No. 29033-6-III
IN THE COURT OF APPEALS
FOR THE STATE OF WASHINGTON
DIVISION III

STATE OF WASHINGTON,

Plaintiff/Respondent,

vs.

CLAYTON GENE STAFFORD,

Defendant/Appellant.

Appellant's Brief

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2. Was the Sixth Amendment Confrontation Clause violated when an expert witness's testimony was based on the work of others who did not testify and that work was done for the purpose of criminal prosecution?

3. Should the testimony of Theresa LaFray have been excluded because it was irrelevant and its probative value was substantially outweighed by the danger of unfair prejudice?

4. Was Mr. Stafford's right to due process under Washington Constitution, Article 1, § 3 and United States Constitution, Fourteenth Amendment violated where the State failed to prove the essential elements of the crime of aggravated first degree murder?

5. Should the aggravating factor and special verdict be vacated because the jury was incorrectly instructed it had to be unanimous to answer "no" to the special verdict?

C. STATEMENT OF THE CASE

On June 13, 1993, Dr. Roger Vielbig and a group of Boy Scouts found a woman's body floating in the Yakima River while on a canoe trip. RP 973-77. The woman was nude except for a black bra pushed up over her shoulders and there was blood on her face. RP 979. Dr. Vielbig testified the swiftness of the current in that area combined with a number of rocks and logs could have caused the bumps, bruises and scratches on the body.

RP 988. The cause of death was a skull fracture from a blow to the head by a blunt object. There were also signs of strangulation. RP 1079. The victim was identified later that same day by her boyfriend as 21-year-old Shawna Yandell. RP 1277.

Travis Sinden, about 24 years old in 1993, was the victim's boyfriend. The two of them had lived together for about a year and had come to Yakima from Arkansas about three weeks prior to the incident looking for work picking cherries. RP 1135-45. They were living in an old garage owned by the Wilkeys—family friends of Travis Sinden's family. Travis testified he and Shawna were always together and never did anything separately. Travis said he did not know Mr. Stafford. RP 1145-47.

On the morning of 6/13/93, Travis' friend Kenny Maddon and his girlfriend, Kim Moyer, came to the garage and woke up Travis and Shawna to go to the Tri-Cities for a possible cherry-picking job. RP 1148. Travis bought a case of beer and they all drank beer on the way to the Tri-Cities. RP 1149. The cherry-picking job did not pan out so they bought a fifth of whiskey and headed back to Yakima with all of them drinking. RP 1150. Travis said he was drunk and belligerent by the time they got back to Yakima. Kenny dropped off Travis and Shawna near Sportsman's Park by the Yakima River. RP 1151.

Kenny's cousin, Tina Wilkey, testified that Travis, Shawna and Kenny drank a lot and almost every day—especially if the three of them were together. RP 1247. Travis and Shawna also liked to go out to Sportsman's Park 2-3 nights a week and "huff paint."[1] They also huffed paint in the garage. RP 1184, 1246-47. Tina said she had told Travis that Sportsman's Park was a dangerous place after dark and that people got killed there all the time. RP 1248-50.

Tina recalled one prior occasion when she drove to Sportsman's Park to pick up Travis and Shawna where she had dropped them off earlier. Travis came down a trail to the car alone and said Shawna wanted to stay. Tina reminded Travis about the park being a dangerous place and convinced him to go back and get her. When Travis brought Shawna back to the car she didn't want to leave—she just wanted to sit out there huffing paint, even by herself. "She just didn't care; she didn't know where she was half the time." RP 1249-50.

Tina also testified that she and Shawna were friends and close to the same age. Tina and Shawna would sometimes hang out and go do things together without Travis. Shawna wanted to get high all the time. Tina said she didn't do drugs. RP1250-51.

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[1] The term "huff paint" means to get high on paint fumes by pouring paint in a plastic bag and breathing in the fumes by holding the bag opening over mouth and nose. RP 1152.

After Kenny dropped them off at Sportsman's Park the night of 6/13/93, following the failed cherry-picking expedition to the Tri-Cities, Travis and Shawna went to a familiar secluded area by the Yakima River to huff paint. The next thing Travis remembered was being pushed or falling into the river. RP 1152-53. Shawna helped Travis to the bathroom to change his clothes where he passed out. The next thing he remembered was Shawna shaking him waking him up to call the Wilkeys to come and get them and take them home because she was cold and tired and wanted to go to bed. RP 1154-55.

Travis called from a payphone and spoke to Tina and her father, Junior, but neither of them was willing to drive out at 1:00 a.m. and pick them up. RP 1155, 1227. Tina said Travis sounded drunk in her statement to the police. She reminded Travis of what she had told him before—that she would not go out to Sportsman's Park after dark because people get killed there all the time. RP 1242-43.

At this point, Travis saw someone coming toward them holding a flashlight that he assumed was the park ranger, so he and Shawna headed back to the bathroom. RP 1156. David Small, the now-retired park ranger, testified that he contacted two people near the restroom that night. He asked them if they were campers and they said "no." He recalled the girl asking

for money to use the payphone but he said he didn't have any. He said the girl also asked for a ride home but he said he could not do that. RP 1254-62. He said the man said a few words that were kind of slurred and he was real unclear. RP 1262.

After they returned to the restroom, Travis passed out again. The next thing he remembered was waking up inside the bathroom and Shawna was gone. He said he hollered for her several times, got no answer, so he walked home a mile and a half to the Wilkey's garage. RP 1156-57.

The next morning about 7:30 a.m. Travis asked to borrow the car to go get cigarettes. Junior Wilkey gave him the keys. Travis said he bought cigarettes and then went to the park sometime that morning. He looked around for about 20 minutes and hollered for Shawna, but he did not see her so he left. RP 1160, 1320-22. When Travis came back to the Wilkey's house, Junior asked him where Shawna was. Travis replied, "I don't know, I guess she's up at the park." RP 1231-32.

Travis eventually called the police sometime later that afternoon. A short while later, the police came and took Travis to the police station and the morgue where he identified Shawna's body. RP 1160-62. The area where Shawna's body was found is about two and a half miles upstream of Sportsman's Park. RP 1022.

Lt. Noland Wentz, the lead investigator in the case, searched the area where Shawna's body was found, known as the Greenway, for 4-5 days along with around 20 other people but found no evidence of a crime scene or evidence associated with the victim. RP 1011-30, 1050-51. A similar search of Sportsman's Park failed to produce any evidence. RP 1056-57, 1068. Lt. Wentz concluded the crime probably occurred in a different area. RP 1064. Travis Sinden and Kenny Maddon were considered persons of interest by Lt. Wentz in his investigation, but both were eliminated as suspects. RP 1844-47.

Dr. Thiersch was the forensic pathologist who performed the autopsy the next day. RP 1076. He found spermatozoa in vaginal swabs taken from the victim that could have been as much as seven days old, depending on temperature and other conditions. RP 1096. Comparative analysis of the DNA from the sperm on the vaginal swabs and DNA samples from persons of interest done in 1995, did not reveal any matches. RP 1510-12. No spermatozoa were found on oral swabs taken from the victim's mouth. RP 1098.

Dr. Thiersch testified injuries on the victim's arms, legs and feet could be defense wounds, but could also be caused by falling down from being intoxicated. RP 1088, 1104. Linear marks on the victim's legs could

have been caused by dragging or from hitting rocks while floating in the river. RP 1104. Dr. Thiersch further testified he was unable to tell whether the victim was raped or had consensual sex. He was also unable to tell if the person who had sex with the victim was the same person who inflicted the lethal head injuries. RP 1108-09.

