

NO. 66858-7-I

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

STATE OF WASHINGTON,

Respondent,

v.

PHONSAVANH PHONGMANIVAN,

Appellant.

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COURT OF APPEALS
STATE OF WASHINGTON

APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE JAMES ROGERS AND MICHAEL HAYDEN

BRIEF OF RESPONDENT

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A. ISSUES PRESENTED

1. Did the trial court abuse its broad discretion in finding the defendant's shooting victim, Margilyn Umali, was competent to testify?

2. After the trial court found Margilyn competent to testify, the defense sought to have her undergo a battery of unknown psychological tests under the direction of their expert. Did the trial court properly exercise its discretion in denying the defense discovery motion?

3. Did the trial court abuse its discretion in rejecting the defendant's motion to dismiss based on a claim of prosecutorial misconduct?

B. STATEMENT OF THE CASE

1. PROCEDURAL FACTS

For the Halloween night shooting of Roger Wright (victim one) and Margilyn Umali (victim two), the defendant was charged with two counts of first-degree assault, with a firearm enhancement on each count. CP 1-6. A jury found the defendant guilty as charged. CP 124-27. He received a standard range sentence on each count, with a total term of confinement of 306 months. CP 134-41.

2. SUBSTANTIVE FACTS AT TRIAL

Maravic and Gil Umali immigrated to the United States in 1991. 12/6/10 RP¹ 16. Maravic works as a phlebotomist, while her husband Gil works as a machinist for Boeing. 12/6/10 RP 43-44. They have three children, 23-year-old Gil, 24-year-old Carlito, and 26-year-old Margilyn. 12/6/10 RP 42.

At the time of this incident, Margilyn and the defendant were involved in a long-term dating relationship and had a young child in common. 12/7/10 RP 16. On Halloween night, October 31, 2008, Margilyn, the defendant, Anitsa Siphadone and her boyfriend, Souksavanh Mekavong, were going clubbing in the Belltown area of Seattle. 12/13/10 RP 88-89. Prior to leaving for Belltown, the group downed shots of tequila while pre-functioning at Mekavong's house. 1/4/11 RP 52. They then drove in Siphandone's SUV to Belltown, and parked in a parking lot off of First Avenue and Blanchard Street.² They parked their SUV at the east end—or top of the parking lot, opposite a hotdog stand that was down on the

¹ The State received a total of 23 volumes constituting the verbatim report of proceedings. The volumes are not sequentially dated. Some of the volumes are mislabeled and some volumes contain multiple dates. For this reason, the report of proceeding shall be listed by date, with other identifying information as needed. The State has attached an appendix as an aid in identifying the correct volumes. See Appendix A.

² Trial Exhibit 92 and Trial Exhibit 155, a crime scene investigation report and map with photographs help illustrate the scene of the shooting.

street along First Avenue. 12/13/10 RP 89-91; 1/4/11 RP 55-56. Siphadone was dressed as a French maid, while Margilyn was dressed as a school teacher. 12/13/10 RP 118, 128. Both were wearing high heels. Id. The defendant was wearing a long-sleeved white shirt and a blue polo shirt. 12/13/10 RP 126.

Around the same time, a number of old high school friends, now in their mid-twenties, Timothy Bower, Dennon Majors, Roger Wright, Gabriel McBride, his girlfriend Jenelle Dalit, Dave Pressley and Melanio Ramos, decided to spend Halloween evening together in Belltown. 12/7/10 RP 144-47, 150, 194-95. Bower was dressed as a hippy, Wright was dressed as a love guru, Dennon was dressed as a police officer, Ramos was dressed as Spiderman, Dalit was dressed as a Seahawks cheerleader and McBride was dressed as Seahawks player Matt Hasselbeck—complete with a jersey top and helmet. 12/7/10 RP 150, 153-55, 199-200; 12/10/10 RP 11. McBride is mixed race Filipino/Caucasian. 12/7/10 RP 236-37.

Arriving in a couple of cars, the group ultimately met up at the corner of First Avenue and Blanchard at approximately 10:30 in the evening. 12/7/10 RP 155-56, 202. They then went to Ohana's restaurant for drinks. 12/7/10 RP 203-04.

After about 30 to 40 minutes, the group of friends went outside and across the street to a hotdog stand to eat. 12/7/10 RP 204-05. While Pressley, Ramos, Dalit, McBride, Majors and others were standing by the hotdog stand with their hotdogs, Dalit saw Wright and Bower over in the adjacent parking lot and it appeared to her that they were about to get into a fight with a couple of Asian men farther up in the parking lot. 12/7/10 RP 210, 216-17; 12/8/10 RP 209-10; 12/10/10 RP 15-16, 21. Dalit was not able to see the persons' faces but she testified that one of them was wearing a gray hoodie and one was wearing a blue top. 12/7/10 RP 214, 216. Dalit was standing next to McBride and Majors at the time. 12/7/10 RP 218; 12/8/10 RP 209-10.

Dalit told McBride and Majors that Wright and Bower were about ready to get into something, so the three of them began walking over to the parking lot. 12/7/10 RP 239; 12/8/10 RP 211-12. Just as Dalit, Majors, and McBride entered the parking lot, someone yelled "gun, run." 12/7/10 RP 219; 12/8/10 RP 212. As Dalit started to run, McBride pushed her to the ground and told her to stay down. 12/7/10 RP 219, 221. Then suddenly, the window of the car they were both hiding behind was shot out. 12/7/10 RP 221.

Ramos testified that he was within five feet of Dalit and McBride when the shooting started. 12/10/10 RP 23. He said that he could see two people at the top of the parking lot (up where the defendant was parked)—one wearing a blue shirt, one a white shirt—shooting from the top of the lot down towards the people below. 12/10/10 RP 23-24. Ramos said that these same two Asian males put a woman's body (Margilyn) into their car. 12/10/10 RP 25, 107-09. Ramos provided a witness statement to the police at the scene of the shooting. 12/10/10 RP 59.

Pressley testified that he was at the hotdog stand with Dalit, McBride, Ramos and Majors just before the shooting occurred. 12/10/10 RP 124. Dalit had drawn his attention to Wright and Bower, as she told him that they were about to get into a fight. Id. at 126. Pressley walked over with McBride, and saw Wright and Bower, an Asian male in a white shirt, and two Asian females. Id. The Asian male then ran to the top of the parking lot just as another person in a blue shirt jumped out from the same area and started shooting. Id. at 126, 128. Pressley was not able to identify the race of the person in the blue shirt. Id. at 129. Pressley waited at the scene and provided a statement to the police. Id. at 59, 131. Asked if McBride could have been the shooter—an allegation that

would be made by the defense, Pressley testified that was not possible, that McBride was next to him at the bottom of the parking lot at the time of the shooting. Id. at 155.

Majors testified that he did not actually see the shooter but that the shots were being fired from the top of the parking lot. 12/8/10 RP 217.

McBride testified that on Halloween night he was dressed as Seahawks quarterback Matt Hasselbeck—a blue jersey with white lettering and a helmet. 12/13/10 RP 208-10, 231. He and his girlfriend, Dalit, and a number of friends all met at his house before driving down to Belltown. 12/13/10 RP 210-12. McBride drove one car and parked about two blocks away from Ohana's. 12/13/10 RP 211-12. After being inside Ohana's for a while, they all left to get hotdogs across the street at the hotdog stand. 12/13/10 RP 213-14. McBride purchased a hotdog while Dalit took pictures of them standing next to the hotdog stand. 12/13/10 RP 215-16.³ McBride testified he was standing next to the hotdog stand with Pressley, Dalit, Ramos and others. 12/13/10 RP 217-18.

³ Dalit took multiple photographs that night with her camera phone. Many of the photos were introduced showing the group at the hotdog stand. See, e.g., Trial Exhibits 175, 183, 184 and 185.

McBride said that Dalit then told him that Wright and Bower were about to get into something over in the parking lot. 12/13/10 RP 218. McBride testified that although he could see Wright, Bower and a girl arguing, he could not hear what they were saying. 12/13/10 RP 221. As he and the others started walking over to the parking lot, McBride heard gunshots, at which point he pushed Dalit down behind a car. 12/13/10 RP 218-19. The window of the car was then blown out. 12/13/10 RP 19.

From behind the car, McBride was not able to see who the shooter was. 12/13/10 RP 219. When McBride looked up after the shooting, he saw Wright, who had been shot in the leg, and the girl he had seen earlier, laying on the ground and two people trying to carry her away. 12/13/10 RP 223. An ambulance quickly arrived and took Wright to Harborview. 12/13/10 RP 223. McBride testified that he went and got his car, and with Dalit and Bower, he drove to Harborview to check on Wright. 12/13/10 RP 223, 225. However, when they arrived at the hospital, they were turned away by an officer who told them they could not go inside. 12/13/10 RP 226. McBride then drove them all home. Id.

Wright testified that after leaving Ohana's with everyone else, instead of going to the hotdog stand, he walked over to the

parking lot. 1/4/11 RP 125-26, 129. In the parking lot, Wright, who was intoxicated, saw two attractive Asian females in Halloween costumes. 1/4/11 RP 129-31, 205-06. As Wright was trying to flirt with one of the girls, an Asian male came up from behind the girls and exchanged words with Bower, who had also walked up to the two girls. 1/4/11 RP 131. As Wright described, Bower was making an "ass of himself." 1/4/11 RP 132.

