

NO. 65809-3-I

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

STATE OF WASHINGTON,

Respondent,

v.

DZEVAD KULOGLIJA,

Appellant.

APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE JIM ROGERS

BRIEF OF RESPONDENT

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COURT OF APPEALS
STATE OF WASHINGTON

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A. ISSUES PRESENTED

1. Whether the trial court properly found that Kuloglija's statements to police were admissible because the initial questions fell within the public safety exception to Miranda requirements, the second set of statements were after advice and waiver of his rights, and the remainder of the statements were spontaneous and not the product of interrogation.

2. Whether Kuloglija waived any error in mention of the term "domestic violence" during trial testimony, where he agreed to use of the term during voir dire and there was no objection at trial.

3. Whether testimony about evidence at the scene, including blood spatter, was properly admitted lay opinion.

4. Whether Kuloglija waived any error in the admission of opinion testimony of the victim's treating physician.

5. Whether Kuloglija waived the claimed errors in the admission of testimony that in 2007 a detective spoke to Kuloglija in English, when no such objection was made at trial.

6. Whether Kuloglija cannot claim error in the exclusion of testimony of Suada Curavac when that testimony was admitted.

7. Whether sufficient evidence supports a conviction for attempted murder, when the defendant repeatedly confessed.

B. STATEMENT OF THE CASE

1. PROCEDURAL FACTS

The defendant, Dzevad Kuloglija, was charged with attempted murder in the second degree and assault in the first degree, in the alternative, both with deadly weapon enhancements. CP 67-68. The State also charged an aggravating factor as to each count: that the victim, Alija Kuloglija, was particularly vulnerable or incapable of resistance. CP 67-68. Kuloglija was tried in King County Superior Court, the Honorable Jim Rogers presiding. 1(a)RP 1, 3-4.¹ A jury found Kuloglija guilty as charged on both counts. CP 130-35. The court later dismissed the assault in the first degree conviction on the State's motion. 7RP 7.

Kuloglija moved to arrest judgment based on insufficiency of the evidence; the motion was denied. CP 140-42, 150; 7RP 6. The court imposed a standard range sentence. 7RP 15.

2. SUBSTANTIVE FACTS

On October 15, 2009, defendant Dzevad Kuloglija stabbed his elderly mother in the chest repeatedly, as she struggled to

¹ The volumes of the reports of proceedings that are cited by Kuloglija are referred to in this brief using the same numbering system: 1RP - June 1-2, 2010; 1(a)RP - June 1, 2010; 2RP - June 3, 7, 8 and 9, 2010; 2(a)RP - June 7-8, 2010; 2(b)RP - June 9, 2010; 3RP - June 14, 2010; 4RP - June 15-16, 2010; 5RP - June 17 and 21, 2010. Additional volumes are referred to as follows: 6RP - January 7, 2010; 7RP - July 23, 2010.

resist. Kuloglija's mother, Alija Kuloglija,² suffered life-threatening injuries but recovered.

Officers responded to a 911 call of a stabbing and came into the apartment through an entry covered with blood, where Alija Kuloglija lay critically injured. 2RP 56-57. They went inside to check for other victims or suspects. 1RP 24. Kuloglija shared this apartment with his parents but his father had been hospitalized days before. 4RP 118, 120, 166-67.

Officer LeCompte found Kuloglija in a bedroom, lying on the floor behind a bed, covered with blood and holding a knife. 2RP 61-65, 107. LeCompte did not know whether Kuloglija was a suspect or another victim. 1(a)RP 45. LeCompte ordered Kuloglija to let go of the knife; he asked, "What happened?" and Kuloglija answered, "I stabbed my mom." 2RP 66, 88, 93, 108. LeCompte said, "What?" and Kuloglija repeated, "I stabbed my mom." Id. After advice and waiver of his Miranda rights, Kuloglija said again that he had stabbed his mother, and that he wanted to die. 2RP 67, 111. Kuloglija was transported to the hospital for treatment of wounds to his torso. 1(a)RP 50, 53; 2RP 74-75.

² Alija Kuloglija will at all times be referred to using her full name, to avoid any confusion with the defendant, who is referred to by last name only.

Alija Kuloglija had five chest wounds near her heart, one that cut into her heart and required surgery and stitches in her heart. 3RP 100-06. She had blood in her abdominal cavity due to a wound at least four inches deep that cut her diaphragm; abdominal surgery was required to repair that damage. 3RP 108-12. She had many defensive wounds on her hands and forearms. 3RP 112-15.

Alija Kuloglija telephoned her daughter, Suada Curavac, immediately after she was stabbed. 4RP 170-71. Curavac arrived within minutes and tried to stop the bleeding. 4RP 122-23. Curavac called 911. 4RP 124.

Physical evidence was photographed and collected at the scene. All the indications of the blood patterns indicated the door was closed during the attack. 2(b)RP 15. There was an enormous amount of blood in the entry, and a complete absence of blood in the hall outside the door or on the stairs leading out of the building. 2RP 146-52; 3RP 9, 57-60, 74; 4RP 183-84; 5RP 13-14, 21. DNA on a broken knife blade hidden in the garbage matched Alija Kuloglija; Kuloglija's DNA was on the handle. 2RP 185; 4RP 41-45.

The day after the assault, Detective Seese was assigned to guard Kuloglija at the hospital. 2(b)RP 75-76. Seese did not want to talk, but Kuloglija repeatedly initiated conversation. 1RP 56-61.

Kuloglija said that he was stupid, that he had stabbed his mother and himself, and that he wanted to die. 2RP 121. Kuloglija repeatedly asked how much time he was going to get. 2RP 128. Kuloglija asked about Seese's gun and said that he should have used a gun to shoot himself and everyone else. 2RP 123-25.

Alija Kuloglija testified that she was stabbed by a masked man wearing gloves and plastic over his shoes. 4RP 167-70. She testified that her doorbell rang that morning and when she opened the door, the masked person immediately began to stab her. 4RP 168. She said that her son fought with the intruder. 4RP 169.

At trial, Kuloglija testified that he had no memory of the events surrounding the stabbing of his mother. 5RP 54. He did not address his many confessions.

C. ARGUMENT

1. STATEMENTS MADE BY KULOGLIJA WERE PROPERLY ADMITTED AT TRIAL.

Kuloglija claims that all of the statements that he made to police should have been suppressed because they were obtained in violation of his privilege against self-incrimination³ and Miranda v. Arizona, 384 U.S. 436, 467-73, 86 S. Ct. 1602, 16 L. Ed. 2d 694

³ U.S. Const. amend. V.

(1966). These arguments are without merit; there was no violation of Miranda or of Kuloglija's privilege against self-incrimination.

Miranda warnings are required when a suspect is subjected to custodial interrogation by a State agent. State v. Sargent, 111 Wn.2d 641, 647, 762 P.2d 1127 (1988). Miranda warnings were not required when police arrived at the scene of this emergency and were attempting to make it safe. When Kuloglija told the officers that he had stabbed his mother and he was advised of his Miranda rights, Kuloglija waived those rights. All of the statements Kuloglija made the next day at the hospital occurred after this proper advice and waiver of rights and, in any event were not subject to Miranda because they were unsolicited.⁴

a. CrR 3.5 Hearing And Trial Court Findings.

