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COA NO. 71162-8-I

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

STATE OF WASHINGTON,

Respondent,

v.

MARTIN DAVID PIETZ JR.,

Appellant.

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

The Honorable Michael Hayden, Judge

AMENDED BRIEF OF APPELLANT

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RULES, STATUTES AND OTHER AUTHORITIES

A. ASSIGNMENTS OF ERROR

1. The court erred in giving a flawed "to convict" instruction, in violation of due process.

2. Appellant's right to a public trial was violated by the removal of a sitting juror outside of open court.

3. The court erred in admitting ER 404(b) evidence.

4. The court erred in admitting the victim's out-of-court statement that she knew appellant was having an affair.

5. The court erred in admitting Exhibit 85 in its totality and in denying appellant's motion for mistrial in connection with that exhibit.

6. Cumulative error deprived appellant of his due process right to a fair trial.

Issues Pertaining to Assignments of Error

1. Whether the conviction must be reversed because the "to convict" instruction (1) did not make it clear to the jury that it must acquit appellant if the State failed to prove a single element of the crime under each of the alternatives and (2) did not clearly require the jury to find each element of the crime proven beyond a reasonable doubt?

2. Whether appellant's constitutional right to a public trial was violated because a sitting juror was released from service during trial by the bailiff outside of open court?

3. Whether the trial court erred in admitting evidence of appellant's womanizing and spiking his wife's drink under ER 404(b) because such evidence was not admissible to prove motive and any probative value was outweighed by its unfair prejudicial effect?

4. Whether the trial court erred in admitting the victim's statement that she knew her husband was having an affair because the victim's state of mind was not relevant to a material issue at trial?

5. Whether the probative value of admitting voicemail messages from the victim's family and friends expressing worry and love after the victim went missing was outweighed by its prejudicial effect?

B. STATEMENT OF THE CASE

a. *Pretrial*

The State charged Martin David Pietz with the second degree murder of his wife, Nicole Pietz,[1] on or about January 27 and 28, 2006. CP 10. A major issue was whether allegations of Pietz's extramarital affairs, sexual interest in other women, and an attempt to loosen his wife's sexual inhibitions by spiking her drink at a club should be admitted under ER 404(b). CP 25-42, 50-51, 377-89. Over defense objection, the court admitted such evidence on the theory that Pietz's marital dissatisfaction

[1] To avoid confusion, this brief refers to Martin David Pietz by his last name and Nicole Pietz by her first name, as she was generally referred to at trial.

provided a motive for the killing. 1RP[2] 62-70, 89-95, 109, 111; 2RP 24-25; 3RP 5-12; 4RP 33-36; 6RP 4, 11-14; 11RP 120-22.

b. *Trial*

Pietz and Nicole were married in April 2002. 5RP 52. Nicole was in Alcoholics Anonymous (AA) because she had abused prescription drugs in the past. 5RP 20-21, 51. Near the time of her death in 2006, she was experiencing severe back pain and was prescribed pain pills. 5RP 21, 52-53, 74, 130-31; 14RP 132. Nicole was expected to celebrate a sobriety anniversary at an AA meeting on the morning of Saturday, January 28, 2006. 5RP 24-27. She never showed up. 5RP 28-30. Nicole was expected at a dinner with friends and her husband later that night but she did not arrive. 5RP 132-34.

Pietz called 911 to report his wife missing on the night of January 28. 5RP 158. He told the responding officer that his wife was asleep when he arrived home and she was gone when he woke up later that morning. 5RP 160. She left her wedding ring behind; her medication, purse and car were gone. 5RP 160. He was afraid she had relapsed into

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[2] The verbatim report of proceedings is referenced as follows: 1RP - 9/9/13; 2RP - 9/10/13; 3RP - 9/11/13; 4RP - 9/12/13; 5RP - 9/16/13; 6RP - 9/17/13; 7RP - 9/18/13; 8RP - 9/19/13 and 11/7/13; 9RP - 9/30/13; 10RP - 10/1/13; 11RP - 10/2/13; 12RP - 10/3/13; 13RP - 10/7/13; 14RP - 10/8/13; 15RP - 10/9/13; 16RP - 10/14/13; 17RP - 10/29/13 (incorrectly noted as 10/29/12 on cover sheet).

medication abuse. 5RP 160. The deputy asked if they had argued that night. 5RP 161. The deputy testified that Pietz initially said there was no argument but later said there was a possibly a disagreement of some sort. 5RP 161, 163.[3]

Pietz called Nicole's parents on the morning of January 29 to let them know Nicole was missing. 5RP 199-200. Pietz told Nicole's stepfather that she had been wearing her dental retainer out in public from time to time. 5RP 202-03. He also mentioned to her stepfather and sister that they had stopped wearing their wedding rings.[4] 5RP 55-57, 66, 202. To Nicole's sister, he pointed out the empty prescription pill bottle on the bathroom counter and said "she must have taken them." 5RP 57. She asked him whether they had been fighting. 5RP 58. He said no. 5RP 58.

Pietz sent out an email asking for help in locating Nicole. 5RP 31, 145; 6RP 48-49. Pietz told family and friends that he came home around midnight and found Nicole in bed. 5RP 32; 10RP 116-17. He went to sleep and when he woke up that morning around 8:30 Nicole was gone.

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[3] The deputy's 2006 report reflects that Pietz said there was no argument. 5RP 161, 166-67. The deputy did not include Pietz's other statement because it was so vague. 5RP 161-62.

[4] Nicole's sister and the woman Nicole sponsored for AA testified Nicole was proud of her wedding rings and never went anywhere without them. 5RP 20, 32, 56-57.

5RP 32-33; 10RP 116-17. Pietz expressed concern that Nicole might have relapsed because her pill bottle was empty. 5RP 31-32; 6RP 196.

Sergeant Fenske followed up on January 29. 5RP 173-77. Pietz said he last saw his wife a bit after midnight on the 27th and related the same basic version of events he told others. 5RP 178-81; Ex. 19. Pietz said he tried to call Nicole and it went to voicemail. 5RP 181.

Friends and family called Nicole's phone and inquired as to her whereabouts, but received no response. 5RP 30, 101-02, 134-35, 140, 208. Phone records did not show any call from Pietz's phone to Nicole's phone after January 28. 11RP 82.

Over defense objection, the court allowed Nicole's co-worker Mr. Twitchell to testify that on January 27 Nicole told him "I know that David is having an affair." 1RP 72-80; 5RP 72-76; CP 52. Nicole was sad, dumbfounded and furious. 5RP 75-78.

Mr. Wageman worked with Pietz at a gym called 24 Hour Fitness. 6RP 183. Pietz told Wageman that he was worried about a fight they had, the details of which were not described, and that this was possibly a reason why she was missing. 6RP 197-98. Pietz did not get a promotion sometime before Nicole went missing and was upset because he wanted more money, but was not inordinately angry. 6RP 189-91, 204-05.

Deputy Sheriff Pince spoke with Pietz on January 31. 8RP 15. Pietz told him there were no problems with the marriage. 8RP 16. There was a financial issue surrounding a new condo they had just purchased. 8RP 16. Pietz said he found Nicole's wedding ring and that Nicole normally wore her ring when she went out. 8RP 18. He also said her dental retainer was missing, which she sometimes wore when she was running out for a quick trip to the store and the like. 8RP 18. He said Nicole could be wearing a tennis bracelet. 8RP 18.

Cell phone records show a 21 second phone call was made to Pietz's place of work at the gym from Nicole's cell phone on January 28 at 11:50 a.m. 10RP 53, 56-57, 67, 82. The gym receptionist did not remember getting a call from Nicole before noon that day, but acknowledged that video showed she picked up the phone. 10RP 199-200, 215. Pietz told others that he had missed the call because he was in an area of the gym where he could not hear the page. 5RP 207; 6RP 54-55, 199; 10RP 116-17. Surveillance cameras show Pietz leaving the area of the gym monitored by cameras shortly before the call was made and then returning to a monitored area 10 minutes later. 10RP 184-92.

A phone company employee created a map based on a simulated computer model to predict the coverage area for the cell phone towers in the vicinity of the gym and concluded with 90 to 95 percent certainty that

the outgoing call from Nicole's phone originated in an area near the gym. 10RP 66-68, 71-73, 102. There are a variety of factors that can cause a call signal to not bounce off the closest cell tower and transfer to another tower further away, including a tower not working properly. 10RP 61-62, 72-73, 80-96. There was a maintenance problem with the tower at issue in Pietz's case, which could have affected its performance. 10RP 86-91. The map used for trial did not take into account maintenance or call capacity issues.[5] 10RP 96-97, 103.

