69527-4

69527-4

NO. 69527-4-I

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

STATE OF WASHINGTON,

Respondent,

v.

GARY WADE,

Appellant.

APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE MARY YU, JUDGE

BRIEF OF RESPONDENT

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page

Table of Cases

Federal:

Washington State:

Constitutional Provisions

Federal:

Washington State:

Statutes

Washington State:

Rules and Regulations

A. ISSUES

1. Constitutional error is harmless if the reviewing court is convinced beyond a reasonable doubt that any reasonable jury would have reached the same result without the error. Here, a bank investigator testified that a second bank investigator had told her that the murder victim's last credit card transaction, which posted on December 31, had occurred no later than December 29. It was important to the State's theory that the victim had been murdered on December 30. The second investigator did not testify at trial. There was overwhelming additional evidence that the murder occurred on December 30. Was any error harmless?

2. A jury instruction on a lesser included offense is not warranted unless the evidence supports an inference that only the lesser offense was committed. Forensic evidence established that the victim had been strangled, and the medical examiner testified that death would have occurred only after sufficient pressure had been applied for one to two minutes. Wade did not testify, and there was nothing in the record to support a theory that the victim's death was brought about by recklessness or negligence. Did the trial court properly exercise its discretion in refusing to instruct the jury on the lesser included offense of manslaughter?

3. Evidence that someone else may have committed the crime is admissible only if the defendant can show a nexus between the other person and the crime. There was no evidence that the victim's former boyfriend had been anywhere in the vicinity at the time of the murder – no forensic evidence at the murder scene implicated him, and he did not appear on the surveillance video at the victim's apartment building at any time near the murder. Did the trial court properly exercise its discretion in refusing to admit the "other suspect" evidence?

4. A trial court should grant a mistrial only when the defendant has been so prejudiced that nothing short of a new trial can ensure that he will be fairly tried. A witness mentioned that the defendant had recently been booked into jail. There was already evidence in the record, including by the defendant's own admission, that he was involved in the drug trade. In lieu of a curative instruction from the court, at the defendant's request, the jury heard a stipulation that minimized the seriousness of the reason for the booking into jail. Did the trial court properly exercise its discretion in denying the motion for mistrial?

5. To determine whether a foreign conviction is comparable to a Washington offense, the sentencing court must

first look to the elements of the crime, i.e., legal comparability. The elements of Wade's Utah drug conviction are legally comparable to attempted conspiracy to deliver a controlled substance in Washington. Did the trial court correctly include the Utah conviction in calculating Wade's offender score for this murder?

6. The cumulative error doctrine requires reversal only when the combined effect of several trial errors has denied the defendant a fair trial. The only error that may have occurred in this case is harmless beyond a reasonable doubt. Should this Court decline Wade's invitation to reverse his conviction based on cumulative error?

B. STATEMENT OF THE CASE

1. PROCEDURAL FACTS.

Defendant Gary Wade was charged by information with Murder in the Second Degree under two alternative theories: intentional murder and felony murder based on assault. CP 1. The State alleged that, on or about December 30, 2010, Wade strangled Michelle Thornton and placed her body in the closet of her apartment. CP 1-6.

The jury was instructed on both intentional murder and felony murder as alternative means of committing the crime.

CP 131. The jury found Wade guilty of Murder in the Second Degree. CP 142. The trial court sentenced Wade to the high end of the standard range – 254 months. CP 241-49.

2. SUBSTANTIVE FACTS.

Michelle Thornton was 43 years old, working as a cashier at the Upper Queen Anne Safeway and living alone in an "affordable housing" building known as the Vine Court Apartments in Belltown, where she had resided for several decades. 9RP[1] 13, 50-51, 164-65; 11RP 45-46; 12RP 66-67; 14RP 76-77; CP 160. Her manager at Safeway knew her as a reliable employee, and her friends knew her as a "free spirit" who was friendly, outgoing, and fun to be around. 9RP 14, 167-68; 14RP 190. Thornton enjoyed entertaining, and hosted an annual New Year's Eve party so her friends could view the Space Needle fireworks from her window. 9RP 21, 170; 15RP 93-94; 18RP 143-44.

But there was another side to Michelle Thornton. She was a heavy drinker, and a crack cocaine user. 9RP 16, 31-32, 70, 168;

[1] The verbatim report of trial court proceedings consists of 23 volumes, which will be referred to in this brief as follows: 1RP (12/9/11 & 4/20/12); 2RP (6/28/12); 3RP (7/2/12); 4RP (7/3/12 a.m.); 4aRP (7/3/12 p.m.); 5RP (7/5/12); 6RP (8/3/12); 7RP (8/21/12); 8RP (8/22/12); 9RP (8/27/12); 10RP (8/28/12); 11RP (8/29/12); 12RP (8/30/12); 13RP (9/4/12); 14RP 9/5/12); 15RP (9/6/12); 16RP (9/10/12); 17RP (9/11/12); 18RP (9/12/12); 19RP (9/13/12); 20RP (9/14/12); 21RP (9/17/12); 22RP (9/19/12); 23RP (10/26/12).

13RP 134; 14RP 79-80, 84-85, 177. And she sometimes welcomed the wrong people into her home. 14RP 191.

One of these people was Gary Wade, who went by "G." 9RP 17; 14RP 177-78. "G" supplied Thornton with cocaine, often delivering directly to her apartment and sometimes smoking crack there with her and her friends. 9RP 16-17; 14RP 182-86. "G" had even "crashed" at Thornton's place at least once in the weeks before Christmas of 2010. 14RP 179, 186.

When Thornton's friend Charles Cruise was unable to reach her at the end of December 2010, he became concerned and went to the Upper Queen Anne Safeway to inquire. 9RP 178-79. There he learned that she had missed work, "which [was] not like her at all." 9RP 179. It turned out that Thornton had been scheduled to work on December 30, 2010, at 2:15 p.m., and again on December 31 at 9:15 a.m.; she never showed up for either shift. 9RP 54-56. According to managers at Safeway, this was unlike Thornton, who was normally on time and called if she was going to be late. 9RP 21-22, 51-52.

And there was another indication that something was amiss with Thornton. Her annual New Year's Eve party, which she had

told her friends, was happening, never materialized. 9RP 21, 171; 15RP 93-94; 18RP 142-44.

On January 3, 2011, Cruise, trying once again to contact Thornton, asked a couple of Seattle Police patrol officers to check on his friend. 9RP 65-70, 122-25, 180-81. The officers went with Cruise to Thornton's building at 101 Vine Street; this is a secure building, requiring either a key or contact with a resident to "buzz in" a visitor. 9RP 71, 127, 182. They buzzed apartment 308 from outside the main entrance, but got no response. 9RP 71. When someone who was leaving the building let them in, they went to apartment 308 and knocked on the door; again getting no response, they located a manager, who let them into the apartment with a key. 9RP 72-76, 127, 184-85.