With Wright standing just a few feet from the girls, gunshots suddenly rang out and Wright was struck twice, once in the leg and once in the thigh. 1/4/11 RP 133, 139. Wright immediately looked up and saw the shooter, less than ten feet away. 1/4/11 RP 135. Wright looked directly into the shooter's face. 1/4/11 RP 137. When shown a montage, Wright immediately pointed to the defendant, and stated, "that's him," with "one hundred percent" that is the person who shot me. 12/9/10 RP 92, 142; 1/4/11 RP 144-47. From the moment of the shooting, the image of the defendant's face, Wright testified, was "stuck in my head." Id.

Wright also testified that when he was shot, besides Bower, the two Asian females, the defendant, and the other Asian male, there was nobody else in the parking lot. 1/4/11 RP 149. Wright said he was not certain about the clothing the defendant was

wearing because he was too focused on the defendant's face.

1/4/11 RP 153; 1/5/11 RP 60.

Bower testified that he was very intoxicated on the night of the shooting and had only a sketchy memory of events. 12/7/10 RP 157-59, 166. He testified that he could remember standing next to Wright when an argument broke out and that moments later, shots were fired and he started to run. 12/7/10 RP 158-59. He saw Wright collapse to the ground and remembers Dalit running up and tying something around Wright's leg in an attempt to stem the flow of blood. 12/7/10 RP 159, 161-62, 171. Bower then rode with McBride to the hospital to check on Wright's status. 12/7/10 RP 164-65.

Ryan Trees was working as a doorman when the shooting occurred. 12/8/10 RP 174, 179. When he heard shots being fired, he looked up and saw two Latino or Asian males at the top of the parking lot—one of the males, in a blue shirt, was crouched on his knees, with the other male standing beside him. 12/8/10 RP 185-86. Trees could see the muzzle flashes coming from the area of the two males. 12/8/10 RP 179. Trees also observed two Latino or Asian girls dressed in shirts and high heels near the two males. 12/8/10 RP 186-87. The shots were being fired down from the east

end or top of the parking lot down towards the street and the hotdog stand. 12/8/10 RP 193.

As Trees watched, the shooter fired a couple more shots, at which point one of the two girls went down. 12/8/10 RP 193. Trees testified that the same two males then ran down to the fallen girl, and along with the other girl, they picked her up and carried her to the top of the parking lot and out of sight. 12/8/10 RP 193-94. Trees said that seconds later a dark colored SUV sped from the lot. 12/8/10 RP 194.⁴

Another individual, Drew Kurata, was working at the hotdog stand when out of the corner of his eye, some movement caught his attention. 12/9/10 RP 35. He then saw a number of people running as shots rang out and he fled around the corner. 12/9/10 RP 35. Kurata testified that he believed the shooter was six feet tall and wearing a Seahawks jersey. 12/9/10 RP 50.

When the shooting stopped, McBride was helping Dalit off the ground when they saw Wright limping towards them saying that he had been shot. 12/7/10 RP 222-23. Dalit ran to Wright and tied

⁴ A resident living in a nearby apartment just happened to be videotaping the area from his balcony. 12/9/10 RP 105, 194, 196. On the video, you can hear the shots being fired and can see individuals picking up a female and carrying her to the top of the parking lot to an SUV as Trees described. 12/9/10 RP 106; Trial Exhibit 166.

a shirt around his leg to stem the flow of blood. 12/7/10 RP 223. Medics arrived shortly thereafter and transported Wright to Harborview. 12/7/10 RP 225.

Dalit testified that after the shooting, she saw three people from the group she had seen in the argument with Wright and Bower, and from whom she believed the shots had been fired, carry a body and put it in an SUV. 12/7/10 RP 225-26. The vehicle then left at a high rate of speed. 12/7/10 RP 227; 12/8/10 RP 101-02. Officers working crowd control in the area heard the shots and responded to the scene within three minutes. 12/8/10 RP 7. The defendant had already removed Margilyn and fled from the scene before the officers arrived. 12/8/10 RP 7-8.

A witness was able to record the license plate of the vehicle, described as a dark colored SUV. 12/6/10 RP 181; 12/8/10 RP 103, 105. The SUV was registered Anitsa Siphadone's father. 12/9/10 RP 75-76, 81, 83. The officer impounded the vehicle, but found that it had been wiped clean, with the floor mats still damp and a bottle of liquid detergent found inside. 12/8/10 RP 19, 119-21. Still, several small stains located in the vehicle tested positive for blood. 12/8/10 RP 124-25.

On November 1st, detectives contacted Mekavong and Siphadone. 12/13/10 RP 16-18. Upon first being contacted, Mekavong was evasive, while Siphadone fought back tears. 12/13/10 RP 20. After the detectives learned more of the circumstances of the shooting, they contacted Mekavong again, but he refused to answer any of their questions. 12/13/10 RP 30.

Siphadone was called as a witness at trial. She testified that she was with Margilyn down by the hotdog stand when the shooting occurred. 12/13/10 RP 97-98. She claimed that she did not know where the defendant was when the shooting occurred, that she did not see who fired the shots, and that she did not even know where the shots were coming from. 12/13/10 RP 98, 121.

Siphadone said that when the shooting stopped, Mekavong and the defendant ran over, picked up Margilyn and put her in the SUV. 12/13/10 RP 100. After dropping Margilyn off at Swedish Hospital, Siphadone and Mekavong then drove home. 12/13/10 RP 100-02. They did not call the police. 12/13/10 RP 102.

Siphadone confessed that she talked with Mekavong about the shooting before the police were able to track them down, and that she and Mekavong cleaned out the SUV before the police arrived. 12/13/10 RP 104-05. She also admitted that when she

first spoke to the police, she did not tell them about the fact that she had heard someone utter a pick-up line directed towards Margilyn, and that a confrontation ensued just before the shooting. 12/13/10 RP 107, 110, 113, 116-17. Finally, she admitted she did not see anyone wearing a Seahawks jersey near the scene of the shooting. 12/13/10 RP 120.

Mekavong also was called to testify, although his testimony was limited. Mekavong asserted his Fifth Amendment right to remain silent in regards to any questions about whether he saw a gun or helped dispose of a gun. 1/3/11 RP 8; 1/4/11 RP 21-22.

Mekavong began his testimony by claiming that he did not know where the defendant was when the shooting took place. 1/4/11 RP 58. Mekavong also claimed that he did not know where the shots came from. 1/4/11 RP 97. However, he then changed his story and said that he suddenly remembered that the defendant was at the hotdog stand at the time of the shooting. 1/4/11 RP 62, 65.

Mekavong testified that he had gone to pay the parking fee when two guys started "messing" with Margilyn and Siphadone. 1/4/11 RP 59, 63-64. He says he told the two guys to back off, that the girls were somebody's girlfriends. 1/4/11 RP 59. Mekavong

says that as he was walking away, the two guys approached him in an attempt to beat him up. 1/4/11 RP 65. The two guys were then joined by a number of other men who proceeded to surround him. 1/4/11 RP 68. He testified that as these men began to charge him, he turned to run just as a number of shots rang out. 1/4/11 RP 68-69. Mekavong admitted that he did not tell the police about this alleged confrontation. 1/4/11 RP 85.

At the scene of the shooting, officers recovered ten shell casings, all .40 caliber Smith & Wesson brand and all fired and ejected from the same gun. 12/8/10 RP 138, 147, 149; 12/10/10 RP 167; Trial Exhibits 64, 65, 66. All the casings were located at the east end, or top, of the parking lot—opposite the hotdog stand, and in the location that Margilyn was loaded into the SUV by the defendant and Mekavong. 12/9/10 RP 231-34.

On the night of the shooting, Gil Umali was driving his wife home from work when he received a call directing him to drive to Harborview. 12/6/10 RP 45, 47-49. When they arrived at the hospital, the Umalis instructed the doctors to do whatever it took to keep their daughter alive. 12/6/10 RP 64. Around midmorning, the defendant showed up at the hospital. 12/6/10 RP 55-56. Maravic Umali noted that the defendant seemed scared. 12/6/10 RP 59.

When the younger Gil Umali asked the defendant what had happened, the defendant would not look Gil in the face and would not give him a straight answer. 12/9/10 RP 219.

The Umali family met with the defendant on a number of occasions after the shooting. 12/14/10 RP 88. Carlito Umali, Margilyn's brother, helped the defendant obtain his release from jail pending trial. 12/14/10 RP 91. The day of his release, Carlito went over to the defendant's house to try and find out exactly what had happened on Halloween night. 12/14/10 RP 94-95. The defendant cursed at Carlito and told him he did not need to know anything about what happened and that he did not understand. 12/14/10 RP 95. The defendant later called Carlito and told him that "things will happen in time" and that God was going to take care of them. 12/14/10 RP 96.

A few months later the defendant admitted to Carlito that he had a gun with him on the night of the shooting, but he claimed that it was a big gun and that if he had shot Margilyn with the gun, it would have killed her. 12/13/10 RP 117-18. Over time, the defendant provided the Umali family with multiple different versions of what actually occurred on the night of the shooting. 12/7/10 RP 131. Carlito also attempted to contact Mekavong and Siphadone,

but neither of them ever returned his calls and neither ever visited Margilyn. 12/14/10 RP 132.