On February 6, Nicole's body was discovered in a secluded area in Burien, underneath some blackberry bushes. 6RP 24-30; 8RP 5-8. Detective Decker opined the body was laid under the bushes. 7RP 90, 155. A dental device was in Nicole's mouth. 13RP 140.[6] Detective Decker met with Pietz at his residence later that day. 7RP 115. Upon being told his wife's body had been found, Pietz appeared upset, began to sob and hold onto his father, went into a fetal position, and then excused himself, saying he was going to be sick to his stomach. 7RP 116, 139, 175.

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[5] According to Detective Mellis, 45 of 63 cell phone calls that Pietz made from his phone during work hours in January 2006 connected with the same cell sector as the phone call on 11:50 a.m. on January 28, and those that did not were placed during lunch. 11RP 102-04, 130-31, 150.

[6] Several witnesses maintained Nicole did not wear her dental device outside the home. 5RP 18-20, 50; 11RP 181.

A forensic pathologist determined the cause of death to be strangulation. 13RP 171. There was bruising on Nicole's cheek from a blunt force made before she died, as well as bruising on her neck and other parts of her body. 13RP 151-55. A low amount of Oxycodone was found in Nicole's system, which did not indicate long-term use.[7] 11RP 205-10, 213; 13RP 184-85, 191.

The pathologist estimated, based on the state of the body, that Nicole had been dead a week, give or take two or three days. 13RP 136, 174-75. Detective Decker opined Nicole's body had been there between five and nine days based on the aging effects of vegetation associated with the body. 7RP 99, 108-09.

The State also sought to estimate the time of death based on a Taco time receipt dated January 27, 2006, 6:22 p.m.[8] 13RP 38, 44, 63. Mr. Schneck, a forensic scientist, examined Nicole's stomach contents. 13RP 59. He found the remains of ingredients consistent with a Mexican-type meal that Schneck purchased from Taco Time. 13RP 63-64, 66, 71-73. The stomach contents were inconsistent with the exact ingredients of the

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[7] Nicole's prescribing doctor determined she might have been addicted to the medication. 14RP 130.

[8] Bank account records for Pietz and Nicole show there was a debit charge dated January 27, 2006 from Taco time in Lynnwood in the amount of $5.47. 13RP 38. They shared a residence in Lynnwood at the time of Nicole's death. 5RP 134.

particular combination meal reflected in the receipt. 13RP 89-96, 104-05. The rule of thumb is that it takes four to six hours for food to move through the stomach and into the intestine, although it could take longer or shorter depending on the health or activity of an individual. 13RP 61, 86. The forensic examiner who conducted the autopsy opined a small meal might be emptied from the stomach in two hours while a large, fatty meal might take six to eight hours. 13RP 146-47.

Pietz and Nicole had two vehicles, including a VW Jetta that they both drove. 5RP 132. Police located the Jetta in a University District parking lot on February 22, 2006. 7RP 179-82. The parking lot attendant first noticed the car on February 7. 8RP 24-26, 33-34. Pietz's DNA was on the gearshift, as was Nicole's and an unknown contributor. 12RP 72-75, 119. Pietz and Nicole were possible DNA sources for the steering wheel and windshield wiper knob. 12RP 75-77. A print lifted from the driver's door interior handle matched Pietz's print. 9RP 34-35, 38, 48, 62, 69.

The Jetta was serviced at a Les Schwab tire center on January 27. 5RP 117. Detective Pavlovich determined 67 miles had been put on the Jetta from the time it was at Les Schwab to when it was recovered in the parking lot. 8RP 119. Based on a driving route chosen by the detective, the mileage from Les Schwab to the Pietz condo to the body location to the Jetta in the parking lot added up to 68.1 miles. 8RP 126.

When Nicole's co-worker offered Pietz condolences at the funeral, Pietz said thank you and then asked about how to go about getting Nicole's life insurance.[9] 11RP 181. A few weeks after Nicole's body was found, Pietz asked a co-worker if he thought it was too soon for him to go out on a date. 6RP 200-01, 215, 218. Around April 2006, Pietz asked a co-worker to get the number of a female gym client. 10RP 207-08, 209-10. Around the same time, he made comments about other women at the gym being cute. 10RP 207, 212-13.

Pietz later worked at Chase Bank. 14RP 68. In 2011, a co-worker offered to appraise a bracelet he mentioned. 14RP 71-72. When she put the bracelet on her wrist, Pietz said "You're wearing my dead wife's bracelet." 14RP 73. After Pietz's arrest in March 2012, a co-worker packed up Pietz's belongings and came across the bracelet, which the police later collected. 14RP 50, 84, 88.

The trial court's ER 404(b) ruling allowed the jury to hear a number of sordid details about Pietz's alleged womanizing. Ms. Strieck testified that she met Pietz when he was engaged in 2000 or 2001. 6RP 82-83, 107. They became friendly at work. 6RP 83. He bought her a

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[9] Nicole had life insurance through her employer in the amount of $38,000. 11RP 183, 186. There was no designated beneficiary, leaving Pietz as the recipient. 11RP 187. Pietz claimed the insurance on March 22, 2006. 11RP 187.

piece of clothing and a cell phone. 6RP 84-85. He expressed ambivalence about getting married. 6RP 87, 90. Strieck and Pietz started a relationship while he was engaged to Nicole. 6RP 91-93. Strieck and Pietz stopped seeing one another after Strieck mistakenly reached Nicole on the phone and Nicole expressed suspicion about the relationship. 6RP 97-100, 112-13. The relationship resumed after Pietz got married. 6RP 101-03. They had sex only one time, in 2002 or 2003. 6RP 103-04, 115-16. The relationship ended in 2003. 6RP 105-06, 115.[10]

Ms. Duffy testified that she met Pietz in 2003 when she worked at Chang's restaurant, where Pietz was a regular customer. 6RP 122-23. They had sex after the two had been out drinking with others. 6RP 125, 127-29.

Ms. Hansen testified she meet Pietz at Chang's in 2003. 6RP 131. She kissed him and another woman at a bar one night, goofing around drunk. 6RP 133-34, 136.

Ms. Stewart worked out at a gym where Pietz was employed in 2003. 6RP 141, 158, 162. He propositioned her for a threesome. 6RP

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[10] When Captain Anderson asked Pietz about extramarital relationships on February 7, 2006, Pietz said Nicole thought he was cheating on her with co-worker Strieck in 2001, but he denied actually sleeping with her. 8RP 58. A year and a half later, after the two were married, they got into an argument, and Pietz slept with Strieck out of spite. 8RP 58-59. He did not tell Nicole about his sexual encounter with Strieck. 8RP 59. That was the only time he was unfaithful. 8RP 59.

142. She was uninterested. 6RP 142-43. He said he ended up having a threesome with someone else, but would rather do it with her. 6RP 157. He told her he was trying to convince his wife to do a threesome. 6RP 144.

Stewart hung out at a nightclub with Pietz and others from the gym on three occasions. 6RP 143, 145. Nicole did not feel comfortable going to clubs. 6RP 144. There was talk about using Ecstasy. 6RP 146. Ecstasy loosens inhibitions and makes a person more prone to intimacy. 6RP 147. Pietz wanted Nicole to loosen up. 6RP 144. He told Stewart of his plan to put Ecstasy in Nicole's Red Bull beverage at the club. 6RP 147.

The second time they went to the club, Stewart saw Pietz leave for the bar area and then come back with a Red Bull and give it to his wife. 6RP 149-50. Nicole drank it and became "more sexual" with people. 6RP 150. There was a party going on in the VIP room with about 20 people. 6RP 151. Nicole kissed another woman. 6RP 151, 167. Nicole performed oral sex on Pietz, where everyone could see, while the other woman stroked her hair. 6RP 151-52, 167. Stewart, who took Ecstasy, kissed Pietz at some point that night at the club. 6RP 152, 160, 167-68.

Pietz later told Stewart that he had put Ecstasy in Nicole's Red Bull.[11] 6RP 149.

The next time they went to the club, Stewart saw Pietz go the bar and bring a Red Bull back, with Nicole becoming more intimate with friends but not overtly sexual. 6RP 158-59, 175. Afterwards, Pietz became flirtatious towards Stewart. 6RP 159. She was uninterested. 6RP 159. At some point Pietz told Stewart that Nicole had engaged in a threesome, the circumstances of which were not described. 6RP 162.

About five or six weeks before Nicole's disappearance, Ms. Seachord met Pietz at the gym where she worked out. 11RP 194-95. At some point he asked her out for coffee. 11RP 196. She took it as "more than a friendly coffee." 11RP 196. He gave her his phone number. 11RP 197. She did not take him up on the coffee invitation and did not call him. 11RP 197.

The jury also heard about Nicole's insecurities. Ms. Steussy became friends with Nicole in 2004. 7RP 13. Nicole asked if she needed to lose weight or was pretty enough. 7RP 15. Her insecurities were related to Pietz; she wanted to please him. 7RP 16. Towards the end of 2004, Nicole made comments about being upset because Pietz wanted to

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[11] To Captain Anderson, Pietz denied putting Ecstasy in Nicole's drink. 8RP 60.

go out partying while she wanted to avoid drugs and alcohol. 7RP 17-18. Nicole called the gym to speak with Pietz often; when he was unavailable she asked where he was and what he was doing. 7RP 19-20.