The CrR 3.5 hearing addressed four sets of statements by Kuloglija, as well as his ability to communicate in English. The court heard the testimony of four Tukwila Police officers who

⁴ Kuloglija asserts that the trial court should have sua sponte reconsidered its pretrial rulings after the trial testimony. App. Br. at 12 n.2. That argument is unsupported by analysis and should not be considered. State v. Thomas, 150 Wn.2d 821, 868-69, 83 P.3d 970 (2004). The Findings of Fact and Conclusions of Law for the CrR 3.5 hearing were presented at sentencing, and defense trial counsel indicated that he had reviewed the findings and believed they were "appropriate." 7RP 5.

responded to the scene,⁵ Tukwila detectives to which Kuloglija later made statements,⁶ a detective who had spoken with Kuloglija in 2006 and 2007,⁷ and medics who treated Kuloglija at the scene.⁸ The court heard a recorded call made by the defendant while he was in jail, conducted in English. 1RP 133, 136-37; 2RP 32. The court heard two 911 calls Kuloglija made days before this assault. CP 160; 1RP 216-17, 235-36; 2RP 34; Pretrial Ex. 17. Kuloglija testified only to identify himself as that 911 caller. 1RP 233-36.

The court made extensive oral and written findings of fact and conclusions of law. CP 159-65; 2RP 31-44. The written findings incorporated by reference the oral findings. CP 165. Specific findings relevant to each set of statements are included in the discussion of that set of statements below.

Kuloglija does not assign error to any of the trial court's factual findings. These unchallenged findings are verities on appeal. State v. Hill, 123 Wn.2d 641, 644, 870 P.2d 313 (1994). This Court will review de novo whether the findings support the trial

⁵ Officer LeCompte (1(a)RP 33-75; 1RP 6-16); Officer Devlin (1RP 18-47); Officer Kerin (1RP 93-101); Officer Bisson (1RP 170-87).

⁶ Detective Seese (1RP 48-69); Detective Heckelsmiller (1RP 72-91); Detective Koutouvidis (1RP 102-20).

⁷ Detective Sampson (1RP 149-64).

⁸ James Selig (1RP 189-203); Matthew Reisenberg (1RP 227-31).

court's conclusions of law. State v. Armenta, 134 Wn.2d 1, 9, 948 P.2d 1280 (1997).

The trial court made general findings concerning Kuloglija's ability to speak and understand English:

n. In May of 2006,⁹ as part of an investigation of an unrelated domestic violence case, in which the defendant was a suspect, Detective Cynthia Sampson of the King County Sheriff's Office contacted the defendant at his place of employment. She spoke with him in English to ensure that he understood the language. She even asked him directly if he spoke English. She then advised the defendant of his Miranda warnings line by line and the defendant acknowledged that he understood his rights as she had read them.

o. Based on the testimony of each of the above officers, the recorded jail telephone call in English and the 911 calls admitted into the record, in which the defendant testified that it was his voice in the recording the court finds that the defendant speaks and understands the English to a sufficient degree to understand what the officers were saying as well as to understand his Miranda warnings.

CP 162.

All conversations with Kuloglija were conducted in English and the officers understood him. CP 161-62; 1(a)RP 47, 52; 1RP 33, 56, 80, 109-11, 153-57. Kuloglija never requested an

⁹ This date is an error. The court's oral findings specify that this contact occurred on June 1, 2007. 2RP 34. The detective stated that she had contact with Kuloglija in 2006, but the incident described in the findings occurred on June 1, 2007. 1RP 53, 160.

interpreter. CP 161-62. Kuloglija did not request an attorney or invoke his right to remain silent, until the final conversation with Detectives Heckelsmiller and Koutouvidis. CP 161-62.

b. Miranda Warnings Are Not Required Before Asking An Armed And Injured Person At A Crime Scene What Happened.

i. Relevant facts and trial court findings.

The first set of statements at issue are those made to Officer LeCompte in his first contact with Kuloglija, when LeCompte asked, "What happened?" and Kuloglija answered, "I stabbed my mom." CP 160-61; 1(a)RP 45-46. LeCompte asked, "What did you say?" and Kuloglija repeated, "I stabbed my mom." CP 161; 1(a)RP 46.

The trial court made the following pertinent written findings:

- a. On October 15, 2009, police responded to an alleged stabbing at the Laurel Estates Condo. Medics already were present. Officers LeCompte, Devlin, and Bisson arrived and cleared the condo of victims and suspects.
- b. Officer LeCompte found the defendant facedown with his left arm above his head and his right hand near his chest with a silver knife in or near the body of the defendant. Officer[r] LeCompte ordered him to drop the knife in a loud voice.
- c. The events happened quickly and it was very loud and noisy. Officer Devlin jumped on the bed and both officers had their guns drawn, trained on the defendant. Officers Bisson and Kerin were also present at various times.

- d. The officers' weapons were drawn for officer safety as the officers were attempting to clear the residence of possible additional victims and/or suspects.
- e. It was not clear to Officer LeCompte if the defendant was a suspect or another victim. Officer LeCompte asked the defendant, "What happened?" The defendant responded, "I stabbed my mother." Officer LeCompte asked, "What?" And, the defendant responded, "I stabbed my mother."

CP 160-61. The court found that, at the crime scene, "At no time did the defendant invoke his right to counsel or his right to remain silent, nor did he request the assistance of an interpreter." CP 161.

The court concluded that these statements were admissible in the State's case-in-chief. Its written conclusion was as follows:

These statements [1-2] are admissible because it was reasonable under the circumstances for the officers to ask what happened. Although the defendant was not free to leave, these statements are admissible because the officers were attempting to determine if anyone else was present and it was reasonable to ask what happened. These statements were made in response to a limited number of questions asked by the officers in an attempt to ascertain if the defendant was an additional victim or a suspect. These types of questions are permissible without advisement of Miranda warnings under State v. Walton, 7 Wash.App. 130 (1984) and [Berkemer] v. McCarty, 468 US 420 (1984).

CP 163-64.

The court stated that when officers came upon a man who was injured, who may have been a victim or the perpetrator of a crime, it was reasonable to ask the simple question, "What happened?", to try to find out whether they need to take further actions to secure the scene or to pursue someone else who may have committed the crime. 2RP 39-40.

- ii. The public safety exception to the Miranda requirement applies to the initial questions at the scene.

Officer LeCompte's first question to Kuloglija was "What happened?" No Miranda warnings were required before that question because the situation posed a threat to public safety and the question was an effort to ascertain and respond to that threat.

The United States Supreme Court recognized this exception to Miranda requirements in New York v. Quarles, 467 U.S. 649, 104 S. Ct. 2626, 81 L. Ed. 2d 550 (1984). The Court held that "the need for answers to questions in a situation posing a threat to the public safety outweighs the need for the prophylactic rule protecting the Fifth Amendment's privilege against self-incrimination." Id. at 657. The exception is circumscribed by the exigency that justifies it in each case. Id. at 658. In that case, a woman reported that she had just been raped and that her armed assailant had

gone into a store. Id. at 651-52. An officer went into the store and spotted Quarles, who matched the description; Quarles ran and the officer pursued with gun drawn, ordering him to stop. Id. at 652. The officer frisked Quarles, found an empty holster, and handcuffed him. Id. At least four officers surrounded the handcuffed Quarles when the first officer asked him where the gun was. Id. at 652, 655. The Court concluded that concealment of a gun in a public area was a public safety risk that outweighed the need for Miranda warnings before the question was asked. Id. 657-58.

