SUPREME COURT OF WASHINGTON

No. 29033-6-III

STATE OF WASHINGTON

RESPONDENT

V.

CLAYTON G. STAFFORD

PETITIONER

PETITION FOR REVIEW

PETITIONER IS PRO SE

A. IDENTITY OF PETITIONER

1. Clayton Gene Stafford DOC# 236031 currently incarcerated by Washington State Department of Correctims at Washington State Penitentiary (W.S.P.) South Complex Williams Unit A-119 1313 Nth 13th AVE. Walla Walla, 99362 humbly requests this honorable Court for review of Washington Court of Appeals Div. III decision filed September 15, 2015.

This case involves an issue of first impressions, perhaps more.

"Second count II" was dropped during trial and court refused to instruct jury of the charge no longer part of the case/trial. Court considered dropped count and charged in the alternative RP 2100, Lines 5 and 6, but instructed the jury erroneously by including the uncharged alternative in the instructions, sans amending the information. The issue involves also charging document facial invalidity, because charge was expired by statutory limitation had exhausted divesting the court of jurisdiction, Case from 1993 - June 13th Was Charged In 2009 Past 10yrs Limitation of Action!!

created an absolute bar to prosecute Stafford of the alleged crime. The criminal statute of limitatims made the informatim invalid on it's face; made instructing the jury on it for proving the aggravated factor; relieved the state of it's burden of proof. And invalidated Staffords convictim because when court instructed jury on uncharged alternative, created the possibility the jury convicted Stafford on the un-charged alternative. Count II

B. GROUNDS FOR RELIEF

I. State was barred by the statute of limitatims to charge Stafford for rape.

a. RCW Limitations of Actims

1. The State's zeal to convict Stafford excessively has led to the integrity of his tribunals besmirchment. RCW Laws of Limitatims 9A.04.080 [Sex Offense: RCW 9.94A.030] Laws of 2006 ch. 132 §1, specifically states: When Legislature extends a criminal statute of limitatim, the new period

of limitations applies not to already time barred when enactment became effective. State v. Hodgson, 108 Wn.2d 662, 666-67, 740 P.2d 848 (1987). In 2006 Legislature amended statute to state: ten (10) year statute of limitations runs from the date of commission of the act or from date defendants identification becomes conclusive establishment by DNA testing, which ever is later. However, the Prosecutor Ms. Powers knew when she did it; the rape charge against Stafford was barred by the statute of limitations, yet she filed it by information against him anyway.

A. Facial Invalidity

1. The untoward act to file a crime by information barred by the statute of limitations rendered that charging document facially invalid. In Stoudmire, 141 Wn.2d at 353, the convictions and sentences for his alleged crimes were invalid due to the statute of limitations had expired, and therefore there is nothing

to which an amendment can relate back. State v. Novotny, 76 Wn. App. [181 Wn.2d 296] 343, 345, n. 1, 884 P.2d 1336 (1994). It is an issue Stafford raised in his State-ment On Other Grounds which limits the power of a sovereign to act against him for the rape. See: Glover, -25 Wn. App at 61, 604 P2d 1015 (1979); Phelps, 113 Wn. App. at 357, 57 P.3d 624 (2002); State v. Walker, 153 Wn. App. 701, 705, 224 P.3d 814 (2009).

a. States Act to charge Stafford with crime past it's statutes of limitations caused a dominoe effect of reversable errors.

1. Beginning with the ~~strange~~ strange act to drop the improperly charged crime during trial. Courts decision to keep jury in the dark about rape count suddenly no longer part of case, defense counsel requested 2 instructions be made RP 2099 lines 9-13, but court refused. Court of Appeals reviews the adequacy of a jury instruction de novo State v. Blancaflor,

183 Wn. App. 215, 334 P.3d 46 (2014). Courts failure to instruct jury rape count was dismissed by state was reversible error of a "constitutional magnitude," only an instruction: 'all prior regard for the rape count must be now disregarded,' prevented error. See State v. Ashcraft, 71 Wn. App. 444, 446, 859 P.2d 60 (1993)

2. Defense counsel attempted to inveigh common sense by stating his being unaware of any law or instruction that required a jury to accept RP 2106 lines 24 & 25 and RP 2107 in it's entirety and RP 2108 lines 1-7 the charges as presented during the States closing argument. Mr. Scott suggested the court use the last paragraph of pg 1 for Instruction Number 1 See RP 2107. Standard WPIC language: 'They are to take the evidence that was presented to them, determine what the facts are and apply those facts to the law as given in their instructions . . . . But the trial court, even after admitting it was lost on whether to instruct the jury; the rape count is now no longer an issue requiring their concern RP 2108 lines

8-14. Allowed the Prosecution to lead it down the path where error clearly waited. States act to charge crime obviously beyond statutory legality caused this failure to instruct quandry, and now it is only proper the State prove beyond a reasonable doubt the error was harm-less. Id at 405-06, 859 P.2d 60.

The crime charged beyond statutory legality also cause the reversable error to instruct the jury in a manner that would relieve the state of it's burden of proof. State v. Pirtle, 127 Wn.2d 628, 656, 904 P.2d 245 (1995). It is unclear what to call the information from which a count is dropped mid trial. Did the States act reduce the rape count as an uncharged criminal act? Can State s dropping of rape count in the middle of the trial be considered an amended informatim? Trial court confessed in it's 12 years on the bench it had never been confronted by such an issue. Are we correct to consider what the state did in this case a matter of first impression? Has the

dropping of the rape count in mid trial comported to an accused constitutionally protected right to be informed of the criminal charge against him?, so he will be able to prepare and mount a defense at trial? Accord State v. Recuenco, 163 Wn.2d 428, 180 P.3d 1276 (2008), review granted 154 Wn.2d 156, 110 P.3d 188 Cert. granted S.Ct. 126, 2546, it has not.

II In Pursuit of correct Unanimity Determination Court Erroneously Instructed Jury on an uncharged Crime.

a. When Information alleges only 1 crime, it is reversable error to instruct on a Different Uncharged Crime. State v. China, 117 Wn. App. 531, 540, 72 P.3d 256 (2003); State v. Doogan, 82 Wn. App. 185, 188, 917 P.2d 155 (1996) (jury erroneously instructed on uncharged statutory alternative means); State v. Nicholas, 55 Wn. App. 261, 272-73, 776 P.2d 1385, review denied, 113 Wn.2d 1030, 784 P.2d 530 (1989); State v. Mitchell 149 Wn. App. 716, 721, 205 P.3d 920 (2009)

, affirmed 169 Wn.2d 437, 237 P.3d 282 (2010). When jury is instructed on an uncharged crime, a new trial is appropriate because it is possible the defendant was mis-taken ly convicted of an uncharged crime. State v. Brown, 45 Wn. App. 571, 576-77, 726 P.2d 60 (1986). The reversal for this trial error is proper because it is made from Staffords belief he was convicted through a judicial process that was fundamentally defective when court refused to in-struct jury State dropped rape charge against him; let State include dropped charge in it's closing argument and then instructed jury on rape charge as if he was still being charged with it See State v. Vangerpen 125 Wn. 2d 782, 794, 888 P.2d 1177 (1995)

