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Court of Appeals
Division III
State of Washington

NO. 30219-9-III

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

STATE OF WASHINGTON,

Respondent,

v.

CHRISTOPHER FOLEY,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR KITTITAS COUNTY

The Honorable Scott R. Sparks, Judge

BRIEF OF APPELLANT

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A. INTRODUCTION[1]

Christopher Foley was convicted of first degree manslaughter for the death of his brother-in-law, Russel Ray, whom the state theorized was bludgeoned with a 2 x 10 piece of wood on or about June 21 or June 22, 2010. ARP 27-28; RP 1244. No one had seen or heard from Ray since that date, but his body was found the following March, in a ditch off Vantage Highway by a trapper who claimed he went to retrieve some beaver carcasses he illegally dumped. RP 862, 1414, 1518.

There were no eyewitnesses to Ray's death and police uncovered no physical evidence – DNA or otherwise – tying Foley to Ray's disappearance or death. BRP 60, 62, 79. Moreover, the state's theory as to the timing of Ray's death, and as a result, Foley's opportunity to commit it, was questionable. See e.g. BRP 76; RP 547-48.

Rather, the state's case against Foley was entirely circumstantial, as the prosecution readily admitted. BRP 60, 62, 69; RP 316. Mainly, it was based on evidence of Foley and Ray's deteriorating relationship, after their construction business

[1] This brief refers to the verbatim report of proceedings as follows: "ARP" – 5/6/11 (pretrial hearing); "RP" – pretrial hearings in June 2011, jury trial in August 2011, and sentencing in September, 2011; and "BRP" – 8/19/11 (last day of trial).

dissolved. BRP 63. In that regard, the state sought to admit evidence of three prior arguments or altercations between the two, which the state surmised established Foley's motive and opportunity to kill Ray. Supp. CP __ (sub. no. 98, Notice of Intent to Use 404(b) Evidence, 6/7/11).

In that vein, and over Foley's objection, the state was allowed to present evidence that approximately one month before Ray's disappearance, Foley caught Ray snooping around in his shop and hit him with a 4 x 4 piece of wood. Supp. CP __ (sub. no. 98, Notice of Intent to Use 404(b) Evidence, 6/7/11); RP 166-67. Significantly, however, Foley disputed the existence and state's proof of this altercation. CP 75-79; RP 146, 164, 274. Moreover, Foley argued admission of this evidence violated his right to a fair trial and invited the jury to convict him based on past acts. CP 78-79.

In this appeal, Foley will challenge the court's ruling allowing the state to introduce this highly prejudicial propensity evidence. In light of the absence of direct evidence tying Foley to Ray's death, it is highly likely the inadmissible evidence persuaded the jury to convict.

Foley will also argue he is entitled to a new trial based on instructional error. Over Foley's objection, the court instructed the jury on first and second degree manslaughter as lesser included offenses of the charged second degree murder. According to crime scene responders, the blood and hair evidence found all over Ray's property reflected a "blood letting." Moreover, the 2 x 10 board, which the state theorized constituted the murder weapon, was covered in congealed blood. ARP 27-28. And according to medical examiners, Ray suffered not one – but at least three – blunt force injuries fracturing his skull. Supp. CP __ (sub. no. 102, Memorandum in Support of 404(b) Evidence, 6/7/11); RP 1582-1582.

While Foley maintains his innocence (RP 1690-91), he will argue that regardless, the evidence did not support an inference that a reckless or negligent killing was committed to the exclusion of an intentional one.

Finally, after significant debate and the court's warning it was proceeding at its own risk, the state opted to play in its entirety the video recording of Foley's interview with detectives, following Ray's disappearance. During the video, detective Darren Higashiyama informed Foley the bulk of his family believed he was guilty of killing

Ray. Foley will argue this constituted improper opinion evidence and that the prosecutor committed misconduct by proffering it to the jury.

To the extent defense counsel could have alleviated the prejudice by proposing a limiting instruction, Foley received ineffective assistance of counsel.

B. ASSIGNMENTS OF ERROR

1. The court's admission of propensity evidence violated Foley's right to a fair trial.

2. The court erred in instructing the jury on first and second degree manslaughter.

3. The prosecutor committed misconduct by offering inadmissible opinion evidence, over defense counsel's objection, and in violation of the court's pretrial ruling.

4. To the extent defense counsel contributed to the error by failing to propose a limiting instruction, Foley received ineffective assistance of counsel.

Issues Pertaining to Assignments of Error

1. Did the trial court err in admitting evidence of the 4 x 4 incident, where the state failed to prove it occurred by a

preponderance of the evidence, and where the potential for prejudice far outweighed any probative value of the evidence?

2. Did the trial court err in instructing the jury on first and second degree manslaughter as a lesser included offenses of second degree murder, where there was no evidence supporting an inference that only a reckless killing occurred?

3. Did prosecutorial misconduct deprive Foley of his right to a fair trial, where the state played a portion of Foley's interview with police – in violation of the court's in limine ruling – during which the lead detective asserted Foley's family members believed him to be guilty?

4. Did Foley receive ineffective assistance of counsel where the court indicated it would give a limiting instruction to jurors regarding inadmissible evidence that was proffered by the state through the recorded interview, but defense counsel failed to take the court up on its offer?

C. STATEMENT OF THE CASE

1. Court's Ruling Admitting ER 404(b) Evidence

On March 23, 2011, the Kittitas county prosecutor charged Christopher Foley with second degree murder of his brother in law, Russel Ray, allegedly occurring between June 21 and June 22,

2010. CP 1, 111. Foley and Ray are respectively married to Karen Foley and Christine Ray, who are sisters.[2]

RP 517-18, 566.

As indicated in the introduction, the state's case against Foley was entirely circumstantial. RP 316. As part of these circumstances, the state sought to introduce three prior instances of alleged misconduct it theorized established Foley's motive to kill Ray. Supp. CP (sub. no. 98, Notice of Intent to Use 404(b) Evidence, 6/7/11); RP 145.

At one time, Foley and Ray were business partners in a construction company. Supp. CP __ (sub. no. 102, Memorandum in Support of Admission of Evidence under ER 404(b), 6/7/11). Due to the declining housing market, however, the company stopped being profitable and eventually dissolved. CP 57. According to the state, Ray was obsessed with the company's tools after the company dissolved, particularly how they were divided. Ray reportedly felt he had been cheated. RP 57-58. According to the state, Foley's prior instances of misconduct revolved around disputes about the tools. Supp. CP __ (sub. no. 102, Memorandum

[2] To avoid confusion, individuals sharing the same last names will be referred to by their first names.

in Support of Admission of Evidence under ER 404(b), 6/7/11); RP 149, 155.