At some point before January 2006, Nicole told her AA friend that she was starting to not feel good about herself, and asked her if she thought she was pretty, if she was gaining weight, and if she was a good person. 5RP 15. Nicole also expressed love for her husband. 5RP 15.

Ms. Baltz worked at a gym with Pietz. 12RP 163. She overheard Pietz's comments to Nicole questioning the health of a food choice, inquiring into her amount of exercise, and suggestions about how to dress nicer or do something better with her hair. 12RP 164-65. Nicole was embarrassed. 12RP 166. Pietz called her a "fucking liar" on some occasions at the gym, but Ms. Baltz could not recall the context. 12RP 167, 172. All of this took place sometime before May 2004. 12RP 170.

iii. *Verdict and Sentence*

The jury returned a guilty verdict. CP 321. The court imposed 220 months of confinement. CP 343. In sentencing Pietz to the maximum standard range, the trial judge found testimony that Pietz spiked his wife's drink for the purpose of having her perform a public sex act on him as "particularly appalling." 8RP 150-51. This appeal follows. CP 351-58.

C. ARGUMENT

1. THE CONVICTION MUST BE REVERSED BECAUSE THE "TO CONVICT" INSTRUCTION DID NOT CLEARLY HOLD THE STATE TO ITS PROPER BURDEN OF PROOF.

The "to convict" instruction for second degree murder is defective because it fails to make manifestly apparent that (1) the jury must acquit if the State fails to prove any one element of its case beyond a reasonable doubt; and (2) the jury must find each element of the State's case proven beyond a reasonable doubt in order to convict. This structural error requires reversal of the conviction.

a. The Court Gave The Instruction Over Defense Objection.

The "to convict" instruction given by the trial court provides as follows:

> To convict the defendant of the crime of Murder in the Second Degree, each of the following elements of the crime must be proved beyond a reasonable doubt:
>
> (1) That on or about January 27, 2006 through January 28, 2006, the defendant:
> a) Was committing or attempting to commit the crime of Assault in the Second Degree;
> b) Caused the death of Nicole Pietz in the course of and in furtherance of such crime or in immediate flight from such crime; and
> c) That Nicole Pietz was not a participant in the crime;
>
> OR

(2) That on or about January 27, 2006 through January 28, 2006, the defendant:
a) Acted with intent to cause the death of Nicole Pietz; and
b) That Nicole Pietz died as a result of defendant's acts;

AND

(3) That any of these acts occurred in the State of Washington.

If you find from the evidence that elements 1(a), (b) and (c), or (2)(a) and (b), and element (3) have been proven beyond a reasonable doubt, then it will be your duty to return a verdict of guilty. Elements 1(a), (b) and (c) and (2)(a) and (b) are alternatives and only one need be proved. In order to find the defendant guilty you must unanimously agree that either (1)(a), (b) and (c) or (2)(a) and (b) has been proved. You are not required to unanimously agree which of either (1)(a), (b) and (c) or (2)(a) and (b) has been proved.

On the other hand, if, after weighing all of the evidence, you have a reasonable doubt as to elements (1)(a), (b) and (c) and (2)(a) and (b), and element (3), then it will be your duty to return a verdict of not guilty.

CP 312-13 (Instruction 10).

The defense objected to this instruction, arguing it was confusing and did not properly convey the standard for when the jury must convict and when it must acquit. 15RP 2-7.[12] The court left the instruction as is,

[12] The previous day, defense counsel voiced his concerns about the instruction and debate ensued over what it should be without a resolution being reached. 14RP 166-76. The defense requested that the State be required to select one of the alternatives because of the inadequate "to convict" instruction, but the court declined. 15RP 5, 11.

inviting the defense to come up with something better. 15RP 13. The defense noted its exception. 15RP 13-14.[13]

b. The "To Convict" Instruction Heightened The Requirement For Acquittal And Lessened The State's Burden Of Proof.

Due process requires the prosecution to prove every element of an offense beyond a reasonable doubt. In re Winship, 397 U.S. 358, 364, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970); U.S. Const. Amend. XIV; Wash. Const. Art. I, § 3. A conviction "cannot stand if the jury was instructed in a manner that would relieve the State of this burden." State v. Cronin, 142 Wn.2d 568, 580, 14 P.3d 752 (2000).

Challenged "to convict" instructions are reviewed de novo. State v. Mills, 154 Wn.2d 1, 7, 109 P.3d 415 (2005). Proper jury instructions "must more than adequately convey the law. They must make the relevant legal standard manifestly apparent to the average juror." State v. Borsheim, 140 Wn. App. 357, 366, 165 P.3d 417 (2007) (quoting State v. LeFaber, 128 Wn.2d 896, 900, 913 P.2d 369 (1996); accord State v. Smith, 174 Wn. App. 359, 369, 298 P.3d 785, review denied, 178 Wn.2d 1008, 308 P.3d 643 (2013) (addressing "to convict" instruction). If jury instructions may be construed to allow the jury to assume that an essential element need not

[13] The defense proposed its own instruction, which the court requested be reworded to avoid confusion before it was considered further. 14RP 107-08, 166, 169; CP 293-95.

be proved, the State has been relieved of its burden of proving all elements of the crime beyond a reasonable doubt. State v. Stein, 144 Wn.2d 236, 241, 27 P.3d 184 (2001).

The "to convict" instruction is flawed because it could be construed as directing the jury to acquit Pietz only if it had a reasonable doubt as to multiple elements in each of the alternative means as opposed to only one element in each of the alternative means. The instruction states: "On the other hand, if, after weighing all of the evidence, you have a reasonable doubt as to elements (1)(a), (b) and (c) and (2)(a) and (b), and element (3), then it will be your duty to return a verdict of not guilty." CP 313. The instruction could be read to mean the jury has a duty to return a "not guilty" verdict only if it has a reasonable doubt as to each of the three elements of the first alternative means (1(a), (b) and (c)) and each of the two elements of the second alternative means (2(a) and (b)). The instruction is deficient because it fails to make manifestly clear that the jury, in order to acquit Pietz, need only find a reasonable doubt as to any one element in each of the alternative means.

WPIC 27.02, the pattern "to convict" instruction for second degree intentional murder, and WPIC 27.04, the pattern "to convict" instruction for second degree felony murder, simply read "On the other hand, if, after weighing all of the evidence, you have a reasonable doubt as *to any one of*

these elements, then it will be your duty to return a verdict of not guilty." (emphasis added). The instruction here fails to adequately convey the simple idea that there is a duty to acquit if there is a reasonable doubt as to any one element.

The "to convict" instruction is further flawed because it can be construed to allow the jury to convict if less than all elements of the crime are proven. The instruction states: "If you find from the evidence that elements 1(a), (b) and (c), or (2)(a) and (b), and element (3) have been proven beyond a reasonable doubt, then it will be your duty to return a verdict of guilty. Elements 1(a), (b) and (c) and (2)(a) and (b) are alternatives and only one need be proved." CP 312. It is unclear whether the phrase "only one need be proved" refers to the elements or the alternatives. The instruction could be read to mean elements 1(a) - (c) and 2(a) - (b) are alternatives and only one element need be proved.

The State will argue a reasonable jury would understand that the instruction placed the burden on the State to prove each element when the instructions were considered as a whole. But when jury instructions read as a whole are ambiguous, the reviewing court cannot assume that the jury followed the legally valid interpretation. State v. McLoyd, 87 Wn. App. 66, 71, 939 P.2d 1255 (1997).

While it may be possible to interpret the "to convict" instruction in a manner consistent with applicable law, the jury should not be required to engage in that interpretive exercise. The standard for clarity in a jury instruction is higher than for a statute. LeFaber, 128 Wn.2d at 902. Courts may resolve ambiguous wording in a statute by utilizing rules of construction, but jurors lack such interpretative tools. Id.

The introductory clause in the "to convict" instruction, which states "each of the following elements of the crime must be proved beyond a reasonable doubt," does not save the instruction because internally inconsistent instructions do not meet the requirement of manifest clarity. CP 312; State v. Irons, 101 Wn. App. 544, 552-53, 4 P.3d 174 (2000).

Instruction 3 provides the State "has the burden of proving each element of the crime beyond a reasonable doubt." CP 305. But the jury is entitled "to regard the 'to convict' instruction as a complete statement of the law; when that instruction fails to state the law completely and correctly, a conviction based upon it cannot stand." State v. Smith, 131 Wn.2d 258, 263, 930 P.2d 917 (1997). Even if Instruction 3 were legitimately considered in relation the adequacy of the "to convict" instruction," the latter instruction is still fatally flawed. The "to convict" instruction misstates the law regarding when the jury must acquit. Instruction 3 does not speak to when the jury must acquit.

