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COURT OF APPEALS
STATE OF WASHINGTON
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NO. 63729-1-I

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

STATE OF WASHINGTON,

Respondent,

v.

KYLE PINNEY,

Appellant.

APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE MARY ROBERTS

BRIEF OF RESPONDENT

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A. ISSUES PRESENTED

1. Whether there is any merit to Pinney's claim that he was deprived of a fair trial because the State improperly commented on his Fifth Amendment right to counsel when any such alleged error was invited by Pinney after the door was opened by Pinney, and where the record does not support Pinney's claim.

2. Whether the condition of community custody requiring Pinney to obtain a mental health evaluation should be stricken from the judgment and sentence because the trial court did not follow the required statutory procedures.

B. STATEMENT OF THE CASE

1. PROCEDURAL FACTS

The State charged the defendant, Kyle Pinney, with murder in the first degree (premeditated murder) and, in the alternative, murder in the second degree (intentional murder and felony murder based on assault), both with firearm enhancements, for the February 23, 2008 killing of Stephen Brewer. CP 1-7. Pinney's jury trial on these charges occurred in June 2009 before the Honorable Mary Roberts.

At the conclusion of the trial, the jurors were unable to reach a verdict on murder in the first degree, but they convicted Pinney of murder in the second degree with a firearm enhancement. CP 76-83; RP (6/26/09) 2-8. The trial court imposed a standard-range sentence totaling 260 months in prison. CP 97-104; RP (6/26/09) 37. As a condition of community custody, the court ordered Pinney to obtain a mental health evaluation and follow any treatment recommendations. CP 104; RP (6/26/09) 37-38. Pinney now appeals. CP 95.

2. SUBSTANTIVE FACTS

20-year-old Stephen "Steveo" Brewer was well-known and well-liked by the inhabitants of Amber Sateren's neighborhood in Renton. Brewer liked to "hang out" and spend time with Sateren and other neighborhood friends in the alley behind Sateren's house. RP (6/3/09) 116-19. Brewer often played his guitar at these gatherings, which at least one of the older neighbors appreciated as well. RP (6/3/09) 107.

On Thursday, February 21, 2008, Brewer came over to Sateren's house and had a few beers with Sateren and her boyfriend, Michael Mosely. Brewer spent the night at Sateren's

house, and the next morning, on Friday, February 22, 2008, he went to work with Mosely at Labor Works. RP (6/3/09) 156. Brewer and Mosely returned to Sateren's late that afternoon, and another friend named Matt Cooper came over as well. RP (6/3/09) 121, 157. Cooper was already drunk when he arrived, and he continued to get drunker by drinking Everclear. RP (6/3/09) 158; RP (6/4/09) 186. Brewer played his guitar. RP (6/3/09) 121. Eventually the beer supply ran out, so Sateren and Cooper decided to go to the store. RP (6/3/09) 122-23. But as they were leaving, they noticed some people standing in front of the house, so they drove around the block and came right back to the house to see what was going on. RP (6/3/09) 123.

Pinney and his friend Jesse Bertram had come looking for Sateren's younger brother Sean. RP (6/3/09) 124. Apparently, there was bad blood between Pinney and Bertram and Sean for reasons that were not entirely clear. RP (6/3/09) 127; RP (6/9/09) 114. Pinney and Bertram were "kind of riled up," so Brewer and Mosely came outside to see what they wanted. RP (6/3/09) 125. Pinney and Brewer got into an argument, during which Pinney pulled a gun from the front of his pants and held it pointed

downward by his leg. RP (6/3/09) 126-28, 160. Shortly thereafter, the arguing ended and Pinney and Bertram left. RP (6/3/09) 131.

Brewer again spent the night at Sateren's house, and he was there off and on the following day, which was Saturday, February 23, 2008. RP (6/3/09) 132. Late that afternoon, Brewer called his mother from Sateren's house. RP (6/3/09) 165. The last time Brewer's mother heard from him was at approximately 7:00 p.m. RP (6/2/09) 41-42. During that last phone call, Brewer told his mother he would come home for the weekend. Brewer told her that he would take a ferry, and he asked her to pick him up "on the other side." RP (6/2/09) 42. Brewer said he would try to be on a ferry by not later than 10:15 p.m., but his mother never heard from him again. RP (6/2/09) 43-44.