In the first instance, the state alleged Foley punched Ray at a job site in May 2009, after the two reportedly argued about the tools. The state proffered to prove the existence of this incident with testimony from Bob Collignon, Karen's and Christine's father, who was at the job site at the time of the purported punch, and testimony from Brink Evans, Jr., who was also present at the time. Supp. CP __ (sub. no. 98, Notice of Intent to Use 404(b) Evidence, 6/7/11); Supp. CP __ (sub. no. 99, Affidavit in Support of Use of 404(b) Evidence, 6/7/11); RP 147-48.

In the second instance, the state alleged the two got into a heated verbal exchange in May 2009, about the tools, at an Ellensburg gas station. Supp. CP (sub. no. 98, Notice of Intent to Use 404(b) Evidence, 6/7/11). The state proffered to prove the existence of this incident through Foley's statements to police. RP 160. During an interview with detectives following Ray's disappearance, Foley admitted baiting Ray at the gas station, but insisted his intent was to resolve the disagreement. Supp. CP __ (sub. no. 208, State's Argument and Affidavit in Response, 9/9/11), Appendix A (transcript of interview), pp. 62-63.

In the final instance, the state sought to introduce evidence that in May 2010, Foley caught Ray snooping around in his shop and hit him with a 4 x 4 piece of wood. Supp. CP __ (sub. no. 98, Notice of Intent to Use 404(b) Evidence, 6/7/11). The state proffered it would prove the existence of this incident through Ray's brother, Mark Ray, as well as Mark Emmert, a co-worker of Foley's. Supp. CP __ (sub. no. 99, Affidavit in Support of Use of 404(b) Evidence, 6/7/11); RP 146, 161.

According to the state, Ray disclosed the incident to his brother during a telephone call. However, the defense objected that Mark's testimony as to his brother's supposed statement constituted inadmissible hearsay. CP 79, 114; RP 146. The state argued the statement fit within the exception for statements against interest. RP 162, 281, 319.

According to the state, Foley described the incident to a co-worker, Mark Emmert. Supp. CP __ (sub. no. 99, Affidavit in Support of Use of 404(b) Evidence, 6/7/11). However, during his interview with detectives, Foley denied encountering Ray in his shop, let alone hitting him with a 4 by 4. Foley acknowledged he saw a "silhouette" near the fence line the two families shared, but merely assumed – without making contact – that it was Ray. Supp.

CP __ (sub. no. 208, State's Argument and Affidavit in Response, 9/9/11), Appendix A, pp. 60-62, 98.

Regarding what Emmert reportedly told to the detectives, Foley asserted that people have a tendency to exaggerate or embellish what they've heard. Id., pp. 100; RP 274.

But perhaps most significantly, Ray himself denied anything happened in Foley's shop at the time the incident was alleged to have occurred. Christine recalled seeing Ray with a black eye at the time of the alleged incident, but Ray told her he sustained the injury at work. RP 279. It appears Ray also told his mother-in-law the injury was work-related. RP 320, 323. Moreover, Ray told his nephew Jorry Ray he just "woke up that way." RP 279.

In addition to arguing the incidents were not admissible under ER 404(b) as improper propensity evidence, the defense argued the state could not meet its burden to prove the 4 x 4 incident actually occurred. CP 75-79, 114, 164, 274.

The court found the incidents were sufficiently proven and admissible under ER 404(b) as evidence of motive, opportunity and lack of mistake or accident. CP 122-125; RP 153-55, 160, 167-68. In that same vein, the court denied the defense motion to exclude Mark Ray's testimony as inadmissible hearsay. CP 126-131, 323.

2. Court's Ruling Instructing the Jury on Manslaughter over Defense Objection

Ray was ultimately convicted of first degree manslaughter, of which the jury was instructed as a lesser included offense of second degree murder, over Ray's objection. CP 192-94, 203; RP 1691; BRP 35-37; see also Supp. CP __ (sub. no. 190, Plaintiff's Proposed Instructions, 8/17/11). During the instructions conference, defense counsel confirmed he and Foley had discussed the potential for lesser offenses and agreed upon an all-or-nothing approach. BRP 36; see e.g. State v. Grier, 171 Wn.2d 17, 42, 246 P.3d 1260 (2011) (all or nothing approach a legitimate strategy).

Nevertheless, the state posited manslaughter instructions were appropriate and supported by the evidence:

> I'll just say for the record I think the evidence of the case shows clearly we have a homicide. I think that reasonable minds, based upon the evidence because we're drawing upon a lot of inferences from the circumstances, reasonable minds on the jury could make a conclusion that wasn't intentional but it was a reckless act based upon the scene, based upon the knowledge of the relationships between the parties, um, and at this point I think we certainly the factual basis to suggest that could find a Manslaughter conviction.

BRP 36. Without further discussion, the court resolved it would give both reckless and negligent homicide instructions. BRP 37; see also CP 191-97.

3. Motion for New Trial Based on Prosecutorial Misconduct

Following the jury's verdict, the defense filed a motion for a new trial (CP 204-258), arguing inter alia that the prosecutor committed misconduct by failing to redact a portion of Foley's recorded interview with detectives in which the detectives asserted that Karen and Christine did not believe Foley's version of events. CP 206-207. As pointed out by the defense, opinion evidence on guilt was excluded pursuant to the defense's motions in limine. CP 82 (MIL 6), 207; RP 184 (MIL 6 granted).

In response, the state disputed the video included any improper opinions on guilt and attached a transcript of the recording. Supp. CP __ (sub. no. 208, State's Argument and Affidavit in Response, 9/9/11). Significantly, the transcript included the following dialogue:

Higashiyama: Have you talked to your wife?

Foley: ... California.

Higashiyama: ... about where Russel might've gone?

Foley: She thinks he's dead.

Higashiyama: Right. Why would she think that?

Foley: She's a woman. I have no idea, she has her feeling.

Supp. CP __ (sub. no. 208, State's Argument and Affidavit in Response to Defendant's CrR 7.4 and 7.5 Motions, 9/9/11), Appendix A, pp. 73.

According to the transcript, Higashiyama later returned to the family's beliefs as to what happened to Ray:

Higashiyama: So you know the family's going to be very upset over this, right? Because some family members, not all of 'em are pointing a finger but they're pointing at, at you, but just because of the relationship.

Foley: Yeah.

Higashiyama: Kay, we're not pointing the finger at anybody cause we don't know.

Foley: Yeah. No, that's fine.