The failure to properly instruct the jury on reasonable doubt is structural error requiring reversal without resort to harmless error analysis. Sullivan v. Louisiana, 508 U.S. 275, 281-82, 113 S. Ct. 2078, 124 L. Ed. 2d 182 (1993); Smith, 174 Wn. App. at 368-69 (reversing where atypical wording of the elements instructions given at trial could have allowed jurors to convict defendant even if they entertained reasonable doubt as to his guilt). Pietz's conviction must therefore be reversed.

2. PIETZ'S RIGHT TO A PUBLIC TRIAL WAS VIOLATED WHEN THE BAILIFF RELEASED AN EMPANELLED JUROR OUTSIDE OF OPEN COURT.

Pietz has the right to a public trial. Presley v. Georgia, 558 U.S. 209, 212-13, 130 S. Ct. 721, 175 L. Ed. 2d 675 (2010); State v. Wise, 176 Wn.2d 1, 9, 288 P.3d 1113 (2012); U.S. Const. amend VI; Wash. Const. art I, § 22. Additionally, article I, section 10 expressly guarantees the right to open court proceedings. State v. Easterling, 157 Wn.2d 167, 174, 137 P.3d 825 (2006).

In this case, the record shows a sitting juror was released from service outside of open court. This violated Pietz's right to a public trial. The trial court's subsequent attempt to rewrite history by claiming the juror was not released until the court later addressed the matter in open court is unavailing. The record shows otherwise.

Experience and logic dictate that the right to public trial implicates the removal of a sitting juror. To comply with the public trial requirement, the court needed to conduct a Bone-Club[14] analysis *before* the juror was released outside of open court. That did not happen here. This structural error requires reversal.

a. Circumstances Surrounding Removal Of The Juror.

Near the end of trial on the morning of October 7, 2013, the Court stated: "I think you have been informed that juror number one has been having some health issues during trial, and nevertheless continued to come in everyday. I am informed this morning by my bailiff that Ms. Kelsey called in, and couldn't even get out of bed this morning, because of a systemic health problem she has. So my judgment, we will proceed without her, but she will be excused." 13RP 4. Nothing more was said about the issue that day.

The next morning, however, defense counsel returned to the issue. 14RP 5. The following exchange occurred:

> THE COURT: Let's go on the record. Mr. Offenbecher, you may put your issue on the record.
> MR. OFFENBECHER [defense counsel]: Thank you, your Honor. Yesterday at 8:20 a.m. we received an email from the Court indicating that juror number 1 was ill, and called that morning and said she couldn't come to court and that she had been excused.

[14] State v. Bone-Club, 128 Wn.2d 254, 906 P.2d 325 (1995).

THE COURT: Not had been excused.
MR. OFFENBECHER: Well, that's what the email said.
THE COURT: That wasn't an email from me. That was an email from Teri. I had not excused her at that point. I did not complete excusing her until after I brought it up in open court, so if your issue is the open court issue, it's not accurate.
MR. OFFENBECHER: That is the issue we are raising, your Honor.
THE COURT: Well, that's not accurate because I brought it up in open court. I told you folks that she, in fact, had called in ill, and it was my intent to excuse her. I did it in open court.
MR. OFFENBECHER: Very well, your Honor. Our position --
THE COURT: Our bailiff -- let my say, my bailiff has no authority to excuse a juror. She can only notify me of the condition of a juror. I'm the one who excuses the juror after I brought it up to counsel in open court. Take it up on appeal if you don't like it, but I think I complied expressly with the open court rule.
MR. OFFENBECHER: Can I just put a few more sentences on the record, your Honor?
THE COURT: You may.
MR. OFFENBECHER: Your Honor, my recollection of yesterday morning was we came in and we were informed that she had persistent medical problems and she couldn't get out of bed this morning. We had never heard of her medical problems before. That was the first that we heard of it. It's our position that she was excused not in open court without a Bone-Club analysis, and we are moving for mistrial.
THE COURT: Let me suggest, I did it in open court. She had been -- lupus, right?
THE BAILIFF: Yes.
THE COURT: She has systematic lupus. She had been struggling through it the entire trial. There were a number of days where she had difficulty getting to trial. There was no reason to bring it up until finally she simply couldn't come in and she had no indication of when she would be able to come in. I was notified of that by Teri. After Teri

> notified me of that, I brought it up in open court and said the woman is sick, I intend to excuse her. I then told Teri, after I brought it up in open court, that the juror was excused. I think that -- there was no Bone-Club analysis needed because I handled the matter in open court.

14RP 5-7.

The record shows the court's bailiff, Teri Bush, sent an email to counsel for both parties at 8:20 a.m. on October 7, stating: "Juror #1 called and let the court know she is ill and can no longer come to court. *She has been released* from jury service this morning. Thank you." CP 522 (emphasis added). At 8:24, Carla Carlstrom, the prosecutor, asked "So does Juror #5 then replace her?" CP 522. At 8:28 a.m., the bailiff replied, "We would await the outcome of trial to see how many we still have, but I do believe jury [sic] #5 is the first alternate." CP 522.

b. The Juror Was Released In a Closed Proceeding Before The Matter Was Addressed In Open Court.

The right to a public trial is the right to have a trial open to the public. In re Pers. Restraint of Orange, 152 Wn.2d 795, 804-05, 100 P.3d 291 (2004). Whether that right has been violated is a question of law reviewed de novo. Wise, 176 Wn.2d at 9.

The analytical steps of the public trial right framework are: "(1) Does the proceeding at issue implicate the public trial right? (2) If so, was the proceeding closed? And (3) If so, was the closure justified?" State v.

Smith, __Wn.2d__, 334 P.3d 1049, 1056 (2014). The second step — whether the proceeding was closed — will be addressed first here because of the peculiar state of the record. See State v. Njonge, __Wn.2d__, 334 P.3d 1068, 1074-75 (2014) (addressing second step first).

The bailiff's email makes it clear that juror #1 was already released from service before the court addressed the matter in open court: "She has been released from jury service this morning." CP 522. The prosecutor's follow-up question about the alternate and the bailiff's reply confirm the removal of the juror was a done deal. CP 522.

Emails do not substitute for open court proceedings. See State v. Irby, 170 Wn.2d 874, 883-84, 246 P.3d 796 (2011) (in holding defendant's right to be present violated, addressing excusal of potential jurors via email: "What was not happening in the courtroom is beside the point: What ought to have happened there was instead happening in cyberspace. Contrary to the State's claim that no court proceedings took place at the time, the e-mails in question substituted for jury selection.").

The trial court went on the record later that morning in open court and announced the juror "will be excused." 13RP 4. The email, however, shows the juror was already released.

When defense counsel raised a public trial challenge the next day, the trial court suggested the bailiff either acted without authority or that

the email communication merely represented the beginning rather than the end of the excusal process. 14RP 5-6. Anyone reading the email would come to the conclusion that the juror had already been released before the court addressed the issue in open court. And even if the bailiff released the juror outside of open court without the court's blessing, a public trial violation still occurred.

No government actor, including a judge's bailiff, may constitutionally abrogate the right to a public trial absent strict compliance with constitutional safeguards. A proceeding may be closed in the constitutional sense where, as here, the trial judge did not create the closure and had no knowledge of the closure until after the fact. See, e.g., Commonwealth v. Cohen, 456 Mass. 94, 95-99, 108-09, 116-19, 921 N.E.2d 906 (Mass. 2010) (public trial violation where "do not enter" sign on door to courtroom was placed on courtroom door during voir dire without judge's knowledge).[15]

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[15] See also State v. Vanness, 304 Wis.2d 692, 693-94, 697-99, 738 N.W.2d 154 (Wis. Ct. App. 2007) (locking of courthouse doors while trial ongoing violated public trial right even without affirmative act of judge because the judge's intent is "irrelevant to determining whether the accused's right to a public trial has been violated by an unjustified closure"); Owens v. United States, 483 F.3d 48, 63 (1st Cir. 2007) (court officer's unauthorized closure of a courtroom by preventing two of defendant's family members from entering courtroom, if substantiated, would violate the Sixth Amendment right to a public trial).

"That the defendant was denied a constitutional right by a State official other than the judge is of little moment." Watters v. State, 328 Md. 38, 42-43, 49-50, 612 A.2d 1288 (Md. 1992) (public trial violation where a deputy sheriff unilaterally excluded the public, including members of defendant's family, from the courtroom during jury selection without the knowledge or consent of the trial judge) (quoting Parker v. Gladden, 385 U.S. 363, 364, 87 S. Ct. 468, 17 L. Ed. 2d 420 (1966) (describing the bailiff as "an officer of the State" and holding a bailiff's prejudicial statements to jurors were controlled by the Sixth Amendment)).