Andrew Tucker, Richard Saechao and Cody Krebs were three other young denizens of Amber Sateren's neighborhood. These three young men could frequently be found smoking marijuana near the alley behind their houses. That same Saturday evening, after a full day of smoking marijuana, Tucker, Saechao and Krebs were sitting in Saechao's mother's car in the back yard of Krebs's house, smoking yet more marijuana. RP (6/4/09) 13-16, 48-49, 86-88. As they sat in the car, the three smokers saw

Pinney, his friend Eric Warren, and Stephen Brewer walking up the nearby hill toward the alley. There did not appear to be any problems between them. Brewer was carrying his guitar. RP (6/4/09) 16-17, 51, 89-91. Warren stopped briefly to talk to the young men in the car, while Pinney and Brewer continued toward the alley. RP (6/4/09) 18-19; RP (6/9/09) 36-37.

When Warren reached the alley, although it was dark, he could see Pinney pointing his gun at Brewer, who was just standing there approximately three feet away. Warren then heard a gunshot, and he saw Brewer collapse. RP (6/9/09) 38, 45. Warren turned and ran, but he heard two more shots as he was retreating. RP (6/9/09) 62. The three smokers heard the gunshots as well, and they saw Warren leaving the alley ahead of Pinney. RP (6/4/09) 21-25, 54-59, 92-93. Richard Saechao asked Pinney where Brewer was, and Pinney said, "He is dead." RP (6/4/09) 105. When Pinney caught up to Warren, Pinney said, "He better be dead." RP (6/9/09) 38. As Pinney and Warren were leaving the neighborhood, Pinney hid his gun in a bush. RP (6/9/09) 39.

Pinney and Warren walked to Pinney's mother's house, but when they got there, Pinney decided he needed to retrieve the gun. Pinney convinced a reluctant Warren to come along and help him.

RP (6/9/09) 40. As Pinney was searching the bushes, he asked Andrew Tucker's sister Jessica for a metal detector. Jessica asked Pinney why he needed one, and he "said he shot somebody" and "[h]e threw it." RP (6/4/09) 120-21. Pinney was not able to find the gun. RP (6/9/09) 41.

Although the three smokers, Jessica Tucker, and Eric Warren knew that Pinney had shot Stephen Brewer in the alley, none of them called the police. In fact, no one called the police until the following day, when neighborhood resident David Pearson discovered Brewer's body lying in the alley, with the guitar still slung over his shoulder. RP (6/3/09) 103-08.

Brewer had been shot three times: once in the neck, once in the chest, and once in the head. RP (6/4/09) 140-60. The entrance wound on Brewer's head went through the left eyebrow, and was surrounded by stippling, which indicates that this shot had been fired from close range. RP (6/4/09) 140-43.

Renton Police Detective Norm Ryan found Pinney's gun in the bush using a metal detector. RP (6/3/09) 38-39. The gun was a .22 caliber Ruger revolver. RP (6/3/09) 30. DNA collected from the trigger, the hammer, and the handle of the Ruger matched Pinney's DNA. RP (6/8/09) 29-30. The random match probability

was one in 22 billion people. RP (6/8/09) 36. One of the bullets recovered from Stephen Brewer's body was conclusively matched to Pinney's Ruger. The other two bullets, while not conclusive matches, were consistent with the gun's characteristics. RP (6/8/09) 79.

Pinney was arrested in Tacoma on February 26, 2008, three days after the shooting. RP (6/9/09) 81-83. Detective Frederick Yohann and Detective Keith Hansen conducted a custodial interview at the Renton Police station. RP (6/8/09) 84. During that interview Pinney claimed he was at his mother's house at the time of the shooting on Saturday evening. RP (6/9/09) 85-86. Pinney admitted he had seen Stephen Brewer on Friday evening, but denied that there had been an argument between them. RP (6/9/09) 86. Pinney also admitted he had handled a gun on Friday evening, but claimed that the gun belonged to Brewer. RP (6/9/09) 88-89.

When the detectives confronted Pinney with the fact that his statements were inconsistent with what all the other witnesses had said, Pinney insisted that all of the other witnesses were lying and conspiring against him. RP (6/9/09) 89-90. After the interview had

ended¹ and the detectives were escorting Pinney to the Renton city jail, Pinney spontaneously stated that he was going to talk to his lawyer about "a self defense defense." RP (6/9/09) 90. This was the first time Pinney had said anything about self-defense. RP (6/9/09) 91.