The two officers made a brief tour of the apartment, while Cruise waited by the door. 9RP 78, 129-30, 185-86. Since this was a "welfare check," they were not looking for evidence, and consequently were inside for no more than a minute. 9RP 129-30. Officer Roberts checked the bedroom and bathroom; he saw a closet door, but was certain that he did not open it, as that would

have been outside the scope of a welfare check.[2] 9RP 128-30. They did not locate Thornton. 9RP 78, 130.

After she had been missing for a few days, Michelle Thornton's father filed a "missing person" report. 10RP 47. On January 6, 2011, Seattle Police Detectives Tony Eng and David Ogard unlocked the door to Thornton's apartment with a key they had obtained from the building manager. 10RP 58-59; 15RP 150-52. Looking for clues to where Thornton might be, Ogard opened the closet door and saw her body. 10RP 61-62; 15RP 156-57. Thornton was naked from the waist down, and had dried blood on her face. 10RP 64-66; 15RP 159. She was face up, with her feet pressed up against the wall and her head jammed against the doorjamb. 10RP 64-65; 12RP 113; 15RP 159. Careful not to touch or move the body, the detectives contacted Sergeant Nelson in the homicide unit. 10RP 65-66; 15RP 161.

Nelson summoned the medical examiner, the "next-up" detectives (Timothy Devore and Jeffrey Mudd), and the Crime Scene Investigations Unit ("CSI"). 17RP 76-77. Dr. Timothy Williams, a forensic pathologist in the King County Medical

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[2] Cruise thought that Roberts opened the closet door, but he could not be certain. 9RP 188-89.

Examiner's Office, responded to Thornton's apartment. 14RP 96-97. Her body was still in the closet, exactly as it had been on discovery. 14RP 100-01. Williams saw a number of abrasions on Thornton's neck and petechial hemorrhages in the skin of her face, which was engorged with blood. 14RP 102. All of this raised the "distinct possibility" that she had been strangled. 14RP 103.

There was evidence that Thornton had been moved to the closet at some point. A line of dried blood that originated from an abrasion on the right side of her nose ran across her forehead in a direction that could not have been caused by gravity in the body's current position. 12RP 113-14; 14RP 106-07.

The body showed signs of decomposition.[3] 14RP 103-05, 108-09. Based on all of the evidence, including when Thornton was last seen alive, Williams estimated the time of death at 1:00 a.m. on December 30, 2010. 14RP 112-13, 141-44.

Testing revealed that Thornton had a blood alcohol level of .07, and that her blood contained metabolites of cocaine. 14RP 139-40; 16RP 26-30. Williams determined the manner of death to be homicide, and the cause of death asphyxia due to strangulation.

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[3] Responding detectives noticed only a slight odor of decomposition. 16RP 102; 18RP 44. Dr. Williams explained that, so long as the skin remains intact, the odor from a dead body is minimal. 14RP 147.

14RP 138, 149. With sufficient pressure consistently applied, death by strangulation would take one to two minutes. 14RP 154-58.

Thornton's living room showed signs of a struggle. The couch was askew, and there was a broken picture frame on the floor. 16RP 99-100; 18RP 45-46. There was a broken phone cord, but no telephone.[4] 12RP 130.

There was a pink bathrobe with what appeared to be feces stains on the couch, and a matching bathrobe tie nearby.[5] 12RP 102, 104-05, 121, 156; 16RP 99; 18RP 45. There were feces on the floor. 16RP 99; 18RP 45-46. Feces were also found on a towel in the bathroom, and on pajama bottoms found in the bedroom. 12RP 124; 17RP 75; 18RP 47. Investigators found underwear tangled up with blue tights in the tub, stained with apparent fecal matter; the tights were partly inside out, as if removed in one motion. 12RP 156; 16RP 104; 18RP 150-51.

Forensic evidence linked Gary Wade to Thornton's murder. Wade's fingerprints were found on several beer cans recovered from her apartment. 13RP 53-55. Wade's DNA was detected on

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[4] Thornton had a land line with a long cord; she did not own a cell phone. 9RP 18, 174.

[5] It is common for a person to evacuate the contents of the bowel upon death. 14RP 146-47.

both of Thornton's nipples, and in material recovered from beneath her fingernails. 14RP 28-32.

Police retrieved video covering late December 2010 and early January 2011 from the Vine Court Apartments' surveillance system. 10RP 166-72. This evidence also pointed to Wade as the murderer. Throughout the evening of December 29, 2010, Wade came and went from the building several times, each time for a brief period and each time using the keypad at the front door to gain entry.[6] 16RP 121-22. Wade used the keypad for the last time when he entered the building at 1:48 a.m. on December 30, 2010. 16RP 123. Almost 12 hours later, at 1:35 p.m., Wade left the building; he was carrying a bag slung over his shoulder as well as a plastic grocery bag. 16RP 124. This time, he was gone almost two hours, and when he returned at 3:30 p.m., he let himself into the building with a key.[7] 16RP 124. Staying only briefly this time, he left at 3:41 p.m. 16RP 125. This is the last time that Wade is seen on the Vine Court surveillance system. 16RP 125.

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[6] Shortly after one of Wade's exits from the building, Thornton left as well, and the two appeared at the front door together a few minutes later. 16RP 121-22. Presumably, Thornton would have used her key to let the two in that time.

[7] Thornton's keys were not found in her apartment. 12RP 130.

Michelle Thornton was never heard from again after Wade's 12-hour stay in her apartment on December 30, 2010. Detective Devore was unable to locate anyone who had seen Thornton after that date. 18RP 62-63. The door entry system showed that she last granted access to her building on December 30 at 2:27 a.m.[8] 18RP 81. The last outgoing call from Thornton's land line was made on December 30 at 3:09 a.m.; this call was to an internet dial-up service, and lasted for 63 minutes.[9] 15RP 100, 110; 18RP 102-03. Messages left on Thornton's voicemail after 9:00 a.m. on December 30 were never listened to. 18RP 101-02; 19RP 107. Her computer was last used at 4:12 a.m. on December 30. 16RP 50-51. Her last ATM withdrawal was on December 29. 10RP 107, 116. She failed to show up for work on December 30 at 2:15 p.m. as scheduled, or for her shift on the following day. 9RP 23, 56.

Wade was located and taken into custody on February 26, 2011 at 1:20 a.m. 16RP 78. He was interviewed for several hours. 16RP 153-54. Wade admitted providing cocaine to Michelle

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[8] Based on the 39-minute discrepancy between the door entry system and the video stamp, this corresponds to Wade's last entry via the keypad on December 30, 2010 at 1:48 a.m. 16RP 123; 18RP 82.

[9] The time period covered by the phone records request was December 28, 2010 through January 1, 2011. 15RP 101.

Thornton. Ex. 82 at 9.[10] He maintained that he had last been in her apartment before Christmas. Ex. 82 at 31. He said she had given him her keys on only one occasion, a night when he went on a quick beer run for her. Ex. 82 at 41-44. These claims were refuted when detectives showed Wade time-stamped evidence from the Vine Court Apartments (keypad entries and surveillance video) showing that he had last been in Thornton's apartment on the afternoon of December 30, and that his final entry (after an absence of two hours) was made with a key. Ex. 82 at 52-56.

