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NO. 55217-1-I

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

STATE OF WASHINGTON,

Respondent,

v.

GLEN SEBASTIAN BURNS AND
ATIF AHMAD RAFAY,

Appellants.

APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE CHARLES MERTEL

CONSOLIDATED BRIEF OF RESPONDENT

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TABLE OF CONTENTS

Page

A. ISSUES 1

B. STATEMENT OF THE CASE 8

1. PROCEDURAL FACTS. 8

2. SUBSTANTIVE FACTS. 13

a. Introduction. 13

b. The Murders. 14

i. The police response. 15

ii. The defendants' statements. 19

iii. Flight to Canada 28

c. The Bellevue Investigation. 29

d. The Canadian Investigation. 37

i. The RCMP decides to investigate. 37

ii. The first meeting with Burns. 39

iii. The stolen car scenario in Whistler. ... 41

iv. The meeting with Burns at the Four Seasons Hotel. 45

v. The first money laundering scenario with Burns and Miyoshi. 51

vi. The visit to Burns and Rafay's house. 55

vii. The second money laundering scenario with Burns and Miyoshi. 56

viii. Burns's admissions at the Ocean Point Hotel. 65

ix. Rafay's admissions at the Ocean Point Hotel. 73

x. Miyoshi's and Burns's admissions at the Landis Hotel. 81

e. Jimmy Miyoshi. 87

i. Pretrial statements. 87

ii. Trial testimony. 92

f. Burns's Trial Testimony. 101

C. ARGUMENT 106

1. THE DEFENDANTS' SPEEDY TRIAL RIGHTS WERE NOT VIOLATED. 106

a. Relevant Facts. 108

b. The Defendants' CrR 3.3 Right To A Speedy Trial Was Not Violated. 113

i. The defendants were not amenable to process while they were incarcerated in Canada. 114

ii. The State exercised good faith and due diligence in attempting to obtain the defendants' presence for trial. 117

c. The Defendants' Constitutional Right To A Speedy Trial Was Not Violated. 121

i. The defendants waived this claim. ... 121

ii. The defendants' rights were not violated. 122

(a). The delay in this case triggers the analysis..... 123

(b). The defendants bear responsibility for the delay. 123

(c). The defendants failed to timely assert their rights..... 125

(d). The defendants cannot show prejudice..... 127

2. THE DEFENDANTS' ADMISSIONS WERE NOT COERCED..... 128

a. Relevant Facts. 129

i. The admissions. 129

ii. The hearing and the trial court's findings..... 132

b. The Defendants' Admissions Were Not Coerced. 136

i. Standard of review and governing law..... 136

ii. The record supports the trial court's conclusion that the defendants' admissions were not coerced..... 141

iii. Defendants' reliance on Fulminante is misplaced..... 149

3. DEFENSE COUNSEL'S DECISION TO NOTIFY THE JURY THAT THIS WAS NOT A CAPITAL CASE WAS NOT INEFFECTIVE ASSISTANCE..... 152

a. Relevant Facts. 153

b. Any Error Was Invited. 155

c. Standard Of Review. 156

d. Opening The Door. 158

e. Counsel's Use Of The Death Penalty To Strategic Advantage Was Not Deficient Performance. 159

i. The death penalty was used to impress upon the jury the serious consequences that could follow convictions based on false confessions. 159

ii. The death penalty was used to attack Detective Thompson's credibility. 162

iii. The death penalty was used to attack Jimmy Miyoshi's credibility. 164

iv. The defense raised the death penalty in its own case-in-chief..... 167

v. Townsend, Mason and Hicks are distinguishable..... 169

f. The Defendants Cannot Show Prejudice. ... 174

4. THE TRIAL COURT PROPERLY DISMISSED JUROR NO. 4. 176

a. Relevant Facts. 176

b. The Court Acted Within Its Discretion When Excusing Juror No. 4. 191

c. Any Error In Excusing Juror No. 4 Does Not Justify Reversal Of The Jury's Verdicts. 198

5. THE TRIAL COURT PROPERLY LIMITED THE ADMISSION OF PURPORTED "OTHER SUSPECT" EVIDENCE 202

a. Relevant Facts. 203

i. The tip by Douglas Mohammed..... 203

ii. The FUQRA tip. 205

iii. The tip about Jessie Brar and the Dosanjh Group. 206

iv. The court's ruling. 207

b. The Evidence Relating To Douglas Mohammed and FUQRA Was Not Admissible As "Other Suspect" Evidence 210

c. Washington's Standard Governing The Admission Of "Other Suspect" Evidence Is Constitutional 214

d. The Excluded Tip Evidence Was Inadmissible Hearsay. 221

e. The Excluded Tips Were Not Admissible As Impeachment Evidence. 222

f. The Defendants Were Not Improperly Restricted In Presenting Evidence Concerning Jessie Brar. 233

g. Any Error Was Harmless..... 236

6. THE TRIAL COURT PROPERLY EXCLUDED PROPOSED EXPERT TESTIMONY OF DR. RICHARD LEO ON FALSE CONFESSIONS..... 237

a. Relevant Facts. 238

b. The Testimony Was Properly Excluded Under ER 702. 245

i. Standard of review. 245

ii. The testimony would not have aided the jury. 249

(a). This was not a custodial interrogation. 250

(b). The confessions were on videotape. 253

(c). Credibility is a quintessential jury determination. 257

iii. The testimony lacked foundation. 272

iv. Testimony from RCMP officers did not open the door to Dr. Leo's testimony. 281

v. Any error in excluding the testimony was harmless. 289

c. There Was No Constitutional Error. 293

7. THE TRIAL COURT PROPERLY EXCLUDED PROPOSED EXPERT TESTIMONY OF MICHAEL LEVINE ON UNDERCOVER OPERATIONS. 299

a. Relevant Facts. 300

b. The Testimony Was Properly Excluded Under ER 702. 305

i. Standard of review. 305

ii. The testimony lacked foundation. 305

iii. The testimony would not have aided the jury. 308

iv. Testimony from RCMP officers did not open the door to Levine's testimony. 311

v. Any error was harmless. 313

c. There Was No Constitutional Error. 314

8. ALLEGED COMMENTS ON GUILT DO NOT REQUIRE REVERSAL. 314

a. Pretrial Discussion. 315

b. Allegedly Improper Comments. 318

i. Officer Greg Neese. 318

ii. Officer Lisa Piculell. 319

iii. Officer Stephen Cercone. 320

iv. Detective Jeffrey Gomes. 321

c. The Comments Do Not Require Reversal. 326

9. THE TRIAL COURT PROPERLY DENIED THE MOTION FOR MISTRIAL BASED ON ALLEGED VIOLATIONS OF RULINGS ON MOTIONS *IN LIMINE*. 328

a. The Alleged Violations. 330

i. Bellevue Detectives Gomes and Thompson. 330

ii. U.S. Customs Officer Larry Overcast. 334

iii. RCMP Inspector Lorne Schwartz. 338

iv. The Dosanjh Group. 341

b. The Motion For Mistrial. 347

c. The Motion Was Properly Denied. 348

10. THE TRIAL COURT PROPERLY DENIED THE DEFENDANTS' MOTION FOR A MISTRIAL BASED UPON ALLEGED PROSECUTORIAL MISCONDUCT IN CLOSING ARGUMENT. 351

a. Relevant Facts. 351

b. Standard Of Review. 353

c. The Reference To A Beheading. 354

d. The Comment Concerning Jennifer Osteen. 363

e. The Prosecutor's Reference To His Father's Death. 370

f. Discussion Of Burns's Testimony. 374

11. REVERSAL IS NOT REQUIRED BASED ON THE CUMULATIVE ERROR DOCTRINE. 378

D. CONCLUSION 379

TABLE OF AUTHORITIES

Page

Table of Cases

Federal:

Arizona v. Fulminante, 499 U.S. 279,
111 S. Ct. 1246,
113 L. Ed.2d 302 (1991)..... 133, 137, 138, 141, 149, 151

Barker v. Wingo, 407 U.S. 514,
92 S. Ct. 2182, 33 L. Ed.2d 101 (1972)..... 122, 123, 126

Brady v. Maryland, 373 U.S. 83,
83 S. Ct. 1194, 10 L. Ed.2d 215 (1963)..... 232

Chambers v. Mississippi, 410 U.S. 284,
93 S. Ct. 1038, 35 L. Ed.2d 297 (1973)..... 215, 223, 295

Chavez v. Martinez, 538 U.S. 760,
123 S. Ct. 1994, 155 L. Ed.2d 984 (2003)..... 139

Crane v. Kentucky, 476 U.S. 683,
106 S. Ct. 2142,
90 L. Ed.2d 636 (1986)..... 271, 294-296, 298, 299, 350

Daubert v. Merrell Dow Pharmaceuticals, Inc.,
509 U.S. 579, 113 S. Ct. 2786,
125 L. Ed.2d 469 (1993)..... 280

Davis v. Alaska, 415 U.S. 308,
94 S. Ct. 1105, 39 L. Ed.2d 347 (1974)..... 295

Doggett v. United States, 505 U.S. 647,
112 S. Ct. 2686, 120 L. Ed.2d 520 (1992)..... 123, 127

Dyer v. Calderon, 151 F.3d 970
(9th Cir. 1998) 196

Frazier v. Cupp, 394 U.S. 731,
89 S. Ct. 1420, 22 L. Ed.2d 684 (1969)..... 137

Frye v. United States, 293 F. 1013
(D.C. Cir. 1923) 280, 281, 302

Haynes v. Washington, 373 U.S. 503,
83 S. Ct. 1336, 10 L. Ed.2d 513 (1963) 137

Holmes v. South Carolina, 547 U.S. 319,
126 S. Ct. 1727, 164 L. Ed.2d 503 (2006) 217-220, 295

Lego v. Twomey, 404 U.S. 477,
92 S. Ct. 619, 30 L. Ed.2d 618 (1972) 136

Mendez v. Artuz, 303 F.3d 411
(2nd Cir. 2002) 231

Miller v. Fenton, 474 U.S. 104,
106 S. Ct. 445, 88 L. Ed.2d 405 (1985) 137, 268, 269

Mincey v. Arizona, 437 U.S. 385,
98 S. Ct. 2408, 57 L. Ed.2d 290 (1978) 138

Miranda v. Arizona, 384 U.S. 436,
86 S. Ct. 1602, 16 L. Ed.2d 694 (1966) 250, 251, 255, 291

Payne v. Arkansas, 356 U.S. 560,
78 S. Ct. 844, 2 L. Ed.2d 975 (1958) 151, 152

Schneckloth v. Bustamonte, 412 U.S. 218,
93 S. Ct. 2041, 36 L. Ed.2d 854 (1973) 136, 137

State v. Hall, 93 F.3d 1337
(7th Cir. 1996) 266, 271

Stein v. New York, 346 U.S. 156,
73 S. Ct. 1077, 97 L. Ed. 1522 (1953) 137

Strickland v. Washington, 466 U.S. 668,
104 S. Ct. 2052, 80 L. Ed.2d 674 (1984) 156, 157, 170

Taylor v. Illinois, 484 U.S. 400,
108 S. Ct. 646, 98 L. Ed.2d 798 (1988) 215

United States v. Adams, 271 F.3d 1236
(10th Cir. 2001) 249, 264, 271, 294, 298, 299, 314

United States v. Bradley, 173 F.3d 225
(3rd Cir. 1999) 195

United States v. Brika, 416 F.3d 514
(6th Cir. 2005) 272, 305

United States v. Crosby, 75 F.3d 1343
(9th Cir. 1996) 230, 231

United States v. Hankey, 203 F.3d 1160
(9th Cir.) 310

United States v. Manning, 56 F.3d 1188
(9th Cir. 1995) 124

United States v. McVeigh, 153 F.3d 1166
(10th Cir. 1998) 226

United States v. Mitchell, 957 F.2d 465
(7th Cir. 1992) 124, 125

United States v. Patrick, 248 F.3d 11
(1st Cir. 2001)..... 221, 225

United States v. Rodriguez-Felix, 450 F.3d 1117
(10th Cir. 2006) 291, 294

United States v. Shay, 57 F.3d 126
(1st Cir. 1995)..... 267, 271, 279, 294

United States v. Thirion, 813 F.2d 146
(8th Cir. 1987) 125

United States v. Vallejo, 237 F.3d 1008
(9th Cir. 2001) 270

United States v. Verdugo-Urquidez, 494 U.S. 259,
110 S. Ct. 1056, 108 L. Ed.2d 222 (1990)..... 139

Washington State:

Breckenridge v. Valley General Hosp., 150 Wn.2d 197,
75 P.3d 944 (2003) 374

Creech v. City of Aberdeen, 44 Wash. 72,
87 P. 44 (1906) 199, 200

In re Personal Restraint of Tortorelli, 149 Wn.2d 82,
66 P.3d 606 (2003) 156

Ottis v. Stevenson-Carson Sch. Dist. No. 303,
61 Wn. App. 747,
812 P.2d 133 (1991) 192

Seattle v. Heatley, 70 Wn. App. 573,
854 P.2d 658 (1993), review denied,
123 Wn.2d 1011 (1994) 315

Seybold v. Neu, 105 Wn. App. 666,
19 P.3d 1068 (2001) 307

State v. Aaron, 57 Wn. App. 277,
787 P.2d 949 (1990) 312, 313

State v. Aho, 137 Wn.2d 736,
975 P.2d 512 (1999) 156

State v. Allen, 50 Wn. App. 412,
749 P.2d 702, review denied,
110 Wn.2d 1024 (1988) 224

State v. Anderson, 121 Wn.2d 852,
855 P.2d 671 (1993) 116, 117

State v. Barajas, 143 Wn. App. 24,
177 P.3d 106, 115 (2007), review denied,
164 Wn.2d 1022 (2008) 363

State v. Barrow, 60 Wn. App. 869,
809 P.2d 209, review denied,
118 Wn.2d 1007 (1991) 377

State v. Belgarde, 110 Wn.2d 504,
755 P.2d 174 (1988) 359, 360

State v. Black, 86 Wn. App. 791,
938 P.2d 362 (1997), review denied,
133 Wn.2d 1032 (1998) 241

State v. Black, 109 Wn.2d 336,
745 P.2d 12 (1987) 327, 328

State v. Borboa, 157 Wn.2d 108,
135 P.3d 469 (2006) 354, 358

State v. Braun, 82 Wn.2d 157,
509 P.2d 742 (1973) 136

State v. Brown, 132 Wn.2d 529,
940 P.2d 546 (1997) 354

State v. Campbell, 78 Wn. App. 813,
901 P.2d 1050 (1995), review denied,
128 Wn.2d 1004 (1995) 310

State v. Campbell, 103 Wn.2d 1,
691 P.2d 929 (1984) 223

State v. Carlin, 40 Wn. App. 698,
700 P.2d 323 (1985) 327, 328

State v. Carlson, 61 Wn. App. 865,
812 P.2d 536 (1991), review denied,
120 Wn.2d 1022 (1993) 374

State v. Cheatam, 150 Wn.2d 626,
81 P.3d 830 (2003) 246, 248

State v. Condon, 72 Wn. App. 638,
865 P.2d 521 (1993), review denied,
123 Wn.2d 1031 (1994) 210, 211

State v. Copeland, 130 Wn.2d 244,
922 P.2d 1304 (1996) 281

State v. Crane, 116 Wn.2d 315,
804 P.2d 10 (1991) 329, 350

State v. Craven, 69 Wn. App. 581,
849 P.2d 681, review denied,
122 Wn.2d 1019 (1993) 315

State v. Danforth, 97 Wn.2d 255,
643 P.2d 882 (1982) 224

State v. Darden, 145 Wn.2d 612,
41 P.3d 1189 (2002) 215

State v. Descoteaux, 94 Wn.2d 31,
614 P.2d 179 (1980) 224

State v. Dhaliwal, 150 Wn.2d 559,
79 P.3d 432 (2003) 375

State v. Downs, 168 Wash. 664,
13 P.2d 1 (1932) 211, 216

State v. Elmore, 155 Wn.2d 758,
123 P.3d 72 (2005) 191

State v. Evans, 26 Wn. App. 251,
612 P.2d 442 (1980), rev'd on other grounds,
96 Wn.2d 119, 634 P.2d 845 (1981) 200

State v. Fisher, 130 Wn. App. 1,
108 P.3d 1262 (2005), review denied,
156 Wn.2d 1013 (2006) 368

State v. Fladebo, 113 Wn.2d 388,
779 P.2d 707 (1989) 122

State v. Fleming, 83 Wn. App. 209,
921 P.2d 1076 (1996), review denied,
131 Wn.2d 1018 (1997) 376, 377

State v. Gefeller, 76 Wn.2d 449,
458 P.2d 17 (1969) 158, 159

State v. Gentry, 125 Wn.2d 570,
888 P.2d 1105 (1995) 198, 199

State v. Greenwood, 120 Wn.2d 585,
845 P.2d 971 (1993) 114

State v. Greiff, 141 Wn.2d 910,
10 P.3d 390 (2000), review denied,
151 Wn.2d 1031 (2004) 378

State v. Haga, 8 Wn. App. 481,
507 P.2d 159, review denied,
82 Wn.2d 1006 (1973) 327, 328

State v. Hendrickson, 129 Wn.2d 61,
917 P.2d 563 (1996) 156

State v. Hessler, 155 Wn.2d 604,
121 P.3d 92 (2005) 114, 115, 117

State v. Hicks, 163 Wn.2d 477,
181 P.3d 831 (2008) 169, 172

State v. Hodges, 118 Wn. App. 668,
77 P.3d 375 (2003) 378

State v. Hopson, 113 Wn.2d 273,
778 P.2d 1014 (1989) 329, 351

State v. Howard, 127 Wn. App. 862,
113 P.3d 511 (2005), review denied,
156 Wn.2d 1014 (2006) 211, 216, 217, 221

State v. Hudlow, 99 Wn.2d 1,
659 P.2d 514 (1983) 210, 215, 216, 314

State v. Hudson, 130 Wn.2d 48,
921 P.2d 538 (1996) 114, 117, 120

State v. Johnson, 61 Wn. App. 539,
811 P.2d 687 (1991) 312, 313

State v. Johnson, 124 Wn.2d 57,
873 P.2d 514 (1994) 368

State v. Jorden, 103 Wn. App. 221,
11 P.3d 866 (2000), review denied,
143 Wn.2d 1015 (2001) 191, 192, 194, 195, 199

State v. Kilgore, 107 Wn. App. 160,
26 P.3d 308 (2001), aff'd,
147 Wn.2d 288, 53 P.3d 974 2002) 223

State v. Kirkman, 159 Wn.2d 918,
155 P.3d 125 (2007) 121

State v. Knapp, 14 Wn. App. 101,
540 P.2d 898, review denied,
86 Wn.2d 1005 (1975) 223

State v. Lee, 48 Wn. App. 322,
738 P.2d 1081 (1987) 115

State v. Lewis, 130 Wn.2d 700,
927 P.2d 235 (1996) 329, 350, 351, 368

State v. Lord, 117 Wn.2d 829,
822 P.2d 177 (1991) 156, 157

State v. Lord, 161 Wn.2d 276,
165 P.3d 1251 (2007) 191, 236, 314

State v. Luvene, 127 Wn.2d 690,
903 P.2d 960 (1995) 367

State v. Lynn, 67 Wn. App. 339,
835 P.2d 251 (1992) 121

State v. Mason, 160 Wn.2d 910,
162 P.3d 396 (2007) 169, 170, 172, 173

State v. Maupin, 128 Wn.2d 918,
913 P.2d 808 (1996) 216

State v. McFarland, 127 Wn.2d 322,
899 P.2d 1251 (1995)..... 121

State v. McKenzie, 157 Wn.2d 44,
134 P.3d 221 (2006)..... 353, 354

State v. Mezquia, 129 Wn. App. 118,
118 P.3d 378 (2005), review denied,
163 Wn.2d 1046 (2008)..... 132

State v. Perez-Mejia, 134 Wn. App. 907,
143 P.3d 838 (2006)..... 361

State v. Pittman, 88 Wn. App. 188,
943 P.2d 713 (1997)..... 273, 305

State v. Reed, 101 Wn. App. 704,
6 P.3d 43 (2000)..... 215, 217

State v. Rehak, 67 Wn. App. 157,
834 P.2d 651 (1992), review denied,
120 Wn.2d 1022 (1993)..... 211, 224, 225

State v. Riker, 123 Wn.2d 351,
869 P.2d 43 (1994)..... 308

State v. Roman, 94 Wn. App. 211,
972 P.2d 511, review denied,
138 Wn.2d 1014 (1999)..... 115, 116

State v. Russell, 125 Wn.2d 24,
882 P.2d 747 (1994)..... 211, 216, 373, 378, 379

State v. Scott, 110 Wn.2d 682,
757 P.2d 492 (1988)..... 121

State v. Simon, 64 Wn. App. 948,
831 P.2d 139 (1991), rev'd on other grounds,
120 Wn.2d 196, 840 P.2d 172 (1992)..... 310

State v. Stein, 144 Wn.2d 236,
27 P.3d 184 (2001)..... 368

State v. Stenson, 132 Wn.2d 668,
940 P.2d 1239 (1997) 353

State v. Stewart, 130 Wn.2d 351,
922 P.2d 1356 (1996) 115, 117

State v. Striker, 87 Wn.2d 870,
557 P.2d 847 (1976) 113, 114

State v. Swan, 114 Wn.2d 613,
790 P.2d 610 (1990) 246, 362, 368, 375

State v. Swenson, 150 Wn.2d 181,
75 P.3d 513 (2003) 113, 114

State v. Thomas, 71 Wn.2d 470,
429 P.2d 231 (1967) 157

State v. Thomas, 109 Wn.2d 222,
743 P.2d 816 (1987) 156, 157

State v. Thomas, 150 Wn.2d 821,
83 P.3d 970 (2004) 210, 234

State v. Townsend, 142 Wn.2d 838,
15 P.3d 145 (2001) 169, 170, 171, 172

State v. Vicuna, 119 Wn. App. 26,
79 P.3d 1 (2003), review denied,
152 Wn.2d 1008 (2004) 122

State v. Warren, 134 Wn. App. 44,
138 P.3d 1081 (2006), aff'd,
___ Wn.2d ___ (Nov. 20, 2008) 282

State v. Weber, 99 Wn.2d 158,
659 P.2d 1102 (1983) 328, 351

State v. Wilber, 55 Wn. App. 294,
777 P.2d 36 (1989) 290

State v. Willis, 151 Wn.2d 255,
87 P.3d 1164 (2004) 245, 246, 247, 272, 305

State v. Wilson, 29 Wn. App. 895,
626 P.2d 998, review denied,
96 Wn.2d 1022 (1981) 157

State v. Wilson, 71 Wn.2d 895,
431 P.2d 221 (1967) 353

State v. Wright, 76 Wn. App. 811,
888 P.2d 1214, review denied,
127 Wn.2d 1010 (1995) 376

State v. Zunker, 112 Wn. App. 130,
48 P.3d 344 (2002), review denied,
148 Wn.2d 1012 (2003) 309, 310

Walker v. Bangs, 92 Wn.2d 854,
601 P.2d 1279 (1979) 246, 305

Walker v. State, 121 Wn.2d 214,
848 P.2d 721 (1993) 273, 305

Other Jurisdictions:

Boyer v. State, 825 So.2d 418
(Fla. Dist. Ct. App. 2002) 270

Burgal v. State, 740 So.2d 82
(Fla. Dist. Ct. App. 1999) 201

Commonwealth v. Reynolds, 429 Mass. 388,
708 N.E.2d 658 (1999) 232

Commonwealth v. Robinson, 449 Mass. 1,
864 N.E.2d 1186 (2007) 275

Conley v. Life Care Centers of America, Inc.,
236 S.W.3d 713
(Tenn. Ct. App. 2007) 307

Edmonds v. State, 955 So.2d 864
(Miss. Ct. App. 2006), rev'd on other grounds,
955 So.2d 787 (Miss. 2007) 277, 278, 298

Garza v. State, ___ S.E.2d ___
(2008 WL 4761923) (Nov. 3, 2008) 263

Hannon v. State, 84 P.3d 320
(Wyo. 2004) 269

Kindler v. Canada (Minister of Justice), [1991]
2 S.C.R. 779 ..... 119, 120

Lee v. State, 340 Ark. 504,
11 S.W.3d 553 (2000) 201

Lyons v. State, 282 Ga. 588,
652 S.E.2d 525 (2007) 263, 276

Miller v. State, 770 N.E.2d 763
(Ind. 2002) 268

People v. Green, 250 A.D. 2d 143,
683 N.Y.S.2d 597 (1998) 280

People v. Hall, 41 Cal.3d 826,
718 P.2d 99, 226 Cal. Rpt. 112 (1986) 220

People v. Philips, 692 N.Y.S.2d 915,
180 Misc.2d 934 (1999) 271, 279, 280

Price v. State, 365 Ark. 25,
223 S.W.3d 817 (2006) 372

Reference re Ng Extradition, [1991]
2 S.C.R. 858 ..... 119, 120

State v. Cobb, 30 Kan. App. 2d 544,
43 P.3d 855 (2002) 291

State v. Davis, 32 S.W.3d 603
(Mo. Ct. App. 2000) 260, 261, 291

State v. Free, 351 N.J. Super. 203,
798 A.2d 83 (2002) 258, 259, 278

State v. Gregory, 198 S.C. 98,
16 S.E.2d 532 (1941) 218, 219

State v. Holmes, 361 S.C. 333,
605 S.E.2d 19 (2004) 219

State v. Lambert, 175 Vt. 275,
830 A.2d 9 (2003) 201

State v. Ritt, 599 N.W.2d 802
(Minn. 1999) 256, 258

State v. Santana, 135 Idaho 58,
14 P.3d 378 (Idaho Ct. App. 2000) 201

Thorson v. State, 895 So.2d 85
(Miss. 2004) 255

Vent v. State, 67 P.3d 661
(Alaska Ct. App. 2003) 261, 263

Constitutional Provisions

Federal:

U.S. Const. amend. VI 122

Washington State:

Const. art. 1, § 22 122

Canada:

Canadian Charter of Rights and Freedoms § 6(1) 109

Statutes

Washington State:

RCW 2.36.110 191

Rules and Regulations

Washington State:

CrR 3.3 ..... 1, 106, 107, 112, 113, 120

CrR 6.5 191

ER 404 333

ER 702 ..... 238, 239, 245, 246, 247, 289, 290, 299, 305

ER 801 222

ER 806 234

RAP 2.5 121

RAP 10.3 234

Other Authorities

16 C.J. Criminal Law § 1085, p. 560 (1918) 218

20 Am. Jur. Evidence § 265, p. 254 (1939) 218

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Evidence 702-18 (1988) 308

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Treaty Between the Government of Canada and the Government of the United States of America on Mutual Legal Assistance in Criminal Matters..... 92

Treaty on Extradition Between the United States of America and Canada, Article 6..... 118

WPIC 1.02..... 257

A. ISSUES

1. When a defendant is amenable to process and there is a long delay between charging and arraignment, the courts will establish a constructive arraignment date for speedy trial purposes of 14 days after arraignment, unless the State can show that it has acted with good faith and due diligence in bringing the defendant to court. During the nearly six-year delay between charging and arraignment, the defendants were incarcerated in Canada, resisting commitment and extradition. The State pursued extradition without assurances that the defendants would not face the death penalty if convicted, until Canada's highest court finally held that such assurances would be required. Did the trial court correctly find that the defendants were not amenable to process until the Canadian court ruled, that the State was not required to forego the death penalty option before its appeals were exhausted, and that the defendants' speedy trial rights under CrR 3.3 were not violated?

2. A lengthy delay between charging and arraignment triggers inquiry into the other factors that determine whether the constitutional right to a speedy trial was violated: the reason for the delay, whether the defendants asserted the right, and prejudice to the defendants. The defendants caused the delay by fighting

extradition and appealing committal. Neither defendant demanded a speedy trial until more than four years after charges were filed. Neither defendant has even alleged actual prejudice from the delay. Does the sum total of these factors weigh against a finding that the defendants' constitutional rights were violated?

3. Before a defendant's statements may be admitted at trial, the State must show by a preponderance of the evidence that they were voluntarily made; voluntariness is determined from the totality of the circumstances. The defendants admitted their guilt to undercover police officers posing as dangerous gangsters; these "gangsters" offered to destroy incriminating evidence and involve the defendants in a lucrative criminal enterprise. The defendants were not in custody, and met with the "gangsters" freely and repeatedly. Videotapes of the confessions show the defendants, appearing comfortable and relaxed, laughing at times as they describe how they carried out the brutal murders. Was the trial court correct in concluding that the confessions were voluntary?

4. To prevail on a claim of ineffective assistance of counsel, a defendant must show deficient performance that affected the outcome of the trial. Legitimate trial strategy cannot support such a claim. Defense counsel here used the death

penalty to impress upon jurors the serious consequences that could result from false confessions, and to attack the credibility of the State's witnesses. The jurors heard and saw the defendants laughing and giggling as they described committing these brutal murders in videotaped confessions. Have the defendants failed to show that counsel's decision to inform the jurors that this was not a death penalty case, thus leaving counsel free to use the death penalty to tactical advantage, was ineffective assistance?

5. The trial court has a duty to excuse from service any juror unfit for the task. The trial court found that Juror No. 4 slept through parts of the trial, removed notes from the courtroom in violation of instructions, expressed a desire to get off the jury, and lied to the court. Did the court act within its discretion when it excused the juror from further jury service and replaced her with an alternate who had sat through the entire trial?

6. A defendant has no right to be tried by a particular juror. The trial court removed Juror No. 4 and replaced her with an alternate juror who had been accepted by all parties and had sat through the entire trial. There is no evidence that the alternate was tainted or biased. Have the defendants failed to show that their constitutional right to an impartial jury was violated?

7. Before evidence of "other suspects" may be admitted at trial, the defendant must show a clear nexus between the alleged other suspect and the crime. Motive, ability and opportunity are not enough; there must be some step taken by the third party that indicates an intention to act. The trial court excluded a tip from a confidential informant whose mental stability was in question, and who had relayed what he regarded as suspicious behavior by a member of a Muslim extremist group; there was no admission to the murders, no showing that the group was anywhere in the vicinity at the time of the murders, and no evidence of any step taken. The court also excluded evidence of an extremist group, where there was no evidence tying the group to the murders. The court admitted evidence of a tip from a different confidential informant that a criminal organization had "put out a contract" on an East Indian family in Bellevue. Did the trial court properly exercise its discretion in deciding which evidence met the legal criteria for "other suspects" and which did not?

8. The right to cross-examine adverse witnesses is not absolute; questioning that only remotely tends to show bias or prejudice, or that is based on vague or speculative evidence, is properly rejected. The defendants attempted to get the excluded

"other suspect" evidence before the jury under the guise of impeaching the thoroughness of the investigation. Did the trial court properly exercise its discretion by rejecting this attempt to "back-door" otherwise inadmissible evidence?

9. Expert testimony is not admissible unless it is helpful to the trier of fact. The defendants argued at trial that their confessions were coerced. The undercover officers who elicited the confessions were fully cross-examined on the circumstances under which the confessions were obtained. The jury saw and heard the videotaped confessions. Did the trial court properly exercise its discretion in excluding expert testimony on "false confessions" as not helpful to the jury under these circumstances?

10. Expert testimony is not admissible unless it is helpful to the trier of fact. The defendants at trial argued that the RCMP's undercover operation was flawed, and likely to lead to false confessions. They proposed an "expert" who had experience in undercover narcotics investigations in the U.S., but they produced no evidence of accepted standards for undercover murder investigations in Canada. Based solely on review of the case file, the "expert" characterized the defendants as unsophisticated, naive and immature. The jury saw or heard almost every interaction

between the RCMP officers and the defendants. Did the trial court properly exercise its discretion in excluding this testimony because it would invade the province of the jury?

11. A jury is presumed to follow instructions to disregard testimony. In this case, several police officers made remarks that, while based on their observations of the defendants, may have crossed the line into interpretations of behavior and indirectly commented on guilt. The trial court immediately sustained timely objections, struck the remarks, and instructed the jury to disregard them. Do the remarks fail to justify reversal of these convictions?

12. The trial court should grant a mistrial only when the defendant has been so prejudiced that nothing short of a new trial can ensure a fair hearing. In this six-month trial, several witnesses gave testimony that arguably violated the court's rulings on motions *in limine*. Where information was imparted to the jury, much of it was inconsequential. Where timely objections were raised, the trial court sustained them, struck the offending testimony, and instructed the jury to disregard it. Did the trial court properly exercise its discretion in denying the motion for a mistrial?

13. To prevail on a claim of prosecutorial misconduct, a defendant must show that the conduct was both improper and

prejudicial. The challenged comments must be examined in the context of the total argument, the issues in the case, the evidence addressed in the argument, and the instructions given to the jury. The four isolated remarks challenged here came during a State's closing argument that totaled almost eight hours. Three of the comments came during rebuttal. The jury was instructed to disregard one of them, while another drew no objection. None of the challenged comments touched directly on the central issue in this case – whether the defendants' confessions were true. Did the trial court act within its discretion in denying the defendants' motion for a mistrial based on these comments?

14. The cumulative error doctrine applies only where several trial errors, standing alone, may not justify reversal, but when combined may deny the defendant a fair trial. Most of the claims of error here are meritless; any that might have some merit nevertheless had no effect on the outcome of this six-month trial. Should this Court conclude that the cumulative error doctrine cannot justify reversal of the defendants' convictions?

B. STATEMENT OF THE CASE

1. PROCEDURAL FACTS.

On July 31, 1995, the State of Washington charged Glen Sebastian Burns and Atif Ahmad Rafay with three counts of Aggravated Murder in the First Degree; the charges were based on the murders of Rafay's parents, Tariq and Sultana Rafay, and his sister, Basma Rafay, at their home in Bellevue, Washington on July 12, 1994. CP 1-9. Burns and Rafay were arrested in Canada on July 31, 1995. 114RP[1] 95; 115RP 160; CP 542-46.

Following lengthy litigation in the courts of Canada, the Canadian Minister of Justice was required, as a condition of the defendants' surrender to the United States, to seek assurances that they would not face the possibility of the death penalty if convicted. CP 53-81 (Court of Appeal for British Columbia), 834-65 (Supreme Court of Canada). The King County Prosecuting Attorney ultimately gave such assurances, and the defendants were returned in the spring of 2001 to face these charges. CP 534.

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[1] In referring to the verbatim report of proceedings, the State adopts the numbering system set out in Appendix A of the Brief of Appellant ("BOA") (Rafay). Additional volumes are referred to by date.

Problems between the defendants and their attorneys delayed the trial. Late in 2001, Rafay became dissatisfied with his court-appointed attorneys, Gary Davis and James Koenig, and moved to replace them. 1RP 70-89; 2RP 69-125; 3RP 5-74, 82-92; 4RP 1, 75-102; 5RP 1-44. The trial court ultimately allowed Davis and Koenig to withdraw, and ordered appointment of new counsel. CP 3635, 3661. On April 12, 2002, attorneys Veronica Freitas and Marc Stenchever filed notices of appearance on behalf of Rafay. CP 3663-66. Rafay's new attorneys promptly sought a continuance of the time for trial to April 28, 2003; Burns agreed, and the motion was granted. CP 1745, 1746, 3667, 3668.

Burns initially was represented by Theresa Olson and Neil Fox. 1RP 1. Following an incident at the King County Jail on August 10, 2002, Olson was removed from the case. 7RP 6-7; CP 1985-86. Finding that a conflict of interest had arisen between Burns and The Defender Association, the trial court allowed Fox to withdraw from the representation as well. 7RP 87-99; CP 1984-88. New counsel appeared on behalf of Burns on August 27, 2002: Jeffery Robinson, Song Richardson and Amanda Lee of Schroeter, Goldmark & Bender. 7RP 144; CP 1996-97.

Burns's new attorneys eventually asked that the trial date be pushed back to September 8, 2003, and the court acquiesced. 10RP 101-02, 112; CP 2421. Trial was later continued, with the defendants' agreement, to October 13, 2003. 32RP 101-03; CP 2468, 3794.

Following more than a month devoted to jury selection, the parties began opening statements on November 24, 2003. 64RP 7. The jury heard closing arguments almost six months later, on May 18-20, 2004. 148RP – 150RP. On May 26, 2004, the jury found each defendant guilty of three counts of Aggravated Murder in the First Degree. CP 3175-80, 4181-86.

Sentencing was postponed while attorney Robinson filed a motion for withdrawal, as well as a motion for new trial based on ineffective assistance of counsel on behalf of Burns. 152RP 2-3. Rafay, apparently also dissatisfied with his attorneys' performance, filed a pro se motion for a new trial based on ineffective assistance of counsel. 154RP 4. The trial court postponed ruling on these motions, and appointed a new attorney for each defendant to present the motions to the court.[2] 154RP 7-8, 26; CP 3195, 4189.

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[2] The court declined to allow original counsel to withdraw at this point, instructing them to cooperate with the newly-appointed attorneys in presenting the defendants' motions. 154RP 31-32; CP 3195, 4189.

Burns, through his attorneys, also filed a separate motion for new trial based on alleged trial error, in which Rafay joined. 154RP 5-7, 11; CP 4775-76. The trial court denied this motion. 154RP 24, 45; CP 3194, 4188.

Prior to sentencing, Burns moved to represent himself on the motion for new trial based on ineffective assistance of counsel. 156RP 2-44; CP 3198-3201, 3206-28, 3314-20. He asked to keep newly-appointed counsel Bill Jaquette as standby counsel. 156RP 24. After questioning Burns, the trial court denied the motion, finding that it was untimely made and that granting it would unduly delay the proceedings. 156RP 16-25, 44-47; CP 3202, 3203.

When the sentencing hearing was finally held, on October 22, 2004, Jaquette moved on behalf of Burns to continue the hearing for four months so that he could investigate Burns's claims of ineffective assistance of counsel; Jaquette also informed the court that Burns had privately retained yet another attorney, Brian Todd, and that Todd would ultimately pursue the motion. 157RP 1-5. Todd indicated that he and Burns might need only a week or two to prepare for a hearing on the motion. 157RP 5-7.

Katie Ross, Rafay's new attorney, citing the enormity of the task of preparing a motion for new trial based on ineffective assistance of counsel in a case of this size, ultimately moved to withdraw Rafay's motion without prejudice. 157RP 8-11.

Noting previous delays, the trial court refused to continue the sentencing hearing. 157RP 12-13. In response, Burns withdrew his motion for new trial. 157RP 13-15. The trial court granted the motions to withdraw, adding that it found "absolutely zero merit to these claims." 157RP 29-33.

The parties proceeded to sentencing. 157RP 33. Burns gave a lengthy allocution, criticizing his trial attorneys and complaining that his trial was unfair. 157RP 44-87. The trial court described Burns's remarks as "chilling in the lack of remorse that you expressed for this brutally massacred family" and a "remarkable example of selective memory." 157RP 87. The court described Burns as "not immoral, you're amoral," and an "arrogant, convicted killer." Id. The court concluded: "You were convicted, Mr. Burns, based on your own chilling, casual confession and the confession of Mr. Miyoshi, and a mountain of circumstantial evidence as to your opportunity to kill and your motive for killing: selfish greed." 157RP 88.

Rafay's allocution was much shorter; he too proclaimed his innocence, and he insisted that he loved and grieved for his family. 157RP 103-06. The court expressed its belief that Rafay was remorseful, and had been so at the time of the murders. 157RP 106-07. As with Burns, the court said Rafay had been convicted "on your own confessions, frightening confessions casually given about how you did these things and why you did it." Id.

The court sentenced both defendants to three terms of life imprisonment without possibility of parole. 157RP 88, 108.

2. SUBSTANTIVE FACTS.

a. Introduction.

Sebastian Burns and Atif Rafay were both 18 years old in July of 1994. Ex. 22 at 1; Ex. 78 at 1. Both were Canadian citizens, and the two were best friends. CP 58; Ex. 76 at 4; Ex. 543 at 38. With their former West Vancouver High School classmate, Jimmy Miyoshi, they formed a close trio. 104RP 103-04.

Atif Rafay's immediate family consisted of his parents, Tariq and Sultana, and a sister, Basma. 109RP 34-39. Atif, the only son, was his parents' pride and joy. Ex. 76 at 5.

The Rafay family had only recently moved to Washington State from Vancouver, British Columbia, Canada. Ex. 78 at 1.

Tariq Rafay was an engineer, and had obtained work in the area. Id.; 98RP 15. By the time that his family was settled in Washington, Atif had left for his freshman year at Cornell University. Ex. 78 at 1.

Atif's parents were devout Muslims. 98RP 18-19; 109RP 59-62, 65-66; Ex. 68 at 2; Ex. 72 at 88. Atif did not share their religious devotion; he did not consider himself a Muslim, and did not have Muslim friends. Ex. 72 at 88-89.

Atif had a troubled relationship with his sister, Basma, who was autistic.[3] Ex. 72 at 69. Atif said that he was afraid of Basma, and that she was "gross." Id. Tariq and Sultana took care of Basma; Atif had little to do with her. Ex. 72 at 70.

b. The Murders.

Shortly after 2:00 a.m. on July 13, 1994, Sebastian Burns called 911 from the Rafay home and, in a breathless voice, reported that there had been "some kind of break-in." 101RP 18-21; Ex. 446. Burns added that he thought his friend's parents were dead: "There's blood. They're not breathing. There's blood all

[3] Basma had developed normally up to the age of five or six, when she stopped speaking. 98RP 20; 109RP 37-39. Sultana feared that she may have caused her daughter's developmental problems by not giving Basma enough attention after Atif was born. 69RP 186.

over his face." Id. Telling the 911 operator that he did not think it was safe to stay in the house, Burns said, "We'll be outside." Id.

i. The police response.

The Bellevue Police Department responded swiftly. Officer Hromada was the first on the scene, arriving at approximately 2:06 a.m. 67RP 184-85, 187, 197. While driving through the cul-de-sac looking for the house number, Hromada was stopped by two young men furiously pounding on his car and yelling. 67RP 190-92. Burns and Rafay were almost incoherent, screaming about blood and bodies "everywhere" in the house.[4] 67RP 193-96. Hromada told them to calm down and sit on the curb. 67RP 199-200. The two immediately quieted down, and sat on the curb as directed. 67RP 200-02. They asked no questions during the 15-20 minutes that Hromada waited outside with them, nor did they volunteer that there might be someone still alive in the house.[5] 67RP 205-08.

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[4] In contrast to Burns's breathless call to 911 (Ex. 446) and the defendants' near-incoherent screaming a few minutes later when police arrived, neighbors heard two teenagers conversing relatively calmly in the cul-de-sac outside the Rafay house at around 2:00 a.m.; the neighbors observed the two for about five minutes, until police arrived. 70RP 207-08, 210-14; 71RP 81-85.

[5] Rafay was well aware that his sister was still alive; he later told police that he had heard Basma moaning in her room before he left the house to await the arrival of the police. Ex. 69 at 6-7; Ex. 72 at 65-66; Ex. 78 at 2.

After a few minutes, Hromada turned the two over to Officer Piculell. 67RP 211; 69RP 73. Burns was clutching his stomach in a dramatic way and contorting his face, as if he were in severe pain. 69RP 78. Burns refused medical attention, and rebuffed Piculell's attempts at reassurance. 69RP 79-82. Rafay sat motionless, staring straight ahead, but became "fidgety" when Piculell began to question him. 69RP 82-83. Rafay answered questions about himself and his family, and briefly described his and Burns's activities that evening. 69RP 85-88. Burns ultimately calmed down, and answered similar questions. 69RP 91-95.

Officer Lewis eventually took over, placing Burns and Rafay in the back of his patrol car for about five minutes; the two were quiet and subdued at that point. 77RP 12, 14-16. Eventually, Lewis took a statement from Rafay (Ex. 78), while Officer Deffenbaugh took one from Burns (Ex. 22). 69RP 11, 13-29; 77RP 16-48. After completing the statement, Lewis transported Rafay to an interview room at the Bellevue Police Department, where a second statement was taken by Detectives Bob Thompson and Jeff Gomes (Ex. 69).[6] 77RP 48-49. Deffenbaugh, after taking Burns's

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[6] When police told Rafay that he would have to go to the station and talk to detectives, he seemed startled, and asked more than once why he had to do that. 71RP 205-09.

statement at the scene, transported him to the police station, where a second statement was taken by detectives (Ex. 68). 69RP 21.

Meanwhile, police were discovering a scene of brutal carnage inside the Rafay home. They went first to the upper level of the house. 66RP 108; 67RP 33. Hearing gasping noises, they started down a lighted hallway. 66RP 108, 112-13; 67RP 40-41. The master bedroom was very dark. 66RP 115; 67RP 42-44, 130-31, 133. With the aid of a flashlight, police could see a body on the bed; the head and face were unrecognizable.[7] 66RP 115-16, 119; 67RP 43-45. Later inspection revealed a "massive" deposit of blood spatter on the wall at the head of the bed, to the extent that it actually ran down the wall; there was so much blood that it evaded quantification even by an expert in bloodstain pattern analysis. 81RP 53; 91RP 48; 92RP 134, 148-49; 93RP 39-41. Based on this scene, police initially suspected suicide by shotgun. 66RP 151; 67RP 45, 59-60; 68RP 142.

Police then moved on to Basma's room, the source of the gasping sounds; they found her lying on the floor behind the door, still alive. 66RP 120-23; 67RP 46. There was a hole in the wall

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[7] The medical examiner compared the force used on Tariq Rafay to a bowling ball dropped from several stories high directly into the center of his face. 107RP 90.

behind the door; the drywall had been caved in and a piece of it was hanging. 66RP 150-51. Medics transported Basma, who was bleeding profusely from the head, to Overlake Hospital. 67RP 171-72; 68RP 119-20, 199-200. She died later that day. 107RP 36-38.

When police moved to the downstairs part of the house, they found Sultana Rafay's lifeless body, her bloody head covered by a cloth. 66RP 129-31; 67RP 50-51. In the adjacent bedroom, police found a messy scene, with boxes and other things lying around on the floor. 67RP 51-52.

Police also checked the outside of the house. They noticed that a sliding glass door leading onto a deck, providing a way of entering or leaving the house, was half-way open.[8] 68RP 162-64. There were no signs of forced entry to the house. 66RP 85; 67RP 57; 68RP 114; 92RP 179.

Detective Thompson arrived at the Rafay house at about 5:00 a.m. 98RP 167. Thompson described the scene in Tariq Rafay's room as "horrific" – while he had been to hundreds of crime scenes and seen many dead bodies, "that one will always stick in

[8] This is consistent with Burns's confession, in which he said that they left the Rafay house after the murders through a sliding door upstairs. Ex. 542 at 20-21.

my mind, just because of the violence that was in that scene." 98RP 179-80. Thompson had never seen anything like it before or since. 98RP 183.

ii. The defendants' statements.

In all, police interviewed the defendants three times in the days following the murders: at the scene on the morning of July 13, 1994 (Ex. 22, 78); at the police station later that morning (Ex. 68, 69); and late in the afternoon on July 14th (Ex. 72, 76). In these statements, the defendants gave a narrative of their activities in the days leading up to the murders, including a detailed version of events on the night the Rafay family was murdered.

Rafay told police that his family had moved to their new Bellevue home during the winter of 1993-94, while he was away at Cornell for his freshman year. Ex. 78 at 1. Rafay had visited briefly in late May, after school ended, then spent time in Canada with relatives and friends. Id.; Ex. 69 at 12-16.

Both defendants reported that they had arrived in Bellevue for a visit on Thursday evening, July 7, 1994. Ex. 78 at 1; Ex. 22 at 1. Burns described their activities on Tuesday, July 12th (the day of the murders) in detail, starting from the time they awoke. Ex. 22 at 1. Getting to the evening, Burns said that he took a shower at

about 7:45 or 8:00 p.m., just before they went out. Ex. 22 at 2. Both described going to the Keg Restaurant in Factoria, and then to the Factoria Cinemas for the 9:40 p.m. showing of "The Lion King." Ex. 22 at 2; Ex. 78 at 1-2. Burns gave detailed descriptions of the hostess and the waiter at the Keg. Ex. 22 at 2.

Both defendants said that they went to a restaurant in downtown Seattle after the movie.[9] They arrived at around midnight, and stayed an hour or more. Ex. 22 at 2-3; Ex. 78 at 2. Once again, Burns gave a detailed description of the wait staff they encountered. Ex. 22 at 2-3. The defendants said they left the restaurant for a nearby nightclub, the "Weathered Wall," but arrived just as it was closing. Ex. 22 at 3; Ex. 78 at 2. Burns said that he went back into the restaurant to use the restroom, and then they headed back to the Rafay house, arriving between 1:45 and 2:00 a.m. on July 13, 1994. Ex. 22 at 3; Ex. 78 at 2.

Both defendants reported parking the car in the garage and entering the downstairs level of the house. Ex. 22 at 3; Ex. 78 at 2. The first body they discovered was that of Sultana Rafay, lying in a pool of blood on the floor of the family room. Ex. 22 at 3; Ex. 78 at

[9] Steve's Broiler, a 24-hour restaurant in downtown Seattle. 74RP 197-200; 75RP 15-18.

2. They ran upstairs to Tariq Rafay's room and found him lying in bed, with a large amount of blood on the bed and on the wall behind his head. Ex. 22 at 4; Ex. 78 at 2. Rafay reported hearing his sister, Basma, moaning in her room. Ex. 78 at 2.

Rafay took the time to notice a number of things in addition to the bloodied bodies of his parents and the cries of his wounded sister. He reported that boxes had been moved and opened in the downstairs bedroom where Burns had been staying. Ex. 78 at 2. He noticed that someone had moved things around in his own room, and he believed that his stereo and "Discman" CD player were missing. Id. at 3. He also noticed that the cabinet under the television was open and the VCR was missing. Id.

After Burns called 911, the two went out the front door and waited for police in the driveway. Ex. 22 at 4; Ex. 78 at 2.

In his statement later that morning, Burns added some details about their activities of the previous evening. He said that he and Rafay "chatted with the staff" at the movie theater, and he described some technical problems that kept the curtain from opening at the beginning of the movie. Ex. 68 at 2-3. He reported what he had eaten at the restaurant in Seattle, and gave additional details about the waitresses. Id. at 3. In spite of the fact that

neither he nor Rafay was wearing a watch, Burns seemed fairly certain about the times associated with each activity. Id. at 4, 2-4.

Rafay, in his second statement that morning, also gave additional details about their activities of the day before, including visits to Barnes & Noble, Safeway and Silver Platters. Ex. 69 at 1-2. They returned home at about 5:30-6:30 p.m., and had dinner with the Rafay family. Id. at 2. They left at around 8:30 p.m. to go to the Keg, where they ate again. Id. at 3. After the movie, they went to another restaurant in Seattle. Id. at 4.

Rafay said that, after finding his mother dead on the floor, and before going upstairs to check on his other family members, he and Burns went into the guest room downstairs and noticed that "everything was upturned." Id. at 6. Rafay then went into his father's room, saw the blood on the wall, and "freak[ed] out." Id. at 7. He could hear his sister moaning, but he "didn't wanna hear that," so he "just ran." Id. When pressed for further details about what he did in the house, Rafay repeatedly said that he didn't know or couldn't remember. Id. at 8, 9, 10, 11.

Detectives were struck by several things in these initial statements. First of all, there was Rafay's reaction to seeing his mother lying on the floor. He did not roll her over, or shake her, or

attempt to see what was wrong – he just said she was dead. 98RP 194-95. Similarly, seeing blood in his father's bedroom, he did not call out or run up to his father. 98RP 195. He heard his sister moaning, but never went in to check on her. 98RP 195-96. In spite of the carnage, he somehow noticed that his Walkman (Discman) was missing. 98RP 197. And he showed no emotion, even when detectives expressed empathy with his situation. 99RP 54-58.

As to Burns, Detective Thompson was surprised by his statement that he could see blood on Tariq Rafay's head from the doorway; Thompson had just been in Tariq's bedroom, and even at 5:00 a.m., when it was already starting to get light, it was dark in there. 99RP 68-69. In addition, both Burns and Rafay were quite detailed as to the times of their activities on the previous evening, even though neither wore a watch. 99RP 66-67. While Burns had said that he was afraid the killer might still be in the house, he went no farther than the end of a very short driveway to sit down and wait for police. 99RP 70. And Burns seemed "put out" by having to talk to the police. 99RP 75-76.

Detectives Thompson and Gomes decided they needed to talk to Burns and Rafay again. 90RP 95-96; 99RP 79-80. The detectives went to the Bellevue Motel at around 3:00 p.m. on

Thursday, July 14th, but the defendants were not there.[10] 90RP 96; 99RP 101. Acting on a hunch, they found them at a nearby Barnes & Noble bookstore. 90RP 97-98; 99RP 101-02. When the detectives said that they wanted to talk to each one individually, Burns reached toward Rafay and said, "We'll go together," but the detectives would not allow that. 90RP 101-02; 99RP 102-04.

They started with Rafay, sitting down at a picnic table in a nearby park. 90RP 100; 99RP 104-05. When asked what he and Burns did in the days following their arrival in Bellevue on Thursday night, July 8th, Rafay mentioned a mall and a lot of time watching television, but said that "all the days seem to be blur[re]d." Ex. 72 at 4-5. They stayed up late and slept late. Id. at 7. They ate pizza and "cruised around"; the days were "a mis[h]mash." Id. at 9, 12.

On Sunday or Monday they drove to Vancouver. Id. at 12. They stopped at Burns's house, picking up his bank book and a shirt. Id. They stopped to eat, and then headed back; Rafay denied seeing any friends, saying that there wasn't time. Id. at 13.

When pressed for further details of their stay in Bellevue, Rafay was vague: "Maybe we just hung out, we may have even

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[10] Since the Rafay home was a crime scene, Bellevue Police had rented a room for Burns and Rafay at the Bellevue Motel. 72RP 42-43.

gone for a drive or something, or, but I don't remember anything specific. I just don't remember. We, we, I guess we, I guess we wasted insane amounts of time just hanging around and eating food and lying around." Id. at 15-16.

By contrast, Rafay was clear on their activities on Tuesday, right before the murders. He mentioned Silver Platters, Barnes & Noble, Safeway, and a Mitsubishi dealer. Id. at 16-17. They ate dinner at home, went to the Keg, and then to "The Lion King." Id. at 18-20. Rafay described the waiter at the Keg, and he knew what they ate there. Id. at 22-23. He described their time at the movie theater in great detail, including how they ran up and tried to pull back the curtains when they were stuck. Id. at 25-29. When asked, Rafay described the movie's ending.[11] Id. at 29.

Rafay also knew exactly where they parked at the restaurant in Seattle, where they sat and what they ate; he described the waitresses in great detail. Id. at 31-37. After finding a nearby nightclub closed, they drove straight home. Id. at 38-40.