Subsequent testing of the vaginal and oral swabs was done by Orchid Cellmark, an independent laboratory, in 2008. This testing revealed the presence of spermatozoa on both the vaginal and the oral swabs. RP 1712, 1750-57. A DNA profile was obtained from the DNA extracted from the sperm found on both swabs. RP 1751, 1757. This profile was entered into CODIS, a combined DNA index system managed by the FBI. RP 1565-66. In May 2009, a "hit" was obtained that matched the DNA profile to Mr. Stafford. RP 1566-67, 1765-66.

The police then determined that Mr. Stafford was residing in Yakima. RP 1853. A bucal swab was obtained from Mr. Stafford and sent to Orchid Cellmark. RP 1686, 1691. Comparative DNA analysis by Orchid Cellmark matched the DNA from the sperm on the vaginal and oral swabs to Mr. Stafford. RP 1765-66.

Admissibility of Mr. Stafford's statements.

After the police determined where Mr. Stafford was residing in Yakima, Lt. Wentz, Detective Kellett, and four uniformed officers went to Mr. Stafford's house, handcuffed him and took him to police headquarters for interrogation. RP 1853-55. The interrogation was tape recorded and portions were played for the jury at trial. RP 1855-84.

Before trial the court held a CrR 3.5 hearing to determine the admissibility of Mr. Stafford's statements. RP 22-208. The tape was played as part of the evidence at the hearing. RP 43-69. Lt. Wentz did the questioning. RP 40. The following pertinent statements are from that recording:

Q Do you understand that this statement is being recorded?

A Yes, I (inaudible) hear that. And I understand that I should have an attorney present most, pretty soon.

Q Okay. Well let me go through this.

RP 43.

Mr. Stafford was then asked his biographical information and read his constitutional rights. He said he understood them. RP 43-46. The interview then continued as follows:

Q Well, this is a (inaudible) waiver of constitutional rights. This is if you're willing to talk with me to begin with.

A Yeah, I'm not going to sign none of that unless an attorney asks me to sign something like that.

Q Okay. Well, I'm not an attorney.

A Right.

Q And I told you before that I can't advise you.

A Right.

Q All right. What I'm going to do is kind of tell you a little story.

A Okay, tell me a little story.

RP 46-47.

Lt. Wentz then tells how the body was discovered and continues with the interrogation. He told Mr. Stafford he had become a person of interest as causing the death of Shawna Yandell. Mr. Stafford denied knowing Shawna Yandell or Travis Sinden, or having anything to do with the murder. RP 47-53. Mr. Stafford said he was living in the Yakima area in 1993. RP 53-54. Lt. Wentz told Mr. Stafford that Shawna was sexually assaulted before she was murdered and Mr. Stafford's DNA was found. Mr. Stafford said, "No it wasn't." RP 58. After a few more questions and

answers, Mr. Stafford made an unequivocal request for an attorney. RP 59-65.

Mr. Stafford argued that all his statements should be suppressed because he made an equivocal request for counsel and never waived his constitutional rights. RP 188-99. The court disagreed and suppressed only the portion of the interview after Mr. Stafford made his unequivocal request for counsel. RP 204-08.

Testimony of Theresa LaFrey.

Theresa LaFray testified for the State over Mr. Stafford's objection. RP 1423-35. LaFray testified that sometime during the summer of 1993, she doesn't know which month, Mr. Stafford showed up at her house late at night covered in blood. LaFray said Mr. Stafford was living next door with his sister at the time. RP 1457. LaFray's house is three quarters of a mile from Sportsman's Park. RP 1452-53. He said he had been in a fight with some Mexicans and wanted to know how to get the blood out of his clothes. LaFray said she told Mr. Stafford to get into the shower, throw his clothes out to her and she would wash and dry them. RP 1454. After she laundered his clothes she threw Mr. Stafford his clothes and told him to leave. RP 1456.

LaFray had been interviewed prior to trial by both parties including multiple times by Lt. Wentz. She was a person of interest because her husband had once sold a car to Mr. Stafford, who drove the car for a short time then got rid of it. Police eventually located the car but found no evidence of any value pertaining to this case. RP 1125, 1423, 1459. LaFray made no mention to the incident of Mr. Stafford showing up at her house covered with blood in any of these prior interviews. She only contacted Lt. Wentz with this information after the trial had begun. RP 1459.

LaFray admitted on cross examination that she did not like Mr. Stafford. RP 1460, 1467. She also stated she came forward with this late information because she was afraid Mr. Stafford might not be convicted. RP 1465-66. She originally told Lt. Wentz that this incident occurred sometime in late summer between 10:30 and 12:00 p.m. She also said she usually was not up later than midnight. RP 1462.

Defense counsel objected to LaFray's testimony because of the late disclosure of this information and its questionable validity and relevancy, since LaFray could not say when this occurred or whether it had anything to do with this case. He further argued there was no corroboration of this evidence and that its probative value was far outweighed by its prejudicial effect. RP 1426-29. The court overruled the objection. RP 1434-35.

Testimony regarding DNA results.

The only evidence matching the DNA profile to Mr. Stafford was testimony from Valencia Ward, a DNA analyst for Orchid Cellmark. RP 1765-66. Ms. Ward stated at the outset of her testimony that she did not perform any of the DNA tests herself. RP 1713. Mr. Stafford objected to Ms. Ward testifying any further about the DNA tests or results citing *Crawford v. Washington* and *Melendez-Diaz v. Massachussetts*. The court overruled the objection relying on *State v. Lui*. RP 1738.

Continuing her testimony, Ms. Ward testified about the general process Orchid Cellmark uses to extract DNA from cells. RP 1745-46. Her role for the samples received in this case was to review the reports submitted by others who actually did the testing and then reach her own conclusions. RP 1746-47. There was no visual or audio recording of the testing procedures to see what was actually done. RP 1780. She relied solely on what someone else wrote down as being accurate information of what was done. In this case, Jenna Sparling, the person who actually did the DNA testing, no longer works at Orchid Cellmark. RP 1780-81.

On cross examination, defense counsel showed Ms. Ward an e-mail from Jenna Sparling, dated 8/22/08, in which she mixed up and misstated the quantity of sperm on the vaginal swab versus the quantity on the oral

swab. Ms. Ward admitted she relied on the sperm quantity stated on the laboratory report as being correct information. That sperm quantity was listed on the report by Jenna Sparling, the same person who misstated the sperm quantities in her e-mail. RP 1781-82.

Special verdict instruction.

The jury was asked to find by special verdict the aggravating circumstance that the murder was committed in the course of, in furtherance of, or in immediate flight from the crime of first or second degree rape. RP 2148-49. The jury was instructed in pertinent part regarding the special verdict:

> Because this is a criminal case, all 12 of you must agree for you to answer the special verdict form. In order to answer the verdict form, yes, you must unanimously be satisfied beyond a reasonable doubt that yes is the correct answer. If you have a reasonable doubt as to the question, you must answer no.
>
> Because this is a criminal case, each of you must agree for you to return a verdict. When all of you have so agreed, fill in the proper form of verdict or verdicts to express your decision.

RP 2148.

The jury found Mr. Stafford guilty of aggravated first degree murder and answered "yes" to the special verdict. RP 2273-74. Based on this answer, the court imposed a sentence of life without possibility of parole. RP 2283. This appeal followed. CP 3.