In State v. Wilson, the bailiff excused two potential jurors for illness-related reasons before voir dire began in the courtroom. State v. Wilson, 174 Wn. App. 328, 332, 298 P.3d 148 (2013). The Court of Appeals held the bailiff's actions did not violate the right to public trial because the right to public trial did not apply to the excusal of jurors before voir dire began. Wilson, 174 Wn. App at 342-47. But the underlying presumption was that a public trial violation would have occurred had the bailiff excused the jurors outside the courtroom *after* the public trial right was triggered. Id. at 337, 345-46.

The trial court implied it did not authorize the bailiff to release the juror outside of open court.[16] But the fact remains that the bailiff released the juror outside of open court. The court's later announcement in open court that the juror was excused did not retroactively cure that violation. *Before* an event implicating the right to a public trial can take place outside of open court, the trial judge must consider the five factors identified in Bone-Club on the record. Wise, 176 Wn.2d at 12.[17] There is no indication the court here considered the Bone-Club factors before the juror was removed from service. If a *later* recitation of what occurred in private suffices to protect the public trial right, the requirement that a

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[16] See RCW 2.36.110 ("It shall be the duty of a judge to excuse from further jury service any juror, who in the opinion of the judge, has manifested unfitness as a juror by reason of bias, prejudice, indifference, inattention or any physical or mental defect or by reason of conduct or practices incompatible with proper and efficient jury service."); State v. Rice, 120 Wn.2d 549, 561, 844 P.2d 416 (1993) (judge, not clerk, has power to remove jurors under RCW 2.36.110).

[17] Under the Bone-Club test, (1) the proponent of closure must show a compelling interest for closure and, when closure is based on a right other than an accused's right to a fair trial, a serious and imminent threat to that compelling interest; (2) anyone present when the closure motion is made must be given an opportunity to object to the closure; (3) the proposed method for curtailing open access must be the least restrictive means available for protecting the threatened interests; (4) the court must weigh the competing interests of the proponent of closure and the public; (5) the order must be no broader in its application or duration than necessary to serve its purpose. Bone-Club, 128 Wn.2d at 258-60; Wise, 176 Wn.2d at 10.

Bone-Club analysis take place *before* a closure occurs would be eviscerated.

c. The Removal Of A Sitting Juror Implicates The Public Trial Right.

Appellate courts employ the experience and logic test to determine whether a proceeding implicates the public trial right. Smith, 334 P.3d at 1052-53 (citing State v. Sublett, 176 Wn.2d 58, 73, 292 P.3d 715 (2012)). The first part of the test, the experience prong, asks whether the process have historically been open to the public. Sublett, 176 Wn.2d at 73. The logic prong asks "whether public access plays a significant positive role in the functioning of the particular process in question." Id. The "guiding principle" is whether openness will enhance both the basic fairness of the criminal trial and the appearance of fairness so essential to public confidence in the system. Smith, 334 P.3d at 1053.

Experience shows sitting jurors are not released from service outside of open court. See State v. Jorden, 103 Wn. App. 221, 225-26, 11 P.3d 866 (2000), review denied, 143 Wn.2d 1015, 22 P.3d 803 (2001) (court released sleepy, inattentive juror after hearing on the record in open court); State v. Rafay, 168 Wn. App. 734, 817-21, 285 P.3d 83 (2012), review denied, 176 Wn.2d 1023, 299 P.3d 1171 (2013) (court released distracted juror after hearing on the record in open court); State v. Elmore,

155 Wn.2d 758, 764-66, 123 P.3d 72 (2005) (court released deliberating juror after hearing on the record in open court); State v. Depaz, 165 Wn.2d 842, 846-51, 204 P.3d 217 (2009) (same). Undersigned counsel has not located a single case where an empanelled juror was released from service outside of open court. The experience prong is satisfied.

The logic prong is also satisfied. Public access to a proceeding where a sitting juror is removed plays a significant positive role in the functioning of that particular process. Public oversight helps ensure that a juror will not be removed for improper or inadequate reasons. Whether to remote a sitting juror — one slated to deliberate on the defendant's fate after having passed through the voir dire process — is a weighty decision. Public scrutiny through contemporaneous oversight encourages an appropriate exercise of discretion on the matter. See Wise, 176 Wn.2d at 6 (the public nature of trials is a check on the judicial system, providing for accountability and transparency). Public access thus deters the removal of a juror who is not actually unfit to serve under RCW 2.36.110 and provides assurance that the judicial process takes place without the taint of irregularity or bias.

d. A New Trial Is Required.

"Where experience and logic counsel that a particular proceeding must be open, a trial court's failure to conduct a Bone-Club analysis

justifying a closure will result in a new trial." Njonge, __Wn.2d__, 334 P.3d at 1073. The violation of the public trial right is structural error requiring automatic reversal because it affects the framework within which the trial proceeds. Wise, 176 Wn.2d at 6, 13-14. As argued above, juror #1 was released outside of open court and that proceeding was not justified by an on the record balancing of the Bone-Club factors. Pietz's conviction must therefore be reversed due to the public trial violation.

3. IMPROPER ADMISSION OF PRIOR BAD ACT EVIDENCE, NICOLE'S OUT OF COURT STATEMENT ABOUT AN AFFAIR, AND VOICEMAIL MESSAGES LEFT FOR NICOLE PREJUDICED THE OUTCOME OF THE TRIAL.

The trial court erred in determining allegations of Pietz's philandering and spiking Nicole's drink were admissible for the purpose of showing motive and in determining that the evidence was more probative than prejudicial. The court further erred in admitting Nicole's out of court statement that she knew Pietz was having an affair to prove Nicole's state of mind. Nicole's state of mind was irrelevant. The court also erred in admitting all voicemail messages contained in Exhibit 85 in which friends and family expressed worry and love for Nicole after she went missing. The probative value of that evidence was outweighed by its prejudicial effect. The conviction must be reversed because there is a reasonable

probability that the erroneous admission of this evidence affected the outcome.

a. ER 404(b) Overview

"ER 404(b) is a categorical bar to admission of evidence for the purpose of proving a person's character and showing that the person acted in conformity with that character." State v. Gresham, 173 Wn.2d 405, 420, 269 P.3d 207 (2012).[18] ER 404(b) thus prohibits admission of evidence to prove bad character. State v. Lough, 125 Wn.2d 847, 859, 889 P.2d 487 (1995). Acts that are unpopular or disgraceful fall within the scope of ER 404(b). State v. Halstien, 122 Wn.2d 109, 126, 857 P.2d 270 (1993).

Evidence of other misconduct is prejudicial because jurors may convict on the basis that the defendant deserves to be punished for a series of immoral actions. State v. Bowen, 48 Wn. App. 187, 195, 738 P.2d 316 (1987). Evidence of prior misconduct "*may*, however, be admissible for any other purpose, depending on its relevance and the balancing of its probative value and danger of unfair prejudice." Gresham, 173 Wn.2d at 420. "ER 404(b) is only the starting point for an inquiry into the admissibility of evidence of other crimes; it should not be read in isolation,

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[18] Under ER 404(b), "[e]vidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident."

but in conjunction with other rules of evidence, in particular ER 402 and 403." State v. Saltarelli, 98 Wn.2d 358, 361, 655 P.2d 697 (1982).

When determining admissibility under ER 404(b), the trial court must (1) find the alleged misconduct occurred by a preponderance of the evidence; (2) identify the purpose for admission; (3) determine whether the evidence is relevant to prove an element of the crime charged; and (4) weigh the probative value against its prejudicial effect. State v. Foxhoven, 161 Wn.2d 168, 175, 163 P.3d 786 (2007).

"If the trial court properly analyzes the ER 404(b) issue, its ruling is reviewed for an abuse of discretion." State v. Dawkins, 71 Wn. App. 902, 909, 863 P.2d 124 (1993). A trial court abuses its discretion when its decision is manifestly unreasonable or based on untenable grounds. State ex rel. Carroll v. Junker, 79 Wn.2d 12, 26, 482 P.2d 775 (1971).

b. Evidence Of Pietz's Womanizing And Sexual Behavior Was Inadmissible To Prove Motive Under ER 403 And ER 404(b).

The State sought to admit evidence of Pietz's attitude and actions toward his wife, marriage and other women under ER 404(b). CP 377-89. The State summarized that Pietz, before and during marriage, engaged in an ongoing pattern of behavior involving his wife and other women, including infidelity, that "suggests" he was tired of the marriage and

Nicole, he was in conflict with her, and "wanted her gone when he put his hands around her neck the night she died." CP 379.

Over defense counsel's objection, the court admitted testimony that (1) Pietz had a relationship with a woman while he was engaged to Nicole and had sex with her during the marriage in 2002 or 2003; (2) in 2003, Pietz had a one night stand with a woman; (3) in 2003, Pietz kissed a woman; (4) in 2003, Pietz surreptitiously spiked Nicole's drink at a nightclub with Ecstasy on two occasions, the first time resulting in Nicole performing a public sex act on him; (5) in 2003, Pietz asked a woman about forming a threesome; (6) before Nicole's death, Pietz invited a woman out for coffee; (7) Pietz expressed interest in other women (8) a few weeks after Nicole's body was found, Pietz asked a co-worker if was too soon to date. 1RP 62-70, 89-95, 109, 111; 2RP 24-25; 3RP 5-12; 4RP 33-36; 6RP 4, 11-14; 11RP 120-22; CP 25-42, 50-51.