In Hinton, 152 Wn.2d at 856-57 the court erred by allowing him to be convicted of felony murder predi-cated on assault, when after determining charging document was invalid on it's face, it still sent assault charge to jury for considering it an aggrava-ting factor in the murder conviction. The charging

document alone established the constitutional infirmity of the conviction; because a court may not use facially invalid convictions for any sentencing purpose See State v. Floyd, 178 Wn. App. 402, 316 P.3d 1091 (2013).

b. Courts Refusal to instruct jury rape count was dismissed relieved State of it's burden to prove 'all' elements of the aggravating factor beyond a reasonable doubt. See Washington Practice Volume 11A: Washington Pattern Jury Instructions (W.P.I.C): Criminal 300.10 at 704 (3d edition 2008). By inaccurately stating the relevant law to the jury, the trial Court aided the State in Convicting Stafford of First degree Aggravated Murder, by relieving it of it's burden to prove the aggravating factor beyond a reasonable doubt.

Conversely, RCW 9.94A.537(4) provides: that evidence supporting aggravating factors will be considered at the same time as evidence supporting the underlying crime. All the [redacted] State did was prove the

defendant had sex with the decedent. Evidence re-
-garding any facts supporting aggravating circumstances
under RCW 9.94A.535(3), (a) through (y) shall be
presented to the jury during the trial of the alleged crime,
unless the jury has been impaneled soley for re-sen-
-tencing, or unless the state alleges aggravating
circumstances listed in RCW 9.94A.535(3)(e),(i),
(h),(o) or(t) [Except the circumstances listed in
§2 of Section (RCW [redacted] 9.94A.535) the following
circumstances are an exclusive list of factors that
can support a sentence above the standard range [as
determined by RCW 9.94A.537] (a) The defendants
conduct during commission of the current offense
manifested deliberate cruelty to the victim; (b) defen-
-dant should've known victim to be particularly vul-
-nerable or incapable of resistance; (c) current offense
was a violent offense and defendant victim was
pregnant; (d) current offense was major economic
offense or series of offenses, so identified by con-

- sideration of the following factors: (i) current offense involved multiple victims or multiple incidents per victim; (ii) current offense involved attempted or actual monetary loss substantially greater than typical for offense; (iii) current offense involved a high degree of sophistication or planning occurred over a length of time.

There exists no evidence Stafford forced sex on the decedent. The two most common aspects of rape e.g. 'bruises on thighs and vaginal tearing' were completely absent. When determining whether sufficient evidence at trial supports "forceable compulsion" means that force exerted was (1) directed at overcoming victims resistance and (2) was more than that which is normally required to achieve penetration See State V. Wright, 152 Wn. App. 64, 71, 214 P.3d 968 (2004) (quoting State v. McKnight, 54 Wn. App. 521, 528, 774 P.2d 532 (1989)). In other words:

"Forceable Compulsion is not the force inherent in any act of sexual touching. State produced no evidence of "Forceable Compulsim".

C. The accused in a criminal case (when statutory limits bar the predicate felony [in our case rape] for proving aggravating factor charging in the alternative is improper) has a constitutional right to notice of the alleged crime the state intends to prove State v. Kosewicz, 174 Wn. 2d 683, 278 P.3d 189 (2012). In State v. Brewczynski, 173 Wn. App. 541, 294 P3d (2013) it was held by Court of Appeals Division III, the trial court erred when it included the uncharged alternative in jury instructions because it was reversible error to instruct the jury on alternative means not contained in the charging document. State v. Severns, 13 Wn. 2d 542, 548, 125 P.2d

At this juncture Stafford believes the case of first impression is most applicable. State drops charge in mid trial, is it proper here to consider the rape an

uncharged alternative? The trial court believed so, See RP 2100, except the rape charge being expired before the defendant was charged by information made for facial invalidity: the information ; judgement; and all proceedings using it to convict with aggravating circum-stances. Trial court owed the defendant more than merely mentioning in his 12 years he'd not experienced any precedent to guide him how to proceed once State dropped rape count. Whenever an exceptional sen-tence is imposed," the court shall set forth the reasons for it's decision in written findings of fact and conclusions of law See RCW 9.94A.535. A court that fails to enter written findings of facts and conclusions of law to support an exceptional sentence requires remand. State v. Friedlund, 182 Wn.2d 388, 395-97, 341 P.3d 280 (2015).

However, their (the court and state) slap dash count drop, charge in the alternative, has more dire consequences than remand. If the

State is not willing to concede, it made every proceeding invalid by including the expired rape charge in the charging document, then it must admit the error committed [including uncharged alternative in the jury instructions] was not harm-less. Unfortunately, by refusing to instruct the jury rape count was dropped, by prosecutor using rape count in closing arguments, and court instructing jury on rape count, for which all practical intents and purposes became uncharged, it was impossible to simultaneously give an instruction that clearly limited the crime to the uncharged alternative. Severns, 13 Wn.2d at 549, 125 P.2d 659; China, 117 Wn. App. at 540, 72 P.3d 256. None of the courts other instructions limit-ed the jury to consider soley rape alternative. See RP 2100 lines 2-4, the prosecutor, consequently, urged the jury to consider both alternatives, by doing so condigned any finding this error can

be considered harmless because they [court and prosecutor] created the possibility Stafford was convicted on the basis of the uncharged alternative! Chino 117 Wn. App. at 540-41, 72 P.3d 256. Consequently, Staffords stand alone first degree murder conviction must be reversed due to instructional error, but because State dropped charge in mid trial and was permitted to procede as if rape was still part of the case, the conviction was first degree aggravated murder, Staffords stand alone crime, and the question is whether the validity of aggravated murder wasn't predicated on the uncharged alternative.

The State caused this mess and should not be allowed to benefit from it. The closest comparisons that seem to be available for perspective are Rosevicz and Brewczynski. Aggravating factor for first degree murder - Essential elements rule is to inform the defendant of the charges against him,

so that he may prepare a defense State v. Kjorsvik, 117 Wn.2d 93, 101, 812 P.2d 86 (1991). In Brewczynski, the amended information alleged he murdered Mr. Cross in the furtherance of or in immediate flight from the crime of burglary in the first degree, significantly, the amended information did not, as it did in the separate charge of first degree burglary, allege that the burglary aggravating factor was committed soley under the "armed with a deadly weapon" alternative means. In the usual case, when the aggravating factor requires proof of a separate offense, the alternative means [redacted] of proof of the separate offense need not be pleaded. Kosevicz, 174 Wn.2d at 693, 278 P.3d 184. However the amended information in both Brewczynski, and Kosevicz, muddie the water by limiting the stand alone predicate crime (1st degree burglary), to one alternative means Id at 694, 278 P.3d 184 permitted Brewczynski, to argue as did Kosevicz, that he only had notice the state intended to prove the predicate