D. ARGUMENT

Issue No 1. Once Mr. Stafford made an equivocal request for counsel at the police interrogation, the officer was prohibited from continuing the interrogation and could only ask questions clarifying Mr. Stafford's request.[2]

The Fifth and Sixth amendments to the federal constitution (and their State counterparts) include guarantees of the right to counsel. The Fifth Amendment prohibition against compelled self-incrimination requires that custodial interrogation be preceded by advice to the accused that he has the right to remain silent and the right to the presence of an attorney. *Miranda v. Arizona*, 384 U.S. 436, 479, 86 S.Ct. 1602, 16 L.Ed.2d 694, 10 A.L.R.3d 974 (1966). The United States Supreme Court has held that once the right to counsel is invoked the police cannot initiate further interrogation or seek a waiver until the suspect has an opportunity to meet with counsel, and further, that counsel must be present during any future interrogation once the right to counsel is invoked. *State v. Warness*, 77 Wn.App. 636, 639, 893 P.2d 665 (1995) (citing *Edwards v. Arizona*, 451 U.S. 477, 101 S.Ct. 1880, 68 L.Ed.2d 378 (1981) and *Minnick v. Mississippi*, 498 U.S. 146, 111 S.Ct. 486, 112 L.Ed.2d 489 (1990)).

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[2] Assignments of Error Nos. 1-7.

When a suspect who is advised of rights makes an equivocal request for counsel during a custodial interrogation, the interrogating officer must stop the interrogation. The officer may then ask questions to clarify the suspect's wishes. But those questions must be strictly limited to clarifying the suspect's request. *State v. Aten*, 130 Wn.2d 640, 665-66, 927 P.2d 210 (1996) (citing *State v. Robtoy*, 98 Wn.2d 30, 38-39, 653 P.2d 284 (1982)).

Here, Mr. Stafford made an equivocal request for counsel before he was even read his constitutional rights or asked to waive them. At the beginning of the interview Lt. Wentz asked, "Do you understand that this statement is being recorded?" Mr. Stafford responded, "Yes, I (inaudible) hear that. And I understand that I should have an attorney present most, pretty soon." RP 43. The trial court's finding that this statement was merely Mr. Stafford expressing his understanding of his right to counsel (Finding of Fact No. 16, CP 754) is error. There is no such statement in the record of the interview. Nor is it supported by any other evidence in the record. It is pure conjecture and therefore not a proper finding of fact.

The trial court further erred in finding Mr. Stafford made no request for an attorney at the time he made the above statement. Finding of Fact No. 18, CP 754. While it is not an unequivocal request for counsel, the

statement is none the less an equivocal request that required the interviewing officer to clarify before any further interrogation.

Instead of asking questions to clarify whether Mr. Stafford wanted an attorney present before going any further, Lt. Wentz said, "Okay. Well let me go through this." RP 43. He then proceeded with his interrogation completely ignoring Mr. Stafford's statement as if he had not even heard it, contrary to *Aten* and *Robtoy*. Any later interrogations or so-called waivers are therefore tainted and invalid, pursuant to *Warness*, supra. The trial court erred in admitting any of Mr. Stafford's statement because it was given after he made an equivocal request for an attorney. That request was not honored or clarified by the officer.

The State argued and the court agreed that this case is instead controlled by *State v. Radcliffe*, 164 Wn.2d 900, 194 P 3d 250 (2008) and *Davis v. United States*, 512 U.S. 452, 459, 114 S.Ct. 2350, 129 L.Ed.2d 362 (1994) because Mr. Stafford waived his right to an attorney by continuing to answer questions. Once a suspect has knowingly waived his right to an attorney, he must explicitly ask for an attorney or the police may continue questioning; an equivocal request will not do. *Radcliffe*, 164 Wn.2d at 906; *Davis*, 512 U.S. at 459.

A person being interrogated may validly waive the right to counsel. *Miranda*, 384 U.S. at 475, 86 S.Ct. 1602. However, if the interrogation takes place without an attorney present, the State has the heavy burden of establishing the defendant's waiver of his privilege against self-incrimination and his right to retained or appointed counsel. This burden is met if the State can prove the voluntariness of the statement by a preponderance of the evidence. *State v. Whitaker*, 133 Wn. App. 199, 215, 135 P.3d 923 (2006) (citing *State v. Earls*, 116 Wn.2d 364, 378-79, 805 P.2d 211 (1991)).

To be valid, the waiver must be voluntary, knowing, and intelligent. *Id.* (citing *Edwards*, 451 U.S. at 482, 101 S.Ct. 1880). Validity of a waiver depends upon the particular facts and circumstances surrounding that case, including the background, experience, and conduct of the accused. *Edwards*, 451 U.S. at 482, 101 S.Ct. 1880. Courts examine the totality of the circumstances to determine whether the relinquishment of the right was voluntary and whether the waiver was made with "full awareness of both the nature of the right being abandoned and the consequences of the decision to abandon it." *State v. Bradford*, 95 Wn. App. 935, 944, 978 P.2d 534 (1999) (citing *Moran v. Burbine*, 475 U.S. 412, 421, 106 S.Ct. 1135, 89 L.Ed.2d

410 (1986). The State must establish the voluntariness of the statement by a preponderance of the evidence. *Earls*, 116 Wn.2d at 378-79, 805 P.2d 211.

Here, in support of waiver, the trial court found among other things that Mr. Stafford had prior knowledge of his constitutional rights through other contacts with law enforcement. Finding of Fact No. 21, CP 755. There is no evidence of this fact in the record. It may be something the State argued, but since it was not in evidence, it is not a proper finding of fact.

The trial court also found that Mr. Stafford's eventual unequivocal request for counsel indicated he had previously not invoked his right to counsel. Finding of Fact No. 26, CP 755. Again, this conclusion by the court is pure conjecture, not supported by the record and thus not a proper finding of fact. Therefore, it is error.

In *State v. Aronhalt*, 99 Wn. App. 302, 994 P.2d 248 (2000), the defendant made an equivocal request for an attorney during a police interview. *Aronhalt*, 99 Wn. App. at 307. The detective indicated to Aronhalt that if he wanted an attorney all he had to do was say so and the interview would stop. *Id.* The detective worked to clarify the equivocal request for an attorney and did not resume questioning designed to elicit

incriminating answers until after Aronhalt unequivocally waived his right to counsel. *Id.*

After signing a waiver, Aronhalt "made reference to the possibility that he should get a lawyer." Questioning ceased. *Aronhalt*, 99 Wn. App. at 308. Then, Aronhalt was asked several times whether he wanted a lawyer. Even though Aronhalt did not remember how he responded, the detective was clear. The time was noted when Aronhalt again waived his right to an attorney and basically said, "we can continue." *Id.* Under these circumstances, this Court held the trial court did not err in finding Aronhalt voluntarily waived his right to counsel.

The facts in the present case are quite different from *Aronhalt*. Instead of asking questions to clarify whether Mr. Stafford wanted an attorney present after he made an equivocal request for counsel, Lt. Wentz proceeded with his interrogation completely ignoring Mr. Stafford's statement as if he had not even heard it. Unlike the detective in *Aronhalt*, not once did Lt. Wentz ask Mr. Stafford if he wanted a lawyer. Lt. Wentz continued asking questions even after Mr. Stafford refused to sign a written waiver. The detective in *Aronhalt*, did not resume questioning until after Aronhalt unequivocally waived his right to counsel. Therefore, considering the totality of the circumstances, there was no valid waiver of right to

counsel in this case. Accordingly, the trial court erred in concluding that Mr. Stafford knowingly, voluntarily and intelligently waived his rights. Conclusion of Law No. 3, CP 755.

Since Mr. Stafford did not waive his right to an attorney, this case is easily distinguishable from both *Radcliffe* and *Davis*, since the holding in both of those cases is predicated on the defendant having already waived his right to counsel before any equivocal request for counsel is made. Therefore, *Aten* and *Robtoy* control the issue in this case, not *Radcliffe* and *Davis*. The interrogation should have ceased once Mr. Stafford made an equivocal request for an attorney. Since that did not happen, the trial court erred in admitting any of Mr. Stafford's statements.