Higashiyama: So you're okay with the family and holding that shadow over your head?

Foley: Yeah I'm fine with it.

Higashiyama: Okay.

Foley: I mean they still talk to you anyways.

Higashiyama: Mmhm (yes).

Foley: But yeah, I, I can live with it.

Supp. CP __ (sub. no. 208, State's Argument and Affidavit in Response to Defendant's CrR 7.4 and 7.5 Motions, 9/9/11), Appendix A, pp. 95-96.

At sentencing, the state reiterated without argument that there was no basis to grant a new trial. RP 1686. The court stated simply: "I agree. You need to prepare an order, Mr. Sander [prosecutor]." RP 1686.

Interestingly, the court's careless rejection of the motion for a new trial was not in sync with its previous warnings and comments to the prosecutor about his tortured decision to play the recording.

Discussion of the video began during the defense motions in limine. RP 179-181. The defense moved to exclude comments concerning Foley's exercise of his constitutional rights, including "any evidence that the defendant was read his rights, exercised his right to remain silent or any evidence that he retained an attorney." RP 80.

The prosecutor opposed the motion, only insofar as Foley's exercise of the right to an attorney was concerned. RP 181. In light of the recorded interview, for which Foley's attorney was present, the prosecutor argued it would be difficult to omit

altogether any reference to Foley's exercise of the right to counsel. RP 181. Nonetheless, the prosecutor affirmed he would not improperly comment Foley's exercise of the right to counsel. RP 181. Based on this representation, the court denied the motion "for now." RP 181.

Additionally, the need to redact the DVD was brought up by defense counsel just before opening statements. RP 497. The defense insisted that instead of "fast forwarding or muting" the offending portions, the DVD itself should be altered. RP 497. The court agreed the DVD, if admitted as an exhibit, needed to be in the same format or condition it would be given to the jury when it retired to deliberate. RP 497.

The prosecutor responded he would investigate further, but believed the "camera, sound, audio recording" system used "doesn't allow for editing." RP 498. In other words, "there is no way to split cut physically." RP 498. But the prosecutor noted alternatively, "the transcript would be – that's easily redacted." RP 499.

When the subject of the hour-and-a-half long video was discussed again, the prosecutor proposed he could play it in its entirety for the sake of completeness (RP 1138), or he could stop

the video for pertinent parts and fast-forward through the parts that needed to be redacted, such as a polygraph reference. RP 1138-39. The court and parties resolved to discuss it further later. RP 1141.

During detective Bannister's testimony about the recorded interview, defense counsel objected the state's presentation of the interview evidence was "confusing" and "awkward." RP 1393. The prosecutor responded that presentation of snippets of the recording was not a viable option, because the video could not be physically altered. RP 1396, 1398. Because the transcript contained "inaudible" portions, the prosecutor asserted it was not a good option. RP 1396. The state therefore asked the court to revisit its decision that the video could not be admitted unless it was in the condition as would be needed to go back to the jury. RP 1398.

As the prosecutor argued: "if the state screws up and [in]admissible evidence comes in by error there will be a problem." RP 1398. In that instance, the prosecutor further argued the "problem" could be fixed with an instruction. RP 1398.

At this point, defense counsel objected that the erroneous admission of inadmissible evidence – excluded by virtue of the court's pretrial rulings – could be so easily cured. RP 1399.

Moreover, defense counsel noted, "We can have a completely err[or] free introduction of the evidence." RP 1399.

The court granted the state's request to reconsider and ruled the state would be allowed to present the video in the manner it suggested. RP 1399. The court resolved the video would not go back to the jury, but would be treated more like a witness statement. RP 1400. Ominously, however, the court warned the prosecutor: "But I'll let you play the video with the understanding that if something comes in we'll have a mistrial." RP 1400.

Regardless, when the prosecutor commenced to play the video during Detective Higashiyama's testimony, it failed to skip the part where the detectives informed Foley of his constitutional rights. RP 1635-37. Defense counsel immediately objected. RP 1637. The court agreed the warnings were not relevant, were not "helpful to the jury" and were partially privileged. RP 1638. The court reminded the prosecutor it had "required the state to come up with a way to make this easy and that doesn't work, right?" RP 1638.

Defense counsel interjected there were many references in the recording that were inadmissible. RP 1639. The prosecutor essentially complained the state had limited options regarding the recording. RP 1638.

After further complaints by the prosecutor that the video was unwieldy, the court resolved:

> Create a case against him to impeach. That's the whole purpose of what this trial is about. I've never seen anything like this. All right. You can – we'll fast forward it past advisement of rights and we'll start there and you can play other than the circumstance.

RP 1644.

The prosecutor played the remainder of the DVD. RP 1645, 1647-68. The court later criticized him for wasting everyone's time by playing the lengthy video, most of which was irrelevant. RP 1659.

The video was brought up once more before the jury was instructed, when the defense sought to have the court instruct the jury to disregard the video. BRP 42. The court indicated it would not instruct the jury to disregard the video entirely, but would instruct the jury to disregard portions of it. BRP 42. Defense counsel indicated frustration, on grounds it would be difficult to parse out which parts should be disregarded. BRP 42. The defense noted that the recording contained statements attributed to other people opining on Foley's guilt, which was one of the reasons the defense argued its admission in the first place. BRP 42.

When the court indicated the defense had "a good point," the prosecutor disagreed and analogized to "pepper jack cheese:"

> Right. Well ... I guess I disagree that it is a good point. It's taking to be arguing that pepper jack cheese you should ignore the pepper. Well it affects the flavor of the entire product so this is the exhibit, all the comments are in there, yes may or not have been right on point, um, but that was the, that was the context in which he was giving his statements.

BRP 43. In any event, the prosecutor was "not sure exactly how it is spelled out in the video that somebody else thinks she [sic] did it." BRP 43.

The court resolved it would not give an instruction at the time, but opined that, "if Mr. Foley's convicted then he would have something to appeal that's for sure." BRP 43.

At sentencing, the parties addressed that part of the defense motion for a new trial not concerning the video. CP 206; RP 1685. Afterward, the state argued there was no basis for a new trial, and the court agreed. RP 1686.

4. Trial Testimony

At the time of Ray's disappearance, Ray and Christine lived at 241 Look Road in Ellensburg. RP 566. Christine's sister Karen lived with Foley at 1517 Sanders Road in Ellensburg. RP 940. Look and Sanders Road intersect and the sisters' property lines are

such that Karen's back pasture (north of her house) abuts Christine's back pasture (west of her house). RP 579, 940. The properties are essentially kitty-corner, with a house in between on the corner where Sanders and Look intersect. RP 578-79, 941.