When the defendant was first contacted by detectives, he claimed that he was getting a hotdog and talking to Mekavong at the time of the shooting. 12/13/10 RP 158. The defendant's clothing was taken into evidence—a bright blue collared shirt—with blood stains, and a white long-sleeved shirt, also with blood stains. 12/8/10 RP 161-64; Exhibits 79, 80. The defendant did not testify at trial.

Margilyn, was shot once, with the bullet lodging in her brain. She began her testimony by providing some background information about herself and her family.⁵ 12/13/10 RP 263-70. She provided her name, age, name and age of her daughter, that the defendant was her boyfriend and father of her daughter, and that Mekavong and Siphadone were friends. 12/13/10 RP 264-66. Margilyn testified that she remembered Halloween of 2008. 1/5/11 RP 76. She testified that she was studying for a final in South Seattle in the morning and then went home. 1/5/11 RP 76-79. She

⁵ Due to her injury and the difficulty she had with the spoken word, Margilyn answered some of the questions posed to her verbally, by writing, and by drawing pictures. See, e.g., 1/5/11 RP 79, 100.

said that she was with Mekavong, Siphadone and the defendant in the evening. 12/13/10 RP 266.

Margilyn said that she and the defendant went out that evening. 1/5/11 RP 79. She then drew a picture of two other people she said she was with and identified them as Mekavong and Siphadone. 1/5/11 RP 80-82. She drew a car and said that the defendant drove them to a party. 1/5/11 RP 82-83. She identified herself, Wright and Siphadone in the drawing. 1/5/11 RP 84. She also drew a gun and said that the defendant had it and that there had been a fight but that she did not know what the fight was about. 1/5/11 RP 84, 88. She testified that she told the defendant not to fight. 1/5/11 RP 88. Asked the defendant's response, Margilyn simply responded, "a gun." 1/5/11 RP 89.

Margilyn said that she had seen the gun before and that the defendant had it when they were over at Mekavong and Siphadone's house. 1/5/11 RP 89. Asked who shot her, Margilyn said that it was the defendant, she was sure of it. 1/5/11 RP 92-93. She testified that the defendant is "everything" to her, that she still loves him, and that he apologized to her. 1/5/11 RP 91-92, 94.

3. MARGILYN UMALI'S INJURY, RECOVERY, AND THE DEFENDANT'S ATTEMPT TO HAVE HER SUBMIT TO A BATTERY OF TESTS

Margilyn was shot once, with the bullet entering her head and lodging in the corpus callosum region of her brain. 12/8/10 RP 46. The injury affected Margilyn in two significant ways. First, she suffers from hemiparesis, meaning that one side of her body is less functional than the other. 12/8/10 RP 43. Second, she suffers from what is called "mixed aphasia." 12/10/10 RP 64; 12/8/10 RP 61.

"Aphasia" is a term that describes disorders related to language—the ability to speak, understand, read and write. 12/10/10 RP 64. "Mixed aphasia" is a level of aphasia that affects all the language modalities. Id. at 64. "Aphasia," however, "is specifically related to language and ... does not encompass anything having to do with memory, it is strictly language." Id. at 63-64, 105.

Margilyn was hospitalized from the time of the shooting, October 31, 2008, until January of 2009. 12/9/10 RP 162. While hospitalized, she was essentially mute, unable to verbally communicate other than saying a few words a day. 12/9/10 RP 166. She spent months on the inpatient rehabilitation unit. 12/9/10

RP 162. Margilyn underwent extensive speech therapy, occupational therapy, and physical therapy. 12/8/10 RP 48-49.

After her release from the hospital, Margilyn underwent home therapy each week. 12/9/10 RP 173-74. Initially, she had extreme difficulty communicating and relied mainly on using thumbs up and thumbs down responses to communicate. 12/9/10 RP 177. Over time, Margilyn improved, and although she could not always come up with the correct words when speaking, she was able to communicate effectively with her therapist and family. 12/9/10 RP 179-81.

By April of 2009, Margilyn was able to speak using sentences consisting of three to four words. 12/8/10 RP 56. While Margilyn would attempt to communicate properly, her condition made it difficult for her to come up with the correct words to express exactly what she was actually thinking or trying to say. 12/8/10 RP 75. For example, while she knew the members of her family, when shown pictures of her family members, she would get their names wrong sometimes up to 60 percent of the time. 12/10/10 RP 83, 85.

During this time period, on multiple occasions she made reference to "Sam," the defendant's nickname. 12/10/10 RP 77.

She also asked on occasion what had happened to her. 12/6/10 RP 120; 12/10/10 RP 75.

As with many persons suffering from aphasia, Margilyn communicated best by using mixed language modalities; for example, combining the use of her verbal skills with drawing, writing, using her hands, and choosing between different written words.⁶ 12/7/10 RP 105-06; 12/10/10 RP 77. Also, as with other persons suffering from mixed aphasia, Margilyn would get “overloaded,” causing a sharp decrease in her ability to effectively communicate. 12/10/10 RP 99-100; 1/4/11 RP 14.

On August 25, 2009, the prosecutor informed the court that she had spoken to Margilyn, but that she was not yet capable of having a really substantive conversation about the shooting. 8/25/09 RP 29-30. On March 9, 2010, the prosecutor informed the court that she had spoken with Margilyn, and that Margilyn was able to communicate and that she indicated that she remembered the shooting. 3/9/10 RP 126. The prosecutor said that this was reflected in the transcript of an interview conducted on January 2,

⁶ Despite this evidence, the defense objected to Margilyn using any form of communication other than verbal communication. 1/4/11 RP 7-10. It is difficult to understand the basis for this objection given that a court would usually accommodate any witness with a significant speech or communication impediment.

2010, that was attached to the defense trial brief. 3/9/10 RP 126.⁷

In the interview, Margilyn said that the defendant apologized to her for shooting her. CP ____, sub # 130A. Defense counsel said that they had also interviewed Margilyn back in September of 2009.

3/9/10 RP 127.

The next day, on March 10, 2010, the defense told the court that they had concerns about having Margilyn testify that the defendant had shot her. See 3/10/10 RP 16-70. The court tried to clarify, asking the defense if their concern was “whether she has a memory of the event or whether it’s simply an attempt by the State to put evidence in front of her so that she’ll be nodding her head and saying yes, yes, yes, when in fact she has no memory.”

3/10/10 RP 170. Defense counsel affirmed that this was their concern. Id. The court indicated it would conduct a competency hearing to determine whether Margilyn understood her oath and whether she had a memory of relevant information. 3/10/10 RP 194-95. Margilyn was then called as a witness before the Honorable Judge Michael Hayden. 3/10/10 RP 227-28. Prior to testifying, the court was informed that Margilyn’s ability to communicate effectively was enhanced if she could respond

⁷ See CP ____, sub # 130A, appendix E (this is a transcript of Pretrial Exhibit 7).

verbally and also write, draw or choose written words as part of her modes of communication. 3/10/10 RP 227-28.

a. The Competency Hearing

Margilyn began by accurately spelling her name. 3/10/10 RP 229. Asked who her boyfriend was in 2008, Margilyn answered "Me and Sam." Id. She also accurately answered who her daughter was, and that Sam was the father of her daughter. Id.

Margilyn was asked if she knew a person named Noy,⁸ and she responded yes. 3/10/10 RP 230. She responded similarly that she knew a girl named Anitsa, and that Noy was Anitsa's boyfriend. 3/10/10 RP 230.

Margilyn testified that she remembered Halloween of 2008, and that she was with Anitsa "and a guy." 3/10/10 RP 231. Margilyn then wrote the name Sam. Id. She testified that Sam was her boyfriend on Halloween. 3/10/10 RP 232.

Margilyn was then asked if "[w]hen somebody tells the truth, is that right or is it wrong?" 3/10/10 RP 233. Margilyn responded "right." Id. Asked "[w]hen somebody's being good, are they being right or are they being wrong," Margilyn responded "right." Id.

⁸ Noy is Souksavanh Mekavong's nickname.

Margilyn then drew a picture of what she remembered from Halloween. In the picture, she identified herself, the defendant, another guy, and some cars. 3/10/10 RP 235. Asked where it was they were at, Margilyn responded, "downtown." 3/10/10 RP 235-36. Asked what was drawn in one of the person's hand, Margilyn said "a gun." 3/10/10 RP 236. Asked who the person was, Margilyn responded, "Sam." Id.

Defense counsel began cross-examination by asking if Margilyn remembered her—she responded that she did, but could not provide counsel's name. 3/10/10 RP 237-38. She responded that she knew the prosecutor, that she knew she was a lawyer and that she recalled her coming to her house. 3/10/10 RP 238-39. Asked if she knew what it meant to tell the truth, Margilyn responded "yeah." 3/10/10 RP 240. Asked, "[w]hat does that mean," Margilyn responded, "good, good." Id. Asked what a lie means, Margilyn responded, "bad." 3/10/10 RP 242.

