NO. 300366-III

COURT OF APPEALS, DIVISION III
OF THE STATE OF WASHINGTON

THE STATE OF WASHINGTON, Respondent

v.

RAMON GARCIA MORALES, Appellant

APPEAL FROM THE SUPERIOR COURT
FOR FRANKLIN COUNTY

NO. 08-1-504955

BRIEF OF RESPONDENT

ANDY MILLER
Prosecuting Attorney
for Benton County

AMY M. HARRIS
Prosecuting Attorney
BAR NO. 37988

TERRY J. BLOOR, Chief Deputy
Prosecuting Attorney
BAR NO.9044
OFFICE ID 91004

BRANDON L. PANG
Legal Intern, NO. 9128340

7122 West Okanogan Place
Bldg. A
Kennewick WA 99336
(509) 735-3591

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I. STATEMENT OF FACTS

The crimes: The defendant, accompanied by his brother, shoots Alfredo M. Garcia six times, killing him. He shot Mr. Garcia's wife, Maria, four times. The defendant then pointed his gun at the Garcias' teenage daughters, who witnessed the shooting.

On December 10, 2008, the defendant and his brother went to the residence of Alfredo and Maria Garcia. (RP[1] at 456). The two brothers confronted Alfredo, demanding money. (RP 457). Shortly after, at around 8:30 p.m., Mrs. Garcia tried to call 911. (RP 252, 457, 463). The defendant shot Alfredo six times, killing him. (RP 201, 218). The defendant shot Maria four times, including one shot to the head. (RP 248-49).

The Garcias' teenage daughters, Erica and Maricela, were home and heard the gunshots. (RP 336, 355). They both saw the defendant shoot their father. (RP 339, 355). The defendant pointed his gun at Erica and Maricela. (RP 338, 355). However, he and his brother fled when they heard sirens. (RP 340).

The defendant flees the area and via a ping on a cell phone is located in Idaho.

Detective Parramore, Pasco Police Department, had information that both Garcia Morales brothers had cell phones. (05/24/11, RP 41).

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[1] "RP" refers to the Verbatim Report of Proceedings from the Jury Trial; all other Verbatim Report of Proceedings will include the date of hearing.

Detective Parramore requested information from the cell phone provider, Sprint Nextel, on locating the defendants. (05/24/11, RP 41). Sprint Nextel faxed a form for Detective Parramore to complete. At about 10:00 a.m., on December 10, 2008, he faxed the form back. (05/24/11, RP 41-42).

Sprint Nextel e-mailed the Pasco Police Department about two cell phone tower hits on December 11, 2008, at 2:26:00 to 2:26:42, and at 2:30:31 to 2:30:56. (05/24/11, RP 50). The location of the cell phones lead to the arrest of the Garcia-Morales brothers in Elmore County, Idaho. (RP 303-05).

The defendant explains why he shot Alfredo and Maria Garcia.

Spanish speaking Pasco Police Detective Kirk Nebeker went to Elmore County, Idaho, and spoke with the defendant on December 12, 2008. (RP 625-28). After Detective Nebeker advised the defendant of his Miranda rights, the defendant stated that he felt that Mr. Garcia was someone who was able to get people work for an onion company. (RP 627-28). The defendant stated that Mr. Garcia excluded him from work, causing him financial despair. (RP 628). Out of desperation, he decided to approach Mr. Garcia and give him an ultimatum: either pay him money he felt he was owed or the defendant would kill him. (RP 628).

The defendant told Detective Nebeker that he announced this plan to his brother, his sister, and his wife the day before. (RP 628). On December 10, 2008, the defendant and his brother, armed with firearms, went to the Garcia residence. (RP 628). The two brothers had a long conversation with Mr. and Mrs. Garcia. At one point, he claimed, Mrs. Garcia "came at" Jose, and Mr. Garcia at him, so he shot them both. (RP 629, 641).

The defendant denied pointing the gun at the teenage daughters, Erica or Maricela. (RP 629). However, he stated his brother told him not to leave the guns at the Garcia residence. They took the guns and left, heading toward California. (RP 629-630).

The defendant then completed a written statement in his own words. (RP 630). The defendant wrote:

> I, Ramon Garcia Morales, am really sorry for what happened. I did not want this to happen but I lost a job where I made enough money to get by. That is why I decided to do what I did. Jose and I went to talk to Alfredo and what I wanted was to sort things out by talking and that they give me back at least some of the money because I did not have any to pay our bills but if they did not give me some of the money that I had lost on that job I was going to shoot him/ her but Alfredo's wife was hitting Jose and Alfredo was hitting me and that is why I shot them, and believe me I'm really sorry for what happened and I did not want this to happen. But well what can I do. I'm really sorry to everyone. This I am saying I'm really sorry. I guess that's it. It already happened. Ramon Garcia Morales.

(RP 653). Detective Nebeker left the interview room for a few minutes and came back shortly thereafter. (RP 630-31). Nebeker asked the defendant about his motivation, and whether revenge was worth it. (RP 631). The defendant stated that the shooting was not about revenge, but was for financial reasons. (RP 631).

The defendant is found to be competent.

During the pendency of the case defense counsel raised competency concerns on a number of occasions; however, every evaluation conducted found the defendant to be malingering the symptoms of incompetency, and ultimately the defendant was found competent to stand trial.

On May 18, 2009, the court stayed the proceedings, and ordered the defendant undergo a mental health evaluation by Eastern State Hospital. (CP 524-29).

The first evaluation found the defendant competent.

On July 10, 2009, the defendant was evaluated in the Franklin County Jail by Nathan Henry, a licensed psychologist from Eastern State Hospital. (CP 511; 08/18/10, RP 32, 38). Dr. Henry concluded that the defendant had the capacity to adequately understand the proceedings against him and participate in his own defense. (CP 516). Dr. Henry also concluded that the defendant was malingering the symptoms of cognitive impairment for secondary gain, i.e., to avoid legal responsibility for the crimes charged. (CP 516).

During the interview, the defendant presented himself as if he was suffering from severe disorientation and gross cognitive impairment (e.g. presented as if he did not know the year, current location, or the country in which he was born). (CP 516). Dr. Henry noted that this type of impairment is exhibited only in the most severe cases, and was inconsistent with Garcia Morales' displayed behaviors during the interview with Detective Nebeker. (CP 516).

The defendant also described seeing individuals dressed in black with horns outside his cell; however, he did not appear at all distressed when describing these experiences. (CP 513). The defendant described this person as hitting the door with a hatchet and seeing fire at the door. (CP 513). Dr. Henry noted that these types of visual hallucinations are uncharacteristic of genuine psychotic disorders and that individuals who are malingering psychotic symptoms are also more likely to describe vivid visual hallucinations. (CP 513).

Dr. Henry noted the defendant had no known history of psychiatric treatment, and the defendant confirmed that he had never been hospitalized for psychiatric reasons and had no history of outpatient mental health treatment. (CP 512).

The Test of Memory Malingering (TOMM) was administered due to Garcia Morales' highly questionable performance during the mental

status examination. Prior to administering the test, Dr. Henry asked Garcia Morales if he had any problems with his eyes, and Garcia Morales stated, "yes" and began squinting in an exaggerated matter, which stopped about half way through the test. (CP 514). The TOMM took an unusually long time to administer because Garcia Morales took long delays in responding. (CP 515). On the initial trial, Garcia Morales' score was within the range of what an individual may expect to get by randomly guessing the answers. (CP 515). The performance on the second trial showed no improvement. (CP 515). This is noteworthy because individuals are told during the first trial whether their answers are correct or incorrect. (CP 515). The defendant's second trial score was significantly below the average performance of individuals with traumatic brain injury on whom the test was normed. (CP 515). The defendant's score was well below the suggested cutoff for identifying potential malingering. (CP 515).