When asked what he did and said once inside the house, Rafay's answers were rife with "I don't know" and "I can't [or don't]

[11] "The Lion King" had been released in Seattle and Vancouver, British Columbia on June 24, 1994, three weeks before the murders. 112RP 84-85; Ex. 498.

remember." Id. at 41-85. He did report seeing the bloodstain on the wall in his father's bedroom, even though the light was off and he did not go very far into the room. Id. at 54, 57. He admitted that he never liked his sister, and that he found her "gross." Id. at 69.

When asked why anyone would want to kill his parents, Rafay recalled his mother talking about "enemies of the family" from the Shiite religious sect.[12] Id. at 87. When confronted with the fact that he had made no attempt to notify any relatives about the murders, but was instead sitting around with Burns reading magazines,[13] Rafay reacted defensively, claiming he felt insulted. Id. at 91-94. When asked whether Burns might have done the killing, Rafay responded, "Never in a million years." Id. at 96.

At the conclusion of the interview, Thompson and Gomes drove Rafay back to the motel. 99RP 214. Returning to the bookstore, the detectives found Burns upset that he had been kept waiting so long. 95RP 24-25; 99RP 225-26; Ex. 76 at 1. As with Rafay, they interviewed Burns in the park. 95RP 26; 99RP 226.

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[12] Rafay had previously told police that he could not think of any enemies of his family, either in the U.S. or in Pakistan. Ex. 78 at 3.

[13] Rafay also rented videos using his father's Blockbuster card during their stay in the motel. 76.5RP 18-19; 101RP 222-26.

When asked what they did in the first days of their visit, Burns, like Rafay, mostly could not remember. Ex. 76 at 4-5, 7-8. Like Rafay, Burns did recall the trip to Vancouver. Id. at 8-11. Contrary to Rafay's statement, however, Burns reported visiting Jimmy Miyoshi at Miyoshi's workplace. Id. at 10.

Burns recited much of the same details of their activities on the day of the murders as Rafay had. Id. at 11-15, 18-25. Burns said that he had showered in the downstairs bathroom before they went out that evening. Id. at 15-16. But when it came to what they did when they returned to the Rafay home after the evening's activities, Burns, like Rafay, responded to many questions with "I don't remember" or "I don't know." Id. at 27-38. Burns said that he could see blood on Tariq Rafay's face and on the wall, although the bedroom was dark and Burns did not go past the doorway. Id. at 32-33. Burns had no idea who might have done this. Id. at 39-40.

After the interview, the detectives took Burns back to the motel. 95RP 35; 100RP 166-67. Having learned from Rafay that the room had no telephone, they arranged to have one put in. Ex. 72 at 92; 95RP 19-21, 35.

iii. Flight to Canada.[14]

On Friday morning, July 15th, at about 11:30 a.m., Detective Gomes went to the Bellevue Motel and found the defendants gone. 95RP 43-45. At about noon on the same day, some of Rafay's family members arrived at the motel, also looking without success for the defendants.[15] 95RP 45; 100RP 174. Gomes contacted Canadian Customs to determine whether the two had crossed the border into Canada.[16] 95RP 49-50. Gomes was notified at 2:10 on Friday afternoon that Burns and Rafay had in fact entered Canada.[17] 95RP 52-53.

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[14] While the defendants characterize their actions as simply a return "home" (BOA (Burns) at 21; BOA (Rafay) at 29), the Supreme Court of Canada saw it differently: "We accept that when the respondents are in British Columbia they are 'at home.' They are also using 'home' as a safe haven. A murderer who flees the scene of a crime across an international boundary is seeking a 'safe haven' irrespective of whether he or she holds citizenship in the state from which flight commenced, or in the destination state, or in neither." CP 848.

[15] Detective Thompson had learned only that morning that members of the Rafay family were in town and planned the funeral for that day. 100RP 169.

[16] Detective Gomes was unaware at this point that Lieutenant Mott had received a call from the Canadian Consulate inquiring whether the defendants were being held in custody, or were free to leave. 95RP 51-52; 72RP 193-95.

[17] The Canadian Customs Inspector later described Burns and Rafay as "very pale, very nervous." 77RP 153.

The funeral for the murdered Rafays was held on Friday, July 15, 1994 at 1:30 p.m. at a mosque in the Northgate area of Seattle. 98RP 45-48. Close to 500 people attended. 98RP 59-60. Burns and Rafay did not. 89RP 156-57; 98RP 60; 100RP 174-75.

Within a month of their return to Canada, the defendants, along with their friends Jimmy Miyoshi and Robin Puga, moved into a house at 2021 Philip Avenue in North Vancouver. 104RP 185-86; 108RP 144.

c. The Bellevue Investigation.

In the immediate aftermath of the murders, Bellevue Police canvassed the neighborhood. 71RP 191-92; 73RP 33-34, 78. Julie Rackley, whose house was just to the northeast of the Rafays', reported hearing hammering sounds, as if someone were putting up pictures, on the evening of July 12th. 70RP 91. Rackley was unable to pinpoint where the sounds were coming from. 70RP 92. After trying to recreate her activities of the evening, Rackley's best estimate of the time she heard the sounds was between 9:45 and 10:15 p.m. 70RP 101.

Mark Sidell, another near neighbor of the Rafays, heard what he described as hollow pounding sounds on that evening; at

the time, he attributed the sounds to someone unpacking boxes.[18] 71RP 65-66. Sidell's best estimate of the time was between 9:10 and 9:20 p.m. 71RP 66. Sidell's wife, Judy, was inside watching a movie with the windows open; she heard no hammering or banging sounds up until 11:30 p.m., when she fell asleep. 70RP 206.

Detectives collected a mountain of evidence from the Rafay residence. Among the most significant items were blood and hair from the downstairs shower. Eleven hairs were collected from the floor of the shower stall; they were dispersed in a circular pattern, between 6 and 18 inches from the drain. 80RP 70-71. In 1995, a forensic serologist, Dr. Edward Blake, was able to link one of those hairs to Burns with a high degree of certainty. 112RP 132-33. In 2001, using more sophisticated DNA technology, Dr. Blake was able to link two additional hairs to Burns. 113RP 5, 8-18.

Blood evidence pointed to the murderer having showered downstairs.[19] Sprayed with Leucomalachite Green, a reagent that turns green when it comes in contact with blood, the wall on which

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[18] In a later attempt to recreate the sounds, detectives hit the walls of the Rafay home with a piece of pipe, a hammer, and an aluminum baseball bat while the witnesses listened from their homes. Both Rackley and Mark Sidell identified the bat as the likely source of the sounds they had heard. 95RP 69-70.

[19] This is consistent with Burns's confession, in which he said that he had showered after the murders to clean the blood off himself and the baseball bat he used to kill the Rafays. Ex. 542 at 28, 47.

the shower head was located "lit up" as if "turning on a Christmas tree." 91RP 102-03, 171. An evidence technician collected some samples. 80RP 55-56, 73-89. These blood samples were linked through DNA analysis to Tariq Rafay. 94RP 73-74; 113RP 20-30.

The blood spatter in the shower was not consistent with a person simply leaning into the shower to wash off an implement, because the small amount of blood on the back wall indicated that something was blocking the spatter of water and blood onto that wall; it is likely that a person in the shower created the spatter pattern. 91RP 9-14; 92RP 95, 98; 94RP 73. The evidence in Tariq's room and, to a lesser extent, Basma's, led to the conclusion that whoever wielded the weapon would have gotten a significant amount of blood on himself. 92RP 95-96; 93RP 193-94.

Not surprisingly, many of the latent prints found in the Rafay home belonged to various members of the Rafay family, including Atif Rafay, and to Sebastian Burns, who had been staying in the house for days. 84RP 97-98, 124-72. The fingerprint examiner, Carl Nicoll, focused particular attention on the overturned boxes in the downstairs bedroom, because the call had come in as a burglary. 85RP 14, 24, 28, 45-46. Nicoll discovered a set of three prints on the inside lip of the lid of one of these boxes. 85RP 24,

46, 52-53. One of the prints was from a right index finger; based on the orientation of the other two, it was likely that they represented the middle and ring fingers of the same person. 85RP 57-58. The index finger belonged to Sebastian Burns. 85RP 60. The box was tipped over and its contents spilled toward the floor; the prints could not have been left there when the box was closed.[20] 85RP 63-67.

Ninhydrin, the chemical Nicoll used to develop the latent prints on the porous surfaces of the boxes, reacts primarily to amino acids, a component of perspiration. 85RP 10. The process is generally a slow one, and most of the fingerprints on the boxes took three days to develop fully. 85RP 69-70. Burns's prints were the exception, however; they developed at a speed unlike anything Nicoll had seen in his 32-year career. 85RP 70-72. This indicated a substantial deposit of perspiration on those prints. 85RP 71.

Additional evidence was consistent with the defendants' confessions.[21] An expert in crime scene analysis concluded that the likely order of the killings was Sultana, then Tariq, then Basma. 94RP 64-66. The fact that Tariq's blood was found in Basma's

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[20] This is consistent with Burns's confession, in which he said that they moved things around to simulate a break-in. Ex. 543 at 18.

[21] These confessions are set out in detail in §§ B.2.d.viii and ix, infra.

room made it a virtual certainty that the father was killed before his daughter. 94RP 23-26; 113RP 51-55. Burns, in describing the murders to an undercover RCMP[22] officer, said that he killed "the mother" first, "[t]hen the dad and then the sister." Ex. 542 at 31-32.

It appeared that Sultana and Tariq moved little if at all during the attacks on them. 92RP 184, 187; 93RP 37. Basma, however, was a very different story. Evidence at the scene showed that she was in motion during the attack. 94RP 29, 32, 36, 42-43, 56-57, 59-60. Basma had serious injuries on her arms and hands that showed how vigorously she had tried to defend herself. 107RP 161-63. When an undercover RCMP officer asked if any of the victims had fought back, Burns responded, "Well, [t]hat's a story that hasn't really been told . . . ." Ex. 543 at 40. As Burns and Rafay both laughed, Burns described how Basma was "standing up and walkin' around," and thus "took a little more bat work." Id.

The medical examiner concluded that the blunt-force injuries sustained by all three of the Rafays were consistent with a baseball bat. 107RP 47, 66, 82, 90-92, 141-42. Fragments recovered from indentations in the wall of Basma's room indicated that the damage

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[22] Royal Canadian Mounted Police. 108RP 103.

was likely caused by a metal baseball bat. 88RP 5-28. Burns told an undercover RCMP officer that he used a metal baseball bat to murder the Rafays. Ex. 542 at 20, 53.

Spraying the carpet in Tariq's and Basma's rooms and the hallway outside those rooms with a chemical to detect blood, investigators observed "soft, curved patterns" consistent with a shoeless foot. 91RP 118-22, 134-47; 93RP 153. Burns told an undercover RCMP officer that he committed the murders wearing only his underwear. Ex. 542 at 28-29; 99RP 127.

The evidence on the east wall of Tariq's room cast some uncertainty on where the attacker stood while wielding the murder weapon, and how many persons may have been in the room during the attack. The east wall contained a sliding glass door. 91RP 49. The head of the bed was against the south wall. 91RP 55. The entry to the bedroom, and thus the approach to the bed, was from the west. 91RP 68.

While the majority of the blood was deposited on the wall above the head of the bed, there was some blood spatter on the east wall next to the bed. 91RP 48-49, 87-88. There was an area on that wall, extending 62 inches up from the floor and about 24 inches wide, that appeared to be devoid of blood spatter. 91RP 88-

89. Crime scene analyst Kay Sweeney concluded that something, most likely a person, had blocked the blood spatter. 91RP 90.

Based on this void, and on a pillow found on the east side of the bed that crime scene analyst Ross Gardner believed had been moved off the bed during the attack, Gardner hypothesized that there was a second person on the east side of the bed while the attacker directed blows at Tariq from the west side. 93RP 64-68, 119-21, 183. Gardner acknowledged, however, that he could not exclude the possibility that the attacker struck blows from the west side of the bed, then walked around to the east side and moved the pillow while striking additional blows; he simply did not find that "logical." 93RP 120-21.

There was in fact evidence that the killer had delivered blows from the east side of the bed. Sweeney had observed a circular deposit of apparent blood, approximately the size of a baseball bat, on the carpet in that area; using a different technique, Gardner observed two contact marks on the east side of the bed that he believed represented a weapon in contact with the floor. 91RP 91-92; 93RP 153, 155-56. Sweeney also noted a cast-off pattern of blood extending across the east wall and onto the ceiling that was

consistent with a person standing on the east side of the bed and swinging a bat right-handed. 91RP 93.

Based on the defendants' statements, it is likely that only Burns was present in Tariq's bedroom when Tariq was murdered; both Burns's and Rafay's confessions indicated that Rafay played little active role in the murders, and watched only the murder of his mother. Ex. 542 at 18, 31; Ex. 543 at 39, 40. Neither defendant ever mentioned the participation of a third party, and both indicated that Miyoshi was not present. Ex. 542 at 32-33; Ex. 543 at 51.

Several pieces of evidence could not be tied to any of the known players with certainty. Two small blood stains from the garage floor contained sufficient DNA for Dr. Blake to develop a genetic profile. 113RP 58-60. While one was compatible with Tariq Rafay, the other contained a mixture of male and female DNA from at least three persons not previously connected with the Rafay home through any other evidence. 113RP 61-62. Blake explained that myriad biological material ended up on floors as a result of talking, expectorating, etc. 113RP 63. There was no way to know when this material was deposited on the garage floor. 113RP 64.

In addition, a hair recovered from the sheet on Tariq Rafay's bed could be attributed only to an unknown male. 113RP 9-10.

Two cigarette butts found in the Rafays' back yard almost six weeks after the murders could be attributed only to a different unknown male. 83RP 67, 75-76; 113RP 10.

d. The Canadian Investigation.

Over the course of approximately three months, the Royal Canadian Mounted Police ("RCMP") conducted an undercover operation into the murders. The investigation culminated in Burns and Rafay describing to undercover officers how and why they killed the Rafay family.

i. The RCMP decides to investigate.

In early January 1995, a sergeant with the RCMP's Serious Crimes Unit, having learned of the Rafay murders through the media, contacted the Bellevue Police to offer assistance. 101RP 26-27. On January 11, 1995, Bellevue detectives met with RCMP investigators in Vancouver, British Columbia, and shared information about the investigation. 101RP 27-30; 108RP 107-08. The Bellevue Police asked the RCMP's assistance in obtaining financial records, as well as DNA, blood, and hair samples from the defendants. 108RP 107-14; 113RP 131-32. After this meeting, the RCMP agreed to help the Bellevue Police; they also decided to undertake their own investigation ("Project Estate") because it

appeared that the murders had been planned in Canada. 108RP 115-17; 109RP 158; 113RP 133; 114RP 43.

An RCMP unit called "Special O" was responsible for surveillance. 108RP 119. Members of this unit obtained the requested DNA samples by recovering a napkin and straw used by Burns, and cigarette butts discarded by Rafay. 101RP 34-36; 108RP 125-29.

The RCMP also obtained judicial authorization to intercept the defendants' private communications. 108RP 133-34, 143-47. The RCMP installed listening devices in their residence at 2021 Phillip Avenue ("Channel 34") and in their Honda Accord, and arranged to record telephone calls made to and from the residence ("Channel 35"). 108RP 148-54; 113RP 134-35, 147-53; 114RP 62; 123RP 52. In a monitoring room, an RCMP employee listened to the calls and prepared summaries of them.[23] 108RP 155-57.

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[23] In their briefs, the defendants point out that they were never overheard discussing the murders. BOA (Burns) at 38; BOA (Rafay) at 46-47. However, they were careful in their conversations in the residence and over the telephone because they believed (correctly, as it turns out) that their house and telephone were tapped. At trial, Burns admitted that he believed that the house was wire-tapped and that he and Rafay would go elsewhere if they wished to talk about anything sensitive. 143RP 151-52; see also Ex. 540 (transcript 1) at 21-22 (possibility phone tapped); Ex. 541 at 78-79 (phone tapped and house bugged); 132RP 14-15 (house bugged).

By April 1995, the RCMP decided to launch an undercover operation. Inspector Doug Henderson was responsible for directing the investigation; Sergeant Al Haslett and Corporal Gary Shinkaruk acted as the primary undercover operators, posing as members of a criminal organization. 115RP 13-22; 122RP 103. Haslett, whom Burns and Rafay knew only as "Al," was the apparent head of the organization; Shinkaruk, or "Gary," worked for "Al." 127RP 120.

Haslett and Shinkaruk initially were told very little about the Bellevue homicides, but as the undercover operation proceeded, they learned more as events warranted. 123RP 45, 54-56; 127RP 40-42. The RCMP referred to each meeting between an undercover operator and a target as a "scenario." 108RP 168. The RCMP conducted a total of 12 scenarios with the defendants. 115RP 27-28; Ex. 501.

ii. The first meeting with Burns.

On April 10, 1995, the RCMP intercepted a telephone call reminding Burns that he had a hair appointment the next day in downtown Vancouver. 108RP 173-74; 123RP 51. They decided to have Shinkaruk contact Burns outside the salon. 123RP 49-51.

The next day, when Burns exited the hair salon, Shinkaruk approached, claimed that he had locked himself out of his car, and

asked Burns for a ride to the Bayshore Hotel so that he could retrieve an extra set of keys. 123RP 71-74. Burns agreed. 123RP 76. When they arrived at the Bayshore, Shinkaruk suggested that Burns have a beer in the hotel lounge while Shinkaruk got his extra set of keys. 123RP 83-84. Shinkaruk then joined Burns in the lounge, and the two talked. 123RP 87-91. Burns said that he was making a film, and that he needed $200,000 and was looking for investors. 123RP 88-89. Shinkaruk offered to introduce Burns to "Al," who might be willing to make an investment. 123RP 89.

Shinkaruk and Burns headed to a pub in Richmond where "Al" was already waiting. 123RP 93-94; 127RP 46. At the pub, Haslett talked with Burns for approximately two hours. 123RP 101; 127RP 58. During their conversation, Haslett asked Burns if he would like to earn extra money, and Burns responded positively. 127RP 54. Haslett indicated that Burns would have to do things with Shinkaruk from time to time. 127RP 54. Burns provided his telephone number and suggested that Haslett could communicate by leaving messages on Burns's answering machine. Haslett warned Burns that any message left should be erased and that Burns should not tell his friends about Haslett. 127RP 55-61.

iii. The stolen car scenario in Whistler.

During the first meeting with Burns, Haslett said nothing to directly convey that either he or Shinkaruk was involved in criminal activity. 127RP 50. In the next meeting, the RCMP sought to make the criminal connection clear. 127RP 65. They planted a rental car in Whistler that had been rigged so that the ignition could be pulled out to make the car appear stolen. 123RP 127-28, 138; 127RP 66-71. Because the rental car, a Crown Victoria, looked like a police vehicle, the RCMP added a child car seat to make it look like a family car. 115RP 52-53; 127RP 69.

On April 13, 1995, Haslett called Burns and asked him what he was doing. 127RP 71-73. A short time later, Shinkaruk picked Burns up and they drove to Whistler. 123RP 147. On the way, Burns talked at length about movies, boasted that he and his friends were among the smartest people in the world, and declared that he had no use for people of lesser intelligence. 123RP 147-49.

After arriving at Whistler, Burns misunderstood a comment that Shinkaruk made, thinking it was a reference to the Bellevue homicides. 123RP 150-52; Ex. 546 at 70-71. Burns responded that if he or his friends went to the United States, the police would arrest them and try to get bodily samples from them. 123RP 150-

52. Because the murders had not previously been discussed, Shinkaruk pretended that he did not understand Burns's comment. 123RP 152.

Shinkaruk and Burns met with Haslett at a Whistler pub. 127RP 77-79. Shinkaruk excused himself, and Haslett explained that he wanted Burns to drive a stolen car back to Vancouver. 127RP 77-84. Burns turned pale, expressed concern about the plan, and discussed how he should react if police stopped him. 123RP 157-58; 127RP 85-88. When Shinkaruk returned, Burns asked whether he had gloves; Shinkaruk replied that he did not, and gave Burns a can of air freshener, claiming that it could be used to eliminate fingerprints. 123RP 158; 145RP 137-38. Burns was dissatisfied with this suggestion, and bought gloves from a nearby ski store. 123RP 158-59; 145RP 138-39. Shinkaruk retrieved the rental car, made it appear stolen, and turned it over to Burns. 123RP 160. Burns then drove the car to Vancouver with Shinkaruk ahead of him in another car. 123RP 162-63.

After dropping off the stolen car, Burns and Shinkaruk met Haslett at a downtown restaurant. 123RP 162-66. Burns was unhappy. He expressed concern about what would have happened had he been stopped, and complained that he had not been told

what was happening until the last minute. 127RP 94-95. When Haslett paid Burns $200 for driving the "stolen" car, Burns complained: "That's a $40,000 car and I get $200?" 127RP 98-99. Burns said that he would not take that risk again for $200, and described how he was able to make that much money by shoplifting videos and re-circulating ski tags. 123RP 170-71; 127RP 100-02. Burns insisted that when he stole an item, he and his friends planned it out perfectly and never got caught. 127RP 101-02.

Burns told Haslett that he and his friends wanted to make big money. 123RP 170-71; 127RP 102. He said they had thought about stealing cars, but did not know how to dispose of them. 127RP 102. Burns also suggested that he could sell ecstasy, but he did not know how to make it. 123RP 170-71; 127RP 102. Burns then asked Haslett about obtaining a stolen car, and Haslett responded that he could arrange to get one for Burns. 127RP 104.

Haslett left the pub, and Burns and Shinkaruk continued to talk. 123RP 172-88. Burns reiterated that he was upset that he was not told of the plans in advance, explaining that he wanted to be involved in the planning in order to ensure that there was no chance of getting caught. 123RP 172. Burns repeated that he was not happy with getting only $200 and reminded Shinkaruk that he

wanted $200,000. 123RP 179. Shinkaruk advised Burns to be patient, explaining that Haslett would naturally start Burns out on small jobs. 123RP 180.

Burns stated that he was frustrated because he was different from other people. 123RP 180. Before he did anything, he and his friends planned it out to eliminate any risk of getting caught. 123RP 180-81. Burns explained that he trusted his friends with his life because they had done things together that they would not do unless each knew the others would never tell the police. 123RP 181-82. When Shinkaruk asked Burns what he meant, Burns smiled and replied that it did not matter, and that they would do anything if the price was right and they thought they could get away with it. 123RP 182.

Burns volunteered that he was capable of being a "hit man" and asked how much he could get for killing someone. 123RP 182, 184. Shinkaruk responded that it depended on whom he killed. 123RP 184. Burns also expressed an interest in making $50,000 by selling cocaine, and Shinkaruk replied that it would be a while before Burns was trusted with that much cocaine. 123RP 184. Shinkaruk then decided to shut the evening down and dropped Burns off. 123RP 185-88.

iv. The meeting with Burns at the Four Seasons Hotel.

Several weeks passed before the next contact between Burns and the undercover operators. Because Burns had been unimpressed with the $200 he received and had expressed a desire for a large amount of money, the RCMP decided to demonstrate at the next meeting that Haslett had access to significant sums of money. 115RP 63-63; 127RP 108, 117. They also wanted to communicate that murder was "no big deal" for them. 127RP 108.

On May 1, 1995, after trading phone messages for several days, Burns and Shinkaruk made plans to get together in a few days. 124RP 18-38, 52-53; Ex. 549 (intercepted call on May 1, 1995 at 1:36 a.m.). On May 5th, Burns was heard explaining to Rafay and Miyoshi that he had better get a call from Gary. 124RP 84-89; Ex. 549 (interception on May 5, 1995 at 6:15 a.m.). When Miyoshi commented, "fuck Gary," Burns responded that he wanted a car and that he wanted to keep in touch. Ex. 549 (interception on May 5, 1995 at 6:15 a.m.).

On May 6, 1995, Shinkaruk met Burns in the town of Burnaby, just outside Vancouver. A female undercover operator,

Chris Wozney, posed as Shinkaruk's girlfriend. 124RP 59-60; 129RP 66-70. With Wozney sitting in Burns's lap, Shinkaruk drove them in a Corvette to the Four Seasons Hotel in Vancouver. 124RP 60-61, 79; 129RP 73-77. After arriving at the hotel, Shinkaruk gave Wozney a wad of hundred-dollar bills, and she left. 124RP 60-61; 129RP 77. Burns and Shinkaruk went up to a room and waited for Haslett. 124RP 61. This room was bugged and the conversations were tape-recorded. 115RP 70-71.

While Burns and Shinkaruk waited in the room, RCMP undercover operator Scott Doran, dressed as a biker, arrived, displayed two guns, and left a large amount of money. 124RP 62-64, 102; 127RP 8-20; Ex. 546 at 7-17.[24] After Doran left, Burns told Shinkaruk that things were complicated for him because he was under investigation for a fairly serious offense. Ex. 546 at 23. Burns explained that he had been anxious about the stolen car in Whistler because if he had been caught, it could have caused the investigation to flare up. Id. at 23-24. In response, Shinkaruk explained that Al knew the person whose car they had stolen and that this individual would never have pursued charges even if the

[24] The audiotape was admitted as Exhibit 507. The jury was provided with a transcript of the recording, designated as Exhibit 546. References are to page numbers in Exhibit 546.

police had stopped Burns. Id. at 25-26. Shinkaruk told Burns that he had done time for "toasting" a guy, but when it came time to go to court, Haslett made sure that the person who could "finger" him was no longer around. Id. at 27.

Burns then explained to Shinkaruk that he and his friend had come home one night and found his friend's parents murdered. Id. at 30. Burns complained that the police had hassled them to the point where they were named as suspects, and that the sale of the house was held up for half a year. Id. Burns explained that the police had failed to take skin or blood samples from him, but they now wanted them. Id. at 32.

Burns stated that he assumed that Haslett and Shinkaruk were into cars, guns, drugs and maybe murder. Id. at 39. While Burns claimed that he now had funding for his movie and that he was busy with producing it, he said that he was still interested in opportunities that were easy and worthwhile, and he inquired about money laundering and selling drugs. Id. at 45-46. Shinkaruk asked how his conscience could handle it; Burns replied that his conscience "is not the issue." Id. at 46. "[L]et me put it this way . . . if you said to me . . . there's . . . some guy who we know, who screwed us around, umm, and, we'd like you to go and shoot him . .

. in no way would I have any dilemma about this." Id. Burns explained that the only reason he would not take the job would be concerns about his shooting ability, but that he would not "feel bad about it afterwards." Id. at 46-47. "I guess what I'm saying is that, anything goes." Id. at 47.

After Haslett arrived, and Burns and Shinkaruk finished counting the money left by Doran, Shinkaruk left, leaving Haslett and Burns alone to talk. Id. at 53-60. Haslett asked Burns about his reaction to the car theft in Whistler, and Burns explained that his concern was due to his status as a suspect in a triple homicide. Id. at 60-62. As they discussed the murders, Haslett asked Burns whether Burns could trust his friends, and Burns insisted that they would never betray him. Id. at 63. When Haslett asked Burns to talk about the homicides, Burns resisted, asking Haslett why he wanted to know. Id. at 65.

During the course of the conversation, Burns repeatedly indicated that he was busy with his movie and did not have much time to work for Haslett in the upcoming months. Id. at 66, 69-70. Burns kept the door open, however, stating he was available if there was a "groovy opportunity," and insisting that he wanted to continue their relationship. Id.

During the conversation, Burns suggested that he wanted to blow up a Bellevue Police Department building or have a clerical person take care of some things on the inside. Id. at 78-79. Haslett responded that he had "people in different places that can do a lot of things," and offered to do some checking around for Burns. Id. at 79-80. Burns encouraged Haslett to do so, stating that he would not mind "knowing what's going on." Id. at 80.

During the course of their conversation, Haslett repeatedly told Burns that he believed Burns had committed the murders. Id. at 94-96. Burns responded indirectly: "Well that's up to you but uh, I'm curious about uh, finding out anything, that, uh, I need to know." Id. at 94. Burns indicated that he was willing to pay to have any evidence linking him to the murders destroyed. Id. at 102. He suggested that Bellevue police might be fabricating evidence against him. Id. at 141. When Haslett asked Burns why he committed the murders, Burns replied that "you know as much as I do.... there's nothing I can say that can help you . . . ." Id. at 142.

Before the next encounter with Burns, the RCMP became concerned that the undercover operation had been compromised. On May 13, 1995, a local newspaper had published an article about a similar undercover RCMP operation where an officer had posed

as a member of an organized crime group. 109RP 156-58. The next day, the RCMP intercepted a conversation in Burns and Rafay's residence where they could be heard discussing this article; someone commented that it sounded like Al and Gary. 109RP 157-60; 115RP 84-85; 130RP 17-32; 139RP 11-12; Ex. 549 (intercepted call on May 14, 1995 at 11:02 p.m.). After hearing these comments, there was debate within the RCMP about whether they should shut down the undercover operation. 139RP 12-14.

After waiting a few weeks, Shinkaruk called Burns on May 29, 1995, attempting to detect whether Burns was suspicious. 115RP 86-87; 129RP 106-07; 139RP 16-17. When Shinkaruk called, Burns stated that he was glad to hear from him and that he was free to get together. 130RP 37-48; Ex. 549 (intercepted call on May 29, 1995 at 6:16 p.m.). Shinkaruk told Burns that he would call the next day to set things up. Id. Immediately after the call, Burns could be heard in a jovial mood, singing about happiness.[25] 130RP 48; Ex. 549 (intercepted on May 29, 1995 at 6:18 p.m.). The RCMP concluded that the undercover operators were not compromised, and continued the operation. 139RP 16-18.

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[25] At trial Burns insisted that, by this date, he was afraid of the RCMP undercover operators. 143RP 141-48.

The next day, Shinkaruk called Burns and told him that Haslett was busy and nothing was going on that day. 129RP 109; Ex. 549 (intercepted call on May 30, 1995 at 7:44 p.m.).[26] Burns expressed disappointment, suggesting that they could meet the next day and stating that he was waiting with bated breath. Ex. 549 (intercepted call on May 30, 1995 at 7:44 p.m.).

v. The first money laundering scenario with Burns and Miyoshi.

In formulating the next scenario, the RCMP incorporated Burns's expressed interests. On May 6th, Burns had raised the subject of money laundering; the RCMP decided to follow up on it because it was a relatively risk-free crime that would attract Burns. 125RP 13-16. Burns had also suggested he was interested in destroying evidence that the Bellevue Police had collected, and the RCMP decided to pursue this as well. 115RP 78; 129RP 13-14. The RCMP also realized there had to be some reason why Haslett would appear willing to help Burns; they decided to develop the notion that Haslett was interested in Burns's computer skills. 115RP 81; 126RP 79-80; 129RP 44.

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[26] The RCMP called off the meeting to throw off Burns, thinking that if he suspected they were the police, he would not expect that they would set up and then cancel a meeting with him. 129RP 110; 139RP 18-19.

On June 13, 1995, Shinkaruk called Burns, asked if he was "up for making some coin," invited him to come to Victoria, and suggested that he bring along someone he trusted. 130RP 67, 77-78; Ex. 549 (intercepted call on June 13, 1995, at 6:39 p.m.). After Shinkaruk called and provided Burns with instructions to meet at the Royal Scott Hotel,[27] Burns and Miyoshi talked about Shinkaruk and Haslett. Miyoshi asked Burns whether they respected him, and Burns replied that their job was to pick young guys to do their dirty work. 130RP 81-82; Ex. 549 (interception on June 14, 1995, beginning at 9:07 p.m.). During this conversation, Burns expressed no fear of Haslett or Shinkaruk.

On June 15, 1995, Burns and Miyoshi met Haslett and Shinkaruk at a room in the Royal Scott Hotel. 130RP 73-74, 82. The room was bugged to record the conversation. 130RP 68, 86; Ex. 540.[28] Haslett explained the money laundering scheme and provided a bag of money. 130RP 83-85; Ex. 540 (transcript 1) at 12-15.

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[27] Ex. 549 (intercepted call on June 14, 1995, at 9:50 p.m.).

[28] The audiotape was admitted as Exhibit 508. The jury was provided with five transcripts of the recording, designated as Exhibit 540. References are to page numbers in Exhibit 540.

Burns asked Haslett whether he had done his "homework," referring to his promise to check on the status of the murder investigation in Bellevue. Haslett told Burns that they would talk about it later. 130RP 88; Ex. 540 (transcript 1) at 20. Burns then expressed concern about Shinkaruk's reference to "making some coin" during their telephone conversation. Ex. 540 (transcript 1) at 21. He warned Shinkaruk and Haslett to be careful talking to him over the phone because he believed that his phone was tapped and anything they said could be used in court. Id. at 21-22.

Shinkaruk drove Burns and Miyoshi to the various banks where they carried out the "money laundering." 130RP 97-98. There was a transmitter in the car so that officers could overhear their conversations. 130RP 89. At one point Shinkaruk briefly left the car, and Burns told Miyoshi that he wanted to talk with Haslett alone. 130RP 97-100.

After Burns and Miyoshi returned to the hotel, Haslett asked them to stay overnight and do more work the next day. Ex. 540 (transcript 1) at 32. Burns again raised the subject of the Bellevue murders, and again asked Haslett if he had done his "research." Id. at 34. Haslett pulled Burns aside and told him that his man was making "some checks" in the States. 130RP 101-02, 109-10; Id. at

35. In response to being pulled aside, Burns told Haslett that Haslett could say anything in front of Miyoshi. 130RP 110.

That night, Miyoshi called Rafay in Vancouver and told him that they would be back tomorrow, that things were going pretty well, and that they were having fun. 131RP 14; Ex. 549 (intercepted call on June 15, 1995, beginning at 5:13 p.m.).

The next day, June 16, 1995, Shinkaruk, Burns and Miyoshi continued with the money laundering, visiting several more banks. 131RP 29-33. After they returned to the hotel, Haslett gave Burns a large amount of cash and told Burns that he would let Burns know when he learned more about the Bellevue investigation. 131RP 37-40. After Haslett and Shinkaruk left, Miyoshi counted the money and announced that it was $2,000. Ex. 540 (transcript 5) at 2. Burns responded, "Well that's fantastic." Id. After Miyoshi said that he had expected less, Burns explained that the last time they had paid him only $200 and he "took a shit." Id. at 2-3. Burns added that "it was pretty fucking easy, this is the world of crime . . . . It's so cool. This has been the coolest thing ever I couldn't ask for any more . . . ." Id. at 3.

vi. The visit to Burns and Rafay's house.

A few days later, on the night of June 20, 1995, Shinkaruk and Haslett went to Burns and Rafay's house, claiming that they wanted to look at Burns's computer system. 131RP 46; 132RP 7-12; 139RP 28-29. Although Shinkaruk had called Burns earlier in the day and suggested that they might visit,[29] Burns was surprised when they arrived and did not let them inside immediately. 132RP 10-13. After Haslett insisted, Burns allowed them to enter the residence. 132RP 13-15. When Haslett asked to see Burns's computer, Burns protested that it was not set up and that this was a bad time. 132RP 13.

Haslett and Burns then spoke in a bedroom. 132RP 13-14. Haslett told Burns that he had received a call from a friend "down south," referring to Bellevue. 132RP 14; Ex. 549 (interception on June 20, 1995, beginning at 9:14 p.m.). Haslett explained that his friend obviously knew something, because he would not talk over the telephone but was coming up over the weekend to meet with Haslett. 132RP 14; Ex. 549 (interception on June 20, 1995, beginning at 9:14 p.m.). Burns then apologized for the way that he

[29] Ex. 549 (intercepted call on June 20, 1995, beginning at 8:44 p.m.).

had reacted when Haslett and Shinkaruk arrived, explaining that he had to watch out for reporters and cops. 132RP 14; Ex. 549 (interception on June 20, 1995, beginning at 9:14 p.m.). During their conversation, Burns lowered his voice and told Haslett that his house was bugged. 132RP 14-15.

vii. The second money laundering scenario with Burns and Miyoshi.

A week later, Shinkaruk invited Burns to come to Victoria again. 132RP 22-27. On June 28, 1995, Burns and Miyoshi took the ferry to Victoria and met Shinkaruk at a pub near the ferry. 132RP 33-34; 139RP 33-35. He gave them some expense money, and told them to book a room.[30] 132RP 34-36; 139RP 35-36. That afternoon, they proceeded with the money laundering scheme. 132RP 50-52.

After Burns and Miyoshi returned to their hotel room, Haslett met with them. 132RP 52-53. Burns and Miyoshi began to discuss computers and encryption at great length. Ex. 541 at 53-77.[31]

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[30] In order to minimize Burns's suspicions that his hotel room was bugged, Shinkaruk had Burns arrange for his own hotel room. 132RP 27-28. The RCMP had arranged with hotel management to ensure that the room given to Burns would be bugged. 132RP 28. Despite these efforts, Burns and Miyoshi still expressed concern that their room was bugged. 132RP 42-44.

[31] The audiotape was admitted as Exhibit 509. The jury was provided with a transcript of the recording, designated as Exhibit 541. References are to page numbers in Exhibit 541.

Eventually, Haslett suggested that Shinkaruk and Miyoshi go have a beer, leaving Burns and Haslett alone in the room. Id. at 78.

Haslett started the conversation by asking Burns about the fact that, when Haslett was at Burns and Rafay's house, Burns had told him the house was bugged. Id. In reply, Burns explained that he had previously warned Haslett that they thought their house and phone were bugged. Id. at 78-79.

Haslett then turned to the Bellevue murders and told Burns that he had read some interesting stuff. He said that they had Burns "in a pretty big fucking way down there." Id. at 80. Haslett explained that the police had Burns's DNA, that they had found his hair in the shower with the victims' blood, and that Burns's fingerprint was found on a box that was tipped over. Id. at 80-81. Haslett pointed out that Burns was the only suspect mentioned in the report. Id. at 84. Haslett stated that he was willing to help Burns, but that Burns was going to have to help Haslett with the computer work. Id. at 82-83.

Haslett asked Burns to provide him with details of the homicides, explaining that his contact in Bellevue was making further inquiries, but that he needed to know more. Id. at 85. Burns repeatedly resisted. When Haslett asked Burns to explain how the

blood got in the shower, Burns replied that "there's no sort of percentage in . . . talking about this." Id. Haslett continued to press him, and Burns replied that anything he said could end his life. Id. at 87. Burns then explained that he could tell Haslett certain things that the police had talked about and what had been on TV. Id.

Haslett asked Burns what they should be looking for in Bellevue; Burns said there was a possibility that his hair was on the bodies or other places where blood was found. Id. at 94. Burns did not think that a box with his fingerprints on it was a concern, but added that if Haslett's friend thought it was, it "should be gotten rid of." Id. at 95-96. When Haslett asked Burns how he had killed the victims, Burns replied that the medical report indicated that the weapon was a baseball bat or a two-by-four; Burns added that "that's not a big variety of possibilities so I don't really see why you need to ask me questions, on that." Id. at 96.

Throughout their conversation, Burns expressed concern that Haslett might be an undercover officer. Burns explained that he had recently read about an undercover police operation where the suspect had been charged with murder after confessing to a police officer who was posing as a Mafia member. Id. at 92-93. When Haslett told Burns that "right now I'm probably the best friend

ya got in the world," Burns replied: "I'm acting on the assumption that that's true, okay. But . . . it's not that I know for 100% for sure okay . . . ." Id. at 97.

When Haslett pressed Burns for details of the crime, Burns insisted that he was giving Haslett "all the information that you need . . . ." Id. at 101. When Haslett asked Burns about the motive for the crime, Burns responded elliptically:

> **Haslett:** Answer me this. Why did you guys do this? Money? Answer me that fuck that's . . . for money or what?
>
> **Burns:** Why do you wanna know?
>
> **Haslett:** 'Cause I just wanna know, I wanna know what kind of guys I'm going to be workin' with, tell 'em. You can answer that, that's a simple fuckin' question, and I know who did it, fuckin' uh so do the police who did it now. Let's fuckin' worry about you not goin' to fuckin' jail, but why you do it is for my peace of mind.
>
> **Burns:** Uhhh, there's really no gain in talkin' about that.
>
> **Haslett:** There's no gain in talking about it? If you're thinking about working for me and I'm gonna be lookin' after ya, yeah there is. So, I wanna know.
>
> **Burns:** Okay, if you wanna know what kind of person I am okay.

Haslett: No, answer the question Sebastian, answer that fuckin' thing straight out, and then uh I will. Answer that other question. Why did you guys do this?

Burns: I, I, I'm like, I, I can't answer that question,

Haslett: Why?

Burns: Why the fuck do you think . . . think about that.

Haslett: Oh whatever,

Burns: Like I don't know man, you like it, like the thing is, I guess, I guess the problem here that you know because, like because you know, you probably are genuinely who you are, um,

Haslett: Probably, I know who I am.

Burns: (Chuckles) Whatever, but I mean as you appear to me, I guess, one of the problems is that you are perhaps are not as familiar with like say, ah . . . verbal specificities and things like that . . . which I am very aware of, O.K.?

. . .

Haslett: Why, you scared to talk in this room?

Burns: No man, it's just that, that's the kind of question, that like

Haslett: I'm asking that cause . . . I want to know what kind of guy you are, that's why I'm asking

> **Burns:** 'Kay, well I'll tell ya what kind of guy I am. If you wanna ask me that question specifically uh, ask me again when this is all over, okay?

Ex. 541 at 103-05.

Burns ultimately indicated that the motive for the murders was financial, while still continuing to express concerns about Haslett's motives for questioning him:

> **Haslett:** Why did you do this? Answer me that fuckin' thing. I just wanna know, just wanna know it's on my mind. Was it for money? . . .
>
> **Burns:** Um, I'm not uh, not a weirdo I'm not some sleazy super violent guy, I'm not some philosophical weirdo, dude. I'm kind of like yourself in many ways.
>
> **Haslett:** (Chuckles) And what way is that?
>
> **Burns:** Well, put yourself in this scenario. Think of uh how you would feel about things and then, and then that might indicate to you . . .
>
> **Haslett:** That doesn't answer my question Sebastian.
>
> **Burns:** Well, the thing is I answered your question.
>
> **Haslett:** Well give me is give me a black and white answer that I can understand.
>
> **Burns:** Come on man!
>
> **Haslett:** Hey, I don't give a fuck. I just wanna know if, if it's off my fuckin' mind then I can do my job and do what I gotta do. That's one thing I wanna know.
>
> **Burns:** What do you wanna know? Do you wanna know if, I'm ambitious about money in my life?

Haslett: No, I wanna know why you killed these fuckers.

. . .

Burns: Listen, you. The way you're askin' me this it's like you're a cop.

Haslett: Nah, I don't give two fucks what I'm like. It's on my mind, I wanna know why.

Burns: No, do huh. I, uh because basically you know the answer okay? I, I already said to you. Like, you the answer, . . .

Haslett: Huh? What did ya say to me?

Burns: Well, you're askin' me the question. I explained to you a little things about myself, like I'm not some kind of weirdo. Incidental to your questions in a totally unrelated fashion, I said to you that in my life I'm ambitious about getting money. I feel it is a vital, integral part of our life. Not totally incidental to your question of course.

Haslett: That's all I asked you did you do it for money. All you had to do is say yes. Fuckin' great, I don't give fuck why. How much money?

Burns: Um. Well, the estate, uh of the place is um is, is like. I, I okay I don't even know specifically. I know that the estate is worth a few hundred grand or somethin' um and it's like totally depending on like, how much the house is sold for and crap like that, and just little things like that. So that's like the property value, the worth of the place. The, the estate is totally not settled at all okay, 'cause like there's like major procedures you have to go through, it's like a probate and shit like that and um, uh. Like the insurance company is waiting and stuff like that and like you

> know? Police have, apparently 30 grand in like jewels or something that was seized jewels out of a safety deposit box, of the mother's safety deposit box . . .

Ex. 541 at 129-31.

Later, Burns reiterated this financial motive during a general philosophical discussion with Haslett. Id. at 160-66.

> **Haslett:** What do you fear?
>
> **Burns:** Fear well gee uh, lots of things I guess, I fear like, ultimately I guess I fear having a really shitty life and I guess what I want is to have a really great life and so I guess I fear is that I won't be able to do that yeah, a real kick ass life, do tons of fucking great things.
>
> **Haslett:** It takes money.
>
> **Burns:** (LAUGHS) I know that's why I . . . ended up doing in Bellevue.

Ex. 541 at 165-66.

Haslett pointed out that Burns did not stand to inherit any of the money. Id. at 131. Burns was not concerned:

> **Haslett:** So, you guys gonna split the estate three ways?
>
> **Burns:** (Laughs) Well, what the fuck are we gonna split? We're just gonna live together, ya know?
>
> **Haslett:** And pool all the money?

> **Burns:** Yeah, yeah. Like well basically uh for example we're buying a car. We're buying a Mustang and it's our car, and we're buying it with the money . . .

Ex. 541 at 133-34. Burns was adamant that Rafay and Miyoshi would never betray him. Id. at 135-37.

Haslett questioned Burns about whether they should be looking for evidence implicating Rafay. Id. at 148-49. Burns responded that he should prioritize Burns but also check on information relating to Rafay. Id. at 149. Haslett then drew a circle and asked if Burns was on the inside and Rafay on the outside, and Burns responded by gesturing with two thumbs up. 133RP at 18-19, 32-33; Ex. 541 at 150.

During their conversation, Burns questioned Haslett about the intelligence of the person working for Haslett in Bellevue. Ex. 541 at 115. Burns asked Haslett about getting a copy of the police file on the case. Id. at 127. Haslett told Burns that he would not be paid for his work on the trip, because of what Haslett was doing for Burns in Bellevue. 133RP 39-40.

Haslett ultimately moved the conversation away from the Bellevue homicides in order to avoid appearing overly interested in the subject. 133RP 33-34; Ex 541 at 151-59. After discussion

about Burns's computer work and movie, they briefly returned to the murders. Haslett asked Burns whether, under the right circumstances, he could kill again; Burns replied that he doubted it, that it was making him "an old man." 133RP 36-37; Ex. 541 at 159.

The next day, Burns and Miyoshi accompanied Shinkaruk and made more bank deposits, believing that they were laundering money. 134RP 25-27; 139RP 37-38.

A week and a half later, the RCMP employed a money laundering scheme involving only Miyoshi. 134RP 29-36; 139RP 38-39. Miyoshi had expressed an interest in further money laundering, and the RCMP decided to follow up on this proposal in order to avoid any appearance that they were interested only in Burns. 134RP 29-33.

viii. Burns's admissions at the Ocean Point Hotel.

Before Haslett met with Burns again, the RCMP created a memorandum, purportedly prepared by a Bellevue detective, detailing some of the investigation into the murders. 115RP 112-21; 140RP 14-24. The purpose of the memo was to convey the notion that there was a good potential for charges in the future. 115RP 116-17. In the memo, "Detective Jennings" wrote that he

planned on "telling the media that we have obtained DNA samples from BURNS and that formal charges will be laid against both BURNS and RAFAY once the culturing of the DNA is completed." Ex. 502. The memo stated that the police anticipated positive results from certain evidence: red fabric fibers found in the shower that were mixed with Burns's hair, stains on boxer shorts found in the washer, bloodstains in the garage, saliva on Tariq's bedroom wall, and murder weapon impressions on the bedroom wallboard. Id.

On July 16, 1995, Shinkaruk contacted Burns and asked if he would be available for another overnight trip; Burns indicated that he would be. 140RP 36; Ex. 549 (intercepted call on July 16, 1995, beginning at 10:00 p.m.).

On the afternoon of July 18th, Shinkaruk picked up Burns and they took the ferry together to Victoria. 139RP 44-45. After meeting Haslett in a room in the Ocean Point Hotel, Shinkaruk left Haslett and Burns alone. 139RP 46; Ex. 542 at 8.[32] Hidden audio and video devices recorded the conversation. 115RP 143, 155-57.

[32] The videotape was admitted as Exhibit 510. The jury was provided with a transcript of the recording, designated as Exhibit 542. References are to page numbers in Exhibit 542.

Haslett began by telling Burns that the police were "coming to lock [his] ass up" and that things were happening quickly. Ex. 542 at 9. Burns replied that he wanted Haslett's help. Id. at 10. Haslett handed Burns the fake Bellevue memorandum; after reading it several times, Burns turned pale. 140RP 52; Ex. 542 at 10. Haslett then burned the memo and implored Burns to be straight with him, stating that he would do nothing further until he got the full story. Ex. 542 at 17-18. Burns finally began to provide details about how he committed the murders:

> **Haslett:** How'd you fuckin' do three people at once?
>
> **Burns:** Uh, not at once . . . it was one after the other.
>
> **Haslett:** Well how, why wouldn't somebody hear you?
>
> **Burns:** Uh, 'cause the dad was sleeping and so was . . . they were asleep upstairs, the dad and the sister. . . .

Ex. 542 at 21.

Burns stated that he killed the mother first, then the father and then the sister. Id. at 31-32. He admitted that he used a metal bat to commit the murders and later washed it off in the shower. Id. at 20, 47, 53. He and Rafay left the house through a sliding door on the upper floor. Id. at 21. He disposed of his clothes and the

bat in different dumpsters in downtown Seattle. Id. at 18-20, 29, 48. Burns expressed confidence that the police had not found these items because he had heard that they only searched dumpsters in Bellevue and that they never found the murder weapon. Id. at 19-20.

When Haslett asked Burns about his alibi, Burns described how they went to the Keg restaurant, the movie theater, and then a 24-hour cafe in downtown Seattle. Id. at 25-26. He explained that one of the waitresses at the nightclub described them as "nice looking clean boys who don't invade houses." Id. at 26-27.

Haslett repeatedly pushed Burns for details:

> **Haslett:** So when'd you fuckin' uh, do the dirty deed?
>
> **Burns:** Uh, during the movie.
>
> **Haslett:** See you left that out, see, I'm trying to check up on things, you didn't tell me that, you left the movie, you left during the movie?
>
> **Burns:** Sorry, I thought you would have known that just from, I thought you'd just take it for granted . . .
>
> . . .
>
> **Haslett:** So what's this about the shower?
>
> **Burns:** Took a shower to clean off, you know blood and that kind of stuff, and um, yeah I just . . .

> **Haslett:** And they're not gonna find your clothes, 'cause they're gonna, is there blood on your clothes?
>
> **Burns:** No there wasn't, those clothes are gonna be gone now anyhow, but no there was no blood on them.
>
> **Haslett:** There was no blood on 'em?
>
> **Burns:** No.
>
> **Haslett:** How do you fuckin' uh, hit someone with a baseball bat, have to shower and have no blood on you.
>
> **Burns:** You do it naked.[.[33]]

Ex. 542 at 27-28.

Burns again confirmed that the motive for the murders was financial:

> **Haslett:** Like, why'd you do this for fuckin' a couple hundred thousand dollars or . . .?
>
> **Burns:** Well now you know you look back and you might think it's some trivial thing but I mean you know, to you it's not much money and stuff . . . you know it's pathetic it's not like really, you know.

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[33] Burns later clarified that he wore underwear and gloves. Ex. 542 at 29, 47. In his opening brief, Burns incorrectly implies that he did not mention gloves in this conversation. BOA (Burns) at 71.

> **Haslett:** Well what'd you, what'd you and Atif just sit down and say let's go fuckin' do this to get the money?
>
> **Burns:** Basically.

Ex. 542 at 22. Burns explained that they planned to invest the money in their film. Id. at 34. At one point, Burns offered Haslett a role as an extra in the movie. Id. at 45.

Burns told Haslett that he should check whether there was any blood found in the car they drove, explaining that he had read a report in the newspaper suggesting such evidence. Id. at 46. Burns expressed confusion as to how blood could have gotten inside the car and suggested that it could have come from blood spatter hitting Rafay's clothes. Id. According to Burns, Rafay saw Burns kill Rafay's mother, but he did not witness the murders of his father and sister. Id. at 31.

Burns told Haslett that Miyoshi was aware of their plans to commit the murders, and he knew what happened in Bellevue; Miyoshi did not participate only because he was busy. Id. at 23, 32-33.

Haslett repeatedly raised concerns about whether Rafay and Miyoshi could be trusted, given that Burns was the one who had actually committed the murders. Id. at 22-24. Burns explained that

Rafay's participation was limited because he was "a little guy." Id. at 23. Burns insisted that there was no danger that Rafay would turn on Burns; he explained that Rafay thought nothing about his family being murdered, and pointed out that Rafay had already resisted considerable pressure from the police. Id. at 24-25. In defending his friends, Burns explained why he committed the murders:

> **Haslett:** I have one concern in my mind and I always have concerns in the back of my mind, is he let you swing that baseball bat and he didn't help you.
>
> **Burns:** Well, man, can I tell you something, like I, I, you know, I felt like you know I was capable and like have you ever killed a person?
>
> **Haslett:** That really doesn't matter right now does it?
>
> **Burns:** Okay, alright, whatever. Well, I guess, I don't know, I mean same with Jimmy and stuff like that, like I mean maybe they could have done more but . . .
>
> **Haslett:** What more could they do, you did the job?
>
> **Burns:** Exactly, and there's no point spreading it around I suppose . . .

Ex. 542 at 40.

Haslett asked how Rafay reacted to the murders of his family:

> **Haslett:** Well what he [Rafay] think about the whole thing?

> **Burns:** Think about it, I don't know, I just thought that uh, I don't know, we thought it would be more nerve wracking then we expected I guess, but apart from that he just, he just didn't think it was a bad idea right I mean . . .
>
> **Haslett:** He didn't think it was a bad idea?
>
> **Burns:** Hmm?
>
> **Haslett:** He didn't think it was a bad idea?
>
> **Burns:** No.
>
> . . .
>
> **Burns:** Well yeah personally I, I think that I'm a lot happier than, than if it didn't happen. And I'm sure he would feel that way too.
>
> **Haslett:** You're happier now, that it did happen?
>
> **Burns:** Yeah.
>
> **Haslett:** And he feels the same yeah well fuck sure he's gonna get rich. How about Atif, how does he feel?
>
> **Burns:** Same thing.

Ex. 542 at 35-36.

Haslett then described how he was going to help Burns. He said that there would be a fire at the laboratory, that some records would be destroyed, and that Burns's hairs would be replaced. Id. at 36. Haslett asked Burns to get replacement hairs that night, even from a dog if necessary. Id. at 37. After the hairs were

substituted, an East Indian man working for Haslett would go to the police and claim that he and a group of other people were responsible for the murders; the police would not be able to hold this man because there would be no proof that he had actually committed the murders, and he would then disappear. Id. at 36-37. Burns commented that the plan was "pretty cool" and that "it would be fun to plan things like this all the time." Id. at 43.

ix. Rafay's admissions at the Ocean Point Hotel.

The next morning, July 19, 1995, Shinkaruk and Haslett went to Burns's hotel and woke him up; Haslett told Burns to call Rafay and ask him to come to Victoria. 139RP 50-51, 63-65; 141RP 10-11, 14-15. Burns called Rafay, claiming that he had had an accident and needed to be picked up. 139RP 65-66; 141RP 15-17; Ex. 549 (intercepted call on July 19, 1995 at 10:48 a.m.).