Pinney testified at trial, and claimed that he shot Stephen Brewer in self-defense because Brewer had tried to hit Pinney with his fists. RP (6/9/09) 152-53.

C. ARGUMENT

1. **ANY ALLEGED "COMMENT" ON PINNEY'S RIGHT TO COUNSEL WAS INVITED BY PINNEY AFTER THE DOOR WAS OPENED BY PINNEY DURING CROSS-EXAMINATION OF A STATE'S WITNESS AND IN PINNEY'S OWN TESTIMONY.**

Pinney argues that he is entitled to a new trial because the State elicited testimony from Detective Hansen that constituted a direct comment on Pinney's Fifth Amendment right to counsel. More specifically, Pinney points to a portion of the record where Detective Hansen explained that Pinney's custodial interview ended

¹ As will be discussed in far greater detail in the first argument section below, the detectives decided to end the interview because Pinney made an equivocal request for counsel. However, this fact was not brought to the attention of the jury until Detective Yohann's cross-examination by Pinney's defense attorney. RP (6/9/09) 98.

when Pinney said that "maybe [he] should have an attorney."

Further, because Pinney did not object at trial, Pinney claims that Hansen's testimony amounts to manifest constitutional error that may be raised for the first time on appeal under RAP 2.5. Brief of Appellant, at 8-16.

This Court should reject Pinney's claim, which is based on a distorted and misleading version of the record. As Pinney's trial attorney conceded, Detective Hansen testified as a proper rebuttal witness after Pinney himself had invited and opened the door to the subject of the equivocal request for counsel made during his custodial interview with the detectives. Therefore, the testimony was entirely appropriate under the circumstances. Moreover, even if Pinney's claim is considered on the merits, it fails because the State did not ask the jury to infer guilt from the exercise of a constitutional right. Accordingly, no error occurred, whether manifest or otherwise.

As a preliminary matter, the statement of facts in Pinney's brief is woefully incomplete. Specifically, it jumps from Detective Yohann's direct examination in the State's case-in-chief on June 9, 2009 – during which the State *did not* elicit any testimony regarding Pinney's equivocal request for counsel – to Detective Hansen's

testimony during the State's rebuttal case on June 10, 2009. See Brief of Appellant, at 5-6 (jumping from "7RP 87-90" and "7RP 90, 98," to "8RP 97-98" and "8RP 98-99"). In so doing, Pinney omits defense counsel's cross-examination of Detective Yohann and Pinney's own trial testimony, both of which placed the circumstances surrounding Pinney's equivocal request for counsel squarely at issue. Thus, in order to provide this Court with a fair and undistorted view of what actually occurred at trial, a detailed review of the trial record is necessary.

a. Additional Facts Are Necessary To Evaluate Pinney's Claim.

As noted, Detective Yohann testified about Pinney's custodial interview during the State's case-in-chief. During the prosecutor's direct examination, Detective Yohann did not mention the equivocal request for counsel by Pinney that had prompted the detectives to terminate the interview. RP (6/9/09) 84-91. Rather, Yohann testified that Pinney insisted that the witnesses "were all lying and out to get him," that Yohann and Hansen eventually told Pinney that this story "didn't pass the smell test," and that when the interview ended (without telling the jury why it ended), they took

Pinney "back down to the jail, using the elevators." RP (6/9/09) 90. At that point, Yohann explained that Pinney "said something about mentioning to his attorney about a self defense defense," and that this was the first time Pinney had said anything at all about self-defense. RP (6/9/09) 90-91.

Defense counsel then began her cross-examination of Yohann by establishing that Pinney had been advised of his rights, including specifically the right to counsel. RP (6/9/09) 91-94. Shortly thereafter, the following exchange occurred between Pinney's defense counsel and Yohann:

Q: At some point Detective Hansen questioned the validity of [Pinney's] story?

A: Yes.

Q: And about him continuing to accuse everybody involved in making up lies?

A: Yes.

Q: *And then he asked for an attorney?*

A: Yes.

Q: One moment, please.

At some point, were you present when Detective Hansen said that Mr. Pinney would be better off telling the two of you what actually happened? Do you remember him saying that at any point?

A: Not specifically, but that would be something we would encourage him to do, certainly.

Q: Okay.

A: It would not be unusual for that to have taken place.