The Washington Supreme Court had recognized an officer safety exception to Miranda warnings in State v. Lane, 77 Wn.2d 860, 467 P.2d 304 (1970). There, several days after an armed robbery, four officers entered Lane's home with guns drawn. Id. at 860-61. Officers arrested and handcuffed Lane and asked, "Do you have the gun?" Id. at 861. The court found that although Lane was in custody, the questions were asked for officer safety purposes, holding that it is not a Miranda violation for police to ask questions strictly limited to protecting their physical safety and which could not reasonably be delayed until warnings were given. Id. at 862-63. The court more recently has held that this exception to the Miranda requirements applies to situations in which there is a danger to

police, to the public, or to the defendant himself. State v. Finch, 137 Wn.2d 792, 828-30, 975 P.2d 967 (1999) (statements made during SWAT team negotiations with armed defendant).

The Ninth Circuit has analyzed the Quarles public safety exception in terms of whether the questions asked constitute interrogation. United States v. Brady, 819 F.2d 884 (9th Cir. 1987). It held that questions necessary to secure officer or public safety are not designed solely to elicit testimonial evidence from a subject, so they fall within the exception. Id. at 887-88.

This Court found an exception to the requirements of Miranda on facts similar to this case, in State v. Richmond, 65 Wn. App. 541, 828 P.2d 1180 (1992). There, an officer responded to a report of a stabbing and heard a woman screaming inside the home. Id. at 542. The officer forced the door and went into a bedroom, where he saw Richmond strike a woman; the officer pulled his gun and told Richmond to freeze. Id. The officer asked who had called the police and both said it might have been the other person in the apartment. Id. Asked where that person was, Richmond said he was down the hall; there, the officer found a man lying in a pool of blood, and a phone with a receiver hanging by the cord. Id. The trial court in Richmond concluded that the questions

asked were reasonable under the circumstances, and did not require Miranda advice. Id. at 543. This Court affirmed, holding that although Richmond was in custody, the questions were not interrogation. Id. at 543-46. The Court held that it was reasonable and prudent for the officer to be concerned that there might be an injured person in the apartment, and that outweighed the need for Miranda advice. Id. at 545-46.

The trial court in this case did not cite the public safety exception recognized in Quarles, but based its ruling on the public safety concerns of the situation. The cases it cited stand for the general principle that not every person who is detained and questioned by the police has the right to advice of Miranda rights. CP 164, citing Berkemer v. McCarty, 468 U.S. 420, 435-42, 104 S. Ct. 3138, 82 L. Ed. 2d 317 (1984) (person detained for traffic offense), and State v. Walton, 67 Wn. App. 127, 130-31, 834 P.2d 624 (1992) (person detained pursuant to an investigative stop).

Miranda advice was not required before these questions in any event, because Kuloglija was not in custody for purposes of Miranda. A person is in custody for purposes of Miranda if a reasonable person in the detainee's position would have felt that his freedom was curtailed to the degree associated with formal

arrest. Berkemer v. McCarty, 468 U.S. at 441-42; State v. Heritage, 152 Wn.2d 210, 218, 95 P.3d 345 (2004). Kuloglija was not free to leave, but the initial detention was in the nature of an investigative stop pursuant to Terry v. Ohio, 392 U.S. 1, 88 S. Ct. 1868, 20 L. Ed. 2d 889 (1968).

By definition, a person subject to detention is not free to leave. State v. Marcum, 149 Wn. App. 894, 909, 205 P.3d 969 (2009). The presence of numerous police officers does not convert it into a custodial arrest. Id. at 910. That detention is at gunpoint also does not convert it into a custodial arrest. State v. Belieu, 112 Wn.2d 587, 598-605, 773 P.2d 46 (1989); State v. Johnson, 147 Wn. App. 276, 289, 194 P.3d 1009 (2008).

An officer may ask questions during a Terry stop to confirm or dispel the officer's suspicions without rendering the person in custody for purposes of Miranda. Heritage, 152 Wn.2d at 218. LeCompte asked only one question here, and then asked Kuloglija to repeat what Kuloglija had said, to confirm it. 1(a)RP 45-46. At that point, Kuloglija was advised of his rights. 1(a)RP 47.

As the trial court noted, it is not clear that Kuloglija even saw the guns pointed at him because he was face down. 2RP 38. LeCompte had his gun drawn, announced that he was a police

officer, and loudly told Kuloglija to drop the knife. 1(a)RP 43-44. The court concluded that the detention was not a Terry stop because Kuloglija already was on the ground, injured. 2RP 38. It is clear that Kuloglija was not free to leave, but Kuloglija has not argued below or on appeal that his detention was not justified. While Kuloglija was not stopped, the detention while the initial questions were asked did not exceed the scope of a Terry stop, during which Miranda warnings were not required.

Kuloglija argues that the questions were the functional equivalent of custodial interrogation because the police should have known that the only person at the scene with a weapon was likely to be the assailant. However, the first responders did not know that Kuloglija was the only one at the scene with a weapon; that was one reason their questions were essential to the safety of themselves and of the public.

The trial court properly concluded that when LeCompte came upon a man who was injured, who may have been a victim or the perpetrator of a crime, it was reasonable to ask "What happened?" to try to find out whether police needed to take further action to secure the scene or to pursue someone else who may have committed the crime. 2RP 39-40. The court properly

concluded that even though Kuloglija was detained, this was not custodial interrogation and Miranda warnings were not required under these circumstances. CP 164; 2RP 39-40.

Even if these statements were improperly admitted, the error was harmless. Constitutional error is presumed to be prejudicial and the State bears the burden of proving that it was harmless beyond a reasonable doubt. State v. Jasper, 158 Wn. App. 518, 535, 245 P.3d 228 (2010), aff'd, 174 Wn.2d 96 (2012). A constitutional error may be so insignificant in the context of a particular case that it is harmless. Id. Because Kuloglija made the same statement, "I stabbed my mother," after he was advised of his constitutional rights, and made that statement and many additional equally incriminating statements the next day, any error in admitting the first statements was harmless beyond a reasonable doubt.

c. After Miranda Advice At The Scene, Kuloglija Voluntarily And Intelligently Waived His Rights.

i. Relevant facts and trial court findings.

The next set of statements at issue were made to Officer Devlin after Kuloglija was advised of his Miranda rights. Kuloglija said that he had stabbed his mother, that he wanted to die, and thanked the officers for helping him. CP 161; 1(a)RP 49; 1RP 28.

The trial court made the following pertinent written findings:

- f. Officer Devlin read the defendant his Miranda rights using his department issued card. The defendant acknowledged that he understood his rights.
- g. Officer Devlin asked him again, "What happened" and the defendant stated that he stabbed his mom, that he wanted to die, and thanked the officers for helping him.
- h. This conversation took place in English and the officers were able to understand what the defendant was saying. At no time did the defendant invoke his right to counsel or his right to remain silent, nor did he request the assistance of an interpreter.

CP 161.

The court concluded that these statements were admissible in the State's case-in-chief because "they were made after the defendant had been advised of his rights under Miranda, and he acknowledged that he understood those rights." CP 164. The court orally found that Kuloglija understood his Miranda rights in 2007 and understood his rights on October 15, and 16, 2009. 2RP 43. The court concluded that Kuloglija waived his rights and that his statements were voluntary. 2RP 43.

ii. Admissibility.