Burns and Shinkaruk then headed to the town of Nanaimo for the ostensible purpose of collecting money. 139RP 66-71; 141RP 10-15. The true reason for the trip was to keep Burns occupied for several hours while waiting for Rafay to arrive. 115RP 148-49; 139RP 51. In Nanaimo, Shinkaruk contacted another undercover officer, pretended to fight him, and recovered some

money, while Burns stood guard. 139RP 73-76. The point of the fighting was to reassure Burns, who had just admitted to committing three murders, that the organization was comfortable with violent behavior. 139RP 84; 141RP 30-31. On the way back to Haslett's hotel room, Burns wanted to talk about violence; he told Shinkaruk that Haslett knew what he was capable of. 139RP 80.

After dropping Burns off with Haslett at the Ocean Point Hotel, Shinkaruk left to get Rafay, who had arrived at Burns's hotel. 139RP 81-82; 141RP 31. While they waited in the hotel room, Burns told Haslett of his numerous unsuccessful attempts to get hair samples on the previous night. Ex. 543 at 15-16.[34]

Haslett asked Burns about his fingerprint on the box; Burns explained that he and Rafay had moved things around to simulate a break-in, and they later put the VCR in a dumpster. Id. at 18-19. Burns said that they bought the bat in Bellingham,[35] but he was not worried about the bat being traced back to him if it was found: "I've worked in a retail store, okay I'm, and I know what the fuck it's like it

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[34] The videotape was admitted as Exhibit 511. The jury was provided with a transcript of the recording, designated as Exhibit 543. References are to page numbers in Exhibit 543.

[35] On the previous day, Haslett had asked Burns where he had obtained the bat and whether it could be traced to him; Burns replied that he could not remember, but the bat might have been "kicking around" the house. Ex. 542 at 32.

like and stuff, and I didn't do shit to make myself memorable or anything like that . . . if they were gonna come forward then they would have come forward by now." Id. at 21.

When Rafay entered the room, Haslett asked him what Burns had told him about Haslett; Rafay said that he knew his name was Al, that he was a businessman of some kind, and that the business was not necessarily legitimate. Id. at 33-34. Rafay said that he was "flattered by [Haslett's] attention." Id. at 35.

After Burns told Rafay about the Bellevue memorandum and discussed some of the "evidence" listed therein, Haslett explained why he wanted to talk to Rafay:

> **Haslett:** Yeah, well, don't know, he told me some stuff and I'm curious about a lot of things but I'm curious about, the biggest thing is trust. Because as I explained to Sebastian yesterday, trust, like, I want to be sure he can trust you and I fuckin' want to be one thousand percent positive that I can trust you.... Because it's pretty easy for you now to go and rat him out.
>
> **Rafay:** That would never happen.
>
> **Haslett:** Why.
>
> **Rafay:** I would never do it.
>
> **Haslett:** Why.
>
> **Rafay:** Because, uh, Sebastian, uh, um, uh, well, he's my best friend but apart from that is-is, I guess,

> he's so important to everything that I do that, um, there'd be no point in doing that because I might as well rat myself out. I mean, I might as well, like, I'd be-I'd be fucked.
>
> **Haslett:** Why.
>
> **Rafay:** Because as I said he's just that important to whatever I do as far as anything.
>
> **Haslett:** Why did you do this.
>
> **Rafay:** (LAUGHS) . . . Well, um, uh, I guess, uh, the reason we did anything was to, um, I guess set ourselves up so that we could, uh, I guess, become richer and more prosperous and more successful and...

Ex. 543 at 38.

Haslett said that he was concerned about trust because Rafay had only watched Burns commit the murders. Id. at 39-40. Rafay explained that he did not take a more active role because he did not have the nerve for it, and because Burns was bigger and stronger. Id. at 40.

During the course of the conversation, Rafay largely confirmed Burns's account of the murders. Rafay said that they had bought the bat in Bellingham; after the murders, the bat was cleaned and thrown in a dumpster in downtown Seattle. Id. at 45, 54-55. Rafay explained that they had left the house by the sliding door on the top floor and they had worn gloves. Id. at 54. Rafay

confirmed that they had disposed of their clothing in different dumpsters in downtown Seattle.[36] Id. at 44, 54. Rafay said that he had witnessed only his mother's murder. Id. at 40.

Rafay answered Haslett's questions about motive and planning:

> **Haslett:** How much money do you think you're gonna get from your parents for . . .?
>
> **Rafay:** Um, okay, the house will probably be sold but it'll probably have such a high lien on it that it will probably net about maybe thirty thousand dollars American, which is nothing. Um, the two life insurance policies combined mmm . . . will net around a hun . . . maybe if we're lucky around three fifty to four hundred thousand dollars.[[37]]
>
> **Haslett:** How long were you guys planning this?
>
> **Rafay:** Not very long actually, I uh, was at univ . . . university for a year, and I came back um, and right back then it was just a little thought at the back of my head and uh, came . . . I came up and started living in Vancouver and stuff, my parents moved down to Seattle and uh, I just started talking about it with Sebastian and uh, just him and Jimmy and uh, then within I guess four or five weeks or something, probably less than that actually.

Ex. 543 at 53.

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[36] While Rafay initially described the disposal of the clothing as "hucked out the window," Burns explained that this was a colloquial term for "tossed the crap out." Ex. 543 at 44.

[37] Tariq Rafay's two life insurance policies were together worth $350,000. 96RP 141-43, 150.

Rafay then gave a chilling rationalization for annihilating his entire family:

> **Haslett:** How does it feel to kill your parents and knock off your sister?
>
> **Rafay:** Pretty rotten but it was tempered by the fact that I felt that it was necessary.
>
> **Haslett:** Why?
>
> **Rafay: It was necessary to I guess um, achieve what I wanted to achieve in this life. It was I think of it as a sacrifice I think of it as um, I guess um, a sort of injustice in the world that basically, basically forced me or, and Sebastian, to uh, have to do the thing.**

Ex. 543 at 56 (emphasis added).

During the conversation, Burns confirmed some additional details about the commission of the murders:

> **Haslett:** Did any of 'em fight.
>
> **Rafay:** Um, uh, yes.
>
> **Burns:** Well, That's a story that hasn't really been told, cause . . .
>
> **Rafay:** I don't think you want to tell anything about that . . . (LAUGHS).
>
> **Burns:** Yeah. (LAUGHS) I know that. Um, well, basically, uh, the father was uh really nothing and curious episode was uhm the sister, who basically, um, yeah was standing up and walkin' around and whatever . . .

> **Rafay:** (LAUGHTER) Oh, God.
>
> **Burns:** (LAUGHTER) . . . and took a little more bat work.[38]
>
> **Haslett:** How much, effort?
>
> **Burns:** Not much but it was just . . .
>
> **Haslett:** So where were you when all this was goin', why didn't you help.
>
> . . .
>
> **Rafay:** I offered to at one point but, um, I guess, uh,well, he declined at that time and, uh, I guess, in general I was pretty freaked out after what I saw. It was, uh, it was, I must admit, more than I expected to be confronted with. If it had been a different sort of weapon then perhaps I might've been . . .

Ex. 543 at 40-41.

Burns explained that they had used a plastic bag to carry all the stuff, like the bat, to make sure no blood got in the car. Id. at 45. Burns said that, after they had gotten a table at the restaurant in Seattle, he briefly left, as if going to the restroom, retrieved the VCR and placed it in a dumpster. Id. at 46.

Haslett asked why they had used a bat, and they both responded that they did not know where to get a gun. Id. at 41-42. They suggested that they were fortunate they did not use a gun;

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[38] Burns testified that he said "effort" rather than "bat work." 146RP 40.

they were unaware of the gunshot residue test, and the police had used such a test on them immediately after the murders. Id. at 42.

When Haslett expressed concerns about Miyoshi, Burns and Rafay said that Miyoshi knew about the plan to commit the murders, and knew that it had been carried out; they assured Haslett that Miyoshi was "solid." Id. at 51-52. Burns claimed that the police had threatened Miyoshi and that he had been kicked out of his house, but he still stuck by his friends. Id. at 52.

Haslett reiterated for Rafay his plan to help them, describing the plan to cause a fire at the lab, replace the hairs, and have the East Indian man claim responsibility for the murders. Id. at 47-48. When Haslett asked if he had any other questions, Rafay responded that he was a little overwhelmed, but impressed and happy about Haslett's involvement. Id. at 58.

After this conversation, Shinkaruk drove the two back to their hotel. 139RP 83. Burns and Rafay returned to their home later that night and were overheard joking around. 142RP 25-27; Ex. 549 (interception beginning on July 19, 1995, beginning at 10:04 p.m.).

x. Miyoshi's and Burns's admissions at the Landis Hotel.

A few days later later, on July 24, 1995, Burns paged Haslett with the message, "I found your dog" (referring to the hairs that Haslett had asked him to provide). 142RP 27-29. Haslett contacted Burns and told him to meet him at the Landis Hotel in Vancouver the next day and to bring Miyoshi. 142RP 29-34; Ex. 549 (intercepted call on July 24, 1995 at 2:57 p.m.). The RCMP wanted to explore Miyoshi's involvement in the murders. 142RP 36. Burns expressed some hesitation about involving Miyoshi, noting that Miyoshi did not know about the hairs. Ex. 549 (intercepted call on July 25, 1995 at 2:57 p.m.). Haslett told him not to worry, that would be dealt with separately. Id.

The next day, Haslett met Burns in front of the Landis Hotel, and Burns handed him a bag containing hair and a music CD.[39] 142RP 49-51. Burns, Miyoshi and Haslett then entered room 621. 142RP 45. Haslett told Burns and Miyoshi that they would do their computer work in the hotel room and that they would be given a

[39] The music CD was a gift from Burns to Shinkaruk. 139RP 86-87; 142RP 49; 143RP 22.

key, computer equipment and a shredder. Ex. 544 at 1.[40] Haslett then turned to Miyoshi and explained that he had talked to Rafay and Burns over the last couple of days, and he needed to know if he could trust Miyoshi. Id. at 2. Haslett asked whether Miyoshi knew that Haslett was going to take care of the problem in "the States," and Burns responded that he had not yet told Miyoshi. Id.

Haslett then attempted to get Miyoshi to talk about the murders, but Miyoshi resisted. When Haslett suggested that Miyoshi could have ratted out Burns and Rafay, Miyoshi replied that there was "nothing to rat about." Id. at 3. Burns interjected, "He's just being, clever." Id. Burns encouraged Miyoshi to talk to Haslett:

> **Haslett:** How much did you know about this ahead of time, what they were gonna do?
>
> **Miyoshi:** Pardon me?
>
> **Haslett:** How much ahead of time did you know what they were gonna do?
>
> **Burns:** It's ok . . . (LAUGH)
>
> **Miyoshi:** Um, how much did I know ahead of time what they were gonna do?
>
> . . .

[40] The audiotape was admitted as Exhibit 512. The jury was provided with a transcript of the recording, designated as Exhibit 544. References are to page numbers in Exhibit 544.

> **Burns:** I, I understand that you're uncomfortable talking about this but basically, in this circumstance it is to your credit to um, explain like you know one year ago, like precisely, like what, you know what sort of . . .
>
> **Miyoshi:** Hm, hm. Well I mean, what do you want me to do?
>
> **Burns:** Well he just, he basically, just wants to know, like to confirm with you I guess did you know, ah, what, you know, was going to go on in, in the States kind of thing and ah, so.
>
> **Miyoshi:** Well then you talk then.... Well then you talk for me then.
>
> **Haslett:** This isn't gonna work.
>
> **Burns:** Jimmy.
>
> **Haslett:** I'll be back in two minutes, you tell him what you already told me, and then ah, see what I mean.

Ex. 544 at 4-5.

Haslett left Burns and Miyoshi alone and went into a bedroom. 142RP 36, 56-57; 143RP 18. While Haslett was gone, Burns implored Miyoshi to trust Haslett; when Miyoshi questioned why Haslett needed to know about the murders, Burns again admitted to committing the murders:

> **Burns:** I, like I, I've explained to him [Haslett] like previously, what uh occurred in, in Bellevue. Like, I, I, whatever, I mean cause I guess I felt that, that was like, um, necessary kind of thing and I, you know, trust Al and like . . .

Miyoshi: Well I guess, I guess what I was getting at was like um, kind of the opposite or whatever, like why would that be asked kind of thing?

Burns: . . . um, be, because, uh, I guess, like, his concern is, is, um, with yourself and with Atif, alright, and basically it's this, ah, he, **he knows what went on ok,** and he knows that, that, like I was like the major roll [sic] in that, kind of thing, so I stand to lose everything. Alright, and I guess his concern is that with yourself and with Atif, um, you know, you, you guys don't stand to lose as much, because of your circumstances and so you know the question in his head is, you know, why, why, didn't you guys do as much. Now, um, like basically, to my recollection, the reason why you didn't actually go and participate ah, was because you were working at the time and um, you know, it was, it was like we weren't even really sure, precisely what was going to happen until we were actually down there. Ok, so, I mean that's and it was my, **it was always my understanding that had things been different, had you been there that you know you would have probably helped out and everything.** And basically um, for him it is to, like it's it's to your credit for you to explain that to him, ok because, if the reason why he wanted to know if you knew about it in advance, ok, is because, um, like I know that I can trust you with my life, you know what I mean, but he doesn't know that alright. And so if you explain yes, I knew about it in advance, I didn't say shit to anybody, ok, it just shows that basically you know, y,you didn't fuck me up.

. . .

You know I also understand where you're coming from, ok, because you're thinking, well why does it matter kind of thing. Like is this just some, some, some thing that is going to be used against me or whatever. But it's like sort of beyond that point right now. So like basically there's not really much choice

> but to like to forget about that, kind of thing, because . . . because, it's like there's really very little to lose at this point so.

Ex. 544 at 5-7 (emphasis added).

When Haslett returned, Miyoshi remained reluctant to discuss what he knew about the murders, while acknowledging a few things:

> **Haslett:** What do you know?
>
> **Miyoshi:** What do I know? Um, well I, I guess I don't know exactly but I have a general idea, of, of like, how they did it or whatever, um.
>
> **Burns:** Jimmy listen, like, w-we, the only way we can be up here for a few minutes, this is um, it, it basically just be kind of quick about like yes no, kind of thing so we don't have to bother, like going through sort of like the fucken ordeal of an explanation kind of thing. Like cause you're being hesitant and there's not only does it need to be, but he just wants to kind of know like, you know.
>
> **Miyoshi:** Well you you like, I, I notice the way you're asking me questions or whatever is that you want, you want a yes, no, whatever, and like if you told me that you actually wanted something from me.
>
> **Haslett:** Okay, do you know who killed the parents?
>
> **Miyoshi:** Yeah.
>
> . . .
>
> **Miyoshi:** And, um, I just wanted you to explain to me exactly the purposes of you wanting to know, is that so we can establish this kind of . . .

Haslett: Totally for trust.

. . .

Miyoshi: Ok, yes I do know.

Haslett: Ok, so who did it?

Miyoshi: Right there.

Haslett: Yeah, Sebastian, I knew that all along so you're not fucken telling me something I don't know. Sebastian be, can tell you when you leave this room exactly what I know, and what I'm gonna do for you. You see what I mean?

. . .

Haslett: How much did you know ahead of time?

Miyoshi: Seb . . . I guess about a month.

Ex. 544 at 11-12.

During their conversation, Miyoshi acknowledged that he knew that the murders were going to happen at least a month before they occurred, and that he knew "quite a bit" of what happened in Bellevue. Id. at 10-11. When they parted ways, Haslett told Burns and Miyoshi that they would probably hear in the media the results of his actions in the United States. Id. at 16.

e. Jimmy Miyoshi.

i. Pretrial statements.

The RCMP arrested Jimmy Miyoshi, as well as Burns and Rafay, in Vancouver, B.C. on July 31, 1995. 138RP 154. During the interrogation that followed, Miyoshi repeatedly insisted that he knew nothing about the defendants' involvement in the murders. Ex. 480[41] at 3, 5, 12-13, 17, 23-24.

By August 24, 1995, when Miyoshi next spoke with the RCMP, he was represented by an attorney, Nancy Kalid. Ex. 78 (pretrial) at 1. During the interview, Miyoshi admitted that he "pretty well kn[e]w everything . . . [f]rom the beginning." Id. at 2. Miyoshi said that Atif Rafay first brought up the idea of killing his family during a car ride from Bellevue to Canada. Id. at 2-4. Miyoshi understood the motive as financial. Id. at 3. Rafay told Miyoshi that Burns already knew about the plan at that time. Id. at 4.

Miyoshi said that he, Burns and Rafay discussed the plan at a later date, weighing the merits of such methods as gassing or staging a car accident. Id. at 5-6. When the defendants finally

[41] Transcripts of the statements Miyoshi made to the authorities were not provided to the jury. They are recounted in this brief to complete the picture of Miyoshi's role in the crimes and in the prosecution.

announced that they were going to the U.S., they appeared to have settled on a baseball bat as a "quick and painless" way of accomplishing the murders. Id. at 7. Burns seemed to be in control at this point, doing most of the planning. Id. While the defendants solicited Miyoshi's input, they never asked him to play an active part in the scheme. Id. at 8.

Miyoshi estimated that the defendants were gone for about five days. Id. They returned to Canada once during that period and visited Miyoshi at his workplace. Id. at 8-9. Miyoshi thought that they had come to get a baseball bat. Id. at 9. The defendants did not ask Miyoshi to go back to Bellevue with them. Id. at 10.

When the defendants returned to Vancouver after the murders, they were "pretty shaken up," so Miyoshi drove them around Stanley Park to "keep them occupied." Id. at 13. Miyoshi learned that Burns had done the killing. Id. at 14. Burns described the experience as "pretty crappy." Id. Rafay did not participate in the killings; Miyoshi thought he was "pretty shocked." Id. at 14, 19.

Miyoshi was again interviewed by the RCMP, with his lawyer present, on September 26, 1995. Ex. 77 (pretrial). When asked if Rafay resented his parents, Miyoshi spoke of the "bizarre things" that Rafay's disabled sister, Basma, did, and how Sultana spent

80% of her time caring for her daughter. Id. at 5. Miyoshi observed that Rafay "doesn't like his sister that much at all." Id. at 22. Miyoshi also thought that Rafay was unhappy that his parents had moved the family from Vancouver to Bellevue. Id. at 10.

Miyoshi revealed additional details of the murders that he had learned from the defendants. Rafay said that Sultana made a noise, like a moan, when she was hit. Id. at 22-23. Miyoshi was "pretty sure" that Rafay saw his mother killed. Id. at 24. Burns did the killing, attacking Sultana first, then Tariq. Id. at 23-24. The defendants threw away the bat, and cleaned up in the shower. Id. at 24. They took a VCR and a CD player, to make it look like a robbery. Id. at 32.

When asked if he thought the defendants were capable of killing the Rafays, Miyoshi responded, "I think they are capable of doing anything." Id. at 11.

Miyoshi subsequently entered into an immunity agreement with the Attorney General of British Columbia. The details were spelled out in a letter dated October 13, 1995: Miyoshi would receive immunity from prosecution for conspiracy to commit murder; in return, he would make "full and frank" disclosure of his

knowledge of the Rafay murders to authorities, he would submit to interviews as requested, and he would "attend court to give full and truthful testimony." CP 3033-35; Ex. 79 (pretrial).

Miyoshi submitted to a lengthy interview on March 11, 1996, again with his lawyer present. Ex. 76 (pretrial).[42] Questioning him were representatives of the RCMP, the Bellevue Police, and the King County Prosecutor. Id. at 1-2. Miyoshi described his close relationship with Burns and Rafay. Id. at 3-6. He described in some detail the conversation in the car on the way back to Canada, when Rafay first told him about the plan to murder his family. Id. at 14-20. Miyoshi spoke of Rafay's problems with his parents' strict religious beliefs. Id. at 26-27.

Miyoshi also detailed how the planning discussion came about, when all three of them discussed various methods of killing the Rafays. Id. at 27-32. When Miyoshi asked about DNA, his friends said they had it worked out. Id. at 32. They appeared "more than sure of what they were doing." Id. at 35.

Miyoshi spoke on the telephone with Burns and Rafay several times during their stay in Bellevue. Id. at 48-54. During

[42] Much of the information that Miyoshi gave in this interview was brought out during his perpetuation deposition and played before the jury. CP 5429-53.

these conversations, Burns related his somewhat critical observations of the Rafay family, especially focusing on Basma's odd behavior. Id. at 48-50, 52. The pair also spoke of their plan to create an alibi, going to a restaurant and other places. Id. at 51-53.

Rafay told Miyoshi that he lured his mother downstairs; Miyoshi thought that a cat was somehow involved. Id. at 59. It took more than one blow to kill Sultana. Id. at 60. Rafay "couldn't handle it," and was more or less in shock after his mother's murder. Id. at 59-60. Nevertheless, the damage had been done and the plan had to go forward. Id. at 61.

Miyoshi also described their relationship with Al (Haslett) and Gary (Shinkaruk). When Miyoshi had expressed his distrust of Al, Burns responded that it was too late for that. Id. at 63-64. Burns told Miyoshi that Al was going to get rid of evidence. Id. at 74. While Miyoshi said that Al and Gary inspired a "general kind of fear," neither Burns nor Rafay ever told Miyoshi that they had lied to Al and Gary about the murders, and Miyoshi himself told Al the truth. Id. at 77-78.

When he spoke to Burns after their arrest, Miyoshi told Burns that he felt "kind of like a dog." Id. at 78-79. When Miyoshi

implied that he might be talking to the police, Burns reassured him that there was no physical evidence, and their confessions would likely be inadmissible. Id. at 80-84.

When Miyoshi was asked if his relationship with his two friends was over, he said, "I guess so." Id. at 81, 87. Miyoshi admitted that he felt no remorse over the killings. Id. at 92. Acknowledging that he "should be thinking it's wrong," he speculated that there might be something "really, you know, wrong with me." Id.

On August 26, 1996, Miyoshi was examined under oath in a formal proceeding in a Vancouver, B.C. court under the Treaty between the Government of Canada and the Government of the United States of America on Mutual Legal Assistance in Criminal Matters ("MLAT"). Ex. 75 (pretrial). Miyoshi reiterated much of the information from his earlier statements, adding some detail in response to focused questioning. Id. at 25-43. Asked if Rafay had said anything about what happened in his sister's room, Miyoshi responded, "I think he said that she put up a fight." Id. at 41.

ii. Trial testimony.

Miyoshi appeared in court and gave testimony in a videotaped perpetuation deposition from August 13-15, 2003.

33RP-35RP.[43] Both defendants were present with their attorneys, as were the attorneys for the State. 33RP 1. Miyoshi was represented by attorney Mark Tackitt. 33RP 16. The defendants' attorneys fully cross-examined Miyoshi. 33RP-35RP. At the conclusion of the deposition, the State served a subpoena on Miyoshi, directing him to appear as a witness at trial on February 2, 2004. 35RP 84-85.

Miyoshi failed to appear at trial. The defense objected to the State presenting his testimony to the jury via the videotaped deposition, arguing that the State had not shown that Miyoshi was unavailable. 104RP 16-19. The State responded that it had made a good-faith effort to secure Miyoshi's presence for trial, and referred to its declaration detailing these efforts. 104RP 19-21; CP 3020-98; see also 103RP 199-224. Noting that there was no mutual legal assistance treaty between the U.S. and Japan, where Miyoshi resided at the time, the trial court found that "there's just no question this man is unavailable." 104RP 19, 22; CP 3026. Before playing Miyoshi's videotaped testimony for the jury, the parties redacted certain parts, either by agreement or by decision of the court. See, e.g., 104RP 248-62; 105RP 4-11, 192.

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[43] This testimony is also contained in Ex. 551.

In his testimony presented to the jury, Miyoshi said that Sebastian Burns and Atif Rafay were his best friends in the 11th and 12th grades; after the three graduated from high school, their relationship got even stronger, and Burns and Rafay comprised Miyoshi's entire circle of friends. 104RP 103-04, 114, 118, 129. During the 1993-94 academic year, Miyoshi and Burns attended Capilano College in North Vancouver, B.C., while Rafay was in the United States at Cornell University. 104RP 105-06.

By the spring of 1994, when Rafay returned from his first year at Cornell, his family had moved to Bellevue, Washington; nevertheless, Rafay spent a lot of his time in Vancouver, B.C. with Burns and Miyoshi. 104RP 127-28. It was Miyoshi's impression that Rafay did not have a close relationship with his family, and would rather spend time with his friends in Vancouver than stay with his family in Bellevue. 104RP 130-31.

It was during a car trip from Bellevue to Vancouver during the spring or early summer of 1994 that Rafay first mentioned the idea of killing his parents to Miyoshi. 104RP 130-39. Rafay appeared to be gauging Miyoshi's reaction to the idea. 104RP 138. Miyoshi took Rafay seriously, and was "pretty neutral about it." 104RP 138-39. Some days later, Burns asked Miyoshi if Rafay had

raised the subject with him. 104RP 139-40. At some point, Burns mentioned insurance money, although Miyoshi did not think that was the only reason behind the plan. 104RP 140-41, 159, 160-62.

The three later talked about the idea in more detail by a creek near Miyoshi's house. 104RP 142-43. They discussed ways of carrying out the murders, such as gassing the house or using a baseball bat; the bat was thought to be a quick and painless way of doing it. 104RP 143-44, 146-47, 149-50. They also discussed DNA evidence; Burns and Rafay said that if they were living in the house at the time, DNA found there would not necessarily connect them to the murders. 104RP 144, 148, 150-51.

Burns and Rafay went to Bellevue and lived in the Rafays' house for a period of time before the murders. 104RP 151, 164. At one point, they returned to Canada in Rafay's parents' car and visited Miyoshi at his workplace. 104RP 162-64. This occurred before the murders. 104RP 166. Miyoshi recalled little of that conversation, other than mention of a baseball bat. 104RP 165, 167-68.

Miyoshi recalled telephoning Burns and Rafay while they were staying in Bellevue – definitely before the murders, and possibly after as well.[44] 104RP 169-70, 172, 173-74.

Rafay disclosed some details of the murders to Miyoshi within weeks of the event. 104RP 175. Rafay said that he had lured his mother into the basement, and Burns struck her from behind. 104RP 175-76. Rafay was distraught. 104RP 176. The two then went upstairs; while Burns went into Tariq's room, Rafay removed a VCR and other items to make it look like a robbery. 104RP 176. Rafay said that his sister was also struck, and that she was alive when they left the house. 104RP 176.

Miyoshi had a conversation with Burns about the murders at around the same time. 104RP 178-79. Burns confirmed that Rafay was distraught, but said that, from the moment he struck Sultana, there was no going back. 104RP 179. Burns added that, while it was not the easiest or most pleasant task, it was something that he

[44] Telephone records showed that Miyoshi called the Rafays' number in Bellevue from his home in Canada five times during July 1994: July 9th at 8:22 p.m. (42 seconds); July 10th at 7:44 p.m. (9 minutes and 18 seconds); July 12th at 7:15 p.m. (5 minutes and 54 seconds); July 13th at 7:27 p.m. (30 seconds); and July 13th at 11:18 p.m. (30 seconds).

had to go through. Id. Burns said that there was a lot of blood in Tariq's bedroom. Id. They got rid of the bat and other things by throwing them away in different places. 104RP 181.

After these two conversations, the three stopped discussing the murders in any detail. 104RP 177. They were concerned about police surveillance. 104RP 177-78.

Miyoshi knew something about the alibi plan before Burns and Rafay left for Bellevue. While he had some difficulty sorting out what he had learned from his friends and what he had learned from media accounts, he recalled that they had plans to go out to eat or to some public place, and to see "The Lion King"; they planned to leave the theater during the course of the movie. 104RP 180, 182-84. In general, they planned to attract enough attention so that they would be remembered at these locations. 104RP 183.

Within a month of Burns and Rafay's return to Canada after the murders, they moved into a house in North Vancouver with Miyoshi and Robin Puga. 104RP 185-87. The relationship among the three grew stronger during that period; it was a very stressful time due to media and police attention, and the trio saw the media and the police as their antagonists. 104RP 194-95, 208. After

about six months, they decided they no longer wanted to live with Puga, and found a way to get him out of the house. 104RP 188-90.

Miyoshi said that it was difficult to maintain employment while he lived with his friends in the house on Phillip Avenue because of the distractions and the stress created by the attention from the media and the police. 104RP 186-87. To the best of Miyoshi's recollection, neither Burns nor Rafay worked during that period. 104RP 191-92. All of the members of the household received public assistance during a portion of their time together. 104RP 192-93. The only other source of income that Miyoshi recalled was money from the Rafay estate. 104RP 223. Any resources that came into the household were shared among its members. 104RP 192.

At some point after the murders, Miyoshi and Puga went to Bellevue at the request of either Burns or Rafay to check on the condition of the house, and possibly to pick up a car 104RP 195-98. Puga and Miyoshi were both taken into custody by the Bellevue Police and questioned separately. 104RP 198. Miyoshi refused to talk because he did not want to provide any information that could be used against his friends. 104RP 199, 201.

Burns at one point told Miyoshi about meeting Gary and Al, whom Burns described as organized crime figures. 104RP 202-03. Miyoshi worked with Burns once or twice on a job for Gary and Al, depositing sums of money in banks in Victoria. 104RP 204-07. Burns and Rafay eventually asked Miyoshi to go with them to meet Al at the Landis Hotel, so that Miyoshi could assure Al that he knew about the murders ahead of time; Miyoshi understood the purpose of this admission as enhancing their relationship with Al and whatever resources he had at his disposal. 104RP 211-12, 214-15, 230-31.

Prior to the meeting with Al, Miyoshi and Burns had a discussion on the roof of the Phillip Avenue house.[45] 104RP 215-16. Miyoshi expressed his suspicion that Gary and Al might be undercover police officers.[46] 104RP 226, 235-36. Miyoshi learned that Burns had already told Gary and Al that Burns, Rafay and Miyoshi were all involved in the murders. 104RP 229-30.

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[45] Burns and Rafay had repeatedly expressed their concern that the house was bugged or under surveillance. 104RP 227. They, along with Miyoshi, had developed a code for talking about the murders. 104RP 216-18.

[46] At some point, they had talked about telling Al nothing that had not already come out in the newspapers. 104RP 235-36.

When they met at the Landis Hotel, Miyoshi recalls Al asking only whether Miyoshi knew about the murders ahead of time. 104RP 223-24. Burns encouraged him to answer. 104RP 224. Concerned about the possibility of recording equipment, Miyoshi merely nodded his head. 104RP 224-25.

Miyoshi said that the answers he gave during his post-arrest interrogation on July 31, 1995 were designed to protect Burns and Rafay, as well as himself. 104RP 237-38. He subsequently entered into an immunity agreement, and gave several more statements while represented by counsel. 104RP 238-42.

Miyoshi acknowledged on cross-examination that some of the information that he gave in the perpetuation deposition may not have been included in his earlier statements to the RCMP. 105RP 22-25, 86-97, 101-06, 177-80, 182-91. Miyoshi explained that, at the time he gave those earlier statements, he had mixed feelings about his course of action, and was still motivated in part by a desire to protect his friends. 105RP 42, 91-92, 105-06, 132-35, 183; CP 5423.

Miyoshi readily admitted that being drawn back into this case after so many years had affected his job. 105RP 67. After talking to his employers, it became clear to Miyoshi that, should he refuse

to come to the United States and testify, the company would find a reason to fire him. 105RP 74. Miyoshi said that he did not want to return and testify, because by telling the truth he would hurt his friends. 105RP 84-85. In fact, the first person Miyoshi contacted was not Detective Thompson, as directed in the letter sent through Miyoshi's employer, but Jeff Robinson (Burns's attorney). CP 5425-26; Ex. 82 (pretrial). Miyoshi acknowledged that he did this because he was still considering not giving testimony that could hurt his friends. CP 5416, 5426.

Miyoshi admitted that he was still reluctant to testify against his friends, and that he was not inclined to volunteer any information that could harm them. CP 5419-20, 5426. When pressed, however, Miyoshi confirmed that both Burns and Rafay had discussed the murder plan with him before they carried it out, and that they had told him after the fact that they had committed the murders. 105RP 35; CP 5419, 5423.

f. Burns's Trial Testimony.

Burns testified at trial and claimed that his admissions to committing the murders were false.[47] 143RP 99-103. He said that

[47] Rafay did not testify at trial.

he and Rafay believed that anyone who broke Haslett's rules was in danger of being killed. 143RP 101-03. Burns claimed that, after learning incriminating information about Haslett and Shinkaruk, he believed that they viewed him as a possible threat to their criminal organization. 143RP 101-03, 154. Burns testified that he believed the safest thing to do was to play along and pretend to have committed the murders. 143RP 103, 167. According to Burns, he and Rafay planned in advance to tell Haslett that they committed the murders, and they went over the details of the crime from what they knew or had learned from the media. 143RP 164-65.

Burns acknowledged that a few days after the murders, he was no longer cooperating with the Bellevue police. He refused to speak with them, and encouraged Rafay to do the same. 145RP 82-83, 89. Confronted with a recording of a conversation he had with Rafay in their residence, Burns admitted that they had discussed sending smoke or gas bombs to Detective Thompson's residence or to his children's school. 146RP 11-13; Ex. 550 (interception on July 26, 1995 beginning at 11:56 p.m.). They laughed about how those could be places where an assassination could occur. 146RP 12-13.

Burns complained that, due to the publicity from the murders, he could not get a job in Canada. 143RP 106-07. He testified that he dropped out of college because everyone at school stared at him and the teachers ignored him. 143RP 108; 145RP 56. He claimed that by September of 1994, "there was really nothing for us to do in our lives except wait for the investigation to end . . . ." 143RP 109. While they waited, using money from the Rafay estate, he and Rafay bought a Mustang. 145RP 63.

Burns testified that when he first met Shinkaruk, he was flattered by the attention. 143RP 114-16. After the first meeting with Haslett, Burns assumed that Haslett was involved in criminal activity, because he was described as someone who made money "any way he could." 143RP 123. Nonetheless, Burns gave his telephone number to Haslett. 143RP 124. Burns admitted that greed led him to associate with Haslett. 143RP 131; 145RP 105-06. Burns claimed that he continued to associate with Shinkaruk and Haslett because, unlike young girls who "get it on a lot," he had never had any reason to distrust strangers. 143RP 132.

Burns testified that he was scared and confused when he was asked to drive the stolen car from Whistler. 143RP 130-31. He insisted that he could not go to the police at that time because it

would result in him getting convicted and executed for the murders in Bellevue. 143RP 130. Burns admitted that before he drove the car from Whistler, he "possibly" had an interest in obtaining a stolen car, and that after the Whistler scenario he asked Shinkaruk about whether Haslett could get him a stolen car. 145RP 144-46. Contradicting his complaints to Haslett and Shinkaruk, Burns insisted at trial that the amount he was paid for driving the car was "beside the point for me." 145RP 140.

Burns testified that he intended to tell Haslett that he did not want to work for him when they met at the Four Seasons Hotel on May 6, 1995. 143RP 139-40. On cross-examination, he acknowledged that at that meeting he told Haslett and Shinkaruk that he was worried about losing touch with them. 145RP 148-49. Burns also admitted that he was the first to raise the idea of money laundering. 145RP 154.

Burns was asked no questions about and did not explain his statements on July 24, 1995 at the Landis Hotel, when, outside the presence of Haslett, he implored Miyoshi to admit what he knew about the plan to commit the murders. See Ex. 544 at 5-12.

Burns acknowledged the possibility that he and Rafay might ultimately have used the money from the Rafay estate to finance

their movie. 145RP 67-68. He acknowledged that the recordings from wiretaps revealed that he had had a large number of conversations about the film as the undercover scenarios unfolded. 145RP 110-11. After Haslett assured Burns that evidence implicating him in the murders would be destroyed, Burns called a cinematographer and told him that their script was complete, that they would begin filming in August, and that they planned to spend $200,000 to $300,000. 145RP 131-32; Ex. 550 (intercepted call on July 28, 1995 beginning at 7:41 p.m.). Burns acknowledged that he expected that Rafay would be providing the money for the movie. 145RP 133-35.

During the course of his testimony, Burns admitted to several additional incriminating facts. Burns acknowledged that in March of 1992, approximately two years before the murders, he had used a movie as an alibi. 146RP 28-33. Burns had been driving the family car, with a friend as a passenger, when he hit a pole in a parking lot. 146RP 28-29. Burns collected pieces of the car, drove to a movie theater parking lot, and staged a scene to make it appear that the car had been hit there. 146RP 30-33. Burns then bought tickets to the movie to support his claim that he

was inside the movie theater when the car was hit. 146RP 30-32. Finally, Burns asked a friend to lie in court about what had happened. 146RP 32-33.

Burns also admitted to previously expressing an interest in committing murder. Late one night, about six months before the murders, he and Rafay visited a friend, Nazgol Shifteh, at her home. 146RP 61-63. Shifteh, a high school senior, had wanted to talk to Rafay about Cornell University. 146RP 63. While talking in Shifteh's bedroom late at night, Burns told the girl, "I want to try to kill someone one day. I'd like to see how it would feel, because I think I would find it enjoyable." 146RP 64.

C. ARGUMENT

1. THE DEFENDANTS' SPEEDY TRIAL RIGHTS WERE NOT VIOLATED.

The defendants claim that their rights to a speedy trial were violated under the federal and state constitutions, and under former CrR 3.3. The premise of all of these claims is that the State of Washington should have immediately given assurances that it would not seek the death penalty in this case, rather than seeking a decision on that issue from the highest court of Canada. These arguments are baseless.

Under CrR 3.3, the defendants were not amenable to process because they were incarcerated in a foreign jurisdiction and they fought extradition. Moreover, the State exercised good faith and due diligence in obtaining their presence for trial. Until the Supreme Court of Canada resolved the issue, there was a significant question whether Canada would require assurances in this case. Neither the Extradition Treaty nor the Canadian Charter of Rights and Freedoms unequivocally required such assurances.

For the first time on appeal, the defendants raise a constitutional speedy trial claim. Because they did not raise this claim below, and because they cannot show manifest constitutional error, they have waived this claim. In any event, the claim cannot succeed. The bulk of the six-year gap between charging and arraignment was caused by the defendants' aggressive fight against their commitment and extradition to the United States, and the State's attempt to clarify whether they could be subject to the death penalty if convicted. In combination with the defendants' long delay in asserting their speedy trial rights, and their failure to show actual prejudice, this is fatal to their constitutional claim.

a. Relevant Facts.

On July 31, 1995, the State charged the defendants with three counts of aggravated murder in the first degree; the RCMP arrested them in Canada on the same day. CP 1-9, 531, 542-46; 114RP 95; 115RP 160. A formal extradition request was filed on September 25, 1995, by diplomatic note under the treaty between Canada and the United States. CP 531-32.

On February 2, 1996, a Canadian judge committed the defendants for surrender. CP 532, 784. On July 12, 1996, the Canadian Minister of Justice exercised his discretion and concluded that the defendants should be surrendered to Washington State to face criminal prosecution, without requiring assurances that they would not face the death penalty. CP 784, 2243-44. The defendants appealed both the committal decision and the decision to surrender them without assurances that Washington would not seek the death penalty. CP 55-56, 817.

On June 30, 1997, the British Columbia Court of Appeal affirmed the committals. CP 817-32. In a divided opinion, the court further held that unconditional surrender violated the Canadian Charter of Rights and Freedoms; the court accordingly required that the State of Washington assure the Canadian government that the

State would not seek the death penalty. CP 53-81. The court based its decision on § 6(1) of the Canadian Charter of Rights and Freedoms, which guarantees that "[e]very citizen of Canada has the right to enter, remain in and leave Canada." CP 64, 2264. The court reasoned that, should the defendants be executed in the United States, their return to Canada would be impossible, and that the goals of extradition did not require such an impairment of their rights as Canadian citizens. CP 64-69.

The Minister of Justice sought review in the Supreme Court of Canada of the Court of Appeal's decision requiring assurances. CP 101-02. The defendants sought review of the decision affirming the committal. CP 784. In November 1997, the Supreme Court accepted review of the Minister's appeal on the issue of assurances, but declined to hear the defendants' committal appeal. CP 784, 868, 3574.

While the Minister's appeal was pending in the Supreme Court of Canada, the defendants continued to actively fight extradition. On May 9, 2000, the defendants asked the court to reconsider its decision denying review of the committal order. CP 784, 3575; 10RP 87. On December 8, 2000, concerned that the Supreme Court of Canada might allow their extradition, the

defendants asked the King County Superior Court to stay extradition pending their appeal to the United Nations Human Rights Committee ("UNHRC"). RP(12-18-00) 1-6; CP 377-83, 3387-88. The court denied the motion because it did not believe it had jurisdiction to stay the extradition. RP(12-18-00) 14-15.

On February 15, 2001, the Supreme Court of Canada issued its decision on the Minister's appeal and dismissed the defendants' motion to reconsider the committal order. CP 834-65, 870. The court recognized that the Extradition Treaty between Canada and the United States of America "**permits** the requested state . . . to refuse extradition of fugitives unless provided with assurances that if extradited and convicted they will not suffer the death penalty." CP 840 (emphasis added). Refusing to allow the defendants in this case to be extradited without such assurances, the court nevertheless took care to recognize the discretion vested in the Minister of Justice:

> We agree that the *Canadian Charter of Rights and Freedoms* does not lay down a constitutional prohibition in all cases against extradition unless assurances are given that the death penalty will not be imposed. The Minister is required (as he did here) to balance on a case-by-case basis those factors that favour extradition with assurances against competing factors that favour extradition without assurances. We hold, however, for the reasons which follow, that

> such assurances are constitutionally required in all but exceptional cases. We further hold that this case does not present the exceptional circumstances that must be shown before the Minister could constitutionally extradite without assurances. . . . We thus agree with the result, though not the reasons, reached by a majority of the judges of the British Columbia Court of Appeal in this case.[[48]] The Minister's appeal must therefore be dismissed.

CP 841. See also CP 845 ("*The Extradition Act Confers a Broad Statutory Discretion on the Minister.*").

The Supreme Court acknowledged that it had previously allowed extradition without assurances for individuals facing the death penalty. CP 850-51. The court distinguished those cases, however, in light of a number of more recent developments surrounding the death penalty, including growing international opposition, controversy about wrongful convictions, and the "death row phenomenon."[49] CP 853-62. The court ultimately concluded that "principles of fundamental justice," as applied to the "factual

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[48] The Court of Appeal had held that extradition without assurances would violate the defendants' "mobility rights" under the Charter. CP 64-69. The Supreme Court rejected this reasoning, observing that "[e]xtradition with assurances would result in the forcible removal of the respondents from Canada as much as extradition without assurances." CP 848.

[49] The "death row phenomenon" refers to the psychological stress that a defendant feels during the long delay between the sentence and the actual execution due to the generous, but lengthy, appellate process afforded to those sentenced to death. CP 2208, 2214-15.

developments" surrounding the death penalty, tilted the balance in favor of extradition only with assurances. CP 864.

Following this decision, the King County Prosecuting Attorney promptly gave the requisite assurances; the defendants were transported to the King County Jail on March 29, 2001, and arraigned on April 6, 2001. CP 533-34, 3575.

On the day of arraignment, April 6, 2001, Burns filed a motion to dismiss, alleging a speedy trial violation under CrR 3.3. CP 530-91. On February 15, 2002, Rafay filed a similar motion to dismiss, also under CrR 3.3. CP 3569-99. The State filed its response on February 14, 2003. CP 2171-2379. The trial court heard argument on the motions on February 18, 2003. 10RP 78-99. The court denied the motion, finding that the defendants were not amenable to process until the Supreme Court of Canada issued its decision in February of 2001. 10RP 99. The trial court also rejected the argument that the prosecutor was required to waive the death penalty before exhausting all appeals. 10RP 100.

b. The Defendants' CrR 3.3 Right To A Speedy Trial Was Not Violated.

Former CrR 3.3[50] guaranteed a defendant who was detained in jail a right to a speedy trial within 60 days of arraignment. CrR 3.3(c)(1). The rule excluded from this calculation "[t]he time during which a defendant is detained in jail or prison outside the state of Washington . . . ." CrR 3.3(g)(6). If the court determines that the deadline has passed, and an objection was properly raised,[51] the court must dismiss the charges with prejudice. State v. Swenson, 150 Wn.2d 181, 186-87, 75 P.3d 513 (2003).

Because the rule failed to address the consequences of a long delay between filing of the charge and arraignment, the courts have filled the gap through case law. Under the Striker[52] rule, when a defendant is amenable to process and there is a long delay between filing of the charge and arraignment, the time within which trial must be held starts to run on the "constructive arraignment

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[50] CrR 3.3 was substantially revised in 2003.

[51] Former CrR 3.3(e) required that any objection to the date of arraignment be made at the time of arraignment. Both defendants objected in accordance with the rule. CP 592-93, 3391-92.

[52] State v. Striker, 87 Wn.2d 870, 557 P.2d 847 (1976).

date," which is calculated as 14 days after the charge was filed. State v. Hessler, 155 Wn.2d 604, 607, 121 P.3d 92 (2005). Only unnecessary delay falls under the Striker rule; the rule does not require the court to establish a constructive arraignment date where the State acts in good faith and with due diligence in attempting to bring a defendant before the court to answer to the charges. State v. Greenwood, 120 Wn.2d 585, 601, 845 P.2d 971 (1993). The Striker rule does not apply to any period of delay that can be attributed to the defendant. Greenwood, 120 Wn.2d at 600.

The trial court determines as a matter of fact whether the State acted in good faith and with due diligence in trying to bring an incarcerated defendant before the court. Swenson, 150 Wn.2d at 186. The determination whether a defendant's time for trial deadline has passed requires application of a court rule to particular facts, and review is thus *de novo*. Id.

i. The defendants were not amenable to process while they were incarcerated in Canada.

The Striker rule applies only when the defendant is amenable to process. State v. Hudson, 130 Wn.2d 48, 55, 921 P.2d 538 (1996). "Amenable to process" means being liable or

subject to the law. State v. Stewart, 130 Wn.2d 351, 361, 922 P.2d 1356 (1996). In a motion to dismiss for unnecessary delay, the defendant bears the initial burden of showing that he was amenable to process. Hessler, 155 Wn.2d at 607.

A defendant is not amenable to process when, although his whereabouts are known, he is not subject to the law because the court cannot obtain jurisdiction over him. State v. Lee, 48 Wn. App. 322, 325, 738 P.2d 1081 (1987). Where a defendant must be extradited from somewhere outside the state, Washington has no "power" over him until extradition procedures are completed. Id. at 325; Stewart, 130 Wn.2d at 361.

Where a defendant incarcerated out-of-state affirmatively seeks to waive extradition and return to Washington for a speedy trial, the defendant is amenable to process, and the time spent incarcerated in the foreign jurisdiction is counted against the time for trial. State v. Roman, 94 Wn. App. 211, 217, 972 P.2d 511, review denied, 138 Wn.2d 1014 (1999). Where such a defendant is exercising his extradition rights, however, he is not amenable to process until the extradition process has culminated in an extradition warrant. Id.

The defendants were not amenable to process until they were extradited to Washington from Canada. Up to that point, Washington courts had no power to bring the defendants to court to answer the charges.

The defendants' reliance on State v. Anderson, 121 Wn.2d 852, 855 P.2d 671 (1993) is misplaced. Anderson was in federal custody in Arizona; when his Washington case was set for retrial following remand after appeal, Anderson "began a series of efforts to assert his right to a speedy trial [in Washington]." Id. at 854. In such a case, the defendant is amenable to process. Roman, 94 Wn. App. at 216-17. However, where the defendant is exercising his extradition rights, as these defendants were doing, he is not amenable to process until the extradition procedure has been successfully completed. See Roman, 94 Wn. App. at 217.

By requesting extradition, the State gave the defendants the ability to return for a speedy trial if they so chose. They could have returned to Washington either by immediately waiving extradition, or by not pursuing appeals in the Canadian courts or the UNHRC. By choosing to resist extradition, the defendants made themselves not amenable to process by the State of Washington.

ii. The State exercised good faith and due diligence in attempting to obtain the defendants' presence for trial.

Because the defendants were incarcerated in a known location, the State was required to act in good faith and exercise due diligence through the extradition process to bring them to trial in this state. Anderson, 121 Wn.2d at 864; Hudson, 130 Wn.2d at 56; Stewart, 130 Wn.2d at 364. Any period during which the State acts in good faith and with due diligence in attempting to bring a defendant to court is excluded from the time for trial calculation. Hessler, 155Wn.2d at 607. Whether the State acted in good faith and with due diligence turns on the facts of each individual case. Hudson, 130 Wn.2d at 54.

There is no dispute that the State promptly initiated extradition proceedings. The defendants argue, however, that the State demonstrated a lack of good faith and due diligence when it did not provide assurances that they would not face the death penalty until the Supreme Court of Canada finally ruled that such assurances were a necessary prerequisite of extradition. BOA (Burns) at 182. The trial court expressly rejected this argument. 10RP 100. The trial court's factual finding is supported by both the facts and the law.

Looking first to the extradition treaty between the United States and Canada, the relevant provision is Article 6:

> When the offense for which extradition is requested is punishable by death under the laws of the requesting State and the laws of the requested State do not permit such punishment for that offense, extradition **may** be refused unless the requesting State provides such assurances as the requested State considers sufficient that the death penalty shall not be imposed, or, if imposed, shall not be executed.

CP 2223 (emphasis added). The use of the permissive "may" refutes the defendants' claim that such assurances are **required**.[53]

The use of the permissive term implies that discretion is vested in some government official to determine when extradition will be refused in the absence of assurances. Indeed, the Supreme Court of Canada, in its ruling in this case, recognized that the Canadian Charter of Rights and Freedoms "does not lay down a constitutional prohibition in all cases against extradition unless assurances are given that the death penalty will not be imposed." CP 841. Rather, the Minister of Justice is required to "balance on a case-by-case basis those factors that favour extradition with

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[53] Burns himself recognized this in his brief: "The Extradition Treaty **permits** Canada to refuse extradition of fugitives unless the United States provides assurances that if Canada extradites the fugitives to the United States and the Canadian citizens are convicted, they will not suffer the death penalty." BOA (Burns) at 170 (emphasis added). He later contradicted himself, however, asserting that the treaty **mandates** such assurances. BOA (Burns) at 178-79.

assurances against competing factors that favour extradition without assurances." Id. The court explicitly recognized the discretion vested in the Minister: "None of the parties to this litigation has attacked the constitutional validity of this discretion which has previously been found by a majority of this Court to pass *Charter* scrutiny . . . ." CP 846.

The Supreme Court recognized that it had more than once in the past extradited fugitives to face the death penalty in the United States, citing the cases of Kindler v. Canada (Minister of Justice), [1991] 2 S.C.R. 779 and Reference re Ng Extradition, [1991] 2 S.C.R. 858. CP 842, 850-51. The court reaffirmed the validity of the balancing process applied in those cases, noting that some of the factors considered would remain unchanged, while "others will evolve over time." CP 851. The court reviewed the factors on either side of the issue, placing great emphasis on developments since Kindler and Ng were decided in 1991. The court noted, for example, that the Canadian Parliament had "abolished the last vestiges of the death penalty in 1998." CP 853. The court also noted the emerging international consensus against the death penalty (CP 853-54), international initiatives opposing extradition without assurances (CP 854-55), and the growing concern with

potential wrongful convictions (CP 856-60). Observing that "[t]he arguments against extradition without assurances have grown stronger since this Court decided Kindler and Ng in 1991," the court concluded that the balance "now tilts against the constitutionality [of extradition without assurances]." CP 862, 864.

Whether the State acted in good faith and with due diligence turns on the facts of this case. Hudson, 130 Wn.2d at 54. There can be no question that the Minister of Justice had discretion, under both the extradition treaty and the Canadian Charter, to decide whether assurances would be required. While the appellate courts of Canada ultimately decided that assurances would be required, they did not agree on the rationale. Moreover, the Supreme Court recognized that much had happened in recent years to change the balance of factors that weighed in the extradition decision. Given these facts, it cannot be said that the State of Washington lacked either good faith or due diligence in pursuing the question of assurances in the Canadian courts, with the goal of having all legal options available to punish these defendants, who stood accused of murdering three people in the State of Washington, under Washington law. Their claim under CrR 3.3 should be rejected.

c. The Defendants' Constitutional Right To A Speedy Trial Was Not Violated.

i. The defendants waived this claim.

An appellate court will not generally review a claim of error not raised in the trial court. RAP 2.5(a); State v. Scott, 110 Wn.2d 682, 685, 757 P.2d 492 (1988). An exception is made for "manifest error affecting a constitutional right." RAP 2.5(a)(3). The exception is a narrow one. Scott, 110 Wn.2d at 687. To take advantage of it, the defendant must show that the asserted constitutional error had "practical and identifiable consequences in the trial of the case." State v. Lynn, 67 Wn. App. 339, 345, 835 P.2d 251 (1992); State v. Kirkman, 159 Wn.2d 918, 935, 155 P.3d 125 (2007). That is, he must show how, in the context of the trial, the error **actually affected** his constitutional rights. State v. McFarland, 127 Wn.2d 322, 333, 899 P.2d 1251 (1995).

In support of their constitutional claim, the defendants allege no specific prejudice – they do not attempt to show any "practical and identifiable consequences" of the delay. Instead, they merely assert that this Court may **presume** prejudice from the length of the delay. BOA (Burns) 174-77. This is not sufficient where the claim

of a constitutional violation of their speedy trial right was never raised below. This Court should not consider this claim for the first time on appeal.

ii. The defendants' rights were not violated.

Even if this Court chooses to review this claim of error, the claim nevertheless fails. A criminal defendant's right to a speedy trial is guaranteed by both the federal and the state constitutions. U.S. Const. amend. VI; Wash. Const. art. 1, § 22.[54] In evaluating a claim that the constitutional right to a speedy trial has been violated, the court balances four factors: 1) the length of the delay, 2) the reason for the delay, 3) whether or not the defendant asserted the right, and 4) the prejudice to the defendant. State v. Fladebo, 113 Wn.2d 388, 393, 779 P.2d 707 (1989) (citing Barker v. Wingo, 407 U.S. 514, 530-32, 92 S. Ct. 2182, 33 L. Ed.2d 101 (1972)).

[54] The defendants do not argue that the state constitutional provision is more protective of their speedy trial right than its federal counterpart. Washington courts have regularly applied the federal standard. See, e.g., State v. Fladebo, 113 Wn.2d 388, 393, 779 P.2d 707 (1989); State v. Vicuna, 119 Wn. App. 26, 35, 79 P.3d 1 (2003), review denied, 152 Wn.2d 1008 (2004).

(a). The delay in this case triggers the analysis.

There was a nearly six-year delay between the defendants' arrest in Canada in July 1995 and their arraignment in Washington in April 2001. The length of the delay is a triggering mechanism: "Until there is some delay which is presumptively prejudicial, there is no necessity for inquiry into the other factors that go into the balance." Barker, 407 U.S. at 530. A delay approaching one year is generally considered sufficient to trigger the inquiry. Doggett v. United States, 505 U.S. 647, 652 n.1, 112 S. Ct. 2686, 120 L. Ed.2d 520 (1992). The delay in this case requires inquiry into the remaining factors.