Issue No 2. The Sixth Amendment Confrontation Clause was violated when an expert witness's testimony was based on the work of others who did not testify, and that work was done for the purpose of criminal prosecution.[3]

The Sixth Amendment Confrontation Clause provides: "In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him." U.S. Const. amend. VI. This right is made

[3] Assignment of Error No. 8.

binding on the states through the Fourteenth Amendment. *Pointer v. Texas*, 380 U.S. 400, 403, 85 S.Ct. 1065, 13 L.Ed.2d 923 (1965).

Article I, section 22 of the Washington Constitution similarly provides, "[i]n criminal prosecutions the accused shall have the right ... to meet the witnesses against him face to face." In *State v. Shafer*, 156 Wn.2d 381, 128 P.3d 87 (2006), our Supreme Court concluded that article I, section 22 can offer higher protection than the Sixth Amendment with regard to a defendant's right of confrontation. *Id.* at 391-92, 128 P.3d 87 (citing *State v. Foster*, 135 Wn.2d 441, 957 P.2d 712 (1998)). An alleged violation of the Confrontation Clause is subject to de novo review. *Lilly v. Virginia*, 527 U.S. 116, 137, 119 S.Ct. 1887, 144 L.Ed.2d 117 (1999); *State v. Kirkpatrick*, 160 Wn.2d 873, 881, 161 P.3d 990 (2007).

Until the Supreme Court decided *Crawford v. Washington*, 541 U.S. 36, 124 S. Ct. 1354, 158 L. Ed. 2d 177 (2004), hearsay statements made by unavailable declarants were admissible if an adequate indicia of reliability existed, i.e., they fell within a firmly rooted hearsay exception or bore a 'particularized guarantee of trustworthiness.' *Ohio v. Roberts*, 448 U.S. 56, 66, 100 S. Ct. 2531, 65 L. Ed. 2d 597 (1980), overruled by *Crawford*, 124 S. Ct. 1371 (2004).

Under *Crawford*, "[w]here nontestimonial hearsay is at issue, it is wholly consistent with the Framers' design to afford the States flexibility in their development of hearsay law . . . as would an approach that exempted such statements from Confrontation Clause scrutiny altogether." *Crawford*, 124 S. Ct. at 1374. But if testimonial hearsay evidence is at issue, the Confrontation Clause requires witness unavailability and a prior opportunity for cross-examination. *Crawford*, 124 S. Ct. at 1374. After *Crawford*, a state's evidence rules no longer govern confrontation clause questions. See *United States v. Cromer*, 389 F.3d 662, 679 (6th Cir.2004).

The U.S. Supreme Court applied the *Crawford* analysis to statements prepared by expert, forensic witnesses in *Melendez-Diaz v. Massachussetts*, -- U.S. --, 129 S.Ct. 2527, 174 L.Ed.2d 314 (2009). It found that the certificate of a laboratory analyst asserting that the tested substance was cocaine was a testimonial statement. *Id.*, 129 S. Ct. 2527, 2540. It rejected various arguments that the statements of scientific experts should be treated differently from the statements of other witnesses. *Id.* at 2532-42. Consequently, the analysts were "witnesses" for confrontation clause purposes and Melendez-Diaz had the right to confront them. *Id.* at 2532. Because he was not given this opportunity, the evidence should not have been admitted. *Id.* at 2542. The Court concluded, "The Sixth

Amendment does not permit the prosecution to prove its case via ex parte out-of-court affidavits, and the admission of such evidence against Melendez-Diaz was error." *Id.*

The issue in this case is whether the reasoning of *Melendez-Diaz* applies when, as here, a live expert witness testifies at trial but it is not the same one who performed the forensic analysis. The trial court held it did not, relying on *State v. Lui*, 153 Wn. App. 304, 221 P. 3d 948 (2009)[4]. In the *Lui* Court's view, the decision in *Melendez-Diaz*, "does not preclude a qualified expert from offering an opinion in reliance upon another expert's work product." *Lui*, 153 Wn. App. at 318-19. The Court relied for persuasive precedent on a decision of an intermediate appellate court in California[5] and two decisions from Illinois courts. *Id.* at 323-24. It recognized that "some courts have reached contrary results." *Id.* at 325, n.21.

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[4] Review accepted, No. 84045-8; argued 9/14/10. This same issue is also pending in the U.S. Supreme Court in *Bullcoming v. New Mexico*, No. 09-10876; argument scheduled February 22, 2011.

[5] *California v. Rutterschmidt*, 176 Cal.App.4th 1047, 98 Cal.Rptr.3d 390 (2009), relied on by the *Lui* Court, may no longer be cited as authority under California's rules because the California Supreme Court granted review in *California v. Rutterschmidt*, -- Cal.Rptr.3d --, 2009 WL 4795343 (Cal. Dec 02, 2009) (No. S176213).

In fact, many courts have held – both before and after the *Melendez-Diaz* ruling, that the sort of testimony presented in this case and in *Lui* violates the Confrontation Clause. Courts reaching that conclusion prior to *Melendez-Diaz* include: *McMurrar v. Indiana*, 905 N.E.2d 527 (2009) (quality assurance manager of lab testified to drug test performed by analyst); *Maine v. Mangos*, 957 A.2d 89, 2008 ME 150 (2008) (confrontation violation where DNA lab supervisor testified based on work of analyst); *United States v. Mejia*, 545 F.3d 179, 198-99 (2d Cir. 2008) (gang expert violated confrontation clause by basing opinion on statements of others); *Florida v. Johnson*, 982 So.2d 672 (Fla., 2008) (laboratory supervisor testified about results of a drug test performed by a subordinate); *Roberts v. United States*, 916 A.2d 922 (D.C. 2007) (DNA expert gave opinions regarding probability of a match based on work of analyst who tested samples); *State v. Hopkins*, 134 Wn. App. 780, 142 P.3d 1104 (2006), *rev. denied*, 160 Wn.2d 1020, 163 P.3d 793 (2007) (discussed below); *New York v. Goldstein*, 6 N.Y.3d 119, 843 N.E.2d 727, 810 N.Y.S.2d 100 (2005), *cert. denied*, 547 U.S. 1159, 126 S.Ct. 2293, 164 L.Ed.2d 834 (2006) (psychiatrist based her opinion regarding defendant's sanity on interviews with third parties who had contact with defendant); *Michigan v. Lonsby*, 268 Mich. App. 375, 707 N.W.2d 610 (2005) (crime laboratory

serologist's testimony that stain on bathing suit was semen violated *Crawford* because it was based on work of another serologist from same laboratory); *Smith v. Alabama*, 898 So.2d 907 (2004) (testimony of medical examiner violated Confrontation Clause because it was based in part on the work of a pathologist who actually performed autopsy).

Favorable cases decided after *Melendez-Diaz* include: *Michigan v. Payne*, 285 Mich. App. 181, 774 N.W.2d 714 (2009) (Confrontation Clause violated when witness who testified about DNA testing was not the analyst who performed the tests); *North Carolina v. Locklear*, 363 N.C. 438, 681 S.E.2d 293 (2009) (chief medical examiner improperly based conclusions on work of pathologist who performed autopsy and dentist who identified victim from remains); *North Carolina v. Galindo,* 683 S.E. 2d 785 (N.C. App. 2009) (chemist improperly gave opinion regarding weight and nature of drugs when he relied on report of analyst who actually performed tests); *People v. Dendel*, -- N.W.2d -- , 2010 WL 3385552 (Mich.App. Aug. 24, 2010) (Confrontation Clause violated when laboratory supervisor testified to toxicology tests performed by subordinates); *Commonwealth v. Durand*, 457 Mass. 574, 931 N.E.2d 950 (Mass. Aug. 19, 2010) (Confrontation Clause violated where doctor's testimony included observations made by non-testifying medical examiner who actually performed autopsy); *Vega v.*

State, 236 P.3d 632, 2010 WL 3184312 (Nev. Aug. 12, 2010) (Doctor's testimony relating observations and findings of sexual assault nurse violated Confrontation Clause); *State v. Craven*, 696 S.E.2d 750, 2010 WL 2814417 (N.C.App. July 20, 2010) (Confrontation Clause violated when forensic chemist testified based on work of other, non-testifying chemists); *Gardner v. United States*, 999 A.2d 55, 2010 WL 2679339 (D.C. July 8, 2010) (Testimony by DNA expert from Orchid Cellmark violated Confrontation Clause where it was based on work of non-testifying analysts).