Q: *And after that, isn't that when he asked for an attorney and mentioned that he would be looking at the self defense defense?*

A: *Yes. I suppose right after, in that area of time frame, he did eventually ask for an attorney, and at that point we stopped the questioning and returned him to the jail.*

Q: And that's when he brought up the term self-defense?

A: Well, I recall him mentioning the self defense defense about the time we were getting off the elevator at the jail.

RP (6/9/09) 97-99 (emphasis supplied).

At this point, there were no further questions from either party, and the State rested its case. RP (6/9/09) 99. Accordingly, the only testimony regarding Pinney's equivocal request for counsel during the State's case-in-chief was elicited *by Pinney* during Detective Yohann's cross-examination.

Pinney then testified during the defense case, and claimed that he had shot Stephen Brewer in self-defense because Brewer had tried to punch him. RP (6/9/09) 152-53. Pinney also testified

to a very different version of what had happened at the end of his custodial interview with Detective Hansen and Detective Yohann. Pinney admitted that he had lied to the detectives about what had occurred the Friday evening before the shooting, and he also admitted that he had told the detectives that all of the witnesses were lying and conspiring against him. RP (6/9/09) 162-65. However, Pinney then had the following exchange with his defense attorney regarding what had transpired at the end of the interview:

Q: And so, then, did Detective Hansen question the story that you were telling them about everyone making up lies?

A: Yes.

Q: And what did you do when he said that? Did he ask you to tell the truth?

A: Well, it wasn't until he said that I would be better off telling them what happened, and I was still hesitant about telling them what happened. But on the way to the, back to the [jail] facility, they told me if I had anymore, anything else I wanted to talk to them about, that the facility had the number; *and that's when I said I'll talk to them about self defense, but I need, I need to talk to my lawyer.*

RP (6/9/09) 165 (emphasis supplied). The prosecutor's cross-examination of Pinney then began shortly thereafter, and continued until the end of the business day. RP (6/9/09) 166-84.

The next morning, before Pinney resumed his testimony, the prosecutor gave notice on the record that he would be calling Detective Hansen as a rebuttal witness "because it's the State's position that the defendant mischaracterized the conversation the two of them had." RP (6/10/09) 11. In response, Pinney's defense attorney conceded that Hansen's testimony regarding his interaction with Pinney would be "proper rebuttal" under the circumstances. RP (6/10/09) 14.

The prosecutor's cross-examination of Pinney then continued. Among other subjects, the prosecutor confirmed that the detectives had advised Pinney of his rights, and that Pinney understood those rights. RP (6/10/09) 55-58. Pinney then denied that Detective Hansen had challenged the veracity of his story that all the witnesses were lying. RP (6/10/09) 61. At that point, the following exchange ensued between the prosecutor and Pinney:

Q: And you had no thought in your mind that said that Detective Hansen was suggesting to you that maybe you should claim the self defense because the story you were giving them right now is a bunch of baloney, correct?

A: Correct. No.

Q: It was pretty obvious to you, though, that Detective Hansen, listening to your story, didn't believe a word you were saying, did he?

A: Well, I mean, we could carry out the point. It's just they said I might as well, you know, tell them what happened.

Q: But you didn't tell them what happened, did you?

A: I did several minutes later, yeah.

Q: Seven minutes later?

A: Several.

Q: Several minutes later?

A: Yes.

Q: Okay.

A: On the way down to the facility.

Q: Right. So, after you said you wanted a lawyer, the detectives stopped asking you questions, they put the handcuffs back on you, they walked you to the elevator, they got in the elevator with you, you went down the elevator back to the jail. And after you got off the elevator, you made the comment, "Maybe I'll talk to my lawyer about that self defense thing."

A: No.

Q: Do you remember that statement?

A: They said, they said that if I had anything I wanted to tell them, that the facility would have the number. And then I said, "I would like to talk to them about the self defense thing, but my, I need to contact my lawyer first."

RP (6/10/09) 61-63.

After the defense rested, as Pinney's counsel had already agreed, Detective Hansen was called as a rebuttal witness to testify about, among other things, the exact content of Pinney's statements and the surrounding circumstances. As is relevant here, Hansen's rebuttal testimony was as follows:

Q: Uh-huh. Okay. But was [Pinney] pretty adamant about the fact that people were conspiring against him at this point?

A: Yes.

Q: How did you respond to that?

A: I told him that nobody was going to believe this, and I said, "You might as tell [sic] us that you did it, but make up a reason," and then I said, "Like Stephen started to fight with me."