The undisputed factual findings of the trial court support its conclusion that these statements were voluntarily made after proper advice of Miranda rights and thus were admissible at trial. An appellate court “will not disturb a trial court's conclusion that a waiver was voluntarily made if the trial court found, by a preponderance of the evidence, that the statements were voluntary and substantial evidence in the record supports the finding.” State v. Athan, 160 Wn.2d 354, 380, 158 P.3d 27 (2007).

Kuloglija's argument that his lack of facility with the English language requires a different result should be rejected. The trial court rejected the argument, finding: “the defendant speaks and understands the English to a sufficient degree to understand what the officers were saying as well as to understand his Miranda warnings.” CP 162. That factual finding is unchallenged. The only evidence that Kuloglija might have difficulty understanding English is his accent, and occasional lapses in grammar. He told Sampson that he did understand English. CP 162; 1RP 153. He told Devlin and Koutouvidis both that he understood his rights. 1RP 28, 111.

In all his interactions with the police in 2007 and in 2009, Kuloglija never indicated that he did not understand what was being

said and never requested an interpreter. Kuloglija had previously been advised of his Miranda rights in 2007, and indicated at that time that he understood each right as it was read. CP 162; 1RP 154-56. The detective who talked to him at that time had no trouble at all communicating with Kuloglija in English. 2RP 154-55. There is no evidence that he did not understand his rights in this instance. That conclusion also is supported by his invocation of his right to an attorney when he was interviewed by Detectives Heckelsmiller and Koutouvidis the next day. CP 161-62; see Athan, 160 Wn.2d at 381.

Even if the initial statements to LeCompte are found to be inadmissible, the statements at the scene post-Miranda were admissible. Absent deliberately coercive tactics used to obtain the initial statements, advice of Miranda rights allows an individual to make a rational choice whether to invoke or waive the rights. Oregon v. Elstad, 470 U.S. 298, 305, 314, 105 S. Ct. 1285, 84 L. Ed. 2d 222 (1985). Unless a pre-Miranda statement was “actually coerced,” post-Miranda statements are admissible. State v. Ustimenko, 137 Wn. App. 109, 116, 151 P.3d 256 (2007).

While Kuloglija argues that any confession obtained in violation of Miranda is coerced, the Supreme Court rejected that

claim in Elstad. 470 U.S. at 310. Kuloglija was detained at gunpoint, but he has made no claim that his initial statements at the scene were actually coerced. The trial court's finding that his statements were voluntary has not been challenged.

That Kuloglija may have "let the cat out of the bag" with his first confession is irrelevant. Ustimenko, 137 Wn. App. at 116. State v. Lavaris,¹⁰ upon which Kuloglija relies, was superseded by the analysis in Elstad. State v. Baruso, 72 Wn. App. 603, 865 P.2d 512 (1994). The plurality in Missouri v. Siebert, also cited by Kuloglija, did not reject the analysis of Elstad, but held that it did not apply when the officer purposely chose not to give Miranda warnings, conducted a lengthy interrogation that produced a confession, then provided the warnings. 542 U.S. 600, 614-15, 124 S. Ct. 2601, 159 L. Ed. 2d 643 (2004).

The unchallenged facts support the trial court's ruling that the post-Miranda statements at the scene were made after a voluntary and intelligent waiver of rights and were admissible.

¹⁰ 99 Wn.2d 851, 664 P.2d 1234 (1983).

d. The Statements Made To Detective Seese Were Not The Product Of Interrogation Or Coercion And Were Properly Admitted.

i. Relevant facts and findings.

The third set of statements at issue are those made to Detective Seese, who guarded Kuloglija at the hospital the day after the stabbing. Over a period of four hours, Kuloglija repeatedly called Seese over and made small talk, such as comments relating to television programs and admiring female hospital staff. 1RP 51-57, 64. Kuloglija also said that he was stupid, that he had stabbed his mother and then himself, and that he wanted to die. CP 161; 1RP 61-62. Kuloglija asked about Seese's gun and said that he should have used a gun to shoot himself and everyone else. CP 161; 1RP 61-62. Kuloglija asked how much jail time he would get. 1RP 62; 2RP 128.

The trial court made the following pertinent written findings:

- i. On October 16, 2009, Detective Seese guarded Mr. Kuloglija at Harborview Medical Center. Detective Seese did not want to speak with the defendant or be involved in the case. The defendant was not free to go.
- j. Detective Seese did not initiate conversation with Mr. Kuloglija or ask him any questions. Mr. Kuloglija made several statements to Detective Seese. Mr. Kuloglija told Detective Seese that he was stupid, that he stabbed his

mother, and that he wanted to die. He also told Detective Seese that he should have used a gun to shoot himself and everyone else.

- k. These conversations took place in English and the detective was able to understand what the defendant was saying. At no time did the defendant invoke his right to counsel or his right to remain silent, nor did he request the assistance of an interpreter.

CP 161.

The court concluded that these statements were admissible in the State's case-in-chief. The court's written conclusions were:

These statements are admissible as they were made after the defendant had been advised of and acknowledged that he understood his rights under Miranda. Additionally, these statements are admissible, because, while the defendant was in custody at the time the statements were made, they were spontaneous statements not in response to questioning by the detective and are therefore not the product of interrogation.

CP 164. The court orally found that Kuloglija understood his Miranda rights in 2007 and understood and voluntarily waived his rights on October 15, 2009. 2RP 43. The court concluded that all of Kuloglija's statements were voluntary. 2RP 43.

- ii. Maintaining a police guard over a suspect at a hospital is not the functional equivalent of interrogation.

The State does not contest the trial court's finding that Kuloglija was in custody when he made these statements. As the trial court concluded, the statements were admissible because they were spontaneous and not the product of interrogation. CP 164. Even if there had been interrogation, Kuloglija already had been advised of his rights and readvisement was not required.

The requirements of Miranda apply when a person in custody is subjected to interrogation or its functional equivalent. Rhode Island v. Innis, 446 U.S. 291, 300-01, 100 S. Ct. 1682, 64 L. Ed. 2d 297 (1980). Volunteered statements of any kind, on the other hand, are admissible in evidence. Id. at 299-300.

Kuloglija does not claim that Seese asked him any questions, but argues that Seese's presence beside the bed, bearing a badge and a sidearm, was the functional equivalent of interrogation because of Kuloglija's injuries. That claim is inconsistent with the Supreme Court's definition of the term.

The functional equivalent of direct questioning includes "any words or actions on the part of the police (other than those normally attendant to arrest and custody) that the police should know are

reasonably likely to elicit an incriminating response.” Innis, 446 U.S. at 301 (footnote omitted). It includes “words or actions that, given the officer’s knowledge of any special susceptibilities of the suspect, the officer knows or reasonably should know are likely to ‘have ...the force of a question on the accused,’ and therefore be reasonably likely to elicit an incriminating response.” Pennsylvania v. Muniz, 496 U.S. 582, 601, 110 S. Ct. 2638, 110 L. Ed. 2d 528 (1990) (citation omitted). Simply speaking does not constitute interrogation. Id. at 603-04.