(b). The defendants bear responsibility for the delay.

The State attempted to bring the defendants to trial in Washington by making a timely request to the Canadian government for extradition. The Minister of Justice agreed to extradite the defendants without assurances that they would not face the death penalty if convicted. The defendants resisted extradition, and pursued appeals of both their committal and their extradition. The State attempted to preserve its initial position

(extradition without assurances) throughout the appellate process. By fighting extradition, the defendants were the cause of any delay in bringing them to trial.

Courts have found no constitutional violation where the State initiated formal extradition proceedings and the defendant resisted extradition. In United States v. Manning, 56 F.3d 1188 (9th Cir. 1995), there was a thirty-month delay between the defendant's indictment and the government's request for his extradition. The Ninth Circuit concluded that the defendant had caused the delay:

> Manning cannot avoid a speedy trial by forcing the government to run the gauntlet of obtaining formal extradition and then complain about the delay that he has caused by refusing to return voluntarily to the United States. Manning could have avoided any post-indictment delay by returning to the United States. His affirmative resistance of the government's efforts to secure his presence in the United States constitutes an intentional relinquishment of his right to a constitutional speedy trial, and he cannot now complain of the delay that he himself caused.

Manning, 56 F.3d at 1195.

Similarly, in United States v. Mitchell, 957 F.2d 465 (7th Cir. 1992), the court found that the defendant's right to a speedy trial had not been violated by a seven-year delay between indictment and trial, where the defendant had to be extradited from Colombia.

Again, the court found that the defendant caused the delay:

> "A defendant's claim that the government violated [his] right to a speedy trial is seriously undermined when the defendant, and not the government, is the cause of the delay . . . . Mitchell's initial decision to flee from the halfway house to Colombia is the root cause of the long delay between his indictment and trial.

Mitchell, 957 F.2d at 469 (internal citation omitted).

In United States v. Thirion, 813 F.2d 146 (8th Cir. 1987), the court again refused to attribute delay to the government where the defendant did not waive extradition. "Absent evidence of any formal waiver of extradition, we are unwilling to attribute to the government any delay caused by formal extradition proceedings initiated in compliance with the treaty." Id. at 154.

As argued above (§ C.1.b.ii), the State acted in good faith in pursuing extradition without assurances. The defendants resisted extradition throughout the appellate process. Because they bear the responsibility for the delay, this factor weighs against the defendants.

(c). The defendants failed to timely assert their rights.

The defendants were arrested and charged on July 31, 1995. 114RP 95; CP 1-9. Rafay did not demand a speedy trial

until October 19, 1999, more than four years later. Supp. CP ___ (sub #7 (Rafay)). The closest Burns came to making a demand for a speedy trial came in a letter to prosecutors dated April 17, 2000, in which he stated: "Mr. Burns and Mr. Rafay can be brought to Washington to stand trial if you would agree that you would not seek the death penalty." CP 548.

The Court in Barker, while rejecting a bright-line rule that a defendant who fails to demand a speedy trial forever waives the right, nevertheless concluded that a defendant has some responsibility to assert a speedy trial claim. Barker, 407 U.S. at 528-29. The Court emphasized that "failure to assert the right will make it difficult for a defendant to prove that he was denied a speedy trial." Id. at 532. Barker was not brought to trial for more than five years after his indictment for murder. Id. at 516-18. He made no objection, however, to numerous continuances, first moving to dismiss more than three years after his indictment. Id. at 517. The Court found that Barker, who was hoping that his accomplice would be acquitted and that he himself would never be tried, did not want a speedy trial; the Court concluded that he was not deprived of one. Id. at 535-36.

Similarly, Burns and Rafay did not want a speedy trial, as evidenced by their long delay in demanding one. Rather, they hoped that the Canadian courts would reverse the committal decision, and set them free. Because they did not timely assert their speedy trial rights, this factor weighs against the defendants.

(d). The defendants cannot show prejudice.

The defendants have neither claimed nor shown any actual prejudice resulting from the delay between their arrest and their arraignment. They rely wholly on the presumption that a lengthy delay is prejudicial. But presumptive prejudice alone cannot carry the day under these circumstances. The Court in Doggett explicitly limited the role of such presumptive prejudice:

> [I]f the Government had pursued Doggett with reasonable diligence from his indictment to his arrest, his speedy trial claim would fail. Indeed, that conclusion would generally follow as a matter of course however great the delay, so long as Doggett could not show specific prejudice to his defense.

Doggett, 505 U.S. at 656.

Here, the State acted in good faith and with reasonable diligence in using the extradition procedures to return the defendants to Washington for trial. While presumptive prejudice from the lengthy delay may trigger analysis of the remaining

factors, it not sufficient to show a violation. In the absence of a showing of actual prejudice, this factor weighs against the defendants' claim.

Given their part in causing the delay by resisting extradition and appealing their committal, their failure to timely assert their speedy trial rights, and their failure to show actual prejudice, the defendants' constitutional speedy trial claim must fail.

2. THE DEFENDANTS' ADMISSIONS WERE NOT COERCED.

The defendants contend that their admissions of guilt to undercover RCMP officers posing as gangsters were obtained through fear and coercion, and thus admitted at trial in violation of their Fifth Amendment right against compulsory self-incrimination, as well as the due process protections of the Fifth and Fourteenth Amendments. The facts belie these claims. The defendants, especially Burns, met repeatedly and freely with the undercover officers, who they thought would help them to destroy evidence and launch them on a profitable life of crime. The videotaped confessions show them relaxed, even laughing about the brutal murders of the Rafay family. These confessions were not coerced.

The defendants also assert that the trial court improperly analyzed the admissibility of the statements under the "silver platter doctrine," which they argue applies only to Fourth Amendment claims. While the law in this area is somewhat unsettled, the argument is irrelevant – the trial court correctly recognized the Fifth and Fourteenth Amendment claims, and concluded that the statements were nevertheless admissible.

The defendants also claim that the trial court simply relied on the Canadian court's finding that the statements were not coerced. This is not correct. The trial court listened to weeks of testimony from the RCMP officers who conducted the undercover operation, and watched and listened to hours of video and audio recordings of the defendants' conversations, including their admissions to these crimes. Based on all of this evidence, the trial court specifically found the admissions were not the product of coercion or duress.

a. Relevant Facts.

i. The admissions.

After reading the fake Bellevue Police Department memo, Burns finally admitted his involvement in the murders. Ex. 542[55] at

[55] Ex. 542 is the written transcript of the July 18, 1995 scenario at the Ocean Point Hotel in Victoria, B.C. The corresponding DVD, containing audio and video of this scenario, is Ex. 510.

10-20. Burns told Haslett that he killed the Rafays "one after the other." Id. at 21. He killed the mother first, then the father, then the sister. Id. at 32. He used a metal bat. Id. at 20, 53. During the murders, he wore only his underwear. Id. at 28-29. He took a shower to clean off blood and "that kind of stuff." Id. at 28. He rinsed the bat off in the shower as well. Id. at 47.

Burns went with Rafay to the Keg, "The Lion King" and Steve's Broiler to create an alibi. Id. at 25-26. They committed the murders during the movie, after leaving the theater early. Id. at 27-28. Burns explained that Rafay did not help with the actual killings because "[h]e's a little guy" and "it was unnecessary." Id. at 23, 24.

Burns described the murder of Basma Rafay in some detail, and Rafay chimed in here:

> **Haslett:** Did any of 'em fight.
>
> **Rafay:** Um, uh, yes.
>
> **Burns:** Well, That's a story that hasn't really been told, cause . . .
>
> **Rafay:** I don't think you want to tell anything about that. . . . (LAUGHS).
>
> (BOTH RAFAY AND BURNS ARE HEARD CHUCKLING THROUGHOUT THIS EXCHANGE).
>
> **Burns:** Yeah. (LAUGHS). I know that. Um, well, basically, uh, the father was uh really nothing and

> curious episode was uhm the sister, who basically, um, yeah was standing up and walkin' around and whatever . . .
>
> **Rafay:** (LAUGHTER). Oh, God.
>
> **Burns:** (LAUGHTER) . . . and took a little more bat work.

Ex. 543[56] at 40.

Burns said that Jimmy Miyoshi knew in advance of the plan to murder the Rafay family. Ex. 542 at 23, 32-33. Miyoshi did not participate because he was too busy, and because he wasn't needed. Id. at 33, 35.

Burns told Haslett that he and Rafay murdered Rafay's family for the money. Id. at 22, 25. Burns described how he felt about the murders: "I think that I'm a lot happier than, than if it didn't happen." Id. at 35.

Atif Rafay confirmed that he and Burns murdered the Rafay family for the money. Ex. 543 at 38. Rafay told Haslett that he did not take part in the murders, but "[s]tood around" and "yanked out a

[56] Ex. 543 is the written transcript of the July 19, 1995 scenario at the Ocean Point Hotel in Victoria, B.C. The corresponding DVD, containing audio and video of this scenario, is Ex. 511.

v-c-r." Id. at 39. When Haslett asked Rafay how it felt to kill his family, Rafay responded at some length:

> Pretty rotten but it was tempered by the fact that I felt that it was necessary. . . . It was necessary to I guess um, achieve what I wanted to achieve in this life. It was I think of it as a sacrifice I think of it as um, I guess um, a sort of injustice in the world that basically, basically forced me or, and Sebastian, to uh, have to do the thing.

Ex. 543 at 56.

ii. The hearing and the trial court's findings.

In their briefing on the motion to suppress the defendants' admissions to the RCMP, both defendants spent considerable time arguing that the RCMP investigation into the Rafay family murders was conducted with the full cooperation and participation of the Bellevue police, and was thus a "joint investigation." CP 2436-45, 3752-53, 3759-70. They accepted that the "silver platter" doctrine applied in some form, and concluded that the admissions obtained during the course of the investigation were not admissible under that doctrine.[57] CP 2446-47, 2449-56, 2471-76, 3771-74.

[57] Under the "silver platter doctrine," evidence that is lawfully and independently obtained in another jurisdiction is admissible in Washington, even if the evidence would violate Washington law if obtained in Washington. State v. Mezquia, 129 Wn. App. 118, 132-33, 118 P.3d 378 (2005), review denied, 163 Wn.2d 1046 (2008).

The defendants also challenged their admissions as involuntary and coerced, relying on the Fifth Amendment right against compulsory self-incrimination as well as the due process protections under the Fifth and Fourteenth Amendments. CP 3774-77. In making this argument, the defendants relied, as they do on appeal, on Arizona v. Fulminante, 499 U.S. 279, 111 S. Ct. 1246, 113 L. Ed.2d 302 (1991). CP 3776-77, 3834-36. Defendant Rafay followed up on this argument in his proposed findings of fact and conclusions of law, urging the court to conclude that "[i]ncriminating statements by Atif Rafay and Sebastian Burns were coerced and involuntarily made in violation of the Fifth and Fourteenth Amendments to the United States Constitution." CP 2769.

The trial court heard argument from all parties. Counsel for Rafay focused on the argument that the defendants' admissions were "involuntarily made and coerced," relying on the Fifth and Fourteenth Amendments. 36RP 127. As he had in his briefing, counsel again relied on Fulminante. 36RP 128-30. Arguing that the admissions were the result of "threats and inducements," counsel urged the court to find them unreliable. 36RP 136. In response, the State emphasized the freedom that the defendants

had to simply walk away from the undercover RCMP officers, and reminded the court that the defendants were not in custody when they made their admissions. 36RP 149.

The trial court prefaced its detailed oral ruling by underscoring the importance of the extensive evidentiary hearing that had just taken place:

> Thirdly, and I think significantly for any reviewing court, weeks of sworn testimony was admitted in this process, giving this court the opportunity to weigh credibility of witnesses, listen and view videotapes and the RCMP operations, undercover operations scenarios, and the opportunity to listen and view not only to what was said, but to how it was said and the demeanor of the participants in those scenarios.

37RP 3-4.

The trial court denied the motion to suppress the defendants' admissions made during the RCMP investigation. 37RP 5. The court rejected the defendants' contention that the RCMP investigation was a joint venture with the Bellevue police. 37RP 15-21. The court then addressed the coercion argument:

> Two issues remain, the Franks vs. U.S. issue and what I understood to be Ms. Freitas' argument under the Fifth and Sixth, and I think by extension the 14th Amendment, that the statements were coerced, violative of defendants' rights against self-incrimination, violative of defendants' rights to counsel. I want to take the last argument first.

> The defendants do clearly enjoy the protections of the U.S. Constitution, the Fifth, Sixth, and the 14th Amendment, insofar as due process. Were defendants' rights under these laws violated? The court's answer is no.
>
> The statements of defendants were given, unlike Mr. Fulminante and unlike Galileo, in a noncustodial setting. The defendants were free to speak or not. The defendants were free to leave or not. The defendants were free to consult their Canadian counsel or not, as they chose.
>
> The Canadian court reviewed and found no evidence of coercion, and this court makes the same finding. The Canadian court, in reviewing the self same issue under Canadian charter rights, found no duress, found nothing under Canadian police standards that would bring the administration of justice into disrepute.

37RP 22-23.

The trial court again addressed the question of coercion in its written findings of fact and conclusions of law. In finding of fact #15, the court found: "The Court of Appeals for British Columbia further found that there was no duress or coercion employed by the RCMP during the undercover scenarios in order to obtain the defendants' admissions. The Supreme Court of Canada did not disturb this finding.[58] This Court agrees with the Canadian courts and finds the same." CP 2808. In conclusion of law #6, the court

[58] The Supreme Court of Canada did not take review of this issue.

elaborated on the legal basis for the coercion argument: "The defendants['] statements and admissions to undercover RCMP officers during the course of the undercover scenarios were not the product of coercion or duress and their admission into evidence will not violate the defendants' due process rights, right to counsel or right against self incrimination guaranteed by the State and Federal Constitutions." CP 2811.

b. The Defendants' Admissions Were Not Coerced.

i. Standard of review and governing law.

When the State seeks to admit statements of the accused as evidence at trial, it bears the burden of proving the voluntariness of those statements by a preponderance of the evidence. State v. Braun, 82 Wn.2d 157, 162, 509 P.2d 742 (1973) (citing Lego v. Twomey, 404 U.S. 477, 489, 92 S. Ct. 619, 30 L. Ed.2d 618 (1972)). The test for voluntariness looks to whether a confession was the product of an essentially free and unconstrained choice. Schneckloth v. Bustamonte, 412 U.S. 218, 225, 93 S. Ct. 2041, 36 L. Ed.2d 854 (1973). In determining whether a defendant's will was overborne, courts should assess the totality of the circumstances, including both the character of the accused and the details of the

interrogation. Id. at 226. The mere fact that police lie to a suspect, thereby exaggerating the evidence against him, does not render a confession involuntary. Frazier v. Cupp, 394 U.S. 731, 737-39, 89 S. Ct. 1420, 22 L. Ed.2d 684 (1969).

In Bustamonte, the Court said that the question of voluntariness is a question of fact, to be determined from the totality of the circumstances. 412 U.S. at 227. In Fulminante, however, the Court said that "the ultimate issue of 'voluntariness' is a legal question requiring independent federal determination." 499 U.S. at 287.

The cases on which Fulminante relies appear to reach this conclusion based largely on the importance of federal oversight of the state courts. See Haynes v. Washington, 373 U.S. 503, 515-16, 83 S. Ct. 1336, 10 L. Ed.2d 513 (1963) ("we cannot avoid our responsibilities by permitting ourselves to be 'completely bound by state court determination of any issue essential to decision of a claim of federal right, else federal law could be frustrated by distorted fact finding'") (quoting Stein v. New York, 346 U.S. 156, 181, 73 S. Ct. 1077, 97 L. Ed. 1522 (1953)); Miller v. Fenton, 474 U.S. 104, 111, 106 S. Ct. 445, 88 L. Ed.2d 405 (1985) ("state-court determinations concerning the ultimate question of the

voluntariness of a confession are not binding in a federal habeas corpus proceeding"); Mincey v. Arizona, 437 U.S. 385, 398, 98 S. Ct. 2408, 57 L. Ed.2d 290 (1978) ("In making this critical determination, we are not bound by the Arizona Supreme Court's holding that the statements were voluntary. Instead, this Court is under a duty to make an independent evaluation of the record.").

Whether the question of voluntariness (and the other side of the same coin, coercion), is a factual or a legal determination, it is clear that Fulminante focused on the facts in deciding the issue. 499 U.S. at 286 n.2. Should this Court agree with Rafay that *de novo* review is required,[59] the Court must review all of the evidence that the trial court relied on for its findings that the defendants' confessions were not coerced. This includes the lengthy pretrial testimony of the RCMP undercover officers (23RP – 28RP) and the entirety of the audio and video record of interactions between the defendants and those officers, most importantly the videotaped confessions contained in Ex. 510 (audio/video of July 18, 1995 Ocean Point scenario) and Ex. 511 (audio/video of July 19, 1995 Ocean Point scenario). See 37RP 3-4.

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[59] Supplemental BOA (Rafay) at 5.

Rafay also argues that the "silver platter doctrine" does not apply to the defendants' confessions to the undercover RCMP officers, because the violation of the Fifth Amendment right against self-incrimination does not occur when the statements are made, but rather when they are used at trial. Supplemental BOA (Rafay) at 6-8. Rafay relies primarily on United States v. Verdugo-Urquidez, 494 U.S. 259, 110 S. Ct. 1056, 108 L. Ed.2d 222 (1990) for this proposition. That case, however, addressed a claimed Fourth Amendment violation ("The question presented by this case is whether the Fourth Amendment applies to the search and seizure by United States agents of property that is owned by a nonresident alien and located in a foreign country."). Id. at 261. Thus, the Court's discussion of when a Fifth Amendment violation occurs is necessarily dicta.

The Supreme Court revisited the question in Chavez v. Martinez, 538 U.S. 760, 123 S. Ct. 1994, 155 L. Ed.2d 984 (2003). The Court in Chavez addressed an allegedly coercive interrogation. Id. at 763. Four justices (Thomas, Rehnquist, O'Connor, Scalia), relying on Verdugo-Urquidez, held that it is not until coerced statements are used in a criminal trial that a violation of the Fifth Amendment right against self-incrimination occurs. Id. at 767.

Since that position did not command a majority, however, it appears that the question has not finally been settled by the Court.

Nevertheless, all parties and the trial court proceeded on the assumption that the Fifth Amendment privilege against self-incrimination and the due process guarantees of the Fifth Amendment and the Fourteenth Amendment applied to the defendants' confessions in this case, even though all of the admissions were made in Canada to the RCMP. See CP 2767-70, 2808, 2811, 3774-77, 3785-86, 3788, 3825, 3834-46, 5040-41; 36RP 127-36; 37RP 22-23.

Ultimately, the legal uncertainty in this area of the law is irrelevant in this case. As Rafay recognizes, the question is whether, under the totality of the circumstances, the defendants' admissions to the undercover RCMP officers resulted from coercion, or were instead the product of the defendants' free and unconstrained choice. Supplemental BOA (Rafay) at 11. There is abundant evidence in the record to support the trial court's conclusion that the admissions were not coerced.

ii. The record supports the trial court's conclusion that the defendants' admissions were not coerced.

Rafay appears to argue that the trial court simply relied on the finding of the Canadian Court of Appeal that the admissions were not coerced. See Supplemental BOA (Rafay) at 18-20. The record belies this claim. Before giving his oral ruling, Judge Mertel detailed the extensive evidence adduced in the trial court, including the testimony of the undercover RCMP officers and the extensive audio and video recordings of the defendant's conversations with them, on which the court based its findings and conclusions.[60] 37RP 3-4. As set out in detail below, the interactions between the defendants and the undercover RCMP officers reveal the voluntary nature of the defendants' confessions to murdering the Rafay family.[61]

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[60] The pretrial testimony of the RCMP officers is contained in 23RP-28RP. The conversations between the undercover RCMP officers and the defendants are contained in written transcripts (Ex. 546, 540, 541, 542, 543, 544) and the corresponding audio and video recordings (Ex. 507, 508, 509, 510, 511, 512).

[61] It is rare that a court has found statements coerced outside the context of custodial interrogation. Even in Fulminante, the maker of the statements was incarcerated. While it may be possible to conceive of a situation where the recipient of the statements has exercised such control over a non-incarcerated speaker that the statements might be deemed coerced, the facts of this case do not support such a conclusion.

Perhaps first and foremost is Burns's eagerness – even determination – to maintain contact with Haslett and Shinkaruk. Even after the "stolen car" scenario at Whistler on April 13, 1995, to which Burns reacted somewhat negatively, he gave indications that he wanted to continue the contact. Clearly unhappy with the $200 he had received, Burns told Haslett that he and his friends wanted to make big money, and he suggested schemes based on stealing cars or selling ecstasy. 123RP 170-71; 127RP 102. Burns also talked with Haslett about obtaining a stolen car for his own use. 127RP 104. Burns told Shinkaruk that he wanted to be in on the planning of any future ventures, to ensure that he would not get caught. 123RP 172. Burns told Shinkaruk that he and his friends would do anything if the price was right and they thought they could get away with it. 123RP 182.

Several weeks later, after trading messages for several days, Burns and Shinkaruk made plans to get together in a few days. 124RP 18-38, 52-53; Ex. 549 (intercepted call on May 1, 1995 at 1:36 a.m.). Burns was subsequently overheard telling Rafay and Miyoshi that he had better get a call from Gary. 124RP 85-89; Ex. 549 (interception on May 5, 1995 at 6:15 a.m.). When

Miyoshi responded, "fuck Gary," Burns countered that he wanted a car and wanted to stay in touch. Ex. 549 (interception on May 5, 1995 at 6:15 a.m.).

During their next meeting, at the Four Seasons Hotel in Vancouver on May 6, 1995, Burns told Shinkaruk that, while he was busy with his movie and now had funding, he was still interested in opportunities to make easy money, such as money laundering and selling drugs. Ex. 546 at 45-46. Burns emphasized his readiness: "I guess what I'm saying is that, anything goes." Id. at 47. Burns told Haslett that, once the movie was completed, "this is the kinda of [sic] relationship that, I would hope to sort of continue I guess, because I would be interested in pushing money through those sorts of circles because as I just explained to your pal here the things that I would want done." Id. at 66.

When Haslett asked Burns what he wanted done, Burns hinted at one of his motivations for continued contact: "Uhh, well I am not content to live my life with Detectives in Bellevue um, on my case. I, I can't go to the States right now. If I go to the States I'm, I'm arrested for investigation and forcibly . . . um." Id. at 66. Burns repeatedly emphasized this motivation. "Well just later in my life, umm, I'm not gonna want to have to worry about whether or not I

can go to the States, or whether I can travel to this country or that country or whatever. And whatever would be necessary to ensure that aum, that I, don't have to worry about that." Id. at 78. "[W]hat I want, is to be able to go to the States." Id. at 95.

Shinkaruk waited a few weeks before he contacted Burns again. When he finally called Burns on May 29, 1995, Burns told Shinkaruk that Burns was glad to hear from him, and that he was free to get together. 130RP 37-46; Ex. 549 (intercepted call on May 29, 1995 at 6:18 p.m.). After he hung up, Burns was in a jovial mood, singing about happiness. 130RP 48; Ex. 549 (intercepted on May 29, 1995 at 6:18 p.m.).[62] When Shinkaruk called back the next day and said that Haslett was too busy to get together, Burns expressed disappointment and suggested that he was anticipating their next meeting with "bated breath." Ex. 549 (intercepted call on May 30, 1995 at 7:44 p.m.).

Burns and Miyoshi traveled to Victoria, B.C. on June 15, 1995 to participate in what appeared to be money laundering. 130RP 84; Ex. 540 (transcript 1) at 12-15. After being paid $2000 at the conclusion of the job, the two seemed impressed. Ex. 540

[62] At trial, Burns testified that he became afraid of Haslett and Shinkaruk much earlier, at the May 6, 1995 encounter at the Four Seasons, when Shinkaruk told him that he had killed a man. 143RP 141-48.

(transcript 5) at 2. Burns commented that "it was pretty fucking easy, this is the world of crime." Ex. 540 (transcript 5) at 3. He added, "It's so cool. This has been the coolest thing ever I couldn't ask for anymore [sic] . . ." Ex. 540 (transcript 5) at 3.

When Burns and Miyoshi traveled to Victoria yet again for the money-laundering scheme, a private conversation in their hotel room revealed that Burns was looking toward his future in Haslett's organization. In conversation with Miyoshi, Burns said that "we could be doing major things with them, like a couple years . . ." Ex. 541 at 31. Comments like the foregoing, made wholly in the privacy of Burns's conversations with one of his best friends, convey excitement and anticipation, but certainly not fear.

Supporting the conclusion that Burns's frequent meetings with Haslett and Shinkaruk were voluntary, and not driven by fear, are Haslett's repeated assurances to Burns that all contact would be severed if either one so desired. For example, during Burns and Miyoshi's second trip to Victoria for "money laundering," Haslett told Burns that Haslett would "just walk away from this in a fuckin' heartbeat. If I don't fuckin' like the feeling of it." Ex. 541 at 114. Later, during the same conversation, Haslett feigned frustration with Burns's evasiveness, and again threatened to break off all contact:

"The minute I fuckin' make this mistake being made [sic] you won't fuckin' hear from me again. . . . You got Gary's pager number now. The minute I don't like it, Gary's num, pager will be fuckin' thrown in the fuckin' ocean and that'll be the end of it." Id. at 122.

On July 18, 1995, during the meeting at the Ocean Point Hotel in Victoria, Haslett reinforced his intention to break off all contact with Burns, should it become necessary: "Now if you want my help, you have to fuckin' do as I say and things are gonna be done proper, if you don't want it, you can tell me right now and you're gonna deny ever fuckin' knowing me." Ex. 542 at 14. "If I don't trust you I'll walk away. If you don't trust me you'll walk away." Id. at 54.

Many statements that Burns made to Haslett belie his claim that he and Rafay were in mortal fear of the supposed "crime boss." See, e.g., Ex. 542 at 43 ("Uh, I (LAUGHING) think it would be fun to plan things like this all the time."); Ex. 542 at 35 ("Well yeah personally I, I think that I'm a lot happier than, than if [the murders] didn't happen."). But it is Rafay's explanation of why he killed his family that most strongly refutes the claim of fear: "It was necessary to I guess um, achieve what I wanted to achieve in this life. It was I think of it as a sacrifice I think of it as um, I guess um,

a sort of injustice in the world that basically, basically forced me or, and Sebastian, to uh, have to do the thing." Ex. 543 at 56. This statement has the strong ring of truth; it is difficult to imagine why Rafay would give this lengthy and ultimately chilling explanation for the murders, when all he had to say to maintain credibility was, "We did it for the money."[63]

Of course, the strongest evidence that refutes the defendants' claim of coercion is their own demeanor and body language during their confessions. There can be no doubt that this evidence greatly influenced the trial court's conclusion that the statements were voluntarily made. If this Court chooses to independently evaluate the facts underlying this claim, it is imperative that the Court view the videotaped confessions contained in Ex. 511 and 512.

Rafay also contends that the trial court placed undue weight on the finding of the Court of Appeal for British Columbia that the admissions were voluntarily made; he complains that "it appears the defense was not permitted to introduce all of its evidence on the

[63] It is also difficult to understand why Burns told Haslett that Miyoshi knew what happened in Bellevue, if Burns and Rafay were, as they claim, simply concocting a story out of fear. Adding Miyoshi to the mix could only complicate this task.

subject" before the lower court in the committal proceeding. Supplemental BOA (Rafay) at 19-20. This is not quite accurate.

The opinion in question arose out of the defendants' appeal of a committal order under the Extradition Act. CP 817. The requesting state (the United States) called two witnesses, RCMP Corporal Haslett and RCMP Constable Shinkaruk; the balance of the evidence considered was documentary. CP 818. The defendants' evidence was not barred, however; they simply chose not to testify in the proceeding. See CP 826 ("It is significant to note that the appellants did not testify on the voir dire as to the effect on their minds and what they did and said as a result of the conduct of the officers and what they said and did."), 831 ("I interject here to note again that neither of the appellants testified on the voir dire as to the admissibility of their confessions.").[64]

Thus, when the appellate court said that there was "no point in leading further evidence on the matter when such evidence could have had no legal relevance and could not result in exclusion of the evidence" (CP 830), it was not referring to the defendants'

[64] The Canadian court referred to the proceedings in the committal hearing as "the voir dire." See CP 830 ("I entirely agree with the way in which the trial judge dealt with the matter on the voir dire."), 831 (". . . the issue on the voir dire which was, as the respondent put it 'the direct interaction between the appellants and the undercover officers'.").

testimony, nor to any relevant evidence they might have wished to offer to support their position that the statements were involuntary.

Nor did the defendants choose to testify in the hearing in Judge Mertel's court on the admissibility of their statements. 37RP 3. Contrary to Rafay's argument, Judge Mertel did not simply rubber-stamp the conclusions of the Canadian appellate court. Rather, the trial judge conducted a lengthy hearing, during which he heard testimony and reviewed extensive audio and video recordings containing almost the entirety of the interactions between the defendants and the undercover RCMP officers. The fact that the judge then agreed with the Canadian court does not indicate any abdication of his responsibility to make independent findings. See CP 2808 ("This Court agrees with the Canadian courts *and finds the same*.") (emphasis added).

iii. Defendants' reliance on Fulminante is misplaced.

Rafay relies heavily on Fulminante in arguing that the defendants' statements were obtained through coercion, and thus should not have been admitted in their trial. This reliance is misplaced. While the facts of Fulminante superficially resemble those of this case -- paid FBI informant, masquerading as an

organized crime figure, offered to protect Fulminante from fellow inmates who were threatening him, but required that Fulminante first admit killing his stepdaughter -- there is a critical distinction: Fulminante was incarcerated, leaving him no way to avoid the inmates who were threatening him due to the rumor that he was suspected of killing a child. 499 U.S. at 282-83.

Judge Mertel rightly focused on this distinction in his oral ruling on the motion to suppress, noting that Burns and Rafay were not in custody when they confessed to the murders: "The statements of defendants were given, unlike Mr. Fulminante and unlike Galileo, in a noncustodial setting. The defendants were free to speak or not. The defendants were free to leave or not. The defendants were free to consult their Canadian counsel or not, as they chose." 37RP 22-23.

Most telling of all, perhaps, is the fact that Burns chose to meet with Haslett and Shinkaruk repeatedly, even travelling as far as Victoria to do so. His present claims of fear and coercion lose credibility in light of his obvious delight at being recontacted after a significant break in the communication in May 1995, and his equally obvious disappointment when the meeting had to be postponed.

See 130RP 48; Ex. 549 (intercepted on May 29, 1995 at 6:18 p.m.); Ex. 549 (intercepted call on May 30, 1995 at 7:44 p.m.).

Significantly, the Supreme Court, while agreeing with the Arizona court's conclusion that Fulminante's confession was coerced, noted that "the question is a close one." Fulminante, 499 U.S. at 287. If it found the question of coercion "close" where the defendant was in prison and surrounded by dangerous inmates, as Fulminante was, the Court likely would have come out differently had the confession been made in a non-custodial setting. The defendants' confessions to these murders were not coerced.

Rafay also relies on Payne v. Arkansas, 356 U.S. 560, 561, 78 S. Ct. 844, 2 L. Ed.2d 975 (1958), in which the Supreme Court recognized that the use at trial of a defendant's coerced confession is a due process violation, regardless of whether the coercion was physical or mental. Payne was a "mentally dull 19-year-old youth." Id. at 567. Police arrested him without a warrant, and he was denied a hearing before a magistrate at which he would have been informed of his right to counsel and to remain silent. Id. He was held incommunicado for several days, while members of his family who tried to see him were turned away. Id. He was denied food for long periods of time. Id. After days of this treatment, the police

chief came to his cell and, according to Payne, "said thirty or forty people were outside wanting to get in to me and he asked me if I wanted to make a confession he would try to keep them out."[65] Id. at 564-65. Under these circumstances, Payne confessed to murder and was sentenced to death. Id. at 561, 565, 567.

Payne is a far cry from this case. Burns and Rafay were not "mentally dull." Nor were they held incommunicado for days, without access to family or friends and deprived of food. Rather, they willingly and repeatedly met with Haslett and Shinkaruk. While the circumstances in which Payne found himself may lead to the conclusion that his confession was coerced, the circumstances of these defendants, when carefully and fairly examined, do not.

3. DEFENSE COUNSEL'S DECISION TO NOTIFY THE JURY THAT THIS WAS NOT A CAPITAL CASE WAS NOT INEFFECTIVE ASSISTANCE.

The defendants argue that their attorneys were ineffective in agreeing that prospective jurors should be told that they did not face the death penalty. They ask for reversal and a new trial. This claim should be rejected.

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[65] The chief of police admitted to the substance of this statement. Payne, 356 U.S. at 565.

First, the decision to inform jurors that this was not a capital case was an integral part of a reasonable strategy employed by the defense. During voir dire, the defense focused on jurors' concerns about the death penalty, to impress upon them the serious consequences that can result from convictions based on false confessions. The defense used the death penalty during the State's case-in-chief to attack the credibility of witnesses, and again in the defense case-in-chief to drive the point home.

Nor can the defendants show prejudice. They assign error only to the decision to notify jurors that this was not a death penalty case, ignoring the fact that the jury received the same information when the defense raised the death penalty repeatedly during cross-examination of the State's witnesses, and in Burns's case-in-chief. In any event, the defendants' videotaped confessions to these crimes presented the jury with overwhelming evidence of their guilt.

Because the defendants cannot meet their burden to show both deficient performance and resulting prejudice, their claim of ineffective assistance of counsel should be rejected.

a. Relevant Facts.

The defense first raised the issue of the death penalty long before a jury was empaneled. During the August, 2003 deposition

of Jimmy Miyoshi, Burns's attorney, Jeff Robinson, cross-examined Miyoshi on his interrogation by the RCMP upon arrest on July 31, 1995. 34RP 85-87, 93. Counsel confronted Miyoshi with a reference by the RCMP officer to the fact that Burns and Rafay might well be facing the death penalty.[66] 34RP 109-10.

Prior to voir dire, the defense agreed that prospective jurors should be told that this was not a death penalty case.[67] 50RP 114. The prospective jurors were given the information in a questionnaire:

> Sebastian Burns and Atif Rafay are charged with three counts of aggravated first degree murder. The case involves the death of Mr. Rafay's father, mother, and sister in July 1994. Sebastian Burns and Atif Rafay have denied the allegations and have entered pleas of not guilty to the charges. This is not a death penalty case.

Supp. CP ___ (sub #473 (Burns), Agreed Order Permitting Filing of Juror Questionnaire, at 1); see 44RP 102; 50RP 115.

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[66] The defense understood that Miyoshi's testimony in this perpetuation deposition would likely serve as his testimony at trial; the State made it clear from the start that it would have difficulty securing the presence of Miyoshi, a citizen and resident of Japan, at trial. 33RP 1, 4; 35RP 84-85; 104RP 98; 138RP 139, 143.

[67] It appears that this issue was discussed in a conference call held on September 23, 2003; the full content of this conference call is not part of the record. See 36RP 173-76.

At trial, the defense used the death penalty in several different ways. During cross-examination of two witnesses, Jimmy Miyoshi and Detective Thompson, the defense used the fact that the death penalty was at one time a possibility to attack the credibility of these witnesses. 102RP 68-70; 105RP 149-51. The defense then called Douglas Comrie, the RCMP officer who had arrested Miyoshi, in its own case-in-chief. 138RP 151, 154. Focusing on Comrie's interrogation of Miyoshi, Burns's attorney questioned Comrie in detail about references to the death penalty, and the possible effect on Miyoshi. 138RP 164-69.

At the close of the case, prior to deliberations, the court instructed the jury that they had "nothing whatever to do with any punishment that may be imposed in case of a violation of the law," and that "[t]he fact that punishment may follow conviction cannot be considered by you except insofar as it may tend to make you careful." CP 3153.

b. Any Error Was Invited.

The invited error doctrine prohibits a party from setting up an error in the trial court, and then complaining of that error on appeal.

In re Personal Restraint of Tortorelli, 149 Wn.2d 82, 94, 66 P.3d 606 (2003). Because the defendants agreed to inform the jury that this was not a death penalty case, the invited error rule applies.

Nevertheless, where a defendant maintains that any error that occurred was the result of ineffective assistance of counsel, the invited error doctrine does not preclude review. State v. Aho, 137 Wn.2d 736, 745, 975 P.2d 512 (1999). Because the defendants here argue that their attorneys were ineffective in agreeing to notify the jury that this was not a death penalty case, review is proper.

c. Standard Of Review.

To prevail on a claim of ineffective assistance of counsel, the defendants must show: (1) that their attorneys' representation fell below an objective standard of reasonableness, and (2) resulting prejudice. State v. Thomas, 109 Wn.2d 222, 225-26, 743 P.2d 816 (1987) (citing Strickland v. Washington, 466 U.S. 668, 687-88, 104 S. Ct. 2052, 80 L. Ed.2d 674 (1984)). "If either part of the test is not satisfied, the inquiry need go no further." State v. Hendrickson, 129 Wn.2d 61, 78, 917 P.2d 563 (1996).

There is a "strong presumption" that counsel's conduct "falls within the wide range of reasonable professional assistance." State v. Lord, 117 Wn.2d 829, 883, 822 P.2d 177 (1991). "The

reasonableness of counsel's challenged conduct must be viewed in light of all of the circumstances, on the facts of the particular case as of the time of counsel's conduct." Id. (citing Strickland, 466 U.S, at 689-90). If defense counsel's conduct can be characterized as legitimate trial strategy or tactics, it cannot serve as a basis for a claim of ineffective assistance of counsel. Lord, at 883.

To meet the prejudice requirement, the burden is on the defendant to show a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. Thomas, 109 Wn.2d at 226 (citing Strickland, 466 U.S. at 694). "A reasonable probability is a probability sufficient to undermine confidence in the outcome." Id.

The competency of counsel is not measured by the result obtained. State v. Wilson, 29 Wn. App. 895, 904, 626 P.2d 998, review denied, 96 Wn.2d 1022 (1981). "Some defendants are, in fact, guilty and no amount of forensic skill is going to bring about an acquittal." State v. Thomas, 71 Wn.2d 470, 472, 429 P.2d 231 (1967).

The record here shows that the decision to allow the jury to be informed that this was not a death penalty case was based on legitimate strategic considerations. As set out in subsection **e.**,

below, counsel used this information to attack the credibility of two important witnesses, Jimmy Miyoshi and Detective Thompson, and to impress upon the jury the serious consequences that can result if defendants are convicted based on false confessions. This strategic use of the death penalty defeats any claim of ineffective assistance of counsel.

d. Opening The Door.

The principle that a party may "open the door" to otherwise inadmissible evidence by introducing the subject at trial is well established. In State v. Gefeller, 76 Wn.2d 449, 454, 458 P.2d 17 (1969), the court addressed the defendant's claim that evidence of the results of his polygraph test had been improperly admitted at trial. Noting that the defendant himself had first raised the existence of the test on cross-examination, the court elaborated on the "open door" rule:

> It would be a curious rule of evidence which allowed one party to bring up a subject, drop it at a point where it might appear advantageous to him, and then bar the other party from all further inquiries about it. Rules of evidence are designed to aid in establishing the truth. To close the door after receiving only a part of the evidence not only leaves the matter suspended in air at a point markedly advantageous to the party who opened the door, but might well limit the proof to half-truths. Thus, it is a sound general rule that, when a party opens up a subject of inquiry on direct or

> cross-examination, he contemplates that the rules will permit cross-examination or redirect examination, as the case may be, within the scope of the examination in which the subject matter was first introduced.

Gefeller, 76 Wn.2d at 455. By repeatedly raising the death penalty in pursuit of tactical advantage, the defense opened the door to the jury being told that this was not a capital case.

e. Counsel's Use Of The Death Penalty To Strategic Advantage Was Not Deficient Performance.

The defense injected the death penalty into this trial from the outset, beginning with voir dire and continuing through cross-examination of witnesses called in the State's case-in-chief, and direct examination of a witness called in Burns's case-in-chief. Because reference to the death penalty furthered the defense, this was a reasonable trial strategy, and thus cannot constitute ineffective assistance of counsel.

i. The death penalty was used to impress upon the jury the serious consequences that could follow convictions based on false confessions.

During a segment of his voir dire, defense attorney Robinson introduced the topic of wrongly-convicted defendants who were later exonerated by DNA or other evidence. 59RP 80-83.

Robinson then focused his questions on what was to be the core of the defense theory: wrongly-convicted defendants who had nevertheless confessed. 59RP 83. Emphasizing the seriousness of the problem, counsel asked potential jurors, "Has anybody read statistics about the number of people that have been freed from death row based on DNA testing, people who were actually convicted and sentenced to death and then were freed from death row?" 59RP 84.

Using the Central Park Jogger case as a departure point, Robinson then led the jurors in a discussion about why someone might confess to a crime that he did not commit, and how one might recognize a false confession. 59RP 84-95. Encountering some skepticism that an innocent person would confess to a serious crime (59RP 86-87, 92-93), Robinson drove the point home: "Are you aware that 20 of the 101 people freed from death row, because they were innocent of the crime they were convicted of, are you aware that 20 of them confessed?" 59RP 95.

The strategy is evident from the questioning itself. Faced with the fact that the defendants had confessed to these murders, the defense had to convince the jurors that the confessions were false. Counsel chose an example calculated to grab the jurors'

attention – persons who were actually innocent had been known to confess to crimes serious enough to warrant the death penalty. This was unquestionably a deliberate trial strategy. Given the defendants' confessions to these murders, this strategy fell well within the wide range of reasonable professional assistance.

The defendants nevertheless argue on appeal that, "[s]ince defense counsel's point was to warn jurors they needed to be careful because false confessions sent innocent people to death row, letting those same jurors know the death penalty was not a possibility in this case was a bizarre tactic." BOA (Rafay) at 96. What the defendants overlook is that their use of the death penalty would inevitably have opened the door to the truth. Experienced defense counsel knew that they would not be permitted to use the death penalty as both a sword and a shield. They accordingly chose to handle the matter directly, recognizing the net gain from implanting in jurors' minds the concern that false confessions might occur in even the most serious cases.

ii. The death penalty was used to attack Detective Thompson's credibility.

The defense did not stop with warning the prospective jurors in voir dire, but continued to use the death penalty to advantage during the State's presentation of its evidence at trial. While cross-examining Detective Thompson, Robinson handed him a copy of the affidavit that Thompson had signed on September 20, 1995, in support of the defendants' extradition from Canada. 102RP 67-68. Counsel then began to question Thompson:

> **Robinson:** [T]he affidavit was signed under oath, is that right?
>
> **Thompson:** Yes.
>
> **Robinson:** And it was signed in connection with the state's request to extradite Mr. Burns and Mr. Rafay to stand trial in the United States?
>
> **Thompson:** That is correct.
>
> **Robinson:** And at this point, on September 20, 1995, that request to extradite Mr. Burns and Mr. Rafay to the United States was a request to do so unconditionally, with no restriction on what might happen to them when they came back into this country?
>
> **Thompson:** That is right.
>
> **Robinson:** And so **that affidavit that you signed under oath could potentially have exposed both of them to the death penalty?**

Konat: Excuse me, Your Honor, irrelevant. As we discussed in jury selection, **death penalty is not at issue.**

Robinson: I understand it's not, Your Honor, **but importance to that affidavit is.**

Court: I am going to sustain it as to that particular question. You may rephrase if you want.

Robinson: We understand that **Mr. Burns and Mr. Rafay aren't subject to the death penalty in this trial**, we understand that, right?

Thompson: Yes.

Robinson: But **on September 20, 1995, when you signed that affidavit under oath, there was at least the possibility that they could be brought back here and face that penalty?**

Thompson: Yes.

Robinson: And so given the importance of that affidavit and the importance of the issue that it was addressing, you were careful to be honest in that affidavit?

Thompson: Yes.

Robinson: To be accurate in that affidavit?

Thompson: Yes.

Robinson: To be complete in that affidavit?

Thompson: Yes.

102RP 68-70 (emphasis added).

Counsel then confronted Thompson with facts that Thompson had included in his affidavit as information that the defendants had revealed in their taped conversations with Haslett in 1995. 102RP 72. After pinning Thompson to his assertion in the affidavit that Burns and Rafay had demonstrated knowledge of so-called "holdback evidence," Robinson established that much of this information had appeared in the press long before the defendants' conversations with Haslett. 102RP 74-84. Through this line of cross-examination the jury was invited to consider whether, if Thompson might have been sloppy in putting together his affidavit when he knew that the defendants still faced the possibility of the death penalty, the jury should discount his testimony at trial now that the death penalty was no longer an option.

It is clear from the carefully crafted questions that this line of attack on the credibility of an important witness for the State was planned in advance. The mention of the death penalty in this context was a reasonable tactical decision.

iii. The death penalty was used to attack Jimmy Miyoshi's credibility.

Jimmy Miyosh's pretrial videotaped deposition was ultimately played for the jury at trial. 104RP 87-88, 98. During cross-

examination, attorney Robinson questioned Miyoshi about his interrogation by the RCMP after his arrest on July 31, 1995. 34RP 85-87, 93. In that first statement, Miyoshi denied that Burns and Rafay had ever confessed to the murders to him. 105RP 149.

RCMP Corporal Comrie had pressed Miyoshi further on this at the time. On cross-examination, Robinson read the following statement made by Comrie during the July 31st interrogation:

> **Because the maximum penalty they can get in the United States of America, in the State of Washington, for what they have done, my friend, is death. The death penalty is carried.** That is what those offenses carry in the State of Washington. So you could go down in history of being part of the big group. I am not saying that is going to happen to them, but if they go for the death penalty, that is what they're going for. . . . **You want to associate yourself and ally yourself with those two, then you are going to have to suffer the consequences for doing that.** They, of course, can be astronomical. People are going to be very, very angry.

105RP 150-51 (emphasis added

Reference to the death penalty in this context was carefully considered trial strategy. Jimmy Miyoshi was an important witness for the State. In August of 1995, less than a month after his initial denials, Miyoshi began cooperating with the RCMP, and revealed

that the defendants had told him in advance about the plan to murder Rafay's family, and had later confessed to him that they had carried out the murders. 105RP 32, 184-85.

It was critical for the defense to somehow cast doubt on Miyoshi's allegations. Miyoshi and the two defendants had been close friends; the defense had to give the jury some reason why Miyoshi would turn on his friends, and was now willing to help send them to prison for something they did not do. The defense attacked Miyoshi's credibility by putting the allegations in the context of Comrie's reference to the death penalty, suggesting to the jury that Miyoshi's initial denials of his friends' involvement in the murders had been overcome by fear that he might share in the penalty that would ultimately befall his friends, and the penalty could be death

Had the defense wished to keep any mention of the death penalty out of this trial, they had only to move to exclude this series of questions and answers from Miyoshi's deposition. Defense counsel moved for other portions to be excluded, and the videotape was edited accordingly. 104RP 32-34, 248-61; 105RP 4-11, 158-68, 170. The fact that counsel did not move to exclude references to the death penalty is further evidence of a deliberate decision to allow the jury to have this information for strategic purposes.

iv. The defense raised the death penalty in its own case-in-chief.

Finally, defense counsel again emphasized Corporal Comrie's use of the death penalty during the defense case-in-chief. On direct examination of Comrie, attorney Robinson introduced the subject: "The first topic I want to ask you about is statements you may have made or comments you had with Mr. Miyoshi about the situation of Mr. Burns and Mr. Rafay were in as of July 31st, 1995." 138RP 162. Counsel then repeated verbatim the same comments about the death penalty that he had previously highlighted:

> **Robinson:** And would you tell the jury if I have read this correctly, again, you saying to Mr. Miyoshi, because the maximum penalty they can get, they being Burns and Rafay, in the United States of America, in the State of Washington, for what they have done, my friend, is death. The death penalty is carried so that these offenses in the State of Washington – actually, would you just read on to the bottom of that paragraph?
>
> **Court:** Read it to himself or out loud?
>
> **Robinson:** Read it out loud.
>
> **Comrie:** Starting with "so"?
>
> **Robinson:** Yes.
>
> **Comrie:** So you could go down in history of being part of a big group. I am not saying that that is going to happen to them, but if they go for the death penalty, that is what they're going for. And I am just

> saying you want to align yourself and still maintain – you want to align yourself with that and still maintain that you know nothing? . . .

138RP 164-65.

Counsel followed up with questions designed to emphasize the effect that mention of the death penalty could have had on Miyoshi: "The statements to Mr. Miyoshi about Mr. Burns and Mr. Rafay potentially facing the death penalty in the State of Washington, were those statements made to Mr. Miyoshi to make sure he understood the serious nature of these charges?" 138RP 165-66. "And were those statements made to Mr. Miyoshi to make sure that he understood what he could potentially be facing if he decided not to cooperate?" 138RP 166. "What impact did you think it would have on Mr. Miyoshi by telling him that Mr. Burns and Mr. Rafay might very well be executed in the State of Washington?" 138RP 166. "Did you think it might make him want to sort of disassociate himself from Mr. Burns and from Mr. Rafay?" 138RP 167.

The strategy is clear from the questions themselves. The defense wanted the jury to think that Miyoshi had decided to implicate Burns and Rafay in these murders out

of fear that he might otherwise share in the penalty that his friends were facing – potentially, death. Counsel was not ineffective in buttressing the defense in this manner.

v. Townsend, Mason and Hicks are distinguishable.

The Washington Supreme Court has addressed this issue several times in recent years. In all of these cases, the court found that it was error to inform the jury that death was not a potential penalty. These cases do not control the result here. In two of the cases, the defense did not agree that the jury should be told that death was not a possible penalty; in this case, the defense agreed to notification. In none of the other cases did counsel repeatedly use the death penalty to tactical advantage, as counsel did here.

In State v. Townsend, 142 Wn.2d 838, 842, 15 P.3d 145 (2001), the defendant was convicted of first-degree murder. The prosecutor had mentioned in voir dire that the case before the jury was not a death penalty case; in response, the trial court told the jurors, "This is not a case in which the death penalty is involved and will not be a consideration for the jury." Id. Defense counsel did not object. Id. at 843. Noting the "long-standing rule that no

mention may be made of sentencing in noncapital cases," the court found that counsel's failure to object fell below prevailing professional norms. Id. at 847.

Addressing the performance prong of the Strickland test, the Townsend court concluded that "[t]here was no possible advantage to be gained by defense counsel's failures to object to the comments regarding the death penalty." Townsend, 142 Wn.2d at 847. Noting that the defendant did not suggest that he would have been acquitted absent the court's instruction on the death penalty, but rather argued that he would have been convicted only of second-degree murder, the court found no prejudice because the evidence of premeditation was overwhelming. Id. at 849.

In State v. Mason, 160 Wn.2d 910, 917, 162 P.3d 396 (2007), the defendant was convicted of aggravated first-degree murder. Prior to voir dire, the trial court had informed the attorneys that, should a juror ask about the death penalty, the court would inform the jury that Mason did not face that penalty. Id. at 928. The court reasoned that a juror who opposed the death penalty might disqualify him or herself on that basis, and that the loss of such jurors would be prejudicial to the defense. Id.

Defense counsel raised a somewhat hesitant objection, stating, "I think that in light of the prevailing case law, the defense needs to object, understanding that we will essentially defer to the Court on this matter." Id. Invited by the court to explain any prejudice to his client from the jury obtaining this information, counsel responded that there was a "possibility" that jurors might be more likely to convict if they knew that the defendant was not facing the death penalty; counsel admitted, however, that he did not think this reasoning was particularly compelling. Id.

When prospective jurors were asked in voir dire whether any would be unable to apply the law as instructed, one responded, "If it were the death penalty. I don't support the death penalty. I would have a hard time with that." Id. at 929. The trial court admonished the jurors not to concern themselves with what penalty might follow conviction, but added that "this is not a capital case." Id.

Relying on its decision in Townsend, the Supreme Court found that it was error for the trial judge to inform the jury that the

death penalty was not a possibility in Mason's case.[68] Id. at 929-30. The court left the door open, however, for an argument to be made that, in a given case, the decision to inform the jury that the death penalty was not at stake was based on "legitimate strategic and tactical reasons." Id. at 930.

In State v. Hicks, 163 Wn.2d 477, 484, 181 P.3d 831 (2008), the defendants were convicted of first-degree felony murder. During voir dire, a juror expressed concern that her church's teachings on capital punishment might interfere with her ability to decide the case. Id. at 482-83. After a sidebar with the attorneys, the trial court informed the juror that the case did not involve the death penalty; counsel did not object. Id. at 483. Both the defense and the prosecution referred to the fact that the case was not a capital one on several more occasions during voir dire, and the prosecution mentioned it in closing argument. Id.

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[68] The court again found no prejudice from the information given to the jury. Rather than relying on overwhelming evidence, as it had in Townsend, the court in Mason pointed to defense counsel's "lukewarm" objection that may have actually encouraged the judge in his chosen path, and to the fact that "no objection was advanced to the selection of any juror or to the panel." Mason, 160 Wn.2d at 930-31.

Adhering to precedent, the court held that defense counsel's performance was deficient because counsel informed the jury that the case was noncapital, and did not object when the trial court and prosecution made similar references. Id. at 488. The court again found no prejudice, however, observing that there was no indication that the jurors failed to take their duty seriously, and there was abundant evidence in the record to support the convictions. Id. The court concluded that "[a] guilty verdict was likely even if the jury had not been informed that the case was noncapital." Id.

None of these cases precludes a finding that counsel's performance was not deficient under the facts of this case. To the contrary, this case presents the situation contemplated by the court in Mason, when it left open the possibility that a decision to inform the jury that the case was not a capital one might be based on legitimate strategic and tactical reasons. Mason, 160 Wn.2d 930. While defense counsel here did not articulate the strategy, it could not be plainer from this record.

The defense in this case used the death penalty in several different ways to attack adverse witnesses, as well as to impress upon jurors the seriousness of their job, all in furtherance of the

defendants' trial strategy. This is quite different from the implicit strategy rejected by the Supreme Court in its previous cases. Counsel's performance in this case was not deficient.

f. The Defendants Cannot Show Prejudice.

In any event, the defendants cannot show prejudice from the fact that prospective jurors were told prior to voir dire that this was not a death penalty case. The defense subsequently referred to the death penalty several times during trial, to strategic advantage. The trial court would have been obligated to inform jurors of the truth – that this was not a death penalty case.

Moreover, while the defendants argue that there was little physical evidence against them,[69] certain physical evidence was particularly damning. The downstairs shower had literally hundreds of spots that reacted positively for blood. 91RP 171-73. Virtually all of this blood came from Tariq Rafay. 113RP 21, 23-24, 29-30. Based on the distribution of the blood spatter all the way up the shower walls, it is likely that the blood was deposited there by a person taking a shower. 94RP 73.

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[69] BOA (Rafay) at 97.