A formal assessment of competency was not completed because of Garcia Morales' lack of cooperation. (CP 516). It was Dr. Henry's opinion that any result from such an assessment of competency would not be valid due to his pattern of responding. (CP 516). Dr. Henry concluded there was no evidence to indicate Garcia Morales had a genuine

psychiatric illness that would constitute a mental disease or defect. (CP 516).

The second evaluation found the defendant competent.

On January 7, 2010, a follow up interview was conducted by Dr. Henry at the Franklin County Jail. (CP 586; 08/18/10, RP 63). Dr. Henry authored a letter to the court confirming his conclusion that the defendant was competent. (CP 586).

Dr. Henry noted that Garcia Morales' affect (display of emotions) during this second interview was similar to his presentation during the previous interview on July 10, 2009. (CP 586). He exhibited bright affect as his attorneys, the interpreter, and Dr. Henry entered the room, and made eye contact with his attorneys. (CP 586). When Dr. Henry started the interview, Garcia Morales' affect became more blunted (showing little emotional express) and he exhibited long delays before responding to many questions. (CP 586).

Dr. Henry asked Garcia Morales a number of mental status and orientation questions including many that had been asked in the previous interview. (CP 586). The defendant's responses showed a marked difference from his responses to the same or similar questions in July 2009, as indicated by the following:

- During the second interview Garcia Morales knew that the year was 2010. He also knew that it was January. He stated he did not know the date, but when asked if it was the beginning or end of January, he stated it was the beginning. (CP 586-87).
- The defendant stated he did not know what season it was, but correctly guessed winter when asked if it was winter or summer. He did not know what day of the week it was, but correctly guessed the day when asked if it was Monday or Thursday. (CP 586-87).
- In the previous interview, Garcia-Morales stated he did not know the year, and guessed that it was 1998 from a list of three choices, (CP 586-87).
- When asked if it was summer or winter, he stated, "What's that?" (CP 587).
- When asked where he was, Mr. Garcia Morales stated, "jail." He would not guess which floor he was on. When asked what city and state he was in, he stated he was in Pasco, Washington. When asked what county he was in he stated, "County is, they say like Franklin." When asked what country he was in, he stated, "The North." When asked if he was in the United States of America or France, he stated, "Yes the States." (CP 587).

- When Garcia Morales was interviewed initially in July 2009, he indicated that he did not know where he was including location, city, state, or country. (CP 587).
- When asked in the first interview if he was currently in a hospital, a school, or a jail, he stated he was in a school. When asked if he was currently in Europe, Mexico, or the United States, he guessed that he was in Europe. (CP 587).
- During this second interview, Garcia Morales was asked to repeat three words (apple, table, penny). He completed this task without noticeable difficulty. When asked to name some common objects, he correctly identified a pen and a chair. (CP 587).
- The defendant reportedly was not able to name a notebook. When given a simple three-step direction, he correctly followed two of the three steps (took the paper in the correct hand, folded it in half, but did not put it on the floor). (CP 587).
- When asked to recall the three words from several minutes earlier, he did not respond for more than two and a half minutes. Dr. Henry again asked him if he could remember any of the words, and he stated, "Table." Dr. Henry asked him what the other two words were, and he stated, "Apple." Dr. Henry stated, "The third?" and Garcia Morales stated, "Penny." (CP 587).

- During this second interview, Garcia Morales was asked if he had family members in the area. He slowly looked around the room and stated, "No." Dr. Henry clarified that he meant this part of the state, and he stated, "Yes." The defendant eventually stated that his wife lived in the area. Garcia Morales was asked who had also been in jail with him, and he stated, "Yes." When he was asked what his name was, he stated, "Jose." When asked similar questions in July 2009, Garcia Morales stated, "I don't have anyone" and specifically denied that he had a brother named Jose in the jail. (CP 587)
- During the second interview, Garcia Morales was asked how he had been doing recently. He stated he did not know. When asked if he had been having any problems, he did not respond. When the question was eventually repeated, he stated he did not know. When asked if anything had been bothering him, he stated he did not know. He did not describe any of the unlikely visual experiences he had reported during the previous interview e.g., a person in all black with horns on his head. (CP 587).
- During the first interview, a formal assessment of competency was not attempted because Garcia Morales was presenting himself as if

he was disoriented and grossly impaired, and evidence indicated that he was malingering. (CP 587).

During this second interview, Dr. Henry attempted to obtain information about Mr. Garcia Morales' knowledge of his legal case and courtroom proceedings.(CP 587). Garcia Morales was asked if he was charged with a crime. (CP 588). After a 29-second delay, he stated, "I think so." He was asked several times what he is charged with. After five minutes he had still not offered an answer to the question. He was again asked, "What are they saying you did?" (CP 588).

After a minute and a half he had still not responded to the question. Dr. Henry asked if he was charged with murder or robbery. (CP 588). He asked, "What's robbery?" He was asked if he was being accused of "taking something from someone or killing someone," and he eventually stated, "I think that one." (CP 588). Dr. Henry could not get him to clarify what he meant by "that one." Garcia Morales did not respond to basic questions about the primary figures in the courtroom. (CP 588). Based on all available information, Dr. Henry believed that it is most likely that the defendant was not putting forth adequate effort on the competency-related questions. (CP 588).

Dr. Henry provided a brief education regarding the primary figures in the courtroom and their respective roles. (CP 588). Dr. Henry then

attempted to ask a series of questions with two answers for each question in order to assess Mr. Garcia Morales' pattern of responding to forced-choice items. (CP 588). This process took an unusually long time due to Garcia-Morales' delays in responding. (CP 588). Also, Garcia Morales ultimately would not comply with the instructions i.e., on two of the items he would not offer a guess. (CP 588). Only 11 of the 27 items were asked, and he answered 8 of incorrectly. (CP 588).

Dr. Henry noted that Garcia Morales has no known psychiatric condition/disorder that might explain the marked discrepancy in his performance on mental status items between the two interviews. (CP 588). On January 14, 2010, Dr. Henry received confirmation from Franklin County Correction medical staff that Garcia Morales had not been treated with any medications between the two interviews. (CP 588).

Dr. Henry concluded that nothing from that interview would cause him to change his opinion outlined in his initial report.

The defendant was found competent after the third evaluation.

Before a competency hearing could be scheduled and completed, based upon the first two evaluations, the court ordered another evaluation on March 16, 2010, based upon assertions made by Garcia Morales' counsel that his behavior had changed since the prior evaluations. (CP 490-94).

Pursuant to this Order, the defendant was observed at Eastern State Hospital from April 21, 2010, to May 5, 2010. (CP 590). Dr. Henry and Dr. Avery Nelson, a licensed psychiatrist, conducted a psychiatric evaluation with Garcia Morales upon admission to Eastern State Hospital April 21, 2010. (CP 596).

At the outset of the interview, Garcia Morales reportedly asked the interpreter if he was going to die. (CP 596). The defendant reportedly asked several times where his wife is, and where his children are. (CP 596). The defendant endorsed auditory hallucinations, but would not/could not elaborate. (CP 596). The defendant denied suicidal or homicidal ideation. (CP 596). Garcia Morales reportedly was minimally verbal and in that sense presented with "catatonic withdrawal." (CP 596). The defendant's psychomotor movement was reportedly slow; however, he was responsive to instructions e.g., walking over to the scale and getting on the scale when instructed, and nodding in response to questions. (CP 596). Dr. Nelson was able to gather very little information over the course of the two-hour interview. (CP 596). Dr. Nelson indicated that psychosis, not otherwise specified was a diagnosis that needed to be ruled out. (CP 596).

During the course of stay, the following notes were taken by hospital staff.