Christine and Karen's parents, Bob and Connie Collignon, lived at 291 Look Road, property adjacent and to the north of Ray's. RP 580-81, 1284. Theirs was a tight knit family. RP 570-77, 754, 1286-1291.

In June 2010, most of the family had gone to California for a wedding. RP 599, 1299. Ray had stayed behind to work and tend the animals, however. RP 600. For similar reasons, Foley returned home early on Monday June 21, 2010. RP 1299.

That was the day Ray supposedly disappeared, according to the state's theory. ARP 27-28. Kevin Johnson was the last known person to see Ray. RP 922. Johnson, who works for a tow truck company, testified that he received a call from Ray shortly after 5:00 p.m., Monday evening. RP 672-73. Ray's truck had broken down on the west side of Snoqualmie Pass coming home from work (RP 673).

In November 2009, Ray had gone to work for his nephew, Jorry Ray who ran a construction site in Puyallup.[3] RP 595, 599, 630, 690, 695. Ray did not care too much for Jorry. RP 630, 633-34. In fact, immediately preceding Ray's disappearance, he and Jorry had a falling out. RP 695-97, 764. Ray had been staying with Jorry on the Westside during the week, but told Christine he had "worn out [his] welcome" and needed to find a different place to stay immediately. RP 634. Within one day, Ray moved his travel trailer to a friend's property to stay during the week instead of Jorry's. RP 634, 1316.

Moreover, the supposed day of his disappearance, Ray was livid with Jorry. RP 606, 639, 1315. While broken down on the side of the highway, Ray spoke to his father-in-law (who was still in California) over the phone. RP 1301-1302. Collignon testified Ray believed Jorry directed one of the laborers on the job site to put bad diesel in his truck, thereby causing his truck to break down. RP 1302, 1315. According to Collignon, Ray was so fed up with Jorry

[3] In addition to their official work, Ray and Jorry were also involved in a joint enterprise involving the removal and recycling of scrap metal from the job site. RP 635, 768. According to Christine, it was without the owner's permission. RP 637. The two reportedly split the cash proceeds. RP 636, 768. Jorry admitted "salvage" is "big business." RP 783.

he was thinking about taking a few days off to look for a different job. RP 1302, 1315-16.

Jorry testified he, too, had received a call from Ray that evening, but claimed that Ray was mad at himself for putting the bad diesel in his truck. RP 702.[4] Apparently, there were tanks of old diesel fuel on the job site used to run the generators. RP 698. Jorry claimed Ray had an arrangement with the company people to use the diesel for his truck. RP 700. Jorry testified Ray told him he likely would not be at work on Tuesday in order to have the truck repaired, but would return on Wednesday. RP 702.

In any event, upon receiving Ray's call, Johnson drove to meet Ray at the Pass. RP 674. After unloading Ray's truck back at the shop in Ellensburg and grabbing a bite to eat, Johnson dropped Ray off at home sometime after 10:30 p.m. RP 679.

Jorry testified that when Wednesday arrived and he had not heard from Ray, he became worried and started calling Ray's friends and family. RP 703-704. Jorry called in a missing person's report on Thursday. RP 707.

Meanwhile, Christine had overheard her father's telephone conversation with Ray and was worried Ray might quit his job with

Jorry. RP 606, 639. She testified Ray was so angry with Jorry, she did not want to confront him for fear of making the situation worse. RP 607. Accordingly, when she received a call from Jorry on Wednesday indicating that Ray had not come to work, Christine was not very worried. RP 607-08, 706.

Nevertheless, after unsuccessful attempts to reach Ray, Christine contacted family friends, Randy Shannon and Time Eagan. RP 608-609, 794. When they responded they had not heard from Ray, she asked them to check on the house and animals. RP 608-609.

Shannon testified he and his wife Teresa went to the property Tuesday morning[5] after Christine called. RP 795. Tim Eagan was already there when they arrived. RP 795, 826. Shannon looked around for Ray unsuccessfully for about an hour, before returning home. RP 796.

Shannon and his wife returned Thursday to look around again. RP 797-98. At this time, Shannon did not see any blood on the carport or sidewalk. RP 801. Nor did he see any blood on the

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[4] Johnson similarly testified his memory was that Ray was mad at himself. RP 675.

[5] Although it's unclear, it may actually have been Wednesday that the Shannons received Christine's call and went to check the property. Cf. RP 795, 826, 913.

house or any of the gates separating the various areas of the property. RP 802-803.

Shannon's wife Teresa similarly saw no blood on the property. Interestingly, she watered some of Christine's flowers, where crime scene responders would later find blood evidence. RP 813-14, 818-820, 1101. Nor did Teresa see any blood on the carport post, where responders would also later find blood evidence. RP 820, 1104. Teresa testified she would have seen blood, had it been there. RP 820.

Shannon similarly testified that if blood had been there on that Tuesday or Thursday, he would have seen it. RP 804, 806. In fact, he did observe blood on the gate towards the barn when he returned to the property the following Monday, June 28. RP 806.

Tim Eagan testified he rushed over to the property on Wednesday after receiving Christine's call. RP 826, 831. After looking inside, Eagan went outside to find the Shannons. RP 827. Eagan looked around the property with the Shannons. RP 828. He did not recollect seeing any blood. RP 833-34.

Upon receiving Jorry's missing person report Thursday, June 24, sheriff's deputy Christopher Whitsett went out to the residence. RP 612, 708, 897, 900. Whitsett testified he looked around, but did

not observe anything unusual. RP 901; see also RP 612-613. After speaking with the Shannons who had shown up, Whitsett decided he needed to do a more thorough search. RP 912.

Later that day, Whitsett returned with sergeant Rob Hoctor "to make sure we look over every square inch of that property." RP 843, 861, 916-17. Despite looking at "every square inch," Hoctor testified they found only one item of potential interest. RP 851-52, 854, 1002. Hoctor found a small-to-medium sized mark that appeared to be blood on the fence on northwest side of the house. RP 854, 919. To him, however, it looked old and unconcerning. RP 855, 870, 877. Whitsett did not find it significant, either. RP 1001. There was no other blood on the scene of which Hoctor or Whitsett was aware. RP 879, 919.

Worried, Collignon started the drive back from California Thursday morning. RP 610. Upon his return Friday, he found Jorry inside the house, supposedly sleuthing for clues. RP 649, 1304. Interestingly, Jorry had never been inside the house before in order to know what would be a clue. RP 649. Collignon told him to leave. RP 649, 1304. Christine did not trust Jorry, and Collignon felt Jorry had no business there, in light of the diesel incident. RP 1304, 1320.