Wade was caught in additional lies. He told police that Thornton had called him after he left her apartment, and that he had tried to call her but got no answer; phone records showed that neither claim was true. Ex. 82 at 16, 86; 17RP 15-16. He told police that he and Thornton had had vaginal sex in the early morning hours of December 30, but forensic analysis revealed no sperm or semen from any of the samples taken, including the vaginal wash. Ex. 82 at 21, 67, 70; 13RP 213; 14RP 9.

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[10] The videotape of Wade's interview with police was shown to the jury. 16RP 158-60; Ex. 85. Jurors were given a transcript of the interview to assist them while they viewed the video. 16RP 159; Ex. 82. Both exhibits have been designated by the State for transmission to this Court.

But Wade's biggest lies were directed at the circumstances of Thornton's death. Wade insisted that, at some point after they had sex, Thornton became ill. Ex. 82 at 61, 65, 67, 90. Wade was adamant that Thornton was alive when he left, that she locked the door, and that he knew nothing about her death. Ex. 82 at 79, 80, 81, 83, 84, 100, 102, 109, 129, 139, 141, 142. Wade repeatedly denied placing Thornton's body in the closet. Ex. 82 at 75, 98, 124.

But after getting assurances that he would not be prosecuted simply for failing to call 911 (Ex. 82 at 131-34), Wade told a somewhat different story:

> See okay when I seen her laid out right there, right. You could tell she had a heart attack. Just laid out. Then I panicked. But then I was about to leave and I grabbed my bag and was about to leave out. And then the neighbor knock on the door. So I got scared and put her nicely in the closet and closed the door and left.

Ex. 82 at 153.

Wade did not testify at his trial.

C. ARGUMENT

1. ANY ERROR IN ADMITTING TESTIMONY ABOUT THE DATE OF MICHELLE THORNTON'S LAST CREDIT CARD TRANSACTION WAS HARMLESS BEYOND A REASONABLE DOUBT.

Wade contends that his constitutional right to confront the witnesses against him was violated when a financial crimes investigator for Key Bank testified that Michelle Thornton's last credit card transaction (which posted on December 31, 2010) took place no later than December 29, 2010, and then confirmed that she had obtained this information from a different investigator at the bank who did not testify at trial. But even if this was error, it was harmless beyond a reasonable doubt. Overwhelming evidence established that Thornton was murdered no later than December 30, 2010, when Wade was recorded on video entering and leaving Thornton's building multiple times. Any error in this regard does not merit reversal.

a. Relevant Facts.

The State called Janet McGinnis, a financial crimes investigator and custodian of records for finance records for Key Bank, to testify about activity on Michelle Thornton's bank account. 10RP 102-04, 109. At the request of Seattle Police, who first

contacted her on January 6, 2011,[11] McGinnis had searched for recent activity on Thornton's account. 10RP 104-07. McGinnis determined that the last activity on Thornton's Key Bank account was an ATM withdrawal on December 29, 2010. 10RP 107.

Thornton's bank statement, which covered December 7, 2010 to January 7, 2011, also showed a credit card transaction at the Belltown Market that posted on December 31, 2010. 10RP 111-14. The bank statement did not indicate the date on which the credit card purchase was made. 10RP 114. McGinnis's investigation revealed that the transaction occurred no later than December 29, 2010. 10RP 114.

McGinnis explained that she did not personally have access to the database that showed the date on which the credit card transaction occurred; she obtained the date of December 29 by calling another investigator at Key Bank, Sarah Anderson.[12] 10RP 133-35, 155. McGinnis confirmed that the information about the

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[11] McGinnis was contacted on January 6 by a missing persons detective, and subsequently (possibly January 7) by Detective Devore from homicide. 10RP 106-08.

[12] When McGinnis later tried to verify the information herself, she discovered that it had been overridden 90 days after the transaction, and was no longer available to the bank. 10RP 156.

credit card transaction is the type of information that she normally relies on in her work as an investigator for Key Bank. 10RP 136.

Defense counsel moved to strike McGinnis's testimony about the date of the credit card transaction "based on improper foundation." 10RP 134, 139-40. Counsel additionally referenced "hearsay" and "a Crawford issue," pointing out that the defense was not able to cross-examine Anderson regarding what she looked at in reaching her conclusion as to the date of the transaction. 10RP 140, 141. The State responded that McGinnis reasonably relied on information from another Key Bank investigator in carrying out her own investigative work, and that the information was reliable. 10RP 137, 141-42, 143-44.

The trial court denied the motion to strike. 10RP 152-53. Finding the evidence at issue "very much akin to a business record," the court reasoned: "This is a person whose job and function is to investigate these kind [sic] of matters, who talked to another investigator who had specific jurisdiction over ATMs. This is something this individual indicated she would ordinarily have relied upon in terms of gleaning information and then simply providing it to somebody else." 10RP 153. The court concluded

that "it does come down to how reliable is it," and treated the evidence at issue "much like a business record." 10RP 153.

b. Any Error Was Harmless.

Hearsay is defined as "a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." ER 801(c). Hearsay is not admissible except as provided by evidence rule, court rule, or statute. ER 802. A statutory exception exists for business records:

> A record of an act, condition or event, shall in so far as relevant, be competent evidence if the custodian or other qualified witness testifies to its identity and the mode of its preparation, and if it was made in the regular course of business, at or near the time of the act, condition or event, and if, in the opinion of the court, the sources of information, method and time of preparation were such as to justify its admission.

RCW 5.45.020.

The rules governing admissibility of evidence do not necessarily end the inquiry, however. The Sixth Amendment to the United States Constitution guarantees a criminal defendant the right to "be confronted with the witnesses against him." In Crawford v. Washington, the Supreme Court held that this guarantee extends to those witnesses who "bear testimony" against the defendant.

541 U.S. 36, 51, 124 S. Ct. 1354, 158 L. Ed.2d 177 (2004). "Testimony" is a declaration or affirmation "made for the purpose of establishing or proving some fact." Id. "Testimonial" statements include "pretrial statements that declarants would reasonably expect to be used prosecutorially." Id. Testimonial statements of a witness who did not appear at trial are not admissible unless the witness was unavailable to testify and the defendant had a prior opportunity to cross-examine the witness. Id. at 53-54.

The Supreme Court in Melendez-Diaz v. Massachusetts, 557 U.S. 305, 129 S. Ct. 2527, 174 L. Ed.2d 314 (2009), discussed the impact of the Crawford decision on the admissibility of business records. In Melendez-Diaz, the evidence at issue consisted of three sworn "certificates of analysis" indicating that a substance contained cocaine. 557 U.S. at 308. The forensic analysts who had prepared the certificates did not testify at trial. Id. at 309.

The Supreme Court found a violation of the Confrontation Clause under these circumstances:

> Business and public records are generally admissible absent confrontation not because they qualify under an exception to the hearsay rules, but because – having been created for the administration of an entity's affairs and not for the purpose of establishing or proving some fact at trial – they are not testimonial. Whether or not they qualify as business or official

> records, the analysts' statements here – prepared specifically for use at petitioner's trial – were testimony against petitioner, and the analysts were subject to confrontation under the Sixth Amendment.