Physician's notes from their observations of Garcia Morales:

- April 23, 2010: Dr. Nelson noted that Garcia Morales' diagnosis was "not yet established" and the plan of treatment was to "use meds that can help and rarely make the situation worse." He noted that lithium is the only medication used for depression/mood disorders that does not have a warning about increasing suicidality. (CP 598).
- April 26.2010: Dr. Nelson noted that Mr. Garcia Morales' "motor system seems normal except that he won't talk or initiate activities." Mr. Garcia Morales was prescribed Zyprexa Zydis (antipsychotic medication) to help "catatonic withdrawal if has [symptoms] of psychosis or severe anxiety" and Lithium to help "if he has suicidal tendencies." (CP 598).
- April 29 2010: Dr. Nelson noted that Mr. Garcia Morales was withdrawn and "regressed" and "won't verbalize today." At the same time he noted that Mr. Garcia-Morales' movements were often "normal in rate." (CP 598).
- May 3, 2010: Dr. Nelson noted that Mr. Garcia Morales does not show psychomotor retardation as some of his movements are normal speed. (CP 598).

Mental Status/Behavioral Observations during May 5, 2010 interview:

Garcia Morales sat in a chair with his head down. His feet were fidgety (tapping the table in front of him) throughout most of the interview. (CP 598). This hypermotor behavior is not generally exhibited in individuals who are experiencing catatonic symptoms or psychomotor retardation. (CP 598). When Garcia Morales was asked about his wife, he whispered, "Where is she." (CP 598). He repeated this several times in response to unrelated questions. (CP 59). When asked to look at the evaluator, he made brief eye contact with the interpreter, but never the evaluator. (CP 598).

Dr. Nelson noted that he had been responsive to some questions and gave some information to him and other staff members at the hospital, but now was completely unresponsive. (CP 598). Dr. Nelson noted that Garcia Morales' condition has not improved in response to prescribed antipsychotic and mood stabilizing medications. (CP 598). Mr. Garcia Morales met privately with his attorneys for several minutes at one point during the interview. (CP 598).

The evaluation was eventually discontinued because of Defendant's lack of responses to questions. (CP 598). Dr. Henry stated the interview was complete unless he had anything else he wanted to

share. (CP 598). The unit staff member, who was present, said his name, and Garcia Morales spontaneously stood up and turned in the appropriate direction to leave. (CP 598).

Based upon the observations and interviews conducted during the stay at Eastern Washington Hospital, Dr. Henry concluded that Garcia Morales has not exhibited consistent and/or credible symptoms of a mental illness in previous interviews/evaluations or during his stay at ESH. Dr. Henry noted that during previous evaluations, he has exhibited marked inconsistency with regard to his affect, orientation, and endorsement of symptoms. (CP 598). Previous tests (TOMM) indicated the defendant was not putting for the adequate effort on memory tasks, and may have been malingering memory impairment. (CP 599). Garcia Morales had no confirmed history of developmental delay or other cognitive problems. (CP 599).

Dr. Henry noted that some of Garcia Morales' behavior (speaking very little, staying in bed, requiring prompts to complete basic activities of daily living) could be associated with a mental disorder; however there were inconsistencies that make it unlikely he was suffering from catatonic or vegetative symptoms of depression. (CP 599).

Evidence of this included the fact that he had eaten meals on a regular basis, gained weight, and exhibited normal speed motor

movements. (CP 599). Dr. Henry also noted concern that Garcia Morales may be incorporating feedback from previous evaluations/reports to portray himself as mentally impaired. (CP 599).

Dr. Henry and Dr. Avery concluded that Garcia Morales had the capacity to adequately understand the proceedings against him and aid in his defense, and that should Garcia Morales choose to present himself as not being competent to proceed, it would be under his volitional control and not due to a mental disease or defect. (CP 599).

First Competency Hearing Held, finding Garcia Morales Competent.

On August 18, 2010, a competency hearing was finally held and the defendant was determined to be competent. (CP 483). Testimony was provided by Detective Nebeker and Dr. Nathan Henry. (08/18/10, RP 3, 32). On December 12, 2008, Detective Nebeker interviewed the defendant at the Elmore County Jail in Idaho, three days after the offense occurred. Detective Nebeker testified that he spoke to the defendant in Spanish and the defendant was able to provide a detailed description of what occurred on December 10, 2008, and the reasons why he committed the offense. (CP 517-18; 08/18/10, RP 10-15).

Dr. Henry testified regarding his observations of the defendant, which included the first two evaluations at the Franklin County Jail, and

then during the defendant's stay at Eastern State Hospital. (08/18/10, RP 32-136). Dr. Henry's testimony mirrored the findings he outlined in the reports.

Garcia Morales was also evaluated by an evaluator of his choosing; however, defense counsel chose not to call their evaluator to testify for the hearing nor submit the report he prepared. (08/18/10, RP 2-3, 111). Based upon the testimony and information provided by Detective Nebeker and Dr. Henry, the court found that Garcia Morales was competent to stand trial. (08/18/10, RP 140). The Findings of Fact and Conclusions of Law establishing that Garcia Morales was competent following the hearing was entered on June 28, 2011. (CP 23-29).

Second Competency Hearing Established that Garcia Morales was Competent.

On February 16, 2011, the proceedings were again stayed following Garcia Morales' counsel's recommendation and assertion that the defendant was not currently competent. (CP 392). Dr. Henry conducted his fourth evaluation of the defendant on March 9, 2011, in the Franklin County Jail. (Ex. 1).

During the attempted interview, the defendant gave no verbal or nonverbal responses to Dr. Henry's questions. He did not engage or interact in any way with Dr. Henry or his attorneys. (Ex. 1). Dr. Henry

stated that there was no new information since his prior report that would cause him to change his opinion that the defendant was competent to stand trial. (Ex. 1).

Dr. Henry stated that since his initial interview with the defendant in 2009, the defendant's presentation has deteriorated significantly. The defendant has consistently avoided verbally communicating with others for some time, and his attention to his own physical needs has decreased to the point of requiring a feeding tube at times. (Ex. 1).

However, Dr. Henry noted that while not eating could be a sign of debilitating illness, physical or mental, those are rare and extreme circumstances and in terms of mental illness that might lead to that behavior, Garcia Morales did not exhibit any other behavior that would be characteristic of those types of mental illnesses. (04/26/11, Motions RP 129).

Garcia Morales was noted as spending the majority of time lying in his bed. However, he reportedly has not had problems with incontinence and continues to use the toilet independently. (Ex. 1). Dr. Henry testified this is relevant in ruling out some of the more severe debilitating problems that might cause a person to present how Garcia Morales was presenting, because if a person has catatonic schizophrenia for example, they don't respond to those needs the same way others do, and reflects inconsistency

in terms of his presentation. (04/26/11, Motions RP 130). Correctional officers advised Dr. Henry that the defendant generally responds when prompted to get up, and continues to eat independently at least at times. (Ex.1).

It was Dr. Henry's opinion that the defendant does not have a mental disease or defect, and that his lack of communication can best be attributed to elective mutism (choosing not to speak). (Ex. 1).

Dr. Henry indicates that prior evaluations have indicated converging evidence of efforts to feign competency related impairment. It was Dr. Henry's opinion that the defendant's presentation and lack of cooperation with his attorneys is not caused by a lack of capacity for adequate self-serving motivation, but more likely the result of a belief by the defendant that his participation and cooperation will not be beneficial to his situation. (Ex. 1).

A second competency hearing was held on April 26, 2011, and Garcia Morales was again found to be competent to stand trial. (04/26/11, Motions RP 12, 146). Findings of Fact and Conclusions of Law were entered by the court on May 24, 2011. (CP 348-353).

After the completion of the hearing, the court entered an Order at Garcia Morales' request for a blood draw to allow defense counsel to pursue medical tests related to competency. (CP 376; 04/26/11, Motions

RP 145-48). The record does not show that defense counsel ever attempted to introduce information regarding whether any testing was completed or that they had discovered information establishing a lack of competency.