Crime under the one alternative means. But in our case the information wasn't amended, unless dropping the rape in mid trial can be called amending the information. Which limitation of the stand alone crime of first degree murder was reduce to 'no' alternative means. But unlike Brewczynski Stafford objected at trial to the jeremiaded information the State used against him. In his statement on other grounds he reiterated vigorously his challenge to the improprieties in his information charging an expired crime. It will be unjust to expect him to now have the 2 pronged liberal construc-tion rule used against him. He protested in open court when the State dropped the rape count, yet was given latitude to continue with it business as usual

It is Staffords contention, we stand where no defendant has ever stood before in the State of

Washington courts legal quandry of first impression. Unlike Kosevicz, and Brewczynski, who were apprised of the elements of aggravated first degree murder in amended informations, Stafford wasn't apprised of the alternative means of committing the aggravator rape, how could he when the state dropped it in mid trial? This limitation on the aggravator offense suddenly no longer charged, relieved the Prosecution of proving the alternative means of committing the remaining charge. Unlike Kosevicz 174 Wn.2d at 695, 278 P.3d 184, where no limitation on the aggravating offense, due to the courtesy of an amended information which restricted the prosecutor from proving both alternative means of the crime, the prosecutor in our case merely only needed to prove Stafford had sex with the decedent which allow the prosecutor to prove the aggravating factor by no means at all. Unlike Brewczynski,

or Kosevicz, who both failed to object, 174 Wn. 2d at 689, when jury was instructed to the elements of Kidnapping as the uncharged alternative means of the crime, Stafford objected loudly and vigorously when the rape elements were given to the jury. The Supreme Court in Brewczynski, held: a charging document that alleges only 1 alternative means for committing the stand alone crime and does not limit the same crime as an aggravator; is imprecise and inartful, Kosevicz, 174 Wn. 2d at 694, n. 3, 278 P.3d 184 Standard of review 2 prong liberal construction applies to them. But, like Kjorsvik, 117 Wn. 2d at 105-06, Stafford challenged his charging document before and during trial RP 2107 Lines - 3-8

Washington Courts have held that instructing the jury on uncharged alternative means is presumed to be prejudicial In re Brockie, 178 Wn. 2nd at 539, unless State can demonstrate the error was harmless, but a constitutional error that is per se prejudicial on direct appeal [Statement on other Grounds] can-

-not be shown to be harmless. In re Pers. Restraint of St. Pierre, 118 Wn.2d 321, 328-29, 823 P.2d 492 (1992) (on direct appeal, a defendant doesn't have to show prejudice for an error that is per se prejudicial because harm is presumed. The State has only itself to blame. When it dropped the rape count CrR 2.1(d): a trial court may permit an information to be amended any time before verdict if substantial rights of defendant. Rather than be deliberate and amend the information their; "full steam ahead damn the torpedoes", slap dash loose play of protecting the rights of the defendant, we stand at the Y in the road of first impression.

The manner of committing a crime is an element and the defendant must be informed of this element in the information in order to prepare a proper defense. Once the State dropped the rape charge, only by filing a new information could it avoid trying Stafford for an uncharged offense. See

State v. Brown, 45 Wn. App. 571, 576, 726 P.2d 60 (1986). Thus, an instruction given in the language of the uncharged alternative of committing first degree premeditated murder is error because the instruction being exacerbated in the prosecutors closing statement referring to the rape charge it dropped before jury deliberations, and the complete absence of any subsequent instruction the rape charge had been dropped, expressly precluding jury from considering the uncharged means of committing the murder deprives the State of the fruits of it's prejudicial act: drop the charge but didn't amend the information, if it wasn't already invalid on it's face. See Severns, 13 Wn.2d at 549, 125 P.2d 659. Error is prejudicial because jury might have convicted Stafford of the aggravated first degree murder under either alternative Severns, 13 Wn.2d at 552, 125 P.2d 659. Coterminously, an erroneous in-

- struction given on behalf of the party in whose favor the verdict was returned is presumed In re - Brockie 178 Wn. 2d at 539.

Defendant Stafford has convincingly demonstrated he is being unlawfully restrained due to fundamental defect(s) which inherently result in complete miscarraige of justice In re Cook, 114 Wn. 2d 802, 812, 792 P.2d 506 (1990). In Stoudmire, 141 Wn.2d at 354, 5 P3d 1240 Court accepted facial invalidity of judgement by looking to information - (an information which charges a crime beyond the statute of limitations is void on it's face, and therefore, there is nothing to which an amendment can relate back) State v. Novotny, 74 Wn. App. 343, 345, n. 1. 884 P2d 1336 (1994). Stafford respectfully request he be given the same relief as Stoudmire. Jurisdictional effect constitutes fundamental defect for which relief can be granted via Personal Restraint Petition, id at 354, 5 P.3d 1240 - invalidity based on charging

documents.

Respectfully Submitted this 4/11 day of November 2015.

Clayton Stafford

Clayton Gene Stafford
DOC # 236031
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FILED
SEPTEMBER 15, 2015
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WA State Court of Appeals, Division III

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

STATE OF WASHINGTON,	)	No. 29033-6-III
	)	
Respondent,	)	
	)	
v.	)	UNPUBLISHED OPINION
	)	
CLAYTON GENE STAFFORD,	)	
	)	
Appellant.	)	

LAWRENCE-BERREY, J. — A jury convicted Clayton Gene Stafford of aggravated first degree murder. On appeal, he contends (1) the trial court erred in not suppressing his statements made during police interrogation because he did not waive his right to have an attorney present, (2) the Sixth Amendment confrontation clause was violated when the court allowed DNA[1] expert testimony from a witness who was not the person who tested the evidence, (3) the court abused its discretion in allowing irrelevant and unfairly prejudicial testimony of a witness, (4) the State failed to prove the essential elements of aggravated first degree murder, and (5) the jury was erroneously instructed that it had to

[1] Deoxyribonucleic acid.

be unanimous to answer "no" to the special verdict. We disagree with his contentions and affirm.

FACTS

On June 12, 1993, Shawna Yandell and her boyfriend, Travis Sinden, went to Sportsman's Park by the Yakima River. While they were there, Mr. Sinden passed out in the public restroom after drinking too much. Ms. Yandell awakened Mr. Sinden because she was cold, tired, and wanted to go home. Around midnight, the couple tried to get a ride from the park ranger, but the ranger refused. The couple was staying with Mr. Sinden's relatives, the Wilkeys, and Mr. Sinden called them for a ride. Members of the Wilkey family told Mr. Sinden that they would not pick him up, primarily because of the late hour.

Unable to secure a ride, Mr. Sinden went back into the restroom and fell asleep. He awoke while it still was dark. Ms. Yandell was gone. He yelled for her but could not find her. He began walking back to the Wilkeys, thinking that Ms. Yandell may have done the same.

Ms. Yandell was not at the Wilkeys. Mr. Sinden was worried and went back to the park to search for her. He did not find her, so he went back to the Wilkeys' house and waited. Eventually, Mr. Sinden called the police and reported her missing.

Meanwhile, a group of Boy Scouts on a canoe trip found Ms. Yandell's body in the Yakima River. The location was about two and one-half miles upstream from Sportsman's Park. Ms. Yandell's body was nude, except for a black bra pushed up over her shoulders. Officers responded and observed that Ms. Yandell's scalp was open. A search was conducted of the area but no additional evidence was found.