After Margilyn testified, defense counsel stated that they were concerned that the statements Margilyn made about the shooting was a "fed memory," something that had been planted in her brain by her family. 3/10/10 RP 252. The court then put on the record that it was "particularly significant" that when asked what she

remembered about the event, Margilyn walked up to the board and made a diagram of the event. 3/10/10 RP 245. The court stated that it appeared Margilyn did this on her own volition and that she drew the events that happened on Halloween from her “own bank of memories.” Id. The court also responded to the defense accusation that Margilyn’s family had put her up to the task. The court stated that “I don’t think there is any way she could have been putting on that kind of an act for this court. Everything she did up there was profound.” 3/10/10 RP 249. “In my view,” Judge Hayden stated, “having looked at her, she’s making her best attempt to testify from memory, and she has some memories.” 3/10/10 RP 256. Defense counsel put on no evidence at the competency hearing and Judge Hayden found Margilyn competent to testify. 3/10/10 RP 257.

b. The Defendant’s Attempt To Have Margilyn Subjected To A Battery Of Tests

On May 20, 2010, after Margilyn had already been found competent to testify, defense counsel asked that Margilyn be subjected to a battery of psychological tests to be administered by Doctor Kenneth Muscatel. 5/20/10 RP 2-3. The court said that

before ruling on the issue, it wanted briefing from the parties.

5/20/10 RP 4, 26-28.

On June 11, 2010, the defense filed a formal motion to have Margilyn undergo a full psychological examination. 6/11/10 RP 381; CP ____, sub # 144, 145, 146, 147, 148. The court acknowledged that it had the discretion to order such an examination but questioned whether any doctor "is going to say, I've got a test that will test whether somebody is capable of having any memory of something following a traumatic event, if they have any flash of memory from two years ago, I'd be happy to see it. I doubt the doctor is going to say I can do that." 6/11/10 RP 398. In other words, as the court put it, if Margilyn were to testify about a gun, the court expressed doubt as to whether there was any test that could be administered that would determine if this were a false memory or not. 7/2/10 RP 12-13.

Along these lines, the court asked counsel what tests would be administered and how intrusive the tests were. 7/2/10 RP 25-27. Defense counsel said they did not know what was entailed in the battery of tests they sought to have administered, how stressful they might be, or how long they would take. 7/2/10 RP 6-7. The court said it needed answers to all these questions, and

specifically instructed counsel to have Doctor Muscatel provide the court with a copy of the actual tests to be administered. 7/2/10 RP 27. Finally, along with having substantial doubt that any testing could resolve the memory issue the defense was raising, the court also noted that it was concerned with privacy issues, and very concerned with the trauma that the testing could inflict upon Margilyn. 7/2/10 RP 5.

c. Doctor Muscatel

On July 22, 2010, Doctor Muscatel testified that he was hired by the defense to determine whether Margilyn had any neurological and neuropsychological issues that might pertain to her current competency and whether she had a memory of the shooting. 7/22/10 RP 3. Doctor Muscatel stated that he had reviewed 11 CD's containing Margilyn's medical records, the interview of Margilyn conducted by Detective Cobane on January 2, 2010, and the competency hearing held on March 10, 2010. Based on a review of this information, Doctor Muscatel stated that he could not opine that Margilyn was not competent to testify. Id. at 5.

The doctor acknowledged that Margilyn was severely impaired in her ability to use language, and thus, it would be very difficult to conduct any type of testing. Id. at 5-6. In other words, as

Doctor Muscatel put it, because of Margilyn's difficulty with language, he was concerned whether it was even possible for him to gauge and assess her responses accurately. Id. at 7. This would be further compounded by the fact that with mixed aphasia, multiword questions and multiword responses encompassed in the testing would be very difficult for Margilyn. Id. at 9.

The court then asked Doctor Muscatel a specific question. Judge Hayden reminded Doctor Muscatel that at the competency hearing, Margilyn had drawn a picture of the defendant pointing a gun in a parking lot. How, the court asked, could any test determine whether this was a true memory or not. Id. at 12-13. When Doctor Muscatel said that Margilyn could be cross-examined on the issue, the court interrupted, stating that he wasn't talking about cross-examination.

The Court: I'm asking you to say how you can run some kind of test on her, whether it's a psychometric test or a psychological test, so that you can get in front of the jury and say my tests says that information is wrong.

Doctor Muscatel: There is no such test.

The Court: That's what I thought.

Doctor Muscatel: There never could be.

The Court: That's what I thought.

Id. at 14.

Doctor Muscatel then entered into a debate with the court. Muscatel claimed that because of Margilyn's language difficulties, it would be difficult for her to be effectively cross-examined, and therefore, he asserted, she may not be competent to testify. The court responded that the effectiveness of cross-examination was a matter for the jury to determine, and not a matter of competency.

Id. at 15-21. Muscatel then said that he could maybe test Margilyn's current memory capacities so that the court would be "more comfortable" with its decision, but he added that there was "no forensic examination" that could ever determine to a reasonable medical or psychological probability whether Margilyn had a memory of the shooting. Id. at 15, 20.

When asked what tests he would give, Doctor Muscatel listed a litany of possible tests but stated he did not know what tests he would administer because he had not met Margilyn. Id. at 22-23. In an unusual statement, because it appears to have little to do with a competency determination, Doctor Muscatel said he was interested in tests that had to do with "attention, processing speed

and language.” Id. at 23. “The key is,” Doctor Muscatel mused, “can she provide spontaneous information and fill in the details enough so that everybody felt like she was comfortable with the information.” Id. Finally, when directly asked yet again whether testing could provide any determination regarding memory with a medical degree of certainty, Muscatel responded:

All I can tell you is that I feel an evaluation would be appropriate. Whether that, whether it turns up anything, I don't know... There's no magic pill or magic bullet that can tell you something's real or something's not in somebody's head. You look at a collection of information and you present it and the court decides or the jury decides.

Id. at 36-37.

The court responded:

I will tell you that what he said is exactly what I expected him to say, that no one is going to be able to test as to whether the memory that she conveyed in her competency hearing in front of me is real or fabricated, or not fabricated, real or not real. You cannot test for that.

.....

Anyone who reviews the [medical] records would be able to take the witness stand in front of the jury and testify what the records show about her level of impairment, and can testify about confabulation, memory difficulties and brain injury. Muscatel is not pretending that he would be able to say it's real or imagined. The battery of tests, the number of hours, he doesn't know. He's never done this before, nor does he know anyone else who's ever done it before.

Id. at 38-39.

The court then denied the defense request to have Margilyn undergo a battery of psychological tests. Id. at 57-58. The court found that the testing would impose a hardship on Margilyn, and that Doctor Muscatel could adequately pursue the issue regarding the level of her injury through the voluminous medical records and through testimony. Id. He also found that the effort to test Margilyn would be futile because no battery of tests would allow an expert to give an opinion as to whether Margilyn's testimony was an altered memory or confabulation—"such tests do not exist." Id. The court, however, did rule that the defense could interview Margilyn yet again, and that Doctor Muscatel could be present during the interview.⁹ Id.

d. The Defendant's Continued Attempts

On December 1, 2010, the defense brought a motion to reconsider. 12/1/10 RP 13-14. The court denied the motion, stating:

It is still the court's opinion that if she has information that she remembers, and at the competency hearing she did have some limited information...specifically, that the defendant was armed with a firearm and was shooting at the

⁹ At trial, Doctor Dawn Ehde, one of Margilyn's treating physicians--with a Ph.D in Clinical Psychology, testified that it would be inappropriate to have someone in Margilyn's condition undergo psychological testing and that because of her language disability, Margilyn would be incapable of taking such tests. 12/14/10 RP 72-78, 86.

time of the event, if she has that memory and she's able to communicate that memory, she is competent as a witness. I have no doubt that she understands the difference between a fabrication and the truth.

Id. The court held that the defense had not met its burden of proving Margilyn had no testimonial information. Id. Defense counsel then told that the court that they would make the tactical decision of whether to call Doctor Muscatel as a witness or not at a later date. 12/1/10 RP 14.

For scheduling reasons, the case was then transferred to the Honorable Judge James Rogers. On December 2, 2010, the defense interviewed Margilyn again, this time with Doctor Muscatel present. 12/2/10 RP 20-26.

On December 12, 2010, the defense renewed their motion before Judge Rogers. Defense counsel said that it was "very very difficult" to communicate with Margilyn, and therefore she was not competent to testify. 12/13/10 RP 196-97. The court asked counsel, "what new issue are you raising that Judge Hayden hasn't already considered?" Id. at 197. The defense simply reiterated that in interviewing Margilyn with Doctor Muscatel present, she did not exhibit a full memory of the shooting and that what she was able to express—including drawing a picture of the shooting, the

defense could not prove whether the memory was a true memory of confabulated. Id. at 199-200.

Judge Rogers rejected the defendant's motion, finding that the evidence shows that Margilyn suffers from mixed aphasia, which is related to language and communication, not memory. Id. at 204. The court said it was persuaded that Margilyn understood the difference between right and wrong in regards to understanding the oath given to testify, and that she appeared to have a memory of the shooting. Id.

On December 14, 2010, in discussing the possible testimony of Doctor Muscatel, defense counsel conceded that no psychological testing could ever tell whether or not a stated fact was a true memory or confabulation. 12/14/10 RP 10-11.

Additional facts are included in the sections they pertain.

C. ARGUMENT

1. JUDGE HAYDEN AND JUDGE ROGERS DID NOT ABUSE THEIR DISCRETION IN FINDING MARGILYN UMALI COMPETENT TO TESTIFY

The defendant claims that both Judge Hayden and Judge Rogers abused their discretion in finding that he had failed to meet his burden of proving that Margilyn Umali was not competent to testify as a witness. The defendant's claim should be rejected.