Q: So you remember specifically saying that to Mr. Pinney?

A: Yes.

Q: And did you write that in your follow-up as something that you said to Mr. Pinney as well?

A: Yes.

Q: So when you said to Mr. Pinney, "You might as well make up a reason, and say something like Stephen started --"

A: "Stephen started the fight."

Q: -- "started the fight," how did Mr. Pinney respond to that?

A: He went right back to the conspiracy, "Everybody is making up this story about me."

Q: So he didn't make any comments at all about this statement you just made to him about maybe claiming self defense or that Stephen started the fight?

A: No.

Q: How much longer did the conversation last with Mr. Pinney there after you made that statement to him?

A: You know, it didn't go on very much longer, and then he said, again, "Well, maybe I should have a [sic] attorney."

Q: So, when he said to you, "That maybe I should have an attorney," what did you guys do at that point?

A: We just ended the interview at this time.

Q: And why is that?

A: Because we had already explained to him once, you know, that -- earlier in the interview, he had already said something, "Well, maybe I should have an attorney." And I think it was Detective Yohann explaining to him the rules we played by, and told him that if he wants an attorney, you know, to tell us, and we'll stop the interview. We have to stop the interview.

Q: Okay.

A: And he started, he started talking again.

Q: About this conspiracy theory?

A: About, about the conspiracy.

Q: Okay.

A: So then the second time when he did that, we thought, "No, let's just end it." So we just ended the interview.

RP (6/10/09) 97-99.

After the prosecutor clarified with Detective Hansen that Pinney had been properly advised of his rights, including the right to an attorney, and that although Pinney's request for counsel was equivocal Hansen and Yohann thought it best to terminate the interview, the following exchange ensued:

[By the prosecutor:] So you indicate that you didn't ask him any questions at that time. Did he make any statements to you after you guys got off the elevator?

A: Yes, he did.

Q: And what did he say?

A: And if I can look at my notes just to make sure that I can get this accurate.

Okay. He said that, he said, "Maybe I should talk to my attorney this [sic] self-defense thing."

Q: Okay. "Maybe I should talk to my attorney about that self defense thing." And that was the statement that the defendant made at that point?

A: Yes.

Q: Other than the fact that you had brought up with him earlier in the interview that maybe he should come up with a better story like, say, Stephen started the fight, was there any other conversations that you had with him about whether this was self defense?

A: No.

Q: Did the defendant make any statement to you that would lead you to believe that he was saying that Stephen had attacked him first?

A: No.

Q: -- other than this one statement?

Thank you, Detective. I have no further questions.

RP (6/10/09) 101-02.

Lastly, during Pinney's attorney's second cross-examination, Detective Hansen directly contradicted Pinney's version of what had occurred at the end of the interview:

Q: Did Mr. Pinney indicate that he would get back to you about that self defense thing after he had a chance to talk to an attorney?

A: No.

Q: So, when you were going down, taking him back to the jail from the interview room, he didn't indicate that he would get back to you?

A: No.

Q: How did you leave it, in terms of talking to him in the future?

A: I don't, I don't know that there was anything.

Q: So, you took him down the elevator. Were you with Detective Yohann?

A: Yes.

Q: And you got to the place where you were going to leave Mr. Pinney?

A: Yes.

Q: And he brought something up about the self defense thing at that time?

A: Yes. I recall it was just as he was stepping out of the elevator, right around that area.

Q: And do you remember his exact words?

A: Well, I know that he said, "I'm going to talk to my attorney about that self defense thing."

Q: And did he say he would get back to you about it?

[By the prosecutor]: Asked and answered.

THE COURT: Sustained.

RP (6/10/09) 111-12. At that point, both parties stopped questioning Detective Hansen and rested. RP (6/10/09) 112.

During the State's closing argument the following day, the prosecutor did not even mention Pinney's custodial interview with the detectives. RP (6/11/09) 8-37. By contrast, Pinney's defense attorney argued in closing that the jury should adopt Pinney's

version of what occurred, i.e., that Pinney told the detectives, "I want to see an attorney, and I want to talk to an attorney about a possible self-defense." RP (6/11/09) 53-54. In rebuttal, the prosecutor argued that "the light bulb" did not go on for Pinney as far as claiming self-defense until after Detective Hansen mentioned it first. RP (6/11/09) 63. In neither his closing nor in his rebuttal did the prosecutor mention Pinney's equivocal request for counsel, which had terminated the custodial interview. RP (6/11/09) 8-37, 62-74.