The U.S. Supreme Court's resolution of the petition for a writ of certiorari in *Ohio v. Crager*, 116 Ohio St.3d 369, 879 N.E.2d 745 (2007), most notably demonstrates the *Lui* court's misinterpretation of *Melendez-Diaz*. In *Crager*, as here, the State introduced DNA evidence through an expert witness. *Crager*, 116 Ohio St.3d at 371. The analyst who actually performed the testing was not produced because she was on maternity leave. *Id.* The testifying analyst performed a "technical review" of the other's work, which "involved reviewing her notes, the DNA profiles she generated, her conclusions, and the final report." *Id.* at 373. He came to an independent opinion regarding the conclusions. *Id.* The Ohio Supreme Court found that, because the testifying analyst had reached his own conclusions, he conveyed any "testimonial" aspects of the DNA

examination. *Id.* at 384. There was no confrontation violation in the Court's view because the testifying analyst could be questioned about "the procedures that were performed, the test results, and his expert opinion about the conclusions to be drawn from the DNA reports." *Id.* (citations and internal quotations omitted).

On June 29, 2009, four days after the opinion issued in *Melendez-Diaz*, the Supreme Court issued the following order in *Crager*:

> The motion of petitioner for leave to proceed in forma pauperis and the petition for a writ of certiorari are granted. The judgment is vacated and the case is remanded to the Supreme Court of Ohio for further consideration in light of *Melendez-Diaz v. Massachusetts*, 557 U.S. ___ (2009).

Crager v. Ohio, -- U.S. --, 129 S.Ct. 2856, 174 L.Ed.2d 598 (2009). The Supreme Court will issue such an order only when an intervening decision "reveal[s] a reasonable probability that the decision below rests upon a premise that the lower court would reject if given the opportunity for further consideration, and where it appears that such a redetermination may determine the ultimate outcome of the litigation." *Lawrence v. Chater*, 516 U.S. 163, 167, 116 S. Ct. 604, 133 L. Ed. 2d 545 (1996).

On remand from the U.S. Supreme Court, the Ohio Supreme Court reversed Crager's conviction and ordered "a new trial consistent with *Melendez-Diaz v. Massachusetts*." *Ohio v. Crager*, 123 Ohio St.3d 1210,

914 N.E.2d 1055 (2009). The facts in this case are indistinguishable from *Crager*. This Court should therefore grant Mr. Stafford the same relief that Crager received.

In addition, the trail court's decision in this case conflicts with a prior decision by this Court. In *State v. Hopkins*, supra, this Court recognized that the Confrontation Clause prohibits one medical expert from testifying in place of another. In that case, the child victim of sexual abuse was examined by a nurse practitioner, who prepared a report. Her supervising doctor then testified at trial, relying on the nurse's report. *Hopkins*, 134 Wn. App. at 784. The Court accepted that the victim's statements to the nurse fit within the hearsay exception of ER 803 (a)(4) (statements for the purpose of medical diagnosis), and the nurse's report could fit within the exception under RCW 5.45.020 (business records) if the proper foundation were laid. *Id.* at 788-89. Nevertheless, the doctor's testimony violated the Confrontation Clause. *Hopkins*, 134 Wn. App. at 790-91. The nurse's report was "testimonial" because she would have understood that it would be available for use at a later trial. *Id.*, citing *Crawford*, 541 U.S. at 51-52.

The situation in the present case is indistinguishable from *Hopkins*. Valencia Ward did not perform any of the DNA tests herself. RP 1713.

She relied entirely on what Jenna Sparling, the person who actually did the DNA testing, wrote down as being accurate information. Defense counsel was able to successfully demonstrate on cross examination that there were inaccuracies in some of this information. See RP 1781-82. Ms. Sparling, no longer works at Orchid Cellmark and did not testify in this case. RP 1780-81. Ms. Sparling's report was clearly testimonial because it was prepared specifically for use at trial. Therefore, Ms. Ward's testimony violated the Confrontation Clause.[6]

Issue No. 3. The testimony of Theresa LaFray should have been excluded because it was irrelevant and its probative value was substantially outweighed by the danger of unfair prejudice.[7]

Generally, all relevant evidence is admissible and all irrelevant evidence is inadmissible. ER 402. Relevant evidence is any "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence". ER 401. Even relevant evidence will be excluded "if its probative value is substantially outweighed by the danger of unfair prejudice". ER 403.

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[6] The undersigned counsel thanks David B. Zuckerman, Attorney at Law and counsel for Mr. Lui on appeal, for his contribution to the research and writing of this issue.
[7] Assignment of Error No. 9.

The determination of relevance is within the broad discretion of the trial court, and will not be disturbed absent manifest abuse of that discretion. *In re Young*, 122 Wn.2d 1, 53, 857 P.2d 989 (1993).

ER 403 is the same as Federal Rule of Evidence 403, so our courts look to both state and federal case law for guidance. See ER 403 comment, 1994 Washington Rules of Court, at 196. Both rules are concerned with what is termed "unfair prejudice", which one court has termed as prejudice caused by evidence of "scant or cumulative probative force, dragged in by the heels for the sake of its prejudicial effect.' " *Carson v. Fine*, 123 Wn.2d 206, 223, 867 P.2d 610 (1994) (citing *United States v. Roark*, 753 F.2d 991, 994 (quoting *United States v. McRae*, 593 F.2d 700, 707 (5th Cir.),cert. denied, 444 U.S. 862, 100 S.Ct. 128, 62 L.Ed.2d 83 (1979)), reh'g denied, 761 F.2d 698 (11th Cir.1985); see also 5 K. Tegland, Wash.Prac., Evidence § 106, at 349 (3d ed. 1989); *State v. Rice*, 48 Wn. App. 7, 13, 737 P.2d 726 (1987) (in determining prejudice, the linchpin word is "unfair")).

Another authority states that evidence may be unfairly prejudicial under rule 403 if it appeals to the jury's sympathies, arouses its sense of horror, provokes its instinct to punish, or "triggers other mainsprings of human action." *Carson*, 123 Wn.2d at 223 (citing 1 J. Weinstein & M. Berger, Evidence § 403[03], at 403-36 (1985)). Washington cases are in

agreement, stating that unfair prejudice is caused by evidence likely to arouse an emotional response rather than a rational decision among the jurors. *Id.* (citing *Lockwood v. AC & S, Inc.*, 109 Wn.2d 235, 257, 744 P.2d 605 (1987); *State v. Cameron*, 100 Wn.2d 520, 529, 674 P.2d 650 (1983)).

Here, Theresa LaFray testified that sometime during the summer of 1993, Mr. Stafford showed up at her house late at night covered in blood. LaFray had been interviewed prior to trial by both parties including multiple times by Lt. Wentz, but had made no mention of that incident in any of these prior interviews. She only contacted Lt. Wentz with this information after the trial had begun. RP 1459.