The record here shows that the highly deferential decision of the trial court was correct.

a. Standard Of Review

Washington law places severe restrictions on who may be excluded from testifying. In Washington every person is presumed competent to be a witness except as otherwise provided by statute or by court rule. ER 601. Only persons "of unsound mind, or intoxicated at the time of their production for examination," are not competent to be a witness, nor are persons "who appear incapable of receiving just impressions of the facts, respecting which they are examined, or of relating them truly." RCW 5.60.050.

In State v. Smith, 30 Wn. App. 251, 633 P.2d 137 (1981), aff'd, 97 Wn.2d 801, 650 P.2d 201 (1982), a prosecution for assault, the defendant attempted to exclude the testimony of the victim on the grounds that the victim's severe mental retardation rendered her incompetent to testify. Although 38 years of age, the victim has an I.Q. of 23, the equivalent of a four-year-old. In affirming the trial court's decision finding the victim competent, the Court stated that only persons,

who are commonly called insane; that is to say, those suffering from some derangement of the mind rendering them incapable of distinguishing right from

wrong. . .those who are without comprehension at all, not those whose comprehension is merely limited. Thus, although of “unsound mind,” a witness may possess sufficient comprehension regarding certain matters so as to be competent to testify as to them.

Smith, 30 Wn. App. at 253-54. The Supreme Court affirmed as well, stating that while the victim had been adjudicated as “mentally deficient,” and with a “retarded mind,” this did not make her incapable of knowing the difference between the truth and a lie and of testifying about facts. State v. Smith, 97 Wn.2d at 803.

Whether a witness is competent to testify is a question of fact to be determined by the trial court. State v. Watkins, 71 Wn. App. 164, 170, 857 P.2d 300 (1993). The burden of proving incompetency is on the party opposing the witness—in this case, the defendant. Watkins, 71 Wn. App. at 170. The party opposing competency must prove incompetency by a preponderance of the evidence. State v. Brousseau, 172 Wn.2d 331, 341-42, 259 P.3d 209 (2011).

A determination of competency rests primarily with the trial judge, who sees the witness, notices the witness's manner, and considers his or her capacity and intelligence. State v. Allen, 70 Wn.2d 690, 692, 424 P.2d 1021 (1967). These are matters that are not reflected in the written record for appellate review, and

therefore, a competency determination lies within the sound discretion of the trial judge and will not be disturbed on appeal in the absence of proof of a manifest abuse of discretion. Allen, 70 Wn.2d at 692. In fact, the Supreme Court has stated that "[t]here is probably no area of law where it is more necessary to place great reliance on the trial court's judgment than in assessing the competency of a child witness." State v. Woods, 154 Wn.2d 613, 617, 114 P.3d 1174 (2005),¹⁰ see also State v. Hunsaker, 39 Wn. App. 489, 693 P.2d 724 (1985) (3 1/2 year old found competent to testify about abuse that occurred when she was two). Thus, in reviewing a competency claim, this Court must review the record in the light most favorable to the State, and determine whether the trial court reasonably could have found the witness competent. See State v. Karpenski, 94 Wn. App. 80, 105, 971 P.2d 553 (1999), abrogated on other grounds by State v. C.J., 148 Wn.2d 672, 682, 63 P.3d 765 (2003).

In general, a witness is competent to testify if he or she "has sufficient mental capacity to understand the nature and obligation of an oath and [is] possessed of sufficient mind and memory to

¹⁰ While Woods was a child-witness case, the rationale applies equally to all witness competency situations.

observe, recollect, and narrate the things he has seen or heard.” State v. Ryan, 103 Wn.2d 165, 171, 691 P.2d 197 (1984); State v. Moorison, 43 Wn.2d 23, 28-29, 259 P.2d 1105 (1953); State v. Pham, 75 Wn. App. 626, 629, 879 P.2d 321 (1994), rev denied, 126 Wn.2d 1002 (1995). The Court “may examine the entire record in reviewing the competency determination.” Woods, 154 Wn.2d at 617.

b. Margilyn Umali’s Competence

There is no question but that Margilyn Umali is severely **disabled**. She has, and will likely continue to have, significant difficulties **communicating** in a normal functional manner. She suffers from mixed aphasia. But there is nothing in the record—and defense counsel possessed Margilyn’s entire medical file, that shows that Margilyn is cognitively impaired to such a degree that she does not know right from wrong, or that she does not have a memory of relevant events—the shooting. She is, like many other persons in society, a person who suffers from a disability, a specific disability that affects her ability to communicate. While the defense apparently wanted the trial court to presume that because Margilyn suffered from a disability that made it difficult for her to answer questions in a normal manner, that she must not know the

difference from right and wrong, and must not have a memory—no evidence supports this bias.¹¹

Even ignoring all of the evidence from the multitude of interviews that Margilyn was subjected to, and her trial testimony, her testimony at the competency hearing alone supports the trial court's findings. Margilyn testified that the defendant was her boyfriend in October of 2008. 3/10/10 RP 229. This fact alone shows that she had memories from 2008—the relevant time period. She testified that she remembered Halloween of 2008 and that she was with the defendant, Siphadone and Mekavong. Id. at 231-32. She then drew a picture—one of the ways in which she communicates—showing them downtown, with the defendant holding a gun. Id. at 235-36. The defendant can argue that these are false memories or lies, but that same claim can be made in every case. That is an issue for the jury to decide, not an issue of competency. The trial court found that Margilyn had memories of the shooting. The defendant fails to show that this highly deferential determination was an abuse of discretion.

¹¹ The defense relied heavily on a presumption that because Margilyn could not communicate in a normal manner, she must be mentally impaired. This is no different than improperly assuming that someone with a substantial speech impediment must be mentally challenged. Margilyn actually carries a card that informs people she has “a communication impairment,” that her “intelligence is intact,” and that she is not “retarded or mentally unstable.” Trial Exhibit 245, 246.

Similarly, Margilyn testified that she knew that when someone tells the truth, this is the right thing, a good thing. Id. at 233. She testified that it is “bad” to lie and that she knows what it means to tell the truth. Id. at 240, 245. Again, the defendant has provided no evidence that can overcome the presumption of competence and the trial court’s discretion in this area.

c. Any Error In Finding Margilyn Competent Was Harmless

Where an error infringes upon a defendant's constitutional rights, the error is presumed prejudicial, and the State has the burden to prove it was harmless. State v. Caldwell, 94 Wn.2d 614, 618, 618 P.2d 508 (1980). However, an error which is not of constitutional magnitude, for example, the mere erroneous admission of evidence, requires reversal only if the error, within reasonable probabilities, materially affected the outcome of the trial. State v. Halstien, 122 Wn.2d 109, 127, 857 P.2d 270 (1993); State v. Stenson, 132 Wn.2d 668, 709, 940 P.2d 1239 (1997). In other words, the inquiry is whether the outcome of the trial would have been different if the error had not occurred. State v. Jackson, 102 Wn.2d 689, 695, 689 P.2d 76 (1984). Thus, to overcome the harmless error analysis here, the defendant must show that “within

reasonable probabilities," but for the error, the outcome of the trial would have been different. State v. Smith, 106 Wn.2d 772, 780, 725 P.2d 951 (1986); State v. Thamert, 45 Wn. App. 143, 151, 723 P.2d 1204, rev. denied, 107 Wn.2d 1014 (1986). To determine the probable outcome, the reviewing court must focus on the evidence that remains after excluding the tainted evidence.¹² Thamert, 45 Wn. App. at 151.

The evidence that would have been excluded here is the testimony of Margilyn. However, the extensive remaining evidence was particularly damning to the defendant. Thus, even if this Court were to find that Judge Rogers and Judge Hayden both erred in finding Margilyn competent to testify—and her testimony irrelevant and inadmissible, the admission of her testimony was harmless. There was simply too much evidence of the defendant's guilt.

The defense argues that other than Margilyn, the only person who positively identified the defendant as the shooter was Wright. While true, his testimony was incredibly powerful. He was

¹² The defendant cites to State v. Brousseau, 172 Wn.2d 331, 334, 259 P.3d 209 (2011) and claims that a constitutional harmless error standard applies. See Def. br. at 36. It does not. The erroneous admission of evidence is not an error of constitutional magnitude. See, e.g., Stenson, 132 Wn.2d at 709. Further, Brousseau does not state otherwise and this issue was not even before the Court. Rather, the Court in Brousseau was asked to determine whether, under the due process clause, a child witness was required to testify at a pretrial competency hearing.

shot while looking directly into the face of the shooter—a face he said he could not forget. Then, without having talked to anyone, while still in the hospital, Wright picked the defendant's photo, with 100% certainty, from a montage.

Moreover, the State did not need to rely solely on Wright's eyewitness identification. The other eyewitnesses, while not able to make a positive identification of the defendant—they did not see his face, all put the shooter in the position of the defendant. All the physical evidence as well, the shell casings and bullet strikes, all placed the shooter at the top of the parking lot firing down—where all the witnesses said McBride and the others were gathered. And finally, all the witnesses said it was the shooter who then picked up Margilyn and drove her away in the SUV traced back to the defendant. Along with the defendant's actions post shooting that suggested he was culpable, the circumstantial evidence and direct evidence was simply overwhelming. See State v. Myers, 133 Wn.2d 26, 38, 941 P.2d 1102 (1997) (the court considers circumstantial evidence to be as reliable as direct evidence).

2. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN DENYING THE DEFENDANT'S REQUEST TO SUBJECT MARGILYN UMALI TO A BATTERY OF PSYCHOLOGICAL TESTS

The defendant contends that the trial court abused its discretion in denying his motion to subject Margilyn Umali to a battery of psychological tests. This claim has no merit. Two months *after* the trial court held a competency hearing and determined that Margilyn was competent to testify, the defense decided they wanted to have Margilyn undergo a battery of unknown psychological tests to be administered by their expert. The defense admitted that their primary concern was that they wanted to know whether the facts Margilyn recited about the shooting were real memories or memories planted in her mind by her family. The defense expert, Doctor Muscatel, admitted that any testing he could administer could not determine whether Margilyn's statements of past facts were true memories or not. With nothing more to rely on than this, the trial court did not abuse its discretion in denying what amounted to a "fishing expedition." The jury, not a psychiatrist, is the appropriate entity to evaluate the credibility of a witness. State v. Braxton, 20 Wn. App. 489, 491, 580 P.2d 1116 (1978), rev denied, 91 Wn.2d 1018 (1979).

The Supreme Court has firmly stated that “[w]e have made clear... a crime witness or victim should not be ordered to submit to psychiatric examination unless a defendant demonstrates a compelling reason.” State v. Hoffman, 116 Wn.2d 51, 89-90, 804 P.2d 577 (1991) (citing State v. Demos, 94 Wn.2d 733, 738, 619 P.2d 968 (1980) and State v. Tobias, 53 Wn. App. 635, 637, 769 P.2d 868 (1989)). “To conclude otherwise,” the Court stated, “would smack of our countenancing a practice of placing victims and witnesses on trial in place of defendants; this we decline to do.” Hoffman, 116 Wn.2d at 89-90. In the absence of a compelling reason, the court will “refuse to sanction the use of a psychiatric examination as a ‘fishing expedition’ for gathering of evidence which might be used to impeach the complainant.” Tobias, at 638. When no compelling reason for a psychiatric examination can be articulated by defense, traditional means of assessing witness credibility and perceptual ability are sufficient. Tobias, at 637.

Thus, the decision to order a witness to submit to psychiatric testing is vested within the sound discretion of the trial court. State v. Israel, 91 Wn. App. 846, 849-51, 963 P.2d 897 (citing Demos, 94 Wn.2d at 738), rev. denied, 136 Wn.2d 1029 (1998). While reasonable minds might disagree with the trial court's ruling,

that is not the standard. See State v. Willis, 151 Wn.2d 255, 264, 87 P.3d 1164 (2004). To prevail on appeal, the defendant must prove that no reasonable person would have taken the position adopted by the trial court. State v. Robtoy, 98 Wn.2d 30, 42, 653 P.2d 284 (1982).

Here, Margilyn had already been interviewed multiple times, including by the defense, and had testified at a competency hearing. Margilyn testified that she knew the difference between the truth and a lie and that she remembered the events of Halloween 2008. The trial court found her competent to testify. The defense also possessed all of her medical records.

The defense expert and defense counsel both admitted that no tests could be administered that could determine whether Margilyn's statements of fact regarding the events of the shooting were real or not. Further, besides the obvious physical disability to Margilyn, and the well documented language/communication disability she suffered, the defense, at the trial court level and on appeal, have failed to make a showing suggesting that Margilyn is mentally infirm, that she is "incapable of distinguishing right from wrong," and is "without comprehension." See Smith, 30 Wn. App. at 253-54.

Both Judge Rogers and Judge Hayden were willing to consider the defense requests if the defense had provided the court with facts supporting the requests. But despite possessing the voluminous medical records and having interviewed Margilyn multiple times, the defense was never able to provide the court with facts supporting a claim that Margilyn suffered from injuries beyond those articulated in the record, physical harm and mixed aphasia. In short, the request to have Margilyn subjected to a battery of unknown tests was a “fishing expedition.” Besides reciting histrionic language *ad nauseam* about how severely disabled Margilyn is, the defense never provided the court with the “compelling reason” to order that Margilyn be subjected to a full psychiatric examination. More importantly, on appeal, the defendant has failed to show that no reasonable judge would have ruled as both Judge Rogers and Judge Hayden did in this case.

3. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN DENYING THE DEFENDANT’S MOTION TO DISMISS BASED ON A CLAIM OF MISCONDUCT

The defendant asked the trial court to dismiss the charges against him because the prosecutor informed two witnesses— Gabriel McBride and Jenelle Dalit, that the defense would be

accusing McBride of having shot Margilyn and Wright, and for telling the two witnesses that Margilyn had been seriously injured. This claim is without merit. The prosecutor committed no misconduct. The witnesses had the right to be informed that they faced serious accusations of criminal wrongdoing. It is also perfectly permissible to discuss with witnesses the theory of a case. In any event, as the trial court noted, the defendant can show no prejudice.

a. The Facts

Many of the potential witnesses in this case could not be located or did not respond to repeated attempts to contact them. 8/25/09 RP 32-33. Two individuals who fit into this category were Jenelle Dalit and Gabriel McBride. 12/7/10 RP 4.

Dalit and McBride are involved in a dating relationship, were at the scene of the shooting, and are friends with Roger Wright. 12/13/10 RP 208-09. After Wright was shot and taken from the scene by ambulance, Dalit and McBride drove to Harborview to check on Wright's condition. 12/13/10 RP 223. However, officers at the hospital told them that they were not allowed inside, so the two drove home. 12/13/10 RP 226.

Detective Eugene Ramirez was able to contact Dalit by phone a few days after the shooting and conduct a full interview. 12/7/10 RP 231-32, 240. Detective Ramirez was unable to contact McBride. 12/9/10 RP 149, 243. Until trial had commenced, McBride had neither been contacted by the police nor did he even know he was a part of the case. 12/13/10 RP 228-29.

On March 9, 2010, the defense informed the court that they would be pointing the finger at McBride as possibly being the person who shot Margilyn and Wright. 3/9/10 RP 95-105. The defense indicated that Dalit was with McBride at the time of the shooting. Id.

Subsequent to being interviewed by Detective Ramirez, Dalit moved, changed phones, and could not later be located. 12/7/10 RP 4, 231-32, 240. McBride also did not have an updated address and could not be located. 12/13/10 RP 228. As a result, as trial neared, Detective Jeff Mudd, filling in for the retired Detective Ramirez, was asked by the prosecutor to try and track down Dalit and McBride. 12/13/10 RP 38. Detective Mudd was able to contact Dalit's father and warn him that if Dalit did not call the prosecutor, a material witness warrant would be issued for her arrest. 12/13/10 RP 38-39.

On Sunday, December 5, the prosecutor had contact with Dalit for the first time. 12/7/10 RP 116-17. Opening statements occurred on Monday, December 6. 12/6/10 (Opening Statements) RP 11-44. On Tuesday, December 7, the defense interviewed Dalit. 12/7/10 RP 4-5, 116-17.

In the defense interview, Dalit provided a description of the shooting that was consistent with her trial testimony. See Trial Exhibit 34A (transcript of the defense interview); 12/7/10 RP 183-246. In sum, and in pertinent part, Dalit said that she saw Wright and Bower in the parking lot and believed they were about to get into a fight after they had complimented some girls on their costumes, that she was walking with McBride at the time of the shooting near the hotdog stand going towards the parking lot, and that she did not know who the shooter was. Id. Dalit testified that nothing in her statement given to Detective Ramirez was any different than her trial testimony or defense interview. See 12/7/10 RP 246; Trial Exhibit 34A at 3-4.¹³

¹³ While Dalit's statement to Detective Ramirez was not made a part of the record, the consistency of her statements is corroborated by the fact that she was not impeached at trial by anything she said to Detective Ramirez. Further, the trial court did review the statement she made to Detective Ramirez and specifically found it to be consistent with the statement she made during the defense interview. 12/7/10 RP 177-78.

Also during the defense interview, Dalit said that when she met with the prosecutor on Sunday, December 5, the prosecutor told her that the defense was pointing the finger at McBride as the shooter, that Margilyn was disabled, and that her brother had to quit school to take care of her. Trial Exhibit 34A at 22-23. However, Dalit testified that she already knew how badly Margilyn had been hurt. 12/7/10 RP 242-44.

In regards to her and McBride being contacted about the case, Dalit testified that the first time she had contact with anyone about the case, other than the interview conducted by Detective Ramirez shortly after the shooting, was on Friday, December 3, when she was contacted by her father. 12/7/10 RP 214, 245-46. Dalit admitted that she had not responded to any attempts to contact her because she did not want to get involved in the case. 12/7/10 RP 117-18, 214, 245. She said that she had talked to McBride on Friday, December 3, about testifying and that McBride talked to the police on Monday, December 6. Trial Exhibit 34A at 19-22.