Maintaining a police guard is a normal attendant to custody and thus falls outside the definition of the functional equivalent of questioning. This Court rejected Kuloglija’s argument in a case where the hospitalized defendant was very seriously injured, medicated with a tranquilizer, and confined in a halo device that affected his hearing. State v. Peerson, 62 Wn. App. 755, 816 P.2d 43 (1991). The court held that 24-hour surveillance by an officer openly taking notes was not the functional equivalent of interrogation. Id. at 773. Because the defendant was fully aware of the officer’s presence and note-taking, there was nothing surreptitious about the police conduct. Id. at 774. To constitute

interrogation there must be compulsion beyond that inherent in custody. Richmond, 65 Wn. App. at 545.

Moreover, there is no indication that Kuloglija was particularly susceptible to intimidation by the presence of Detective Seese. Seese seated himself at a distance from the bed, and introduced himself when Kuloglija asked his name. 1RP 54. It was Kuloglija who waved Seese over to the bed, about 50 times. 1RP 55-56. Kuloglija usually wanted to make small talk. 1RP 56-57.

When Kuloglija volunteered, "I am stupid," Seese did not respond. 1RP 60. Kuloglija continued, said that he had stabbed his mother and himself and then asked about his mother's condition. 1RP 60. Seese responded that he had no idea and walked away. 1RP 60. Seese wanted nothing to do with a discussion of the stabbing; he had nothing to do with this investigation and had already worked many hours before this duty. CP 161; 1RP 61. But Kuloglija soon called him back and said that Kuloglija should have used a gun and shot everyone and himself. 1RP 61. Seese walked away again without comment, but Kuloglija called him back to ask about Seese's firearm. 1RP 61-62. When Seese said that the gun was a .45, Kuloglija responded, "Oh good, so you won't miss me when you shoot me." 1RP 62. Seese said

that he was not going to shoot Kuloglija, who responded, "I want to die please." 1RP 62. Kuloglija also asked for how long he was going to go to jail. 1RP 62.

The voluntariness of a statement is determined based on the totality of the circumstances. State v. Ortiz, 104 Wn.2d 479, 484, 706 P.2d 1069 (1985). The remarks about the stabbing and Kuloglija's feelings about it are rational and indicate that Kuloglija was aware of his situation.¹¹ Even a defendant who is in critical condition, in pain, and on medication is capable of making a voluntary statement, and voluntariness is established by coherent responses when the officer has made no effort to take advantage of the defendant. United States v. George, 987 F.2d 1428, 1430-31 (9th Cir. 1993); State v. Gregory, 79 Wn.2d 637, 641-43, 488 P.2d 757 (1971); State v. Butler, 165 Wn. App. 820, 825-28, 269 P.3d 315 (2012). This conversation was not directed in any way by Seese; there is no evidence of any coercion. Further, the susceptibility of the defendant is irrelevant where statements were entirely unsolicited, as in this instance. Ortiz, 104 Wn.2d at 484.

¹¹ Kuloglija contends that he was being administered pain medication, but no evidence was presented regarding what medication he received or the effect it might have had on his mental state. He suffered an injury that was serious, but there is no evidence of the nature of that injury, or that it caused him to be unable to exercise free will.

Even if the behavior of Seese is determined to be the functional equivalent of interrogation, Kuloglija already had been advised of his Miranda rights the previous day, understood his rights and waived them. CP 164; 2RP 43. Where a defendant has been effectively advised of his rights, it is not necessary to repeat a recitation of the warnings before taking each statement. State v. Gilchrist, 91 Wn.2d 603, 607, 590 P.2d 809 (1979).

- iii. The claim that some of these statements were unfairly prejudicial has been waived.

The claim that some of Kuloglija's statements to Seese should have been excluded because their probative value was outweighed by unfair prejudicial effect was not raised in the trial court.¹² It cannot be raised for the first time on appeal, because it is not a constitutional claim. RAP 2.5(a)(3). Further, Kuloglija has not identified the unfair prejudice of comments about television or about the good looks of hospital staff. Kuloglija's comments about wanting to die are highly probative of serious remorse, consistent with a man who stabbed his mother in the heart the previous day.

¹² Kuloglija's citation to the record appears to be a typographical error. App. Br. at 22. Seese's testimony on the topics identified appears at 2RP 118. No objection is made at that point and the State has found no other point at which this claim was raised.

e. Statements To Detectives Heckelsmiller And Koutouvidis Were Properly Admitted.

i. Relevant facts and findings.

The last set of statements at issue are those volunteered to Detectives Heckelsmiller and Koutouvidis at the hospital. The trial court made the following pertinent written findings:

- i. On the same day [October 16, 2009], Detectives Heckelsmiller and Koutouvidis attempted to interview the defendant and read him his rights. They told Mr. Kuloglija that they wanted his side of the story. At one point, the defendant interrupted and stated that he was tired and wanted to talk to the detectives as friends. He stated that he wanted to have fun. He then stated that he wanted an attorney and needed money because he could not afford one. At that point the Detectives terminated their conversation with the defendant.
- m. This conversation took place in English and the detectives were able to understand what the defendant was saying. At no time did the defendant [] request the assistance of an interpreter.

CP 161-62.

The court concluded that these statements, except for the request for counsel, were admissible in the State's case-in-chief:

5. Statements to Detectives Heckelsmiller and Koutouvidis that he wanted to talk as friends and that he wanted to have fun are admissible as they were not made in response to any direct questioning by the detectives and are therefore not the product of

custodial interrogation. Additionally these statements were made after the defendant had been advised of his Miranda warnings.

CP 164. The court found that the invocation of counsel was not admissible. CP 165.

At trial, Heckelsmiller testified that Kuloglija said that he wanted to talk to us as friends, he just wanted to have fun but it was too late. 2RP 183. Koutouvidis testified that Kuloglija said he would have preferred talking to Koutouvidis as a friend and not a police officer, and said something about wanting to enjoy life (have fun) and that he had not to this point. 4RP 86-87.

- ii. These statements were not the product of interrogation or coercion.

Kuloglija argues that the statements that he made to these detectives were the product of coercion because English is not his native language. The trial court found that Kuloglija understood his rights as he was advised of them in 2007, on October 15, 2009 (at the scene), and on October 16 (when advised by Koutouvidis). CP 162, 164; 2RP 43. The trial court's factual findings have not been challenged and so are verities on appeal.

Kuloglija's challenge to the voluntariness of his statements at the hospital is addressed in Section C(1)(d)(ii), supra. There is no

evidence that these detectives either tried to coerce a statement or had any coercive influence: Kuloglija stated that he understood his rights and invoked his right to counsel; the detectives asked no questions and immediately left. 1RP 77-80, 109-11.

If these statements were improperly admitted, the error was harmless. These brief statements of regret were so insignificant in the context of this case, especially in light of Kuloglija's repeated direct admissions of guilt, that the error would be harmless beyond a reasonable doubt. Jasper, 158 Wn. App. at 535.

- iii. The other challenges to these statements have not been preserved.

The claim that these statements should have been excluded because their probative value was outweighed by unfair prejudicial effect was not raised in the trial court and cannot be raised for the first time on appeal. A claim of error may be raised for the first time on appeal only if it is a "manifest error affecting a constitutional right." RAP 2.5(a)(3); State v. McFarland, 127 Wn.2d 322, 333, 899 P.2d 1251 (1995). The defendant must show both a constitutional error and actual prejudice to his rights. State v. Kirkman, 159 Wn.2d 918, 926-27, 155 P.3d 125 (2007). To demonstrate actual prejudice, there must be a "plausible showing

by the [appellant] that the asserted error had practical and identifiable consequences in the trial of the case.” Id. at 935.