The court admitted this evidence on the theory that Pietz's marital dissatisfaction provided a motive for the killing. 1RP 89-95, 109-111; 2RP 24-25; 3RP 9-12 4RP 34-36; 6RP 12-14. Motive is an impulse, desire, or any other moving power that causes an individual to act. State v. Powell, 126 Wn.2d 244, 259, 893 P.2d 615 (1995). Thus, when only circumstantial evidence of guilt in a murder case exists, prior misconduct

evidence consisting of prior fights and quarrels between husband and wife can demonstrate motive and is of consequence to the action. Id. at 250-60.

But here the prior bad acts consist not of fights with a wife but of extramarital affairs and womanizing. There is little case law in Washington addressing whether such evidence is admissible to prove motive in a murder case.

In State v. Messinger, a case in which the husband was convicted of murdering his wife on circumstantial evidence, the Court of Appeals upheld the admission of acts of marital infidelity known to the husband and wife to have been committed by each other as admissible to prove motive. State v. Messinger, 8 Wn. App. 829, 835, 509 P.2d 382 (1973). The court reasoned "[e]vidence of marital disharmony and infidelity may be relevant and material and be admissible if there exists some causal relationship or natural connection between the misconduct and the criminal act with which the accused stands charged. State v. Gaines, 144 Wash. 446, 258 P. 508 (1927). The acts introduced, when coupled with the fact that the parties had consulted an attorney a week earlier regarding a divorce, were properly admitted." Messinger, 8 Wn. App. at 835.

Messinger is a pre-ER 404(b) case that relies on pre-ER 404(b) case law adopting a loose, expansive approach to the admission of evidence in a circumstantial murder case. Id. at 833. The standard for

admissibility under ER 404(b) is more rigorous. The utility of Messinger in deciding Pietz's case is therefore circumspect.

That said, Messinger is distinguishable because that case involved the husband being aware that his wife committing infidelity. Id. In that circumstance the motive for killing the wife is obvious: jealousy. That dynamic is absent from Pietz's case. Nor does Pietz's case involve any rumblings of divorce. More than that, although the facts in Messinger are tersely stated, the suggestion is that the mutual affairs were ongoing at the time of the wife's death. There is no evidence in Pietz's case that he was having an affair at the time of Nicole's death.

So does evidence of marital dissatisfaction as manifested through womanizing provide the moving impulse for murder? In this case, the answer is no because any link between the behavior and the killing is attenuated.

Camm v. State, 812 N.E.2d 1127, 1131 (Ind. Ct. App.), review denied, 822 N.E.2d 980 (2004) is instructive. In that case, the defendant was charged with the murder of his wife and two children, and the State presented extensive evidence of the defendant's extramarital affairs and attempts to engage in them. Camm, 812 N.E.2d at 1129-30. The Camm court concluded "evidence of a defendant's marital infidelity is not

automatically admissible as proof of motive in a trial for murder or attempted murder of the defendant's spouse." Id. at 1133.

"[T]o be admissible as proof of motive, the State must do more than argue that the defendant must have been unhappily married or was a poor husband or wife, ergo he or she had a motive to murder his or her spouse." Id. "[E]vidence of a defendant's extramarital affairs should be accompanied by evidence that such activities had precipitated violence or threats between the defendant and victim in the past, or that the defendant was involved in an extramarital relationship at the time of the completed or contemplated homicide." Id. "The admissibility of such evidence may be further constrained by concerns of chronological remoteness, insufficient proof of the extrinsic act, or the general concern that the unfair prejudicial effect of certain evidence might substantially outweigh its probative value in a particular case." Id.

The Camm court concluded evidence of the defendant's extramarital affairs was inadmissible where there was no evidence that the defendant was involved in an extramarital affair at the time of the murders and there was no evidence of violence or threats between the defendant and his wife. Id. at 1133-35. In such a circumstance, the evidence had minimal probative value as proof of motive and its prejudicial effect substantially outweighed its value. Id. at 1135.

In Pietz's case, the jury heard no evidence that Pietz was violent towards Nicole or threatened her.[19] And there is no substantive evidence that Pietz was involved in an extramarital affair at the time of Nicole's death. The court admitted Nicole's statement that she knew Pietz was having an affair only to show her state of mind, not as substantive evidence that Pietz was actually having an affair. 1RP 73-75, 79.

The State introduced substantive evidence that Pietz started a relationship with Strieck in 2000 or 2001 before the marriage. 6RP 82-83, 91-93, 107. The relationship resumed during the marriage. 6RP 101-03. They had sex one time and the relationship ended in 2003. 6RP 103-06, 115-16. The State also introduced substantive evidence of Pietz's one night stand with Duffy in 2003. 6RP 122-23, 125-29. Both relationships ended more than two years before Nicole's death. Proof of Pietz's alleged extramarital affairs was prejudicial and was too remote to be admitted as a show of motive pursuant to ER 404(b). Those things occurred well before Nicole's death. The factors present in Camm are present in Pietz's case: no violence, no ongoing affair at the time of the murder, and the affairs that did occur were remote in time.

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[19] The court excluded the allegation that Pietz slammed a computer keyboard on Nicole's hand about a year before her death. 1RP 81-83, 92; CP 387.

Lesley v. State, 606 So.2d 1084 (Miss. 1992), cited by Camm, is also instructive. In Lesley, a wife was convicted of conspiring with a lover to murder her husband. Lesley, 606 So.2d at 1085. The wife admitted to the affair with the accused lover. Id. at 1089. However, the husband was also allowed to testify as to two other men with whom his wife allegedly had extramarital affairs in previous years. Id. at 1088-89.

The Mississippi Supreme Court reversed the conviction because the other two affairs had occurred years before the conspiracy to commit murder arose and thus were too remote. Id. at 1090. "Any extramarital affairs of Loretta Lesley other than the affair with Hood [the current lover and alleged co-conspirator] were not part of any chain of events leading to the planned murder of Dale Lesley. Additionally, proof of previous extramarital affairs lacked relevance into the murder conspiracy and was so prejudicial as to fail any balancing test under Rule 403. Her alleged prior adultery did not make it more likely than not that she committed conspiracy to commit murder, and it did inflame any listener." Id.

The court held it was improper to use this evidence "only to show that she had a motive for killing her husband because she was unhappy in her marriage and had a reason for wanting to 'get rid' of her husband. The only effect of such testimony was to show the jury that she was a 'bad woman.'" Id. The court distinguished the case from those in other

jurisdictions that had allowed evidence of extramarital affairs to be introduced, noting in other cases the "evidence of adultery was introduced in combination with evidence of violence or current conduct [an ongoing affair at the time of the murder] to show motive." Id. at 1090-91.

Again, no substantive evidence was introduced that Pietz was violent towards Nicole or had an ongoing affair at the time of the murder. Being unhappy in a marriage and seeking out other women is not enough to admit such evidence as motive for killing a spouse. Lesley, 606 So.2d at 1090.

Other evidence of womanizing is also remote in time to Nicole's death. The kiss with Hansen was in 2003. 6RP 131-36. The threesome proposition with Stewart and the kiss with her at the nightclub were in 2003. 6RP 152, 158, 160, 162, 167-68. These events are too remote to provide enough probative value to outweigh prejudice. This evidence, like the affair evidence, made Pietz look like an immoral person without providing the requisite connection between his behavior and the murder.

The court admitted evidence of marital dissatisfaction on the premise that there was a "continuing pattern that would suggest that the defendant had a long-standing dissatisfaction with their sexual relations in his marriage" that existed before and through their marriage up to the date of Nicole's death. 1RP 90-91. But evidence of a continuing pattern did

not materialize at trial. The State's introduction of evidence that Pietz asked a woman out for coffee a few weeks before Nicole's death, which the woman interpreted as an invitation to "more than a friendly coffee," does not bridge the gap between 2003 and 2006. 11RP 194-96. At most, the coffee invitation was a flirtation that was declined and never followed up on. 11RP 197. It should not have been admitted because it too failed to provide a connection as motive for murder.

The court also admitted evidence that a few weeks after Nicole's body was found, Pietz asked a co-worker if he thought it was too soon for him to go out on a date. 1RP 85, 6RP 200-01, 215, 218. The defense objected on grounds of relevance and ER 403. 1RP 85. The court admitted it as part of a "continuing pattern of his motive to end his wife's life in order to engage in what he perceived to be a satisfying sexual relationship with other women." 1RP 92. But again, the probative value does not outweigh prejudicial effect. There is a wide gap in time between what happened in 2003 and 2006, so the probative value is minimal due to the lack of a continuing pattern of such behavior. The prejudicial effect is great. Asking whether it is too soon to date a few weeks after the death of a wife makes the husband look like an unfeeling cad. The same goes for evidence that Pietz expressed interest in other women in April 2006. 10RP 207-10, 212-13.