Hairs collected from the area around the shower drain were genetically linked to Burns. 80RP 70-72; 112 RP 133; 113RP 12-18. While he could argue that he had showered in the downstairs bathroom throughout his stay in the Rafays' home, the fact that his hairs remained after a shower taken by the murderer is strong indication that Burns and the murderer were one and the same.

Indeed, the very fact that the murderer took a shower after killing the Rafays points strongly to these defendants. An intruder would never feel comfortable enough at the scene of these crimes to linger for a shower, never knowing when others might come home. Only someone who knew exactly where the other family member was would take the time to clean up at the scene.

The defendants' fate was sealed, of course, once the jurors saw and heard their videotaped confessions. Ex. 510, 511 (videos); 542, 543 (transcripts). Their casual descriptions of these brutal murders, punctuated by laughter and giggling, must have dispelled any lingering doubt that the defendants were responsible for these horrendous crimes. The defendants have failed to show a reasonable probability that, had jurors not been told that this was not a capital case, the result of the trial would have been different.

4. THE TRIAL COURT PROPERLY DISMISSED JUROR NO. 4.

The defendants contend that the trial court abused its discretion in dismissing Juror No. 4, Donna Perry, during the course of the trial. This claim should be rejected. Perry demonstrated inattentiveness at trial, and was observed sleeping during testimony. The trial judge found that Perry lied to him when he questioned her about this and other misbehavior. Under these circumstances, the court acted within its discretion in excusing her from further jury service, and replacing her with an alternate juror.

a. Relevant Facts.

On November 13, 2003, the parties concluded jury selection. The court empaneled twenty jurors. 60RP 12. The jurors were not told which ones were designated as alternates. 60RP 12. The court provided the jurors with notebooks, and repeatedly instructed them not to disclose or discuss their notes, and to leave the notebooks in the courtroom during breaks in the proceedings. 64RP 4-5; 94RP 194-95.

On February 18, 2004, a juror sent a note to the court concerning Juror No. 4, Donna Perry:

> Judge - I was told today, that Juror #4 made a comment referring to "fighting her battles during

> deliberation," in reference to her being extremely upset because the heat was not turned-up yesterday, in the courtroom.
>
> She was very angry yesterday as she relayed the situation, to her husband on the phone, in the presence of many jurors.
>
> Note: Her comment today, has many jurors concerned about her motive during deliberation.

CP 3011; 97RP 6-7. The prosecutor asked the court to make an inquiry of the juror who sent the note to determine whether further investigation was necessary. 97RP 7-13. Judge Mertel declined to take any action, observing that it appeared to be the type of personality clash that was inevitable under the circumstances. 97RP 12-14.

A week later, on February 24, 2004, a group of six jurors sent another note to the court: "Do you have any suggestions on how to help eliminate the constant snorting and coughing problems of Juror # 4? It's been distracting and annoying. We've tried to accommodate her the best we can but we don't know what else to do." CP 3019; 99RP 228. In response, Judge Mertel indicated that he planned to move the jurors around in the jury box. 100RP 3. Prosecutor Davidheiser reminded the court that Perry had been the subject of a previous complaint; he suggested that moving the

jurors around might not solve the problem, and said that "we need to keep a close eye on this...." 100RP 6-7. The judge agreed, stating that he was "very concerned" and would continue to watch Perry. 100RP 7-8.

Later that day, in the middle of Detective Thompson's testimony about his taped interview with Burns on July 14, 1994, prosecutor Konat requested a recess because Juror Perry did not appear to be paying attention:

> **Konat:** Your Honor, I asked for the recess not because I wanted to at that point, but because for the last three and a half pages I took the opportunity to seize this because this might be one of those rare occasions when you were observing the same thing I was observing, and that was as I listened to Detective Thompson go on and on ad nauseam about the information that Mr. Burns was giving him to these questions, every single one of these jurors were following along except juror number four. And at the risk of invading the province of the jurors, their notebooks are all closed, she sat for the last three and a half pages like this.
>
> **Court:** That is true.
>
> **Konat:** You saw it, I saw it. I walked back and forth in front of the jury box and kept an eye on her, trying to see if she was sick or what was up. Now all the other jurors are turning to see what's going on with juror number four. I hate to say it, but it might be time to make some inquiry about what's going on back there in the jury room. At a minimum, if there's some reason why it is that she's not following the transcript,

> it might be that she doesn't choose to read it and is really listening intently, but unless we make that inquiry we're never going to know.
>
> **Court:** I did observe the same physical body movements that you have just described. They are concerning to me.

100RP 78-79.

In response, defense counsel Robinson argued that "Juror number four has been probably the most active juror in this trial . . . ." 100RP 79. Judge Mertel disagreed and replied:

> **Court:** Okay. *I have watched her for the last several days,* when we had that earlier note, and *there does appear to be an absolute lack of attention in the last couple days.* That may not be your observations from the defense table, but it is mine on this bench. I am not going to take any action today on this.

100RP 80 (emphasis added). The judge indicated that he would re-shuffle the jurors and continue to watch Perry. 100RP 81-83.[70]

Two weeks later, on March 8, 2004, while the jury was watching the videotaped deposition of Jimmy Miyoshi, a juror complained to the bailiff that Perry was sleeping through the

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[70] In his statement of facts, Rafay suggests that, from early on, the prosecutors asked the court to excuse Perry from the jury. When discussing the events of February 25, 2004, Rafay claims that "the State tried again to get rid of Perry," implying that the State asked that Perry be excused on that day and had done so on a previous occasion. BOA (Rafay) at 135. In fact, the prosecutors did not request that the court excuse Perry that day, and had not done so at any earlier time. As of February 25, 2004, the prosecutors had simply suggested that the court make further inquiry of Perry. 100RP 77-78.

testimony. 106RP 4. A jail guard had also observed Perry sleeping, and informed defense counsel and the prosecutor. 106RP 7-8. Detective Tompkins had also noticed Perry sleeping. 106RP 7. For the first time, the prosecutor asked that Perry be excused, complaining that "it has been clear that she has checked out . . . ." 106RP 6-8.

Judge Mertel indicated that, after he heard of the complaint from the juror, he had watched Perry but had not seen her sleeping. 106RP 4-5. The judge said that he was "at ragged edge with Ms. Perry" and observed that she "continues to surface as a problem." 106RP 10-11. He indicated that he would continue to watch Perry, and he gave the jury a "pep talk" about staying alert. 106RP 11-13.

Approximately a month later, on April 14, 2004, the court received yet another note concerning Juror Perry from Juror Passig (Juror No. 19):

> During our afternoon break juror # 4 Donna Perry made a remark about serving on this jury. She stated that she will do whatever she has to do to be dismissed! I advised her to talk to you, but it bothered me and I wanted you to know. It appears to me that she is not taking serving on this jury serious which is so unfair to our defendants.

CP 3113, 4772.

Judge Mertel then questioned Passig. 128RP 9. Passig reported that, during a break the previous day, Perry said, "I will do anything I can to get off this fucking jury." 128RP 10. Passig advised Perry to speak to the judge. 128RP 10. Passig said that Perry had frequently made other comments in the jury room making it clear that she did not want to be there. 128RP 11, 15.

Passig also reported that she had observed Perry writing what appeared to be letters, then folding the papers and sticking them in her shirt pocket. 128RP 11-12, 18-19. Passig assumed that Perry did this so that she could take the paper to the jury room. 128RP 11-12. Passig believed that Perry's writing did not relate to the case, because Perry was writing at a time when no other juror was taking notes. 128RP 19. Passig had observed Perry not paying attention, but staring at the walls. 128RP 12. Passig said that she found Perry's behavior "very distracting" while she was trying to listen to the testimony. 128RP 12. In fact, for months a number of the jurors had talked about Perry's behavior. 128RP 14.

After hearing from Passig, the court and the attorneys proceeded to individually question all but two of the jurors, saving Perry for last. 128RP 25-111. When asking each juror whether any juror had made a statement about wanting off the jury or had

stopped paying attention at trial, Judge Mertel carefully framed his questions to avoid pointing to a particular juror. Perry was the only juror ever identified in response.

Juror Wilson confirmed that he had heard Perry state that she would "do anything to get off this fucking jury." 128RP 27. When Wilson suggested that she write to the judge, Perry replied, "I already have and it didn't do any good." 128RP 27. When asked whether there was a juror who was not paying attention and was writing personal letters, Wilson replied that it was Perry. 128RP 28. Wilson said that Perry appeared to be sleeping at trial. 128RP 29.

Juror Browne also confirmed that he heard Perry say she wanted to get off the "fucking jury." 128RP 39-40. He reported that no other juror had vented to the degree that Perry had. 128RP 42.

Juror Delap heard Perry say that she wanted to get off "the fucking jury." 128RP 59. Delap explained that nothing had prompted Perry's outburst; Perry was simply "pissed off." 128RP 59. Delap thought that Perry was tired and disinterested. 128RP 59. Delap knew that Perry wrote many personal letters to friends back in Georgia, and noticed that Perry was writing at length in court. 128RP 60. While Delap never saw exactly what Perry was

writing in court, she observed Perry writing when no one else was taking notes. 128RP 60-61. Delap further observed that Perry did not seem to watch the video screen. 128RP 60-61.

Juror Erickson reported that she heard Perry say she would do anything to get off the jury. 128RP 65-66. Erickson said she had previously sat next to Perry and noticed that Perry occasionally stopped taking notes. 128RP 67. One time, she heard paper ripping and saw Perry folding four or five pages that she had written on. 128RP 67-68. Erickson was concerned, because she knew they were not supposed to remove any papers. 128RP 67.

Juror Dewey reported that he had not heard anything recently about a juror wanting to get off the jury. 128RP 36-37. However, Dewey recalled that approximately one month earlier Perry had thrown a tantrum, expressed a desire not to be there, and "went through a lot of hysterics." 128RP 37.

Juror Bowden reported that she had not heard a comment by a juror about getting off the jury; she did not sit in the same jury room as Perry. 128RP 52, 55. However, when the judge asked whether a juror had stopped listening to the evidence and taking notes, Bowden replied that it was Perry. 128RP 53. Bowden reported that Perry was having problems staying awake and had

not been paying attention. 128RP 54. When the judge suggested that Perry might be listening with her head down, Bowden disagreed: "No, I am not mistaking that for a head down. It has been sleeping. And there was a comment made by another juror . . . to kick her seat when they see her sleeping." 128RP 54.

Bowden explained that she thought Perry was writing letters because Perry had her head down constantly and was scribbling; "when you are taking notes, you kind of look up or listen." 128RP 55. Bowden saw Perry tear pages out of her notebook and carefully fold them. 128RP 56. Bowden described Perry's writing: "[S]he starts at the beginning and goes all the way down the page, and before we are dismissed, it is carefully torn out of the book." 128RP 56.

Juror Purdy reported that she did not hear a comment about getting off the jury. 128RP 76-77. However, Purdy reported that she had observed Perry napping. 128RP 78. She also saw Perry write what appeared to be letters while in court. 128RP 7678.

Juror Olson also reported that he had seen Perry writing what appeared to be personal letters instead of taking notes. 128RP 80. He said that Perry was continually writing when the rest of the jury was not taking notes. 128RP 80-81. He saw Perry rip

pages out of the notebook and place them in her coat pocket. 128RP 81-82. Olson confirmed that Perry was sleeping in court; he was concerned that her sleeping would later affect deliberations. 128RP 81-83. He heard Perry tell other jurors that she was on medication and it was hard for her to stay awake. 128RP 84. When defense counsel questioned whether other jurors fell asleep from time to time, Olson replied, "very rarely." 128RP 83.

The court finally questioned Perry and first raised the subject of whether she had said that she wanted to get off the jury:

> **Court:** Ms Perry . . . I have been informed that one of your fellow jurors, or a juror, yesterday in the jury room . . . made a statement to the effect -- and I'm going to leave it on a he or she basis because I don't want to identify anybody specifically -- that he or she would do whatever was necessary or needed to get off of this -- and the phrase used was "this fucking jury." And so I use it only because it is a quote. I need to know whether you heard or potentially participated in such a remark?
>
> **Perry:** No, we have all expressed our frustration over being here from time to time. . . . but nothing specific like that.
>
> **Court:** Never heard or made such a remark yourself? Let's start with have you heard such a remark made by a fellow juror?
>
> **Perry:** Not that graphic.
>
> **Court:** That's pretty graphic. Have you yourself made such a remark?

> **Perry:** Not specifically. I have said I wish I could just go home.
>
> . . .
>
> **Court:** And so that's not a remark you yourself made?
>
> **Perry:** No.

128RP 84-86.

Perry again denied making the comment when asked by defense counsel Robinson:

> **Robinson:** In terms of comments that the judge indicated, a comment that was reported about "I will do anything I can to get off this fucking jury," or "I sure would like to get off this fucking jury," if we take the word "fucking" out of it, do you think you may have made some kind of comment like that at some point in, say, the last couple of days?
>
> **Perry:** Not to get off, no.

128RP 89.

When Judge Mertel asked if any jurors were writing letters, Perry replied she did not know of any. 128RP 86. When asked whether she had removed her notes from the courtroom, Perry stated that she had not. 128RP 87. Finally, when defense counsel Robinson told Perry that they had heard she was tearing things out

of her notebook, Perry replied that, other than questions she wrote up for the judge, she had torn only two sheets out, and they were still with the notebook. 128RP 88, 106-08.

When asked if she had problems staying awake, Perry answered that it had occurred one or two times. 128RP 88. The prosecutor informed Perry that it appeared that she was not watching the screen, and Perry explained that she was legally blind, could not get corrective contacts, and had a hard time following what was on the screen. 128RP 104-05.

During the course of questioning, Perry complained about the behavior of some of the other jurors. She stated that there was bickering going on in the jury room that was hard to listen to, and that "[i]t is not pleasant at all." 128RP 98. She suggested that there were personal issues between some of the jurors, and speculated that they might deliberately disagree with each other when it came time to deliberate. 128RP 99. She claimed to be one of the few jurors taking her role seriously: "I am one of the minority that treats this like a job." 128RP 103.

When asked if there was anything going on in her personal life affecting her jury service, she replied that it was difficult for her

to serve as a juror because of personal issues. 128RP 100. Perry explained that her son was in special education and was failing several of his classes in high school. 128RP 100-01.

After hearing from Perry, Judge Mertel believed that she had committed misconduct and lied to the court. 128RP 111-12. The court invited argument from counsel. The prosecutors agreed that Perry should be excused. 128RP 115-25. Both defendants objected to excusing her. Burns's counsel suggested that Perry did not lie to the court, but may have forgotten that on the previous day she had stated that she wanted off the jury. 128RP 137-40. Rafay's attorney argued, among other things, that Juror Passig, who had sent the notes about Perry, was guilty of juror misconduct because she was "busy worrying about whether another juror is doing what they are supposed to be doing...." 128RP 150-51. Rafay's counsel argued that if the court excused Perry, it must excuse a number of other jurors. 128RP 151-55.

Judge Mertel decided to excuse Perry from jury service:

> I'm going to dismiss Ms. Perry. I believe there is evidence in this record of misconduct, and I believe there is evidence in this record to justify her dismissal on hardship grounds. . . . I have observed Ms. Perry with her head down, and it appears she is sleeping on a number of occasions. And I have also observed her with her head down taking notes. And so it is not

easy to discern when she is sleeping, and when she is taking notes. But it is easy to discern that literally sometimes days on end, her head is simply down, and she's not writing while her head is down. And I think there is clear evidence and the fellow jurors have confirmed it, that she is sleeping through some, I will put it, of these proceedings.

I think there is clear evidence that she is writing things in her juror notebook, and then removing them from this courtroom in direct violation of the court's instruction. I don't know what is on those pieces of paper, but it really doesn't matter whether it is a personal note, or some memo for a book she is writing, or whatever. She is clearly utilizing time in this courtroom, while evidence is being presented, to write something, and remove it from this courtroom, as I say, in direct violation of the court's instructions.

And I think she is a high risk for letting her passion and prejudice get the best of her. She has demonstrated in here an anger and some animosity, a pettiness toward her fellow jurors that this Court just has to note.

And her physical ailments have been reported to this Court to be a distraction. Again, in and of itself, certainly not standing alone a basis for disqualification. And that should go into the hardship column, not the misconduct column.

And her statement today, I don't think there is any question that she made that statement. And it is really irrelevant whether the expletive was included or not, although I'm finding it was, because I think enough jurors reported that it was to this Court's satisfaction. There could have been at least one juror, trying to excuse the conduct who said, oh, we are just blowing off steam back there, or venting I think was the word used. And I was absolutely willing to listen to that explanation from her, but that isn't

> what I got. She didn't know anything about that remark. Later, under closer questioning from counsel, she said, "Well, yeah, maybe I said I would like to go home." So I don't think there is any question she made that remark, and she compounded that by lying to this Court. And I make that finding.
>
> I think there is grounds for a misconduct dismissal, and I think there is grounds for a hardship dismissal. . . .
>
> And perhaps a new issue for this Court today was she is nearly legally blind. I did not know that. That was not disclosed.
>
> Again, any one of these things standing alone would not be grounds for dismissal, but you combine all of these personal issues, which she was so candid to share with us, and I think it is clear that she is distracted, and that she is unable to concentrate on this trial, and unable to do her job as a juror, even though she assures this Court that she can and wants to.

128RP 161-64.

Defense counsel Robinson suggested that the court count the pages in Perry's notebook to figure out how many pages had been torn out. 128RP 135. Judge Mertel did not examine Perry's notebooks, but instructed the clerk to take custody of them and seal them. 128RP 165, 170.

b. The Court Acted Within Its Discretion When Excusing Juror No. 4.

This Court reviews the excusal of a juror for abuse of discretion. State v. Elmore, 155 Wn.2d 758, 768-69, 123 P.3d 72 (2005); State v. Jorden, 103 Wn. App. 221, 226, 11 P.3d 866 (2000), review denied, 143 Wn.2d 1015 (2001). "A trial court abuses its discretion when its decision is manifestly unreasonable or exercised on untenable grounds or for untenable reasons." State v. Lord, 161 Wn.2d 276, 283-84, 165 P.3d 1251 (2007).

Under RCW 2.36.110, "[i]t 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." CrR 6.5 provides: "If at any time before submission of the case to the jury a juror is found unable to perform the duties *the court shall order* the juror discharged . . . ." (Emphasis added.) Accordingly, "RCW 2.36.110 and CrR 6.5 place a continuous obligation on the trial court to excuse any juror who is unfit and unable to perform the duties of a juror." Jorden, 103 Wn. App. at 227.

The trial court has "fact-finding discretion" in deciding whether to remove a juror. Jorden, 103 Wn. App. at 229 (quoting Ottis v. Stevenson-Carson Sch. Dist. No. 303, 61 Wn. App. 747, 753, 812 P.2d 133 (1991)). This discretion includes the power to weigh the juror's credibility. Jorden, 103 Wn. App. at 229. The appellate court defers to the trial court's factual determinations. Id.

Here, the trial court acted well within its discretion in removing Perry from the jury. The court found that Perry (1) had been inattentive and slept through portions of the trial, (2) removed her notes from the courtroom in violation of the court's repeated instructions, (3) expressed her desire to do anything to get off the jury, and (4) lied to the court when she was asked about these subjects. These findings are clearly supported by the court's observations and the testimony of the other jurors.

With respect to Perry's sleeping and inattentiveness, the court had watched her for several days and noted "an absolute lack of attention." 100RP 80. The prosecutor, jail guards and Detective Thompson had all reported her sleeping on occasion. Numerous other jurors reported that Perry was sleeping and had stopped

paying attention. In fact, Perry's behavior had become such a topic of conversation among the jurors that they joked about kicking her chair when she fell asleep.

The defendants attempt to minimize Perry's history of inattentiveness by pointing to evidence that other jurors were sleeping during the trial. However, the only other juror repeatedly accused of sleeping was Juror Browne. The State repeatedly requested that he be excused due to this behavior.[71] 77RP 75-80; 78RP 173-78; 82RP 90-92. Juror Browne was already an alternate juror, and, in response to this issue, the court designated him as the last alternate. 78RP 167-71. Browne never ultimately deliberated. 78RP 167-70; 150RP 197. The fact that Browne was sleeping and arguably should have been excused hardly justifies not excusing Perry. In any event, even Browne did not share Perry's reputation for sleeping. When the court asked the other jurors whether there was a juror who had stopped paying attention, the only juror ever mentioned was Perry.

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[71] Though the defendants initially asked the court to excuse Browne and agreed that Browne appeared to be sleeping, they did not join in the prosecutor's motions to excuse him. Instead, Rafay's counsel noted that Browne was one of the few African-American jurors and expressed an opinion that he would be a "good defense juror." 77RP 80-81; 78RP 173-74, 178-82.

With respect to Perry's removal of her notes from the courtroom, several jurors reported that they had seen her rip pages from her notebook, fold them up, and place them in her pocket. 128RP 11-12, 18-19, 56, 67-68, 80-81. These actions were in violation of the court's instructions; when asked about it, Perry denied doing this. The court found the other jurors more credible.

With respect to Perry's statement that she would "do anything to get off this fucking jury," numerous jurors reported hearing the statement. On appeal, the defendants do not contend that the court erred in finding that she said this. Nor is there any serious dispute that Perry lied to the court when she denied it.

These findings justified the court's decision to remove Perry as a juror. The fact that Perry was caught repeatedly not paying attention and sleeping during the trial was itself grounds for her dismissal. In Jorden, both the bailiff and a detective informed the court that a juror had been inattentive and appeared to be sleeping during the first day of trial; on motion of the State, the trial judge excused the juror, noting that he had observed that "she was yawning, dozing, and sitting with her eyes closed." 103 Wn. App. at 226. The Court of Appeals held that the trial court acted within its

discretion in excusing the juror for misconduct. Jorden, 103 Wn. App. at 229; see also United States v. Bradley, 173 F.3d 225 (3rd Cir. 1999) (upholding removal of juror who was sleeping during parts of the trial).

Here, Perry was not only repeatedly caught sleeping but, consistent with that behavior, she had expressed a desire to get off the jury and claimed that she had difficulty observing what was on the video screen. These facts established that she was unfit to continue as a juror.

In addition, the fact that Perry disobeyed the court's instructions concerning the notebook and lied to the court when questioned provided additional grounds to dismiss her. A juror who is willing to lie to the court in an effort to remain on the jury is subject to removal. In so holding, the Ninth Circuit explained:

> If a juror treats with contempt the court's admonition to answer voir dire questions truthfully, she can be expected to treat her responsibilities as a juror - to listen to the evidence, not to consider extrinsic facts, to follow the judge's instructions - with equal scorn. Moreover, a juror who tells major lies creates a serious conundrum for the fact-finding process. How can someone who herself does not comply with the duty to tell the truth stand in judgment of other people's veracity? Having committed perjury, she may believe that the witnesses also feel no obligation

> to tell the truth and decide the case based on her prejudices rather than the testimony.

Dyer v. Calderon, 151 F.3d 970, 983 (9th Cir. 1998).

Indeed, in moving to excuse Juror Grage, attorney Robinson argued that Grage had lied to the court concerning whether he had made inappropriate comments about the case. 128RP 172. Having found that Perry lied to the court, Judge Mertel acted well within his discretion in removing her from the jury.

In arguing that the court erred in removing Perry, the defendants point out that the court did not review her notebooks before deciding whether to dismiss her. They contend that, had Judge Mertel looked through Perry's notebooks, he would have learned that she was thoughtful and attentive, and that she took the burden of proof and the presumption of innocence very seriously. BOA (Rafay) at 146-47. At trial, however, Burns's counsel argued that the substance of the notes should be irrelevant to the court's decision.[72] Counsel suggested only that the court count the pages in Perry's notebooks in order to determine how many pages were ripped out. 128RP 135.

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[72] In discussing Perry's notes, defense counsel argued, "And I know for a fact we are not here to argue about what those notes mean, and what side she may be favoring or not favoring. That is of no import to anybody at this point, and to the decision I know you have to make." 128RP 130.

While the court did not count the pages, the notebooks are now part of the record, and it is worth noting that many pages are missing from Perry's notebooks. More than 20 pages are missing and unaccounted for.[73] This fact is consistent with the other jurors' observations that Perry was ripping pages out and putting them in her pocket.

The defendants devote a substantial portion of their argument to summarizing Perry's notes, yet nothing in the notebooks refutes the court's findings on the issues concerning Perry's misbehavior. The notebooks shed no light on whether Perry was inattentive or sleeping.[74] While they are silent on the issue of whether Perry lied when she told the court she never stated that she wanted to get off the jury, some of Perry's notes are consistent with her expressed desire to get off the jury. See CP

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[73] The notebooks are missing a total of 33 sheets. Notebook # 4 is missing 22 sheets. Notebook # 3 is missing 8 sheets. Notebook# 2 is missing 1 sheet. Notebook # 1 is missing 5 sheets. There are 3 loose sheets with the notebooks. There are 10 pages containing questions submitted by Perry on notebook paper, leaving a total of 23 pages unaccounted for. CP 2958, 2972, 2989, 2996, 2999, 3004, 3009, 3100, 3109 and 3111. (Several questions by Perry were not submitted on the notebook paper. CP 3015, 3102, and 3103).

[74] In an effort to suggest that Perry was not inattentive at trial, the defendants claim that Perry was the "most active" juror posing questions for witnesses. BOA (Rafay) at 131. In fact, she was not. Juror No. 1 posed at least as many questions. See CP 2970-3139. Moreover, Perry offered approximately 12 questions over a 15-week period - this behavior hardly rebuts the numerous observations that she was napping at trial.

4792 ("[M]y attitude and motivation have been less than ideal for the purposes of equal justice consideration . . . . There are many days when I can barely stand to be here.") (emphasis in original).

The defendants have failed to show that the court abused its discretion when it excused Perry. She had been repeatedly observed sleeping or not paying attention, she disobeyed the court's instructions concerning note-taking, she expressed a strong desire to get off the jury, and she lied to the court. The court hardly acted precipitately, but only after repeated complaints and after Perry's misbehavior was confirmed by a significant number of other jurors. The defendants' challenge on this basis should be rejected.

c. Any Error In Excusing Juror No. 4 Does Not Justify Reversal Of The Jury's Verdicts.

Even if the court erred in excusing Perry, such an error does not justify reversal of the defendants' convictions and a new trial, because the defendants cannot show they suffered prejudice. "A Defendant has no right to be tried by a particular juror or by a particular jury." State v. Gentry, 125 Wn.2d 570, 615, 888 P.2d 1105 (1995). Perry was replaced with an alternate juror whom the defendants had accepted. They have presented no evidence that the alternate juror was biased, partial, or unqualified for any reason.

The defendants acknowledge that "[w]here 'there is no evidence that removing the juror resulted in a tainted or unfair jury,' a defendant has no recourse on appeal." BOA (Rafay) at 154 (quoting Jorden, 103 Wn. App. at 228). They claim, however, that after Juror Perry was dismissed, "the remaining jurors were more likely to convict the innocent." BOA (Rafay) at 154. There is no evidence to support this.

Because a defendant has no right to a particular juror, the Washington Supreme Court has repeatedly refused to order a new trial when the trial court erroneously excuses a juror. For example, in Gentry, the jury selected included 12 regular jurors and 3 alternate jurors. Before the jury began deliberating, the court mistakenly excused a regular juror in place of an alternate. On appeal, the court held that there was no constitutional issue at stake. "The Defendant participated in their selection and the entire panel, both regular jurors and alternates, was ultimately accepted by the Defendant. Thus his constitutional right to an impartial jury selected by him was not violated." Gentry, 125 Wn.2d at 616.

Similarly, in Creech v. City of Aberdeen, 44 Wash. 72, 87 P. 44 (1906), cited in Gentry, the court held that an error in allowing

one party an extra peremptory challenge did not justify a new trial:

> It does not appear that the jury was rendered partial by this mistake on the part of the court, the juror who took the place of the juror who was challenged being examined and passed for cause. All that the appellant can claim is the right to have its case tried by an impartial jury. . . . It has frequently been decided by this court that litigants had no vested right in any particular juror . . . .

Creech, 44 Wash. at 74.

Again, in State v. Evans, 26 Wn. App. 251, 612 P.2d 442 (1980), rev'd on other grounds, 96 Wn.2d 119, 634 P.2d 845 (1981), the trial court erroneously allowed a party an extra peremptory challenge. The Court of Appeals rejected the claim that reversal was required:

> [T]he error is not fatal. Parties are not entitled to have any particular juror serve. The State does not allege that any of the jurors subsequently selected were not qualified; unless prejudice results from allowing an excessive number of peremptory challenges, reversible error has not been committed. No such prejudice is cited; none is found.

26 Wn. App. at 263.

Courts in other states also recognize that an error in excusing a juror is harmless when the juror is replaced with a duly selected alternate. The Vermont Supreme Court explained:

> Absent some showing of prejudice, we would not reverse a criminal conviction merely because

> potential jurors were improperly excused. [Citation omitted]. That defendant here suffered no prejudice from the juror's dismissal -- even if erroneous -- is readily apparent. Defendant had ample opportunity to voir dire the alternate who replaced the dismissed juror, and plainly determined that the alternate was acceptable. See V.R.Cr.P. 24(d) (alternate jurors "shall be drawn in the same manner, shall have the same qualifications, shall be subject to the same examination and challenges . . . as the regular jurors"). Absent any claim or showing of impartiality [sic] on the part of the alternate, there is no basis to find that defendant was deprived of a fair and impartial jury.

State v. Lambert, 175 Vt. 275, 278-79, 830 A.2d 9, 13 (2003); see also Lee v. State, 340 Ark. 504, 514, 11 S.W.3d 553, 559 (2000) ("an appellant must show prejudice, when the trial court removes a juror and seats an alternate in the juror's place."); Burgal v. State, 740 So.2d 82, 84-85 (Fla. Dist. Ct. App. 1999) (finding error harmless because juror was replaced by a duly selected alternate who had been present during the entire proceedings); State v. Santana, 135 Idaho 58, 64, 14 P.3d 378 (Idaho Ct. App. 2000) (error in excusing juror was harmless because none of the twelve jurors who deliberated was biased).

These decisions make sense. If there is no showing that any juror who ultimately deliberated on the case was biased, there is no basis to award a defendant a new trial. Here, the defendants

cannot show that they suffered any prejudice even if the court erred in excusing Juror Perry. This claim should be rejected.

5. THE TRIAL COURT PROPERLY LIMITED THE ADMISSION OF PURPORTED "OTHER SUSPECT" EVIDENCE.

The defendants claim that the trial court erred by limiting their proffered evidence of alleged "other suspects" in these murders. This claim fails, because the excluded evidence was inadmissible under Washington's long-standing rules governing such evidence.

Because it was obvious that the proffered evidence did not satisfy this standard, the defendants did not aggressively pursue this theory of admissibility at trial. On appeal, they argue that if the evidence was inadmissible under the Washington standard, the standard is unconstitutional. This argument fails, given that the United States Supreme Court recently affirmed an "other suspect" standard identical to that used in Washington State.

As they did at trial, the defendants argue that the evidence was admissible for a different purpose -- to impeach testimony suggesting that the police had conducted a thorough investigation. The trial court properly rejected this theory as a backdoor way to admit otherwise inadmissible "other suspect" evidence. The

defendants had a full opportunity to cross-examine the State's witnesses, and they failed to justify using inadmissible "other suspect" evidence as impeachment. The trial court properly exercised its discretion in excluding this evidence.

a. Relevant Facts.

During pretrial hearings, the court heard evidence of several tips that Bellevue police received after the murders. Three tips were discussed: (1) a tip from Douglas Mohammed about an alleged local radical Muslim group, (2) a tip from a Seattle detective about the militant Islamic group FUQRA, and (3) a tip about Jessie Brar and a Canadian criminal organization referred to as the Dosanjh Group. After hearing motions *in limine*, the trial court admitted the evidence relating to Brar and the Dosanjh Group, but excluded evidence concerning the other tips.

i. The tip by Douglas Mohammed.

Detectives Thompson and Gomes testified that, several days after the homicides, Douglas Mohammed contacted the Bellevue Police, claiming that he might have information concerning the Rafay murders. 17RP 52; 31RP 71. On July 18, 1994, the detectives met with Mohammed. 17RP 120-21; 31RP 72.

Mohammed said that he was an informant for the FBI,[75] and that he was familiar with a faction in the Muslim community headed by a man who advocated death to those who did not accept his version of the Koran. 17RP 53-54; 31RP 73-74. Mohammed claimed that this leader had indicated that Tariq Rafay should be killed because of his interpretation of the Koran. 17RP 56.

According to Mohammed, a few days after the murders, a member of this faction came to Mohammed's house appearing nervous, and asked if Mohammed remembered a baseball bat that had been in a faction member's car. 17RP 53-54; 31RP 74; 32RP 7-8. Mohammed told the police that he had heard that the Rafays had been bludgeoned to death, and speculated that the bat could be the murder weapon. 17RP 54, 121.[76]

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[75] Burns claims that "Mohammed had provided reliable information to the FBI in the past," and repeatedly refers to him as a reliable FBI informant. BOA (Burns) at 136, 150. There is nothing in the record concerning whether Mohammed had previously provided reliable information.

[76] In describing the Mohammed tip, Rafay cites to counsel's argument, rather than to the pretrial testimony about the tip. Not all of counsel's description of the tip was supported by the testimony. For example, Rafay claims that Mohammed said that the man asked him to forget about the baseball bat. BOA (Rafay) at 101. There was no testimony that Mohammed told the police this. See 17RP 52-55; 31RP 71-74.

Based upon Mohammed's demeanor and manner of speaking during this interview, the detectives concluded that he was crazy, and thus did not put much value in the substance of his claims. 17RP 121; 18RP 4. Nonetheless, the police spoke with relatives of the Rafay family, who indicated that there was no history of any antagonism between Tariq Rafay and any Muslim faction. 17RP 122; 31RP 75. Tariq was not a leader in the Muslim community, but just a regular worshipper. 32RP 69-70.

ii. The FUQRA tip.

There was little evidence offered concerning the tip on the FUQRA organization. Early on in the case, the defendants sought a 10-year-old FBI document about the group. See RP (7-11-00) 2-22. A police report attached to a defense pleading indicated that, several weeks after the murders, Seattle Police Detective Detmar called the Bellevue Police to inform them of the existence of a militant Islamic group called FUQRA based in Toronto. CP 123-24. The detective offered no specific information linking FUQRA with the Rafay homicides. Id. It appears that the defendants obtained the FBI document about FUQRA, but after receiving it, the defense never suggested that they had any further information connecting FUQRA to the murders. See RP (5-15-01) 10-12; CP 647-49.

iii. The tip about Jessie Brar and the Dosanjh Group.

On July 19, 1994, a confidential informant told RCMP Constable Patrice Gelinas that he had heard from another source that, approximately a week and a half earlier, the Dosanjh group had placed a contract on an East-Indian family[77] residing in Bellevue, Washington. 17RP 69-70; Pretrial Ex. 70. The confidential informant heard that Jessie Brar was offered $20,000 to execute the contract. 17RP 70; Pretrial Ex. 70. After the informant saw a television report on the Rafay homicides, he contacted Constable Gelinas. 17RP 70; Pretrial Ex. 70.

After Constable Gelinas communicated this information to the Bellevue Police, several detectives met with him the next day. 17RP 57-59; 32RP 18-21; 138RP 68-69. The police learned that the Dosanjh Group was an organized crime family located in Vancouver. 31RP 69-70. During their investigation into the Rafay homicides, the police did not discover any connection between the Rafays and the Dosanjh Group, any organized crime group, or Jessie Brar. 31RP 70; 138RP 118-23.

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[77] The Rafay family was originally from Pakistan, not East India. 98RP 16-17; 136RP 74.

The informant had no information that Brar actually committed the homicides. 138RP 117. The identity of Constable Gelinas' confidential informant was never revealed. 63RP 7. It was later revealed that the confidential informant's source was Jessie Brar. 136RP 66-67; 138RP 82.

Several years later, when Canadian authorities re-contacted the informant about the tip, he indicated that Brar had asked about getting guns in the United States. Ex. 531. The informant speculated that the hit for $20,000 concerned a family that owned a cab company in Coquitlam, Canada. Id.; CP 2949.

iv. The court's ruling.

During pretrial motions, the State moved to prohibit the defendants from introducing "other suspect" evidence. CP 2884. On November 19, 2003, the court heard argument on the motion. 63RP 3-59. Initially, defense counsel insisted that the defense did not intend to offer the tips as "other suspect" evidence. 62RP 98-100; 63RP 10 ("I think I made it clear yesterday that this is not other suspect evidence, so I object to that characterization."). Instead, he argued that the evidence about the tips went to the thoroughness of the police investigation. 62RP 98-100; 63RP 32-38.

When the court inquired about whether the evidence was admissible as "other suspect" evidence, defense counsel responded that "the evidence was admissible on the bases I just argued to you." 63RP 38. After the court told counsel that if they had an "other suspect" argument, they should make it, the defense argued that the evidence relating to the tips was also admissible as "other suspect" evidence. 63RP 38-44. Defense counsel did not discuss the tip concerning FUQRA at any length. Id.

When the prosecution pointed out that the proffered evidence was hearsay, defense counsel responded that "[w]e're not offering it for the truth." 63RP 51. Instead, he claimed that they were offering it to show that Detective Thompson was provided with the tips but did not follow up on them. Id. Defense counsel suggested the court could give a limiting instruction to the jury. Id.

The court held that the tip on Jessie Brar and the Dosanjh Group was admissible, although noting that it required "some stretching" of the "other suspect" criteria. 63RP 59-60. The court found that the tip from Mohammed was not admissible because it did not satisfy the "other suspect" criteria. 63RP 61-63. "It just simply would require too much speculation." 63RP 61. The court also excluded evidence concerning the FUQRA tip. 63RP 62.

The defendants asked the court to reconsider. CP 4712-13. Again, the defense argued that "[t]his is not other suspect evidence through the back door, this is impeachment." 70RP 4. The court denied the motion to reconsider, commenting that "the impeachment analysis just simply is without boundaries . . . and ultimately is, in this Court's view, merely an effort to back door in other suspect testimony." 70RP 45.

The defense introduced evidence relating to the tip on Jessie Brar and the Dosanjh Group. 138RP 56-94, 116-31; 144RP 20-48. The court prevented the State from admitting evidence explaining the background of the Dosanjh Group, such as the fact that it was involved in the sale of narcotics on the streets of Vancouver; that they were Sikhs, not Muslims; and that the group had been led by two brothers, both of whom were dead by April of 1994, several months before the Rafay murders. 136RP 78-79; 138RP 103-08; 144RP 63-64. The court allowed general testimony that the detectives did not discover any evidence linking the Rafay family with the Dosanjh Group and Jessie Brar. 144RP 44-48. The parties stipulated that Brar's prints were not found inside the Rafay home, and that Brar was eliminated as a source of all DNA found on items in the home. 143RP 94-97; 146RP 99-100; CP 3140-43.

b. The Evidence Relating To Douglas Mohammed and FUQRA Was Not Admissible As "Other Suspect" Evidence.

This Court reviews a trial court's determination whether to admit "other suspect" evidence for abuse of discretion. State v. Thomas, 150 Wn.2d 821, 856, 83 P.3d 970 (2004). The trial court's decision should be reversed only if no reasonable person would have decided the matter as the court did. Id. Here, the trial court acted within its discretion in excluding the proffered "other suspect" evidence concerning the tip from Mohammed regarding militant Muslims, and the tip concerning FUQRA.

Although a defendant has a constitutional right to obtain witnesses and present a defense, he has no right to present irrelevant evidence. State v. Hudlow, 99 Wn.2d 1, 15, 659 P.2d 514 (1983). Evidence that a third party committed the charged crime is not admissible unless a sufficient foundation is established. State v. Condon, 72 Wn. App. 638, 647, 865 P.2d 521 (1993), review denied, 123 Wn.2d 1031 (1994).

For more than seventy-five years, the Washington Supreme Court has held that, before "other suspect" evidence may be admitted, there must be such proof of connection or circumstances that tend to clearly point out someone besides the one charged as

the guilty party. State v. Russell, 125 Wn.2d 24, 75, 882 P.2d 747 (1994); State v. Downs, 168 Wash. 664, 13 P.2d 1 (1932); State v. Howard, 127 Wn. App. 862, 866, 113 P.3d 511 (2005), review denied, 156 Wn.2d 1014 (2006). The foundation requires a clear nexus between the other suspect and the crime. Condon, 72 Wn. App. at 647. Motive, ability, and opportunity to commit a crime are not alone sufficient. "Not only must there be a showing that the third party had the ability to place him or herself at the scene of the crime, there also must be some step taken by the third party that indicates an intention to act on that ability." State v. Rehak, 67 Wn. App. 157, 163, 834 P.2d 651 (1992), review denied, 120 Wn.2d 1022 (1993).

On appeal, the defendants argue that the tip concerning FUQRA and the tip from Mohammed met this standard. They did not. At trial, defense counsel appeared to recognize that the "other suspect" standard was not satisfied, and only argued this theory of admissibility when pressed by the court. Under settled Washington law, evidence of these tips was not admissible.

With respect to the tip from Douglas Mohammed, the evidence was extremely limited. Mohammed had relayed his suspicions about an alleged extremist group without indicating that

anyone had told him they had committed the murders. He had no information that anyone in the group was near the Rafays' house at the time of the murders. There was no evidence that a member of this alleged group had taken any step to commit the murders.

The defendants made much of Mohammed's mention of a baseball bat, claiming he was aware of holdback evidence. Yet it was not a secret that the Rafays had been bludgeoned to death. When discussing Mohammed's tip, defense counsel Robinson acknowledged that, even before the information was released to the public, the inference could be drawn that a baseball bat was the likely weapon. 63RP 30. Documents submitted by the defense reveal that early on, the press was reporting that a bat may have been used. See Ex. 514 (The Province, dated July 20, 1994). In fact, counsel later made a point of the fact that a baseball bat was listed as a possible weapon early in the investigation. 138RP 36-37; 143RP 53.

Furthermore, the defense never suggested that they had any evidence rebutting the detectives' assessment of Mohammed as mentally questionable. The defense did not claim that they had interviewed Mohammed and found him credible. Nor did they claim

that they had other witnesses who could vouch for Mohammed's reliability. And the defense never suggested that they intended to call Mohammed as a witness.

The information regarding FUQRA was even weaker. A Seattle detective had simply called the Bellevue Police to inform them of the existence of the group. The detective offered no information that even indirectly linked the group to the murders.

The defendants claim that this "other suspect" evidence was supported by evidence that the Rafays "had religious enemies." BOA (Rafay) at 109. The evidence supporting this claim is extraordinarily weak; the only suggestion that the Rafay family had enemies comes from Atif Rafay's taped statement to the police in which he suggested that the family had religious enemies -- Shiites -- and then discounted the possibility that such persons might have killed his family. Ex. 72 at 87.

Attempting to buttress this claim, the defendants speculate that Tariq Rafay's involvement in the Pakistani-Canadian Friendship Association and his published article about the proper direction of prayer may have created enemies. BOA (Rafay) at 109. In fact, the testimony established that others had pointed out the proper direction of prayer, that the direction had been corrected

before Tariq Rafay's article was published, that Tariq was not well known on this issue, and that there was no serious controversy about it. 109RP 90-92.

The trial court acted within its discretion in holding that the evidence relating to Douglas Mohammed and FUQRA did not satisfy the standard for admission of "other suspect" evidence. There were no facts or circumstances that clearly pointed to militant Muslims or FUQRA as the murderers. While the court was willing to liberally apply the standard for admission of "other suspect" evidence, as reflected by the court's admission of the tip relating to Jessie Brar and the Dosanjh Group, the other tips were not even close to meeting the standard. There was no error.

c. Washington's Standard Governing The Admission Of "Other Suspect" Evidence Is Constitutional.

The defendants argue that if the tips concerning Mohammed and FUQRA were inadmissible under the existing standard for "other suspect" evidence, that standard is unconstitutional. This claim is without merit, and is refuted by some of the very cases that the defendants cite.

The notion that, under due process, the rules of evidence must be relaxed for a criminal defendant is not supported by the

caselaw. "In the exercise of this right [to present a defense], the accused, as is required of the State, must comply with established rules of procedure and evidence designed to assure both fairness and reliability in the ascertainment of guilt and innocence." Chambers v. Mississippi, 410 U.S. 284, 302, 93 S. Ct. 1038, 35 L. Ed.2d 297 (1973). A defendant is not entitled to present hearsay evidence unless it fits within an exception to the hearsay rule. Id.; see also Taylor v. Illinois, 484 U.S. 400, 410, 108 S. Ct. 646, 98 L. Ed.2d 798 (1988) (holding that "[t]he accused does not have an unfettered right to offer testimony that is incompetent, privileged, or otherwise inadmissible under standard rules of evidence").

The defendants suggest that the standard for admission of "other suspect" evidence is in conflict with other Washington cases; they cite State v. Darden, 145 Wn.2d 612, 41 P.3d 1189 (2002); State v. Hudlow, 99 Wn.2d 1, 659 P.2d 514 (1983); and State v. Reed, 101 Wn. App. 704, 715, 6 P.3d 43 (2000). They argue that, under this line of cases, the court must admit minimally relevant evidence proffered by a defendant unless the State shows a compelling interest justifying exclusion of the evidence. This argument overlooks the fact that the "other suspect" standard is a means of determining whether the proffered evidence is relevant in

the first place. Evidence that fails this test is not relevant. As this Court has recognized, there is no tension between the "other suspect" case law and these cases.

In Hudlow, the Washington Supreme Court observed that "a criminal defendant has no constitutional right to have irrelevant evidence admitted in his or her defense." 99 Wn.2d at 15. The court has also held that, when proffered "other suspect" evidence fails to satisfy the standard set forth in Russell and Downs, it is deemed not relevant. See State v. Maupin, 128 Wn.2d 918, 925, 913 P.2d 808 (1996) (noting that "other suspect" evidence that failed the standard was excluded because it was "irrelevant" and was based upon "the most remote kind of speculation"). The evidence concerning Mohammed and FUQRA, having failed to satisfy the "other suspect" standard, was not relevant.

In Howard, this Court considered and rejected a virtually identical argument to that made by these defendants:

> The defense cites State v. Reed for the proposition that, under the rule announced in State v. Hudlow, "evidence relevant to the defense of an accused will seldom be excluded, even in the face of a compelling state interest." Reed is not helpful here.
>
> That case involved the question of whether there was a need for the State not to disclose the location of a hidden police observation post. This need competed

> with the defense's right to cross-examine a police officer, the sole witness to the defendant's illegal drug transaction, about the post's location. But our supreme court [in State v. Darden] noted that Reed mistakenly applied the Hudlow rule. Hudlow lays out the "proper method of balancing the defendant's right to produce *relevant evidence* versus the state's interest in limiting the prejudicial effects of that evidence." However, prior to any balancing analysis under Hudlow, the evidence must be relevant -- it must clearly point in this case to someone other than Howard as the guilty party.

127 Wn. App. at 868-69 (footnotes omitted) (italics in original).

The defendants also claim that their position is supported by a recent United States Supreme Court case, Holmes v. South Carolina, 547 U.S. 319, 126 S. Ct. 1727, 164 L. Ed.2d 503 (2006). It is not. In Holmes, the Court, while holding that South Carolina's "other suspect" standard was unconstitutional, contrasted it with an acceptable and widely adopted standard for "other suspect" evidence -- the rule applied by Washington and many other states.

At issue in Holmes was South Carolina's newly revised "other suspect" rule, which allowed for exclusion of such evidence if the State's case against the defendant was particularly strong. At the outset, the Supreme Court observed that it was entirely appropriate for states to limit evidence concerning "other suspects":

> While the Constitution thus prohibits the exclusion of defense evidence under rules that serve no legitimate

> purpose or that are disproportionate to the ends that they are asserted to promote, well-established rules of evidence permit trial judges to exclude evidence if its probative value is outweighed by certain other factors such as unfair prejudice, confusion of the issues, or potential to mislead the jury.
>
> . . .
>
> A specific application of this principle is found in rules regulating the admission of evidence proffered by criminal defendants to show that someone else committed the crime with which they are charged. [Citations omitted]. Such rules are widely accepted, and neither petitioner nor his *amici* challenge them here.

547 U.S. at 326-27 (footnote omitted).

The Court noted that South Carolina's original standard for "other suspect" evidence, similar to that in Washington, provided that, before "other suspect evidence was admissible, 'there must be such proof of connection with it, such a train of facts or circumstances, as tends clearly to point out such other person as the guilty party.'" Holmes, 547 U.S. at 328 (quoting State v. Gregory, 198 S.C. 98, 104-05, 16 S.E.2d 532, 534-35 (1941) (quoting 16 C.J. Criminal Law § 1085, p. 560 (1918) and 20 Am. Jur. Evidence § 265, p. 254 (1939))). However, more recently, the South Carolina Supreme Court had "radically changed" the rule and held that "'where there is strong evidence of [a defendant's] guilt,

especially where there is strong forensic evidence, the proffered evidence about a third party's alleged guilt' may (or perhaps must) be excluded." Holmes, 547 U.S. at 328-29 (quoting State v. Holmes, 361 S.C. 333, 343, 605 S.E.2d 19, 24 (2004)).

The Court contrasted this new rule with the more common standard for "other suspect" evidence articulated in the earlier Gregory case and applied in Washington. "[T]he rule applied by the State Supreme Court does not rationally serve the end that the Gregory rule and its analogues in other jurisdictions were designed to promote, *i.e.,* to focus the trial on the central issues by excluding evidence that has only a very weak logical connection to the central issues." Holmes, 547 U.S. at 330.

The Court concluded that South Carolina's new rule, conditioning admission of "other suspect" evidence on the strength of the State's case against the defendant, made little sense. "The point is that, by evaluating the strength of only one party's evidence, no logical conclusion can be reached regarding the strength of contrary evidence offered by the other side to rebut or cast doubt." 547 U.S. at 331. The Court concluded that the new rule violated the defendant's right to present a complete defense.

Contrary to the defendants' argument in this appeal, Holmes does not stand for the proposition that there is any constitutional infirmity in Washington's rule on "other suspect" evidence. In fact, the Court repeatedly pointed to that standard as an appropriate rule governing the admission of such evidence.

Similarly, the defendants' claim that California applies a different, more appropriate standard for "other suspect" evidence is overstated. In the case cited, the California Supreme Court described its rule for "other suspect" evidence in terms very similar to those used in Washington cases:

> [W]e do not require that any evidence, however remote, must be admitted to show a third party's possible culpability. As this court observed in Mendez, evidence of mere motive or opportunity to commit the crime in another person, without more, will not suffice to raise a reasonable doubt about a defendant's guilt: there must be direct or circumstantial evidence linking the third person to the actual perpetration of the crime.

People v. Hall, 41 Cal.3d 826, 833, 718 P.2d 99, 104, 226 Cal. Rpt. 112, 116 (1986). The evidence concerning Mohammed and FUQRA did not meet this standard.

In sum, the defendants' argument that Washington's standard for the admission of "other suspect" evidence is unconstitutional is not supported by the authorities they cite. The

defendants offer no compelling reason for this Court to abandon seventy-five years of consistent case law on this issue.

d. The Excluded Tip Evidence Was Inadmissible Hearsay.

As the State pointed out at trial, even if the excluded tip evidence satisfied the "other suspect" standard, the evidence was still inadmissible hearsay. The "other suspect" test sets the threshold standard for whether the evidence offered is relevant. See Howard, 127 Wn. App. at 866. The evidence is still subject to the other rules of evidence and is inadmissible if, for example, it is offered in the form of hearsay that does not fall within an exception. United States v. Patrick, 248 F.3d 11, 21 (1st Cir. 2001).

Here, the proffered "other suspect" evidence was inadmissible hearsay offered for the truth of the matter asserted. The defendants did not intend to call Douglas Mohammed or Seattle Detective Detmar as witnesses.[78] Instead, they sought to cross-examine the Bellevue detectives concerning out-of-court statements made by Mohammed and Detmar. The information relating to Mohammed contained both hearsay (what Mohammed

[78] Defense counsel never suggested that they intended to call Mohammed or Detmar as witnesses. Neither was listed on the witness list read to the jury before the court's ruling on the "other suspect" motion. See 59RP 12-20.

said to the detective) and hearsay within hearsay (a Bellevue detective relating what Mohammed said about a third person's statements). ER 801(c). As evidence implicating other suspects, these statements were offered for the truth of the matter asserted.

At trial, the defense never articulated an applicable hearsay exception, and when this issue was raised, counsel fell back on the alternative theory of admissibility, discussed below, that the evidence was offered as impeachment, not as "other suspect" evidence. See 63RP 51 ("the information is simply not hearsay . . . We're not offering it for the truth."). On appeal, the defendants do not acknowledge the hearsay issue, let alone explain how the testimony could fall under any hearsay exception. The evidence concerning Mohammed and FUQRA was properly excluded as hearsay.

e. The Excluded Tips Were Not Admissible As Impeachment Evidence.

The defendants argue that even if the evidence concerning Mohammed was inadmissible as "other suspect" evidence, they were entitled to cross-examine Detectives Thompson and Gomes about the Mohammed tip in order to "impeach the State's evidence suggesting a thorough and exhaustive investigation." BOA (Rafay)

at 118. The trial court correctly recognized that this proffered basis for admissibility was simply a back-door method of introducing the "other suspect" evidence. Given that the defendants had considerable opportunity to impeach the detectives and other investigators on matters relating to their testimony, the court did not abuse its discretion in holding that the defendants could not introduce otherwise inadmissible "other suspect" information under the guise of impeachment.

This Court reviews the trial court's limitation of cross-examination for manifest abuse of discretion. State v. Campbell, 103 Wn.2d 1, 20, 691 P.2d 929 (1984). There was no such abuse here.

The right to cross-examine adverse witnesses is not absolute. Chambers, 410 U.S. at 295. "[T]he trial court still has discretion to control the scope of cross-examination and may reject lines of questions that only remotely tend to show bias or prejudice, or where the evidence is vague or merely speculative or argumentative." State v. Kilgore, 107 Wn. App. 160, 185, 26 P.3d 308 (2001), aff'd, 147 Wn.2d 288, 53 P.3d 974 2002); see also State v. Knapp, 14 Wn. App. 101, 107-08, 540 P.2d 898, review denied, 86 Wn.2d 1005 (1975). Moreover, a witness cannot be

impeached on an issue collateral to the issues being tried. State v. Descoteaux, 94 Wn.2d 31, 37, 614 P.2d 179 (1980), overruled on other grounds by State v. Danforth, 97 Wn.2d 255, 257 & n.1, 643 P.2d 882 (1982). An issue is collateral if it is not admissible independently of the impeachment purpose. Descoteaux, 94 Wn.2d at 37-38; State v. Allen, 50 Wn. App. 412, 423, 749 P.2d 702, review denied, 110 Wn.2d 1024 (1988).