Christine began the drive Friday and returned Saturday evening, June 26. RP 614. She observed Ray's lunch box on the counter, where he usually put it upon returning from work. RP 615. The bowls were washed and ready for their next use. RP 616. Similarly, Ray's change was on the table, where he usually empties his pockets. RP 617.

Ray's wallet was not on the table where he usually sets it. Nor was his cell phone in its charger. RP 617. Christine also noticed the bed was turned down, as if Ray had readied for bed. RP 617. The red shorts he usually wore to bed after showering were missing. RP 618. It appeared Ray had showered, as his shaving kit was still out. RP 616.[6]

On Sunday, Christine looked outside around the property. On the gate leading between the house and backyard, Christine saw smears that looked like they could be blood. RP 619. She looked down at the driveway and saw what appeared to be blood drops. RP 620. Upon further investigation, Christine saw what appeared to be smeared blood on the gate between the back yard and back barn area, as well as the front gate on Look Road. RP

[6] Whitsett and the Shannons made similar observations about the bed and shaving kit. RP 769, 812, 907-908.

620. Christine testified she also observed blood around the picnic table, on nearby boards and a small gate. RP 622.

After receiving Christine's call, Whitsett and his superiors returned the following day, Monday, June 28. RP 624, 651, 969, 1010. On this occasion, they likewise observed blood. RP 624, 1335-336. With assistance from search and rescue volunteers, they also found what the state proposed to be the murder weapon – a 2 x 10 board covered in blood located behind a piece of plywood in a stall in the barn. ARP 27-28; RP 1054, 1055, 1071, 1082-1084, 1244.

That day, the sheriff's office also enlisted Washington State Patrol to help process the scene. RP 1050. Forensic Scientist Brianna Peterson testified she and the other responders spent two days collecting blood evidence. RP 1088, 1112. According to her, the scene was of a "bloodletting." RP 1097, 1167.

Essentially, the responders observed blood spatter, blood drippings and blood drops all over the property. See e.g. RP 1097, 1099, 1100-1110. Particularly gruesome was evidence on the north side of the property:

> So on this fence there was red brown staining, staining across the length of this property line to the residence. On one side of the fence there was

> transfer stains that were 12 inches in length. On the fence post there was red brown drops that were across different areas of the fence along here. The trees that were here some of the branches had red brown staining and there is apparently hair attached to some of the tree branches and then where the fence ended is the north of the residence and there was large red staining on the exterior of the residence of the house.

RP 1099.

A significant amount of blood was also located in the immediate back yard by the trampoline. RP 1107. "Saturation" stains were visible on the nearby railroad ties, as were hairs. RP 1108. Spatters of blood were also observed in the grass to the west of the ties.[7] RP 1108.

Peterson also examined the bloody board found in the barn. RP 1159. According to her, the board revealed: "red brown staining transfers to three sides of the board and actually more than three. ... Four different sides of the board and four has a spatter pattern and the blood is on each of the four." RP 1160.

At Jorry's suggestion, the sheriff's office quickly selected Foley as its suspect. RP 720, 775, 998. Police first contacted

[7] Multiple samples of the blood evidence were taken and tested for DNA. RP 1113-1115, 1242-1243. The resultant profile generated from the evidence matched that of the known sample for Ray. RP 1098, 1242-43, 1249.

Foley Friday, June 25, when Whitsett called to inquire about his whereabouts the night Ray was last seen. RP 938-39, 942-43.

Foley reportedly said he arrived home from California on June 21, at approximately 8:00 p.m. RP 943. Upon returning home, he encountered the family's pet sitter, Shelly Envich. RP 943. After Envich left, Foley made dinner between 9:00 and 9:30 p.m. and went to bed afterwards. RP 944. He left for work the next day around 1:00 a.m.[8] RP 944. Foley worked on the Westside at a job site in Olympia. RP 946-47. Foley explained he left early due to construction delays on the Pass. RP 945.

Like Ray, Foley also stayed on the Westside during the workweek. RP 947. Foley provided Whitsett with contact information for his nephew Michael and his wife, Megan Lucas, with whom he stayed in Shelton. RP 947, 1447.

Police contacted Lucas on July 1, to inquire about Foley's actions following Ray's disappearance. RP 1369, 1371. According to Lucas, Foley had mentioned something about a missing rigging tool when he returned to Shelton after work June 22. RP 1450-51.

[8] Envich confirmed that as expected, Foley was not at home the following morning at 7:30 a.m., when she returned to tend the animals. RP 1034-1035, 1037-38.

Lucas also claimed Foley stated he did not get much sleep the previous night, as he had been up until 2:00 or 3:00 a.m. RP 1453.

Nonetheless, after hearing of Ray's disappearance, Lucas purposely looked to see if Foley had any bruises or scrapes and saw no indication he had been in an altercation. RP 1454, 1465-66. Nor did she observe any change in his behavior. RP 1465.

Foley agreed to give a formal, recorded interview with police on July 23, 2010. RP 1382. During the interview, Foley clarified that he noticed the missing tool the week *after* returning from California, after returning from Shelton for work.[9] Supp. CP __ (sub. no. 208, State's Argument and Affidavit in Response, 9/9/11), Appendix A,

During the interview, Foley described a similar timeline as before. He returned home from California on June 21, at approximately 8:30 p.m. RP 1386. After making dinner at approximately 9:20 p.m., and speaking to Karen on the phone, he went to bed. RP 1386.

[9] In that same vein, Envich testified that Foley had returned from work sometime after their initial meeting on June 21, although she could not recall the specific date. RP 1039. Envich claimed that when she expressed sympathy for Ray's disappearance, Foley said Ray was an "asshole," that they had been in business together but that it had not worked out, because Ray had stolen tools. RP 1042. Foley asked whether Envich had seen anyone on the property near a truck. RP 1042.

Foley awoke early, around 12:30 a.m., gassed up the truck and headed for work on the Westside. RP 1386. He explained he left for work early because of construction on the Pass, blasting on the freeway near Olympia, and because parking spots were scarce.[10] RP 1386, 1401. Foley told the detectives when he arrived around 4:30 a.m., he spoke to co-worker Mart Emmert.[11] RP 1386.

After purchasing a parking pass, Foley returned to his truck to take a nap. RP 1387. He inadvertently forgot to set his alarm, however, and ended up being 18 minutes late for work. RP 1387.