Dr. Norman Thiersch, a medical pathologist, conducted an autopsy the following day and determined that the cause of Ms. Yandell's death was a blow to her head by a blunt object. There were also signs of strangulation. Dr. Thiersch swabbed Ms. Yandell's mouth, anus, and vagina. Dr. Thiersch found spermatozoa on the vaginal swabs.

Ms. Yandell's homicide remained unresolved for over 15 years. In 2008, the Yakima police had the swabs further tested. Spermatozoa were found on both the vaginal swab and the oral swab. A DNA analysis of the spermatozoa was completed and the results were entered into CODIS.[2] On May 20, 2009, a match was discovered between the DNA found on Ms. Yandell's body and a DNA profile in CODIS. Further testing confirmed that the DNA matched Mr. Stafford.

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[2] Combined DNA Index System.

Yakima County officers went to Mr. Stafford's home in Yakima, handcuffed him, took him to police headquarters, and interrogated him. Yakima County charged Mr. Stafford with Ms. Yandell's homicide on May 26, 2009. Later, and by amended information, the State charged Mr. Stafford with aggravated first degree murder and first degree rape of Ms. Yandell.

Prior to trial, Mr. Stafford moved to suppress his statements made during the interrogation, claiming that officers ignored his request for counsel. A CrR 3.5 hearing was held to determine the admissibility of Mr. Stafford's statements. The recording of the interrogation was played at the hearing. The first mention of the right to counsel came at the very beginning of the interview. Yakima Police Lieutenant Noland Wentz handed Mr. Stafford a list of rights and asked him to follow along. In going over the list, Lieutenant Wentz asked, "Do you understand that this statement is being recorded?" Report of Proceedings (RP) at 43. Mr. Stafford responded, "Yes, I (inaudible) hear that. And I understand that I should have an attorney present most, pretty soon." RP at 43. Lieutenant Wentz replied, "Okay. Well, let me go through this." RP at 43.

After a few biographical questions, Lieutenant Wentz then went over Mr. Stafford's constitutional rights. He asked that Mr. Stafford write his initials by each right as they were addressed. Lieutenant Wentz informed Mr. Stafford that he had the right to

an attorney before answering any questions and also during questioning. Mr. Stafford said he understood the rights as explained by Lieutenant Wentz. Lieutenant Wentz asked Mr. Stafford if he wished to talk. Mr. Stafford responded that he wanted to know what was going on. Lieutenant Wentz further explained the right to counsel.

> [Lieutenant Wentz:] And I haven't filled you in entirely yet, so.
> Do you understand that you may re-claim any of these rights at any time during this statement, including the right to stop questioning altogether and the right to the presence of an attorney?
> [Mr. Stafford:] Yes
> [Lieutenant Wentz:] What does that mean to you?
> [Mr. Stafford:] That means that if I want, you guys will go get an attorney before we go any further than we are right at this moment.
> [Lieutenant Wentz:] And it means that if we decide—if you decide to talk to me at some time and you decide at some point that—while you're talking to me, that you want to change that and ask for an attorney, we stop.
> [Mr. Stafford:] Yeah, that's what I just said.

RP at 45-46. Mr. Stafford signed an explanation of rights.

Next, Lieutenant Wentz gave Mr. Stafford a waiver of constitutional rights. Lieutenant Wentz explained,

> [Lieutenant Wentz:] Well, this is a (inaudible) waiver of constitutional rights. This is if you're willing to talk with me to begin with.
> [Mr. Stafford:] Yeah, I'm not going to sign none of that unless an attorney asks me to sign something like that.
> [Lieutenant Wentz:] Okay. Well, I'm not an attorney.
> [Mr. Stafford:] Right.
> [Lieutenant Wentz:] And I told you before that I can't advise you.
> [Mr. Stafford:] Right.

> [Lieutenant Wentz:] All right. What I'm going to do is kind of tell you a little story.
>
> [Mr. Stafford:] Okay, tell me a little story.

RP at 46-47.

Lieutenant Wentz told Mr. Stafford of how the body of Ms. Yandell was found in the river and asked Mr. Stafford about his connection to the Yakima area. Mr. Stafford responded to Lieutenant Wentz's questions. He denied knowing Ms. Yandell or Mr. Sinden. Lieutenant Wentz then told Mr. Stafford that he was a person of interest in the case. Mr. Stafford denied any knowledge of involvement in the matter. Lieutenant Wentz also told Mr. Stafford that Ms. Yandell was sexually assaulted before she was murdered and that Mr. Stafford's DNA was found. Mr. Stafford disagreed. After more questions, Mr. Stafford requested an attorney, saying, "I need an attorney, you know? I mean, you guys are—it looks like you're serious about this shit, so I guess it's time for me to get serious about it." RP at 65.

Mr. Stafford argued to the trial court that all of his statements should be suppressed because he was denied the right to counsel. He contended that he invoked the right to counsel during the advisement of rights. He testified that he asked for an attorney

three or four times and assumed that an attorney was on the way. He admitted to having prior experience with reading rights and was familiar with *Miranda*[3] warnings.

The trial court found that Mr. Stafford did not unequivocally request an attorney until the officers stopped the interview. The court explained that Mr. Stafford's refusal to sign the waiver was not an unequivocal assertion of his right to an attorney. The State offered at trial, and the court admitted Mr. Strafford's statements made prior to the request for counsel.

At trial, Dr. Roger Vielbig testified that he was with the group of Boy Scouts when Ms. Yandell's body was found. He said that Ms. Yandell had blood on her face and bruises on her knees. Regarding the location, he testified that the portion of the river where Ms. Yandell's body was found had deep channels and a swift current. He noted that entering the river in that location was dangerous. A person could be towed under and suffer bumps, bruises, and scratches from the logs and rocks in the river.

Mr. Sinden also testified. He recounted the events of the evening, including passing out in the park and walking to the Wilkeys without Ms. Yandell. He also testified that he and Ms. Yandell came to Yakima about three weeks prior to the incident and were looking for work picking cherries. Mr. Sinden said that he and Ms. Yandell were always

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[3] *Miranda v. Arizona*, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966).

together and never did anything apart. Mr. Sinden also said that he did not know Mr. Stafford.

Theresa LaFray was called to testify for the State. A week prior to being called to testify, Ms. LaFray came forward with new information. Mr. Stafford objected, and argued that her testimony was more prejudicial than probative, was uncorroborated, was inconsistent with information she provided in prior interviews, and was disclosed untimely. The trial court conducted a hearing outside the presence of the jury to hear argument and consider Mr. Stafford's objections. The court overruled Mr. Stafford's objections, and noted that the objections provided good fodder for cross-examination.