Evidence of Pietz's affairs and womanizing was not part of any chain of events leading to Nicole's strangulation. The connection between that behavior and his wife's murder is too speculative. The trial court abused its discretion in allowing the State to introduce evidence of Pietz's adulterous and womanizing conduct because the tie between such evidence and motive, or anything other than simply portraying Pietz as a bad person, is too strained and remote to be reasonable. Even if this evidence had probative value as proof of motive, its prejudicial effect substantially outweighed such value, particularly given the extent to which the State emphasized this evidence.

In reaching that conclusion, it is important to keep in mind that "[e]vidence of a criminal defendant's prior bad acts 'is objectionable not because it has no appreciable probative value but because it has too much.'" State v. Slocum, __Wn. App.__, 333 P.3d 541, 543 (2014) (quoting 1A John Henry Wigmore, Evidence in Trials at Common Law § 58.2, at 1212 (Peter Tillers rev. ed. 1983)). "It presents a danger that the defendant will be found guilty not on the strength of evidence supporting the current charge, but because of the jury's overreliance on past acts as evidence of his character and propensities." Slocum, 333 P.3d at 543. This case illustrates the realization of that danger. Salacious evidence of

adultery and womanizing could not help but inflame the jury against Pietz, especially when juxtaposed against the State's successful introduction of evidence that Nicole was a sweet, homely, loving wife. "When evidence is likely to stimulate an emotional response rather than a rational decision, a danger of unfair prejudice exists." Powell, 126 Wn.2d at 264. Such is the case here.

c. Evidence That Pietz Spiked His Wife's Drink In 2003, And Evidence That She Subsequently Performed A Public Sex Act On Him, Was Inadmissible Under ER 403 And ER 404(b).

The court's admission of evidence that Pietz secretly spiked his sober wife's drink with Ecstasy, which caused her to perform oral sex on him in public, is worthy of special consideration. The court admitted this evidence on the theory that it showed Pietz was "trying to manipulate her into sex acts that are more enjoyable for him that goes to his --the whole issue that he has a long-standing dissatisfaction with his marital relations" and "what he was willing to do in order to change it." 1RP 93-95. The spiking incident went to "his continuing view that his marriage was sexually dysfunctional. He wanted to change it with drugs. He wanted to change it with other women. He wanted to change it with affairs. And ultimately the argument . . . that since none of that happened he finally decided to change it with the death of his wife." 1RP 94-95.

Defense counsel argued this evidence was irrelevant and tremendously prejudicial. 3RP 5-7. Evidence that Pietz drugged his wife made him look like a "really, really bad guy and dangerous." 3RP 6. The State already had evidence of marital disharmony that the court admitted; there was no need to pile on. 3RP 6.

The court opined "the fact that he was willing to give drug to his wife in order to loosen her up for sex, if true, when he knew that she was in AA would suggest that he . . . was willing to harm his wife in order to satisfy his own sexual dispositions." 3RP 9. The relevance, according to the court, was that "he did it against his wife's will, without her knowledge" and "was willing to harm his wife in order to get what he wanted." 3RP 10-11. The court nonetheless thought admissibility was a "close call." 3RP 11. The court did not heed the rule that doubtful cases under ER 404(b) should be resolved in favor of the defendant. State v. Wade, 98 Wn. App. 328, 334, 989 P.2d 576 (1999).

Evidence that Pietz spiked his wife's drink in 2003 when she was a recovering addict in order to pleasure himself was inflammatory evidence of the highest order. The court at sentencing expressed its disgust with this act, calling it "particularly appalling." 8RP 150-51. The jury could be expected to react in the same manner. Evidence causes unfair prejudice when it is more likely to arouse an emotional response than a rational

decision by the jury, or an undue tendency to suggest a decision on an improper basis, commonly an emotional one. Cronin, 142 Wn.2d at 584. That is the reason why this evidence was inadmissible.

Admitting the evidence on the theory that it showed "he was willing to harm his wife in order to satisfy his own urges" (3RP 12) is indistinguishable from admitting it to show Pietz was the kind of person who would harm his wife to satisfy his urges — the kind of person who would murder his wife. Further, the acts of spiking took place in 2003, not any time close to Nicole's death. To say Pietz must have murdered his wife because he spiked her drink more than two years earlier to loosen her up is to stretch the concept of motive beyond the breaking point.

d. The Court Erred In Admitting Nicole's Statement That She Believed Pietz Was Having An Affair Because The Relevance Of Nicole's State Of Mind Was Not Established.

The State sought to admit evidence that Nicole told co-worker Twitchell on Friday afternoon, January 26, that she knew her husband was having an affair. CP 389-91. The State claimed Nicole's statement was of her then-existing mental state, which is an exception to the hearsay rule under ER 803(a)(3). CP 389. The State also contended this statement did not qualify as hearsay because "[i]t would not be offered for the truth of the matter asserted, i.e. that Nicole actually knew the defendant was

having an affair." CP 389. Rather, the statement was admissible as circumstantial evidence of Nicole's state of mind. CP 389.

The defense objected on grounds of hearsay. 1RP 72-73. The court opined the statement was not offered for its truth because even if Nicole erroneously believed an affair was taking place, "the whole notion of him having an affair or not having an affair then generates a really hostile argument resulting in a fight and death." 1RP 73. Defense counsel said that was speculative, as there was no evidence that she confronted him that evening. 1RP 73-74. The court disagreed: "If she thinks he is having an affair to the extent she is going to tell her friend that's the kind of thing that can cause a real bad argument." 1RP 73-74. The statement was admissible not for the truth of the matter but as evidence of her state of mind, i.e. her belief that Pietz was having an affair. 1RP 74.

Defense counsel pointed out a victim's state of mind is typically irrelevant unless the defendant sets forth a defense of accident or mistake. 1RP 75. The court responded the statement was not admitted for the truth of the matter asserted; "[t]he issue is what's in her mind and is she angry." 1RP 75. The court maintained "it puts her in a state of mind where she is going to inferentially have a confrontation with her husband" because "she is angry at her husband at that point in time." 1RP 80.

The state of mind of the victim is generally irrelevant in criminal cases, thus precluding the use of statements by the victim as circumstantial evidence of the victim's state of mind. Karl B. Tegland, 5C Wash. Prac., Evidence Law and Practice § 803.16 at 61 (5th ed. 2007). "In a homicide case, if there is no defense which brings into issue the state of mind of the deceased, evidence of fears or other emotions is ordinarily not relevant." State v. Parr, 93 Wn.2d 95, 103, 606 P.2d 263 (1980).

The victim's state of mind becomes relevant if the defendant puts the victim's state of mind at issue, such as by claiming self-defense or accident. Parr, 93 Wn.2d at 103; accord Powell, 126 Wn.2d at 266 (addressing state of mind exception under ER 803(a)(3)); State v. Athan, 160 Wn.2d 354, 383, 158 P.3d 27 (2007) (defense strategy made victim's state of mind relevant). In this case, Pietz did not make Nicole's state of mind relevant by putting what she was feeling into issue. Pietz did not raise a defense of accident or self-defense, nor did he otherwise pursue a trial strategy that sought to use Nicole's feelings toward him in service of a defense. Under the Parr line of cases, Nicole's statement was not admissible to prove her state of mind in the absence of Pietz putting her state of mind at issue.

The State was the party that made an issue of Nicole's state of mind in service of its theory of the murder. Even so, her state of mind in

relation to believing Pietz was having an affair is not legally relevant. While statements offered as circumstantial evidence of the declarant's state of mind are not hearsay, such statements must be relevant to a material issue of fact to be admissible. State v. Stubsjoen, 48 Wn. App. 139, 146, 738 P.2d 306 (1987); State v. Haack, 88 Wn. App. 423, 438-39, 958 P.2d 1001 (1997), review denied, 134 Wn.2d 1016, 958 P.2d 314 (1998).

The court believed Nicole's state of mind was relevant to show her belief that an affair was taking place, which generated a hostile argument that led to her murder later that night. 1RP 73-74, 79-80. Defense counsel rightly pointed out it was speculation that Nicole confronted Pietz about an affair later that night. 1RP 73-74. Nicole's state of mind is relevant only if the evidence established there was an argument later that night about her belief that her husband was having an affair.