Foley's supervisor, Matthew Curtis, testified he received a text message from Foley at 5:21 a.m. on June 22. RP 1408. It read: "Got in late, forgot to set alarm, might be two hours late." RP 1408, 1476. Curtis testified he also received a call from Foley at approximately 7:30 a.m., about a half hour late for work, reporting he was just down the street. RP 1476, 1478.

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[10] Detective Bannister confirmed there was construction at the Pass and on the freeway near Olympia at the time. RP 1402.

[11] Emmert remembered speaking with Foley one morning in June 2010, but claimed Foley had asked him if he had any parking stubs. RP 1496-97. Emmert thought Foley wanted them for tax purposes and gave him a handful. RP 1496. Emmert was unsure whether Foley asked for parking stubs on more than once occasion. RP 1502.

Despite being late, Curtis did not notice any difference in the quality of Foley's carpentry. RP 1480. In fact, In Curtis' opinion, Foley was the best carpenter he had. RP 1480. Nor did Curtis, who worked alongside the Foley the entire day, notice any scrapes or bruises on him. RP 1481.

Phone records obtained from AT&T indicated Foley's phone was still located in Kittitas County when the text to Curtis was placed. RP 1594, RP 1604. An engineer for AT&T testified the records indicated that the cell phone tower accessed at the time the text was sent was located on the west side of Canyon Road. RP 1607.

Phone records further indicated that approximately six minutes later, at 5:26 p.m., a call was placed from Foley's phone. This time, a cell phone tower on Heart Road was accessed. RP 1608. According to the AT&T engineer, the accessed towers indicated the phone was travelling westbound on I-90. Finally, an additional phone call was placed at 7:20 a.m., and originated from the Olympia area, according to AT&T's records. RP 1608-1609. None of the calls or texts indicated, however, that Foley was on Ray's property or near Vantage Highway. RP 1617.

Foley later informed a friend that he had turned around at North Bend that morning to retrieve something he inadvertently forgot at home. Foley stated he made calls and/or sent texts while in Cle Ellum and Thorp to his wife and superintendent. RP 1555.

Regardless of whether Foley's whereabouts were consistent with the cell phone records, police uncovered no physical evidence – blood or otherwise – tying Foley to the scene of the murder, to Ray's body, or its recovery site. See e.g. RP 1154-56, 1176, 1201, 1246, 1255, 1271, 1434. And not insignificantly, Peterson conducted an experiment in which she attempted to simulate the state's theory of the homicide and got blood all over on her shoes, pants, gloves, as well as on the wall near the performed experiment. BRP 73; RP 1173-1174, 1184.

For example, no blood evidence was located in Foley's truck or truck canopy. RP 1154-57, 1162. Nor was Foley's DNA located at the scene of the crime, or on the 2 x 10 board. RP 1178, 1246, 1248. No blood was located on shoes police seized from Foley's house. RP 1266, 1422. Nor was any staining observed on the shirt police believed Foley had been wearing the night of Ray's disappearance. RP 1665, 1667, 1673. No evidence tying Foley to Ray's body or the dumpsite was uncovered, either, after Ray's body

was discovered along the Vantage Highway on March 9, 2011. RP 862.

Due to the lack of any physical evidence, the state focused on the relationship between Ray and Foley in an attempt to connect Foley to Ray's death. See e.g. BRP 63. He and Ray had been close until their construction company dissolved. RP 581, 584, 588, 1278, 1310-1311, 1324. As indicated above, the two had a falling out over the company's tools. See e.g. RP 584, 1324

In May 2009, Ray and Foley reportedly tussled at a job site where Ray was working. RP 1279-1281. RP 585. Brink Evans was working at the site with Ray. RP 1279. He testified Foley came to the site to retrieve some tools; Foley said he had a bill of sale. RP 1280. Brink knew the men argued about tools and did not pay much attention, until Ray claimed Foley hit him. RP 1281.

When Brink looked over, he saw Ray reaching for his hammer and heard Ray say he was going to hit Foley with it. RP 1281. Brink and Collignon, who was also at the job site, were able to de-escalate the conflict, however, and Foley left after the one alleged punch.[12] RP 1281-82, 1296.

[12] Collignon was present but testified he did not see the punch, either. RP 1295. He testified he saw Ray reaching for his hammer while walking towards Foley, however. RP 1296.

As indicated in the ER 404(b) facts section, there was also a verbal exchange between the two regarding tools at a gas station in 2009. Supp. CP __ (sub. no. 208, State's Argument and Affidavit in Response, 9/9/11), Appendix A (transcript of interview), pp. 62-63; RP x (DVD recording played).

Finally, as also indicated, the state alleged there was an occasion in May 2010, when Foley struck Ray with a 4 x 4. Ray supposedly told Emmert about the incident. Emmert testified Foley said he was running late one morning when he realized he forgot his work boots and turned around to get them. RP 1498. When Foley pulled back into his drive, he reportedly saw a light on in the shop/garage and went to investigate. Once inside, he heard movements and picked up a 4 x 4 board. 1498-99. When a person came around the corner, Foley reportedly "clocked him." RP 1499. When the person dropped, Foley realized it was Ray. According to Emmert, Foley said he helped Ray up, escorted him to the door and went to work. RP 1499.

In that same vein, Ray's brother Mark testified he called Ray in May 2009, after his son (Jorry) called him about an injury he saw to Ray's eye. RP 741, 1512. Jorry claimed Ray said he woke up that way, when he asked about the injury. RP 739, 774.

Mark testified Ray wasn't himself when he called. RP 1514. When Mark asked what was wrong, Ray reportedly said he had gone to look at Foley's for some tools Ray claimed were missing. RP 1514. According to Mark, Ray said he went inside Foley's garage to look, when all of the sudden, he was blind-sided. RP 1514. Ray reportedly said Foley hit him with a 4 x 4, knocking him to the ground. RP 1514.

Significantly, Christine recalled seeing an injury to Ray's eye about this same time. RP 591-94. When she asked about it, Ray said he ran into something at work. RP 591, 635. Ray gave the same explanation to Karen's mother. RP 591. In Christine's opinion, Ray would have told her about the incident, if it actually occurred. RP 644. Collignon testified Ray likewise would have told his wife, as Foley frequently confided in her. RP 1314.

D. ARGUMENT

1. IMPROPER ADMISSION OF PROPENSITY EVIDENCE DENIED FOLEY A FAIR TRIAL.

It is fundamental that a defendant must be tried on evidence relevant to the crime charged, and not convicted because the jury believes he is a bad person who has done wrong in the past. State v. Lough, 125 Wn.2d 847, 853, 889 P.2d 487 (1995). In light of this

principle of fundamental fairness, ER 404(b) forbids evidence of prior acts, which establish only a defendant's propensity to commit a crime.[13] State v. Wade, 98 Wn. App. 328, 333, 989 P.2d 576 (1999). While specific acts of misconduct may sometimes be introduced for other purposes, they can never be used to establish bad character. State v. Saltarelli, 98 Wn.2d 358, 362, 655 P.2d 697 (1982).