The new information consisted of the following: Ms. LaFray testified that one night during the middle of the summer in 1993, Mr. Stafford showed up at her house covered in blood. At the time, Mr. Stafford lived next door with his sister. Ms. LaFray estimated that her home was about three-quarters of a mile from Sportsman's Park. Mr. Stafford told Ms. LaFray that he was in a fight with some Mexicans and wanted to know how to get blood out of his clothes. Ms. LaFray told Mr. Stafford, "[D]on't say another word. I want you to get in the shower and throw your clothes out to me and I will wash them for you, and I will tell you when they are washed and dried. And then leave." RP at 1454. According to Ms. LaFray, Mr. Stafford had no injuries but had blood on his jeans,

t-shirt, over-shirt or light jacket, and the top of his underwear band. After Ms. LaFray returned Mr. Stafford's clothes, he left as directed.

Ms. LaFray admitted that she did not come forward with this information until the middle of trial. She came forward because she thought there was a chance that Mr. Stafford would not be convicted and felt like she needed to come forward even though she was scared. She also said that she had been stressed over the matter and felt that she needed to report it. She admitted that she did not like Mr. Stafford.

Dr. Thiersch testified to Ms. Yandell's autopsy results. Dr. Thiersch attributed Ms. Yandell's death to a blunt impact to the head with bruising of the brain. Ms. Yandell's scalp was lacerated on the front of her head and her skull was fractured. On the back of her head, there were four more lacerations with skull fractures. Dr. Thiersch testified that the skull fractures were significant, lethal injuries causing damage to the brain, and that these injuries were consistent with being hit with an object. He said that floating down the river would not have caused the lethal injuries.

He also noted evidence of strangulation on her body. Ms. Yandell had bruising on her chin and along the side of her face and hemorrhages in the structure of her neck. Dr. Thiersch concluded that the head injuries and strangulation appeared to have occurred about the same time.

Dr. Thiersch found evidence of defensive wounds on Ms. Yandell's arms, legs, and feet. In addition, Dr. Thiersch saw injuries with a linear pattern on Ms. Yandell's left thigh, right hip, lower abdomen, and the back of her left leg. He testified that these could have been caused by someone dragging her or possibly by bumping on rocks and branches when floating down the stream. He also testified that the bruises were purple or red, which was indicative of being caused while still alive. Dr. Thiersch estimated that Ms. Yandell's body was in the water for at least a couple of hours, perhaps longer.

Dr. Thiersch testified that he found spermatozoa on the vaginal swabs taken from Ms. Yandell. He said that the spermatozoa could have been up to seven days old when they were found, depending on temperature and other conditions. However, he said spermatozoa typically last only 24 to 30 hours. Dr. Thiersch further testified that he was unable to tell whether Ms. Yandell was raped or had consensual sex. He was also unable to tell whether the person Ms. Yandell had sex with was the same person who inflicted the lethal head injuries.

The State called Valencia Ward, a DNA analyst for Orchid Cellmark, to testify about the 2008 DNA testing of the vaginal and oral swabs. Ms. Ward stated that she did not personally perform the DNA testing of the swabs. Mr. Stafford objected to Ms. Ward testifying about the DNA tests based on *Crawford v. Washington*, 541 U.S. 36, 124 S. Ct.

1354, 158 L. Ed. 2d 177 (2004) and *Melendez-Diaz v. Massachusetts*, 557 U.S. 305, 129 S. Ct. 2527, 174 L. Ed. 2d 314 (2009). The trial court overruled the objection based on the appellate court decision of *State v. Lui*, 153 Wn. App. 304, 221 P.3d 948 (2009), *aff'd*, 179 Wn.2d 457, 315 P.3d 493 (2014).

Ms. Ward testified that the person who personally tested the swabs no longer worked for Orchid Cellmark. She also testified that each case processed in her lab goes through a significant review process. Ms. Ward explained that she reviews all work in the lab with a second review completed by another person. Ms. Ward testified that for Mr. Stafford's case, she reviewed the entire case file sent to her by the Yakima Police Department and then generated a report. Ms. Ward was one of the reviewers for every report that was submitted for Mr. Stafford's case and personally signed the reports before sending them.

Ms. Ward testified that DNA was found on the swabs of Ms. Yandell's mouth and her vagina, and this DNA matched (to a high mathematical probability) Mr. Stafford's DNA profile. Regarding these results, Ms. Ward testified that she did not simply rely on the conclusions made by other analysts. Rather, she came to her own conclusions. In reviewing Mr. Stafford's case, Ms. Ward found no evidence of contamination. Also, she

found no inconsistency in raw data or case file information that caused her professional concern.

After both sides rested, the trial court dismissed the count for first degree rape. However, the court allowed the State to argue the elements of first degree rape to support the aggravating factor for the other count of aggravated first degree murder.

The jury was asked, by special verdict form, to find 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. The jury was instructed on the elements of first degree rape. The jury was also instructed in pertinent part regarding the special verdict form:

> Because this is a criminal case all twelve of you must agree in order to answer the special verdict form. 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 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.

Clerk's Papers (CP) at 43-44. Mr. Stafford did not object to these instructions.

The jury found Mr. Stafford guilty of aggravated first degree murder and answered "yes" on the special verdict form. CP at 11. The court imposed a sentence of life without the possibility of parole.

ANALYSIS

1. Whether the trial court erred in admitting Mr. Stafford's custodial statements

We review a trial court's challenged findings of fact from a CrR 3.5 suppression hearing for substantial evidence. *State v. Grogan*, 147 Wn. App. 511, 516, 195 P.3d 1017 (2008). "'Substantial evidence is evidence sufficient to persuade a fair-minded, rational person of the truth of the finding.'" *Id.* (quoting *State v. Solomon*, 114 Wn. App. 781, 789, 60 P.3d 1215 (2002)). We apply de novo review to the court's challenged conclusions of law that are derived from the findings of fact. *Id.* (quoting *Solomon*, 114 Wn. App. at 789).

Mr. Stafford contends that once he made even an equivocal request for an attorney during the police interrogation, the officer was prohibited from continuing the interrogation and could only ask questions clarifying his request.

The Fifth and Sixth Amendments to the United States Constitution guarantee 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 or she 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 (1966). 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. *State v. Warness*, 77 Wn. App. 636, 639, 893 P.2d 665 (1995).

A defendant's request for an attorney must be unequivocal. *State v. Nysta*, 168 Wn. App. 30, 41, 275 P.3d 1162 (2012). To be unequivocal, the defendant must sufficiently and clearly articulate his desire to have counsel present so that a reasonable police officer under the circumstances would understand the statement to be a request for an attorney. *Id.* (quoting *Davis v. United States*, 512 U.S. 452, 459, 114 S. Ct. 2350, 129 L. Ed. 2d 362 (1994)). The courts look to the specific wording of the accused's statement to police and the circumstances leading up to the request to determine whether the accused unequivocally invoked his or her right to counsel. *Smith v. Illinois*, 469 U.S. 91, 97-98, 105 S. Ct. 490, 83 L. Ed. 2d 488 (1984).

Where an accused makes an ambiguous or equivocal statement regarding the invocation of his or her rights, officers may carry on questioning. *In re Pers. Restraint of Cross*, 180 Wn.2d 664, 682, 327 P.3d 660 (2014). Law enforcement officers have no obligation to ask clarifying questions or to cease the interrogation. *Id.* "If a defendant fails to unequivocally invoke his *Miranda* rights, a waiver may be inferred when a defendant freely and selectively responds to [further] police questioning." *Id.* at 687.