Moreover, LaFray admitted on cross examination that she did not like Mr. Stafford. RP 1460, 1467. She stated she came forward with this late information because she was afraid Mr. Stafford might not be convicted. RP 1465-66. Considering the lateness of this disclosure, the numerous opportunities to mention the incident in prior interviews, and her obvious bias against Mr. Stafford, the validity and credibility of LaFray's testimony is extremely questionable.

The statement is also irrelevant because its relevancy was never shown. LaFray did not know in which month this incident occurred or whether it was even connected to this case. She told Lt. Wentz that this

incident occurred sometime in late summer between 10:30 and 12:00 p.m. and that she usually was not up later than midnight. RP 1462. Earlier testimony established that Shawna was alive until sometime after 1:00 a.m. on June 13, 1993. RP 1227, 1240, 1243. This discrepancy between the time of night and time of year clearly shows that LaFray's account is unconnected to this case. Therefore, her testimony is irrelevant and has no probative value.

LaFray's testimony was also extremely prejudicial because it was the only evidence connecting Mr. Stafford, though erroneously, to the murder of Shawna Yandell. Therefore, the trial court's failure to exclude this testimony was a manifest abuse of discretion.

Harmless Error. An evidentiary error is not harmless "if, 'within reasonable probabilities, had the error not occurred, the outcome of the trial would have been materially affected.' " *State v. Neal*, 144 Wn.2d 600, 611, 30 P.3d 1255 (2001) (internal quotation marks omitted) (quoting *State v. Smith*, 106 Wn.2d 772, 780, 725 P.2d 951 (1986)).

As will be shown below, the only evidence connecting Mr. Stafford to Shawna is the DNA evidence. However, the DNA evidence by itself only supports a theory that sperm belonging to Mr. Stafford was present because he had consensual sex with Shawna hours or even days before she was

killed. It does not provide sufficient evidence that he killed her. LaFray's testimony is the only evidence that might, though erroneously, link Mr. Stafford to that crime. Therefore, the error is not harmless.

Issue No. 4. Mr. Stafford's right to due process under Washington Constitution, Article 1, § 3 and United States Constitution, Fourteenth Amendment was violated where the State failed to prove the essential elements of the crime of aggravated first degree murder.[8]

As a part of the due process rights guaranteed under both the Washington Constitution, Article 1, § 3 and United States Constitution, Fourteenth Amendment the state must prove every element of a crime charged beyond a reasonable doubt. *State v. Baeza*, 100 Wn.2d 487, 488, 670 P.2d 646 (1983); *In re Winship*, 397 U.S. 358, 364, 90 S.Ct. 1068, 1073, 25 L.Ed.2d 368 (1970). As the United States Supreme Court explained in *Winship*: "[T]he use of the reasonable-doubt standard is indispensable to command the respect and confidence of the community in applications of the criminal law." *Winship*, 397 U.S. at 364.

Mere possibility, suspicion, speculation, conjecture, or even a scintilla of evidence, is not substantial evidence, and does not meet the minimum requirements of due process. *State v. Moore*, 7 Wn. App. 1, 499

[8] Assignment of Error No. 10.

P.2d 16 (1972). As a result, any conviction not supported by substantial evidence may be attacked for the first time on appeal as a due process violation. *Id.* "Substantial evidence" in the context of a criminal case, means evidence sufficient to persuade "an unprejudiced thinking mind of the truth of the fact to which the evidence is directed." *State v. Taplin*, 9 Wn. App. 545, 513 P.2d 549 (1973) (quoting *State v. Collins*, 2 Wn. App. 757, 759, 470 P.2d 227, 228 (1970)). The remedy for a conviction based on insufficient evidence is reversal and dismissal with prejudice. *Smalis v. Pennsylvania,* 476 U.S. 140, 144, 106 S. Ct. 1745, 90 L. Ed. 2d 116 (1986).

In determining the sufficiency of the evidence, the test is "whether, after viewing the evidence in the light most favorable to the State, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992) (citing *State v. Green*, 94 Wn.2d 216, 220-22, 616 P.2d 628 (1980)). "When the sufficiency of the evidence is challenged in a criminal case, all reasonable inferences from the evidence must be drawn in favor of the State and interpreted most strongly against the defendant." *Salinas*, 119 Wn.2d at 201, 829 P.2d 1068 (citing *State v. Partin*, 88 Wn.2d 899, 906-07, 567 P.2d 1136 (1977)). "A claim of insufficiency admits the truth of the State's evidence and all inferences that reasonably can be drawn

therefrom." *Salinas*, 119 Wn.2d at 201, 829 P.2d 1068 (citing *State v. Theroff*, 25 Wn. App. 590, 593, 608 P.2d 1254, aff'd, 95 Wn.2d 385, 622 P.2d 1240 (1980)).

While circumstantial evidence is no less reliable than direct evidence, *State v. Myers*, 133 Wn.2d 26, 38, 941 P.2d 1102 (1997), evidence is insufficient if the inferences drawn from it do not establish the requisite facts beyond a reasonable doubt. *Baeza*, 100 Wn.2d at 491, 670 P.2d 646. Specific criminal intent may be inferred from circumstances as a matter of logical probability." *State v. Zamora*, 63 Wn. App. 220, 223, 817 P.2d 880 (1991).

Here, there is insufficient evidence that Mr. Stafford with premeditation murdered Shawna Yandell. The area where Shawna's body was found is about two and a half miles upstream from Sportsman's Park where she was last seen alive. RP 1022. Lt. Wentz, the lead investigator in the case, searched the area where Shawna's body was found for 4-5 days along with around 20 other people but found no evidence of a crime scene or evidence associated with the victim. RP 1011-30, 1050-51. A similar search of Sportsman's Park failed to produce any evidence. RP 1056-57, 1068. Lt. Wentz could only conclude that the crime probably occurred in a different area. RP 1064.

The only evidence connecting Mr. Stafford to Shawna is the DNA evidence. Even assuming the results of the DNA testing were admissible, they do not provide sufficient evidence that Mr. Stafford either raped or murdered Shawna Yandell.

Dr. Thiersch, the forensic pathologist who performed the autopsy, testified injuries on the victim's arms, legs and feet could be defense wounds, but could also be caused by her falling down from being intoxicated. RP 1088, 1104. Linear marks on the victim's legs could have been caused by dragging or from hitting rocks while floating in the river. RP 1104. Dr. Vielbig also testified the swiftness of the current in that area combined with a number of rocks and logs could have caused the bumps, bruises and scratches on the body. RP 988.

Dr. Thiersch further testified he was unable to tell whether the victim was raped or had consensual sex. He was also unable to tell if the person who had sex with the victim was the same person who inflicted the lethal head injuries. RP 1108-09. The spermatozoa found on the vaginal swabs taken from the victim could have been as much as seven days old, depending on temperature and other conditions. RP 1096. Thus, the evidence would support the theory that sperm belonging to Mr. Stafford was present because he had consensual sex with Shawna hours or even days

before she was killed. It does not provide sufficient evidence that he killed her.

The State inferred in its closing argument that there was never any opportunity for Mr. Stafford and Shawna to have had consensual sex prior to her death because Travis Sinden testified he and Shawna were always together and never did anything separately. RP 1145-47, 2155. However, Tina Wilkey refuted this testimony and the State's inference when she testified that she and Shawna would sometimes hang out and go do things together without Travis.

Travis' testimony is further refuted by Tina's testimony about a prior occasion when she drove to Sportsman's Park to pick up Travis and Shawna where she had dropped them off earlier. Travis came down a trail to the car alone and said Shawna wanted to stay. Travis was perfectly willing to leave Shawna there alone. Tina had to convince him to go back and get Shawna by reminding him about the park being a dangerous place. RP 1249-50. This incident strongly suggests Travis had left Shawna alone on prior occasions and had no qualms about doing it again.