The claim that admission of these statements denied Kuloglija assistance of counsel also was not raised in the trial court. No authority is cited in support of the claim (App. Br. at 22-23) and for that reason the argument should not be considered. Thomas, 150 Wn.2d at 868-69. Further, the claim is that the statements were misleading without the context of Kuloglija’s invocation of counsel; that is a challenge to the probative value of the evidence, another unpreserved evidentiary issue.

2. MENTION OF THE TERM “DOMESTIC VIOLENCE” WAS NOT MANIFEST CONSTITUTIONAL ERROR.

Kuloglija claims that the trial court excluded mention of the term “domestic violence” during the trial and erred in allowing such references. This argument is without merit: the trial court’s pretrial order was not so broad and no objection was made to the references now challenged; the trial court had no opportunity to err.

Kuloglija made a pretrial motion to prevent any reference “to the allegations in this case as one of ‘Domestic Violence.’” CP 60; 1(a)RP 12. The supporting argument objected to reference to a domestic violence designation under chapter 10.99 RCW and

to including that in the jury instructions. CP 60; 1(a)RP 14.

Kuloglija stated that he had no objection to the State raising the subject of domestic violence during voir dire, although he stated that he would object if the prosecutor raised the topic of the cycle of domestic violence. CP 61-62; 1(a)RP 14-15. The court granted the motion to exclude reference to a domestic violence designation, but specified that domestic violence could be discussed during voir dire. CP 60. It denied without prejudice the motion to exclude reference to the cycle of domestic violence. CP 61; 1(a)RP 16.

Kuloglija made a separate pretrial motion to exclude any reference to police investigation being done by the "Major Crimes Unit." CP 64. That motion was denied. CP 64. There was no motion to exclude reference to the Domestic Violence Unit.

Detective Glover testified that he is in the Major Crimes Unit, felony domestic violence section, and had training in the dynamics of domestic violence and how to investigate it. 3RP 64-66. There was no objection. RAP 2.5(a)(3) bars consideration of this issue because Kuloglija has not established that it constituted manifest constitutional error. Kirkman, 159 Wn.2d at 926-27. He has not made a plausible showing that the claimed error had practical, identifiable consequences in the trial. Id. at 935.

Even if testimony challenged on appeal was excluded by a pretrial order, a party ordinarily must object when the evidence is admitted in the trial court to preserve the objection. State v. Weber, 159 Wn.2d 252, 272, 149 P.3d 646 (2006). This is a common sense approach: if there is no objection, the trial court does not have the opportunity to determine whether the evidence was covered by the pretrial motion. Id. Even if the challenged evidence was covered, the lack of an objection deprives the trial court of the opportunity to cure potential prejudice through an instruction. Id.

Because Kuloglija does not claim any constitutional error in the use of the term “domestic violence,” this issue should not be considered for the first time on appeal. He also has not established actual prejudice as a result of the mention of the term during this trial, when it apparently was mentioned during voir dire and where there was no dispute that Alija Kuloglija was violently attacked.

This Court in State v. Hagler held that in some cases informing the jury that a charge has been filed with a domestic violence designation could be prejudicial, by implying that there was a finding of violence. 150 Wn. App. 196, 202-03, 208 P.3d 32 (2009). A charged domestic-violence designation would have more significance than mere mention of the term, but even in Hagler, the

designation was harmless when the violence was undisputed. Id. In the case at bar there was no dispute that Alija Kuloglija was violently attacked, so mention of the term was not prejudicial.

The term “domestic violence” was used in this case to convey no more than the unit and relevant training of the detective assigned to investigate the case after Kuloglija claimed responsibility for the stabbing. No inflammatory inference would be drawn. Apparently there was no other reference to the term, and there was no argument by either party that an inference could be drawn based on the type of training the detective received.

Kuloglija argues that when Glover said that he had training in the “dynamics” of domestic violence, this “suggest[ed] a particular complexity, separation, and animus for these crimes.” App. Br. at 28. The word “dynamics” does not have a negative connotation: it is defined as “a pattern or process of change, growth, or activity.” Merriam-Webster Dictionary, at <http://www.merriam-webster.com/dictionary/dynamics>. The term “domestic violence” refers to “an assault or other violent act committed by one member of a household against another.” Black’s Law Dictionary 1601 (8th ed. 2004). Glover’s statement that he was trained in the “dynamics of domestic violence” thus indicated that there are patterns to be

observed in the occurrence of violence between members of the same household. It suggested no more in this context.

Kuloglija's makes a claim of prosecutorial misconduct but offers no explanation of what misconduct is alleged. A defendant who claims prosecutorial misconduct has the burden of establishing that conduct of the prosecuting attorney was both improper and that prejudice to the defendant resulted. State v. Fisher, 165 Wn.2d 727, 747, 202 P.3d 937 (2009). As the misconduct has not been identified, this burden has not been met. Further, the absence of an objection by defense counsel strongly suggests that the testimony did not appear critically prejudicial to the defendant in the context of trial. State v. McKenzie, 157 Wn.2d 44, 53 n.2, 134 P.3d 221 (2006), citing State v. Swan, 114 Wn.2d 613, 661, 790 P.2d 610 (1990)). Because the testimony was not excluded by the pretrial ruling, eliciting the testimony was not improper. Even if it was improper, the term is not so inflammatory that an instruction could not have cured any improper inference. Finally, the term engendered no prejudice in the context of this case.

Even if this Court considers this assignment of error and concludes that mention of the term was error, non-constitutional error is reversible only if "within reasonable possibilities, the

outcome of the trial would have been materially affected had the error not occurred." State v. Brockob, 159 Wn.2d 311, 351, 150 P.3d 59 (2006) (quoting State v. Bourgeois, 133 Wn.2d 389, 403, 945 P.2d 1120 (1997)). Given the evidence that Kuloglija admitted on multiple occasions that he stabbed his mother, a comment that the case detective was assigned to investigate domestic violence cases could have had no significance. Any error was harmless.

3. TESTIMONY ABOUT BLOOD PATTERNS AT THE CRIME SCENE WAS PROPERLY ADMITTED.

Kuloglija claims that the trial court erred in allowing two detectives to testify about blood deposited at the crime scene because they were not qualified as experts in the field of blood spatter analysis. He also asserts that he was not given proper notice of the presentation of expert testimony. These arguments should be rejected because, as the trial court concluded, the testimony was not expert testimony. 2RP 158-59.

The rules of evidence allow the admission of lay opinion "limited to those opinions or inferences which are (a) rationally based on the perception of the witness and (b) helpful to a clear understanding of his testimony or the determination of a fact in issue." ER 701. Rulings admitting this opinion evidence are

evidentiary and will be reversed only for an abuse of discretion.

State v. Stenson, 132 Wn.2d 668, 701, 940 P.2d 1239 (1997).

Discretion is abused only if its exercise is manifestly unreasonable or is based on untenable grounds or reasons. Id.