Mr. Stafford did not invoke his right to counsel in the beginning of the interview. He did not make an unequivocal request when he said that he understood that he should have an attorney present. Nor did he make an unequivocal request when he refused to sign the consent form. Mr. Stafford's continuing to answer police questions allows us to infer his nonassertion of his rights.

Even if the request was equivocal, the State did not have a duty to stop interrogation and ask for clarification simply because he had not expressly waived his rights. "A suspect may choose to invoke [*Miranda*] rights at any time prior to or during questioning." *Id.* at 682. *Miranda* rights must be invoked unambiguously. *State v. Piatnitsky*, 180 Wn.2d 407, 413, 325 P.3d 167 (2014), *cert. denied*, 135 S. Ct. 950 (2015). Accordingly, a defendant's request for an attorney must be unambiguous, regardless of when the request is made. Law enforcement does not need to ask for clarification on whether the defendant is invoking *Miranda* rights. *Id.* at 415. Here, there was no need for Lieutenant Wentz to ask for clarification of Mr. Stafford's statement given during the advisement of rights.

The court properly concluded that Mr. Stafford invoked his right to have counsel present during questioning when he said "I need an attorney, you know?" RP at 65. Prior to this statement, Mr. Stafford did not invoke his *Miranda* right to counsel but, instead,

waived the right by voluntarily answering Lieutenant Wentz's questions. The trial court did not err in admitting Mr. Stafford's statements. Mr. Stafford's right to counsel was not violated.

2. *Whether the trial court's decision to admit the forensic scientist's DNA testimony violated Mr. Stafford's constitutional right to confront his accuser*

We apply de novo review to confrontation clause challenges. *State v. Jasper*, 174 Wn.2d 96, 108, 271 P.3d 876 (2012). Mr. Stafford contends that Ms. Ward's testimony violated the confrontation clause because she testified about the DNA analysis and match with Mr. Stafford even though she was not the person who performed the DNA tests.

The Sixth Amendment confrontation clause provides that in all criminal prosecutions, the accused shall enjoy the right to be confronted with the witnesses against them. U.S. CONST. amend. VI. This right is 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). Similarly, article I, section 22 of the Washington Constitution provides that in criminal prosecutions, the accused shall have the right to meet the witnesses against him face to face. Here, the United States Constitution and the Washington Constitution compel the same result. *See Lui*, 179 Wn.2d at 468.

The confrontation clause prohibits the admission of testimonial statements against a defendant unless the witness making the statements appears at trial or the defendant has

a prior opportunity for cross-examination. *Melendez-Diaz*, 557 U.S. at 309. Testimonial statements include documents created solely for an evidentiary purpose, made in the aid of a police investigation. *Bullcoming v. New Mexico*, __ U.S. __, 131 S. Ct. 2705, 2717, 180 L. Ed. 2d 610 (2011). A witness is a declarant who makes a factual statement to a tribunal. *Lui*, 179 Wn.2d at 482. "If the witness's statements help to identify or inculpate the defendant, then the witness is a 'witness against' the defendant." *Id.*

The Washington Supreme Court in *Lui* determined that the confrontation clause is not violated when an expert witness at trial presents an independent DNA analysis based on data generated by work of others in the DNA testing process. "[T]he DNA testing process does not become inculpatory and invoke the confrontation clause until the final step, where a human analyst must use his or her expertise to interpret the machine readings and create a profile." *Id.* at 486. When DNA evidence is presented, the witness against the defendant is the final analyst who examines the machine-generated data, creates a profile, and makes a determination that the defendant's profile matches some other profile. *Id.* at 489.

"An expert witness may not parrot the conclusions of others and circumvent the confrontation clause[.] An expert may, however, rely on the work of laboratory technicians when reaching his or her conclusion." *Id.* at 484. Other persons who may

have contributed to certifying a DNA match by participating in the DNA testing process are not a witness against a defendant. *Id.* at 486.

Based on *Lui*, the testimony of Ms. Ward regarding the DNA results did not violate the confrontation clause. As an expert witness for the State, Ms. Ward reviewed Mr. Stafford's entire file and generated a report. She also reviewed the reports of others in the lab. From the data, she was able to determine a match between the DNA found on Ms. Yandell and Mr. Stafford's DNA. Ms. Ward did not rely on the conclusions made by other analysts but reached her own conclusions.

The analyst who actually ran the test did not need to be the person who presented the evidence. That analyst was not a witness against Mr. Stafford, but rather facilitated Ms. Ward's role as an expert witness. Mr. Stafford's right to confront each witness against him was not violated by Ms. Ward's DNA testimony.

3. *Whether the trial court erred when it admitted the new testimony of Theresa LaFray*

Mr. Stafford contends that 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. He argues that Ms. LaFray's testimony regarding her encounter with Mr. Stafford was irrelevant because she could not identify the date it occurred. He also argues that the validity of the testimony is questionable because Ms.

LaFray did not like Mr. Stafford, was late in the disclosure, and admitted that she came forward only because she was afraid he would not be convicted.

The determination of relevance is within the broad discretion of the trial court and will not be disturbed absent a manifest abuse of discretion. *State v. Swan*, 114 Wn.2d 613, 658, 790 P.2d 610 (1990). Similarly, a determination of whether the probative value outweighs substantial prejudice is within the broad discretion of the trial court and will only be reversed in the exceptional circumstance of a manifest abuse of discretion. *State v. Gould*, 58 Wn. App. 175, 180, 791 P.2d 569 (1990).

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. "Relevancy means a logical relation between evidence and the fact to be established. Any evidence which tends to identify the accused as the person guilty is relevant." *State v. Whalon*, 1 Wn. App. 785, 791, 464 P.2d 730 (1970) (citation omitted). Material evidence is also admissible. *Id.* Material evidence is evidence that logically tends to prove a defendant's connection with a crime either alone or from whatever inferences may be drawn when it is considered with other evidence. *Id.* "Where identity of the perpetrator of a crime is at

issue, any evidence tending to identify the accused as the guilty person is relevant." *State v. Coe*, 101 Wn.2d 772, 781-82, 684 P.2d 668 (1984).