Travis Sinden's testimony of the events on the day in question also contradicts his assertion that he and Shawna were always together. After Kenny dropped them off at Sportsman's Park that night following the failed

cherry-picking expedition to the Tri-Cities, Travis and Shawna went to a familiar secluded area by the Yakima River to huff paint. After Travis fell into the river Shawna helped him to the bathroom to change his clothes where he proceeded to pass out. RP 1152-55. There is no way of knowing what Shawna did or where she went while Travis was passed out.

Travis passed out a second time after they returned to the restroom following the encounter with the park ranger. The next thing he remembered was waking up inside the bathroom and Shawna was gone. RP 1155-56. Again, there is no way of knowing what Shawna did or where she went while Travis was passed out. Travis hollered for her several times and got no answer. Instead of looking for her or being frantically worried, he walked home to the Wilkey's garage and went to sleep. RP 1156-57. This indifference to Shawna's well-being or whereabouts at this hour of the night again suggests that Travis had left Shawna alone on prior occasions and had no qualms about doing it again. It refutes his testimony asserting that he and Shawna were an inseparable couple and that he was genuinely devoted to her.

This assertion is further refuted by his actions the following morning. Instead of being frantic because Shawna still had not come home, Travis asked to borrow the car so he could go get cigarettes. Travis said he

bought cigarettes and then went to the park sometime that morning. He looked around for about 20 minutes, hollered for Shawna, but did not see her so he left. RP 1160, 1320-22. When Travis came back to the Wilkey's house, Junior asked him where Shawna was. Travis replied, "I don't know, I guess she's up at the park." RP 1231-32. Travis didn't even bother calling the police until sometime late that afternoon. At that point, Shawna had been missing for over 12 hours. All this behavior indicates not only disingenuousness by Travis but also that he is accustomed to letting Shawna wander off and do her own thing without Travis having any idea of her whereabouts or what she is doing. Therefore, it is very feasible Shawna had a consensual sexual encounter with Mr. Stafford prior to and unrelated to her demise.

This point is further reinforced by the fact that both Shawna and Travis were constantly under the influence of drugs and/or alcohol. Testimony from the State's own witnesses portrays a sad image of two young people completely out of control from substance abuse. Tina Wilkey, testified that Travis, Shawna and her cousin Kenny drank a lot and almost every day—especially if the three of them were together. RP 1247. Shawna wanted to get high all the time. RP 1250-51. Travis and Shawna liked to go out to Sportsman's Park 2-3 nights a week and "huff paint," despite the

fact that Tina had warned Travis that Sportsman's Park was a dangerous place after dark and that people get killed there all the time. They also huffed paint in the garage. RP 1184, 1246-50.

Tina testified that when Travis brought Shawna back to the car on that prior occasion after Tina drove to pick them up in Sportsman's Park, Shawna didn't want to leave—she just wanted to sit out there huffing paint, even by herself. "She just didn't care; she didn't know where she was half the time." RP 1249-50.

On the day of the incident Travis bought a case of beer and he, Shawna and Kenny all drank beer on the way to the Tri-Cities. RP 1149. After the cherry-picking job fell through they bought a fifth of whiskey and headed back to Yakima with all of them drinking. RP 1150. Travis said he was drunk and belligerent by the time they got back to Yakima and Kenny dropped Travis and Shawna near Sportsman's Park. RP 1151. Travis and Shawna then went to a secluded area they knew to huff paint. RP 1153.

Considering Shawna's mental state on the day in question and during her prior three weeks living in Yakima, it is quite conceivable that this young woman who " just didn't care [and] didn't know where she was half the time" would wander off or get into a car with just about anyone—even someone she did not know. If she ended up having sex with that

person, she probably would not even remember. Sadly, this behavior likely contributed to her being victimized resulting in her tragic end. However, there is no evidence that Mr. Stafford was the perpetrator or brought about that end. Therefore, the evidence is insufficient to support the conviction.

Issue No. 5. The aggravating factor and special verdict should be vacated because the jury was incorrectly instructed it had to be unanimous to answer "no" to the special verdict.[9]

Manifest Constitutional Error. As a threshold matter, it should be noted that this issue was not raised at the court below by excepting to the special verdict instruction. However, an error may be raised for the first time on appeal if it is a manifest error involving a constitutional right. RAP 2.5(a)(3); *State v. Roberts*, 142 Wn.2d 471, 500, 14 P.3d 713 (2000). An error is "manifest" if it had " 'practical and identifiable consequences in the trial of the case.' " *Id.* (citing *State v. WWJ Corp.*, 138 Wn.2d 595, 603, 980 P.2d 1257 (1999) (quoting *State v. Lynn*, 67 Wn. App. 339, 345, 835 P.2d 251 (1992)).

Extensive authority supports the proposition that instructional error of the nature alleged here is of sufficient constitutional magnitude to be raised for the first time on appeal. *Id.* (citing *State v. Peterson*, 73 Wn.2d

[9] Assignments of Error Nos. 11 & 12.

303, 306, 438 P.2d 183 (1968)); *State v. Scott*, 110 Wn.2d 682, 688 n. 5, 757 P.2d 492 (1988); *Martinez v. Borg*, 937 F.2d 422, 423 (9th Cir.1991). This is not a case where a jury instruction merely failed to define a term, or where a trial court did not instruct on a lesser included offense that was never requested. See *Scott*, 110 Wn.2d at 688 n. 5, 757 P.2d 492. Instead, the instruction herein effectively alters the burden of proof because it misstates the requirement of unanimity for the jury to answer "no" to the special verdict.

In *State v. Bashaw*, 169 Wn.2d 133, 234 P.3d 195 (2010), the most recent case addressing this issue regarding the special verdict instruction, no exception to the instruction was made at the trial court. *State v. Bashaw*, 144 Wn. App. 196, 199, 182 P.3d 451 (2008). The Supreme Court did not engage in a manifest constitutional error analysis for the instructional error. *Bashaw*, 169 Wn.2d at 145-48, 234 P.3d 195. However, since the Supreme Court did engage in a constitutional harmless error analysis, it must have deemed the instructional error to be one of manifest constitutional error. *Bashaw*, 169 Wn.2d at 147-48, 234 P.3d 195. As such, it may be considered for the first time on appeal. RAP 2.5(a)(3).

Invited Error Doctrine. The State may argue under the invited error doctrine that Mr. Stafford is precluded from challenging the special verdict

instruction in this case because he failed to take exception to that instruction. The invited error doctrine does not go that far. The doctrine of invited error "prohibits a party from setting up an error at trial and then complaining of it on appeal." *In re Call*, 144 Wn.2d 315, 328, 28 P.3d 709 (2001) (citing *In re Thompson*, 141 Wn.2d 712, 723, 10 P.3d 380 (2000)). The invited error doctrine "appears to require affirmative actions by the defendant ... [in which] the defendant took knowing and voluntary actions to set up the error; where the defendant's actions were not voluntary, courts do not apply the doctrine. *Id.* (citing *Thompson*, 141 Wn.2d at 724, 10 P.3d 380)).

In *Call*, the Supreme Court found the defendant did not invite the error where his attorney wrote the wrong offender score and standard range on the guilty plea statement that the defendant signed. Neither the defendant, the prosecuting attorney, or the sentencing court was aware of the error in calculating the offender score and standard range. *Call*, 144 Wn.2d at 324-28, 28 P.3d 709.

Similarly, in the present case, Mr. Stafford did not invite the error where his attorney failed to take exception to an erroneous instruction that neither his attorney, the prosecutor, nor the court was aware. Exceptions to the jury instructions were taken April 20, 2010. Since *Bashaw* was not

decided until July 1, 2010, this was not a situation where there were affirmative actions by the defendant in which he took knowing and voluntary actions to set up the error. Therefore, he did not invite the error.