Before a trial court may admit evidence of other crimes or misconduct under ER 404(b), it must identify on the record the purpose for which such evidence is admitted. Even when a valid purpose can be identified, evidence of prior misconduct still must be relevant to a material issue, and its probative value must outweigh its prejudicial effect. The trial court must also find by a preponderance of the evidence that the claimed misconduct occurred. State v. Brown, 132 Wn.2d 529, 571, 940 P.2d 546 (1997), cert. denied, 118 S. Ct. 1192 (1998). Regardless of relevance or probative value, however, evidence that relies on the

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[13] ER 404(b) provides:

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

propensity of a person to commit a crime cannot be admitted to show a person acted in conformity with his or her propensity to commit a crime. Saltarelli, 98 Wn.2d at 362.

Courts presume that evidence of a defendant's past acts is inadmissible and resolve any doubts on whether to admit the evidence in the defendant's favor. State v. Fuller, __ Wn. App. __ 282 P.3d 126 (2012) (citing State v. Nelson, 131 Wn. App. 108, 115, 125 P.3d 1008 (2006)).

In the present case, the court erred in admitting evidence of the 4 x 4 incident, because the state failed to prove its existence by a preponderance of the evidence, and because its prejudicial effect far outweighed its probative value.

First, the state failed to prove the existence of the 4 x 4 incident by a preponderance of the evidence. As argued by the defense, Mark Ray's testimony as to what Ray told him over the telephone constituted hearsay. Although the state argued Ray's statement qualified as a statement against interest, there was insufficient corroboration to allow for its admission.

Under ER 804(b)(4), a statement against penal interest is not admissible in a criminal case "unless corroborating circumstances clearly indicate the trustworthiness of the

statement." Considering that Foley told his wife he sustained the eye injury at work, while he told Jorry he "woke up that way," there was insufficient corroboration to clearly indicate the trustworthiness of the statement.

And although Emmert testified Foley told him about hitting Ray with a 4 x 4, Foley denied making this statement and pointed out people's tendency to embellish. Considering all the facts, and the requirement of clear corroboration for hearsay statements against interest, the state failed to meet its burden to establish the incident by a preponderance of the evidence. The court should have excluded the 4 x4 evidence on that basis.

Second, the court should have excluded it on the basis that its potential for prejudice far outweighed its probative value. Significantly, the state had ample evidence establishing the tool-centered feud between Ray and Foley and at least two prior altercations – the job site assault and the gas station verbal exchange – establishing the high level of animus between the two. Accordingly, the probative value of the 4 x 4 evidence was diminished. See e.g. State v. Myers, 49 Wn. App. 243, 247, 742 P.2d 180 (1987).

Perhaps more significantly, considering the similarity between the 4 x 4 incident and the state's theory of how Ray was killed, the potential for prejudice was extremely high. See e.g. State v. Escalona, 49 Wn. App. 251, 742 P.2d 190 (1987) (grounds for mistrial in state's case against Escalona for assault with a knife where state's witness testified Escalona stabbed someone before).

Considering the lack of any direct evidence tying Foley to Ray's death, the jury was likely influenced to convict based on the admission of this unfairly prejudicial evidence. This Court should reverse. See e.g. State v. Fuller, __ Wn. App. __ , 282 P.3d 126 (2012) (reversal required where error in admitting defendant's prior bad acts materially affected outcome of the case, within a reasonable probability).

2. THE COURT ERRED IN INSTRUCTING THE JURY ON FIRST AND SECOND DEGREE MANSLAUGHTER.

An instruction on a lesser included offense is warranted when two conditions are met: First, each of the elements of the lesser offense must be a necessary element of the offense charged and second, the evidence in the case must support an inference that the lesser crime was committed. State v. Perez-Cervantes,

141 Wn.2d 468, 6 P.3d 1160 (2000); State v. Workman, 90 Wn.2d 443, 447-48, 584 P.2d 382 (1978).

The purpose of the second prong is to ensure that there is evidence to support the giving of the requested instruction. This factual showing must be "more particularized than that required for other jury instructions" and "must raise an inference that only the lesser included ... offense was committed to the exclusion of the charged offense." Fernandez-Medina, 141 Wash.2d at 455, 6 P.3d 1150. "If the evidence would permit a jury to rationally find a defendant guilty of the lesser offense and acquit him of the greater, a lesser included offense instruction should be given." State v. Warden, 133 Wash.2d 559, 563, 947 P.2d 708 (1997). This rule is intended to allow both parties to "have jury instructions embodying its theory of the case" but only "if there is evidence to support that theory. It is error to give an instruction not supported by the evidence." Warden, 133 Wash.2d at 563, 947 P.2d 708.

The crimes of first and second degree manslaughter constitute legal lessers of the crime of second degree murder. See e.g. State v. Gamble, 154 Wn.2d 457, 469, 114 P.3d 646 (2005). The court nonetheless erred in instructing the jury on these crimes,

as there was no evidence on which a jury could rationally find the defendant guilty of the lesser and acquit him of the greater.

The Supreme Court's opinion in Perez-Cervantes is directly on point. Perez-Cervantes was found guilty of the second degree murder of Samuel Thomas. Perez-Cervantes, 154 Wn.2d at 471. Thomas allegedly robbed Perez-Cervantes. Thereafter, and presumably in retribution, Perez-Cervantes and several accomplices severely beat Thomas. During the affray, Perez-Cervantes twice stabbed Thomas with a pocketknife. The stabbing punctured an artery between Thomas' ribs, which caused blood to rush to the left side of his chest cavity. Id.

Following his apparent recovery and release from the hospital, Thomas began complaining to his girlfriend about his injuries. Id. Two days later, Thomas stopped breathing and died. The autopsy revealed Thomas had five liters of fresh blood in his chest cavity. The medical examiner found the stab wound to have caused Thomas' internal bleeding and death. Id.