Kuloglija objects to testimony from Detectives Glover and Heckelsmiller that they observed droplets of blood on a closet door and that if the front door was open, droplets of blood would not have been cast onto the closet door, because the front door would have blocked it. 2RP 162-63; 3RP 74. RAP 2.5(a)(3) bars consideration of the challenge to Glover's testimony because Kuloglija did not object to it in the trial court and has not established that it constituted a manifest constitutional error causing actual prejudice to his rights. Kirkman, 159 Wn.2d at 926-27.

The ways in which blood is deposited on surfaces is a matter of every day experience, at least as to the distinction between the source of a drop of a blood and the source of a blood smear. 2RP 158-59; Commonwealth v. Sturtivant, 117 Mass. 122, 136-38, 1875 WL 9002 (1875). Kuloglija does not dispute that basic fact.

The testimony of the detectives was based on their observation of the crime scene, on the day of the crime. To describe the relationship between physical objects, they explained

that if blood was spattered in the entryway with the door open, it could not have reached a particular closet door, because that closet door would be blocked by the open door. The jurors could not see the physical relationships themselves and the State was entitled to have the officers describe it.

The conditions for admissibility of lay opinion testimony under ER 701 are that the witness has personal knowledge of matter that forms the basis of the opinion, that the opinion is rationally based on the perceptions of the witness, and that the opinion is helpful to the jury. Ortiz, 119 Wn.2d at 308-09. The principal test is the last—that the opinion is helpful to the jury. Id. The opinion of a police officer may constitute lay opinion, when the officer's experience investigating crimes provides knowledge that forms the basis of the opinion that relates to the crime at issue. State v. Russell, 125 Wn.2d 24, 71, 882 P.2d 747 (1994).

A complex conclusion drawn from the details of blood patterns would require expert testimony. E.g., State v. Roberts, 142 Wn.2d 471, 481, 14 P.3d 713 (2000) (opinion that victim was bound and bleeding before moved, and that two people moved him); Hampton v. State, 588 N.E.2d 555, 557 (Ind. App. 1992) (opinion as to how high victim's head was above the floor and

number of blows struck). However, the physical relationship of an open door to a surface behind it, that the door would block the surface from having blood deposited on it, is an observation that does not require forensic expertise.

If the trial court erred in admitting this testimony, the error was harmless. The trial court noted that there was no surprise that the evidence would be elicited at trial. 2RP 159. Evidentiary error is reversible only if "within reasonable possibilities, the outcome of the trial would have been materially affected had the error not occurred." Brockob, 159 Wn.2d at 351. Even if the conclusion that blood could not have been spattered on that closet door was excluded, the physical relationship between the open front door and the closet door was admissible. Based on that evidence, the jury inevitably would have drawn the same inference: the open door would block blood spatter from reaching the closet door behind it. The detectives did not opine that the blood spatter could not have been deposited at another time, or that the door could not have been closed at some point during the attack on Alija Kuloglija.

Moreover, Kuloglija elicited an even broader conclusion regarding blood patterns on cross-examination of Officer Devlin, when examining him about whether he looked for or observed any

evidence of forced entry. 2(b)RP 14-15. Devlin testified that “all the indications of the blood flow and patterns say the door was shut.” 2(b)RP 15.

The most probative evidence of whether the door was open when Alija Kuloglija was stabbed was the absence of blood drops on the outside of the door, which would have been next to her if it had been open. Ex. 2; 2RP 163-64. The critical blood evidence was the “horrific” amount of blood in the entry, and the complete absence of blood in the hall outside the door or on the stairs leading out of the building.¹³ 2RP 146-52; 3RP 9, 57-60, 74; 4RP 183-84; 5RP 13-14, 21. Alija Kuloglija testified that she was stabbed “right at the door” and blood was “gushing everywhere.” 4RP 168. The smeared blood on the door chain and the inside door handle also supported the inference that she was trying to get out of the locked apartment door while she was being stabbed, or afterward, and not that the door was open when she was attacked. Ex. 2, 31-33; 2RP 148-51; 3RP 9. Those blood smears matched the DNA profile of Alija Kuloglija. 4RP 41.

¹³ There were drops of blood in a parking stall outside the building. 2RP 186. The stall was where the ambulance was parked, into which the still bleeding victim was loaded to be rushed to the hospital. 3RP 59-60; 4RP 71-73, 187; 5RP 18, 32-33.

The trial court did not abuse its discretion in admitting the observation of the placement of the open door at the crime scene as described by the detectives. The inference that blood could not have been spattered onto a specific surface because it would have been behind the open door was properly admitted lay opinion.

4. DR. FOY'S TESTIMONY ABOUT ALIJA KULOGLIJA'S DEFENSIVE WOUNDS WAS PROPERLY ADMITTED.

Kuloglija claims that the trial court erred in allowing Dr. Foy to explain the nature of defensive wounds. This argument was not preserved in the trial court and should not be considered on appeal. Even if the testimony was improperly admitted it was irrelevant to Kuloglija's defense and harmless beyond a reasonable doubt.

Kuloglija did not object to this testimony at trial. RAP 2.5(a)(3) bars consideration of this issue because Kuloglija has not established that it constituted manifest constitutional error or made a plausible showing that it had practical and identifiable consequences in the trial. Kirkman, 159 Wn.2d at 926-27, 935.

Kuloglija's claim that the State did not lay an adequate foundation for this testimony cannot be raised when no objection was made on that basis below. He offers no authority in support of the proposition that a lack of foundation is a constitutional violation.

Kuloglija did object to the doctor's testimony about the life-threatening nature of the injuries based on lack of notice of opinion testimony, but the trial court overruled that objection. 3RP 94-95, 120-21. The trial judge concluded that the defense had notice both that the doctor would be testifying and notice that he would provide his opinions about Alija Kuloglija's wounds, because Dr. Foy was the primary treating physician. 3RP 120-21.

The medical records of Alija Kuloglija had to be obtained by a pretrial court order because she objected to the State's request to obtain a copy. 6RP 3.¹⁴ The judge presiding at that hearing noted that the surgeon (Dr. Foy) was likely to be a witness. 6RP 32. The trial judge confirmed that these medical records had been provided to the defense. 3RP 121.

Kuloglija has provided no authority for the proposition that notice that a treating physician will be testifying is inadequate notice that the physician will provide opinions about the nature of the victim's wounds. This argument should be rejected on that basis.

Thomas, 150 Wn.2d at 868-69.

¹⁴ One of the defense counsel on this appeal, Kevin Trombold, represented Alija Kuloglija in seeking a protective order to prevent release of her records. 6RP 3. He was present in court when the court ordered a limited portion of the medical records be provided to the State. 6RP 2, 29-36.

Even if a constitutional error occurred, it should not be considered on appeal because it had no practical effect in this case. The nature of the victim's wounds as defensive wounds was irrelevant to Kuloglija's defense. He did not claim that his mother attacked him, but proffered the theory that someone else attacked his mother. Alija Kuloglija testified that the wounds on her hands were inflicted when she attempted to defend herself from her attacker. 4RP 168. Curavac also testified that her mother said that her wrists were cut as she tried to defend herself. 4RP 150-51.

The absence of an objection by defense counsel strongly suggests that the evidence in question did not appear critically prejudicial to the defense. State v. McKenzie, 157 Wn.2d at 53 n.2. Dr. Foy did not testify that everyone who is in a knife fight suffers defensive wounds, just that this type of wound occurs if a person tries to block a knife with a hand or, in particular, grabs the knife. 3RP 112. That conclusion is unremarkable and was not prejudicial to the defense.