It is in light of this record that Pinney claims that he was deprived of a fair trial because the State violated his constitutional rights.

b. The Invited Error Doctrine Bars Pinney's Claim.

The invited error doctrine dictates that a party may not set up a potential error at trial and then claim that alleged error as a basis for reversal on appeal. In re Dependency of K.R., 128 Wn.2d 129, 147, 904 P.2d 1132 (1995); State v. Henderson, 114 Wn.2d 867, 870-71, 792 P.2d 514 (1990). Under the invited error doctrine, a claim of error cannot be raised "if the party asserting such error *materially contributed thereto.*" In re K.R., 128 Wn.2d at 147

(emphasis supplied). Such material contribution may include acquiescence as well as direct participation. See State v. Bailey, 114 Wn.2d 340, 787 P.2d 1378 (1990); State v. Lewis, 15 Wn. App. 172, 548 P.2d 587, rev. denied, 87 Wn.2d 1005 (1976). The invited error doctrine bars a claim on appeal even if that claim concerns the defendant's constitutional rights. City of Seattle v. Patu, 147 Wn.2d 717, 720-21, 58 P.3d 273 (2002). The invited error doctrine bars Pinney's claim here.

As previously noted, Pinney's equivocal request for counsel at the end of his custodial interview was not even mentioned at trial until Pinney's attorney purposefully cross-examined Detective Yohann about it. From that point forward, the record reveals that Pinney's attorney had made the strategic decision to broach this subject in order to present Pinney's own, far less incriminating version of the "maybe I should talk to my lawyer about that self-defense thing" statement that Pinney had made. Although this strategic approach was certainly legitimate, as any reasonable trial attorney would have wanted to try to explain an incriminating statement such as, "maybe I should talk to my lawyer about that self-defense thing," this strategic approach necessarily invited the

alleged error Pinney now claims on appeal. Accordingly, Pinney's claim fails.

c. The Open Door Doctrine Defeats Pinney's Claim.

Unlike the invited error doctrine, which is essentially a rule of appellate procedure, the "open door" doctrine is an evidentiary principle whereby a party who introduces evidence that may otherwise be inadmissible "opens the door" to rebuttal with more inadmissible evidence introduced by the adverse party. 5 K. Tegland, Wash. Prac. Evidence § 103.14, at 66-67 (5th Ed. 2007). Although their equitable underpinnings are similar, a major difference between the invited error doctrine and the open door doctrine is that the former is triggered when a party has induced the trial court to err, whereas the latter is, in essence, an exception to the rules of evidence vis-à-vis the adverse party. See State v. Jones, 144 Wn. App. 284, 297-99, 183 P.3d 307 (2008) (explaining the distinction between inviting error and opening the door).

As discussed above, Pinney's trial attorney elicited the first testimony regarding Pinney's equivocal request for counsel during her cross-examination of Detective Yohann as part of a strategy to

address the highly incriminating, spontaneous statement that Pinney had made on the way to the jail. Undoubtedly recognizing that this would open the door to further inquiry, Pinney's attorney did not object at any point when the prosecutor presented further testimony attempting to clarify exactly what had occurred. Indeed, Pinney's attorney agreed on the record that Detective Hansen was a proper rebuttal witness on the subject. RP (6/10/09) 14. In sum, Pinney clearly opened the door to this topic at trial, and his claim on appeal is without merit.

d. The State Did Not Ask The Jury To Infer Guilt From Pinney's Equivocal Request For Counsel.

Finally, in the alternative, even if this Court were to consider Pinney's claim on the merits, it fails nonetheless because the State did not ask the jury to infer Pinney's guilt because he made an equivocal request for an attorney. Rather, the State asked the jury to infer Pinney's guilt from the wealth of admissible evidence proving his guilt.

Pinney is correct that an impermissible comment on the defendant's exercise of a constitutional right is an issue that may be raised for the first time on appeal. See State v. Keene, 86 Wn.

App. 589, 592, 938 P.2d 839 (1997). However, an impermissible comment on the defendant's exercise of Miranda² rights occurs only when it is used to the State's advantage, i.e., it is presented and argued to the jury as substantive evidence of guilt. State v. Sweet, 138 Wn.2d 466, 481, 980 P.2d 1223 (1999). That is not what occurred in this case.