On December 7, after interviewing Dalit, the defense made a motion to dismiss all charges against the defendant because the prosecutor had informed Dalit that the defense was accusing

McBride of being the shooter, that Margilyn had been seriously hurt, and that her brother had quit school to take care of her. 12/7/10 RP 117-19. The defense claimed that the prosecutor had violated a motion *in limine*. 12/7/10 RP 176-83. Apparently, the defendant was referring to a March 9, 2010, motion to exclude witnesses from the courtroom that was granted by the court with an instruction that the parties should “[t]ell your witnesses once they testify they are not to talk to anybody about what’s going on in court.” 3/9/10 RP 55.

The prosecutor asserted that telling Dalit and McBride these things was not improper, and that she did so in an attempt to convince the two reluctant witnesses to come to court and tell the jury what happened. 12/7/10 RP 117-18. The court denied the defendant’s motion to dismiss, stating that while the court believed the prosecutor’s actions were inappropriate, dismissal was not an appropriate remedy. 12/7/10 RP 176-83. Instead, the court informed the defense that they would be given the full opportunity to cross-examine the witnesses in regards to anything they were told about the case by the prosecutor. 12/7/10 RP 178.

On December 8, 2010, the defense interviewed McBride. 12/8/10 RP 127. McBride said that the first time he knew anyone

was looking for him in regards to the case was Friday, December 3, when he found out from Dalit's parents. Trial Exhibit 230 at 20-22; 12/13/10 RP 228-29. He said that he had moved and never updated his address with the department of licensing. Id. at 22. Like Dalit, the information McBride provided in his defense interview was consistent with his trial testimony and the interview conducted by Detective Mudd on Monday, December 6. See Trial Exhibit 230, Trial Exhibit 200; 12/13/10 RP 208-56.

In sum, and in pertinent part, McBride described seeing Wright and Bower with two girls and a guy, when he saw flashes and heard gunshots coming from the top of the parking lot up by the alley. He then jumped behind a car with Dalit. When he looked up, he saw a couple of Asian males trying to carry a girl away, as Wright was jogging towards him calling out that he had been shot. Id. McBride said he did not get a good look at the shooter's face. Id. In the defense interview, McBride said that the prosecutor had told him that the defense was accusing him of being the shooter. Trial Exhibit 230 at 26-27. He said he was "in shock" when he heard this. Id. at 27. McBride also said that he had been told about Margilyn's condition by the detective, but he stated that he

already knew about her condition because a friend's sister knew Margilyn and had actually visited her. Id. at 24, 26, 33.

After interviewing McBride, the defense raised the same motion to dismiss that they did after interviewing Dalit. 12/8/10 RP 128. The court denied the motion and entered a written order. CP 142-45. The court noted that the prosecutor was entitled to, if not ethically required to, inquire of McBride outside the courtroom regarding the allegation that he was the shooter. CP143. The court noted that McBride had a Fifth Amendment right to remain silent and thus it was appropriate that he be informed of the allegations being leveled against him. Id.¹⁴

In regards to prejudice, the court could find none. Id. The court was left to speculate in this regard because the defense did not present any specific claim of prejudice. The court, for example, was left to speculate as to whether the defense felt it was entitled to

¹⁴ McBride and Dalit's situation was no different than the situation faced by Mekavong and Siphadone, who both "lawyered up" before testifying—with the defense also pointing the finger at Mekavong. 3/9/10 RP 97; 12/8/10 RP 238. Outside the presence of the jury, Mekavong asserted his right to remain silent regarding any questions about whether he had seen a gun or helped dispose of a gun. 1/3/11 RP 8; 1/4/11 RP 21-22. Generally, invocation of the right to remain silent and assertion of a Fifth Amendment privilege is not done in front of the jury. See Doyle v. Ohio, 426 U.S. 610, 618, 96 S. Ct. 2240, 49 L. Ed. 2d 91 (1976) (no penalty may carry from the exercise of the privilege); United States v. Doddington, 822 F.2d 818, 822 (8th Cir. 1987) (a witness may not be called simply to force the witness to exercise the privilege in the presence of the jury), accord, United States v. Lyons, 703 F.2d 815, 818 (5th Cir. 1983); State v. Smith, 74 Wn.2d 744, 758, 446 P.2d 571 (1968).

surprise McBride in front of the jury with the allegation that he shot Margilyn and Wright. CP 143. The court noted that the defense was not prevented from eliciting any particular fact. And finally, the court stated that there was substantial evidence that the defendant was the shooter. CP 144.¹⁵

b. The Trial Court Did Not Abuse Its Discretion In Denying The Defendant's CrR 8.3 Motion To Dismiss

The defendant argued below that the court should have dismissed the charges against him under CrR 8.3. On appeal, he claims the trial court erred in failing to dismiss under CrR 8.3. On appeal, he also claims—for the first time, that this Court should dismiss based on a violation of due process.

The due process clause provides: "[N]or shall any State deprive any person of life, liberty, or property, without due process of law." U.S. Const. amend. XIV. The due process clause protects an individual from the arbitrary exercise of government power. Daniels v. Williams, 474 U.S. 327, 331, 106 S. Ct. 662, 88 L. Ed. 2d 662 (1986). It requires the government to follow appropriate, fair procedures before it deprives any person of a protected interest;

¹⁵ The court also held that informing McBride as to Margilyn's condition was not misconduct, and in any event, it was "fodder for impeachment." CP 145.

this is commonly referred to as "procedural due process." Id.; United States v. Salerno, 481 U.S. 739, 746, 107 S. Ct. 2095, 95 L. Ed. 2d 697 (1987). The Due Process Clause also "prevents the government from engaging in conduct that 'shocks the conscience' or interferes with rights 'implicit in the concept of ordered liberty'"; this is referred to as "substantive due process." Salerno, 481 U.S. at 746 (internal citations omitted). The due process clause of the Washington Constitution does not afford broader protection than that of the Fourteenth Amendment. State v. McCormick, 166 Wn.2d 689, 699, 213 P.3d 32 (2009).

Use of substantive due process in this manner is founded on the principle that the conduct of the government agents is "so outrageous that due process principles would absolutely bar the government from invoking judicial process to obtain a conviction." State v. Lively, 130 Wn.2d 1, 19, 921 P.2d 1035 (1996) (quoting United States v. Russell, 411 U.S. 423, 431-32, 93 S. Ct. 1637, 36 L. Ed. 2d 366 (1973)). Dismissal based on outrageous conduct requires more than a mere demonstration of flagrant conduct and is reserved for only the most egregious circumstances. Lively, at 19-20. The conduct must "shock the universal sense of fairness." Russell, 411 U.S. at 432.

Dismissal under CrR 8.3 is equally limited. In pertinent part, CrR 8.3 provides that:

The court, in the furtherance of justice, after notice and hearing, may dismiss any criminal prosecution due to arbitrary action or governmental misconduct when there has been prejudice to the rights of the accused which materially affect the accused's right to a fair trial. The court shall set forth its reasons in a written order.

CrR 8.3(b).

Dismissal under CrR 8.3 "should be used only as a last resort." City of Seattle v. Holifield, 170 Wn.2d 230, 237, 240 P.3d 1162 (2010). Before dismissing a case outright, a trial judge must take ameliorative action before ordering the "extraordinary remedy of dismissal." Holifield, 240 P.3d at 1165. In other words, the extreme measure of dismissal is at the "outer bounds of the court's discretion and power." Holifield, at 1166.

Before a court can entertain a motion to dismiss under CrR 8.3, a defendant must prove two things. First, a defendant must show arbitrary action or government misconduct. State v. Puapuaga, 164 Wn.2d 515, 520-21, 192 P.3d 360 (2008). Second, a defendant must show prejudice affecting his right to a fair trial. Id.

A trial court's decision to dismiss a charge under CrR 8.3 is reviewable under the manifest abuse of discretion standard. Id.

Thus, along with the burden a defendant faces at the trial court level, a defendant appealing a trial court's decision must prove that "no reasonable person would have taken the position adopted by the trial court." Robtoy, 98 Wn.2d at 42. It is not enough that reasonable minds might disagree with the trial court's ruling—that is not the standard. Willis, 151 Wn.2d at 264.

The defendant contends that the prosecutor committed misconduct by telling McBride and Dalit that the theory of the defense case was that McBride was the shooter. More specifically, he claims that this was a violation of the "witness sequestration rule." There was no such violation.

By rule¹⁶ and case law, the exclusion of witnesses during a trial is within the discretion of the trial judge. State v. Dalton, 43 Wash. 278, 86 P. 590 (1906). If a witness violates the instruction of the court not to sit through other testimony, it is within the sound discretion of the trial court whether or not to grant a motion to

¹⁶ ER 605 provides in pertinent part that "[a]t the request of a party the court may order witnesses excluded so that they cannot hear the testimony of other witnesses."

prohibit that witness from testifying.¹⁷ State v. Rangitsch, 40 Wn. App. 771, 782, 700 P.2d 382 (1985).

Here, neither Dalit nor McBride were in the courtroom when any other witness was testifying. Further, when the prosecutor met with Dalit, opening statements had not been given and no witness had yet testified. When the prosecutor met with McBride, opening statements had occurred, three patrol officers had testified, along with Margilyn's mother—none of whom provided any testimony regarding McBride possibly being the shooter. In short, the prosecutor could not have even violated the spirit of the rule, there having been no witness testimony that she could have relayed to Dalit and McBride.

