County, coupled with the 48 hour probable cause determination) is to ensure that probable cause exists for the detention of the arrestee, that the arrestee is aware of his rights, that access to a lawyer is provided, and to set appropriate conditions of release. Probable cause is determined based on an affidavit, there is no adversarial proceeding, and the only questioning of the defendant is that geared to ascertaining whether he wants a lawyer and, if so, whether he can afford his own.

Here, at the preliminary appearance, there were no “rights to be lost, defenses waived, privileges claimed or waived” nor was “the outcome of the case otherwise substantially affected.” There were no significant consequences for the defendant that hung in the balance. The preliminary appearance is not a critical stage of the proceeding and the court’s questions were limited to ascertaining, per court rule, whether the defendant wanted a lawyer and whether he could afford one. Therefore, the petitioner was not required to have to counsel at these appearances intended in part to insure that he was making a decision about obtaining counsel.

8. The trial court did not abuse its discretion in determining a juror's use of electronic media during trial did not violate the defendant's right to a fair and impartial jury.

Oakes contends a juror committed misconduct meriting a new trial by tweeting during the course of the case. Oakes contends there was a violation of the trial court's order not to discuss the case with anyone.

Oakes pursued a post-trial motion for new trial under CrR 7.8 and the trial court conducted a hearing at which the juror's "tweets" were admitted and the juror was examined by counsel. 7/26/12 RP 34. The juror testified that during the time he was a juror he had posted information on his Twitter account during breaks in the trial, but never while in the jury box. 7/26/12 RP 36. The juror did not bring his phone into the courtroom. 7/26/12 RP 37. The juror indicated that he had no independent recollection of anyone responding back to him and that the only people who had responded to his tweets were personal friends. 7/26/12 RP 43-4. The juror did not believe he ever received oral responses to his tweets. 7/26/12 RP 47. The juror indicated that he was aware that he couldn't talk about the case at all during the trial. 7/26/12 RP 45, 48. The juror believed he followed that court's instruction. 7/26/12 RP 48. The juror indicated that his tweets were "essentially there was really nothing about the evidence or deliberations or

anything like that.” 7/26/12 RP 48. The juror indicated he followed the other court’s instructions as well. 7/26/12 RP 48.

A series of tweets of the juror was admitted. 7/26/12 RP 80, (Ex. 8 from 7/26/12 hearing). In referencing those tweets, Oakes notes that some tweets posted on October 22, 2010, pertained to the case being covered by Dateline and requests for an interview. Brief of Appellant at 88. Oakes did not point out that those tweets occurred after the jury had returned the verdict and the jurors would have been relieved from the obligation not to discuss the case with others. CP 670.

The trial court entered written findings. CP 926-8. The trial court found that the jury had been instructed that they could inform people that they were on a trial and the length of the trial. CP 926. The jury was instructed not to discuss the case. CP 926. The trial court found that the juror tweeted on his own time. CP 927. The trial court specifically found that the tweets did not disclose anything that the jury was doing or any of his particular mindsets or ideas concerning his thoughts on the case. CP 927. The trial court found the juror was not exposed to extraneous influences from his tweets. CP 927. The trial court did find the tweets were a violation

of the court's instruction not to use the internet, but that there was no instruction for the jurors not to "tweet." CP 927.¹⁰

The trial court concluded the tweeting was not misconduct, the tweets were not prejudicial and the juror was not influenced by the tweets. CP 927. Thus the trial court denied the motion for a new trial. CP 927.

A trial court's ruling on a motion for a new trial will not be reversed on appeal unless there is a showing of abuse of discretion. State v. Crowell, 92 Wn.2d 143, 145, 594 P.2d 905 (1979). As a general rule, appellate courts are reluctant to inquire into how a jury arrives at its verdict. State v. Gay, 82 Wn.2d 423, 439, 144 P. 711 (1914). See also Gardner v. Malone, 60 Wn.2d 836, 841-43, 376 P.2d 651, 379 P.2d 918 (1963). A strong, affirmative showing of misconduct is necessary in order to overcome the policy favoring stable and certain verdicts and the secret, frank and free discussion of the evidence by the jury. Richards v. Overlake Hosp. Med. Ctr., 59 Wn. App. 266, 271-72, 796 P.2d 737 (1990), rev. denied, 116 Wn.2d 1014, 807 P.2d 883 (1991).