Jury selection was completed without problems.

The actual jurors had no issues:

The following jurors were selected: No. 1, 7, 9, 10, 11, 14, 17, 21, 22, 24, 30, 41, 42 and 44. (CP 547-49). To examine each individual:

No. 1: Juror 1 expressed a general recollection of the case. (RP 34-35). She stated that after the event first occurred, she had read the headlines, but after that skipped over coverage of the case. (RP 36). Further questioning evidenced a lack of familiarity with the facts of the case. (RP 36-38). When asked, juror 1 stated that she could be an impartial juror and could start out with a clear mind. (RP 35-36). At the conclusion of questioning, defense counsel did not challenge juror 1. (RP 38).

No. 7: When juror 7 was questioned, she responded that she had heard of the case years ago, but did not remember any particulars. (RP 60). Juror 7 also stated that she did not regularly watch the news or read the paper. (RP 61). When probed by defense counsel, juror 7 did recall a potential mental problem with one of the defendants. (RP 62). She then

followed up by stating that that information would not affect her ability to listen to evidence. (RP 62). Juror 7 was not challenged for cause at the conclusion of her voir dire. (RP 62).

No. 9: Juror 9 expressed familiarity with the case, and had at least some knowledge and training in mental health issues. (RP 63-66). Juror 9 stated that the things she had read may or may not be factual, and that she would listen to the evidence presented in court and base her opinion solely on that information, and not the information from the newspaper. (RP 67). Defense counsel challenged juror 9 based on her educational background and the information she had heard about. (RP 67). The challenge was denied. (RP 68).

No. 10: Juror Number 10 stated on the juror questionnaire that she had not heard of the case. Therefore, the defendant did not request to interview her individually. The defendant did not challenge this juror.

No. 11: Likewise, Juror Number 11 stated on the juror questionnaire that she had not heard of the case. Therefore, the defendant did not request to interview her individually. The defendant did not challenge this juror.

No. 14: Juror 14 indicated that she had heard something regarding the instant case, but was unable to recall even a single detail. (RP 84-87). Additionally, juror 14 said that she had recently been out of the State for

six or seven months and could not recall any stories regarding the case. (RP 85). She stated that she would make decisions based solely on what she heard in court. (RP 84). At the conclusion of questioning, no challenge to juror 14 was made. (RP 87).

No. 17: Juror 17 stated that she had read about the case through the newspaper. (RP 91). Throughout questioning, juror 17 appeared to fairly familiar with the facts. (RP 92-94). However, she went on to say that she understood what she had previously read was not necessarily the facts of the case, and that she would have no problem presuming the defendant's innocence. (RP 92-93). Defense counsel did not challenge juror 17 for cause. (RP 94).

No. 21: During individual voir dire, juror 21 stated he had become vaguely familiar with the case through his daily routine of reading the paper's headlines. (RP 99). Juror 21 was aware of the very basic details, but did not know specifics, and also stated that he would make his decision based only on evidence presented in court. (RP 99). The juror's father was a police officer; however, he went on to state that this connection would not prejudice his decision. (RP 100, 103). Defense counsel challenged based on personal bias towards police officers, but the challenge was denied. (RP 104).

No. 22: Juror 22 stated that the defendant's name sounded familiar, but she could not recall any details and did not know enough to form an opinion. (RP 110). Further, juror 22 stated that she knew so little about the case that she wouldn't be able to carry on a conversation about it. (RP 112). Defense counsel did not challenge juror 22 for cause. (RP 112).

No. 24: Juror 24 recalled that there was a confrontation over work and that someone was killed because of it. (RP 114). He stated he could base his opinion on what he heard at trial and that he could start without any preconceived ideas. (RP 113). Further, he stated that he had no concerns about sitting on the case. (RP 115). Juror 24 was not challenged for cause. (RP 115).

No. 30: Juror 30 stated that he had read about the case through the newspaper. (RP 117-18). The only details he could recall were that someone was sho, and something about mental illness. (RP 118). When asked if the knowledge he had would make it difficult to be impartial, he responded "no" and then affirmed that he could base his decision on only evidence presented in court. (RP 118). Juror 30 was not challenged for cause. (RP 119).

No. 41: Juror 41 stated that she had recently read about the case in the paper, but had not formed an opinion on the case. (RP 32). When

questioned further, she stated all she knew was that two people had been killed, but did not know why, or if there were other victims. (RP 32-33). Juror 41 was also unaware of any of the defendant's problems or why the case had been delayed. (RP 3). Defense counsel did not challenge juror 41 for cause. (RP 34).

No. 42: Juror Number 42 stated on the juror questionnaire that she had not heard of the case. Therefore, the defendant did not request to interview her individually. The defendant did not challenge this juror.

No. 44: Juror Number 44 stated on the juror questionnaire that he had not heard of the case. Therefore, the defendant did not request to interview him individually. The defendant did not challenge this juror.

There were a large number of potential jurors left in the venire.

There were 15 remaining jurors in the venire who were not challenged for cause, including jurors 37, 38, 51, 52, 56, 59, 60, 61, 64, 65, 66, 67, 68, 69, 72. (CP 547-49).

At trial, the defendant acts catatonic.

Throughout the trial, the defendant always had his head down, with his eyes squeezed shut while physically clenching his face. (RP 181). The defendant was either unable to or refused to lift his head while Maria Garcia attempted to identify him. (RP 472).

The defendant was found guilty of Murder in the first Degree regarding Mr. Garcia. Attempted Murder in the First Degree regarding Mrs. Garcia, and two counts of Assault in the Second Degree regarding Erica and Maricela.

II. ARGUMENT

1. STATE'S RESPONSE TO ARGUMENT I:

"The trial court erred in denying Morales's motion to suppress evidence obtained as the result of a warrantless search of transmission information between Morales's cell phone and cell phone towers that permitted them to locate the cell phone and arrest Morales." (App. Brief, 16).

A. The defendant does not have standing to challenge Sprint Nextel providing the police with information from its cell phone towers.

1. The defendant has the burden to prove he has standing.

State v. Picard, 90 Wn. App. 890, 896, 954 P.2d 336 (1998).

2. The defendant cannot meet his burden to establish standing.

A defendant seeking to suppress evidence must show he had a legitimate expectation of privacy in the place where the allegedly unlawful search occurred. *State v. Jones*, 68 Wn. App. 845, 849, 845 P.2d 1358 (1993). Standing is determined by a two-part inquiry: 1) did the claimant manifest a subjective expectation of privacy in the object of the challenged

search, and 2) does society recognize the expectation as reasonable. State v. Link, 136 Wn. App. 685, 692, 150 P.3d 610 (2007).

Please note that the defendant's argument is not regarding the information generated by the cell phone towers. Rather, the defendant's argument is that Sprint Nextel should not have provided the Pasco Police Department an email concerning that information.

The defendant has not provided any evidence that he subjectively expected that cell phone towers would not generate information about the location of a cell phone user, or that Sprint Nextel would not disclose that information to the police. Even if there were, there is no evidence that society would recognize such an expectation as reasonable. The defendant did not generate the information about his location, did not own the cell towers, and did not control either the towers or the information generated by the towers.

The defendant's citations are not on point. *Matter of Maxfield*, 133 Wn.2d 332, 945 P.2d 196 (1997) involved a public employee obtaining the defendant's residential utility records. *U.S. v. Jones*, 132 S. Ct. 945, 181 L. Ed. 2d 911 (2012), and *State v. Jackson*, 150 Wn.2d 251, 76 P.3d 217 (2003) involved the police installing a GPS unit on the defendant's vehicle. *State v. Gunwall*, 106 Wn.2d 54, 720 P.2d 808 (1986) involved the police obtaining the telephone numbers called from the defendant's

home phone. These differ from the reports of cell phone tower pings in various ways.