Even relevant evidence can be excluded "if its probative value is substantially outweighed by the danger of unfair prejudice." ER 403. Unfair prejudice is that which is more likely to arouse an emotional response rather than a rational decision by the jury. *Gould*, 58 Wn. App. at 183. Crucial consideration is given to the word "unfair" when applying ER 403 to prejudicial evidence. *State v. Bernson*, 40 Wn. App. 729, 736, 700 P.2d 758 (1985). "In almost any instance, a defendant can complain that the admission of potentially incriminating evidence is prejudicial in that it may contribute to proving beyond a reasonable doubt he committed the crime with which he is charged. Addition of the word 'unfair' to prejudice obligates the court to weigh the evidence in the context of the trial itself, bearing in mind fairness to both the State and defendant." *Id.*

The trial court did not abuse its discretion in allowing the testimony of Ms. LaFray. The testimony that Mr. Stafford came to her house covered in blood on a midsummer night in 1993 was relevant to the crime charged. A logical relation exists between Ms. LaFray's testimony and Mr. Stafford's alleged involvement in Ms. Yandell's death. The validity and credibility of Ms. LaFray's testimony and her alleged bias against Mr. Stafford were questions for the jury. *See State v. Thomas*, 150 Wn.2d 821, 874-75, 83

P.3d 970 (2004). Mr. Stafford had the opportunity to challenge the credibility of Ms. LaFray's statements during cross-examination. *See* ER 611(b). The trial court did not abuse its discretion when it considered Ms. LaFray's testimony to be relevant.

The trial court also did not abuse its discretion when it determined that the probative value of Ms. LaFray's testimony was not substantially outweighed by its unfair prejudice. The fact that Mr. Stafford went to Ms. LaFray's home covered in blood is not likely to arouse an emotional response rather that a rational decision by the jury. Also, despite Mr. Stafford's contention, the testimony is not unfairly prejudicial simply because he considers it to be the only evidence besides the DNA evidence that is indicative of guilt. While the testimony is naturally prejudicial because it incriminates Mr. Stafford in the crime charged, this alone is not a reason to conclude that the evidence was *unfairly* prejudicial. Rather, it was highly relevant information that a jury would likely consider rationally rather than emotionally. The trial court was well within its discretion when it determined that the unfair prejudice of the evidence, if any, was not substantially outweighed by its probative value.

4. Whether the State presented sufficient evidence to prove the essential elements of aggravated first degree murder

Mr. Stafford contends that the State failed to prove the essential elements of aggravated first degree murder. He focuses his attention on the elements of identity,

causation, intent, and premeditation. He also contends that there is no evidence that connects him to the murder—that at the most, the evidence shows that he had consensual sex with Ms. Yandell.

The standard of review for a sufficiency of the evidence challenge in a criminal case is "'whether, after reviewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.'" *State v. Bingham*, 105 Wn.2d 820, 823, 719 P.2d 109 (1986) (emphasis in original) (quoting *Jackson v. Virginia*, 443 U.S. 307, 319, 99 S. Ct. 2781, 61 L. Ed. 2d 560 (1979)). A defendant challenging sufficiency of the evidence "admits to the truth of the State's evidence and all inferences that can reasonably be drawn from that evidence." *State v. Gentry*, 125 Wn.2d 570, 597, 888 P.2d 1105 (1995). We defer to the trier of fact on issues of conflicting testimony, credibility of witnesses, and the persuasiveness of the evidence. *Thomas*, 150 Wn.2d at 874-75. "[I]nferences based on circumstantial evidence must be reasonable and cannot be based on speculation." *State v. Vasquez*, 178 Wn.2d 1, 16, 309 P.3d 318 (2013).

In a criminal prosecution, the Fourteenth Amendment's due process clause requires the State to prove each essential element of the crime charged beyond a

reasonable doubt. *Apprendi v. New Jersey*, 530 U.S. 466, 476-77, 120 S. Ct. 2348, 147 L. Ed. 2d 435 (2000).

The jury instructions contained the essential elements of first degree murder:

> (1) That on or about June 13, 1993, the defendant acted with intent to cause the death of Shawna Yandell;
> (2) That the intent to cause the death was premeditated;
> (3) That Shawna Yandell died as a result of the defendant's acts; and
> (4) That any of these acts occurred in the State of Washington.

CP at 29. The jury was also asked to find 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. The evidence is sufficient to establish the elements of aggravated first degree murder.

Identity and Causation. The State presented sufficient evidence to show that Mr. Stafford caused Ms. Yandell's death. The jury could infer from the evidence that Mr. Stafford was with Ms. Yandell on the night of her death. Mr. Stafford's DNA taken from the spermatozoa found in Ms. Yandell's vagina and mouth establishes that he had contact with her prior to her death. The presence of the spermatozoa also sets the time frame of the contact. While Dr. Thiersch said that semen could last for up to 7 days in the vagina, he also testified that the typical time frame was more like 24 hours. Considering that the autopsy was conducted the morning after Ms. Yandell's body was found, the 24 to 30

hour time frame is consistent with Mr. Stafford having contact with Ms. Yandell on the night she died.

The jury could also infer that Mr. Stafford was the person who caused Ms. Yandell's death. The testimony of Ms. LaFray established that Mr. Stafford was seen covered in blood sometime during the summer when Ms. Yandell was killed. Although Mr. Stafford told Ms. LaFray that he was in a fight with a bunch of Mexicans, the fact that he had no wounds on his body, yet was covered in blood, allowed the jury to disbelieve Mr. Stafford's explanation, and conclude that the truth was more sinister. The jury could find that the amount of blood on Mr. Stafford was consistent with the head injury suffered by Ms. Yandell. Furthermore, Mr. Stafford was seen covered in blood close to the location where Ms. Yandell was last seen alive. Ms. LaFray's home was less than one mile from Sportsman's Park.

Intent. The State presented sufficient evidence that the person who inflicted Ms. Yandell's injuries had the intent to kill her. The cause of death was blunt force trauma by multiple blows to the head. The force was strong enough to fracture her skull more than once. The jury could find that a person had to act with intent to cause such wounds. Also, Ms. Yandell had multiple scrapes and bruises on her body that Dr. Thiersch testified were consistent with defensive wounds. The defensive wounds do not point to an

accidental death but instead an intentional act. Considering that the jury could infer that Mr. Stafford was present with Ms. Yandell on the night of her death and that he in fact did cause her death, Ms. Yandell's injuries allowed the jury to also conclude that Mr. Stafford acted with the requisite intent to kill.

Premeditation. The State also presented sufficient evidence of premeditation. "Premeditation" involves a deliberate formation of and reflection on the intent to take a human life. *State v. Hoffman,* 116 Wn.2d 51, 82, 804 P.2d 577 (1991). It includes the mental process of thinking beforehand, deliberation, reflection, weighing, or reasoning for a period of time, however short. *Gentry*, 125 Wn.2d at 597-98 (quoting *State v. Ollens*, 107 Wn.2d 848, 850, 733 P.2d 984 (1987)). Premeditation must involve more than a moment in point of time. RCW 9A.32.020(1).

Both direct and circumstantial evidence can be used to establish premeditation. *Bingham*, 105 Wn.2d at 823-24. Circumstantial evidence can be used where the inferences drawn by the jury are reasonable and the evidence supporting the jury's verdict is substantial. *Id.* at 824. Facts that have been found to support an inference of premeditation are multiple wounds inflicted with a knife or other weapon, signs of a struggle, striking a victim from behind, and evidence that sexual assault or robbery was an underlying motive. *Gentry*, 125 Wn.2d at 599.

The autopsy evidence shows that Mr. Stafford engaged in some sort of sexual activity with Ms. Yandell and then killed her. There was also evidence of rape as an underlying motive, considering Ms. Yandell's multiple defensive wounds. The numerous defensive and offensive wounds, including both strangulation and severe head wounds, is evidence that the attack was prolonged and savage. As noted above, this type of evidence is sufficient for a jury to infer premeditation.