State v. Balisok, 123 Wn.2d 114, 117-118, 866 P.2d 631 (1994). Not all misconduct warrants a new trial. Only that misconduct that causes actual prejudice does. State v. Tigano, 63 Wn. App. 336, 341, 818 P.2d 1369 (1991).

When asking whether prejudice occurred, the inquiry is objective rather than subjective. State v. Briggs, 55 Wn. App. [44 (1989)] at 55, 776 P.2d 1347. The question is whether [in

¹⁰ Denial of use of the internet would have precluded use of any current smart phone which use the internet to engage in activities such as texting others or making internet phone calls. It is not clear whether the court's limitation on using the internet was intended to prohibit that conduct.

this case] the unrevealed or extraneous information could have affected the jury's determinations, not whether it actually did. State v. Briggs, 55 Wn.App. at 55, 776 P.2d 1347; Gardner v. Malone, 60 Wn.2d 836, 841, 376 P.2d 651 (1962), 60 Wn.2d 836, 379 P.2d 918 (1963), see Richards v. Overlake Hosp. Med. Center, 59 Wn.App. at 270, 796 P.2d 737.

State v. Tigano, 63 Wn.App. at 341. Appellate courts give great deference to a trial court's determination of whether prejudice resulted. DeYoung v. Cenex Ltd., 100 Wn. App. 885, 897, 1 P.3d 587 (2000).

In the present case, the trial court found there was no prejudice. CP 627.

The trial court had instructed the jury on multiple occasions to not discuss the case with anybody. The tweets posted by the juror do not constitute a discussion of the case. Until after the verdict was rendered the tweets do not identify the name of case, the type of case, the name of any of the parties, lawyers, or witnesses, the evidence received, or identify any subjective thoughts or feelings of the juror or of any of the other jurors about the case. CP 921, Ex. 8 from 7/26/12 hearing. The juror posts could have been said verbally by the juror to anybody and not constitute misconduct. The only things he says are that he is on a long case, he is tired, and that the bailiff is feeding the jury. In fact, the juror even correctly tweeted that "I just

can't say what case or anything until it's over lol." Recognizing that he had to comply with the court's order to not discuss the case.

Even if these types of statements were a violation of the court's admonition to not discuss the case, Oakes has not shown any actual prejudice. Oakes has not identified any factors that would lead one to conclude that the jury's deliberations could have been affected. Instead, Oakes relies purely on a contention that misconduct alone would merit reversal because the juror could not follow the court's instruction in the future. Brief of Appellant at page 90.

Oakes has not proven the trial court abused its discretion when it determined the juror did not disclose information about the case and that the tweets were not prejudicial.

Oakes cites to the Arkansas Supreme Court decision of Dimas-Martinez v. State, 2011 Ark. 515, 385 S.W.3d 238 (2011) for the proposition that a tweeting juror is cause for a reversal. Even if that case were controlling authority, it would be inapposite. In Dimas, the jurors had been specifically admonished prior to opening statements to not "Twitter anybody about this case. That did happen down in Washington County and almost had a, a \$15 million law verdict overturned. So don't Twitter."

Dimas, 385 S.W.3d at 248. Here, the jurors were not specifically admonished to not tweet.

In Dimas, after learning about the tweets, the judge specifically questioned the juror about them. The juror nonetheless continued to tweet throughout the course of the trial. Dimas, 385 S.W.3d at 247.