Id. at 324.

It could be argued that Sarah Anderson falls within the definition of a witness against Wade. Anderson's statement to McGinnis that Thornton's last credit card transaction occurred no later than December 29, 2010 was made for the purpose of establishing that fact; given Anderson's position as a financial crimes investigator, and the fact that McGinnis was gathering information at the request of the police, it may be reasonable to infer that Anderson expected that the information she gave to McGinnis would likely be used at trial.[13]

It is also reasonable to infer, however, that the record that Anderson was relying on when she relayed this information to McGinnis was created for the administration of Key Bank's affairs, and not for the purpose of establishing or proving some fact at trial. If this were the case, the statement would not be deemed

[13] The record does not clearly establish at what point in her investigation McGinnis called Anderson. It may have been after contact by a missing persons detective, but before contact by a homicide detective. See 10RP 136. If this were the case, it is likely that neither McGinnis nor Anderson expected the information to be used at a criminal trial.

testimonial, and thus would not be subject to confrontation. See Melendez-Diaz, 557 U.S. at 324.

The problem is that McGinnis could not say what form the "record" that Anderson relied on in making her statement took. McGinnis could not obtain this record from the database to which she had access. 10RP 133. McGinnis believed that Anderson was looking at her computer when she answered the question about when the last credit card transaction on Thornton's account was made. 10RP 138. But McGinnis could not testify to the record's "identity and the mode of its preparation" as required by RCW 5.45.020. And she did not rule out the possibility that Anderson had to make some sort of calculations, inferences or assumptions to come to her conclusion about the latest possible date on which the transaction could have occurred. Based on the deficiencies in the record here, Wade arguably had a right to confront Anderson.

Nevertheless, even constitutional error is harmless if the reviewing court is "convinced beyond a reasonable doubt that any reasonable jury would have reached the same result without the error." State v. Jones, 168 Wn.2d 713, 724, 230 P.3d 576 (2010). There was overwhelming evidence in this case that Michelle

Thornton was not alive on December 31, 2010, when her last credit card transaction posted to her account.

First, there was evidence that directly supported the fact of a delay between a merchant transaction and the posting of that transaction to the cardholder's account. McGinnis testified from personal knowledge that the delay between such a transaction and its posting was at minimum 24 hours, and could be up to 72 hours. 10RP 159-60. McGinnis had never seen a merchant transaction post on the same day that it occurred. 10RP 160.

In addition, an employee of Nancy's Sewing Basket on Queen Anne Avenue produced a credit card receipt from the store dated December 27, 2010 in the amount of $3.50. 15RP 130-33; Ex. 75. This transaction posted to Thornton's account two days later, on December 29, 2010. 10RP 159; Ex. 14.

Moreover, there was a mountain of other evidence demonstrating that Michelle Thornton was not alive when Wade was last seen leaving the Vine Court Apartments on the afternoon of December 30, 2010. Thornton's last outgoing phone call was made at 3:00 a.m. on December 30. 18RP 157-58. No one ever listened to voicemail messages that were left on December 30 and 31. 19RP 107. The last time that anyone was buzzed in to

Thornton's apartment was in the early morning hours of December 30; video surveillance showed that that person was Gary Wade. 18RP 158. The last user-created activity on Thornton's computer was at 4:12 a.m. on December 30. 16RP 60. Thornton never held her planned New Year's Eve Party. 9RP 21, 171; 15RP 93-94; 18RP 142-44. And despite being a reliable employee, Thornton inexplicably did not show up for her scheduled shift at the Upper Queen Anne Safeway on December 30 at 2:15 p.m., nor did she appear for her next shift on December 31 at 9:15 a.m. 9RP 49-58.

But the most telling evidence that Michelle Thornton was dead before the start of her 2:15 p.m. shift at Safeway on December 30 came from Wade himself. After acknowledging his presence in Thornton's apartment from the early morning hours of December 30 into mid-afternoon of that day (Ex. 85 at 53-57), Wade admitted that he placed her body in the closet before he left:

> See okay when I seen her laid out right there, right. You could tell she had a heart attack. Just laid out. Then I panicked. But then I was about to leave and I grabbed my bag and was about to leave out. And then the neighbor knock on the door. So I got scared and put her nicely in the closet and closed the door and left.

Ex. 85 at 153.

Wade argues on appeal that any error in admitting Anderson's statement that Thornton's last credit card transaction occurred on or before December 29, 2010 could not have been harmless because "[t]he time of Ms. Thornton's death was critical to the State's theory that she was killed between December 29, 2010, and December 30, 2010." Brief of Appellant at 14. But this argument ignores the overwhelming evidence cited above, which unequivocally shows that Thornton was dead before Wade left her apartment building for the last time on the afternoon of December 30, 2010. Any error in admitting Anderson's statement was harmless beyond a reasonable doubt.

2. THE TRIAL COURT PROPERLY REFUSED TO INSTRUCT THE JURY ON THE LESSER INCLUDED OFFENSES OF MANSLAUGHTER IN THE FIRST AND SECOND DEGREE.

Wade maintains that the trial court erred in refusing to instruct the jury on the lesser included offenses of manslaughter in the first and second degree. However, there was no evidence in the record to support an inference that Thornton's death was brought about by either recklessness or negligence. The trial court thus properly exercised its discretion in refusing to instruct the jury on these lesser crimes.

a. Relevant Facts.

The defense requested the trial court to instruct the jury on the lesser included offenses of Manslaughter in the First Degree and Manslaughter in the Second Degree. 21RP 42; CP 106-07, 110-14, 118-19. Defense counsel argued that "this is a circumstantial evidence case," and "the jury hasn't been given any direct evidence as to what exactly occurred in that room with Ms. Thornton." 21RP 44-45. Counsel summed up her argument:

> Essentially we don't know – the jury doesn't have any direct evidence as to what happened in that room, and so given that we believe that there is a basis to ask for those two lessers given that the State – how the State has charged this case.

21RP 45.

The State opposed the instructions, arguing that they lacked support in the record:

> In this case there is simply no evidence of any reckless or negligent act of [sic] behalf of the defendant. Either he did it or he didn't.
>
> And there's been no testimony, the defendant did not testify about how this occurred or what happened. All we have him saying is that he was there and that he put her in the closet. There's nothing indicating any sort of reckless behavior or negligent behavior.

21RP 42-43.

The trial court rejected the proposed instructions as unsupported:

> I have had the opportunity to give it some thought even before frankly any instructions were being offered, and I'm going to decline to include a lesser, and that's only because there has to be some, even if small, evidence that would support giving those instructions. At this point and I have to admit that I agree with the State that it's either guilty or not.
>
> And it is a case of circumstantial evidence and it very well could be that this jury is going to make a finding of not guilty based on the evidence that's been presented. But I don't think that there's anything that would support a lesser included at this point.

21RP 45-46. The defense properly noted its objection to the court's refusal to instruct the jury on the proposed lesser included offenses. 21RP 59.

b. The Evidence Did Not Affirmatively Establish That The Defendant Committed Either Of The Lesser Included Offenses.