First, the cell phone tower pings in this case did not reveal private information. The defendant was in public, on a public roadway, and in a public convenience store. He had not buried himself in a bomb shelter hidden from the view of John Q. Citizen. The outgoing and incoming numbers to an individual's telephone is private. How much electricity a person uses in her own residence is private. However, a person's presence in public is not private. As stated in *State v. Young*, 123 Wn.2d 173, 867 P.2d 593 (1994), what is voluntarily exposed to the general public and observable without the use of enhancement devices is not considered part of a person's private affairs under Art. 1, Sec. 7 of the Washington State Constitution.

Second, this case deals with a passive act by the defendant, done in public, i.e., turning on his cell phone while on a public roadway or in a convenience store. In the cases cited by the defendant, there was at least something obtained from a private location (the residence in *Maxfield* or the installation of a GPS unit in *Jackson*) or thing (the phone number called by the defendant in *Gunwall*). Further, those cases dealt with private information the defendant generated, i.e., the amount of electricity

used in a residence in *Maxfield*, or the outgoing numbers called on a telephone in *Gunwall*.

Third, there was no intrusion into the defendant's telephone. The police did not learn anything about the contents of the defendant's telephone, how he used that phone, who he called or who called him. In contrast, the cases cited by the defendant involve an intrusion into the defendant's vehicle, obtaining information about the defendant's household activities, and information about the defendant's telephone use. A report from a cell phone provider regarding pings off towers does not disturb the defendant's private affairs, under Art. 1, Section 7 of the Washington State Constitutuion.

Fourth, the information from Sprint Nextel to the police was one step removed from the above cases. The defendant's complaint is not about his phone transmitting pings to a cell phone tower. The complaint is that Sprint Nextel collected that information and released it to the Pasco Police Department. In *Maxfield*, the defendant decided how much electricity he used, leading to his utility bill. When the PUD forwarded that bill to the police, the defendant could properly claim an invasion of his private affairs, since he directly contributed to the generation of the document (the PUD bill), and since it regarded the private affairs in his

residence. Here, the defendant had no hand in generating the information Sprint Nextel provided about which towers his cell phone pinged.

3. The automatic standing doctrine does not apply.

Automatic standing does not apply if the crime charged does not involve possession as an essential element of the offense. *State v. Carter,* 127 Wn.2d 836, 842-43, 904 P.2d 290 (1995). Murder, Attempted Murder, and Assault in the Second Degree do not involve "possession" as an element.

Further, the purpose behind the automatic standing rule does not apply. The purpose of the doctrine is to allow a defendant to not have to choose between either admitting that he was in possession of an item and challenging the search pre-trial, or not challenging the search and arguing that he was not in possession at trial. *State v. Jones*, 146 Wn.2d 328, 334, 45 P.3d 328 (2002). There was no such dilemma for the defendant herein. He could have testified and claimed he had a subjective expectation of privacy in Sprint Nextel's records concerning its cell phone towers without incriminating himself.

B. The argument is based on a faulty premise. Even if the defendant had been illegally arrested, his statement was attenuated from the use of the cell phone towers.

The defendant's argues:

- The police improperly obtained information from a cell phone company about "pings" from cell phone towers.
- That lead the police to locate the defendant.
- Locating the defendant led to his arrest.
- The defendant's arrest led to his interrogation.
- His interrogation led to his statement.

However, a suspect's confession is not the fruit of an illegal arrest simply because he would not have been in custody but for that arrest. *State v. Eserjose*, 171 Wn.2d 907, 926, 259 P.3d 172 (2011). Rather, the issue is whether an illegal arrest was the operative factor in causing or bringing about the about the suspect's confession. *Id.* at 926.

Eserjose cited three factors that Courts should consider in determining if a confession was sufficiently attenuated from an illegal arrest: The temporal proximity of the arrest and the confession, the presence of intervening circumstances, and, particularly, the purpose and flagrancy of the official misconduct. *Id.* at.919. These factors show how attenuated the use of the cell phone tower pings was to the defendant's confession.

Temporal proximity: The timeline is as follows:

December 10, 2008: Crimes committed.

December 11, 2008: Defendant is arrested.

December 12, 2008: Defendant is interviewed by Pasco Police Department Detective Nebeker.

The defendant in *Eserjose* was arrested and taken to the Kitsap County Sheriff's Office where he was interrogated. The Court emphasized that the defendant was not "viscerally impressed by the circumstances of his illegal arrest" i.e., he was not crying or emotional. *Id.* at 924. Likewise, the defendant herein was not emotional. He had been advised of his Miranda rights by Idaho officers and re-advised by Detective Nebeker. The length of time between his arrest and interrogation supports the attenuation between those two events.

Intervening circumstances: The defendant was in custody in Idaho. While jail cells are probably never comfortable, the cells in Elmore County, Idaho were new and described as "state of the art." (02/15/11, Motions RP 115).

Purpose and flagrancy of official misconduct: There was no "flagrant" misconduct. Indeed, the State argued, and the trial court agreed, that there was no police misconduct whatsoever. The State's and the trial court's interpretation is certainly reasonable. It cannot be said that the police acted in flagrant disregard of establish case law or statutes.

Further, the purpose of obtaining the cell tower ping records was not to allow the police to interview the defendant. The defendant and his

brother had participated in a murder and attempted murder about 16 hours before. They were armed, and it was important to arrest them for the safety of the public. The goal was not to interview the defendant, but to get him off the street.

All of the factors in *Eserjose* suggest that the defendant's statement should be admitted whether or not he was appropriately arrested.

C. In addition, the entire defense was based on the defendant's statement to Detective Nebeker. If there was an error, it was harmless.

1. The entire defense was based on the defendant's statement to Detective Nebeker..

The defense was in a quandary. The defendant could either stay in character, continue to act catatonic and not testify, or, he could break character and testify. The defendant did not break character and did not testify. That meant that the defense totally relied on the defendant's statement to Detective Nebeker.

Thus, the defense attorney argued,

> So you have one source of information about the shooting. That source of information, ladies and gentlemen, is number 78. [The defendant's written statement] And that is Ramon's actual statement. . . . He [Detective Nebeker] used the term murder at least four times in his testimony to you. But those statements of murder were not from Ramon. He didn't say I murdered Alfredo. He said he shot Alfredo. He didn't say I went to murder Alfredo. He didn't say I planned to murder Alfredo.

(RP 696).

The defense went on to argue that based on the defendant's statement that Mrs. Garcia "came at" his brother and that Mr. Garcia "came at" him, the defendant acted in self-defense. (RP 697).

Even if this Court determines that the defendant has standing to challenge Sprint Nextel's release of cell tower pings, and even if this Court concludes that the defendant's statement would not have been admissible, any error is harmless. A "harmless error" is one which is trivial, formal or academic." *State v. Ray*, 116 Wn.2d 531, 806 P.2d 1220 (1991). Here, the defense needed to use the defendant's statement; the argument about cell phone tower pings was merely formal or academic.

2. In addition, the evidence is overwhelming.

There were three eyewitnesses to the crimes, Maria, Erica, and Maricela Garcia. Without the defendant's statement, the State proved that the defendant and his brother went to the Garcia residence armed, that they confronted Alfredo Garcia about money, that when Alfredo was not able to pay off the defendant, he shot and killed Alfredo, shot Maria, pointed his firearm at their daughters, and then fled the scene.

2. STATE'S RESPONSE TO ARGUMENT II.

"The trial court erred in denying Morales's motion for a change of venue when the jury panel had been exposed to substantial pretrial publicity biased towards Morales's guilty and detailing aspects of the case, such as Morales's

multiple competency evaluations, that were not admissible evidence in the case." (App. brief, 25).