It was because the juror demonstrated this egregious lack of ability to follow the court's order that the state supreme court reversed the conviction for juror misconduct.¹¹ Dimas, 385 S.W.3d at 247-8. In other words, the prejudice in this case was not from the tweeting *per se*, rather from the juror's demonstrated inability to follow the court's order. The juror disregarded the court's specific order to not tweet, and continued to tweet despite being questioned by the court about that activity. Further adding to the prejudice was the fact that one of the followers of the juror's tweets was a reporter, and the fact that the juror tweeted that a decision had been reached before the verdict was actually announced in open court. Dimas, 385 S.W.3d at 242-3.

In United States v. Fumo, 655 F.3d 288, 305 (3d Cir. 2011), a juror, via Facebook, commented on the trial and offered hints as to when it might

¹¹ The court would have also reversed based on the misconduct of another juror who slept through five minutes of testimony, but it seems fairly clear that the behavior of the tweeting juror alone would have been enough to reverse.

be ending, and, via Facebook and Twitter, indicated that a verdict was forthcoming prior to the verdict being announced in open court. Fumo, 655 F.3d at 298. The federal district court judge, in denying a motion for a new trial, held that there was no indication of outside influence due to the Facebook or Twitter postings and “concluded that, although in violation of his instruction not to discuss the case outside of the jury room, they were ‘nothing more than harmless ramblings having no prejudicial effect. They were so vague as to be virtually meaningless.’” Fumo, 655 F.3d at 299.

Here, the juror’s tweets were even more innocuous than those in Fumo. While the Fumo juror was specifically discussing the length of the case and musing on when it might be over, the juror’s tweets discussed the effect of an unidentified trial on him, i.e. that it was tiring. Other tweets discussed not the case, but how he was being treated as a juror, i.e. what snacks were being offered, how long his lunch break was, what he was doing with his down time. These tweets do not constitute a discussion of “the case.” These tweets provided no information about the case itself. This is very different from the tweets in Dimas and Fumo which did provide information about the case itself and what the juror was thinking about the case. The juror’s tweets do not provide information about the juror’s thoughts on the case itself or when to expect a verdict. See generally

Commonwealth v. Werner, 967 N.E.2d 159, 166 (Mass.App.Ct. 2012) (jurors' posts which reflected "attitudinal expositions" on jury service, protracted trials, and guilt or innocence, but did not reveal any specific facts of the litigation, does not raise the concern of extraneous influence).

Furthermore, even if the tweets were considered to be a violation of the court's instruction to not discuss the case, the defendant has shown no prejudice. As in Fumo, the tweets were "nothing more than harmless ramblings having no prejudicial effect. They were so vague as to be virtually meaningless." Fumo, 655 F.3d at 299.

The Dimas court distinguished the Fumo decision by noting that it was not finding prejudice based on the contents of the tweet but based on the juror's demonstrated inability to follow the court's order, having been questioned about the violation of the order prohibiting tweeting, yet continuing to tweet. Dimas, 385 S.W.3d at 247. The Court also noted that the possibility for prejudice was even higher because one of the followers was in fact a reporter resulting in advance notice of the verdict. Dimas, 385 S.W.3d at 17.

As the trial court specifically found, which has not been contested on appeal, the tweets here themselves did not "disclose anything the jury was doing or any of his particular mindsets or ideas concerning the case." Thus

there was no actual prejudice from the tweets and no misconduct meriting reversal.

9. Any error is harmless beyond a reasonable doubt given the overwhelming evidence of guilt.

While the State does not believe that there were any errors in the present case, the State would be remiss in failing to argue to this Court that any errors found would be harmless given the evidence and testimony presented at trial.

To determine whether error is harmless, this court utilizes “the ‘overwhelming untainted evidence’ test.” Smith, 148 Wn.2d at 139, 59 P.3d 74. Under that test, where the untainted evidence admitted is so overwhelming as to necessarily lead to a finding of guilt, the error is harmless. *Id.* (citing State v. Guloy, 104 Wn.2d 412, 426, 705 P.2d 1182 (1985)).