An accused person may ordinarily be tried only for the offense charged. Wash. Const. art. I, § 22; State v. Peterson, 133 Wn.2d 885, 889, 948 P.2d 381 (1997). An exception exists for lesser included offenses, whereby "the defendant may be found guilty of an offense the commission of which is necessarily included within that with which he or she is charged in the indictment or information." RCW 10.61.006. The offenses that fall under this

exception are referred to as "lesser included offenses." Peterson, 133 Wn.2d at 889.

An instruction on a lesser included offense is warranted if: 1) each of the elements of the lesser offense is a necessary element of the charged offense (the legal component); and 2) the evidence supports an inference that the lesser offense was committed (the factual component). State v. Fernandez-Medina, 141 Wn.2d 448, 454, 6 P.3d 1150 (2000) (citing State v. Workman, 90 Wn.2d 443, 447-48, 584 P.2d 382 (1978)).

Both first and second degree manslaughter are lesser included offenses of second degree intentional murder; i.e., the crimes satisfy the legal component of the Workman test. State v. Berlin, 133 Wn.2d 541, 550-51, 947 P.2d 700 (1997). It is the factual component that is at issue here.

"The purpose of [the factual component] is to ensure that there is evidence to support the giving of the requested instruction." Fernandez-Medina, 141 Wn.2d at 455. The evidence "must raise an inference that *only* the lesser included/inferior degree offense was committed to the exclusion of the charged offense." Id. (italics in original). The trial court must consider all of the evidence presented at trial when deciding whether to give a jury instruction

on a lesser included offense. Id. at 456. However, it is not enough that the jury might disbelieve the evidence pointing to guilt – the evidence must "affirmatively establish" the defendant's theory. Id.

The reviewing court views the supporting evidence in the light most favorable to the requesting party. Id. at 455-56. The trial court's decision on the factual component of a lesser included offense instruction is reviewed for abuse of discretion. State v. LaPlant, 157 Wn. App. 685, 687, 239 P.3d 366 (2010) (citing State v. Walker, 136 Wn.2d 767, 771-72, 966 P.2d 883 (1998)).

Wade has pointed to no evidence that raises a reasonable inference that only the crime of manslaughter was committed in this case. He has presented no theory under which only manslaughter was committed. There is no evidence that "affirmatively establishes" such a theory. In the trial court, he relied exclusively on the lack of direct evidence as to "what happened in that room." 21RP 45. On appeal, he argues only that the State could not provide a motive for the murder, or prove whether Thornton was strangled manually or with a ligature. Brief of Appellant at 17-18. Nothing Wade has offered comes close to the required showing.

Rather, the evidence strongly supported intentional murder. Dr. Williams determined that the cause of death was asphyxia due

to strangulation. 14RP 138. Sufficient pressure could produce unconsciousness within 10-15 seconds, but death would take one to two minutes. 14RP 157-58. If the pressure is relieved after the victim loses consciousness, the victim would most likely survive. 14RP 173-74. Thus, whether Thornton was strangled manually or by ligature, the perpetrator would have had a significant period of time in which to reconsider his actions and reverse course. By continuing to apply pressure even after she lost consciousness, whoever murdered Thornton signaled his intent to kill her.

The question in this case was thus not *whether* intentional murder was committed, but *who* murdered Michelle Thornton. Because there was no evidence presented at trial to support either reckless or negligent homicide, the trial court properly exercised its discretion in declining to instruct the jury on manslaughter.

3. THE TRIAL COURT PROPERLY EXCLUDED "OTHER SUSPECT" EVIDENCE.

Wade argues that the trial court erred in excluding evidence that Georgios Broutzakis, a former boyfriend of Thornton's, was another suspect in her murder. But the facts and circumstances proffered by the defense in support of this "other suspect" evidence were insufficient to establish the required nexus between

Broutzakis and Thornton's murder. Thus, the trial court properly exercised its discretion in excluding this evidence.

a. Relevant Facts.

The defense moved *in limine* to be allowed to introduce evidence that Georgios Broutzakis, a former boyfriend of Michelle Thornton, was an "other suspect" in her murder. CP 32-34; 4aRP 28-29. The defense motion emphasized that the State's case against Wade was circumstantial, that Broutzakis had assaulted Thornton in June of 2009, that he had continued to contact her in violation of a court order, and that his communications with her had contained implied threats. CP 32-33; 4aRP 32-33.

The defense relied on the prior assault to argue that Broutzakis had a motive to murder Thornton. 4aRP 32-33. As to opportunity, defense acknowledged that Broutzakis never appeared on the surveillance video at the Vine Court Apartments during the time period surrounding Thornton's murder, but argued that there were ways to get into the building without being detected. 4aRP 34-37, 53-54. Defense argued that Broutzakis's violations of a no contact order with Thornton constituted a "substantial step" toward assaulting her. 4aRP 38-39.

The defense mentioned several other things that they believed were relevant to the "other suspect" analysis. Defense pointed out that Broutzakis admitted to being in Thornton's apartment in late October 2010. 4aRP 41. There were voicemail messages from Broutzakis from May, August and November.[14] 4aRP 41. An acquaintance of Thornton's said that Thornton had told her that an ex-boyfriend was "flipping out" and Thornton was afraid.[15] 4aRP 42. Broutzakis had used Thornton's bathtub to wash the blood from her after he assaulted her.[16] 4aRP 43.

The defense acknowledged that there was no evidence (fingerprints, DNA,[17] video surveillance) linking Broutzakis with Thornton's apartment near the time of her murder. 4aRP 43, 53, 54-55; 5RP 4. Counsel nevertheless repeatedly pointed out that

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[14] These messages did not carry a year stamp, so it is not clear that they were left in 2010. 4aRP 41. While the May and August messages were threatening, the November message was conciliatory; Broutzakis characterized it as a "breakup" message. 4aRP 41, 58.

[15] Counsel acknowledged that it was not clear that Thornton was referring to Broutzakis. 4aRP 42.

[16] Counsel was apparently trying to tie this to the fact that clothing was found in Thornton's bathtub after the murder, although there was no water in the tub. 16RP 104.

[17] Counsel mentioned a mixed DNA sample on Thornton's bathrobe belt that was inconclusive as to Broutzakis. 5RP 4-5. Forensic analysis showed that one of every two persons in the U. S. was a potential contributor to the mix. 5RP 5-6; 14RP 32-33.

the evidence did not "preclude" the possibility that Broutzakis was the murderer. 4aRP 39, 53-55.

The State asked the trial court to exclude the "other suspect" evidence, noting that Wade could proffer no admissible evidence tying Broutzakis to Thornton's murder. CP 270-73. The State pointed out that, while detectives investigating Thornton's disappearance and murder had initially focused on Broutzakis, they could not find a single piece of evidence that connected him to the murder. 4aRP 57, 58, 60; 6RP 16; CP 74-75. The State argued that Wade had the burden of proof as to the "other suspect" evidence, and that he could not meet that burden by showing a *possibility* that someone else committed the murder – there had to be a nexus between the suspect and the murder, and it had to be based on admissible evidence. 4aRP 56.