Aggravating Factor. The State also presented sufficient evidence to support the aggravating factor, i.e., that the murder was committed in the course of, or in furtherance of, or in immediate flight from the crime of first or second degree rape. Ms. Yandell was found with Mr. Stafford's spermatozoa in both her vagina and her mouth. Additionally, Ms. Yandell's body showed evidence of defensive wounds. Ms. Yandell did not know Mr. Stafford. From this evidence, the jury could infer that the sex was not consensual and that Mr. Stafford murdered Ms. Yandell in the course of, in furtherance of, or in immediate flight from rape.

In conclusion, after reviewing the evidence in the light most favorable to the prosecution, a rational trier of fact could have found, beyond a reasonable doubt, that Mr. Stafford committed aggravated first degree murder.

5. *Whether the jury instruction, which required the jury to be unanimous when answering the special verdict form, was erroneous*

Mr. Stafford contends that the trial court improperly instructed the jury that a unanimous decision was needed to answer "no" on the special verdict form. Instead, he contends that trial court was required to give a nonunanimity instruction as required by *State v. Bashaw*, 169 Wn.2d 133, 146-47, 234 P.3d 195 (2010), *overruled by State v. Guzman Nuñez*, 174 Wn.2d 707, 285 P.3d 21 (2012).

We review alleged errors of law in jury instructions de novo. *Boeing Co. v. Key*, 101 Wn. App. 629, 632, 5 P.3d 16 (2000). Failure to timely object usually waives the issue on appeal, including issues regarding instructional errors. RAP 2.5(a); *State v. Williams*, 159 Wn. App. 298, 312, 244 P.3d 1018 (2011). This court has held that a trial court's failure to instruct a jury that it could be nonunanimous to acquit a defendant of an aggravating factor is not an issue of constitutional magnitude. *State v. Guzman Nuñez*, 160 Wn. App. 150, 159, 162-63, 248 P.3d 103 (2011), *aff'd in part by Guzman Nuñez*, 174 Wn.2d 707.

Mr. Stafford did not object to the unanimity instruction and, therefore, waives the right to raise the issue on appeal. In any case, his challenge to the jury instruction fails.

Prior to the Washington Supreme Court's recent decision in *Guzman Nuñez*, the court in *Bashaw* recognized the nonunanimity rule developed in *State v. Goldberg*, 149

Wn.2d 888, 72 P.3d 1083 (2003), that "a unanimous jury decision is not required to find that the State has failed to prove the presence of a special finding increasing the defendant's maximum allowable sentence." *Bashaw*, 169 Wn.2d at 146. However, in *Guzman Nuñez*, our Supreme Court reconsidered and overruled the nonunanimity rule in *Bashaw*. *Guzman Nuñez*, 174 Wn.2d at 709. The *Guzman Nuñez* court concluded that such a rule "conflicts with statutory authority, causes needless confusion, does not serve the policies that gave rise to it, and frustrates the purpose of jury unanimity." *Id.* at 709-10. The court concluded that the challenged jury instructions, which required a unanimous "yes" or "no" decision on the special verdict form, were correct. *Id.* at 710-11, 719. Here, based on *Guzman Nuñez*, the trial court correctly instructed the jury that it had to unanimously agree "yes" or "no" when answering the special verdict form.

Statement of Additional Grounds for Review

In his statement of additional grounds for review, Mr. Stafford contends that his counsel was ineffective for allowing the court to charge him with rape even though the prosecution was barred by the statute of limitations.

"To demonstrate ineffective assistance of counsel, a defendant must make two showings: (1) defense counsel's representation was deficient, *i.e.*, it fell below an objective standard of reasonableness based on consideration of all the circumstances; and

(2) defense counsel's deficient representation prejudiced the defendant, *i.e.*, there is a reasonable probability that, except for counsel's unprofessional errors, the result of the proceeding would have been different." *State v. McFarland*, 127 Wn.2d 322, 334-35, 899 P.2d 1251 (1995) (emphasis in original).

Mr. Stafford's counsel was not deficient for consenting to the rape charge. The statute of limitations on the rape charge had not expired. The statute of limitations on first degree rape is 10 years from the date of commission or one year from the date on which the identity of the suspect is conclusively established by DNA testing or photograph, *whichever is later. State v. McConnell*, 178 Wn. App. 592, 603, 315 P.3d 586 (2013) (quoting RCW 9A.04.080), *review denied*, 180 Wn.2d 1015 (2014). Identity is "conclusively established" when "DNA testing matches the DNA profile of an unknown suspect to the DNA profile of a known suspect." *Id.* at 605. Here, Mr. Stafford's identity as a suspect in Ms. Yandell's rape was conclusively established in May 2009, and he was charged later that month. The statute of limitations for the rape charge therefore had not run. His counsel's representation was not deficient.

Mr. Stafford also contends that the chain of evidence for the DNA was broken and that the evidence was tainted. A physical object connected with the commission of a crime must be satisfactorily identified and shown to be in substantially the same condition

as when the crime was committed before it may properly be admitted into evidence. *State v. Campbell*, 103 Wn.2d 1, 21, 691 P.2d 929 (1984). "'A failure to present evidence of an unbroken chain of custody does not render an exhibit inadmissible if it is properly identified as being the same object and in the same condition as it was when it was initially acquired by the party.'" *State v. Picard*, 90 Wn. App. 890, 897, 954 P.2d 336 (1998) (quoting *State v. DeCuir*, 19 Wn. App. 130, 135, 574 P.2d 397 (1978)). The witness testifying to the chain of custody does not need to positively identify the challenged evidence and eliminate every possibility of substitution or alteration. *State v. Roche*, 114 Wn. App. 424, 436, 59 P.3d 682 (2002).

Minor discrepancies or uncertainty on the part of the witness affect the weight of the evidence and not admissibility. *Id.* (quoting *Campbell*, 103 Wn.2d at 21). "Evidence of sloppy police work in gathering physical evidence, such as fingerprints and DNA samples, or in establishing chain of custody generally is relevant and admissible." *State v. Rafay*, 168 Wn. App. 734, 803, 285 P.3d 83 (2012).

The evidence identification report produced by Mr. Stafford in his statement of additional grounds does not show a broken chain of custody. The report documents how evidence technician Kristen Drury tracked down the stored evidence from Ms. Yandell's case and her difficulties in locating the evidence, but it does not show that the chain was

broken. Furthermore, the chain of custody issue was appropriately addressed in the trial court. Ms. Drury appeared at trial and was subject to cross-examination regarding interruptions in the chain of custody. Mr. Stafford had the opportunity to discredit the evidence based on the difficulty in locating it. The evidence was properly admitted.

Affirm.

A majority of the panel has determined this opinion will not be printed in the Washington Appellate Reports, but it will be filed for public record pursuant to RCW 2.06.040.

Lawrence-Berrey, J.

WE CONCUR:

Siddoway, C.J.

Fearing, J.