A. The defendant has the burden to prove the trial court abused its discretion by denying the motion for change of venue.

The decision to grant or deny a motion for a change of venue is within the trial court's discretion and appellate courts are reluctant to disturb such rulings in the absence of an abuse of discretion The decision to grant or deny a motion for change of venue is within the trial court's discretion and appellate courts are reluctant to disturb such rulings in the absence of an abuse of discretion. *State v. Hoffman*. 116 Wn.2d 51, 804 P2d 577 (1991); *State v. Laureano*, 101 Wn.2d 745, 682 P.2d 889 (1984) overruled on other grounds; *State v. Brown*, 113 Wn.2d 520, 782 P.2d 1013 (1989). A defendant's due process rights are not violated merely by the existence of pretrial publicity. *Laureano*, 101 Wn.2d at 754. The defendant must show a probability of unfairness or prejudice arising from the pretrial publicity. *State v. Rice*, 120 Wn.2d 549, 844 P.2d 416 (1993).

B. Far from abusing its discretion, the trial court properly denied the motion to change venue.

Trial courts consider nine factors when deciding whether a change of venue is necessary. *State v Crudup*, 11 Wn. App. 583, 587, 524 P.2d 479 (1974) rev denied, 84 Wn.2d 1012 (1974). These factors are:

> (1) the inflammatory or non-inflammatory nature of the publicity; (2) the degree to which the publicity was circulated throughout the community; (3) the length of time elapsed from the dissemination of the publicity to the date of the trial; (4) the care exercised and the difficulty encountered in the selection of the jury; (5.) the familiarity of prospective trial jurors with the publicity and the resultant effect upon them; (6) the challenges exercised by the defendant in selecting the jury, both preemptory and for cause; (7.) the connections of government officials with the release of publicity; (8) the severity of the charge; and (9.) the size of the area from which the venire is drawn.

Id.

Applying these factors to this case, affirms that the trial court exercised permissible discretion by denying the defendant's motion for change of venue.

1. The inflammatory or non-inflammatory nature of the publicity.

Of the jurors seated, the defendant only challenged two, jurors, jurors 9 and 21. Even those two challenges were not based solely on pre-trial publicity. Number 21 was challenged because his father was in law enforcement, and number nine was challenged in part because of her familiarity with mental health.

2. The defendant has not accurately stated the jurors comments.

It is not correct to say that "prospective jurors repeatedly expressed their belief that Morales had shot a man and his wife in front of their

children." Nor is it accurate to state, "numerous jurors acknowledged that they were aware of Morales's mental health issues, including the conclusion that he was 'faking it.'" (App. brief, 27). The State encourages the Court to check the defendant's citations to the record to determine if his summarization is accurate.

Regarding the conclusion that the defendant himself shot a man and his wife, no juror stated that he or she concluded that the defendant, Ramon Garcia Morales, committed the crime. Many remembered news reports of the shooting, but no potential juror concluded that the defendant was the perpetrator. Regarding the "faking it" statement, the defendant's citation to RP 153-157 is typical. The juror stated, "there was a question about his mental state. . . . I recall reading about it, it was something about him going to a medical facility for an evaluation like two times. . . ."

3. The case law is consistent with denying a motion to change venue.

In *State v. Rice*, supra, an elderly couple were brutally stabbed to death in their Yakima County home. The defendants confessed to the crimes. The Court found that the publicity surrounding this crime was mostly factual, noting, "It was the crime that generated the public reaction, not the publicity. *Rice*, at 557.

The Court in *State v. Jamison*, 25 Wn. App. 68, 604 P.2d 1017 (1979) aff'd 94 Wn.2d 663, 619 P.2d 352 (1980), carefully considered the inflammatory nature of pretrial publicity in a case involving physical and sexual abuse of a Pierce County jail prisoner. There the Tacoma News Tribune had reported on the case for several weeks. Phrases used in the paper included, "jail scandal", "Prisoners can Terrorize Other Prisoners Without Discovery", "Five Day Ordeal of Beating and Sexual Abuse." *Id.* at 70. The Court found that due to the nature of the crime, the news accounts would necessarily have to be inflammatory. *Id.* at 71. However, the Court concluded that because the news coverage was factual and "no more than the conventional coverage was given by the media," a change of venue was not necessary. *Id.*

The issue also came before the court in *State v. Wilson*, 16 Wn. App. 348, 555 P.2d 1375 (1976). In that case, the defendant had been charged with rape, sodomy and first degree murder of an eight-year-old girl. *Id.* at 350. There was massive and extensive pretrial publicity. *Id.* at 351. Newspaper headlines were in red ink and quoted one investigator saying that it was the worst crime in the history of the county. *Id.* News accounts also noted that the defendant was paroled for a conviction for carnal knowledge with a twelve-year-old. *Id.* The Court characterized the

reporting as factual material and not sensational in nature, concluding that there was no need for a change of venue. *Id.*at 354.

Widespread publicity of a factual, non-inflammatory nature does not justify a change in venue. *State v. Rupe*, 108 Wash.2d 734, 743 P.2d 210 (1987) (cited as Rupe II). In the case at hand, the nature of the crime charged was such that any mention might be considered inflammatory when compared with headlines generated by, for example, a property crime case. However, like many of the aforementioned cases, the media coverage in this case was factual as opposed to accusatory. The defendant was constantly referred to as a "suspect" or as the "accused." As such, the coverage here, was directly analogous to that in *Jamison*, and should be viewed as conventional media coverage, not necessitating a change of venue.

C. The degree to which the publicity was circulated throughout the community.

Defense counsel is correct in asserting that publicity was fairly widespread in this matter. Indeed, 51 of the 72 prospective jurors indicated at least some familiarity with the case via the local media. (CP 207-10). However, there is no need to change venue in cases where the publicity was more extensive than in the present case.

In *State v. Rice*, nearly all of the 153 prospective jurors indicated on jury questionnaires that they knew of the murders of the elderly couple, yet the trial court's refusal to change venue was upheld. *State v. Rice*, 120 Wn.2d at 557. Further, the Court found that even if this factor favors change of venue, widespread factual publicity does not invariably justify a change of venue. *Id. See* Rupe II, 108 Wn.2d at 752, cert. denied, 486 U.S. 1061, 108 S.Ct. 2834, 100 L.Ed.2d 934 (1988).

Here, it is important to note that each of the jurors who had media exposure to this case was individually questioned. (RP 29-30). Only jurors 9 and 17 appeared to know any substantive details regarding the case. (RP 63-66, 92-94). All of the media exposed jurors were able to affirm that any previous information obtained, would not affect their ability to be impartial and fair. Finally, four of the jurors who sat for the trial had no media exposure what so ever. (CP 547-49).

D. The length of time elapsed from the dissemination of the publicity to the date of the trial.

Despite the fact that articles had begun appearing in the local paper within days of the crime and continued throughout the pretrial proceedings, not a single juror who was selected to sit for trial indicated that such publicity would prevent them from being impartial. (RP 32, 35, 60-61,63-64, 84, 92, 99, 110, 113, 118).

It should also be noted that from the time of the murders to the start of voir dire, nearly two and a half years had passed. One juror stated that after initially reading about the case immediately after it happened, she had not read anything further. (RP 36). Juror 14 stated that she had not been in the state at least six months prior to voir dire. (RP 85). Indeed, only juror 41 indicated that she had recently read about the case. (RP 32).

E. The care exercised and the difficulty encountered in the selection of the jury. .

The record evidences that the trial court here took great care in selection of the jury. Each of the prospective jurors filled out an in-depth jury questionnaire. (RP 2). Additionally, the court allowed each of the prospective jurors who had indicated media exposure, 41 total, to be individually subjected to the voir dire process. None of these prospective jurors witnessed the voir dire of any other juror. Each of these prospective jurors was extensively questioned by the trial judge, the State, and defense counsel. None of them gave any indication that the information they had obtained would prejudice their opinions, and each affirmatively stated that nothing they had heard would prevent them from being impartial to either side. (RP 32, 35, 60-61,63-64, 84, 92, 99, 110, 113, 118).