State v. Davis, 154 Wn.2d 291, 304-05, 111 P.3d 844, 851 (2005) aff'd, 547 U.S. 813, 126 S. Ct. 2266, 165 L. Ed. 2d 224 (2006).

Where an error violates an evidentiary rule rather than a constitutional mandate, the error is not prejudicial unless it is reasonably likely that the outcome of the trial would have been materially affected had the error not occurred. State v. Thomas, 150 Wn.2d 821, 871, 83 P.3d 970 (2004). The improper admission of evidence is harmless error if the evidence is of minor significance in reference to the overall, overwhelming evidence as a whole. Thomas, 150 Wn.2d at 871, 83 P.3d 970.

State v. Price, 126 Wn. App. 617, 638, 109 P.3d 27 (2005).

Oakes was shown by extensive evidence to have gone to Stover's house to do planned killing. He gathered tools and weapons, he went early in the morning, shot Stover's guard dog and shot and killed Stover. He cleaned up the crime scene, removed Stover's body, took Stover somewhere and destroyed the evidence that could have helped prove his claim of self-defense. He fled to another county and when confronted by police denied what he did and snuck out to his car and began removing property. He admitted to his ex-wife that what he did was a felony and he was facing ten to fifteen years in prison. The evidence of guilt was extensive. Against the backdrop of the evidence, the claimed errors need to be evaluated.

Oakes' claims pertaining to the exclusion of evidence of two instances of alleged aggressive conduct occurring on Kiket Island is insignificant in light of the log of information and records saved by Linda Opdycke and shared with Oakes to prove to Oakes how dangerous Stove was. Oakes had full ability to argue self-defense based upon those extensive allegations. Furthermore, in reality Oakes' claim of self-defense was predicated upon Stover shooting Oakes first. As a result, the historical information known to Oakes as shared by Opdycke was not directly relevant to his self-defense claim as it was to the explanation of his actions in the manner which he addressed and confronted Stover.

The admission of the gun and other items found during Oakes' attempted concealment of the items is insignificant in comparison to Oakes' stated claim that the reason he shot Stover was because Stover shot at him first. In fact, his explanation for his actions in cleaning up the crime scene, disposing of Stover's body and the other instrumentalities of the homicide in order to be able to spend more time with his children was consistent with the concealment of the items located in the bag. The evidence obtained would not affect the jury's evaluation of Oakes' stated claim for the basis for shooting Stover.

The admission of the texts showing the purpose of Oakes' meeting with Stover was cumulative of the explanation of the reasons testified to by Oakes' ex-wife. And the trial court's denial of admission of alleged implied assertions did not affect Oakes' claim that Stover came at him, requiring him to shoot Stover to defend himself.

As explained in the argument section above, the handling of the proceeding in the district court did not in any way contribute to Oakes' conviction at trial. Finally, the juror's use of social media was not shown to have in any way affected the process of the jury deliberations.

Overwhelming evidence of guilt allows this Court to reach the conclusion that error, if any, was harmless beyond a reasonable doubt.

V. CONCLUSION

For the foregoing reasons, Oakes conviction and sentence must be affirmed.

DATED this 10th day of May, 2013.

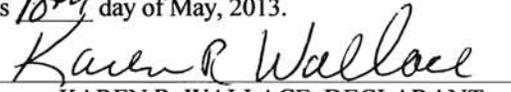
SKAGIT COUNTY PROSECUTING ATTORNEY

By: 
ERIK PEDERSEN, WSBA#20015
Deputy Prosecuting Attorney
Skagit County Prosecutor's Office #91059

DECLARATION OF DELIVERY

I, Karen R. Wallace, declare as follows:

I sent for delivery by; [] United States Postal Service; [] ABC Legal Messenger Service, a true and correct copy of the document to which this declaration is attached, to: Suzanne Lee Elliott and David R. Zuckerman, addressed as 1300 Hoge Building, 705 Second Avenue, Seattle, WA 98104 . I certify under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct. Executed at Mount Vernon, Washington this 10th day of May, 2013.


KAREN R. WALLACE, DECLARANT