First, as discussed at length above, the record shows that the State did not intend to elicit any testimony about Pinney's equivocal request for an attorney, and only did so in rebuttal after Pinney had placed that issue squarely before the jury. Furthermore, nothing about the State's questioning of Detective Hansen or the prosecutor's closing argument suggested to the jurors that they should find Pinney guilty because he made an equivocal request for an attorney. Rather, the prosecutor presented evidence and then argued to the jury that Pinney's self-defense claim was bogus because, among other reasons, the very idea of self-defense was first suggested to Pinney by the detectives. Put another way, Pinney's statement that he was going to "talk to his attorney about that self-defense thing" was not

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

incriminating because it came after Pinney's equivocal request for counsel. Rather, that statement was incriminating for other fairly obvious reasons, both in content and context.

In sum, the State did not comment on Pinney's Fifth Amendment right to counsel because the State did not ask the jury to infer guilt from Pinney's exercise of that right. This Court should reject Pinney's claim to the contrary, and affirm.

2. THE STATE CONCEDES THAT THE CONDITION OF COMMUNITY CUSTODY REQUIRING A MENTAL HEALTH EVALUATION SHOULD BE STRICKEN FROM THE JUDGMENT AND SENTENCE.

Pinney next argues that the trial court exceeded its statutory authority by ordering Pinney to obtain a mental health evaluation as a condition of community custody. Brief of Appellant, at 16-20. The State agrees.

Under the SRA, which governs felony sentencing, the trial court may order a mental health evaluation and treatment as a condition of community custody only when certain procedures are followed. More specifically, under RCW 9.94A.505(9), the trial court must find "that reasonable grounds exist to believe that the

offender is a mentally ill person as defined in RCW 71.24.025," and that the offender's mental illness contributed to the offense. State v. Jones, 118 Wn. App. 199, 209, 76 P.3d 258 (2003). In addition, the trial court's order should be based on a presentence report. Id.; see also State v. Lopez, 142 Wn. App. 341, 353-54, 174 P.3d 1216 (2007), rev. denied, 164 Wn.2d 1012 (2008).

In this case, although Pinney did not dispute that he may need mental health treatment and did not object to this condition of community custody at the time of sentencing, the record does not establish compliance with the required statutory procedures. RP (6/26/09) 29-37. Accordingly, the State agrees that the condition of community custody requiring Pinney to obtain a mental health evaluation and comply with any recommended treatment should be stricken from Pinney's judgment and sentence. CP 104.

D. CONCLUSION

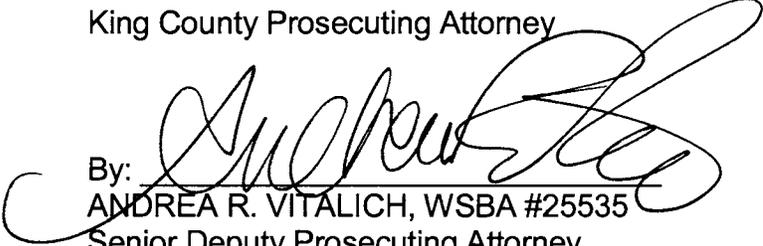
This Court should affirm Pinney's conviction for murder in the second degree because Pinney's claim that he was deprived of a fair trial due to testimony commenting on his right to counsel is wholly without merit. However, this Court should remand for entry

of an order striking the condition of community custody requiring a
mental health evaluation from Pinney's judgment and sentence.

DATED this 15th day of March, 2010.

Respectfully submitted,

DANIEL T. SATTERBERG
King County Prosecuting Attorney

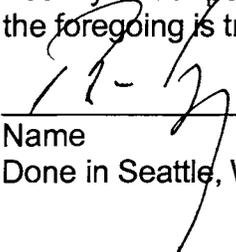
By: 

ANDREA R. VITALICH, WSBA #25535
Senior Deputy Prosecuting Attorney
Attorneys for Respondent

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 Andrew Zinner, the attorney for the appellant, at Nielsen Broman & Koch, P.L.L.C., 1908 E. Madison Street, Seattle, WA 98122, containing a copy of the Brief of Respondent, in STATE V. KYLE PINNEY, Cause No. 63729-1-I, in the Court of Appeals, Division I, for the State of Washington.

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



Name

Done in Seattle, Washington

08/15/10

Date