The trial court focused on the nexus requirement during defense counsel's argument:

> I just need some facts that's going to help me make the point of connection that this is not just again a bad actor out there who's part of this person's past. It's just got to be a little bit more. There has to be some nexus or some connection to a nexus or in connection to the event that is at issue in this case.

4aRP 46. The court maintained this focus in refusing to admit the "other suspect" evidence:

> [T]he relevant factual nexus has not been established. The evidence proffered on [the day the motion was argued] is speculative, and it relies upon a great deal of hearsay that would not be admissible.
>
> Let me just say that I recognize that a defendant has a right to present a Defense, but we know that that right is not absolute. The evidence proffered needs to be relevant and not speculative.
>
> If there was some evidence that Georgios Broutzakis was at the apartment during the relevant time period, I can assure you that this court would be coming to a different conclusion. Mr. Broutzakis may be a bad actor with a violent history involving Ms. Thornton, and in fact may have a motive to harm her, but the cases that I've read tells [sic] us that motive alone is not enough.
>
> The evidence proffered here is far too tenuous, and there's not a sufficient foundation of facts or circumstances that the other suspect evidence being offered should be allowed.
>
> So I'm granting the State's motion which is number nine to exclude other suspect evidence.

5RP 7.

b. There Was No Nexus Between Broutzakis And The Murder.

A criminal defendant has a right under both the Sixth Amendment to the United States Constitution and article I, section 22 of the Washington Constitution to present testimony in

his own defense. The right is not absolute, however; a defendant has no right to have irrelevant evidence admitted. State v. Hudlow, 99 Wn.2d 1, 15, 659 P.2d 514 (1983); State v. Maupin, 128 Wn.2d 918, 924-25, 913 P.2d 808 (1996).

Washington law on the admission of "other suspect" evidence is clear:

> While evidence tending to show that another party may have committed the crime may be admissible, before such testimony can be received there must be such proof of connection . . . or circumstances as tend clearly to point out someone besides the one charged as the guilty party.

State v. Russell, 125 Wn.2d 24, 75, 882 P.2d 747 (1994) (quoting State v. Kwan, 174 Wash. 528, 532-33, 25 P.2d 104 (1933)). In other words, the evidence must establish a *nexus* between the other suspect and the crime. State v. Mezquia, 129 Wn. App. 118, 124, 118 P.3d 378 (2005), review denied, 163 Wn.2d 1046 (2008).

Remote acts, disconnected and outside the crime itself, are not admissible for the purpose of showing that someone else committed the charged crime. State v. Downs, 168 Wash. 664, 667, 13 P.2d 1 (1932). "The '[m]ere evidence of motive in another party, or motive coupled with threats of such other person, is inadmissible, unless coupled with other evidence tending to

connect such other person with the actual commission of the crime charged.'" State v. Rafay, 168 Wn. App. 734, 801-02, 285 P.3d 83 (2012) (quoting Kwan, 174 Wash. at 533), review denied, 176 Wn.2d 1023 (2013).

The defendant has the burden of showing that the "other suspect" evidence is admissible. Mezquia, 129 Wn. App. at 124. The admission or refusal of evidence lies largely within the sound discretion of the trial court, and will be reviewed only for abuse of that discretion. Id.

The defense here, in its proffer to the trial court, turned the burden of proof on its head. Counsel repeatedly argued that the State's evidence did not "preclude" the possibility that Broutzakis was in Thornton's apartment on the night she was killed, and did not "preclude" the possibility that Broutzakis was the murderer:

> [I]f you take the evidence that the State will present during the course of the trial in the case as true, none of that evidence *precludes the possibility* that Georgios Broutzakis came to Michelle Thornton's apartment and assaulted her and ultimately strangled her. If all of this evidence is true, it does not *preclude the possibility* that Georgios Broutzakis acted on the threats that he was making to Michelle Thornton in his actions in violation of no contact orders.

4aRP 39 (italics added). When specifically pressed by the trial court to point to *any* evidence that Broutzakis was in Thornton's

apartment during the period of time surrounding her murder, counsel conceded that there was none: "There is not specific evidence that specifically indicates that it had to be Georgios Broutzakis who was in the apartment. I suppose that's the best that I can do." 4aRP 55. Counsel then reiterated, "I don't think there's anything that *precludes* him being in the apartment." 4aRP 55 (italics added).

Wade has not established the requisite nexus for his "other suspect" evidence to be relevant and admissible. His argument is built on nothing more than speculation, and relies on acts that are remote in time and unconnected to the crime at issue. He has failed to meet his burden here.

Wade's evidence is not unlike the evidence found insufficient in Mezquia. Like Wade, Mezquia relied on animosity between the victim and her former boyfriend in his attempt to proffer the boyfriend as an "other suspect" in the victim's murder. 123 Wn. App. at 123. Like Wade, Mezquia pointed out that the boyfriend had attacked the victim in the past. Id. at 124. In addition, there was evidence that the victim was looking for her boyfriend on the night she was murdered. Id. at 123.

The trial court refused to admit the "other suspect" evidence, observing that "there is no step taken by [the boyfriend] that would connect him to the crime or indicate that he had any intention to act on what are said to be previous, I guess, types of violence toward her." Id. at 124. The Court of Appeals agreed, noting that there was no physical evidence connecting the boyfriend to the crime, no evidence that the victim had any contact with the boyfriend that night, and no evidence that the boyfriend had motive or opportunity to commit the crime. Id. at 125-26.

In State v. Rehak, 67 Wn. App. 157, 834 P.2d 651 (1992), review denied, 120 Wn.2d 1022 (1993), the defendant, charged with murdering her husband, sought to introduce evidence that her stepson could have been the killer. Id. at 159, 160. She proffered evidence that father and son had quarreled, that the son might benefit financially if his stepmother were convicted, that the son knew where the murder weapon was kept, and that the son had been absent without explanation from work on the morning of the murder. Id. at 160-61. The trial court refused to allow the "other suspect" evidence because the defense could produce nothing to show that the son was anywhere near the murder scene on the day of the crime. Id. at 161.

The Court of Appeals affirmed. Id. at 166. The court noted that, while the son *could* have traveled to the murder scene, there was no evidence that he *did*. Id. at 163. "Not only must there be a showing that the third party had the ability to place him- or herself at the scene of the crime, there also must be some step taken by the third party that indicates an intention to act on that ability." Id. Concluding that the theory that the son could have been the murderer was "unsupported" and "nothing more than speculation," the appellate court held that the trial court "properly excluded the evidence as irrelevant and lacking in foundation." Id.

Similarly, here, there was no showing that Broutzakis was anywhere near Thornton's apartment on the night she was murdered. There was no evidence of *any action* taken by Broutzakis that connected him with Thornton's murder. As in Rehak, there was nothing but speculation to support Wade's "other suspect" theory. But speculation is not enough. The trial court properly exercised its discretion in refusing the proffered evidence.