Finally, contrary to the defendant's assertion that each of the final jurors selected had some form of media exposure, four of the final jurors

selected indicated no media exposure to the case at hand. (App. Brief, 30; RP 29-30).

F. The familiarity of prospective trial jurors with the publicity and the resultant effect upon them

As previously mentioned, in *State v. Rice*, nearly all of the 153 prospective jurors had knowledge of the murders at issue. Despite this, the Court found that the fact that a majority of prospective jurors had knowledge of the case, without more, is irrelevant. *State v. Rice*, 120 Wn.2d at 558. Rather, the relevant analysis is whether the jurors had such fixed opinions that they could not act impartially. *Id.*

Here, nothing in the record indicates that any of the final jurors had such a fixed opinion. In fact, each of the final jurors who indicated media exposure, affirmatively stated that nothing they had heard would prevent them from being impartial to either side. (RP 32, 35, 60-61,63-64, 84, 92, 99, 110, 113, 118). Additionally, it should be noted again, that contrary to the defendant's assertion, four of the final juror members had no media exposure and therefore would have been entirely unaffected by pretrial publicity. (RP 29-30)

G. The challenges exercised by the defendant in selecting the jury, both preemptory and for cause

During jury selection, defense counsel exercised all of their peremptory challenges. (CP 248). However, of the final jurors selected,

defense counsel only challenged two for cause. (RP 67, 104). More importantly, only one was challenged based on knowledge obtained through the media. (RP 67). The other was challenged due to possible bias towards police officers. (RP 104).

H. The connection of government officials with the release of publicity

The record does not reflect that government officials were connected with the publicity.

I. The severity of the charge.

The defendant is charged with first degree murder, one of the most serious crimes under Washington State law. However, in numerous Washington cases involving egregious murders, a request by a defendant for a change of venue has been denied. The cases cited herein (*Rupe I* and *Rupe II*, *Hoffman*, *Rice*, *Laureano*, and *Wilson*) in which the defendant's motion for change of venue was denied, each involved murder charges.

J. The size of the area from which the venire is drawn

The final factor takes into consideration the size of the area from which the venire is drawn. The defendant argues that because Franklin County is less than a quarter the size of nearby Spokane County, the motion for change of venue should have been granted. (App. Brief, 31). However, this contention is not supported by precedent. In *Rice*, the Court

denied the motion for change of venue, recognizing that Yakima County had 73,148 registered voters. *State v. Rice*, 120 Wn.2d at 559. The Court has also upheld denial of motions for change of venue in *Rupe* II, 108 Wn2d at 753, where the venire was drawn from 61,000 registered voters and in *State v. Jeffries*, 105 Wn.2d 398, 409, 717 P.2d 722 (1986), where the venire was drawn from 50,000 registered voters. Here, Franklin County's pool of 72,700, was sufficiently large and did not require the trial judge to grant the motion for change of venue. (CP 204). Therefore, this factor lends no support for the defendant's argument.

Taken as a whole, these factors do not appear to support a change of venue. The publicity this case received was not inflammatory, but rather, almost entirely factual. None of the jurors selected to sit for the case gave any indication that such publicity would taint their ability to be impartial. Further, four of the jurors had zero media exposure.

Of additional importance, the trial court exercised great care in conducting voir dire, going so far as allowing each media-exposed prospective juror to be individually questioned at length. Each of the jurors selected were asked whether they could be an impartial trier of the case at hand, and each agreed they could.

Despite the fact that defense counsel exercised all of their peremptory challenges, only two of the final jurors were challenged for

cause, and only one of them for media exposure. Finally, Franklin County is of sufficient size to allow the defendant to receive an impartial jury. For these reasons this Court should uphold the trial court's denial of change of venue.

3. STATE'S RESPONSE TO ARGUMENT II:

"The trial court erred in ruling that Morales was competent to stand trial when there was overwhelming evidence that Morales was not functioning sufficiently to render the adversarial process meaningful." (App. Brief, 33).

A. The defendant has the burden of showing the trial court abused its discretion in finding the defendant was competent.

The trial court's determination of competence is a matter within its discretion, reversible only upon a showing of abuse of discretion. *State v. Ortiz*, 104 Wn.2d 479, 482, 706 P.2d 1069 (1985), cert. denied, 476 U.S. 1144, 106 S.Ct. 2255, 90 L.Ed.2d 700 (1986). Discretion is abused when it is exercised on untenable grounds or for untenable reasons. *State ex rel. Carroll v.Junker*, 79 Wn.2d 12, 26, 482 P.2d 775 (1971). Discretion also is abused when a court uses an incorrect legal standard in making a discretionary decision. *State v. Rundquist*, 79 Wn. App. 786, 793, 905 P.2d 922 (1995), review denied, 129 Wash.2d 1003, 914 P.2d 66 (1996).

What standard Garcia Morales believes would be appropriate for review is unclear from his brief. In part, he appears to believe the 'substantial evidence' standard of review is appropriate. However, he then

cites to many of the cases the State has above, clearly demonstrating the appropriate standard of review is abuse of discretion. He appears to claim that a competency hearing is the equivalent of a bench trial. (App. Brief, 34). No case law suggests this, and no argument is made as to why this Court should judge it as such. A Bench Trial is defined as a: "a trial held in the absence of a jury and decided by a judge culminating in a judgment for the plaintiff(s) or defendant(s)." *Black's Law Dictionary* (6th ed. 1990) By the plain definition of the term, a Competency Hearing is not a Bench Trial.

B. The defendant has the burden to establish he was not competent to stand trial.

It is well settled law that in Washington, a defendant bears the burden to demonstrate that he is competent. *State v. Harris*, 114 Wn.2d 419, 431, 789 P.2d 60 (1990). In this matter, the laws and constitution of Washington State have been found to match the protections granted by the federal constitution. *Id.* Once the defendant has been found incompetent, the burden shifts to the State.

The defendant claims that the law in the State of Washington is "an unanswered question." (App. Brief, 37). This Court appears to agree with the defense in *State v. Coley*, ___ Wn. App. ___, 286 P.3d 712 (Oct. 9, 2012). However, the issue in that case was not whether the burden of

proof was properly on the defense or the prosecution at trial. *Id.* It was whether the Court properly applied the burden of proving that he had not been restored to competency, after an initial finding of incompetence. *Id.* As the Court admits in its own opinion in *Coley*, the two questions have been treated differently. *Id.* Therefore, the statements as to the initial burden of proof are unnecessary to the ultimate holding of the case, and as such, are nonbinding dicta. *Plankel v. Plankel*, 68 Wn.App. 89, 92, 841 P.2d 1309 (1992).

State v. Harris makes the burden of proof on the issue of competency quite clear. "Perhaps most importantly, the competency issue must be raised on the defendant's motion, and he has the burden of proof on that issue." *State v. Harris*, 114 Wn.2d 419, 431, 789 P.2d 60 (1990). The State can find no case from the Supreme Court overruling that statement. As such, the law of the State of Washington remains that the defendant bears the burden of proof.

Furthermore, the defendant attempts to use the 'rule of lenity' to hold that the Court must find that the burden of proof lies with the State. The rule of lenity is defined as: "Where the intention of Congress is not clear from the act itself and reasonable minds might differ as to its intention, the court will adopt the less harsh meaning." *Black's Law Dictionary*, (5th ed. 1979). The rule of lenity only applies when the

legislative intent is not clear. In cases where a statute is silent on a matter covered by the common law, the legislative intent has been held to be that the legislative body intended to keep the common law. *State v. Coria*, 146 Wn.2d 631, 646, 48 P.3d 980 (2002).