The trial court has considerable discretion in deciding whether to permit otherwise inadmissible "other suspect" evidence under the theory that it is offered as impeachment evidence. In Rehak, the defendant argued that she was entitled to introduce as evidence of bias the fact that the police failed to pursue other possible suspects because they immediately concluded that she was the killer. 67 Wn. App. at 161. The trial court barred the testimony of a potential third party perpetrator, and the Court of Appeals affirmed the exclusion, explaining:

> The only evidence actually excluded was the police handling of a tip regarding an unidentified third party who had made threats against Mr. Rehak. The trial court concluded that the intended purpose of the evidence was not to impeach by showing bias, but rather as substantive evidence -- to suggest to the jury that there were other possible perpetrators. For the same reasons discussed above and set forth in State v. Mak, supra, the evidence of a potential third

> party perpetrator was properly excluded based on lack of a proper foundation. The defense was not denied the opportunity to present its theory of the case; the judge merely precluded the use of inadmissible evidence.

67 Wn. App. at 163-64.

The First Circuit has also rejected an argument similar to that made by the defendants here. In United States v. Patrick, 248 F.3d 11 (1st Cir. 2001), the defendant sought to introduce evidence of tips that the police had received on a murder. The defendant argued that the notes were admissible on two grounds: (1) they were evidence that someone else committed the murder, and (2) they established that the police investigation was unreliable. After noting that the evidence was not admissible as "other suspect" evidence, the court addressed the defendant's claim "that the tips are admissible not for their truth but to show the inadequacy of the police investigation." 248 F.3d at 22. The court held that "[s]uch speculative evidence of the inadequacy of the police investigation would have shifted the jury's focus from the accusations against [the defendant] to accusations against the police, thus creating a real danger of unfair prejudice and jury confusion that 'substantially outweighed' the evidence's probative value." 248 F.3d at 23.

Similarly, in United States v. McVeigh, 153 F.3d 1166 (10th Cir. 1998), the defendant sought to introduce reports allegedly revealing that the government's investigation of an "other suspect," Elohim City, was "shoddy" and "slanted" after the government focused on McVeigh. The 10th Circuit held that this material was not admissible:

> The legal premise of McVeigh's claim -- that the quality of the government's investigation was material to his defense -- also founders. Admittedly, the quality or bias of a criminal investigation occasionally may affect the reliability of particular evidence in a trial, and hence, the facts surrounding the government's investigation may become relevant. [Citation omitted]. However, in McVeigh's case, he failed to establish the requisite connection between the allegedly "shoddy" and "slanted" investigation and any evidence introduced at trial. There was no trial evidence whose reliability would have been undercut had McVeigh been able to prove his contentions about the Elohim City investigation. To have allowed McVeigh to put the government on trial because there might have been something more the government perhaps could have done with respect to the activities of the Elohim City group would inevitably divert the jury's attention from the issues of the trial. [Citation omitted].
>
> Under our system of criminal justice, the issue submitted to the jury is whether the accused is guilty or not guilty. The jury is not asked to render judgment about non-parties, nor is it normally asked to render a verdict on the government's investigation. The district court did not abuse its discretion, but rather is to be

> commended, in keeping the focus of the trial upon the issues properly before the jury.

153 F.3d at 1192.

The defendants argue that evidence of "other suspects" was necessary to show that the Bellevue police were biased against them. BOA (Rafay) at 117-18; BOA (Burns) at 146-47. The police, however, made no attempt to hide the fact that they quickly focused on Burns and Rafay as suspects in these murders. Detective Thompson testified that his suspicions were raised as soon as he interviewed Burns and Rafay for the first time on the morning of July 13, 1994, only hours after the murders. 98RP 194-97; 99RP 53-76. The general consensus among police by the end of that day was that the pair were suspects. 72RP 11.

Moreover, although the defendants claim that they were entitled to impeach Detectives Thompson and Gomes through cross-examination about the Mohammed and FUQRA tips, they fail to identify what specific testimony provided by the detectives would be impeached. Instead, they broadly frame the issue as impeachment of testimony "suggesting" that "the investigation" was thorough. They discuss at length the testimony, not from Detectives Thompson or Gomes, but from others involved in the

investigation, such as the police and forensic scientists who processed and collected evidence from the Rafay home. BOA (Rafay) at 123-26.

The defendants were permitted to fully cross-examine these witnesses. See, e.g., 85RP 145-92; 86RP 4-55 (defense cross-examination of Carl Nicoll). There is no indication that the forensic scientists and individuals involved in processing that evidence even knew about the tips. Cross-examination of Detectives Thompson and Gomes about the tips would not have impeached any of the testimony concerning evidence collection.[79]

The defendants repeat the argument made at trial that they were entitled to offer evidence of the tips after the court admitted Atif Rafay's taped statement. They reason that because Rafay vaguely mentioned "enemies of the family," the tip evidence was admissible in order to establish that Rafay's suggestion of religious enemies was not "farfetched." BOA (Rafay) at 126-27.

The defendants overstate what Rafay said in his taped interview. When pressed by the detectives as to who would want his parents dead, Rafay insisted that he did not know. Ex. 72 at 87.

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[79] The notion that the evidence was offered to rebut the thoroughness of the investigation is contradicted by the fact that defense counsel argued this theory of admissibility before any witness testified at trial. 62RP 98-100; 63RP 32-38.

As the detectives continued to ask, Rafay mentioned that his mother had talked about "enemies of the family and whatever." Id. He explained that they were Shiites, another religious group. Id. Rafay then discounted that possibility and began discussing his sister. Ex. 72 at 87-88. In rejecting the motion for reconsideration of the admissibility of the Mohammed tip, the trial court properly noted that "Rafay himself was dismissive of the family problem with the other religious group . . . ." 81RP 193.

Even had Atif Rafay suggested Islamic extremists as the possible culprits, it would be an odd rule of evidence to allow otherwise inadmissible "other suspect" evidence on the basis that the defendant also suggested the "other suspect" in a statement to the police. Under the defendant's theory of admissibility, the *hearsay* tip was offered as substantive evidence to support Rafay's statement concerning religious enemies. Yet, as discussed above, no exception to the rule against hearsay permitted its admission. Furthermore, the defendants failed to link the tips with Rafay's reference to Shiites; there was no evidence that either the radical Muslim group mentioned by Mohammed or FUQRA were Shiites.[80]

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[80] In fact, it appears that FUQRA is a Sunni group. See Federal Bureau of Investigation, Terrorism in the United States 1996, at 6, http://www.fbi.gov/publications/terror/terroris.pdf.

The defendants also repeat the argument that they were entitled to admission of the tip evidence after Detective Thompson testified that he could find no link between the Rafay family and the Dosanjh Group, but they do not make this argument in any detail. BOA (Rafay) at 127. At trial, defense counsel strained to link the various tips, and incorrectly stated at one point that "[t]he Dosanjh group was contacted by somebody willing to pay for these murders." 144RP 49. In fact, the tip was that the Dosanjh Group had put out the hit; there was no suggestion that some other party had done it. These efforts to link the tips, while creative, had no support in the facts and did not justify admission.

The cases cited by the defendants for the notion that they were entitled to offer the tip evidence as impeachment are easily distinguishable. In United States v. Crosby, 75 F.3d 1343 (9th Cir. 1996), the court did not hold that otherwise inadmissible "other suspect" evidence could be used for impeachment. In Crosby, the defendant sought to admit evidence that the victim's husband lived a short distance from where the victim was assaulted, was jealous of the victim dating the defendant, had severely assaulted her numerous times in the past, and was nearby at the time of the assault. Id. at 1346.

In holding that this evidence was relevant and admissible, the Ninth Circuit held that the evidence established that "someone other than Crosby had the opportunity, ability and motive to commit the crime." Id. at 1347. The court noted that the defendant had argued that the police investigation was sloppy. Id. However, rather than suggest that this was an independent basis to admit the evidence, the court emphasized the substantive evidence that someone else might have committed the crime: "Rather than being limited to poking holes in the prosecution's case, Crosby's counsel could have plausibly argued that a more thorough investigation would have produced evidence incriminating Hoskie." Id. at 1348. Crosby does not stand for the proposition that otherwise inadmissible "other suspect" evidence may be admitted for the sole purpose of challenging the police investigation.

Similarly, in Mendez v. Artuz, 303 F.3d 411 (2nd Cir. 2002), the court was not confronted with the admissibility of evidence challenging the adequacy of the investigation. Instead, the issue was the State's failure to disclose evidence that another person had placed a contract on the life of the victim prior to the shooting. Id.

at 412. The Second Circuit held that the State had violated Brady[81] by failing to disclose the evidence, and ordered a new trial. Id. In discussing this evidence, the court noted in passing that it could have been used to attack the adequacy of the police investigation. Id. at 416. However, the court did not provide any significant analysis of this issue, because it was not directly presented.

Finally, in Commonwealth v. Reynolds, 429 Mass. 388, 390, 708 N.E.2d 658 (1999), the defendant sought to impeach the investigating detective with his failure to pursue a tip that the murder was committed by a crime organization upset with the victim over his failure to pay them. The defendant offered to redact the specific information so that the jury would hear only that the police heard from two informants that someone else had committed the crimes. 429 Mass. at 390. The court held that the defendant "should have been allowed to elicit *the redacted form* of the tipsters' leads . . . ." Id. at 391 (emphasis added).

Here, the defendants never suggested redacting the Mohammed information. Instead, the defendants wanted to cross-

[81] Brady v. Maryland, 373 U.S. 83, 83 S. Ct. 1194, 10 L. Ed.2d 215 (1963).

examine the detectives about the details of the tip from Mohammed; the trial court properly rejected this approach.

Judge Mertel's concern about the defendants' proffered impeachment theory of admissibility was well-founded. In virtually any case, a defendant could claim that he is entitled to impeach the "thoroughness" of the police investigation by cross-examining the investigating detectives about otherwise inadmissible "other suspect" information. The defendants, however, failed to establish any connection between the tips and the testimony they sought to impeach. The court acted within its discretion in excluding evidence of the two tips.

f. The Defendants Were Not Improperly Restricted In Presenting Evidence Concerning Jessie Brar.

Although the court permitted the defendants to introduce evidence concerning the tip on Jessie Brar and the Dosanjh Group, the defendants nevertheless claim that they were improperly restricted in presenting this evidence. Specifically, they complain that the court did not allow them to introduce evidence that the informant had provided reliable information about two prior

homicides, that Brar had a criminal record, and that the Dosanjh Group was involved in the drug trade. BOA (Burns) at 138-39. These claims should be rejected.

First, the defendants provide no authority or argument in support of these claims. After asserting in one paragraph that the trial court improperly excluded this evidence, the remainder of the defendants' argument concerns a different issue -- the exclusion of the tip from Mohammed. BOA (Burns) at 139-51. The defendants never explain how the informant's track record and Brar's criminal history were admissible. Because this claim is supported by nothing more than a cursory statement of error, and the defendants fail to provide any argument or authority supporting it, this Court should not consider the issue on appeal. RAP 10.3(a)(6); see Thomas, 150 Wn.2d at 868-69.

In any event, the trial court acted within its discretion in excluding this evidence. At trial, the defense argued that Brar was a hearsay witness and that they were thus entitled to introduce his robbery conviction as impeachment under ER 806. 136RP 88. This argument made little sense, given that it was the defense who offered Brar as a witness and they did not suggest any basis for impeaching his hearsay testimony. Instead, it appears that the

defense simply wanted the jury to hear that Brar had criminal convictions, and to speculate that he might therefore have committed the murders.

With respect to Constable Gelinas's confidential informant's track record in providing tips, at trial the defense argued that this information was somehow relevant to show the Bellevue detectives' bias. They claimed that the detectives did not properly follow up on the tip, despite hearing that the informant had provided reliable information in the past. 136RP 98-99. Yet the informant did not have direct knowledge of the relevant information in this tip. Rather, the informant simply passed on information from another source, Jessie Brar, whose reliability was unknown. Moreover, the steps that the detectives took in connection with the tip were undisputed. The trial court did not err in excluding this evidence.

Finally, the defense claims that the court improperly restricted evidence that the Dosanjh Group was active in the drug trade. It was the State that sought to admit this evidence. 138RP 104-07; 144RP 64-65. Burns's attorney advocated against answering a juror question about the nature of the Dosanjh group. 138RP 98-99. This claim of error is not well taken.

g. Any Error Was Harmless.

Finally, even if the court erred in not allowing the defendants to introduce hearsay evidence about the tips from Mohammed and about FUQRA, any error was harmless. The test for determining whether the error was harmless is whether the admitted evidence was so overwhelming as to necessarily lead to a finding of guilt. Lord, 161 Wn.2d at 296. Not only was the evidence here overwhelming, but the value of the excluded evidence was slight.

Despite the fact that the defendants had carefully planned a visit to the Rafay home to diminish the significance of any evidence of their presence, there nevertheless was compelling physical evidence of their guilt. There was Tariq Rafay's blood all over the shower walls, with Burns's hairs, not in the drain (as would be expected if someone else had showered after him), but on the shower floor inches away from the drain. There was the very fact that the murderer felt comfortable enough, and sure enough that he would not be disturbed, to shower in the home. There was Burns's fingerprint on the inside lid of one of the overturned boxes in the downstairs bedroom, set up to look like a burglary (even though there was no evidence of forced entry).

Even more damning was the videotape showing the defendants laughing and giggling as they confessed to murdering the Rafay family. Burns was also taped discussing the murders with Jimmy Miyoshi when no undercover agent was present. Miyoshi reluctantly admitted that he knew about his friends' plans.

Moreover, the value of the excluded evidence was slight. As noted above, by its ruling the trial court simply prevented the defendant from cross-examining the detectives about certain tips. The court still allowed evidence of one tip, and evidence of the detectives' response to that tip. At best, by offering more evidence of tips, the defendants would have shown that the police had focused on Burns and Rafay to the exclusion of other leads. The existence of the tips would have shed no light on the truth of the defendants' taped confessions to the RCMP, the key issue in the case. Accordingly, any error was harmless.

6. THE TRIAL COURT PROPERLY EXCLUDED PROPOSED EXPERT TESTIMONY OF DR. RICHARD LEO ON FALSE CONFESSIONS.

Burns contends that the trial court's refusal to admit the testimony of Dr. Richard Leo, who proposed to testify as an expert on false confessions, violated his constitutional right to present a

defense.[82] This claim overstates the effect of the ruling. The trial court did not prevent Burns from presenting his chosen defense – that his confession was false, elicited through fear and coercion. Burns was able to put before the jury all of the circumstances under which his confession was made, and the confession itself was captured on videotape and shown to the jury.

The exclusion of Dr. Leo's testimony was rather an evidentiary ruling under ER 702. The trial court, like a number of other courts before and since, properly exercised its discretion in concluding that Dr. Leo's testimony would not have been helpful to the jury. Moreover, Burns failed to establish the proper foundation; he made no showing that Leo's proposed testimony was based on an explanatory theory generally accepted in the relevant social science community. The testimony was properly excluded.

a. Relevant Facts.

Burns moved prior to trial for admission of the testimony of Dr. Richard Leo, Associate Professor of Criminology, Law and Society at the University of California. Burns described Dr. Leo as

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[82] While Rafay joins in this argument on appeal, the arguments in the trial court focused on Burns's defense. Most of the conversations with the undercover RCMP officers involved only Burns; Rafay did not appear until the next-to-last scenario (July 19, 1995). Ex. 511, 543. Consequently, the State's argument in this section will focus on Burns, although the arguments apply equally to Rafay.

an expert in "police interrogation methodology, social psychology, and coercive persuasion." CP 2833. Burns said that Leo would testify on "the topic of false confessions in general," that he would discuss "the factors that affect confessions," and that he would "offer his expert opinion regarding indicia of the reliability of admissions by criminal suspects." CP 2833-34.

In a letter sent to prosecutors, Burns's attorneys expanded on Dr. Leo's expected testimony:

> Dr. Leo's research demonstrates that there are four types of false confessions: stress-complaint [sic], coerced-compliant, non-coerced persuaded, and coerced-persuaded. While Dr. Leo will not be asked to offer an opinion regarding the truthfulness of the confession in this case, **he will testify that if the confession in this case were, indeed, false, it would be a "coerced complaint [sic] false confession." This is a situation where an innocent suspect knowingly confesses falsely in order to escape continuing pressure, fear, and coercion of the interrogation environment.**

CP 2937 (emphasis added).

The State opposed the admission of Dr. Leo's testimony. The State emphasized the requirement under ER 702 that expert testimony must be helpful to the trier of fact, as well as the general prohibition on allowing an expert witness to express an opinion on

the credibility of another witness. CP 2892. The State then turned to the specific facts of this case:

> It is difficult to imagine a situation where expert testimony is any less valuable than the circumstances in this case. Virtually all of the pertinent interaction between the undercover operators and the defendants was recorded. Certainly all of the admissions of responsibility for the Rafay murders were recorded . . . . [The recordings] will become part of the evidence in this case and the jury will ultimately decide what is factual or fictional. The same jury will also have to decide whether these confessions were motivated by fear and coercion or arrogance and ego.
>
> Neither of the defense experts[83] were present at the time of the confessions . . . . They will be basing their opinion as to the veracity of the confessions on the same recordings the jury will see and hear at trial.
>
> These experts are clearly being called to render an opinion about the credibility of witnesses. Their opinions obviously touch on the ultimate issue to be decided by the jury. An issue of credibility that is well within the abilities of ordinary citizens. This court should not allow these opinions to interfere or influence what is the exclusive province of the jury.

CP 2893.

The trial court heard lengthy argument on the admissibility of Dr. Leo's testimony. Attorney Robinson assured the court that Leo would "not be asked to offer an opinion about the truthfulness of the

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[83] The State was also responding to Rafay's motion to admit expert testimony of Michael Levine on the undercover operation conducted by the RCMP. See CP 3806-24. This motion is addressed infra in § C.7.

confession in this case." 62RP 46. Leo would, however, tell the jury about the "four types of false confessions" that his research had revealed. 62RP 46. Robinson elaborated on Leo's proposed testimony: "That if the confession in this case is false, he'll characterize it in one of the four groups that he's laid out from his research." 62RP 46. Robinson represented that Leo would not interview Burns, but would base his testimony on the written transcripts of the scenarios.[84] 62RP 47-48.

In response, the State argued that the proposed expert testimony would be of little or no value to the jury in this case. 62RP 50. The conversations between the defendants and the RCMP were recorded; a large part of the interactions, including the confessions themselves, was on videotape. 62RP 51-52, 53. The State pointed out that Dr. Leo's intention to tell the jury that if the confessions were false, they would fall into his "coerced-compliant" category, contradicted counsel's assurances that Leo would not

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[84] While Burns's argument below focused only on the credibility of his own confession, he argues on appeal that Dr. Leo's expert testimony was also needed to provide "context" for Jimmy Miyoshi's testimony. BOA (Burns) at 113-15. Burns never asked the trial court to admit the testimony on this basis, and thus cannot raise the argument now. See State v. Black, 86 Wn. App. 791, 793, 938 P.2d 362 (1997) (theory not argued below not preserved for appeal), review denied, 133 Wn.2d 1032 (1998). In any event, expert testimony was hardly needed to argue that Miyoshi lied to police about the defendants' involvement in the murders out of self-interest. See, e.g., 149RP 200-03; 150RP 82-87.

testify that the confessions were coerced.[85] 62RP 52. The State argued that persons of ordinary intelligence do not need an expert to help them listen to audiotapes or view videotapes to make a judgment call on credibility, and that Leo's proposed testimony was nothing more than "asking an expert witness to vouch for the credibility of another witness, in its purest and most simple fashion." 62RP 53-54. Finally, the State suggested that any discussion of false confessions in other cases was irrelevant to the issue this jury had to decide, and would amount to a waste of time. 62RP 55.

The trial judge voiced concerns about the proposed testimony: "I just struggle with the concept that this jury doesn't have in their common sense and background and life experience the fact that people lie. . . . I think both of these gentlemen,[[86]] ultimately, in the final analysis, invade the province of the jury in deciding on the credibility of witnesses." 62RP 60-61, 97. The judge declined to rule on this issue immediately: "I want to go back, sit down, think about it some more, look at some more cases." 62RP 60.

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[85] Robinson subsequently contradicted his earlier proffer, and denied that Leo would categorize the confessions in this case, if false, as "coerced-compliant." 62RP 55.

[86] Again, this discussion included the proposed testimony of Michael Levine.

The trial judge ultimately excluded Dr. Leo's testimony, carefully setting out his reasoning:

> It is in this court's opinion within the common experience of people of ordinary experience and knowledge that people for a variety of reasons, limited only by the human imagination, tell lies, little lies and big lies, and this jury was questioned during its selection of [sic] that very proposition and indicated they would not at all be surprised if people did tell lies.
>
> Ultimately what Dr. Leo . . . would be testifying to – though he may say it in a different manner – that this was a coerced, compliant, false confession, and that is the final analysis and question for this jury to decide, number one, if it's a confession, and, number two, was it voluntary or was it coerced?

63RP 65.

Burns later asked the court to reconsider its decision. He argued that, if the State were allowed to put on evidence of the defendants' intelligence, Burns should be able to present the testimony of Dr. Leo, who would say that "book learning" has nothing to do with whether or not a confession might be false. 108RP 201, 210. The court adhered to its ruling excluding Dr. Leo's expert testimony. 108RP 210. The court had already ruled that the State could not present evidence of Atif Rafay's first-year grades from Cornell University, or of an essay for which he had won an award. 81RP 155-58; 108RP 199. The court also

precluded Tahir Rafay (Tariq's brother) from testifying that Tariq and Sultana Rafay considered their son to be highly intelligent. 109RP 28-29.

Burns again asked the court to reconsider its decision to exclude Dr. Leo's testimony, based on Sergeant Haslett's testimony that Burns had passed up twelve opportunities to deny his involvement in the murders. 129RP 7; 131RP 58. Counsel argued that this had opened the door to Dr. Leo, "who will say whether the fact that there are no denials, according to the State's theory, says nothing about whether or not a confession is false." 129RP 7; see also 131RP 58. The court agreed to look at the relevant testimony and rethink the issue. 129RP 8-9. The court ultimately adhered to its ruling excluding Leo's testimony, but ruled that Haslett would not be permitted to offer his opinion on whether there was a denial, nor to characterize Burns's responses as either admissions or denials. 131RP 59-60.

Just prior to resting his case, Burns's attorney, without further argument, filed a declaration from Dr. Leo. 146RP 100-01; CP 3135-37. In his declaration, Dr. Leo outlined his research, which included "police interviewing and interrogation methods and practices; the social psychology of interrogation, coercion and

confession; and the causes, indicia, and consequences of police-induced false confessions." CP 3135. Dr. Leo said that his testimony would "educate the jury about the highly counter-intuitive phenomenon of false confessions and how and why police investigators sometimes elicit them from people of normal or superior intelligence." CP 3135. Dr. Leo proposed to educate the jury about "police interrogation techniques and their role in inducing false confessions from the innocent." CP 3136. Dr. Leo would "describe the potential indicators of known unreliable admissions and confessions that others and I have identified in the social science research on interrogation and confession." CP 3136. Dr. Leo said that he "[would] not offer an opinion as to the truth or falsity of the confessions obtained in this case." CP 3136.

b. The Testimony Was Properly Excluded Under ER 702.

i. Standard of review.

The admissibility of expert testimony is governed by ER 702. State v. Willis, 151 Wn.2d 255, 262, 87 P.3d 1164 (2004). The rule provides: "If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by

knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise." ER 702. The admissibility of expert testimony under ER 702 depends on whether: "(1) the witness qualifies as an expert, (2) the opinion is based upon an explanatory theory generally accepted in the scientific community, and (3) the expert testimony would be helpful to the trier of fact." Willis, 151 Wn.2d at 262 (quoting State v. Swan, 114 Wn.2d 613, 655, 790 P.2d 610 (1990)).

A trial court's decision to exclude expert testimony will be reviewed for abuse of discretion. Willis, 151 Wn.2d at 262. "If the reasons for admitting or excluding the opinion evidence are 'fairly debatable', the trial court's exercise of discretion will not be reversed on appeal." Walker v. Bangs, 92 Wn.2d 854, 858, 601 P.2d 1279 (1979); see State v. Cheatam, 150 Wn.2d 626, 652, 81 P.3d 830 (2003) (whether expert testimony on eyewitness identification was both relevant and helpful was "debatable"; thus, trial court's decision not to admit testimony was a "tenable exercise of discretion"); 5B Karl B. Tegland, Washington Practice: Evidence Law & Practice § 702.15 at 55 (5th ed. 2007) ("[A] court that reaches one result under certain circumstances may well reach a

different result under only slightly different circumstances; and whatever the result, the trial court is unlikely to be reversed on appeal.").

The Washington Supreme Court has repeatedly recognized the broad discretion trial judges have in admitting or excluding expert testimony. In Willis, the defendant was accused of raping a five-year-old child. Willis, 151 Wn.2d at 257. The defense proffered the testimony of Dr. John Yuille, an expert in child interview techniques. Id. at 259, 260 n.2. Dr. Yuille proposed to testify about the potential effect of techniques used by a child interview specialist on the memory of the alleged child victim. Id. at 259. The trial court excluded the testimony under ER 702, finding that it amounted to little more than testimony on suggestibility, and would not assist the trier of fact. Id. at 260, 262 n.4.

The Supreme Court unanimously affirmed the trial court's exercise of its discretion: "While we recognize that reasonable minds might disagree, that is not the standard. We conclude that Willis has not shown the trial court abused its discretion in excluding Dr. Yuille's testimony." Id. at 264.

In Cheatam, the 16-year-old rape victim had only about five seconds to view her knife-wielding attacker, the attack occurred outdoors in the dark, and the identification was cross-racial. Cheatam, 150 Wn.2d at 631, 644. The trial court granted the State's motion to exclude the proposed expert testimony of Dr. Geoffrey Loftus on the effects of these factors on perception and memory. Id. at 632, 644. The court noted that Dr. Loftus had never met or tested the victim or watched her testify, and had no personal knowledge of the conditions under which the identification was made; moreover, the testimony related to the victim's credibility, which was a jury question. Id. at 644. The court concluded that, while the subject matter of the proposed expert testimony was appropriate for cross-examination, it was within the common knowledge, experience and understanding of the jurors. Id.

The Supreme Court again upheld the trial court's exercise of its discretion. The court carefully examined the factors that Dr. Loftus would have addressed in his testimony and concluded that, under the facts of the case, they were either of marginal relevance or within the common understanding of the jurors. Id. at 649-50. The court noted that any inconsistencies in the victim's description of her attacker, or discrepancies between that description and the

defendant's appearance, were thoroughly presented to the jury. Id. at 651-52. The court concluded that "whether the expert testimony proffered here was both relevant and helpful is debatable and, therefore, [we] hold the trial court's decision not to admit Dr. Loftus's testimony under the facts of this case was a tenable exercise of discretion." Id. at 652.

ii. The testimony would not have aided the jury.

The credibility of witnesses is generally not an appropriate subject for expert testimony. United States v. Adams, 271 F.3d 1236, 1245 (10th Cir. 2001). It was not appropriate in this case.

First of all, Dr. Leo's studies of "false confessions" were based almost exclusively on custodial interrogations. The dynamics of such interrogations are a far cry from the relationship between Burns and the undercover RCMP officers with whom he met freely, again and again, to further his own ends.

Moreover, the general consensus among psychologists who have published in this area, including Dr. Leo himself, is that videotaping confessions would solve virtually all of the problems they have identified. The confessions in this case were recorded on videotape. Ex. 510 (7-18-95), 511 (7-19-95). Hours of

conversation between Burns and the undercover RCMP officers that preceded the confessions were recorded on audiotape. Ex. 507 (5-6-95), 508 (6-15-95 & 6-16-95), 509 (6-28-95 & 6-29-95). The jurors thus had everything they needed to judge for themselves the merits of Burns's claim that his confession was the product of coercion and fear.

Perhaps most importantly, the question whether the confessions in this case were credible is a quintessential jury determination. Like the trial court here, a number of other courts have exercised their discretion to exclude testimony by Dr. Leo and his colleagues, concluding that this is a matter that the jury can and should resolve.[87]

(a). This was not a custodial interrogation.

Dr. Leo's field observations in support of his academic work have focused almost entirely on custodial interrogations, i.e., interrogations conducted in a closed room by police after Miranda[88] warnings have been given. In the aptly-titled "Inside the Interrogation Room," Leo drew his conclusions based on 122 such

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[87] These cases are discussed in §§ C.6.b.ii (b). and (c)., infra.

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

interrogations.[89] Richard A. Leo, Inside the Interrogation Room, 86 J. Crim. L. & Criminology 266 (1996). Leo announced at the outset that the article would take the reader "inside the interrogation room"; he reported that "each time the Miranda warnings were given properly," and that "[s]lightly more than one-third (35%) of the interrogations were conducted in an interrogation room located inside the jail; the remaining (65%) were conducted in the interrogation rooms located inside the CID[[90]]." Id. at 268, 270, 273.

Subsequent articles penned by Leo and his collaborators similarly focus on custodial interrogations. See, e.g., Richard J. Ofshe & Richard A. Leo, The Decision to Confess Falsely: Rational Choice and Irrational Action, 74 Denv. U. L. Rev. 979, 989 (1997) [hereinafter Ofshe & Leo, The Decision to Confess Falsely] ("Interrogation begins in earnest after the Miranda advisement"); Steven E. Drizin & Richard A. Leo, The Problem of False Confessions in the Post-DNA World, 82 N.C. L. Rev. 891, 910

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[89] Leo notes that less than 4% of the observations came from cases where "the suspect technically was not 'in custody' for the purpose of questioning," and thus Miranda warnings were not provided. Leo, Inside the Interrogation Room, at 275-76.

[90] Criminal Investigation Division of a major urban police department. Leo, Inside the Interrogation Room, at 268.

(2004) [hereinafter Drizin & Leo, The Problem of False Confessions] (discussing "interrogation-induced false confessions" elicited by techniques designed to "manipulate . . . a custodial suspect").

In The Decision to Confess Falsely, Ofshe and Leo describe exactly what they mean by "interrogation": "At a minimum, suspects are confined in an unfamiliar setting, isolated from any social support, and perceive themselves to be under the physical control of the investigator." 74 Den. U. L. Rev. at 997. None of these conditions describes Burns's conversations with the undercover RCMP officers. Burns was never confined; in fact, he appeared voluntarily at each of the meetings. The setting never got any more "unfamiliar" than Victoria, B.C., a short ferry ride from Burns's home in Vancouver. Far from being "isolated" in Victoria, Burns brought along Jimmy Miyoshi, one of his closest friends. And while it was clear that the criminal lifestyle portrayed by the undercover officers held great allure for Burns, the officers never exercised anything close to "physical control" over him.

Moreover, unlike the suspect interrogated while in police custody, Burns did not know that he was talking to the police. While a jury might find it difficult to understand why a mentally

competent person would confess a serious crime to a known police officer, knowing that the police would likely use the information to put him in prison, there are readily understandable reasons (greed, hope of some benefit, even fear or pressure) why the same person might impart such information in a non-custodial setting. This does not require expert testimony.

The differences between police interrogations and conversations outside that context are significant. Dr. Leo's observations of police interrogations, on which he based the conclusions that he proposed to impart as an expert witness, were irrelevant to the admissions obtained here. Far from being helpful to the jury, the testimony had great potential to be misleading.

(b). The confessions were on videotape.

From his earliest writings on the subject, Dr. Leo has recommended electronic recording of police interrogations as a way to obviate many of the risk factors that he has argued produce false confessions. See, e.g., Ofshe & Leo, The Decision to Confess Falsely, 74 Denv. U. L. Rev. at 1120 ("recording requirements create an objective and reviewable record of the interrogation process that enhances the truth-finding function of the criminal

process"); Richard A. Leo & Richard J. Ofshe, The Consequences of False Confessions: Deprivations of Liberty and Miscarriages of Justice in the Age of Psychological Interrogation, 88 J. Crim. L. & Criminology 429, 494 (1998) [hereinafter Leo & Ofshe, The Consequences of False Confessions] ("[t]he existence of an exact record of the interrogation is crucial for determining the voluntariness and reliability of any confession statement").

More recently, Leo has fully developed his recommendation that the entire interrogation be electronically recorded:

> The risk of harm caused by false confessions could be greatly reduced if police were required to electronically record the entirety of all custodial interrogations of suspects. . . . By preserving the record, taping removes the secrecy of interrogation and makes it accessible to criminal justice officials and triers of fact, thus rendering the fact finding process more accurate and reliable. . . A videotaping requirement . . . allows jurors to make a more informed evaluation of the quality of the interrogation and the reliability of the defendant's confession, and thus to make a more informed decision about what weight to place on confession evidence.

Drizin & Leo, The Problem of False Confessions, 82 N.C. L. Rev. at 997-99.

Other commentators agree. See, e.g., Saul M. Kassin and Gisli H. Gudjonsson, The Psychology of Confessions: A Review of the Literature and Issues, 5 Psychol. Sci. Pub. Int. 33, 60-61 (2004)

(videotaped record provides an "objective and accurate record of all that transpired," and "should thus increase the fact-finding accuracy of judges and juries"); Paul G. Cassell, Balanced Approaches to the False Confession Problem: A Brief Comment on Ofshe, Leo, and Alschuler, 74 Denv. U. L. Rev. 1123, 1133 (1997) ("Videotaping is the best remedy for the false confession problem because it allows reconstruction of what happened during interrogation and identification of suspects who have been induced to spout back information supplied by the police.").

A number of courts have similarly recognized the significance of a videotaped confession. In Thorson v. State, 895 So.2d 85, 96 (Miss. 2004), the defendant made a post-Miranda videotaped confession to the murder of his former fiancée. At trial, he asked the court for funds to hire Dr. Leo to testify that his confession was a police-induced false confession; the court denied this request. Id. at 120-21. The trial court explained: "This is not a case of a written statement being made. This is a case of where it was video recorded. The jury will have the opportunity to view the

video, and can make – draw its own conclusions from the video . . ." Id. at 121. The Supreme Court of Mississippi held that the trial court did not abuse its discretion in denying the funds to hire Dr. Leo. Id. at 123.

In State v. Ritt, 599 N.W.2d 802, 806 (Minn. 1999), a videotape of the defendant's interview with police and subsequent formal statement was played for the jury. The defendant wished to offer expert testimony "to point out the use of specific interview techniques to illustrate how [the detective] coerced Ritt into adopting certain statements." Id. at 810. The defendant argued that the jury could understand the dynamics of the interview and formal statement only if the underlying interrogation technique (the Reid technique) was explained. Id. The trial court refused, finding that the proposed testimony "would exceed the bounds of Rule 702, expert testimony," and that "under Rule 403 there's an extreme danger that it could confuse the jury." Id.

The Supreme Court of Minnesota, while acknowledging that "[e]xpert testimony is helpful and admissible if it explains a behavioral phenomenon not within the understanding of an ordinary lay jury," nevertheless observed that "Ritt's entire interview and formal statement were videotaped and the jury could observe the

surrounding physical environment and circumstances." Id. at 811, 812. The court held that the trial court did not abuse its discretion in excluding the expert testimony:

> This court has been very reluctant to allow experts to testify about matters that are generally for the jury's determination and are susceptible to cross-examination. . . . [T]he jury here had sufficient information to evaluate Ritt's claim that the Reid technique is coercive enough to make an ordinary innocent person confess. Under the circumstances, the jury had ample opportunity to evaluate the veracity of Ritt's statements to [the detective] and the trial court did not err in concluding that expert testimony was unlikely to add either precision or depth to their evaluation. We conclude that the trial court was within its discretion in excluding the expert testimony of Dr. Underwager.

Id. at 812.

These cases and commentary, and the conclusions of Dr. Leo himself, recognize the value of a videotape record where a jury must determine the credibility of a defendant's statements. Where, as here, such a record exists, the jury does not need the help of an expert to evaluate the defendants' admissions.

(c). Credibility is a quintessential jury determination.

Judgments regarding credibility are left to the jury. See, e.g., WPIC 1.02 ("You are the sole judges of the credibility of the witnesses and of what weight is to be given to the testimony of

each."). A number of courts have adhered to this basic principle in rejecting expert testimony on false confessions from Dr. Leo and his colleagues.

For example, the Supreme Court of Minnesota, reviewing the murder conviction of a defendant who had made inculpatory statements to police, concluded that the trial court acted within its discretion in excluding expert testimony about the reliability and effect of the Reid technique of interrogation. Ritt, 599 N.W.2d at 804, 806-07, 810, 812. The court emphasized the central role of the jury in making credibility determinations:

> With respect to most crimes the credibility of a witness is peculiarly within the competence of the jury, whose common experience affords sufficient basis for the assessment of credibility. In most cases, even though an expert's testimony may arguably provide the jury with potentially useful information, the possibility that the jury may be unduly influenced by an expert's opinion mitigates against admission. Nor should the credibility of witnesses in criminal trials turn on the outcome of a battle among experts.

Id. at 811 (citation omitted).

In State v. Free, 351 N.J. Super. 203, 798 A.2d 83 (2002), the appellate court found that the proposed testimony of social

psychologist Dr. Saul M. Kassin,[91] bearing on the circumstances of the interrogation and the credibility of the defendant's statements, was not scientifically reliable. 798 A.2d at 95. The court nevertheless went on to analyze whether the testimony would assist the trier of fact to understand the evidence or to determine a fact in issue. Id. Rejecting any assumption that jurors typically believe that confessions in response to police interrogation are always true, the court recognized that "the coercive factors mentioned by Dr. Kassin, such as isolation, persistent questioning, confrontation with real or fabricated evidence of guilt, and minimization of the consequences of confession, are all matters that a jury would recognize as having a potential for causing a false confession." Id. at 96. The appellate court accordingly found that the trial court had abused its discretion in making a pretrial ruling that Dr. Kassin could testify as an expert on the subject of coerced confessions. Id.

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[91] Dr. Leo has long relied on Dr. Kassin's work in his own published work. See, e.g., Ofshe & Leo, The Decision to Confess Falsely, 74 Denv. U. L. Rev. at n.3, 5, 6, 22, 37, 39, 72, 244, 285, 357, 361; Drizin & Leo, The Problem of False Confessions, 82 N.C. L. Rev. at n.76, 77, 78, 81, 83, 96, 99, 100, 101, 107, 108, 110, 111, 137, 138, 142, 147, 163, 164, 165, 174, 176, 212, 390, 392, 393, 398, 399, 683, 684, 685, 707, 708.

In State v. Davis, 32 S.W.3d 603, 606-07 (Mo. Ct. App. 2000), the defendant, a 19-year-old man suspected in the murder of a 13-year-old girl, gave several statements to police; after initially denying involvement in the murder, he confessed on videotape. At trial, Davis offered the testimony of Dr. Leo as an expert on interrogation techniques, false confessions and coercive persuasion. Id. at 607-08. In an extensive offer of proof, Dr. Leo proposed to testify about interrogation techniques, how those techniques influence criminal suspects, and whether the techniques correlate to false confessions; he proposed to explain to the jury how and why false confessions occur, as well as principles the jury could use to evaluate the reliability of a confession. Id. at 608. The trial court excluded the expert testimony. Id. at 607.

Observing that Dr. Leo's testimony involved a suspect's thought processes when interrogated under circumstances similar to the defendant's, the Missouri Court of Appeals found that the proposed testimony would invade the jury's province to make

credibility determinations.[92] Id. at 608. The court explained how the jury could assess the statements without expert testimony:

> Cross-examination is an adequate tool to expose police conduct, and closing argument gives the defendant a forum to further develop his theory that interrogation techniques are coercive. The jury is capable of understanding the reasons why a statement may be unreliable; therefore, the introduction of expert testimony would be "a superfluous attempt to put the gloss of expertise, like a bit of frosting, upon inferences which lay persons were equally capable of drawing from the evidence."

Davis, 32 S.W.2d at 609 (citations omitted).

In Vent v. State, 67 P.3d 661, 664 (Alaska Ct. App. 2003), the 17-year-old defendant confessed to police that he had participated in a murder. The trial court found that, while police had misled Vent about the strength of the case against him in order to induce him to talk, this tactic was neither unusual nor illegal. Id. at 666. Vent's defense relied in large part on his contention that the police had pressured him into falsely implicating himself in the murder. Id. at 667. In support of this defense, Vent proffered the

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[92] Similarly, here, while Dr. Leo said he would avoid offering a direct opinion on the truth or falsity of Burns's confession (CP 3136), he was prepared to testify that, **if** the confession were false, it would be a "coerced compliant false confession," arising out of a situation where "an innocent suspect knowingly confesses falsely in order to escape continuing pressure, fear, and coercion of the interrogation environment." CP 2937; see 62RP 46, 54; 63RP 65.

expert testimony of Dr. Leo, who proposed to testify to: an allegedly common misconception that people do not falsely confess to a crime unless they are mentally ill or are subjected to torture; psychological research that explains how certain interrogation techniques can lead a person to confess even though innocent; and principles of analysis that researchers use to evaluate whether a statement is likely reliable or unreliable. Id.

After hearing the offer of proof, the trial court concluded that Dr. Leo's testimony would not appreciably aid the jury in determining whether Vent's confession was false. Id. at 669. The court expressed concern that there was no way to quantify or test Dr. Leo's conclusions. Id. The court concluded that jurors would be aware that some people confess falsely, and that Vent could develop his defense through questioning and argument. Id.

Examining other cases that have addressed the admissibility of this type of expert testimony, the Alaska Court of Appeals observed that, while different judges had reached different conclusions, few had been found to abuse their discretion:

> The case law and law review commentary is split over whether to admit false confession expert testimony. Our review of the authorities and the record convince[s] us that there is merit to [the trial judge's] questions concerning Dr. Leo's methodology and

> whether his testimony would appreciably aid the jury. We conclude that whether to admit Dr. Leo's testimony and the determination whether his testimony would appreciably aid the jury in this case is a question that fell within the broad discretion reserved to the trial court. We accordingly conclude that [the trial judge] did not err in refusing to admit Dr. Leo's testimony.

Vent, 67 P.3d at 670. In a concurring opinion, one judge elaborated:

> Based on Dr. Leo's voir dire, [the trial judge] could reasonably conclude that Dr. Leo's principles for determining the truthfulness or reliability of a confession amounted to **nothing more than the common-sense notion that a confession must be tested against the known facts**. This being so, [the trial judge] did not abuse his discretion when he ruled that Leo's proposed testimony on this subject was not admissible under Evidence Rule 702(a).

Id. at 673 (emphasis added).

Other courts have similarly questioned the need for expert testimony in this area, concluding that the jury is best equipped to judge the credibility of a confession. See Lyons v. State, 282 Ga. 588, 652 S.E.2d 525, 531 (2007) (where defendant claimed that detective had threatened her with a gun and later made an offer of leniency, the jury could discern for itself, without the aid of expert testimony, whether defendant's inculpatory statements resulted from threats or coercion), overruled on other grounds by Garza v.

State, ___ S.E.2d ___ (2008 WL 4761923) (Nov. 3, 2008); Adams, 271 F.3d at 1246 (defendant's claim that he falsely confessed to protect his girlfriend was "precisely the type of explanation that a jury is capable of resolving without expert testimony").

As in the cases cited above, the proposed expert testimony of Dr. Leo was properly excluded here. All of the circumstances of the confessions were known to the jury. Nothing beyond the jury's common sense and life experience was needed to understand and evaluate Burns's claim that he confessed to the murders because he feared Haslett, and because he wanted Haslett's help in destroying allegedly fabricated evidence.

Burns's reliance on any concerns that jurors may have expressed during voir dire with the idea of false confessions is misplaced. It is one thing to grapple with the idea of a false confession in the abstract, not knowing to whom the confession was made and under what circumstances; it may indeed be difficult for some to grasp why an innocent person would confess to murder to police officers, knowing that those officers will use the statements to put that person in prison. When the confession appears to be made out of self-interest, however, to persons who

claim they can help keep the confessor out of prison, jurors are not at a disadvantage, and can decide for themselves whether the confession was the truth or a calculated lie.

The comments of the juror quoted in Burns's brief readily illustrate this point. BOA (Burns) at 100. The juror's comments were made during general voir dire of the entire panel, and were preceded by the following question from defense counsel:

> **Attorney Robinson:** Well, I will tell you that you are going to hear evidence in this case of statements **made to the Royal Canadian Mounted Police**, statements that will be called a confession, and what I want to know is how many people here are uncomfortable with the concept that your job will be to decide not only what was said, but to decide if these statements were true or false? Anybody uncomfortable with that idea? Yes, ma'am, 141. Tell me what you are thinking.
>
> **Juror 141:** What I am thinking is I don't understand why someone would confess if they didn't do something. If in your heart and your mind you didn't do it, you are talking about **serious consequences**, I don't understand why you wouldn't just stick to your guns and just hold true to it.

59RP 86-87 (emphasis added). This juror understood from the question that the confession was made to the police. Had she known that Burns made his inculpatory statements to people he thought could help him, and that they were videotaped, she might well have had little difficulty in

determining for herself whether or not Burns was telling the truth. This observation by a prospective juror during voir dire in no way undermines the trial court's ruling.

The cases on which Burns relies are distinguishable. In each case, there was some condition specific to the defendant that required the assistance of an expert before a jury could fully comprehend how that condition might affect the reliability of the defendant's confession.

For example, in State v. Hall, 93 F.3d 1337, 1340 (7th Cir. 1996), detectives realized early in the investigation that Hall had mental health problems. After several interviews, police finally obtained admissions from Hall about his involvement in the abduction and murder of a young girl; there were no notes from this interrogation, and it was not electronically recorded. Id. at 1340. The trial court refused Hall's proffered expert testimony from a social psychologist (Dr. Ofshe) on the indicia of false confessions, and from a psychiatrist as to Hall's susceptibility to various interrogation techniques, the propriety of suggesting answers to him, and his capability of confessing to a crime that he did not commit. Id. at 1341.

In reversing the trial court, the appellate court focused on Hall's mental disorder: "[T]he very fact that a layperson will not always be aware of the disorder, its symptoms, or its consequences, means that expert testimony may be particularly important when the facts suggest a person is suffering from a psychological disorder." Id. at 1343. The court concluded: "It was precisely because juries are unlikely to know that social scientists and psychologists have identified a personality disorder that will cause individuals to make false confessions that the testimony would have assisted the jury in making its decision." Id. at 1345.

In United States v. Shay, 57 F.3d 126, 128-29 (1st Cir. 1995), the defendant had made incriminating statements about his involvement in placing a bomb that killed a police officer. Shay wished to present expert testimony from a psychiatrist that his admissions were unreliable because he suffered from a recognized mental disorder known as "pseudologia fantastica" (also known as "Munchausen's Disease"), which caused him to "spin out webs of lies which are ordinarily self-aggrandizing and serve to place him in the center of attention."[93] Id. at 129-30. The trial court excluded

[93] One doctor even observed that "[i]t is quite common for people suffering from pseudologia fantastica to turn up at a police station confessing to a crime they did not commit." Shay, 57 F.3d at 129 n.1.

the expert testimony, finding that the jury was capable of assessing the reliability of the statements without the assistance of an expert. Id. at 130.

The appellate court disagreed, again focusing on the defendant's mental disorder: "[W]hether or not the jury had the capacity to *generally* assess the reliability of these statements in light of the other evidence in the case, it plainly was unqualified to determine without assistance the *particular* issue of whether Shay Jr. may have made false statements against his own interests because he suffered from a mental disorder." Id. at 133 (italics in original).

The defendant in Miller v. State, 770 N.E.2d 763, 765 (Ind. 2002), was mentally retarded. At the end of a nine-hour interrogation, Miller made statements that implicated him in the murder of an elderly woman.[94] Id. at 768-69. The interrogation included fabricated fingerprint evidence, and a suggestion that perhaps the death was an accident. Id. at 768. Miller offered the expert testimony of Dr. Ofshe, who proposed to testify that the mentally handicapped are more suggestible, easier to manipulate,

[94] While a portion of this interview was videotaped, the "preliminary interview" was not. Miller, 770 N.E.2d at 766.

less able to appreciate long-range consequences, easier to persuade to see the facts as asserted by the interrogator, and more likely to give a false confession. Id. at 770-72. The trial court excluded the testimony. Id. at 771.

On appeal, Miller argued that he was entitled to expert testimony to explain to the jury "why the mentally retarded defendant 'would succumb to the lies' even though he was innocent." Id. at 772. The appellate court reversed, granting Miller a new trial, given the "prominence of the defendant's statement in the State's case and the unique circumstances present." Id. at 774.

In Hannon v. State, 84 P.3d 320, 326 (Wyo. 2004), the defendant made statements during an interview with police that implicated him in a sexual assault against a child. In support of his motion to suppress his statements, Hannon offered the expert testimony of a clinical psychologist who would have testified, based upon her psychological evaluation of Hannon, that he had an extremely low IQ, and that data from testing indicated that he had a tendency to say whatever would appease an authority figure. Id. at 343, 348. The trial court excluded the expert testimony. Id. at 346.

The appellate court reversed, holding that the psychologist should have been permitted to testify about the tests she

performed, the interviews she conducted, her assessment based on those tests and interviews, her opinion on how Hannon's cognitive functioning could have affected his behavior, and her opinion on whether he had the capacity to understand the situation sufficiently to make a "free and determined choice" to admit the allegations with which police confronted him. Id. at 352.

In United States v. Vallejo, 237 F.3d 1008, 1018-19 (9th Cir. 2001), the Ninth Circuit held that the trial court improperly excluded expert testimony concerning the high-school-age defendant's "long-standing, severe language disorder" and how the disorder came into play in "pressure" situations such as an interrogation, where the testimony was offered to explain discrepancies between Vallejo's account of what was said during his interrogation and the account given by police.

In Boyer v. State, 825 So.2d 418, 419 (Fla. Dist. Ct. App. 2002), the defendant claimed that he was mentally and physically debilitated from an extended bout of drinking. When his motion to suppress his confession was denied, he sought to present the testimony of Dr. Ofshe on the phenomenon of false confessions, police techniques that secure false confessions under certain circumstances, and the parameters within which one can evaluate

a confession to determine its veracity. Id. The trial court excluded the testimony, finding that it would not assist the jury in understanding any facts at issue in the case. Id. Quoting extensively from Hall, supra, and with little analysis, the appellate court reversed and remanded for a new trial. Id. at 420.

The cases on which Burns relies share one thing in common: there was some trait specific to the defendant (a mental disorder, mental retardation, a language disorder, drinking-induced mental debilitation) such that expert testimony could assist the jury in recognizing the defendant's specific disorder, and in understanding the possible effects that the disorder might have on the reliability of the confession.[95] Other courts have recognized this distinction. See, e.g. Adams, 271 F.3d at 1246 (distinguishing Hall because defendant claimed a personality disorder caused him to confess, and Shay because defendant claimed his confession was the product of a mental disorder); People v. Philips, 692 N.Y.S.2d 915, 180 Misc.2d 934, 940 (1999) (distinguishing Shay because request for expert testimony in that case "was made for specific relief based on a medically recognized mental disorder").

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[95] The exception is Crane v. Kentucky, 476 U.S. 683, 691, 106 S. Ct. 2142, 90 L. Ed.2d 636 (1986), which involved the "wholesale exclusion" of testimony about the circumstances of the interrogation.

Unlike the defendants in the cases on which he relies, Burns had no specific disorder that required the explanation of an expert. Dr. Leo performed no tests on Burns to determine his mental status or his intelligence; in fact, he never even interviewed Burns, nor did he intend to do so. 62RP 47-48.

Moreover, Burns's interactions with the undercover RCMP officers were revealed to the jury at great length; almost all of the conversations were electronically recorded, and the confessions themselves were videotaped. Absent a mental disorder not readily apparent to the observer, the jurors were fully equipped to judge for themselves what prompted Burns to reveal his part in the murders to Haslett, and whether the interactions between the two evidenced the fear and coercion that Burns claimed at trial.

iii. The testimony lacked foundation.

In addition to being helpful to the trier of fact, expert testimony must be based on an explanatory theory generally accepted in the scientific community. Willis, 151 Wn.2d at 262. The proponent of evidence has the burden of proof and must lay an appropriate foundation for its admission. United States v. Brika, 416 F.3d 514, 529 (6th Cir. 2005). Conclusory or speculative expert

opinions lacking an adequate foundation are not admissible. State v. Pittman, 88 Wn. App. 188, 198, 943 P.2d 713 (1997). It is an abuse of discretion to admit expert testimony without an adequate foundation. Walker v. State, 121 Wn.2d 214, 218, 848 P.2d 721 (1993).

Burns did little in the trial court to establish the reliability of Dr. Leo's conclusions, or to show that the theory underlying his proposed testimony was generally accepted in the social science community. On appeal, Burns relies on numerous law review articles, many authored by Dr. Leo himself, in support of Leo's proposed testimony on "false confessions."

Some commentators, however, have raised questions about the quality of the data on which Dr. Leo and the other "false confession experts" rely, and have expressed corresponding concerns about the reliability of the conclusions drawn from the data. For example, Dr. Leo and his principal collaborator, Dr. Ofshe, have been criticized for relying too heavily on secondary sources (e.g., descriptions of trials by friends or relatives of the defendant, newspaper accounts, habeas petitions designed to win release from confinement) in drawing conclusions about guilt or innocence, rather than on primary sources such as transcripts or

documents from the trial record itself. See Paul G. Cassell, The Guilty and the "Innocent": An Examination of Alleged Cases of Wrongful Conviction from False Confessions, 22 Harv. J. L. & Pub. Pol'y 523, 578-80 (1999) [hereinafter Cassell, The Guilty and the "Innocent"]. Leo and Ofshe themselves have acknowledged that "[d]efendants were identified as false confessors based either on evidence that objectively proved their innocence **or supported the inference that they were innocent**." Leo & Ofshe, The Consequences of False Confessions, 88 J. Crim. L. & Criminology at 482 (emphasis added).

The lack of empirical research in the field of false confessions, and the absence of any random study of criminal cases to assess the frequency of false confessions, have also been identified as problems. Major James R. Agar, II, The Admissibility of False Confession Expert Testimony, Army Law. 26, 40 (1999-Aug.). In 1998, having already published several of his major articles on the subject of false confessions, Leo himself acknowledged the "relatively small number of cases presently available for comparison." Leo & Ofshe, The Consequences of False Confessions, 88 J. Crim. L. & Criminology at 482.

An additional impediment to extrapolating from the available data, and drawing reliable conclusions across a broad spectrum of cases, is the fact that undisputed cases of false confessions arise in significant part from interrogations of mentally infirm persons; this suggests that, "for the most part, false confessions are caused not by police questioning techniques in general but rather by the application of those techniques to certain narrow, mentally limited populations." Cassell, The Guilty and the "Innocent", 22 Harv. J. L & Pub. Pol'y at 583.

As recently as 2007, a number of courts, faced with requests to allow expert testimony on false confessions, have concluded that this testimony is not yet generally accepted or sufficiently reliable.