Wade relies principally on State v. Clark, 78 Wn. App. 471, 898 P.2d 854, review denied, 128 Wn.2d 1004 (1995). Clark was charged with arson based on a fire that occurred in the building that housed his business. Id. at 473. Clark wanted to introduce

evidence that his girlfriend's estranged husband had set the fire. Id. The trial court refused to allow the evidence. Id. at 474. This decision was reversed on appeal. Id. at 480.

Wade argues that the evidence against Clark, like the evidence against himself, was circumstantial, and that he had a right to rebut such evidence with evidence of a similar type. Brief of Appellant at 33. But no direct evidence linked Clark to the fire in his building that was the basis for the arson charge. 78 Wn. App. at 473, 479. Here, by contrast, Wade's DNA was found on Thornton's nipples and under her fingernails, he was seen entering and leaving her apartment at a time consistent with the time of the murder, and he admitted putting her dead body in the closet.

Moreover, there was evidence that the purported "other suspect" had a powerful motive to exact revenge against Clark – he believed that Clark was having an affair with his wife and molesting his 16-year-old daughter. Id. at 475, 476. There was no such motive here – in fact, the last message left by Broutzakis on Thornton's phone was conciliatory in tone, and told her that he would be gone for a while. 4aRP 41, 58. Clark does not support Wade's argument for admission of "other suspect" evidence.

Wade also seeks support from the United States Supreme Court's decision in Holmes v. South Carolina, 547 U.S. 319, 126 S. Ct. 1727, 164 L. Ed.2d 503 (2006). Holmes is inapposite. The South Carolina Supreme Court had established a new rule governing the admissibility of third-party guilt ("other suspect") evidence, holding that "where there is strong evidence of an appellant's guilt, especially where there is strong forensic evidence, the proffered evidence about a third party's alleged guilt does not raise a reasonable inference as to the appellant's own innocence," and should not be admitted. Id. at 324, 329. The U.S. Supreme Court held this rule violated a criminal defendant's constitutional right to present a complete defense because, "by evaluating the strength of only one party's evidence, no logical conclusion can be reached regarding the strength of contrary evidence offered by the other side to rebut or cast doubt." Id. at 331.

The Supreme Court in Holmes noted its approval of state rules, including Washington's, that limit "other suspect" evidence when the evidence is speculative or remote. Id. at 326-28. See Rafay, 168 Wn. App. at 802-03; State v. Strizheus, 163 Wn. App. 820, 834-35, 262 P.3d 100 (2011), review denied, 173 Wn.2d 1030 (2012). Holmes provides no support for Wade's argument. Under

the facts of this case, the trial court acted within its discretion in refusing Wade's proffered "other suspect" evidence.

4. THE TRIAL COURT PROPERLY DENIED WADE'S MOTION FOR A MISTRIAL.

Wade contends that the trial court erred in denying his motion for a mistrial after a detective referred to Wade having recently been booked into jail, in violation of an order *in limine*. He argues that the prejudice was so great that a mistrial was the only remedy. This claim fails. The evidence had already established that Wade was a drug dealer. Moreover, the stipulation that Wade requested in lieu of an instruction from the court removed any possible prejudice.

a. Relevant Facts.

Prior to trial, the defense moved *in limine* to exclude or redact any photo montage that included a booking photo showing Wade wearing jail clothing. 4aRP 20; CP 30-31. Since all of the photos in the montage showed jail clothing, the defense suggested placing a black bar over the clothing of each person. 4aRP 21-21. The prosecutor agreed to this procedure. 4aRP 21.

Wade was ultimately arrested by Seattle Police Detective Randy Moore. 16RP 76, 80. When asked how he came to focus

on Wade, Moore responded: "It would have been in February of 2011. Detective Devore notified me that they had identified the probable suspect as a man named Gary Wade, and that he had been booked into King County Jail recently prior to that." 16RP 78. Asked if he had a photo to aid him in identifying Wade, Moore responded: "Yes, we had a recent booking photo." 16RP 79.

The defense moved for a mistrial. 16RP 131, 135-36. The State argued that any prejudice was minimal, given that the jury had already heard that Wade sold drugs to Thornton and others. 16RP 137-39. The trial court agreed that, in light of the record, the prejudice was minimal. 16RP 140. The court denied the motion for mistrial, finding that any prejudice could be cured by instruction to the jury. 16RP 139-40.

The defense asked in the alternative for a stipulation that Wade had been caught with an open container in a bus shelter, and that the booking had been for a misdemeanor drug violation (not "any sort of aggressive or assaultive behavior"). 16RP 141. The State agreed that such a stipulation was appropriate. 16RP 141-43. By agreement of the parties, the following stipulation was read to the jury:

> The jail booking of Mr. Wade referenced by Detective Moore was a booking on a misdemeanor drug violation after Mr. Wade was contacted by law enforcement in January of 2011 for having an open beverage container in a bus stop. It was unrelated to the investigation of this case.

16RP 150.

b. The Stipulation Cured Any Prejudice.

In assessing the effect of a trial irregularity, the appellate court looks to: 1) the seriousness of the irregularity; 2) whether it involved cumulative evidence; and 3) whether the trial court properly instructed the jury to disregard it. State v. Hopson, 113 Wn.2d 273, 284, 778 P.2d 1014 (1989). A trial court's denial of a motion for mistrial is reviewed under the abuse of discretion standard. State v. Lewis, 130 Wn.2d 700, 707, 927 P.2d 235 (1996). "[T]he court should grant a mistrial only when the defendant has been so prejudiced that nothing short of a new trial can insure that the defendant will be tried fairly." Id. "The trial judge is best suited to judge the prejudice of a statement." Id.

Applying the relevant factors, it is clear that the trial court properly exercised its discretion here. First, Detective Moore's brief references to Wade's having been booked into jail were not particularly serious in light of the fact that the jury had already

heard from Richard Bollinger that Wade was a drug dealer. 14RP 178-80. Second, the evidence was cumulative not only of Bollinger's testimony, but of Wade's own admissions (which the jury was about to hear) to using drugs and facilitating drug transactions. 16RP 160; Ex. 82 at 5-6, 9, 56, 59. Finally, while the court was willing to instruct the jury to disregard Moore's references to jail booking, the defense requested the stipulation instead. 16RP 140-41. In light of the evidence properly before the jury, the stipulation cured any prejudice from Moore's improper statements.

In light of the evidence before the jury and the curative stipulation, the trial court properly exercised its discretion in denying Wade's motion for a mistrial. This claim should be rejected.

5. THE TRIAL COURT CORRECTLY COUNTED WADE'S UTAH CONVICTION IN HIS OFFENDER SCORE.

Wade contends that the trial court should not have counted a prior drug offense from Utah in calculating his offender score for this murder. He focuses his argument on the fact that the Utah statute was broader than Washington's drug delivery statute, and that the State presented no facts in support of comparability. This argument misapprehends the issue. The trial court found that Wade's Utah conviction was legally comparable to attempted

conspiracy to deliver cocaine in Washington. Thus, the conviction was properly included in the offender score without further facts.

a. Relevant Facts.