C The court properly found the defendant was competent to stand trial.

A defendant is competent to stand trial if he is able to appreciate the nature of the proceedings and to assist with his defense. RCW 10.77.010(6); 10.77.050. A defendant need not be able to suggest a trial strategy, help to formulate defenses, or even be able to recall past events. *State v. Harris*, 114 Wn.2d 419, 428, 789 P.2d 60 (1990); *State v. Ortiz*, 104 Wn.2d 479, 482, 706 P.2d 1069 (1985), cert. denied, 476 U.S. 1144, 106 S.Ct. 2255, 90 L.Ed.2d 700 (1986); *State v. Hahn*, 106 Wn.2d 885, 894, 726 P.2d 25 (1986). In determining competency, the trial court considers the "defendant's appearance, demeanor, conduct, personal and family history, past behavior, medical and psychiatric reports and the statements of counsel." *State v. Dodd*, 70 Wn.2d 513, 514, 424 P.2d 302 (1967).

The two-part test for legal competency for a criminal defendant in Washington is as follows: (1) whether the defendant understands the

nature of the charges; and (2) whether he is capable of assisting in his defense. *State v. Hahn*, 106 Wn.2d 885; *State v. Ortiz*, 104 Wn.2d 479. The trial court did not abuse its discretion in finding Garcia Morales competent.

D The court was presented with overwhelming evidence that Garcia Morales was competent to stand trial.

First, Garcia Morales had absolutely no history of suffering from mental illness nor having ever received any inpatient or outpatient treatment. (CP 512). He was able to provide a detailed description of the offense he committed. (08/18/10, RP 13). He was able to tell the detective his motivation for the offense. (08/18/10, RP 13). He was able to provide a written statement. (08/18/10, RP 14). He was able to name the parties, and showed no confusion whatsoever when speaking with Detective Nebeker in December 2008. (08/18/10, RP 13).

Second, Garcia Morales was evaluated on four separate occasions by Dr. Henry, a forensic mental health evaluator at Eastern State Hospital. This was the only expert testimony the court could rely upon because the defense elected not to call their own expert to testify. (08/18/10, RP 2-3, 111).

It was apparent to Dr. Henry after engaging in a mental status examination, that Garcia Morales was not putting forth adequate effort.

(08/18/10, RP 42). Dr. Henry noted that Garcia Morales stated he did not know what date or even the year. (08/18/10, RP 43). Dr. Henry noted this was quite unusual. (08/18/10, RP 43). After providing a list of three options, 1998, 2009 or 2013, the defendant stated it was 1998. (08/18/10, RP 43). Another example was when Dr. Henry asked the defendant where he was and providing three options, and the defendant guessed he was in a school. (08/18/10, RP 44). This raised serious concerns regarding his pattern of responding. (08/18/10, RP 44). It was Dr. Henry's opinion that this type of gross disconnect from reality was in strong contradiction to the fact that the defendant was able to provide clear responses to the detective in December 2008, which was just about eight months prior to the first interview. (08/18/10, RP 45).

During this first interview, Garcia Morales also endorsed having visual hallucinations, specifically, to seeing a person with horns standing outside his cell. (08/18/10, RP 46). In Dr. Henry's experience in evaluating extremely ill individuals, visual hallucinations are uncharacteristic of genuine psychosis and a hallmark of individuals attempting to fake psychosis. (08/18/10, RP 46).

Based upon these red flags, Dr. Henry administered the Test of Memory Malingering (TOMM). (08/18/10, RP 4). Dr. Henry described "malingering" as faking psychiatric impairment or cognitive impairment.

(08/18/10, RP 50). In his experience, most malingerers exhibit generalized impairment because they don't know how to present them in a way that is consistent with a specific disorder. (08/18/10, RP 5).

On the initial TOMM trial, Garcia Morales' score was within the range of what an individual may expect to get by randomly guessing the answers. (CP 515). On the second trial, he showed no improvement. (CP 515). This is noteworthy since individuals are told whether or not their answers are correct on the first trial, then shown the images again before being asked to recall them during the second trial. His score on the second trial was significantly below the average performance of individuals with traumatic brain injury on whom the test was normed. (CP 515). Garcia Morales' responses to the TOMM test indicated he was well below the cutoff for potential malingering.

> According to DSM-IV-TR, "Malingering should be strongly suspected if any combination of the following is noted:
> 1) Medicolegal context of presentation (e.g., the person is referred by an attorney to the clinician for examination).
> 2) Marked discrepancy between the person's claimed distress or disability and the objective findings.
> 3) Lack of cooperation during the diagnostic evaluation and in complying with the prescribed treatment regimen.
> 4) The presence of Antisocial Personality Disorder.

(CP 515). The defendant was referred in a medicolegal context. (CP 515). That factor, coupled with the TOMM results, which is a very objective piece of data and the very unlikely nature and severity of the symptoms he was reporting, converge together to provide strong evidence of malingering. (08/18/10, RP 55). Dr. Henry decided not to proceed with any additional testing because it would not be productive for any purpose. (08/18/10, RP 62).

After Dr. Henry's initial evaluation of Garcia Morales, he concluded the defendant was malingering the symptoms he presented and was not suffering from a mental disease or defect, and competent to stand trial. (08/18/10, RP 54). This was also his conclusion after the second evaluation, after Garcia Morales' stay at Eastern State hospital. and after his fourth and final evaluation of Garcia Morales at the Franklin County Jail.

The trial court had the opportunity to see the defendant's demeanor, consider the testimony of the detective that interviewed him shortly after the offense, and the expert opinion of an evaluator that conducted four separate evaluations. The trial court did not abuse its discretion in finding the defendant had not met its burden in establishing he was incompetent.

The defendant's brief seems to separately argue that Garcia Morales' lack of functionality should have precluded him from being brought to trial because his lack of responsiveness caused a breakdown in the adversarial process and resulted in a fundamentally unfair trial. (App. Brief at 42). If theCourt accepts this premise, it would be concluding that any individual that elects to not cooperate with their counsel should be "incompetent" and not tried. The cases cited by defendant are not on point, as those cases are addressing a person that is actually incompetent, not a person that feigns incompetency. Here, the court concluded that the defendant does have the capacity to understand the proceedings against him and participate in his own defense and "whether he chooses to do so is his choice." (08/18/10, RP 140). If this Court agrees that the trial court did not abuse its discretion in its finding, there would be no basis for holding Garcia Morales should not have had to stand trial, as he suggests in his brief.

III. CONCLUSION

Based on the above arguments, the defendant's conviction and judgment should be affirmed.

RESPECTFULLY SUBMITTED this 9th day of November 2012.

ANDY MILLER
Prosecutor

TERRY J. BLOOR
Chief Deputy Prosecutor
Bar No. 9044
OFC ID No. 91004

AMY M. HARRIS
Deputy Prosecutor
Bar No. 37988
OFC ID No. 91004

BRANDON L. PANG
RULE 9 INTERN
NO. 9128340

CERTIFICATE OF SERVICE

I certify under penalty of perjury under the laws of the State of Washington that on this day I served, in the manner indicated below, a true and correct copy of the foregoing document as follows:

Andrea Burkhart
Burkhart & Burkhart PLLC
6 1/2 N. 2nd Ave, Ste 200
Walla Walla, WA 99352

☒ E-mail service by agreement was made to the following parties:
andrea@burkhartandburkhart.com.

Ramon Garcia Morales
#350535
Monroe Corrections Ctr
P.O. Box 777
Monroe, WA 98272

☒ U.S. Regular Mail, Postage Prepaid

Signed at Kennewick, Washington on November 9, 2012.

Pamela Bradshaw
Legal Assistant