In Commonwealth v. Robinson, 449 Mass. 1, 864 N.E.2d 1186, 1188-89 (2007), the 17-year-old defendant claimed that his confession to first-degree murder was false; he said that police had promised him that he could avoid life in prison if he confessed to the killing and claimed it was an accident, and that they had supplied him with details of the crime. Robinson offered the testimony of Professor Kassin[96] as an expert on the psychology of

[96] See fn 91, supra, on the close relationship between the work of Dr. Leo and that of Dr. Kassin.

police interrogations and confessions. Kassin testified in a pretrial hearing that the techniques used by police in obtaining Robinson's confession were psychologically powerful, and had the potential to elicit false confessions from innocent subjects. Id. at 1189-90. On cross-examination, however, Kassin conceded that there were no empirical data on the number of false confessions, and that there is no scientific basis for distinguishing true from false confessions. Id. at 1190. The Supreme Judicial Court of Massachusetts held that the trial court did not abuse its discretion in concluding that Kassin's testimony did not meet either the general acceptance or the reliability criteria required under Massachusetts law. Id.

In Lyons, 652 S.E.2d at 531, the trial court refused to allow Dr. Leo's principal collaborator, Dr. Ofshe, to testify as an expert witness on false confession theory; following a hearing outside the jury's presence, the trial court concluded that the theory had not reached a verifiable stage of scientific certainty. The Supreme Court of Georgia concluded that admission of expert testimony based on false confession theory was premature and unreliable, citing insufficient scientific support and too many unanswered questions. Id.

In Edmonds v. State, 955 So.2d 864, 877 (Miss. Ct. App. 2006), rev'd on other grounds, 955 So.2d 787 (Miss. 2007), the juvenile defendant offered the testimony of Dr. Allison Redlich, an expert on false confessions, on the characteristics of false confessions and their alleged prevalence among juveniles.[97] At a pretrial hearing on the admissibility of the testimony, Dr. Redlich admitted that it was impossible to do empirical testing in the field of false confessions. Id. at 878-79. The trial court found that it "was not able to determine if Redlich's assertion that there is a widespread misconception among the public that persons do not confess falsely unless they have been tortured or abused had been tested or is testable." Id. at 879.

After reviewing published articles in the field and relevant case law, the court concluded that it could not "say that expert opinion in the field of coerced or false confessions is widely accepted within the scientific community." Id. at 880. The trial court accordingly rejected the proposed testimony. Id. The Court of Appeals held that the trial court did not abuse its discretion: "Whether we would have found the same result or a

[97] Dr. Leo has relied on Dr. Redlich's work for his own conclusions on the interrogation of juvenile suspects. See Drizin & Leo, The Problem of False Confessions, 82 N.C. L. Rev. at 1005 and n.720.

different one, the court did not abuse its discretion in finding that Dr. Redlich's testimony did not meet the standards for admissibility of expert testimony."[98] Id.

In Free, a New Jersey appellate court reversed the trial court's pretrial ruling admitting the testimony of Dr. Kassin, offered by the defendant as an expert in police interrogation and false confessions, on the subject of the credibility of the defendant's confessions. 798 A.2d at 84. After reviewing Kassin's lengthy written report (set out verbatim in Free, at 84-89), testimony from an eight-day hearing, and relevant case law, the appellate court was not satisfied that the premises on which the opinion was based had gained general acceptance, and concluded that the opinions offered in the report were thus "inadmissible as not scientifically reliable." Id. at 95. Noting that "[t]he burden of proving the admissibility of the proposed scientific evidence was on defendant," the appellate court reversed the trial court's ruling admitting Kassin's testimony, finding that it was a "clear abuse of discretion." Id. at 96.

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[98] The Supreme Court of Mississippi, reversing on other grounds, agreed that the trial court did not err in excluding Dr. Redlich's testimony. Edmonds v. State, 955 So.2d 787, 791 (Miss. 2007).

In People v. Philips, 180 Misc.2d 934, 692 N.Y.S.2d 915 (1999), the New York trial court examined a defendant's request for expert testimony from two witnesses: a psychologist to testify with respect to the reliability of confessions derived from custodial police interrogations, and an expert on police procedure. Id. at 935. As to the reliability of his confession, Philips argued that expert testimony was needed to show the "highly suggestive state of defendant's mind" and the "atmosphere of fear" in the interrogation; he argued that such testimony was "necessary to his defense since the average person does not possess the requisite knowledge to judge the voluntariness of defendant's statements without the aid of such expert testimony." Id. at 936.

Rejecting the defendant's reliance on Shay, 57 F.3d 126, the court refused to allow the testimony:

> Here, defendant's attorney seeks to introduce a psychologist who will testify on the general nature of voluntary custodial statements, their abuses and the susceptibility of defendant to police interrogations based on his past history. While this may provide a jury with a general analytical framework for evaluating the voluntary nature of admissions, **defendant has not shown any specific scientific tests, recognized procedures or findings which would assist the jury in dealing with the reliability of such statements. At best the jury would be**

> **simply speculating on the value of the expert testimony, not utilizing it based on accepted scientific principles.**

Philips, 180 Misc.2d at 940 (emphasis added).[99]

Some of the courts that have examined the reliability of this type of expert testimony have explicitly relied on the Frye[100] "general acceptance" standard, while others have relied on the less rigorous standard set out in Daubert.[101] The appellate court in People v. Green, 250 A.D. 2d 143, 683 N.Y.S.2d 597 (1998), finding that the trial court had not abused its discretion in excluding testimony on false confessions, explicitly distinguished two of the cases on which Burns relies, based on the difference between the two standards:

> While some Federal courts have permitted this type of testimony (*see, United States v. Shay*, 57 F.3d 126, 130-134; *United States v. Hall*, 974 F. Supp. 1198, 1203-1206), they do not offer persuasive precedent since, instead of applying the *Frye* "general

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[99] The court also noted that the proposed testimony in the Shay case involved "expert psychiatric testimony on a recognized mental disorder, Munchausen's Disease." Philips, 180 Misc.2d at 940.

[100] Frye v. United States, 293 F. 1013 (D.C. Cir. 1923).

[101] Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. 579, 113 S. Ct. 2786, 125 L. Ed.2d 469 (1993).

> acceptance test" that we apply . . ., they followed the more liberal *Daubert* standard . . . .

250 A.D. 3d at 146-47 (citations omitted). Washington continues to follow the more rigorous Frye standard. State v. Copeland, 130 Wn.2d 244, 251, 922 P.2d 1304 (1996).

Cases that have excluded this evidence as unreliable, many of which involved extensive evidentiary hearings, cast doubt on the acceptance of the methods used by Dr. Leo and his colleagues, and on the conclusions they have drawn based on those methods. The record in this case does nothing to allay such concerns.

iv. Testimony from RCMP officers did not open the door to Dr. Leo's testimony.

Burns nevertheless claims that the RCMP officers testified as "experts" on the truthfulness of his confession, thus creating a necessity for Dr. Leo's testimony. BOA (Burns) at 110-13. This is incorrect. Every one of the statements cited in support of this claim was elicited by Burns's attorneys on cross-examination. See BOA (Burns) at 111-12. "[T]he open-door rule rarely justifies the admission of otherwise inadmissible evidence to contradict statements elicited from an adverse witness on cross-examination."

5 Karl B. Tegland, Washington Practice: Evidence Law & Practice § 103.14, at 72 (5th ed. 2007). The determination whether a party has opened the door is reviewed for abuse of discretion. State v. Warren, 134 Wn. App. 44, 65, 138 P.3d 1081 (2006), aff'd, ___ Wn.2d ___ (Nov. 20, 2008).

Not only was the testimony at issue here elicited by Burns's attorneys, there was in most instances no objection by the defense that the answer was not responsive. Indeed, in one instance, the defense attorney not only elicited the answer over the objection of the prosecutor, but she then reinforced the answer:

> **Attorney Richardson:** A person can confess to a crime and make it sound convincing, even though it is not true; is that right?
>
> **Prosecutor:** Your Honor, I object.
>
> **Court:** Overruled.
>
> **Prosecutor:** That's speculation.
>
> **Court:** That is overruled. Inspector, can you answer that question?
>
> **Insp. Henderson:** Well, my answer to that is obviously that would be possible, I mean, but highly unlikely because of the fact that, you know, that's our business to try and assess the conversations, whether we believe something or not.

> **Richardson:** Exactly. As a police officer, one of your concerns is is a confession true or is it not. That's one of the things you want to figure out, as a police officer; right?
>
> **Insp. Henderson:** Yes.

121RP 41. While Burns cites on appeal to Henderson's answer without the context, trial counsel seemed quite satisfied with the answer.

In another instance, Sergeant Haslett was asked a series of questions about whether he was aware that Burns had read media reports of the murders; Haslett confirmed that he was. 138RP 33-35. Defense counsel then challenged Haslett's assumptions based on information Haslett received from Burns:

> **Attorney Richardson:** Now, I want to go over some newspaper articles with you. These are newspaper articles that were printed before your undercover operation started, okay? And what I want to ask you about these articles is what you did during the undercover operation to determine whether Sebastian was just repeating what he read in the paper, okay? Murder weapon was a baseball bat. There was a Vancouver Province article the jury's already heard about from August 28th of 1994. What did you do during this undercover operation to determine whether Sebastian was telling you the murder weapon was a baseball bat because he read it in the paper or because he knew it independently? What did you do?
>
> **Sgt. Haslett:** I assessed my conversation with Sebastian Burns throughout the whole operation. At

> the end of the meeting on July 19th, taking the whole operation into effect, I am confident he was telling me the truth about what his involvement was.
>
> **Richardson:** Sorry, finish.
>
> **Sgt. Haslett:** Now, whether he read that in a newspaper or not, I don't know that. It was obvious to me there, so he knew he was obviously there.
>
> **Richardson:** You did nothing to verify independent of your own assessment whether or not Sebastian was saying the murder weapon was a baseball bat because he read it in the paper or not?
>
> **Sgt. Haslett:** No, I didn't personally.

138RP 36-37. Again, when the answer is put into context, it is clear that trial counsel not only elicited the response, she encouraged Haslett to finish his answer.

At another point, defense counsel was attempting to support his argument that pressure and intimidation led to Burns's admissions to the murders:

> **Attorney Robinson:** At no time in this entire undercover scenario operation, from April 11th to July 26th of 1995 – at no time did either you or Al Haslett say to Sebastian, hey, if you didn't do this murder, just tell us that. It will be okay. You never said anything like that, did you, sir?
>
> **Cpl. Shinkaruk:** You are right.
>
> **Robinson:** And Al Haslett didn't say anything like that?

> **Shinkaruk:** Al will have to answer that.
>
> **Robinson:** You have listened to those scenarios that were recorded? You have listened to – Al Haslett never said anything like that, did he?
>
> **Shinkaruk:** I would like to add to my previous answer if that's all right.
>
> **Robinson:** I would like you to answer the question I'm asking. In the scenarios you are listening to that were recorded, Al Haslett never said anything to Sebastian like, hey, it is okay. If you didn't do these murders, just tell me that?
>
> **Shinkaruk:** I think the underlying theme by both Haslett and myself, but I will speak for myself, is about truth and honestly [sic], and we were setting a context to be truthful. And did I ask that specific question? No.

126RP 112-13. In this exchange, Shinkaruk readily acknowledged that he had not explicitly invited Burns to deny any involvement in the murders. Not satisfied with this, counsel pressed Shinkaruk to confirm that Haslett had not asked this question. When Shinkaruk refused to speak for Haslett, counsel repeated his question, and got the response that Burns now complains of on appeal. Trial counsel did not object to Shinkaruk's answer as non-responsive, but simply moved on with the questioning.

Counsel complains that "Henderson also testified he had the feeling Sebastian was guilty." BOA (Burns) at 112. That exchange went as follows:

> **Attorney Richardson:** When you were conceiving of this plan for the future scenarios, how did you take into account the fact that Sebastian had stated a concern about fabrication of evidence?
>
> **Insp. Henderson:** I was aware that he said that. But based on all the other things that he said, I didn't really believe it myself.
>
> [Court asks witness to speak up over construction noise.]
>
> **Henderson:** I was aware that he said that. He said all kinds of things and I took them all into consideration. The question, all the way along in the police investigation, did the person know what you are working on or didn't he? I took into effect all of the other things he said, that I had a feeling he may well have done this. Therefore, although he said that, to me he expressed concerns. I think he mentioned once DNA and whatnot, he was obviously concerned about the taking more samples.
>
> **Richardson:** Are you saying that he said it but you didn't believe him?
>
> **Henderson:** I didn't – no, I didn't believe him, no.

119RP 17-18. By asking Inspector Henderson how he took Burns's claimed concern with fabrication of evidence into account, counsel invited a response that assessed the

credibility of that claim. Counsel then explicitly invited Henderson to say that he didn't believe Burns.

In another instance, pushed by defense counsel to agree that the primary purpose of the undercover investigation was to obtain a confession, Sergeant Haslett responded that "[t]he prime purpose was, first of all, to get the truth." 134RP 42. Counsel then confronted Haslett with statements he had made during an extradition hearing, where he had agreed that the prime purpose of the investigation was to get a confession. 134RP 45-49. It is difficult to see how this qualifies as "expert testimony."

Only once, in all the citations Burns relies upon for this argument, did defense counsel object to a response from an RCMP witness. That exchange went as follows:

> **Attorney Robinson:** Is there something that happened on June 28th that made you and Al and Doug Henderson feel like we need to go to Bellevue and get some additional information?
>
> **Cpl. Shinkaruk:** Yes.
>
> **Robinson:** Can you explain that to the jury, please?
>
> **Shinkaruk:** I will be in a better position to explain fully when I listen to the tapes in court, but I can give you my general recollection if that's what you are asking.

> **Robinson:** Sure.
>
> **Shinkaruk:** My opinion was that Mr. Burns was an extremely intelligent individual. I believed he was very cunning in his nature, and I believe that he had – was very cunning and smart in his dealings with Al. I was of the opinion that, very possibly, Mr. Burns could have involvement in these homicides.
>
> **Robinson:** Your honor, at this point I'm going to object to speculation.
>
> **Court:** The question was asked in this manner, and he can answer it as best he can. Keep your answers as much to the point as you can.

126RP 104-05. Shinkaruk then continued his explanation of why the undercover officers concluded they needed to go to Bellevue: they were concerned that, given Burns's obvious intelligence, their planned Bellevue Police Department memo would have to be authentic in every detail, even down to the departmental "lingo" and the form of the document. 126RP 105-10. Given the open-ended nature of the question ("Can you explain that?"), the trial court was correct in allowing Shinkaruk to continue with this response.

One exchange that is not cited in Burns's brief is telling. During cross-examination of Sergeant Haslett, attorney Richardson asked: "You are not asking this jury to send Sebastian and Atif to jail based on your assumptions,

are you?" 135RP 201. Haslett responded: "I am asking this jury to believe the truth." Id. Counsel for Rafay objected to this response; the trial court overruled the objection, noting that Haslett's answer was "a direct response to the question." Id. When the court cautioned Richardson that such questions invited that type of response, counsel agreed, and explained that the questions were strategic: "[T]his is part of the bias that I am trying to get to, so it's not an issue for me." 135RP at 203-04.

These statements by the RCMP officers, given as responses to questions on cross-examination, cannot support Burns's argument that he was entitled to present expert testimony from Dr. Leo to counteract them. This is particularly true where some of the statements may have been elicited deliberately for strategic reasons. Judge Mertel properly refused to change his ruling after cross-examination of the RCMP officers. This was not an abuse of discretion.

v. Any error in excluding the testimony was harmless.

Even if the trial court erred in excluding Dr. Leo's testimony, any error was harmless. Evidentiary error under ER 702 is not of

constitutional magnitude. See State v. Wilber, 55 Wn. App. 294, 299, 777 P.2d 36 (1989) (erroneous admission of expert testimony under ER 702 is not of constitutional magnitude). Such error is not reversible unless there is a reasonable probability that it materially affected the outcome of the trial. Id.

No such reasonable probability exists here. All of Burns's admissions were captured on videotape and played for the jury. The jury was thus able to observe such subtleties as tone of voice, facial expression, and body language – all things that ordinary persons routinely rely upon when evaluating credibility.[102] The help of an "expert" in evaluating the credibility of the confessions was wholly unnecessary, and would have intruded in an area that our legal system has traditionally left to the jury.

Moreover, Burns was able to present to the jury, through cross-examination, all of the circumstances under which his admissions were made. In addition, he was able to bring out any alleged internal inconsistencies in the admissions, as well as alleged inconsistencies between those admissions and other

[102] The State recognizes that this Court may not routinely watch videotapes when transcripts of the same are available. However, given the importance of the videotapes of the confessions to issues in this appeal, the State urges the Court to take the time to view Exhibits 510 and 511 in their entirety.

evidence in the case. His attorney ably argued all of these circumstances and alleged inconsistencies in closing argument.

The role played by cross-examination and closing argument was recognized in another case where Dr. Leo's testimony was excluded. In Davis, the Missouri Court of Appeals held that the trial court did not err in excluding the testimony of Dr. Leo on interrogation techniques, false confessions and coercive persuasion. 32 S.W.2d at 607-08, 609. The court pointed out that cross-examination and closing argument are adequate tools to develop before the jury a defendant's theory that interrogation techniques may be coercive. Id. at 609. The court expanded on the role of cross-examination in particular:

> The defendant had a full opportunity to cross-examine the police officers that interrogated him about their techniques. The jury heard testimony regarding the conditions of defendant's interrogation, the length of time defendant was interrogated, the receipt and waiver of Miranda rights, and the content of the police questions and defendant's statements. It was reasonable for the trial court to conclude that the jury could decide the issue of the statement's reliability using its common knowledge. Consequently, the jury would not be aided by Dr. Leo's testimony.

Id. Accord State v. Cobb, 30 Kan. App. 2d 544, 43 P.3d 855, 868-69 (2002). See also United States v. Rodriguez-Felix, 450 F.3d 1117, 1125 (10th Cir. 2006) (jurors, assisted by skillful cross-

examination, are under normal circumstances quite capable of using their common sense and faculties of observation to determine whether eyewitness identification is reliable).

Burns's trial attorneys ably cross-examined the undercover RCMP officers on the purpose, methods, circumstances and substance of their interactions with Burns. See, e.g., 126RP 71, 100-03, 112; 134RP 45-59, 64-65; 135RP 6-19, 67-68, 73-75, 85-87, 122-23, 126, 153-54, 162-73, 191; 138RP 29-32, 36-39, 40-41, 44-45. Counsel also brought out on cross-examination alleged inconsistencies between what the defendants told the undercover officers about the murders, and what they had said earlier or what the evidence showed. See, e.g., 135RP 212-25; 137RP 38-46, 60-62, 65-68, 72-76; 138RP 9-13. Counsel suggested through cross-examination that details from Burns's admissions had appeared in published accounts of the murders, or had been suggested to Burns by Haslett. See, e.g., 102RP 80-82; 138RP 13-26.

Burns's attorneys likewise effectively used closing argument to attack the credibility of his admissions. Counsel used the argument to support Burns's claims of fear and intimidation. See 150RP 12, 13, 99, 100. Counsel focused in argument on Burns's alleged fear that the Bellevue Police were fabricating evidence

against him. See 150RP 91-95. Counsel portrayed the RCMP investigation as biased from the start. See 150RP 89-90. Counsel highlighted alleged inconsistencies between the confessions and the evidence. See 150RP 24-30, 35, 101-06. Counsel argued that Burns knew only facts that he had either gleaned from newspaper accounts or been given by Haslett. 150RP 14-15, 103. Counsel argued that Burns had been manipulated by experienced undercover officers. See 150RP 17, 110.

Counsel was thus fully able to demonstrate the circumstances under which the defendants confessed to these crimes. All of the relevant facts were made known to the jury through thorough cross-examination of the undercover RCMP officers, and were underscored by Burns in his own testimony. Counsel was then able to use these facts to argue that the confessions were false. These are arguments of a sort commonly made to a jury, appealing to their ordinary life experience and common sense. None of these arguments required, or warranted, the support of expert testimony.

c. There Was No Constitutional Error.

Burns nevertheless argues that exclusion of Dr. Leo's testimony was a violation of his constitutional right to present a

defense. This claim stretches the constitutional right beyond its limits. The Constitution, through the Due Process Clause of the Fourteenth Amendment, or the Compulsory Process or Confrontation clauses of the Sixth Amendment, guarantees criminal defendants a meaningful opportunity to present a complete defense. Crane, 476 U.S. at 690. While a defendant thus has a constitutional right to put his theory of defense before the trier of fact, this does not entitle him "to have admitted whatever evidence he desires to support that theory." Adams, 271 F.3d at 1243.

The Constitution affords trial judges wide latitude to exclude evidence through application of the evidentiary rules. Adams, 271 F.3d at 1243 (citing Crane, 476 U.S. at 689-90). See Shay, 57 F.3d at 130 n.3 (rejecting claim that the exclusion of expert psychological testimony concerning the reliability of defendant's statements violated Sixth Amendment right to present a complete defense, and noting that "in this instance, the Sixth Amendment offers Shay Jr. no greater protection than the rules of evidence"); Rodriguez-Felix, 450 F.3d at 1121 (right to present evidence in support of a defense is constrained by relevancy and materiality, and guided by the rules of evidence).

In support of his constitutional claim, Burns cites Holmes v. South Carolina, 547 U.S. 319, 126 S. Ct. 1727, 164 L. Ed.2d 503 (2006); Crane v. Kentucky, 476 U.S. 683, 106 S. Ct. 2142, 90 L. Ed.2d 636 (1986); Davis v. Alaska, 415 U.S. 308, 94 S. Ct. 1105, 39 L. Ed.2d 347 (1974); and Chambers v. Mississippi, 410 U.S. 284, 93 S. Ct. 1038, 35 L. Ed.2d 297 (1973). These cases are inapposite.

In Holmes and Crane, the defendants were wholly deprived of the opportunity to present potentially exculpatory evidence to the jury, in violation of their constitutional right to have a meaningful opportunity to present a complete defense. Holmes, 547 U.S. at 323, 331 (trial court excluded evidence of third-party guilt); Crane, 476 U.S. at 686, 690-91 (trial court excluded all evidence of circumstances of the interrogation).

In Davis and Chambers, the defendants were prevented from cross-examining key witnesses, in violation of their constitutional right to confront those witnesses. Davis, 415 U.S. at 313-18 (trial court precluded defendant from exposing through cross-examination important source of bias of key prosecution witness); Chambers, 410 U.S. at 291, 294-98, 302-03 (trial court

precluded defendant from cross-examining witness about witness's repudiation of earlier confession, and precluded defendant from calling other persons to whom witness had confessed).

Burns, on the other hand, faced no such impediments to presenting his defense to the jury. Through his own testimony, Burns was able to present all of the circumstances under which he made his videotaped admissions. He was able to challenge the testimony of the undercover RCMP officers through cross-examination. He was able, through closing argument, to use the fruits of his own testimony and his cross-examination of State's witnesses to put his theory of defense before the jury for their evaluation. In sum, Burns had a full and fair opportunity to convince the jury that his confession to the murders of the Rafay family was false. There was no constitutional violation here.

Burns relies most heavily on Crane v. Kentucky in arguing that he was denied his right to present his defense. The Supreme Court's decision in that case has little bearing here. In Crane, the 16-year-old defendant had confessed to a series of armed robberies, including one in which a clerk was shot to death. Crane, 476 U.S. at 684. Crane testified in a pretrial hearing that, during the course of his interrogation, he was detained in a windowless

room for a protracted period of time, he was surrounded by as many as six police officers, he had repeatedly requested and been denied permission to call his mother, and he had been badgered into making a false confession. Id. at 685. Police officers offered a different version of events, and the trial court denied Crane's motion to suppress his confession. Id.

At trial, the prosecutor moved *in limine* to prevent the defense from introducing *any* testimony bearing on the circumstances of Crane's confession, arguing that the voluntariness of the confession was a legal matter that the court had already resolved. Id. at 685-86. Defense counsel responded that she did not intend to relitigate the issue of voluntariness, but sought only to demonstrate that the circumstances of the confession cast doubt on its reliability and credibility. Id. at 686. The trial court refused to allow the defense to present any evidence about the circumstances of the interrogation. Id.

The Supreme Court observed that evidence surrounding the making of a confession bears on its credibility as well as its voluntariness, and questions of credibility are for the jury to decide. Id. at 688. Noting that "evidence of the physical circumstances that yielded the confession was all but indispensable to any chance of

[the defense claim of false confession] succeeding," the Court could find no justification for the "wholesale exclusion" of this evidence, and reversed the conviction. Id. at 691.

The critical difference between Crane and this case is readily apparent. While Crane was unable to tell the jury how his confession came about, and thus wholly unable to challenge the credibility of the confession, the circumstances of Burns's confession were put before the jury in their entirety on videotape. Defense counsel used these circumstances to argue that the confession should not be believed. Moreover, Burns had the opportunity to give the jury his own version of what happened during his conversations with the undercover officers, as well as how the circumstances of those conversations affected him. The jury, as the final arbiter of credibility, did not need the testimony of an expert in addition to all of this evidence.

Other courts have similarly distinguished Crane. See, e.g., Edmonds, 955 So.2d at 881 ("The Supreme Court's holding that a defendant should be allowed to testify as to the circumstances of his confession does not necessitate that a defendant be allowed to present expert opinion about false confessions."); Adams, 271 F.3d at 1245 (noting that credibility of witnesses is not generally an

appropriate subject for expert testimony: "Though Crane prohibits categorical exclusion of this type of evidence, it does not require its categorical admission – the rules of evidence still apply.").

In contrast to the cases on which Burns relies, the trial court's decision in this case to exclude Dr. Leo's testimony did not preclude Burns from raising his chosen defense. Burns "confuses a fundamental right, the right to present a theory of defense, with one that is not fundamental, the right to present that theory in whatever manner and with whatever evidence he chooses." See Adams, 271 F.3d at 1243. There was no constitutional violation.

7. THE TRIAL COURT PROPERLY EXCLUDED PROPOSED EXPERT TESTIMONY OF MICHAEL LEVINE ON UNDERCOVER OPERATIONS.

The defendants also contend that their constitutional right to present a defense was violated by the exclusion of the testimony of Michael Levine as an expert on undercover operations. There was no constitutional violation, because the methods employed by the RCMP during the course of Project Estate were fully revealed to the jury through the audiotaped and videotaped scenarios, as well as through cross-examination of the RCMP undercover investigators.

The exclusion of Levine's testimony is properly evaluated under ER 702. Because Levine presented insufficient evidence of

any accepted standards for conducting undercover murder investigations in Canada in 1995, and the jury was fully capable of determining whether the methods employed by the RCMP resulted in coerced and false confessions in this case, the trial court did not abuse its discretion in excluding Levine's testimony.

a. Relevant Facts.

Rafay moved pre-trial for admission of expert testimony from Michael Levine, based on Levine's "relevant expertise . . . in Law Enforcement Procedures and Undercover and Surveillance Tactics."[103] CP 3808. The motion cited Levine's years of experience as an undercover specialist with the Drug Enforcement Agency ("DEA") (1973-1990), as well as his subsequent career as a lecturer and trial consultant. Id. Rafay asserted that "Mr. Levine's expertise in undercover operations and tactics would be helpful to the trier of fact because the average juror does not know the accepted standards that should be followed by police officers working undercover." CP 3809.

The State opposed Levine's testimony, pointing out that Levine had never been involved in an undercover murder

[103] Burns joined in this argument. 62RP 96; CP 2835, 3806.

investigation in Canada, and had never attended any RCMP training session for such operations; rather, Levine proposed to base his opinion about the RCMP undercover investigation in this case on U.S. standards and training. CP 2891.

The State also took issue with Levine's characterization of the defendants as "unsophisticated, naive and immature," based on nothing more than "the same recordings the jury will see and hear at trial." CP 2891, 2893; see Ex. 105 at 11. Allowing such testimony, the State argued, would invade the exclusive province of the jury. CP 2893.

The trial court heard oral argument on the admissibility of Levine's proposed expert testimony. 62RP 65-98. Rafay's attorney informed the court that Levine would address whether the RCMP had planned and executed the undercover operation in this case "in accordance with accepted standards and norms of U.S. law enforcement for operations of this type." 62RP 66-67. Counsel argued that, in pretrial testimony, the RCMP officers had portrayed themselves as "experts" in this type of undercover operation, and that Levine was needed to counteract this. 62RP 71-76.

The State pointed out that, aside from Burns's initial meeting with Shinkaruk and Haslett, and the trip to Whistler to bring back

the "stolen" car, every meeting between the defendants and the undercover RCMP officers was recorded. 62RP 83. The State argued that "you don't need an expert to interpret what's being said on a tape recorder or what you are viewing on a video camera," and that Levine's proposed testimony would invade the province of the jury. 62RP 83, 87.

The trial court expressed its own concerns with Levine's proposed testimony: "I am not at all satisfied that there is, in fact, a standard for undercover operations period."[104] 62RP 77. As to the pretrial testimony of the undercover RCMP officers, the court pointed out: "They said they met their standards. They didn't say they met American standards. . . . Or that they met any worldwide standard." 62RP 78. The court was particularly concerned with Levine's conclusion that the defendants were unsophisticated, naive, immature teenagers who were innocent to the world of crime: "Who is he to characterize these defendants in that manner?" 62RP 93. Expressing the opinion that Levine's

[104] The court suggested that a Frye hearing might be needed. 62RP 77, 80. Rafay's attorney did not disagree, and suggested that she might fly Levine in for such a hearing. 62RP 77. While the court was open to allowing live testimony from Levine, this never occurred. 63RP 121.

testimony would invade the province of the jury, the court nevertheless determined to "go back, sit down, think about it some more, look at some more cases." 62RP 97-98.

The court ultimately excluded Levine's testimony. The court boiled Levine's lengthy findings down to "the operation was poorly planned, poorly executed, did not meet U.S. standards, and that the confessions are false or coerced." 63RP 66. Acknowledging that Levine was "someone with some experience as an expert witness," the court nevertheless concluded that his proposed testimony in this case would "invade the province of this jury to decide whether or not in their common experience and common sense these statements made by these defendants to those undercover police officers are voluntary or involuntary, are accurate or . . . 'false bragging.'" 63RP 66. The court found no evidence of a generally accepted standard for undercover murder investigations in Canada, and nothing in Levine's proffer that showed such a standard for these operations in the United States in 1994-95. 63RP 67.

The court also noted several deficiencies in Levine's findings. The court faulted Levine's characterization of the defendants as unsophisticated, naive, immature, innocent and gullible in 1995, noting that "Mr. Levine presents himself in this

manner virtually in the guise of a clinical psychologist without any training or credentials." 63RP 67-68. In addition, the court found that "Mr. Levine lacks a complete view of the file when he opines findings 15 and 16, that there is no evidence to corroborate motive/sharing of financial gain and no evidence to corroborate the confessions or statements by the defendants." 63RP 68.

Rafay filed a motion to reconsider, in which he reiterated Levine's proposed testimony:

> Mr. Levine will testify generally about undercover operations describing different types and when certain types of operations should and should not be used. Mr. Levine will also testify generally about standards developed by U.S. police agencies and the reasons for these standards. Finally, Mr. Levine will testify that he reviewed the undercover operation conducted in Project Estate and to his conclusions that the undercover operation failed to meet several standards developed by U.S. police agencies.

CP 4039. The trial court declined to reconsider. 115RP 10.

During a brief interruption in the cross-examination of Inspector Henderson, Rafay's attorney once again moved for reconsideration of the decision to exclude Levine's testimony; counsel argued that Henderson had given expert testimony, and Levine was needed to controvert it. 122RP 29-30. The court

pointed out that the testimony at issue was elicited by the defense on cross-examination (apparently by Burns's attorney). 122RP 30. The court declined to reconsider. Id.

b. The Testimony Was Properly Excluded Under ER 702.

i. Standard of review.

The standard of review is abuse of discretion, as set out in detail in § C.6.b.i., supra.

ii. The testimony lacked foundation.

The burden is on the proponent of evidence to lay an appropriate foundation for its admission. Brika, 416 F.3d at 529. Conclusory or speculative expert opinions lacking an adequate foundation are not admissible. Pittman, 88 Wn. App. at 198. It is an abuse of discretion to admit expert testimony without an adequate foundation. Walker, 121 Wn.2d at 218.

One of the requirements for the admission of expert testimony is that the opinion of the expert must be based on a generally accepted theory. Willis, 151 Wn.2d at 262. The trial court appropriately found this foundational requirement lacking for Levine's proposed testimony. Levine's professional experience

was exclusively with United States law enforcement.[105] Moreover, his experience was primarily in drug enforcement; he worked for the DEA from 1973-1990, and describes himself in his resume as "one of DEA's top Undercover/Deep Cover and international narcotic trafficking specialists." CP 3812. Based on the evidence presented, the trial court properly found that there was insufficient evidence of generally accepted standards for undercover murder investigations in the United States in 1994-1995, much less that such standards existed in Canada at that time.

The fact that Levine had worked primarily in undercover narcotics operations was enough by itself to exclude his proposed expert testimony. Levine never explained in any of the materials he submitted why his experience in drug operations would translate into the arguably different arena of a murder investigation.

The fact that Levine's area of expertise was in undercover operations conducted by the DEA in the United States, while the undercover operation in this case was conducted by the RCMP in Canada, was even more problematic. Again, Levine never explained, in the materials he submitted to the court, why any

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[105] While Levine claimed to have lectured outside the United States, it does not appear from his resume that he ever worked for a foreign law enforcement agency. See CP 3810-24.

standards that might be followed in the United States for undercover operations should necessarily be followed in a different country where police agencies operate under different laws.[106] Cf. Seybold v. Neu, 105 Wn. App. 666, 676-77, 19 P.3d 1068 (2001) (expert testimony in medical malpractice action must be based on standard of care in the state of Washington); Conley v. Life Care Centers of America, Inc., 236 S.W.3d 713, 741-42 (Tenn. Ct. App. 2007) (under Tennessee law, expert testimony in medical malpractice action must be based on standard of care in a particular geographic region).

There simply was no evidence of accepted standards for, or approved ways of conducting, an undercover murder investigation in Canada in 1995. As RCMP Cpl. Shinkaruk said in his testimony at trial: "[T]here is no textbook on how to do undercover work. You don't pull a binder off the shelf; you do each job individually." 126RP 106. Even if Canadian standards governing undercover murder investigations existed, there is no evidence that Levine knew anything about them, or could evaluate their effect on the

[106] For example, on redirect examination, RCMP Inspector Schwartz made reference to case law that delimited the types of conversations that could be used in an undercover scenario, and how forceful and convincing the police could be in such conversations. 112RP 76-77. Levine gave no indication that he was familiar with this Canadian case law.

reliability of confessions in a way that the jury was not equipped to do. Thus, his proposed testimony that the RCMP investigation did not measure up to the standards Levine believed were appropriate was properly excluded.

iii. The testimony would not have aided the jury.

"Expert testimony will be helpful to the jury only if its relevance has been established." State v. Riker, 123 Wn.2d 351, 364, 869 P.2d 43 (1994). The relevancy determination depends on the trial court's evaluation of both the state of knowledge about the subject of the proposed testimony, and the facts of the case before it. Id. (citing 3 Jack B. Weinstein & Margaret A. Berger, Evidence 702-18 (1988)). Levine's proposed testimony was not relevant, and thus not helpful to the jury.

For essentially the same reasons that Levine's testimony lacked foundation, it also lacked relevance. Levine's proffer did not convince the trial court that generally accepted standards for the conduct of undercover murder investigations existed in 1994-95, either in the United States or in Canada. 63RP 67. Moreover, Levine's career had not focused on undercover murder investigations, nor had he carried out such operations under

Canadian law. Given that this case involved an undercover murder investigation conducted wholly in Canada, Levine's opinion on how it should have been carried out was not relevant.

The loss of Levine's testimony did not leave the defendants with no way to challenge the RCMP's undercover investigation. Through cross-examination, the defendants were able to bring out any factors that they believed might lead to involuntary confessions or "criminal braggadocio." The fact that the defendants were relatively young (19 years old) at the time they confessed was known to the jury. 143RP 100; Ex. 543 at 32. Since the confessions themselves were on videotape, the jury could decide for themselves whether the defendants were immature or naive, whether the RCMP officers exerted too much pressure, or whether the defendants were somehow coerced into confessing.

The cases on which the defendants rely do not require a different result. All of those cases involved factual matters that were beyond the knowledge of the average juror, and on which the expert was qualified to testify by virtue of directly relevant experience. See State v. Zunker, 112 Wn. App. 130, 48 P.3d 344 (2002) (detective who had training as well as extensive experience investigating methamphetamine labs testified about how various

ingredients found in the defendant's possession were used in manufacturing the drug), review denied, 148 Wn.2d 1012 (2003); State v. Campbell, 78 Wn. App. 813, 901 P.2d 1050 (1995) (police officers' testimony about gang terminology, symbols and behaviors admitted as relevant to premeditation, intent and motive in first-degree murder case), review denied, 128 Wn.2d 1004 (1995); State v. Simon, 64 Wn. App. 948, 831 P.2d 139 (1991) (detective who had extensive experience investigating street prostitution testified about the behavioral and financial aspects of the pimp/prostitute relationship in first-degree promoting prostitution case), rev'd on other grounds, 120 Wn.2d 196, 840 P.2d 172 (1992); United States v. Hankey, 203 F.3d 1160 (9th Cir.) (where fellow gang members had testified in support of defendant's claim of misidentification, police officer who was a member of FBI anti-gang task force testified in rebuttal about violent retribution that would follow testimony of one gang member against another). These cases do not support a conclusion that the trial court abused its discretion here, where Levine's proposed testimony did not involve factual matters, but rather his own opinion based only on experience that was not directly relevant.

iv. Testimony from RCMP officers did not open the door to Levine's testimony.

The defendants maintain that the RCMP officers testified as "experts," and that the door was thus opened to Levine's testimony. In some instances, claims of "expert" testimony are made without citations to the record, making response difficult. See BOA (Burns) at 123. Some of the testimony cited is nothing more than the normal background testimony on training and experience that is commonly admitted when a police officer testifies. See 122RP 94-95; 127RP 30-34 (cited in BOA (Burns) at 127). In at least one instance, the trial court noted that testimony cited by Rafay as support for a motion to reconsider the admission of Levine's testimony had been elicited on cross-examination. 122RP 28-30.

Nor did testimony about the RCMP officers' state of mind open the door to Levine's testimony. The State gave notice that it intended to have Inspector Henderson, the "cover person" or manager of Project Estate, who was responsible for formulating the "scenarios" between the RCMP officers and the defendants, name each scenario and state its general purpose and goal. 115RP 4-5,

17-18. The court found that this was not expert testimony, but "simply the state of mind of the officers as they moved forward in attempting to do these things." 115RP 10.

The cases on which the defendants rely illustrate why Henderson's testimony was relevant. In State v. Aaron, 57 Wn. App. 277, 279-80, 787 P.2d 949 (1990), the trial court admitted hearsay testimony about how a jacket seized from the defendant's car had been used in the burglary for which he was on trial; the court accepted the State's argument that this was relevant to the state of mind of the officer who seized the jacket. The Court of Appeals disagreed, noting that the defendant had not challenged the legality of the search and seizure, and thus the state of mind of the officer was not relevant to any material issue. Id. at 280. Similarly, in State v. Johnson, 61 Wn. App. 539, 545, 811 P.2d 687 (1991), a police officer was allowed to testify to information from a confidential informant that was recorded in a search warrant affidavit; the State argued that the informant's statements were offered only to show the officer's state of mind at the time he executed the warrant. Again, the Court of Appeals disagreed, because the defendant had not challenged the validity or execution of the search warrant. Id.

Unlike the defendants in Aaron and Johnson, Burns and Rafay vigorously challenged Project Estate, arguing that the scenarios were coercive and elicited false confessions from them. Under these circumstances, it was reasonable to allow Inspector Henderson to give context to the entire investigation by explaining the purpose behind each scenario. This did not open the door to Levine's criticisms of the RCMP investigation, based on nothing more than his own opinion of how it should have been carried out.

v. Any error was harmless.

For the reasons set forth in § C.6.b.v., supra, there is no reasonable probability that any error in excluding Levine's testimony materially affected the outcome of this trial. The manner in which the undercover investigation was carried out was fully revealed to the jury on audiotape and videotape. If jurors believed that the methods employed by the RCMP were unduly coercive, they were free to disbelieve the defendants' confessions to the murders, and find them not guilty. The exclusion of Levine's unsupported and irrelevant opinion on the validity of the methods employed by the RCMP did not affect the outcome of this case.

c. There Was No Constitutional Error.

As with Dr. Leo's testimony, the defendants argue that the exclusion of Levine's testimony was constitutional error. "A criminal defendant has no constitutional right to have irrelevant evidence admitted." Lord, 161 Wn.2d at 294 (citing Hudlow, 99 Wn.2d at 15). Levine's testimony simply was not relevant.

Moreover, the defendants were in no way precluded from putting their theory of defense before the jury, i.e., from attacking the RCMP undercover investigation, and arguing to the jury that the tactics employed were likely to result in coerced, false confessions. The trial court's limitation on the *type* of evidence admitted in support of the defense theory was within the court's wide discretion in evidentiary matters, and did not amount to a constitutional violation. See Adams, 271 F.3d at 1243

8. ALLEGED COMMENTS ON GUILT DO NOT REQUIRE REVERSAL.

The defendants claim that alleged comments on guilt by Bellevue Police officers were so prejudicial that their convictions must be reversed. This claim should be rejected. Objections to each of these brief comments were immediately sustained, and the

comments were stricken or the jury instructed to disregard them. Given the nature of the comments and the trial court's prompt action, reversal is not required.

The general rule is that no witness may testify to an opinion on the guilt of a defendant, whether by direct statement or inference. Seattle v. Heatley, 70 Wn. App. 573, 577, 854 P.2d 658 (1993), review denied, 123 Wn.2d 1011 (1994). Such testimony may invade the exclusive province of the jury. Id.

Nonetheless, "testimony that is not a direct comment on the defendant's guilt or on the veracity of a witness, is otherwise helpful to the jury, and is based on inferences from the evidence is not improper opinion testimony." Heatley, 70 Wn. App. at 578. Thus, opinion testimony about a defendant's behavior is admissible so long as it is supported by a proper foundation, i.e., personal observations of the defendant's conduct, factually recounted, that directly and logically support the conclusion offered by the witness. State v. Craven, 69 Wn. App. 581, 586, 849 P.2d 681, review denied, 122 Wn.2d 1019 (1993).

a. Pretrial Discussion.

During the hearing on the defense motion *in limine* to preclude police officers from offering their interpretations of the

defendants' behavior, the trial court made certain observations that illustrate the difficulties in assessing such testimony. The State argued that the officers should be allowed to testify about their **observations** regarding the defendants' demeanor. 9RP 75-79. The trial court expressed its concerns:

> **This is easy to announce a ruling on. The devil's in the details in an area like this.** An officer is going to be allowed to testify they were crying, there were tears, their face was red, whatever sort of factual observations like that. When we start to shade it beyond that, we get into the he acted surprised. Now, that's an interpretive sort of response, but it seems to me that's probably fair game. When we go beyond that to – I think one of them said they felt like they were acting or something like that, then I think we've crossed that line.
>
> The point I'm trying to make here is not [to] deal with any specific thing but simply to point out to everybody – **I think announcing a ruling on this one is easy. Getting beyond that into the details of it and to identify a given specific as either a factual observation or an opinion, that's not always so easy.**

9RP 79-80 (emphasis added).

The court granted the defense motion in part, noting that there would inevitably be gray areas, and witnesses would make mistakes:

> These officers are going to be allowed to testify as to their factual observations. They will be allowed to give testimony as to demeanor, which is the area we

> get into that's difficult. But I believe that we can limit it to factual observations. Whether someone's voice was flat or it was at a pitched level. It is in part interpretive, but it is I believe a factual observation.
>
> . . .
>
> When we do cross the line – and we do cross the line, so I'll make this ruling right now. When an officer testifies that some reaction or some conduct was very odd, that's an opinion and it's going to be excluded . . . . Acting connotates [sic] not being truthful. That's going to be excluded.
>
> When we talk about someone being dramatic, I'm not quite sure where that fits in. Dramatic could be someone who is screaming and shouting, so that's probably demeanor testimony. That's truly a gray area for me. I probably would allow that.
>
> What we get down to is this. I can give you some guidelines on this. I can't take a six-month trial and set out a script for you. So they're going to be allowed to give testimony as to the facts, and demeanor will be part of those facts, assuming a foundation has been laid. They're not going to be allowed to invade the province of the jury and render opinions about this was the truth or it was a lie.
>
> . . .
>
> **The reality is – we've all been through enough trials to know – the reality is we may well get down to putting these folks on the stand and from time to time having to strike some statement or something or asking the jury to disregard it. I know the point of these motions is to not let that happen, but in reality, it's probably, among other things, what's going to happen.**

9RP 84-85, 88 (emphasis added).

During a discussion of the court's written order on the defense motions *in limine*, the parties revisited the ruling on

demeanor testimony. 10RP 113, 120-22. The court reiterated the difficulty of ruling in advance on such matters:

> It's an easy sort of ruling to announce. It's more difficult in the details of it. We're not going to let them give opinions. We're going to let them describe their demeanor. I don't know how to say it beyond that. It won't be easy, but we'll get through it.

10RP 122. See also CP 2424 (written ruling #15).

b. Allegedly Improper Comments.

i. Officer Greg Neese.

In the summer of 1994, Officer Greg Neese had all of seven months' experience working on his own as a patrol officer; he had never been called to a homicide scene before. 67RP 106-09. Neese responded to the Rafay residence in the early morning hours of July 13, 1994. 67RP 106-07, 111-15. When Neese arrived, he found Burns and Rafay sitting on a planter in the center of the cul-de-sac, talking to several police officers. 67RP 115.

Neese's initial assignment was to go into the residence and take photographs. 67RP 115-17. After completing that task, Neese went outside and helped put crime scene tape around the house. 67RP 134-35. Neese then moved his patrol car down to the cul-de-sac entrance, and sat down to write his report. 67RP 135-37. The car transporting Burns went by Neese; Burns looked

down and gave Neese what Neese described as "[a] grin . . . kind of a wry smile, and it kind of shocked me." 67RP 138.

The defense objected that "[t]he question's been asked and answered." 67RP 138-39. The court responded: "It has. The response that it shocked me will be stricken. The jury is instructed to disregard it. The balance of the answer will stand." 67RP 139.

ii. Officer Lisa Piculell.

Officer Lisa Piculell began working independently as a patrol officer at the beginning of 1993. 69RP 58, 61. On the night of July 12, 1994, and into the early morning hours of July 13th, Piculell was working with Officer Haroldson, helping to train a new K-9 dog. 69RP 63-65. The two officers responded to the Rafay residence just after 2:00 a.m. 69RP 66, 68. Upon her arrival, Piculell was asked to look after Burns and Rafay, who were sitting together on the curb outside the home. 69RP 73-74

Piculell spent a total of 10 or 15 minutes with Burns and Rafay. 69RP 77. She kneeled down and tried to reassure them that everything would be all right. 69RP 78. Burns was clutching his stomach and contorting his face, as if in severe pain; he refused

medical aid. 69RP 78-80. In response to Piculell's reassurances, Burns snapped, "No, you don't understand, it's not going to be okay." 69RP 81.

Piculell then turned to Rafay. She described him as "just staring straight ahead, pretty motionless, just focused straight ahead, staring." 69RP 82. When asked a little later what observations she had made of Rafay's demeanor, Piculell responded, "He seemed somewhat robotic." 69RP 90. Rafay's attorney objected "as to characterizations" and moved to strike. Id. The court sustained the objection, cautioning the officer to describe what she saw in words that were not conclusions. Id.

iii. Officer Stephen Cercone.

Officer Stephen Cercone was working as a corporal of a patrol squad in the summer of 1994. 71RP 181. At about 2:00 a.m. on July 13, 1994, Cercone responded to the Rafay residence. 71RP 183. Cercone assisted Officer Joliffe and a K-9 dog in a search around the outside of the house for suspects, victims or evidence. 71RP 186-89. After completing that task, Cercone took over supervision of officers at the scene. 71RP 190-91. Cercone also canvassed the near neighbors, including the Sidells and the Rackleys. 71RP 192-97.

Officer Cercone then approached a patrol car, where Officer Lewis was completing a statement with Rafay. 71RP 202, 204. When the statement was completed, Cercone put his hand on Rafay's shoulder; Cercone told Rafay that he understood how difficult this must be, but Rafay would have to go down to the police station and talk to the detectives. 71RP 205-07. Rafay responded, "Why do we have to go down to the station? Why do we have to do that? Why?" 71RP 208. When the prosecutor asked Cercone to describe Rafay's demeanor at that time, defense counsel objected as "asked and answered." Id. The court overruled the objection. Id. Cercone responded, "His demeanor, from my observations, were that he was surprised and very concerned that --." Id. Counsel objected that this was a characterization, and moved to strike. Id. The court sustained the objection, and struck the word "concerned." Id.

iv. Detective Jeffrey Gomes.

Detective Jeffrey Gomes, a 29-year veteran with the Bellevue Police Department, was assigned to assist Detective Thompson in investigating this case. 90RP 19-20, 22. Gomes interviewed Rafay at the police station early in the morning on July 13, 1994. 90RP 38-40. Gomes told Rafay that Rafay would need

to get in touch with his remaining family members so that they could offer their support, and that funeral arrangements would have to be made. 90RP 60. Rafay responded that he did not want to do that. 90RP 61. Rafay did not ask Gomes for assistance, nor did he provide the names and addresses of family members in Canada or the United States. 90RP 62. When Gomes contacted Rafay again later that afternoon, Rafay still did not ask for help in contacting his family or making funeral arrangements. 90RP 89-90.

Gomes met with Burns and Rafay again on the afternoon of July 14, 1994. 90RP 96. After trying unsuccessfully to contact the two at their motel, Gomes and Thompson tried a nearby Barnes and Noble bookstore; they found Burns and Rafay sitting on a couch and reading. 90RP 96-98. During a subsequent interview, Rafay said nothing about having contacted family members. This time, though, Rafay asked the detectives to let his relatives know what had happened; he told them about an address book in the Rafay residence that contained contact information. 90RP 104-05.

When asked for more detail, Gomes explained that, when Rafay indicated that he did not want to tell his relatives about the murders over the telephone, Gomes urged him to call his uncle and ask his uncle to help contact the others. 95RP 39. Rafay

responded angrily: "Who the fuck are you to tell me how I should act after something like this?" Id. Asked what Rafay had been doing instead of contacting his family, Gomes responded that Rafay "was just chillin' with his buddy." 95RP 40. The court sustained an immediate objection, and instructed the jury to "disregard the characterization in that answer." Id.

Gomes later said that he had occasionally been required to notify the family when a crime victim was killed; he acknowledged that death notifications are very difficult. 96RP 207-08. He did not consider making funeral arrangements to be part of his job as a police officer, however. 96RP 209. Gomes explained that, once Rafay had discovered the bodies, notification was no longer necessary; it was Rafay's responsibility to contact other relatives, and to make necessary arrangements. Id. When the prosecutor asked Gomes what the issue was on July 14, 1994, Gomes responded: "The issue was why wasn't he doing it? He was watching videos, movies, he was reading."[107] 96RP 210. The

[107] Tariq Rafay's Blockbuster Video card had been used to rent movies and a video player at the Bellevue Way store on July 13 and 14, 1994; Atif Rafay was the only person other than Tariq who was authorized to rent videos with the card. 76.5RP 14-21. Rafay and Burns were reading at the Bellevue Barnes and Noble bookstore on July 14, 1994. 90RP 97-99.

defense objected immediately, arguing that the question called for speculation. Id. The court sustained the objection, and struck the second part of the answer. 96RP 211.

Gomes returned to the Rafay residence at 11:10 p.m. on August 9, 1994, with the goal of recreating the lighting conditions that existed in Tariq Rafay's bedroom on the night of the murders. 95RP 64. Atif Rafay had told police that he had viewed his father's body from a vantage point inside the bedroom, near a white bookshelf; Rafay said the hall light was on, but the light in the bedroom was not. Ex. 72 at 51, 54. Rafay said he could see blood on the wall, and he could see his father's feet; at one point, Rafay said he could see his father's head. Id. at 51, 54-63.

When Gomes returned to the house and stood by the white bookshelf in the bedroom, with the lighting as Rafay had described it, Gomes could not see what Rafay had claimed to see. 95RP 65. When the prosecutor asked Gomes if the lighting recreation had answered any questions, Gomes responded: "To a degree it answered a question." 95RP 66. The prosecutor asked: "Which was what?" Id. Gomes responded: "I don't believe he saw what

he said he saw." Id. Defense counsel's objection "to his conclusion" was immediately sustained, and the jury was instructed to "disregard that last answer." 95RP 66-67.

At one point on redirect, the prosecutor was exploring why Gomes had Burns and Rafay repeat the details they had given about their activities on the night of the murders. 96RP 198-99. Gomes responded:

> On the night of the homicide they gave tremendous detail without my prompting, but it was the days prior to that that they give very little detail about where they were, what they did. They were confused about the days that they did it. It was – now whether they couldn't give me information or were not willing to give me information, I –

96RP 200. Defense counsel immediately objected. Id. The trial court sustained the objection and struck the comment "about whether they were willing to give me that information." Id.

Later, during cross-examination, defense counsel also focused on Gomes's testimony that the defendants had given little detail about their activities on the days leading up to the murders, but considerable detail about the day and evening directly preceding the murders. 97RP 127-33. Counsel had Gomes read from Burns's taped statement of July 13, 1994, where the questioning had turned to the defendants' trip to the movie theater

on the evening of the murders to see "The Lion King." Gomes read Burns's statement about the curtain failing to open at the beginning of the movie: "'That kind of thing, like we – you know, Atif was like yelling and stuff.' So that is another detail, you know, I guess he wanted to be noticed, and so then . . ." 97RP 149-50; Ex. 76 at 20. Counsel objected to Gomes's comment about Rafay wanting to be noticed, arguing that Gomes did not know what was in Rafay's mind. 97RP 150. The trial court immediately sustained the objection, and instructed the jury to disregard it. Id.

c. The Comments Do Not Require Reversal.

The comments at issue were scattered over weeks of testimony by the officers who responded to the scene and those who took the defendants' statements. They occurred during the course of a six-month trial. They fell within what the trial judge described as "truly a gray area" – responses that straddle the line between factual observations and interpretation of those observations. In every case, the trial court immediately sustained the objection, and either struck the response or instructed the jury to disregard it.

None of these comments was a direct opinion on guilt. The cases relied on by the defendants are distinguishable. In State v. Carlin, 40 Wn. App. 698, 700 P.2d 323 (1985), a police officer testified that his dog tracked the defendant by following a "fresh guilt scent." Id. at 700. In State v. Haga, 8 Wn. App. 481, 507 P.2d 159, review denied, 82 Wn.2d 1006 (1973), an ambulance driver, responding to a call that a man's wife and infant daughter were dead, testified that the husband was "very calm and cool about it" and did not react in the "usual" way by attempting to assist in reviving the victims. Id. at 490. In State v. Black, 109 Wn.2d 336, 745 P.2d 12 (1987), a rape case where the only defense was consent, a counselor testified that "[t]here is a specific profile for rape victims and [the alleged victim] fits in." Id. at 339.