The State alleged that Wade's offender score was three, based on his prior felony convictions from Florida, Georgia and Utah. CP 152-220. The defense did not contest the existence of these prior convictions, or that they belonged to Wade, but challenged only the comparability of Wade's Utah conviction for attempted distribution of a controlled or counterfeit substance. CP 199-205; 23RP 5. Utah charged that Wade "did knowingly and intentionally distribute, offer, agree, consent or arrange to distribute a controlled or counterfeit substance, to-wit: Cocaine, a Schedule II Controlled Substance." CP 203-04.

The State acknowledged that the Utah statute was broader than Washington's delivery statute standing alone. 23RP 3. The State pointed out, however, that the Utah crime was legally comparable to attempted conspiracy to deliver cocaine. CP 221-23. The trial court agreed, and sentenced Wade to the high end of the standard range based on an offender score of three. 23RP 8, 20; CP 242, 244.

b. Wade's Utah Conviction Is Comparable To Attempted Conspiracy To Deliver A Controlled Or Counterfeit Substance In Washington.

To determine whether an out-of-state crime is comparable to a Washington offense, the sentencing court must first look to the elements of the crime. State v. Morley, 134 Wn.2d 588, 605, 952 P.2d 167 (1998). The elements of the out-of-state crime "must be compared to the elements of Washington criminal statutes in effect when the foreign crime was committed." Id. at 606. If the out-of-state conviction is comparable to a Washington crime, it will count in the offender score as if it were the equivalent Washington offense. Id. Only if the elements are not identical, or if the out-of-state statute is broader than the Washington definition of the crime, will the court look to the facts of the crime. Id. A determination of legal comparability is reviewed *de novo*. State v. Jackson, 129 Wn. App. 95, 106, 117 P.3d 1182 (2005), review denied, 156 Wn.2d 1029 (2006).

Wade's conviction from Utah was under Utah Code Annotated (U.C.A.) Title 58, Chapter 37, Section 8(1)(a)(ii), which provides that "it is unlawful for any person to knowingly and intentionally . . . distribute a controlled or counterfeit substance, or to agree, consent, offer, or arrange to distribute a controlled or

counterfeit substance." CP 203-04, 207. While Wade was charged with the completed crime, his conviction was for the attempted crime. CP 199. In Utah, "a person is guilty of an attempt to commit a crime if he: (a) engages in conduct constituting a substantial step toward commission of the crime; and (b)(i) intends to commit the crime; or (ii) when causing a particular result is an element of the crime, he acts with an awareness that his conduct is reasonably certain to cause that result."[18] U.C.A. 1953 § 76-4-101; CP 227.

Washington prohibits delivery of a controlled substance under RCW 69.50.401: "[I]t is unlawful for any person to manufacture, deliver, or possess with intent to manufacture or deliver, a controlled substance." Under RCW 69.50.4011, "[I]t is unlawful for any person to create, deliver, or possess a counterfeit substance." Thus, distribution of a controlled or counterfeit substance is a crime in both Utah and Washington.

Utah's statute also prohibits a person from "agree[ing], consent[ing], offer[ing], or arrang[ing] to distribute a controlled or counterfeit substance." U.C.A. 1953 § 58-37-8; CP 207. This conduct is prohibited in Washington under RCW 69.50.407: "Any

[18] Subsection (ii) is not applicable in this case, as Utah's delivery statute does not contain such an element. U.C.A. 1953 § 58-37-8.

person who attempts or conspires to commit any offense defined in this chapter is punishable by imprisonment or fine or both which may not exceed the maximum punishment prescribed for the offense, the commission of which was the object of the attempt or conspiracy." A person is guilty of conspiracy in Washington "when, with intent that conduct constituting a crime be performed, he or she agrees with one or more persons to engage in or cause the performance of such conduct, and any one of them takes a substantial step in pursuance of such agreement." RCW 9A.28.040.

Thus, under the Washington statutes cited above, the crime with which Wade was charged in Utah would have been a crime in Washington as well. But Wade was ultimately adjudicated guilty of an *attempt* to commit that crime. CP 199. In Washington, "[a] person is guilty of an attempt to commit a crime if, with intent to commit a specific crime, he or she does any act which is a substantial step toward the commission of that crime." RCW 9A.28.020(1). Utah's attempt statute similarly requires intent to commit the crime plus a substantial step toward its commission. U.C.A. 1953 § 76-4-101; CP 227.

Thus, if Wade was convicted under the first part of Utah's delivery statute ("distribute a controlled or counterfeit substance"), this would be comparable to an attempt to violate either RCW 69.50.401 or 69.50.4011. As cocaine is a Schedule II controlled substance (RCW 69.50.206(b)(4)), either crime would be a class C felony in Washington. RCW 69.50.401(2)(a); 69.50.4011(2)(a); 9A.28.020(3)(c).

If Wade was convicted under the second part ("agree, consent, offer, or arrange to distribute a controlled or counterfeit substance"), this would be an attempt to violate RCW 69.50.407 (Conspiracy). Since the object of the conspiracy, delivery of cocaine, is a class B felony, the attempt would be a class C felony. RCW 69.50.407; 9A.28.020(3)(c).

The final question, of course, is whether the double inchoate crime of attempted conspiracy to commit a crime exists in Washington. The Washington Supreme Court has said that it does:

> Solicitation is properly analyzed as an "attempt to conspire." . . . Whereas the actus reus of conspiracy is an *agreement* with another to commit a specific completed offense, that of solicitation is an *attempt* to persuade another to commit a specific offense.

State v. Jensen, 164 Wn.2d 943, 951, 195 P.3d 512 (2008) (internal citations omitted) (referring to the "double inchoate crime" of attempt to conspire).

In light of the Washington statutes cited above, Wade's Utah conviction is legally comparable to a Washington crime. Factual comparability is thus not at issue. The trial court properly counted the Utah conviction in Wade's offender score.

6. THE CUMULATIVE ERROR DOCTRINE DOES NOT MANDATE REVERSAL HERE.

Wade seeks reversal under the cumulative error doctrine. "The application of that doctrine is limited to instances when there have been several trial errors that standing alone may not be sufficient to justify reversal but when combined may deny a defendant a fair trial." State v. Greiff, 141 Wn.2d 910, 929, 10 P.3d 390 (2000). This Court is not faced with the accumulation of several errors, but at most one error that had no effect on the outcome of the trial. Wade had a fair trial. Reversal is not warranted on this basis.

D. CONCLUSION

For all of the foregoing reasons, the State respectfully asks this Court to affirm Wade's judgment and sentence.

DATED this 28 day of February, 2014.

Respectfully submitted,

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Certificate of Service by Mail

Today I deposited in the mail of the United States of America, postage prepaid, a properly stamped and addressed envelope directed to **Thomas M. Kummerow**, the attorney for the appellant, at **Washington Appellate Project**, 1511 Third Avenue, Suite 701, Seattle, WA 98101, containing a copy of the **Brief of Respondent**, in **STATE V. GARY WADE**, Cause No. **69527-4-I**, in the Court of Appeals for the State of Washington, Division I.

I certify under penalty of perjury of the laws of the State of Washington that the foregoing is true and correct.

Name

02-28-14
Date

Done in Seattle, Washington