5. KULOGLIJA HAS NOT PRESERVED HIS
OBJECTION TO DETECTIVE SAMPSON'S
TESTIMONY.

Kuloglija claims that the trial court erred in admitting testimony of Detective Sampson about her conversation with

Kuloglija in English, in 2007. No authority is cited in this section of the brief except a reference to a defendant's right to counsel. App. Br. at 35. For this reason, the argument should not be considered by this Court. Thomas, 150 Wn.2d at 868-69.

Further, this claimed error was not preserved. The only objection raised at trial was that the evidence would be cumulative and that Kuloglija was no longer arguing he did not speak English. 5RP 42-44. (In closing, Kuloglija did rely on an argument that his difficulty speaking English caused the police to misunderstand his repeated confessions. 5RP 98-100.) The court overruled the objection. 5RP 44. Sampson testified that she spoke to Kuloglija for 20 minutes outside his workplace. 5RP 47-51. At the judge's direction, she said she contacted Kuloglija as a witness. 5RP 51-52. Kuloglija has not shown how this testimony was manifest constitutional error that caused actual prejudice to his rights. This alleged nonconstitutional error may not be raised for the first time on appeal. RAP 2.5(a)(3).

6. THE COURT DID NOT EXCLUDE CURAVAC'S TESTIMONY AS TO ALIJA KULOGLIJA'S ALLEGED STATEMENTS AT THE SCENE.

Kuloglija claims that the trial court erred in not allowing Suada Curavac to testify to her mother's statements at the scene. This argument is meritless as the trial court allowed that testimony.

During Curavac's testimony, the jury was excused and then returned to the courtroom. 4RP 146. The defense attorney asked, "What did your mother tell you happened there at the scene?"

4RP 149. Curavac testified:

The door bell rang. She opened the door thinking it was me, and then the person pushed her away from the door, and started struggling with her. ... She told me she was trying to fight back. Wrestle him.

4RP 149. Defense counsel asked, "Is there anything else that your mother said that was important?" 4RP 150. Curavac testified:

Yes. She wanted me to know, and tell everyone that it was Dzevad who tried to help her, and was also attacked. And if something happens to her so that everyone knows that.

4RP 150. Asked "Could you tell how she got these wounds?", she related more alleged statements of her mother at the scene:

She said it was from trying to fight back and actually defend herself with her wrists, and as he came in he

was – he was attacking her, and she was trying to defend herself.

4RP 150-51; see also 4RP 130 (additional statement).

The defense attorney referred to this testimony in closing argument. 5RP 97. If this was Kuloglija's best defense, as he claims on appeal, the jury rejected it.

7. OVERWHELMING EVIDENCE SUPPORTED
KULOGLIJA'S CONVICTION OF ATTEMPTED
MURDER.

Kuloglija assigns error to the trial court's denial of his motion to arrest judgment. He addresses only the sufficiency of the evidence to support the conviction and the State's response is limited to that issue. The evidence of Kuloglija's guilt was overwhelming, even though his elderly mother testified that an unknown intruder and not her son attacked her.

When there is a claim that evidence is insufficient to support a conviction, the evidence is viewed in a light most favorable to the State; all reasonable inferences that can be drawn from the evidence must be drawn in favor of the State and interpreted most strongly against the defendant. State v. Salinas, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). The trier of fact is the sole arbiter of credibility determinations, which cannot be reviewed on appeal. State v.

Camarillo, 115 Wn.2d 60, 71, 794 P.2d 850 (1990). A conviction will be affirmed if any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. Salinas, 119 Wn.2d at 201.

The crime of murder in the second degree is committed when a person, with intent to cause the death of another person, causes the death of that person. RCW 9A.32.050(1)(a). Kuloglija does not challenge the sufficiency of the evidence to support the finding that the person who repeatedly stabbed Alija Kuloglija in the chest while she struggled to defend herself intended to cause her death and attempted to cause her death.

The evidence that Kuloglija was the assailant was overwhelming. Kuloglija confessed to officers at the scene that he stabbed his mother and said that he wanted to die. 2RP 66-67, 88, 111. Given that sentiment and the knife in his hand, a reasonable inference is that his wounds were self-inflicted. The next day he volunteered that he was stupid and that he had stabbed his mother and then himself; he said he should have shot everyone and then himself; he again indicated that he wanted to die and repeatedly asked how much jail time he would get. 2RP 121-25. There was no

indication Kuloglija's mental state was impaired when he made these confessions; even one would be sufficient to support the conviction.

These confessions were corroborated by the complete lack of blood outside the apartment door, by blood spatter on a closet door that would be protected if the front door had been open, and Alija Kuloglija's blood on the door chain and inside door knob. 2RP 146-52; 3RP 9, 57-60, 74; 4RP 41, 183-84; 5RP 13-14, 21.

Although Curavac testified that her mother said that someone else stabbed her, Curavac did not mention that to police; her unlikely explanation was that no one asked her directly. 3RP 7; 4RP 151.

That Kuloglija was the assailant was corroborated by his DNA on the handle of the knife broken from the blade that was covered in his mother's blood and hidden inside the apartment, while his own blood was the only blood on the knife found in his hand. 4RP 41-45.

Sufficient evidence supported the conviction.

8. BECAUSE NO ERROR OCCURRED, THE DOCTRINE OF CUMULATIVE ERROR DOES NOT APPLY.

Cumulative trial errors may deprive a defendant of a fair trial. State v. Coe, 101 Wn.2d 772, 789, 684 P.2d 668 (1984). The cases in which courts have found that cumulative error justifies reversal include multiple significant errors. E.g., Coe, 101 Wn.2d

772 (discovery violations, three kinds of bad acts improperly admitted, hypnotized witnesses, improper cross-examination of defendant); State v. Alexander, 64 Wn. App. 147, 822 P.2d 1250 (1992) (improper hearsay as to details of sex abuse and identity of abuser, court challenged defense attorney's integrity in front of jury, counselor vouched victim credibility). No trial error has been shown, so the cumulative error doctrine is inapplicable in this case.

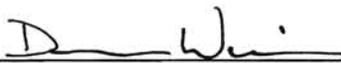
D. CONCLUSION

For the foregoing reasons, the State respectfully asks this Court to affirm Kuloglija's conviction and sentence.

DATED this 18th day of June, 2012.

Respectfully submitted,

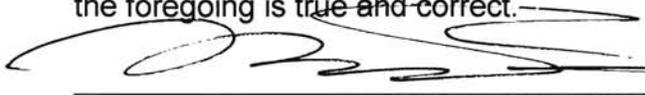
DANIEL T. SATTERBERG
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By: 
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Certificate of Service by Mail

Today I deposited in the mail of the United States of America, postage prepaid, a properly stamped and addressed envelope directed to Blair Russ, Kevin Trombold, and Ted Vosk, the attorneys for the appellant, at 720 Third Avenue, Suite 2015, Seattle, WA 98104, containing a copy of the Supplemental Designation of Clerk's Papers And Exhibits, in STATE V. DZEVAD KULOGLIJA, Cause No. 65809-3-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

06/19/12

Date

STATE OF WASHINGTON
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