In Carlin and Black, the witness offered a direct opinion that the defendant was guilty. While the opinion was more inferential in Haga, it was nevertheless conclusive of guilt. Comments like those challenged here, mentioning "wry smiles" and "robotic behavior" without linking these observations to guilt, and questioning demeanor or behavior not directly tied to the crimes ("chillin' with his buddy" and not contacting family members about funeral arrangements), do not rise to this level.

Moreover, in all three of these cases, the opinion testimony was admitted. Carlin, 40 Wn. App. at 700; Haga, 8 Wn. App. at 490; Black, 109 Wn.2d at 339. In two out of the three, the testimony was admitted over the objections of the defendant. Haga, 8 Wn. App. at 489-90; Black, 109 Wn.2d at 339. Here, it was stricken and the jury was instructed to disregard it.

While the brief comments at issue here may have been improper, the trial court obviated any prejudice by immediately sustaining the objections and striking the comments or instructing the jury to disregard them. This Court must presume that the jury followed the instructions to disregard the remarks. State v. Weber, 99 Wn.2d 158, 166, 659 P.2d 1102 (1983). There was no reversible error.

9. THE TRIAL COURT PROPERLY DENIED THE MOTION FOR MISTRIAL BASED ON ALLEGED VIOLATIONS OF RULINGS ON MOTIONS *IN LIMINE*.

The defendants complain of several violations of the court's rulings on motions *in limine*. They argue that these violations were so prejudicial that nothing short of a new trial could ensure a fair hearing. This claim overstates the alleged violations. The claims must be viewed in the context of this six-month trial. Most of the

information imparted to the jury was inconsequential. In every instance where an objection was timely raised, the trial court sustained the objection, struck the answer and instructed the jury to disregard it. Under these circumstances, it cannot be said that the trial court abused its discretion in denying the motion for a mistrial.

A trial court's denial of a motion for mistrial is reviewed for abuse of discretion. State v. Lewis, 130 Wn.2d 700, 707, 927 P.2d 235 (1996). The court should grant a mistrial "only when the defendant has been so prejudiced that nothing short of a new trial can insure that the defendant will be tried fairly." Id. The trial judge is in the best position to judge whether the defendant has been prejudiced. Id.

In determining the effect of a trial irregularity, the appellate court examines: 1) its seriousness; 2) whether it involved cumulative evidence; and 3) whether the trial court properly instructed the jury to disregard it. State v. Hopson, 113 Wn.2d 273, 284, 778 P.2d 1014 (1989). The appellate court will review the record as a whole in making its determination. State v. Crane, 116 Wn.2d 315, 333, 804 P.2d 10 (1991).

a. The Alleged Violations.

i. Bellevue Detectives Gomes and Thompson.

Prior to trial, the defense moved to exclude testimony about the defendants' involvement in "theft, stealing, etc." CP 3675. The trial court granted this motion. CP 2423.

On direct examination, the prosecutor asked Detective Gomes why he had traveled to Canada on July 19, 1994, just days after the murders. 95RP 59-60. Gomes said that his purpose was follow-up investigation: "We wanted to know their relationship with their friends, if they had a criminal history from the jurisdiction that they lived at or had grew up at as children in West Vancouver, and things of that nature." 95RP 60. The prosecutor did not pursue any of this. 95RP 60-63.

During the break, attorney Richardson told the court that she intended to ask Gomes whether either Burns or Rafay had criminal history. 95RP 63. The following colloquy ensued during Richardson's cross-examination of Gomes:

> **Q:** Jumping ahead a little bit, you went to Canada and I believe you went to the West Vancouver Police Department, right?
>
> **A:** Yes.

Q: And when you went there you were – I believe you said you wanted to find out about criminal history for Sebastian and Atif and their friends, right?

A: Among a lot of other things.

Q: Okay. I just wanted to clear this up. Neither Sebastian Burns nor Atif Rafay have any criminal convictions in Canada, right?

A: Convictions?

Q: Yes.

A: Not to my knowledge.

95RP 105-06.

Following this, the prosecutor raised the issue of criminal convictions during direct examination of Detective Thompson:

Q: Did you look to see whether or not either Mr. Burns or Mr. Rafay had criminal convictions in Canada?

A: Convictions?

Q: Right.

A: Yes, I did.

Q: Did you find any convictions? And perhaps I shouldn't limit it just to Canada. Were you aware of whether or not Mr. Burns had any convictions either in the United States or in Canada?

A: He had no convictions.

Q: And the same question with regard to Mr. Burns [sic]. Did you find – were you able to determine

> whether or not he had any convictions in either the United States or Canada?
>
> **A:** He had no convictions.

101RP 21-22.

During a break in his cross-examination of Thompson, attorney Robinson again raised the issue of the defendants' criminal history. Arguing that the jury had been left with a misimpression, Robinson proposed questioning Thompson as follows:

> You remember the exchange between you and Mr. Konat when Mr. Konat said, convictions, and made quotation marks, and you responded, "Do you mean convictions?" with a question mark. The truth is there are no convictions and the truth is the only criminal charges against these two young men were a malicious mischief charge for playing music too loud after they went back to Canada.

102RP 4-5. After being reminded by counsel for Rafay that the malicious mischief charge did not exist at the time that Thompson and Gomes went to Canada, Robinson modified his proposed question: "Not only were there no convictions, there were no charges?". 102RP 6.

The State argued against this approach. The prosecutor pointed out that the question asked of Gomes on direct examination had been a general one, simply asking why the Bellevue detectives

went to Canada after the murders. 102RP 6-7. When Gomes mentioned that part of the reason for going to Canada was to see if the defendants had any criminal history in West Vancouver, the State asked no further questions along these lines. 102RP 7.

The State pointed out that it was the defense that belabored the issue of "convictions," leaving the jury with the misimpression that the defendants were naive youths who had never been involved in the criminal justice system before. 102RP 7. The prosecutor enumerated several instances of criminal involvement, all subject to ER 404(b): Burns's filing of a police report two years before the murders,[108] at least two investigations for shoplifting, a prank with a body in the back of a car, an investigation of Burns in connection with a bombing at the Austrian embassy in Canada, and a shoplifting incident in Toronto that ended with an agreement that the defendants would leave town and not come back. 102RP 8-9.

The court rejected Robinson's proposal: "I will allow the defense to pursue the matter with regard to convictions. If we go past that into arrest, I wouldn't allow the state to do it and I won't allow you to do it." 102RP 10. The court refused to instruct the jury

[108] This appears to be a reference to Burns staging an accident and then lying about it when he damaged the family car. 146RP 28-33.

to specifically ignore any negative inference from the prosecutor's use of visual quotation marks around the word "convictions," relying instead on an instruction that the court had already given to the jury, and would later repeat, that statements made by the attorneys are not evidence. 102RP 11; 60RP 47-48; CP 3152.

ii. U.S. Customs Officer Larry Overcast.

Prior to putting U.S. Customs Officer Larry Overcast on the witness stand before the jury, the State sought to clarify the limitations on Overcast's testimony: "Well, I suggest we take the break and get him in here so that he understands what we are going to discuss, and what we are not going to discuss." 106RP 23. The State represented that Overcast would testify about what led to his suspicions when he encountered the defendants entering the United States at the border crossing at Sweet Grass, Montana on October 11, 1994. 106RP 23-25, 46.

The State informed the court and the parties that it did not intend to elicit testimony that Burns had in his possession a driver's license in someone else's name, but would instead ask Overcast to testify simply that Burns had a "bar I.D." (i.e., identification showing a different age for bar purposes) on his person. 106RP 25, 35, 36.

The court agreed that this limitation was appropriate: "That was another reason why he took the next step. And all of this is a progression to say, hey, what is going on? And I think the jury is entitled to understand why this border officer made further inquiry." 106RP 36.

The State called Overcast to the witness stand outside the presence of the jury. 106RP 19, 40. The State informed Overcast of the limitations on his testimony:

> **Q:** There are a number of subjects consistent with the decision we had over the noon hour in my office that we are not going to introduce or discuss in front of the jury. And they are – as best I can, what I'm going to do, I'm going – defense counsel has been kind enough to give us an extra copy of your report, and I will try and draw a line through the things that the judge has ruled a jury shouldn't hear about. And they are essentially the fact that in your report – they are the fact that there was the name of a person. You recall finding a driver's license that belonged to another individual?
>
> **A:** Yes, sir.
>
> **Q:** You will be allowed to testify about Mr. Burns' statements about it. That is, that it was used as a bar I.D., as you told us last week, and that that is an illegal purpose. And you can talk about any suspicion you had as a result of what you did. I'm just not going to ask you for the name or the fact of what form of

identification it was, the name of the person it was in, or the fact that it was another individual's driver's license. Okay?

A: All right.

106RP 41-42.

Following this advisement, Overcast testified as follows before the jury:

Q: Anything suspicious in Mr. Burns' possession?

A: I located a British Columbia driver's license bearing the name of another person.

Q: And why was that suspicious?

A: Well, as a border inspector, I was concerned that someone, if they were in possession of someone's else [sic] identification, could be possibly using it to cross the border.

Q: And did you ask Mr. Burns why it was he was carrying this identification?

A: Yes, I did, sir.

Q: And what did he say?

A: He told me he had been using that person's identification as a bar I.D.

Q: Bar I.D.

A: Yes, sir.

> **Q:** And what did you take that to mean?
>
> **A:** Well, at our location, that would be a practice in which someone would be – someone would use someone else's identification to purchase or consume liquor.

106RP 53-54.

At the end of Overcast's testimony, defense counsel expressed frustration that the witness had mentioned the driver's license in spite of instructions not to do so. 106RP 65-66. The court invited the defense to address the issue further: "You think about that, and you may want to articulate something in the morning. And I will allow you to do that." 106RP 66.

The incident passed without further comment, until a discussion on the following day concerning limitations on the testimony of Inspector Schwartz. 107RP 182-83. When it became clear that the parties were in agreement on these limitations, Burns's attorneys nevertheless expressed concern that Schwartz should be told on the record that "those words should not come out of his mouth." 107RP 184. The court agreed, apparently referencing what had happened with Overcast: "I think in view of

our past experience, the the [sic] other day was **really truly innocent** but it did happen and we need to do that."[109] 107RP 184 (emphasis added).

iii. RCMP Inspector Lorne Schwartz.

As they had done with Overcast, the parties agreed to bring Inspector Lorne Schwartz into court outside the presence of the jury to inform him of the rulings on motions in limine relating to his testimony. 108RP 76-77. The prosecutor carefully instructed Schwartz:

> **Atty Davidheiser:** Inspector, the purpose of this on-the-record colloquy is to inform you of some motions in limine that the court has granted at the request of the defense regarding your testimony. And what we would like to do is just go over here in open court on the record what those motions may preclude you getting into. And as a general matter, what that means is that I will not be asking you any questions intent on eliciting this information, nor will the defense attorneys be asking you any questions intent on asking you this information.

[109] The court again focused on Overcast's testimony after the defense moved for a mistrial: "I think Overcast – I would comment, he clearly went beyond what we agreed he was supposed to limit himself to. **I don't think in any way it is harmful to the defendants in the manner in which it came out**, but it was clearly beyond the limits we placed on him." 108RP 217-18 (emphasis added).

> And to the extent you think something we are asking you is getting at something that has been prohibited, it is not. Okay, does that make sense?
>
> **Schwartz:** Yes.

108RP 78. The prosecutor went on to inform Schwartz of the topics that were "off-limits," including any mention of the RCMP's investigation in connection with potential "accessory after the fact" charges. 108RP 84.

On direct examination, in the midst of questioning Schwartz about the placement of intercepts, the prosecutor asked:

> **Q:** And can you tell us what telephones, houses, apartments, and cars you were given authorization to – you know, I don't know if there is a difference, whether this is a term of art or not, to "bug," to plant listening devices in or connect listening devices to?
>
> **A:** I can. But because of this morning's instruction, I don't know if I want to be complete in that answer.

108RP 136. Defense counsel immediately requested a side-bar. Commenting that "I don't think there was a limitation here," the court took the afternoon recess. 108RP 136-37.

Out of the presence of the jury, the prosecutor confirmed that he was not asking Schwartz about his investigation of "accessory after the fact," but simply for factual information about the locations at which Schwartz was authorized to install listening devices,

including the defendants' home at 2021 Phillip Avenue, and the telephones of Nighat Hussein[110] and Burns's parents. 108RP 138. Schwartz explained that he thought he was not supposed to talk about the intercepts at the residences of Burns's parents or Nighat Hussein, due to the restriction on the "accessory after the fact" investigation. Id.

The defense expressed frustration with the misunderstanding: "And when the witness informs the jurors, whoops, I can't say something, it sends the message that we are hiding something from them." 108RP 139. The court disagreed: "I don't know why you take it that personally. It didn't have anything to do with you. The only reference he made was to the court, and I think if they think anybody is hiding anything, it is me." Id.

The defense nevertheless asked that the prosecutor, upon further examination of Scwartz in front of the jury, confirm with Schwartz that he was giving the jury complete information about where the intercepts were placed. 108RP 140. The court saw no need for this, and again expressed its opinion that Schwartz's misstep was inconsequential: "I don't think there was anything in

[110] The transcript mistakenly gives this name as "Nighat Sussian." 108RP 138.

that comment that was -- it was probably a mistake. It was probably inappropriate, and beyond that, I don't think it was much of anything. You are making way too much out of that." Id.

The defense again expressed frustration, remarking that "[w]hen the inspector said that, a number of the jurors sitting on this side of the room looked directly at us wondering what is being hidden here." 108RP 141. Counsel did not believe that Schwartz did anything intentionally wrong, but complained that "[w]e ask the State to have discussions with their witnesses, and still the information gets through." 108RP 142. The court disagreed: "It did not get through. I absolutely reject – that is not what happened." Id.

Upon resuming his direct examination of Schwartz, the prosecutor again asked for the names and locations included in the authorization to intercept private communications. 108RP 144. Schwartz's response this time included the residences of Burns's parents and Nighat Hussein. 108RP 144-45.

iv. The Dosanjh Group.

At the conclusion of direct examination of Detective Thompson, the State brought up the issue of possible rebuttal evidence on the topic of "other suspects." 101RP 59-60. Thompson had recently gained additional information on the

Dosanjh "crime group" from speaking with members of the Vancouver Police Department's Organized Crime Unit: that the group's activities had focused on cocaine smuggling; that both of the brothers who comprised the "group" had been killed prior to the Rafay murders; and that there was no indication that Jessie Brar had ever been associated with the Dosanjh Group. 101RP 61-62.

The State asked that, if the defense were allowed to introduce hearsay evidence relating to an "other suspect" in the Rafay murders, the State be permitted to rebut that evidence with the hearsay evidence that Detective Thompson had obtained about the history and activities of the Dosanjh Group. 136RP 79-80. The court excluded evidence of whether the group did or did not exist at a given point in time. 136RP 93. The court later added: "We're not going to get into that Dosanjh family and whether they made the money selling dope or whatever they didn't." 143RP 81.

Burns called Detective Thompson in his case-in-chief, and directed Thompson's attention to a "source debriefing report" that had earlier been provided to Thompson by Corporal Gelinas. 144RP 25-26. This report contained information about an informant with whom Gelinas had spoken shortly after the Rafay murders. 144RP 26. The informant had heard that a contract had been

placed on an East Indian family from Vancouver, B.C., currently residing in Bellevue, by the Dosanjh Group, and that Jessie Brar was offered $20,000 Canadian to execute the contract. 144RP 30. The informant's source also indicated that the Dosanjh Group would most likely get involved in future homicides. 144RP 30-31.

On cross-examination, the State followed up on this subject. The State started by referencing a question from the jury about the Dosanjh Group,[111] and asking Thompson: "In the course of your work in this investigation, did you investigate who and what the Dosanjh group was?" 144RP 40. An objection from Burns's attorney was overruled, and Thompson answered, "Yes." Id. The prosecutor followed up with: "The question from the juror was who is or what is the Dosanjh group?" Id. The objection this time was sustained. 144RP 40-41. When the prosecutor asked Thompson why he had come to the conclusion that the informant's tip was a "round peg in a square hole," an objection was again sustained. 144RP 41. The prosecutor must have expressed some frustration at that point, because the court added, "Mr. Davidheiser, throw up your hands if you like." Id.

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[111] The question was twofold: "What is Dosanjh Group? Was any member of Rafay family associated with this group?" CP 3123-24, 4773-74.

Thompson was allowed to testify that he had been unable to uncover any evidence that any member of the Rafay family was associated with the Dosanjh Group. 144RP 41. When the prosecutor asked Thompson whether there was any association between the activities of the Rafay family and those of the Dosanjh Group, an objection was sustained. 144RP 42. The court ruled that it would allow a question as to the Rafay family's lifestyle, however, and the prosecutor posed the question carefully:

> **Prosecutor:** Listen to my question, Detective. What was it about the life style of the Rafay family that led you to the conclusion that there was no connection or relationship between the Rafays and the Dosanjh group?
>
> **Thompson:** The Rafay family was a middle class Muslim family, working class. He had a job with $59,000 a year or so, he owed no bills, they were not involved in drug trafficking or –
>
> **Attorney Freitas:** Objection.
>
> **The Court:** Sustained.
>
> **Prosecutor:** Is that a fact?
>
> **The Court:** The objection to that is not only sustained, I instruct the jury to disregard that last remark regarding drug trafficking and it is stricken and the jury's instructed to disregard it. Next question.

144RP 44-45.

The prosecutor then went through the murdered members of the Rafay family one by one, listing their occupations. 144RP 46-47. He asked Thompson:

> **Prosecutor:** Did you determine during the course of your investigation whether any of those four member [sic] of the Rafay family were connected to or were members of the Dosanjh group?
>
> **Thompson:** No. What I determined, there was no Dosanjh group at the time.
>
> **Attorney Freitas:** Object.
>
> **Attorney Robinson:** Object and move to strike and I'll ask for a side bar.
>
> **The Court:** The answer beyond, "no," everything beyond, "no," is stricken. The jury is instructed to disregard anything in that answer beyond, "no." Next question. Side bar is denied.

144RP 47.

When the prosecutor asked Thompson whether any member of the Rafay family had any connection to the type of criminal activity that Jessie Brar was said to be involved in, a defense objection was sustained. 144RP 48. At that point, the prosecutor said: "If I may have a moment, Your Honor. Based upon the court's ruling, those may be all my questions." Id.

During the subsequent break, attorney Robinson accused the prosecutor of deliberately asking questions in violation of the court's ruling on the motion *in limine*. 144RP 49-50. Arguing that the prosecutor had opened the door, Robinson again asked the court to allow the defense to get into the alleged murderous activities of the Dosanjh Group, and the possibility that the group had killed the Rafay family for religious reasons. 144RP 50-52.

The trial court declined to allow the defense to cross-examine in response to testimony that the court had ordered stricken and had instructed the jury to disregard. 144RP 52-53. The court explained:

> But when we start asking, "Did they commit murders? Were they in drug trafficking?" or whatever, that is already information I already ruled we have no clue about and I am not going to decipher rumors and that is about it. I am not going to get into trying the Dosanjh group in this trial.

144RP 54. The court nevertheless assured the defense that it would be allowed to "plumb the depths of [Thompson's] investigation." 144RP 55.

When Robinson reiterated his complaint that the State's questions had been in direct violation of the court's order, the court responded: "You know, I am not here to defend Mr. Davidheiser. I

thought the questions as they were posed were not out of bounds. The answers certainly got out of bounds, and that is when I got involved." 144RP 55-56.

b. The Motion For Mistrial.

Following Inspector Schwartz's testimony, both defendants moved for a mistrial. 108RP 210, 214. Counsel referenced the testimony of Detectives Ghomes and Thompson that they had not discovered any criminal convictions in Canada, the testimony of Inspector Overcast, and the testimony of Inspector Schwartz. 108RP 211-13. Counsel said that the motion was made "because there is no other remedy that I can think of, and the court has indicated essentially that there won't be any." 108RP 213.

The court denied the motion, taking care to clarify its position on trial irregularities:

> I have never indicated there would – I have no idea where you get the idea that I have indicated there wouldn't be sanctions or other matters such as corrective instructions should orders of this court be violated. And I do not by these remarks so indicate. But at any point, in any event, to this point, **there is absolutely no basis in this court's view for a mistrial**.

108RP 214 (emphasis added).

The State made a brief record as to the testimony of the four witnesses that was the basis for the mistrial motion. 108RP 214-17. The prosecutor argued that the defense attorneys, by their highly visible reactions in the courtroom, themselves drew the jury's attention to Schwartz's reluctance to answer. 108RP 216-17. The court observed: "Like a lot of things in a trial, sometimes the more you make of them, the worse they get. But those are all judgment calls trial lawyers have to make." 108RP 218.

Following Detective Thompson's testimony about the Dosanjh Group, the defense again moved for a mistrial, and the court again denied the motion. 144RP 56-57.

c. The Motion Was Properly Denied.

The testimony at issue, taken alone or together, was not sufficient to warrant a mistrial. The motion was properly denied.

Testimony about prior convictions came up only in response to the State's question asking why the Bellevue detectives went to Canada in July of 1994, shortly after the murders. An inquiry into whether the defendants had any criminal convictions was listed as one of the reasons for the trip, and the State pursued this no further. 95RP 59-63. It was the defense attorney who chose to

pursue the inquiry. 95RP 105-06. In spite of the complaints about question marks and quotation marks, the fact is that none of the defendants' prior bad acts was ever mentioned.

The jury learned of one of the prior bad acts during cross-examination of Burns. Burns admitted that, after hitting a pole and damaging the family car in 1992, he had staged a fake accident and lied about what happened; he later asked a friend to lie about the incident in court. 146RP 28-33.

The testimony about Burns's fake driver's license was similarly inconsequential. While Customs Officer Overcast was not to make reference to a driver's license in someone else's name, he was told that he could say that Burns had a "bar I.D." in his possession. 106RP 42. When Overcast nevertheless let slip that it was a driver's license "bearing the name of another person," the State immediately focused the testimony on use of the identification to purchase or consume liquor. 106RP 53-54. Although Overcast technically violated the *in limine* ruling, the trial court later described the violation as "really truly innocent." 107RP 184.

Inspector Schwartz's mistake was not a violation of any ruling, but rather a conscientious attempt to *adhere* to a ruling. When Schwartz thought that the correct answer might cross the line

into forbidden testimony about "accessories after the fact," he instead responded: "[B]ecause of this morning's instruction, I don't know if I want to be complete in that answer." 108RP 136. While the defense complained that this made it look like they were hiding something from the jury, the court aptly pointed out that it was the *court's* instruction that the witness had referenced. 108RP 139. The court correctly rejected the defense claim that any improper information was imparted to the jury. 108RP 142.

As to the Dosanjh Group, the brief mention of drug trafficking drew an immediate objection; the court sustained the objection, struck the reference to drug trafficking, and instructed the jury to disregard it. 144RP 44-45. The same is true for the remark that "there was no Dosanjh group" at the time of the murders – objection sustained, remark stricken, and jury instructed to disregard. 144RP 47. The court found that the prosecutor's questions were not out of bounds, although the answers were. 144RP 55-56.

These brief transgressions, rare in the context of this six-month trial, did not so prejudice the defendants that nothing short of a new trial could ensure a fair hearing of this case. See Lewis, 130 Wn.2d at 707; Crane, 116 Wn.2d 333. The little information that

was actually imparted to the jury was relatively inconsequential, and the jury was instructed to disregard it whenever a timely objection was raised. The jury is presumed to have followed this instruction in each instance. See Weber, 99 Wn.2d at 166. Under these circumstances, the trial court did not abuse its discretion in denying the motion for a mistrial. See Hopson, 113 Wn.2d at 284; Lewis, 130 Wn.2d at 707.

10. THE TRIAL COURT PROPERLY DENIED THE DEFENDANTS' MOTION FOR A MISTRIAL BASED UPON ALLEGED PROSECUTORIAL MISCONDUCT IN CLOSING ARGUMENT.

The defendants claim that four brief comments made by the prosecutor during a nearly eight-hour closing argument require reversal and a new trial. None of the comments, taken separately or together, justifies a new trial. The trial judge, who was in the best position to evaluate the comments, properly denied the defendants' repeated motions for a mistrial. This Court should reject this assignment of error.

a. Relevant Facts.

Closing argument occurred over three days. See 148RP to 150RP. The prosecutor's initial closing argument lasted over six hours. 149RP 115. The defense attorneys then argued for

approximately four hours. 149RP 116; 150RP 9. The prosecutor was allowed one and one-half hours for rebuttal. 150RP 115.

The facts concerning the specific claims of prosecutorial misconduct are addressed below. In summary, the defendants complain about four comments made by the prosecutor during closing argument. One comment, referring to a beheading in Iraq, was made at the beginning of the prosecutor's closing argument; the defendants objected, and later moved for a mistrial. 148RP 36-38, 124-25. The trial court overruled the objection and denied the motion for a mistrial. Id. The prosecution subsequently proposed a curative instruction, but the defendants refused it. 150RP 4-6.

The remaining three comments were made during the prosecutor's rebuttal argument. Only one comment, relating to witness Jennifer Osteen, drew a contemporaneous objection; the trial court sustained the objection and struck the comment. 150RP 150-51. After argument ended, the defendants raised an objection to prosecutor Konat's passing mention of his father's death. The defense did not request a curative instruction, but unsuccessfully moved for a mistrial. 150RP 204-06. The defendants' final claim, that the prosecutor misstated the law and the burden of proof, is raised for the first time on appeal.

The jury began its deliberations on May 20, 2004. 150RP 193. They returned verdicts of guilty on May 26th. CP 3175-80, 4181-86. Over the course of their deliberations, the jury asked to review a number of items of evidence, including a piece of carpet from the Rafay house, the crime scene video, Rafay's taped statement to the undercover RCMP officers admitting to the murders, and the 911 tape. 151RP 3-6.

b. Standard Of Review.

The grant or denial of a motion for a mistrial is a matter primarily within the discretion of the trial court; the reviewing court will not disturb the ruling unless there is a clear abuse of discretion. State v. McKenzie, 157 Wn.2d 44, 51-52, 134 P.3d 221 (2006). Explaining this deferential standard, the Washington Supreme Court has repeatedly observed that the trial judge, having "seen and heard" the proceedings, "is in a better position to evaluate and adjudge than can we from a cold, printed record." Id. at 52 (quoting State v. Wilson, 71 Wn.2d 895, 899, 431 P.2d 221 (1967)).

In closing argument, a prosecutor is afforded wide latitude in drawing and expressing reasonable inferences from the evidence. State v. Stenson, 132 Wn.2d 668, 727, 940 P.2d 1239 (1997). To prevail on a claim of prosecutorial misconduct, the defendants bear

the burden of proving that the prosecuting attorney's conduct was both improper and prejudicial. State v. Borboa, 157 Wn.2d 108, 122, 135 P.3d 469 (2006). To establish the requisite prejudice, the defendants must prove there is a substantial likelihood that the misconduct affected the jury's verdict. Borboa, 157 Wn.2d at 122. "The prejudicial effect of a prosecutor's improper comments is not determined by looking at the comments in isolation but by placing the remarks 'in the context of the total argument, the issues in the case, the evidence addressed in the argument, and the instructions given to the jury.'" McKenzie, 157 Wn.2d at 52 (quoting State v. Brown, 132 Wn.2d 529, 561, 940 P.2d 546 (1997)).

c. The Reference To A Beheading.

The defendants claim that the prosecutor's reference to a beheading in Iraq improperly appealed to the jury's passion and prejudice. This claim should be rejected. First, the point of the prosecutor's remarks -- that the crime scene in this case was horrific -- was proper. Second, the defendants refused a curative instruction and proceeded to offer their own analogy, comparing the defendants to captured United States sailors, and the police to the communist North Korean government. Finally, the remark was

brief, and made at the very beginning of an initial closing argument that lasted over six hours. The defendants have failed to show that the prosecutor's comment justifies a new trial.

The prosecutor's reference to the beheading occurred at the beginning of his closing argument

> **Prosecutor:** [Burns] didn't stick around long enough to answer the questions of the family members who might wonder what happened. He didn't stick around long enough to comply with or satisfy the Bellevue detectives that he had nothing to do with it. Rather he and his best friend in the world returned to Canada, where, as I said before, they spoke with anybody and everybody who would listen about their mistreatment in the United States.
>
> I want to speak for just a moment, because I know it's been a long time that we've been here, and I think it's important that we not lose sight of what we're talking about.
>
> This is the State of Washington versus Atif Rafay and Glen Sebastian Burns, but the people who were murdered in this case were human beings. They were human beings who were executed in a fashion that is not unlike something that has been in the news lately. Last week, or some days ago, an American civilian was beheaded. He was beheaded by some people...
>
> **Defense Counsel:** Excuse me. I am sorry, Counsel, I have to object to this argument. It is completely inappropriate.
>
> **Court:** Objection's noted. This is argument. I am going to allow all sides some latitude in argument. Your objection's noted, Mr. Robinson.

> **Prosecutor:** He was beheaded as an apparent retaliation for mistreatment of Iraq's war prisoners, as I understand it, at the hands of American military personnel. So that Mr. Robinson is clear and that you all are clear as well, I don't raise this subject to somehow make light of an American civilian being executed. Even more grotesque is the notion that they took the time to video tape it before they did, and that is ultimately what led to the outrage all over the world about what had happened. I bring this up because as grotesque and as horrible as that notion is, what these two did to Tariq Rafay, Sultana, and Basma Rafay is even worse.

148RP 36-38.

During a break in arguments, the defendants moved for a mistrial, claiming that the reference to the beheading was a "blatant emotional plea," and was improper "given the racial background of Mr. Rafay." 148RP 124-25. The defendants did not request a curative instruction. The court denied the motion. 148RP 125.

The prosecutors later explained that the purpose of the reference to the beheading in Iraq was to remind the jury that, although the defendants had been at the crime scene and observed the bodies, they later were joking and giggling about the murders. 150RP 4-5. "The reference, the argument was intended to demonstrate just the lack of empathy on the part of the defendants, tending to show their identity as the killers, and for no other purpose." 150RP 5.

In light of the defendants' objection to the comment, the prosecutors proposed the following instruction:

> In his closing argument on Tuesday, the prosecutor referred to the beheading of a man in Iraq that has been recently reported in the media. You are instructed to disregard all such argument and to draw no inferences from it. It should not influence your deliberation in any way, in any respect. You are officers of the court and must act impartially and with an earnest desire to determine and declare the proper verdict. Throughout your deliberations you will permit neither sympathy nor prejudice to influence your verdict.

150RP 5-6.

Judge Mertel indicated that he would give the limiting instruction if the parties were in agreement. 150RP 8. The defendants never requested it, and the instruction was not given. At the beginning of his closing argument, attorney Robinson offered his own analogy and discussed the North Korean government's seizure of the USS Pueblo in 1968. 150RP 11. In this analogy, Burns and Rafay were the captured United States sailors and the RCMP officers were the communist North Koreans. 150RP 11-12.

On appeal, the defendants repeat their claim that the prosecutor's reference to the beheading improperly appealed to the jury's passions and prejudices. This claim should be rejected. The point of the prosecutor's remarks -- that the crime scene was

horrific -- was proper. It is not misconduct for the prosecutor to refer to the horrible nature of the crime. See Borboa, 157 Wn.2d at 123.

After many months of trial, the jury may have been conditioned to the crime scene photographs. It was appropriate to impress upon them that the crime scene in this case was horrific, because this was relevant in assessing the defendants' behavior afterwards. The defendants had seen the terrible injuries inflicted upon the Rafay family. The prosecutor was entitled to argue that their behavior after the murders, as well as their admissions to the murders, during which they laughed and joked, were inconsistent with having innocently stumbled across this awful scene.

The defendants complain that the analogy to the beheading was inappropriate because it involved militant Muslims, and Rafay is of Pakistani heritage. Yet the undisputed evidence was that Atif Rafay was not a Muslim. He told the police that he was not a Muslim and that none of his friends were Muslim. Ex. 72 at 88-89. It was the victims in this case who were Muslims, not their killers.

Nor was there ever a suggestion that the defendants had any religious motive in committing the murders. Instead, the State's

theory was clear – the defendants sought to inherit the Rafay family estate. 149RP 28-29, 209. The State charged this motive as an aggravating circumstance. CP 1-3.

The defendants claim that the prosecutor's comment is similar to that made in State v. Belgarde, 110 Wn.2d 504, 755 P.2d 174 (1988), which the Washington Supreme Court held was so improper as to justify a new trial. In Belgarde, the prosecutor made numerous, inflammatory comments about the American Indian Movement ("AIM"), an organization that the defendant was affiliated with. Several witnesses had testified that they delayed reporting what they knew about the murders because Belgarde had threatened to use AIM against them. Id. at 506. No other evidence about AIM was admitted. Id. at 509. In closing, the prosecutor talked about AIM at length, calling them a "deadly group of madmen" and stating:

> I remember Wounded Knee, South Dakota. Do any of you? It is one of the most chilling events of the last decade. You might talk that over once you get in there. That was the American Indian Movement. That was a faction of the American Indians that were militant, that were butchers, that killed indiscriminately Whites and their own. That event didn't end for some six years before all the court battles were done. Is

> AIM something to be frightened of when you are an Indian and you live on the reservation? Yes it is.

Id. at 507.

The court reversed, finding that the "[t]he remarks were flagrant, highly prejudicial and introduced 'facts' not in evidence." Id. at 508. The court found that it was improper for the prosecutor to invite the jury to discuss Wounded Knee during deliberations and that "[a] prosecutor has no right to call to the attention of the jury matters or considerations which the jurors have no right to consider." Id. at 508. The court noted that the State had not presented evidence about AIM and held:

> If the prosecution wished to put in evidence that Indians fear AIM, the vehicle was properly to present evidence to that effect. To himself "testify" as to the "madmen" and "butchers" that comprise the American Indian Movement is to deny the defendant his right to confront and cross-examine "witnesses". The prosecutor stepped far outside his proper role as a quasi-judicial officer and an advocate to give the jury highly inflammatory "information".

Id. at 509.

In Belgarde, the prosecutor's comments were improper because they introduced significant, arguably irrelevant and prejudicial information that had never been offered at trial. In this case, no reasonable juror would have thought that the prosecutor

was suggesting that the defendants were somehow affiliated with the beheading in Iraq. The prosecutor's reference to the beheading was an effort to suggest to the jury how a normal individual would react to a gruesome murder scene. This was appropriate.

The defendants further argue that the comment was an attempt to appeal to the jurors' patriotism, and cite to a number of cases where prosecutors made such appeals. See State v. Perez-Mejia, 134 Wn. App. 907, 917, 143 P.3d 838 (2006) (prosecutor improperly appealed to jurors' patriotism by quoting from the Declaration of Independence and asking the jury to send a message "as citizens of the State of Washington and the United States of America"). Here, the prosecutor's argument, viewed as a whole, made no attempt to appeal to the jurors' sense of patriotism. Such an appeal would have been rather odd in this case; the evidence clearly established that both the defendants and the victims were Canadian citizens and that a Canadian law enforcement organization, the RCMP, played a critical investigative role in the case.

Even if the prosecutor's comment was improper, the defendants' claim of error fails because they refused, without explanation, the State's proffered curative instruction. When

defense counsel does not request a curative instruction, the court can assume that the impropriety did not appear critically prejudicial. Swan, 114 Wn.2d at 661. Rather than request the curative instruction, defense counsel went on to his own discussion of Americans and their overseas captors. Because the defendants chose to make this argument and refused the curative instruction, this Court may presume that they did not believe that the prosecutor's comment was truly prejudicial.

Nor can the defendants show that there is a substantial likelihood that the prosecutor's reference to the beheading affected the jury's verdict in light of the total argument, the issues in the case, and the instructions given by the trial court. The remarks at issue were brief, they occurred at the beginning of a lengthy closing argument, and they constituted a very small part of the State's closing argument. The prosecutor proceeded to argue for another six hours, and the focus of the argument was, appropriately, on the evidence that had been admitted at trial.

Moreover, the challenged comment related to the brutal nature of the killings, which was not a contested issue. Finally, the court properly instructed the jury that the attorneys' arguments were not evidence, and that they were to disregard any argument not

supported by the evidence. 148RP 7; CP 3152. Given these circumstances, this Court cannot conclude that there is a substantial likelihood that the prosecutor's isolated reference to the beheading affected the jury's verdict. See State v. Barajas, 143 Wn. App. 24, 39-41, 177 P.3d 106, 115 (2007) (holding that prosecutor's improper analogy comparing the defendant to a "mangie [sic] mongrel mutt" did not warrant reversal because "the remarks at issue were brief and were only a small component of the State's overall argument at trial" and "[a]n instruction to the jury from the trial court to disregard the prosecutor's improper characterizations could have neutralized any prejudice."), review denied, 164 Wn.2d 1022 (2008).

d. The Comment Concerning Jennifer Osteen.

The defendants claim that the trial court erred by not granting a mistrial after the prosecutor suggested in rebuttal closing that he smelled alcohol on witness Jennifer Osteen.[112] When the defendants objected to the comment, the court immediately sustained the objection, struck the prosecutor's comment and

[112] By the time of trial, Osteen's last name was Haslund. 144RP 77, 89.

instructed the jury to disregard it. Given the trial court's actions and the marginal relevance of the witness, no new trial was warranted.

Jennifer Osteen was working as a waitress at Steve's Broiler on the night of the murders. 144RP 78. The State attempted to call her as a witness in its case-in-chief, but she was out of the state and unwilling to come and testify at that time. 144RP 85-88. The defense called her as a witness near the end of trial, and her testimony was very brief. 144RP 78-84. Although she was not the defendants' waitress, she had talked to them about clubs in the city. 144RP 79-80. When she later spoke with officers about the defendants, she stated that they appeared grubby and she did not think they had recently showered. 144RP 83.

Osteen testified that she first saw the defendants between 12:00 a.m. and 12:30 a.m. 144RP 79. She suggested that they arrived even earlier because they had been seated by Karen Lundquist, who got off work at midnight.[113] 144RP 96-97. During cross-examination, Osteen reviewed her 1994 taped statement and acknowledged telling a detective that she had first talked to the

[113] Lundquist had testified that she could have been seating customers as late as 12:15 or 12:30. 74RP 211. Christine Mars, who was Burns and Rafay's waitress at Steve's Broiler, recalled that they first appeared in her section at around 12:50 a.m. or 1:00 a.m. 75RP 12-23.

defendants a little after 12:30 a.m. 144RP 98. Osteen claimed she felt that the police wanted her to say that the defendants came into the restaurant later than they actually did. 144RP 100. When asked why she thought this, she explained that "they asked me if they came back in later in the evening." 144RP 101. Osteen was apparently unaware that waitress Christine Mars had told the police that, after the defendants initially left, they returned to use the restroom at around 1:40 a.m. 75RP 25-26.

Osteen apparently had problems walking up to the witness stand when she testified. After her testimony, the prosecutor informed the court that Osteen appeared to have been intoxicated. 150 RP 175. Defense counsel, who had called Osteen as a witness and presumably had direct contact with her, did not dispute the prosecutor's observation.

In closing argument, the prosecutor discussed the timeline for the night of July 12, 1994. 148RP 47-74. With respect to the defendants' appearance at Steve's Broiler, the prosecutor noted that three witnesses testified; he suggested that two waitresses, Christine Mars and Karen Lundquist, had provided consistent testimony. 148RP 67-69. The prosecutor briefly mentioned Osteen, noting that she could hardly get up and down the stairs

when testifying. "I encourage you to remember the way she had to navigate the stairs, into and out of the courtroom." 148RP 69. The defense made no objection to this comment.

In response, defense counsel argued to the jury that the prosecutor's comment about Osteen was "a cheap shot." 150RP 55. "I don't know where this is coming from, navigate her way to the witness stand or maneuver down from the witness stand. That woman was obviously terrified." Id. With respect to the substance of Osteen's testimony, defense counsel argued that her testimony showed that the police were biased because they doubted her statement that the defendants had come into Steve's Broiler a little before midnight. 149RP 199-200.

In rebuttal closing, the prosecutor returned to Osteen:

> **Prosecutor:** Let me tell you, last week was a challenge when Ms. Osteen was here, and I tried to be as polite as I could with her, but you saw the way she went up the stairs and you saw the way that she came down, and I smelled the way she was when she went up and down the stairs.
>
> **Defense Counsel:** Your Honor, I will object and ask that the jury be --
>
> **Court:** They will be, Mr. Robinson. I am going to sustain that objection and instruct the jury to disregard that remark and ask Mr. Konat to move to another argument or phase of your argument.

> **Prosecutor:** You have an instruction that tells you the things that you are to consider when trying to determine the credibility of a witness is their manner, their memory, and their demeanor while testifying. The point that we were trying to establish with Ms. Osteen last week was she didn't wait on them like she first told the detectives. She was wrong about the time that they arrived.

150RP 150-51.

The defendants later moved for a mistrial, complaining that the prosecutor had implied to the jury that Osteen was intoxicated.[114] 150RP 174-75. The court responded that "there is a remedy for it and I believe I remedied it. I instructed the jury to disregard it and to have him move on." 150RP 175.

On appeal, the defendants claim that the trial court should have granted a mistrial due to the prosecutor's comment on how Osteen smelled. This claim should be rejected. A "high degree of deference" is paid to the trial court in its decision to deny a mistrial for prosecutorial misconduct. State v. Luvene, 127 Wn.2d 690, 703-04, 903 P.2d 960 (1995). A trial court "should grant a mistrial only when the defendant has been so prejudiced that nothing short

[114] The defense acknowledged that the prosecutor had told the court immediately after her testimony that Osteen was intoxicated. 150RP 175.

of a new trial can insure that the defendant will be tried fairly." Lewis, 130 Wn.2d at 707 (citing State v. Johnson, 124 Wn.2d 57, 76, 873 P.2d 514 (1994)).

The court struck the prosecutor's comment and instructed the jury to disregard it. The jury is presumed to have followed the court's instructions. State v. Stein, 144 Wn.2d 236, 247, 27 P.3d 184 (2001). As the Washington Supreme Court has held with respect to an improper comment: "While this statement was not supported by the evidence, it was not prejudicial error that denied the defendants a fair trial since the jury is presumed to follow the court's instructions to disregard it." Swan, 114 Wn.2d at 661-62; see also State v. Fisher, 130 Wn. App. 1, 20, 108 P.3d 1262 (2005) (holding that the defendant was not prejudiced by the prosecutor's improper comment about the victim's competency because the trial court instructed the jury to disregard the comment), review denied, 156 Wn.2d 1013 (2006) .

Moreover, although the defendants now characterize Osteen as a "key" witness, her testimony was not of great significance at trial. Rafay's counsel did not even mention her testimony in closing argument. 149RP 116-215. Burns's counsel mentioned her only briefly. 150RP 55-56.

Osteen's testimony suggesting that the defendants may have arrived slightly earlier at Steve's Broiler than testified to by the other witnesses was not particularly helpful to the defense. The movie began at 9:50 p.m. on the night of the murders, and Burns admitted to leaving the movie early to commit the murders. Ex. 542 at 27-28. Testimony established that the drive from the Rafay residence to Steve's Broiler would take approximately 20 minutes. 101RP 53-57. Accordingly, whether the defendants arrived at Steve's Broiler at 12:00 a.m., 12:30 a.m. or 12:50 a.m., they had plenty of time to commit the murders.

Osteen's characterization of their appearance as "grubby" was also of marginal relevance. The defendants admitted in their taped statements to the Bellevue police that both had taken a shower that day -- Burns said that he had taken a shower only a few hours earlier before heading out that night. See Ex. 72 at 21-22; Ex. 76 at 15-16.

Given the trial court's ruling striking the comment, this Court cannot say that the prosecutor's comment prejudiced the defendants' right to a fair trial.

e. The Prosecutor's Reference To His Father's Death.

During closing argument, defense counsel Robinson made a number of personal comments. Arguing that Sultana Rafay must have been praying when she was killed, defense counsel pointed to the location of her glasses and commented, "I've worn glasses for most of my life, contact lenses and glasses now, but for those of you who wear glasses, when you are doing something, don't you tend to take your glasses off and put them down next to what you are doing?" 150RP 59. He told the jury that "I've got a six-year-old friend that stays the night with me sometimes, and when he hears noises in the night, he knows for certain that there is something coming to get him." 150RP 61.

Robinson ended his closing by discussing a conversation he had had with a friend the previous night:

> Last night, in talking to a friend who was trying to give me encouragement, I was told, "You know, Jeff, just do the best you can. This has been a six-month trial. You know the publicity that these jurors were exposed to before they ever walked into this courtroom. You know that it's going to be impossible for them to put those things out of their minds. You know that the state is giving them invitation after invitation to judge Mr. Burns on personality as opposed to evidence, and you know, they're just human beings. You really can't expect this to work out in the right way.

> And I was able to look at my friend, and I was able to say, "I know something you don't." And what I knew that he didn't is that I've looked into the eyes of this jury.

150RP 114.

During rebuttal closing, the prosecutor noted that defense counsel had made a number of these types of comments and offered his own:

> I want to talk for a moment about some comments that Mr. Robinson made this morning, and you know, I think it's always interesting when a defense lawyer spends so much time telling stories about things that really have nothing to do with this case, and I want to remind you that as interesting as those stories may be, they really don't shed any light on the guilt or innocence of Mr. Burns and Mr. Rafay.
>
> I want to tell you something. I have just one little thing to share with you. I was gone for a couple of days because my father died, and for those of you who haven't lost a parent, I encourage you to go back there and listen to the people who have and listen to the people on this jury who have lost a parent, and then you attempt to make sense of the way that these defendants laughed and giggled and snickered at the notion of their family, that is Atif Rafay's family, being murdered.
>
> I encourage you to consider at the time that you do that the way they laughed and they snickered and they giggled about the notion of Bob Thompson being murdered.

150RP 181-82.

After closing arguments concluded, the defendants moved for a mistrial, complaining that the prosecutor's mention of the death of his father was a "blatant attempt" to "garner good feelings" of the jury. 150RP 204. The court denied the motion.[115] 150RP 206. The defendants did not request a curative instruction.

The defendants claim on appeal that the prosecutor's reference in rebuttal to the death of his father was improper because it was based upon facts not in evidence and improperly appealed to the jury's sympathy and passions. BOA (Burns) at 165-67; BOA (Rafay) at 184-86. These claims should be rejected.

The defendants' complaint that the prosecutor's passing reference to the death of his father was based upon facts not in evidence is not well taken. The defendants cite no authority for the proposition that an attorney is prohibited from discussing any personal experiences in closing argument. See Price v. State, 365 Ark. 25, 37, 223 S.W.3d 817, 826 (2006) (not error to allow prosecutor to mention death of father in closing argument). In fact,

[115] In passing, the court noted that they had agreed not to tell the jury about the death of prosecutor Konat's father. 150RP 206. After Konat indicated that he was unaware of that agreement, the court and the attorneys recalled that the discussion had occurred in chambers while Konat was away. 150RP 206-07.

prior to the prosecutor's comment, defense counsel offered his own personal anecdotes, none of which was in evidence. Even if the prosecutor's remark was somehow improper, it was invited by defense counsel's earlier personal anecdotes. See Russell, 125 Wn.2d at 86 (remarks of prosecutor, even if improper, are not grounds for reversal if invited or provoked by defense counsel).

No reasonable juror would have thought that the prosecutor was suggesting that the death of his father was somehow evidence in the case. The jury was instructed that the attorneys' remarks in closing argument were not evidence. CP 3152. The court instructed the jury on this point multiple times, before argument began and immediately after it ended. 148RP 7; 150RP 191.

The claim that the prosecutor was appealing to the jury's passion and prejudice is belied by the brief nature of the comment. The prosecutor made only a passing reference to his father's death and did not belabor the point. The comment was made in the context of a larger argument encouraging the jury to consider their own life experiences about how people behave when they lose a relative. This was certainly proper argument. A juror is expected to bring his or her opinions, insights, common sense, and everyday

life experiences into deliberations. State v. Carlson, 61 Wn. App. 865, 878, 812 P.2d 536 (1991), review denied, 120 Wn.2d 1022 (1993). "Jurors may . . . rely on their personal life experience to evaluate the evidence presented at trial during the deliberations." Breckenridge v. Valley General Hosp., 150 Wn.2d 197, 199 n.3, 75 P.3d 944 (2003). This claim should be rejected.

f. Discussion Of Burns's Testimony.

During the prosecutor's rebuttal argument, he discussed Burns's attempt to explain his admissions to committing the murders. 150RP 189. Describing the parties as "polarized," the prosecutor explained: "You must either believe everything Sebastian Burns told you in order for this unbelievable story of his to be true, or it seems to me you have to believe what Gary and Al told you as they documented it through the months that they attempted to let -- or they attempted and/or encouraged to have these two killers let their guard down enough to believe that they were among their own kind." 150RP 190-91. The defendants made no objection to this argument. When they moved for a mistrial based upon alleged prosecutorial misconduct in closing argument, they never suggested that this comment was improper. See 150RP 204-07; CP 4775-76.

On appeal, the defendants now claim that this argument misstated the law and the burden of proof. BOA (Burns) at 159-61. Nowhere do they acknowledge that they never objected to the comment at trial.

The failure to object to improper statements constitutes a waiver unless the statement is so flagrant and ill-intentioned that it causes an enduring and resulting prejudice that could not have been neutralized by a curative instruction to the jury. State v. Dhaliwal, 150 Wn.2d 559, 578, 79 P.3d 432 (2003). A defendant cannot remain silent, speculate on a favorable verdict and, when it is adverse, use the alleged misconduct to obtain a new trial on appeal. Swan, 114 Wn.2d at 661. Here, no objection was made by either defendant at trial. On appeal, the defendants make no attempt to show that the prosecutor's statement was so flagrant and ill-intentioned that any prejudice could not have been neutralized by a curative instruction. The challenge to this comment was waived.

Even if the challenge was not waived, this claim of error should be rejected. While not artfully stated, the prosecutor was entitled to point out that Burns's testimony was completely at odds

with his admissions to the undercover officers. In State v. Wright, 76 Wn. App. 811, 818, 888 P.2d 1214, review denied, 127 Wn.2d 1010 (1995), the court noted that "there is nothing misleading or unfair in stating the obvious: that if the jury accepts one version of the facts, it must necessarily reject the others." This is undoubtedly why defense counsel saw no reason to object to the comment at trial.

The defendants claim that the prosecutor's remark was the equivalent to that made in State v. Fleming, 83 Wn. App. 209, 921 P.2d 1076 (1996), review denied, 131 Wn.2d 1018 (1997). This is incorrect. In Fleming, the prosecutor misstated the burden of proof by telling the jury that "for you to find the defendants . . . not guilty of the crime of rape in the second degree, . . . you would have to find either that [the victim] has lied about what occurred in that bedroom or that she was confused; essentially that she fantasized what occurred back in that bedroom." Id. at 213. On appeal, the court held that "it is misconduct for a prosecutor to argue that in order to acquit a defendant, the jury must find that the State's witnesses are either lying or mistaken." Id. at 213.

Similarly, in another case cited by defendants, State v. Barrow, 60 Wn. App. 869, 874-75, 809 P.2d 209, review denied, 118 Wn.2d 1007 (1991), the prosecutor argued that "in order for you to find the defendant not guilty on either of these charges, you have to believe his testimony and you have to completely disbelieve the officers' testimony." The court found that the comment was improper, but "not so inflammatory or prejudicial that reversal is required." Id. at 877.

Here, in contrast to Fleming and Barrow, the prosecutor did not misstate the burden of proof. He never argued that *in order to acquit* the defendants, the jury would have to make a particular finding. In fact, the prosecutor unequivocally told the jury during closing argument that the State had the burden to prove each element of the charged crime beyond a reasonable doubt. 150RP 149. He told the jury that "[t]he defense has no burden to prove any element of anything. The defense has no burden, whatsoever, to prove anything." 149RP 74. Given that the prosecutor did not misstate the burden of proof, this claim of error should be rejected.

In sum, none of the prosecutor's challenged comments warrants reversal of the convictions, particularly when reviewed in the context of the total argument, the issues in the case, the

instructions given by the trial court; and the evidence addressed in the argument. See Russell, 125 Wn.2d at 85-86. The prosecutor gave a lengthy eight-hour closing argument, which was devoted primarily to discussing the testimony and evidence at trial. The key issue in the case was whether the defendants' admissions to committing the murders to the undercover RCMP officers were true. None of the challenged comments directly addressed that issue. The trial court properly denied the defendants' motion for a mistrial.

11. REVERSAL IS NOT REQUIRED BASED ON THE CUMULATIVE ERROR DOCTRINE.

The defendants argue that, if none of the alleged errors they have claimed warrants reversal of these convictions on its own, the convictions should nevertheless be reversed based on the combined effect of these errors. This argument fails.

The cumulative error doctrine applies only where several trial errors occurred which, standing alone, may not be sufficient to justify reversal, but when combined may deny the defendant a fair trial. State v. Hodges, 118 Wn. App. 668, 673, 77 P.3d 375 (2003) (citing State v. Greiff, 141 Wn.2d 910, 929, 10 P.3d 390 (2000), review denied, 151 Wn.2d 1031 (2004)). Most of the claims of error raised by the defendants are meritless. Any that might have merit

nevertheless had no effect on the outcome of this six-month trial. See Russell, 125 Wn.2d at 94 (finding certain comments made by the prosecutor "troublesome," but concluding that "[g]iven the scope of this trial, however, we do not find that the comments had a material effect on its outcome, nor do we believe that a different result would have been reached in their absence"). The convictions should be affirmed.

D. CONCLUSION

For all of the foregoing reasons, the State respectfully asks this Court to affirm the defendants' convictions for Aggravated Murder in the First Degree.

DATED this 25th day of November, 2008.

Respectfully submitted,

DANIEL T. SATTERBERG
King County Prosecuting Attorney

By: Deborah A. Dwyer
DEBORAH A. DWYER, WSBA #18887
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Certificate of Service by Mail

Today I deposited in the mail of the United States of America, postage prepaid, a properly stamped and addressed envelope directed to **David B. Koch**, the attorney for the appellant, at **Nielsen, Broman & Koch, PLLC**, 1908 East Madison, Seattle, WA 98122, containing a copy of the **Consolidated Brief of Respondent**, in **STATE v. ATIF RAFAY**, Cause No. **55217-1-I,** in the Court of Appeals for the State of Washington, Division I.

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

LBrame
Name
Done in Seattle, Washington

11/25/08
Date

Certificate of Service by Mail

Today I deposited in the mail of the United States of America, postage prepaid, a properly stamped and addressed envelope directed to **Elaine L. Winters**, the attorney for the appellant, at **Washington Appellate Project**, 1511 Third Avenue, Suite 701, Seattle, WA 98101, containing a copy of the **Consolidated Brief of Respondent**, in **STATE V. GLEN SEBASTIAN BURNS**, Cause No. **55217-1-I**, in the Court of Appeals for the State of Washington, Division I.

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

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Name

11/25/08
Date

Done in Seattle, Washington

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