On review, the Supreme Court affirmed the lower court's decision not to instruct on first and second degree manslaughter:

> Perez-Cervantes contends that the jury could have inferred that manslaughter was committed because "a small knife, causing a small wound, which

> was successfully treated initially does not prove intent to kill," and that Perez-Cervantes "meant to assault Mr. Thomas, not kill." Br. of Appellant at 8-9. Perez-Cervantes cannot, however, overcome the presumption that an actor intends the natural and foreseeable consequences of his conduct. The State's evidence showed that Perez-Cervantes twice attacked Thomas with a knife, after Thomas had been kicked and beaten into submission. "A jury may infer criminal intent from a defendant's conduct where it is plainly indicated as a matter of logical probability." State v. Myers, 133 Wash.2d 26, 38, 941 P.2d 1102 (1997). In short, there was no evidence that affirmatively established that Perez-Cervantes acted recklessly or with criminal negligence in plunging the blade of his knife into Thomas. Whatever Perez-Cervantes' subjective intent, his objective intent to kill was manifested by the evidence admitted at trial.

Perez-Cervantes, 141 Wn.2d at 481-82.

Similarly here, there was no evidence Foley (assuming he was the culprit) acted recklessly or negligently by repeatedly whacking Ray in the head with a 2 x 10. As in Perez-Cervantes, whatever the culprit's subjective intent, his objected intent to kill was manifested by the evidence admitted at trial.

As indicated above, the crime scene was grisly. See e.g. RP 1154-1155. In that same vein, forensic anthropologist Katherine Taylor examined Ray's bones and testified his skull suffered trauma to its left side of the head, in the form of blunt force trauma, with *a*

minimum of three impact sites.[14] RP 1582. She also testified a significant amount of force was necessary to cause this kind of damage. RP 1583.

The forensic pathologist concurred Ray suffered separate blunt force impacts to the left side of his skull. RP 1588. These injuries "undoubtedly caused brain injury which caused death at some point later in the candescence of these injuries." RP 1589. In other words, Ray died of blunt force injury to the heard, enforced injury." RP 1589 (emphasis added).

In light of these facts, and the lack of any evidence indicating Ray's injuries were anything other than intentional, the court erred in instructing the jury of first and second degree manslaughter.

3. PROSECUTORIAL MISCONDUCT DEPRIVED FOLEY OF HIS RIGHT TO A FAIR TRIAL.

The prosecutor committed misconduct and deprived Foley of a fair trial by offering as evidence the unredacted video of Foley's interview with police detectives, in which Higashiyama indicated Foley's family did not believe him and thought he was guilty. Although the defense successfully moved to exclude opinions on guilt at a pretrial hearing, and although the prosecutor knew the video contained objectionable material, he played it anyway –

[14] Blood spatter on the board likewise suggested multiple impacts. RP 1160.

despite the court's warnings he could thereby create grounds for a mistrial or grant of a new trial on appeal.

A prosecutor is a quasi-judicial officer who has a duty to ensure a defendant in a criminal prosecution is given a fair trial. State v. Boehning, 127 Wn. App. 511, 518, 111 P.3d 899 (2005). Where a prosecutor commits misconduct, the defense may be deprived of a fair and impartial trial. Boehning, at 518; U.S. Const. amend. 14; Wash. Const. art. 1, § 3.

A defendant claiming prosecutorial misconduct who has preserved the issue by objection bears the burden of establishing the impropriety of the prosecuting attorney's actions and their prejudicial effect. State v. McKenzie, 157 Wash.2d 44, 52, 134 P.3d 221 (2006). A defendant establishes prejudice if there is a substantial likelihood the misconduct affected the jury's verdict. State v. Dhaliwal, 150 Wash.2d 559, 578, 79 P.3d 432 (2003).

Even with no objection, however, reversal is still required when the misconduct is so flagrant and ill-intentioned it causes enduring prejudice that could not have been cured by instruction. Boehning, 127 Wn. App. at 518.

It is reversible misconduct for a prosecutor to violate a court order regarding the admissibility of evidence. State v. Smith, 189

Wash. 422, 428-29, 65 P.2d 1075 (1937); see also State v. Escalona, 49 Wn. App. 251, 255-56, 742 P.2d 190 (1987) (witness testimony in violation of court's pretrial orders constituted serious trial irregularity necessitating retrial despite court's instruction to disregard the improper statement).

Here, defense counsel preserved the error. Counsel successfully moved to exclude improper opinions on guilt pretrial. Counsel also objected strenuously and often to playing the video without proper redactions. Defense counsel noted the video contained objectionable material that should be redacted by the state. Seemingly unconcerned, but overwhelmed by technical difficulty, the prosecutor opted to play the DVD anyway.

The evidence introduced through detective Higashiyama clearly revealed Foley's family members' opinions as to his guilt. Such evidence is clearly improper, regardless of the court's pretrial ruling. See e.g. State v. Dolan, 118 Wn. App. 323, 329, 73 P.3d 1011 (2003), State v. Demery, 144 Wn.2d 753, 759, 30 P.3d 1278 (2001). The prosecutor's actions in playing that portion of the DVD therefore constituted misconduct.

Based on the lack of any direct evidence tying Foley to Ray's disappearance, and the fact that no blood was observed on the

property until after Foley's opportunity to commit the crime had passed, there is a substantial likelihood the misconduct in offering the improper opinions affected the jury's verdict. This Court should therefore reverse Foley's conviction.

4. FOLEY RECEIVED INEFFECTIVE ASSISTANCE OF COUNSEL.

To the extent defense counsel contributed to the error by failing to take the court up on its offer to give a limiting instruction to disregard portions of the video, Foley received ineffective assistance of counsel.

The federal and state constitutions guarantee the right to effective representation. U.S. Const. Amend. VI; Wash. Const. art. 1, § 22. To prevail on an ineffective assistance claim, trial counsel's conduct must have been deficient in some respect, and that deficiency must have prejudiced the defense. Strickland v. Washington, 466 U.S. at 687. As evidenced by defense counsel's request to have the court instruct the jury to disregard the video entirely, there was nothing tactical to be gained by failing to ask the court to instruct the jury to disregard parts of it, especially in light of the court's willingness to do so. Considering the undue influence the opinions of Foley's family members likely had on jurors,

counsel's deficient performance prejudiced Foley. This Court should reverse.

E. CONCLUSION

For the reasons stated above, this Court should reverse Foley's conviction and remand for a new trial.

Dated this 31st day of August, 2012

Respectfully submitted

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State v. Christopher Foley

No. 30219-9-III

Certificate of Service by email

I Patrick Mayovsky, declare under penalty of perjury under the laws of the state of Washington that the following is true and correct:

That on the 31st day of August, 2012, I caused a true and correct copy of the **Brief of Appellant** to be served on the party / parties designated below by email per agreement of the parties pursuant to GR30(b)(4) and/or by depositing said document in the United States mail.

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Signed in Seattle, Washington this 31st day of August, 2012.

X Patrick Mayovsky