There is no such evidence in this record. Deputy Binkley asked Pietz if they had argued that night. 5RP 161. Pietz initially said no and later said they possibly had some sort of disagreement. 5RP 161, 163. But there was nothing said about an argument over an affair. Pietz told co-worker Wageman that he was worried about a fight they had, that she might be upset or acting out, and that this was possibly a reason why she was missing. 6RP 197-98. But again, there was nothing said about an argument over an affair. The court's decision to admit Nicole's statement

about the affair is error because the relevancy of Nicole's state of mind rests on speculation rather than substantial evidence in the record.

e. The Court Erred In Admitting All Of The Voice Messages Contained In Exhibit 85 And In Declining To Grant A Mistrial After Their Full Prejudicial Effect Became Manifest.

Detective Mellis testified numerous calls from people were made to Nicole's phone after Pietz's last call to her phone on January 28 at 10:15 p.m. 11RP 55-56. Exhibit 85, which contains voicemails from January 28, 2006 at 10:45 p.m. going forward, was initially admitted without objection. 11RP 56-59. After two calls were played for the jury, the defense objected to the admission of all voicemails other than those left by the defendant. 11RP 59-60. Counsel argued voicemails from other people wondering where Nicole was and expressing their worry about her was irrelevant and any probative value was outweighed by unfair prejudice under ER 403. 11RP 60-61. The messages were offered to generate sympathy and emotion. 11RP 60. Other evidence had already been admitted that people were calling Nicole and she did not respond, so the admission of the messages was unnecessary while their charged emotional content was high. 11RP 65.

The court denied the motion because there was a debated issue about whether Nicole was dead on Saturday and the messages from others,

including their urgent tone, tended to show if she was still alive she would have called someone back. 11RP 65-67. The jury listened to the rest of the voicemails. 11RP 72-79.

The next day, the defense moved for a mistrial based on "dire" concerns about the prejudicial effect of the messages on the jury. 11RP 4-6. The jury heard message after message from concerned friends and family members wondering where she was, hoping she was okay, and begging her to call. 11RP 4. Counsel put on the record that a number of people who left those messages were in the courtroom and were crying. 11RP 4-5. The jury sat listening to the messages for 20 minutes, and a number of jurors looked over and observed friends and family members crying. 11RP 5. The observed impact on the jurors was palpable. 11RP 5.

The court denied the motion for mistrial. 11RP 6. The court maintained the day Nicole died was a key factor in the case and the defense had challenged Detective Decker's tracker testimony regarding how long the body had been there. 11RP 6-7. The messages were emotional, but that was the reason they were probative: a person receiving those messages would reply to them if she were alive. 11RP 7. The court

said it had no power to prevent emotions from being displayed in the courtroom. 11RP 7.[20]

This an ER 403 issue. The jury already had evidence that friends and family called Nicole and received no response. 5RP 30, 101-02, 134-35, 140, 208. It was unnecessary to add the actual voice messages from friends and family into the mix, certainly not the nearly 30 of them made after learning Nicole was missing. That matters because of the emotionally explosive nature of those messages. The jury had already sat through more than two weeks of a grueling trial with a disturbing theme: Pietz killed his sweet wife because he wanted sex with other women. The jury was already primed to be swayed by the emotional appeal of evidence the State presented on that theme. Nicole had already been portrayed as the sympathetic, exploited wife who did not deserve to die.

And then these voice messages come along, like a lit match thrown on a keg of dynamite. These messages are heartbreaking because the listener, including the jury, already knows that Nicole is dead. The hope and concern in the voices of friends and family wondering where she is

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[20] During deliberations, the jury asked to listen to all of the voicemails through January 28, a total of seven. 16RP 2, 6-7. The defense renewed its objection to voicemails other than those from the defendant on the basis that their prejudicial effect outweighed their probative value. 16RP 7. The court overruled the objection and the requested voicemails were played for the jury. 16RP 7, 9.

and begging her to come home is juxtaposed against the certain knowledge of the listener that Nicole will never come home and that her friends and family were calling in vain. Of course people who left the messages were crying as they sat in the courtroom. Of course jurors noticed. How could they not, as they sat there for 20 minutes listening to message after message from Nicole's friends and family?

In light of the other evidence presented at trial that went to the timing of the death, these voice messages were of little probative value. The evidence was unfairly prejudicial because it was 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) (quoting United States v. Roark, 753 F.2d 991, 994 (11th Cir. 1985)). The court erred in admitting the evidence under ER 403 and in declining to grant a mistrial after the palpable effect of the evidence reached its emotional zenith. Reversal of a conviction is warranted where there is a substantial likelihood that the error prompting the request for a mistrial affected the jury's verdict. State v. Rodriguez, 146 Wn.2d 260, 269-70, 45 P.3d 541 (2002). The likelihood that these voice messages affected the outcome is addressed in section C.3.f., infra.

f. Reversal Is Required Because The Errors Prejudiced The Outcome.

Evidentiary error is prejudicial if, within reasonable probabilities, the error materially affected the outcome of the trial. State v. Neal, 144 Wn.2d 600, 611, 30 P.3d 1255 (2001). The improper admission of evidence constitutes harmless error only "if the evidence is of minor significance in reference to the overall, overwhelming evidence as a whole." State v. Bourgeois, 133 Wn.2d 389, 403, 945 P.2d 1120 (1997).

The erroneous admission of the ER 404(b) evidence was not harmless. It was not of minor significance. The State made it the centerpiece of its case. Allegations about Pietz's sexual proclivities comprised a theme that Pietz's womanizing, sexualized behavior and unhappiness with the marriage that started years ago led all the way to the killing of Nicole. See 15RP 39-42 (State's closing argument).

The State's case against Pietz was circumstantial. One inference to be drawn from those circumstances was that Pietz committed the crime. Another inference is that the ER 404(b) evidence, in all its salacious glory, swayed the jury to find that circumstantial evidence amounted to proof beyond a reasonable doubt.

At one point in closing argument, the prosecutor told the jury "This is not about what a bad guy he was. This is about how his behavior

affected what happened to Nicole." 15RP 39. But the wink to the jury was already made in the prosecutor's earlier remarks where she described Pietz as an "extraordinarily cold and callous man. The kind of man who does something like this." 15RP 30. That is a propensity argument, one which the jury would naturally gravitate towards given the nature of the ER 404(b) evidence presented to them. This especially holds true for the drink spiking allegation, which was particularly heinous. Reversal of the conviction is required because there is a reasonable probability that juror consideration of the ER 404(b) evidence influenced the outcome.

The errors involving the admission of Nicole's statement that she knew Pietz was having an affair and the admission of the voicemail messages added to the prejudice. Nicole's statement was damaging because it provided a basis for the jury to believe an argument about the affair precipitated the strangulation. Such a belief is speculation. No evidence was presented that Nicole confronted Pietz about an affair that night. But the admission of Nicole's statement invited jurors to embrace that speculation as a convincing aspect of the State's case.

The voice messages, meanwhile, likely overwhelmed the jury with emotion and sympathy for the victim and her family and friends, which is not a fair basis on which to reach a verdict. The cumulative impact of so many messages over the course of 20 minutes likely aroused an emotional

response from the jury that could not be set aside in favor of dispassionate reason when it came time to reach a verdict.

Even if each evidentiary error standing alone did not prejudice the outcome, their combined effect did. Every defendant in a criminal case has the constitutional due process right to a fair trial. State v. Davenport, 100 Wn.2d 757, 762, 675 P.2d 1213 (1984); U.S. Const. Amend. XIV; Wash. Const. art. 1, § 3. Under the cumulative error doctrine, a defendant is entitled to a new trial when it is reasonably probable that errors, even though individually not reversible error, cumulatively produce an unfair trial by affecting the outcome. State v. Coe, 101 Wn.2d 772, 788-89, 684 P.2d 668 (1984); Parle v. Runnels, 505 F.3d 922, 927 (9th Cir. 2007). As discussed above, the cumulative affect of erroneously admitting the ER 404(b) evidence, Nicole's statement about the affair, and the voice messages affected the outcome and produced an unfair trial in Pietz's case.

D. CONCLUSION

For the reasons set forth, Pietz requests reversal of the conviction.

DATED this 3rd day of November 2014

Respectfully Submitted,

NIELSEN, BROMAN & KOCH, PLLC.

CASEY GRANNIS
WSBA No. 37301
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IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE

STATE OF WASHINGTON	)	
	)	
Respondent,	)	
	)	
v.	)	COA NO. 71162-8-I
	)	
MARTIN PIETZ,	)	
	)	
Appellant.	)	

DECLARATION OF SERVICE

I, PATRICK MAYOVSKY, DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOLLOWING IS TRUE AND CORRECT:

THAT ON THE 3RD DAY OF NOVEMBER 2014, I CAUSED A TRUE AND CORRECT COPY OF THE **AMENDED BRIEF OF APPELLANT** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY EMAIL AND/OR DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

[X] MARTIN PIETZ 370510
STAFFORD CREEK CORRECTIONS CENTER
191 CONSTANTINE WAY
ABERDEEN, WA 98520

SIGNED IN SEATTLE WASHINGTON, THIS 3RD DAY OF NOVEMBER 2014.

X Patrick Mayovsky