Improper Special Verdict Instruction. Washington requires unanimous jury verdicts in criminal cases. Const. art. I, § 21; *State v. Stephens*, 93 Wn.2d 186, 190, 607 P.2d 304 (1980). As for aggravating factors, jurors must be unanimous to find the State has proved the existence of the special verdict beyond a reasonable doubt. *State v. Goldberg*, 149 Wn.2d 888, 892-93, 72 P.3d 1083 (2003). However, jury unanimity is not required to answer "no." *Goldberg*, 149 Wn.2d at 893, 72 P.3d 1083. Where the jury is deadlocked or cannot decide, the answer to the special verdict is "no." Id.

In *Goldberg*, the jury was given the following special verdict instruction:

> In order to answer the special verdict form "yes", you must unanimously be satisfied beyond a reasonable doubt that "yes" is the correct answer. If you have a reasonable doubt as to the question, you must answer "no".

Id.

Although the Supreme Court vacated the special verdict for other reasons, it did not find fault with this instruction. *Goldberg*, 149 Wn.2d at 894, 72 P.3d 1083.

Here, the special verdict instruction was similar to the one given in *Goldberg*, except it was preceded by the following language: "Because this is a criminal case, all 12 of you must agree for you to answer the special verdict form." It also contained the following additional paragraph: "Because this is a criminal case, each of you must agree for you to return a verdict. When all of you have so agreed, fill in the proper form of verdict or verdicts to express your decision." RP 2148. This additional language in the instruction incorrectly requires jury unanimity for either answer ("yes" or "no") to the special verdict.

In *Bashaw*, the Supreme Court vacated sentencing enhancements where the jury was given an instruction requiring jury unanimity for special verdicts similar to the one given in this case. *Bashaw*, 169 Wn.2d at 147-48, 234 P.3d 195. In this case as well as in *Bashaw*, the jury was incorrectly instructed that all twelve jurors must agree on the answer to the special verdict. *Bashaw*, 169 Wn.2d at 139, 234 P.3d 195. Citing *Goldberg*, the *Bashaw* court held:

> Applying the *Goldberg* rule to the present case, the jury instruction stating that all 12 jurors must agree on an answer to the special verdict was an incorrect statement of the law. Though unanimity is required to find the presence of a special finding increasing the maximum penalty, see *Goldberg*, 149 Wn.2d at 893, it is not required to find the absence of such a special finding. The jury instruction here stated that unanimity was required for either determination. That was error.

Bashaw, 169 Wn.2d at 147, 234 P.3d 195.

The instruction in the present case incorrectly requires jury unanimity for the jury to answer "no" to the special verdict, contrary to *Bashaw* and *Goldberg*. Since this instruction misstates the law, the special verdict enhancement must be vacated. *Goldberg*, 149 Wn.2d at 894, 72 P.3d 1083; *Bashaw*, 169 Wn.2d at 147, 234 P.3d 195.

Harmless Error. In order to hold that a jury instruction error was harmless, "we must 'conclude beyond a reasonable doubt that the jury verdict would have been the same absent the error.' " *Bashaw*, 169 Wn.2d at 147, 234 P.3d 195 (citing *State v. Brown*, 147 Wn.2d 330, 341, 58 P.3d 889 (2002) (quoting *Neder v. United States*, 527 U.S. 1, 19, 119 S.Ct. 1827, 144 L.Ed.2d 35 (1999)). The *Bashaw* court found the erroneous special verdict instruction was an incorrect statement of the law. *Bashaw*, 169 Wn.2d at 147, 234 P.3d 195. A clear misstatement of the law is presumed to be prejudicial. *Keller v. City of Spokane*, 146 Wn.2d 237, 249, 44 P.3d 845 (2002) (citing *State v. Wanrow*, 88 Wn.2d 221, 239, 559 P.2d 548 (1977)).

In finding the instructional error not harmless the *Bashaw* court stated the following:

> The State argues, and the Court of Appeals agreed, that any error in the instruction was harmless because the trial court polled the jury

> and the jurors affirmed the verdict, demonstrating it was unanimous. This argument misses the point. The error here was the procedure by which unanimity would be inappropriately achieved. In *Goldberg*, the error reversed by this court was the trial court's instruction to a nonunanimous jury to reach unanimity. 149 Wn.2d at 893, 72 P.3d 1083. The error here is identical except for the fact that that direction to reach unanimity was given preemptively.
>
> The result of the flawed deliberative process tells us little about what result the jury would have reached had it been given a correct instruction. *Goldberg* is illustrative. There, the jury initially answered "no" to the special verdict, based on a lack of unanimity, until told it must reach a unanimous verdict, at which point it answered "yes." Id. at 891-93, 72 P.3d 1083. Given different instructions, the jury returned different verdicts. We can only speculate as to why this might be so. For instance, when unanimity is required, jurors with reservations might not hold to their positions or may not raise additional questions that would lead to a different result. We cannot say with any confidence what might have occurred had the jury been properly instructed. We therefore cannot conclude beyond a reasonable doubt that the jury instruction error was harmless. As such, we vacate the remaining sentence enhancements and remand for further proceedings consistent with this opinion.

Bashaw, 169 Wn.2d at 147-48, 234 P.3d 195.

The situation in the present case is indistinguishable from *Bashaw*. It is impossible to speculate about what the jury would have decided if it had been given the correct instruction. The jury was asked to find by special verdict the aggravating circumstance that the murder was committed in the course of, in furtherance of, or in immediate flight from the crime of first or second degree rape. RP 2148-49. Evidence of rape was tenuous at best. The State's own witnesses testified they were unable to determine

whether the victim was raped or had consensual sex. See e.g. RP 1108-09. Therefore, the error was not harmless.

E. CONCLUSION

For the reasons stated, the conviction should be reversed and the case dismissed, or in the alternative, the special verdict aggravating factor should be vacated and the case remanded for resentencing within the standard range.

Respectfully submitted February 8, 2011.

David N. Gasch
Attorney for Appellant

GASCH LAW OFFICE
ATTORNEYS AT LAW

David N. Gasch **Susan Marie Gasch**

April 11, 2011

Renee S. Townsley, Clerk/Administrator
Court of Appeals, Division III
500 N Cedar St
Spokane, WA 99201

RE: State v. Clayton G. Stafford, No. 29033-6-III.

Dear Ms. Townsley:

As permitted by RAP 10.8, Appellant cites as additional authority pertaining to Issue No. 5 of Appellant's Opening Brief: *State v. Ryan*, No. 64726-1 (Apr. 04, 2011). I am enclosing 5 copies of this letter.

Sincerely,

David N. Gasch

Enclosures as stated

cc: Kevin Eilmes

P. O. BOX 30339, SPOKANE, WASHINGTON 99223-3005
PHONE (509) 443-9149; FAX (509) 443-9149 (Call First)

GASCH LAW OFFICE
ATTORNEYS AT LAW

David N. Gasch **Susan Marie Gasch**

August 12, 2011

Renee S. Townsley, Clerk/Administrator
Court of Appeals, Division III
500 N Cedar St
Spokane, WA 99201

RE: State v. Clayton G. Stafford, No. 29033-6-III

Dear Ms. Townsley:

As permitted by RAP 10.8, Appellant cites as additional authority pertaining to Issue No. 2 in Appellant's Initial Brief: *Bullcoming v. New Mexico*, __U.S.__, No. 09-10876 (June 23, 2011). I am enclosing 5 copies of this letter.

Sincerely,

David N. Gasch

Enclosures as stated

cc: Kevin Eilmes

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