In addition, the defendant cites to no case wherein an attorney discussing the theory of a case with a witness constitutes misconduct. To the contrary, it seems unconscionable that a trial attorney would not prepare his or her witnesses by providing them with an understanding of whether the case involves, for example,

¹⁷ Case law suggests that there are only three remedies available for a violation of ER 615: (1) hold the witness in contempt, (2) allow cross-examination regarding the violation and allow comment on the witness's actions during closing argument, or (3) preclude the witness from testifying. See State v. Skuza, 156 Wn. App. 886, 896, 235 P.3d 842 (2010) (citing KARL B. TEGLAND, 5A WASHINGTON PRACTICE: EVIDENCE LAW AND PRACTICE § 615.2, at 627-30 (5th ed. 2007)), rev. denied, 170 Wn.2d 1021 (2011).

an entrapment defense, an issue of insanity or diminished capacity, self-defense or, as in this case, that the witness was being accused of shooting two people. What the defendant's complaint appears to be is a question of timing.

If a month before trial, Dalit and McBride had been informed that McBride was being accused of shooting Wright and Margilyn, there is no question this would have been proper (and the defendant cites no case law to the contrary). In fact, the investigation and trial preparation by the police and prosecutor of this case and any other case is partly driven by the defense theory of the case. Here, the witnesses were informed of the defense theory of the case (not what any witness testified to) at the beginning of trial because that is when the witnesses were located.

In addition, both Dalit and McBride potentially had a Fifth Amendment right to remain silent. The Fifth Amendment declares that no person "shall be compelled in any criminal case to be a witness against himself." State v. Parker, 79 Wn.2d 326, 331, 485 P.2d 60 (1971). This privilege against self-incrimination includes the right of a witness not to give incriminatory answers in

any proceeding—civil or criminal, administrative or judicial, investigatory or adjudicatory. Kastigar v. United States, 406 U.S. 441, 92 S. Ct. 1653, 32 L. Ed. 2d 212 (1972); Malloy v. Hogan, 378 U.S. 1, 84 S. Ct. 1489, 12 L. Ed. 2d 653 (1964). The privilege may be raised where the answer to a question would clearly incriminate the witness or where the facts, aided by use of “reasonable judicial imagination” show the risk of self-incrimination. State v. Lougin, 50 Wn. App. 376, 381-82, 749 P.2d 173 (1988).

McBride had a clear Fifth Amendment right, acknowledged by the trial court, as he was being accused of shooting Wright and Margilyn. Dalit also had a potential Fifth Amendment right. As the defense acknowledged, Dalit was with McBride at the time of the shooting. She gave a statement to the police at that time of the shooting which showed that McBride was not the shooter. Under the defense theory, if Dalit testified consistent with her statement to the police, she would have been potentially subject to charges of perjury (RCW 9A.72.020-030), obstructing (RCW 9A.76.020) or rendering criminal assistance (RCW 9A.76.050). That neither witness asserted their right to remain silent does not change the

fact that, as the court noted, it was appropriate, if not required, that the witnesses be informed of this fact.¹⁸

Apparently, under the defense argument, witnesses who the defense intends to accuse of committing the charged crime may not be informed of this. Rather, the defense must be allowed to surprise the witness in front of the jury—presumably without the witness having counsel—and the witness, without counsel, must either answer the incriminating questions or plead the Fifth Amendment in front of the jury. There is no support for this proposition in the law.

Finally, the defendant can make no showing of prejudice. To obtain a dismissal under CrR 8.3, a defendant must prove by a preponderance prejudice affecting his right to a fair trial. State v. Rohrich, 149 Wn.2d 647, 655, 71 P.3d 638 (2003). This requires a showing by the defendant of "actual prejudice," not "speculative prejudice." Rohrich, 149 Wn.2d at 657 (the mere fact that the State delayed filing charges for 18 months was insufficient to warrant

¹⁸ The defendant also claims that RPC 3.6(a) and RPC 3.8(f) were violated here. These provisions pertain to pretrial publicity, releasing information to the public and media. The provisions were not violated here, have no application to the claims here, and they will not be addressed further.

dismissal under CrR 8.3); see also State v. Norby, 122 Wn.2d 258, 264, 858 P.2d 210 (1993) ("a mere allegation that witnesses are unavailable or that memories have dimmed is insufficient"). Dismissal under CrR 8.3 must be "in the furtherance of justice." State v. Korum, 157 Wn.2d 614, 638-39, 141 P.3d 13 (2006).

The defendant claims that because of the information imparted upon Dalit and McBride, Dalit provided a false alibi for McBride. Def. br. at 49. First, Dalit did not provide an alibi at all. Alibi is defined as "the plea of having been at the time of the commission of an act elsewhere than at the place of commission." Merriam-Webster's Collegiate Dictionary, Eleventh Edition 30 (2003). Neither Dalit nor McBride ever asserted that they were not present at the time and place of the shooting. Second, the defendant fails to mention that Dalit provided a statement to the police **at the time of the shooting** that was consistent with her testimony, she was with McBride down by the hotdog stand when someone at the top end of the parking lot started shooting. Third, not a single witness—including the defendant's friends—identified McBride as being the shooter, or claimed that McBride was even in the parking lot in the location where the shots were fired. To the contrary, multiple witnesses—beyond just Dalit and McBride—

placed McBride's location at the time of the shooting in the lower portion of the parking lot by the hotdog stand—the opposite end of the lot from where the shooter was located. The only thing the defendant can rely on was a witness who could not actually describe the shooting, but who glanced over and believed the shooter was wearing a Seahawks jersey. There is nothing about Dalit or McBride's testimony that was different than the many other witnesses and forensic evidence that showed McBride could not possibly have been the shooter. This was the finding of the trial court and the defendant fails to show that he suffered "actual prejudice" or that no reasonable judge would have so ruled—the standard the defendant must meet on appeal. CP 143-44; Rohrich, 149 Wn.2d at 657; Robtoy, 98 Wn.2d at 42.¹⁹

¹⁹ The defendant also claims that because the prosecutor told Dalit and McBride that Margilyn had been severely injured, the charges against him must be dismissed. This is nonsensical, and the defendant ignores relevant facts in making this claim. First, the situation is not different than telling a witness to a shooting whether the victim lived or died. It tells the witness nothing about the trial testimony. Second, while Dalit and McBride did not realize it at the time of the shooting, they actually knew Margilyn, and as they both told defense counsel, they already knew that she had been seriously injured prior to talking with the prosecutor. Trial Exhibit 230 at 24, 26, 33; 12/7/10 RP 242-44.

c. The Defendant's Argument That Dalit And McBride Should Not Have Been Allowed To Testify Is Without Merit

As an alternative argument, the defendant contends that the trial court abused its discretion in not barring the relevant testimony of Dalit and McBride. This argument fails. First, the defendant never asked that McBride be barred from testifying, so this issue is waived. Second, the trial court specifically stated that defense counsel could explore through cross-examination about anything that was said to the witnesses by the prosecutor. The defendant fails to show how the court abused its discretion.

On December 7, 2010, after interviewing Dalit, defense counsel asked the court to either dismiss the charges against the defendant pursuant to CrR 8.3, or alternatively, to bar the testimony of Dalit for violation of the witness sequestration rule. 12/7/10 RP 117, 179. The court denied the motions.

On December 8, 2010, after interviewing McBride, defense counsel asked the court to dismiss the charges against him under CrR 8.3.

The Court: Okay. Let's stop for a second. You are making a motion to dismiss under 8.3(b) related to Mr. McBride, correct?

Defense Counsel: Yes, and renewing under Ms. Dalit.

12/8/10 RP 129. Unlike the situation involving Dalit, defense counsel did not ask that McBride's testimony be suppressed for violation of the witness sequestration rule. Thus, any claim regarding the court not providing a remedy other than dismissal of the charges under CrR 8.3 regarding the situation involving McBride has been waived. See State v. Dahl, 139 Wn.2d 678, 687 n.2, 990 P.2d 396 (1999) (failure to object can bar review of even constitutional issues); State v. Guloy, 104 Wn.2d 412, 422, 705 P.2d 1185 (1985) (a party may only assign error on the specific ground of the objection made at trial), cert. denied, 475 U.S. 1020 (1986).

In any event, the trial court's determination to let defense counsel cross-examine witnesses on anything said to them by the prosecutor was clearly within the trial court's discretion. There are three remedies for a violation of ER 615, the witness sequestration

rule: (1) hold the witness in contempt, (2) allow cross-examination regarding the violation and allow comment on the witness's actions during closing argument, or (3) preclude the witness from testifying. See Skuza, 156 Wn. App. at 896. The trial court chose option number two.

A trial court has wide discretion in curing trial irregularities. State v. Post, 118 Wn.2d 596, 620, 826 P.2d 172, 837 P.2d 599 (1992) (citing State v. Gilcrist, 91 Wn.2d 603, 612, 590 P.2d 809 (1979)). A trial court's judgment is presumed to be correct and should be sustained absent an affirmative showing of error. State v. Wade, 138 Wn.2d 460, 464, 979 P.2d 850 (1999). The trial court abuses its discretion only where the defendant can show that no reasonable person would have so ruled. Robtoy, 98 Wn.2d at 42. It is not enough that reasonable minds might disagree with the trial court's ruling—that is not the standard. Willis, 151 Wn.2d at 264. The defendant provides no reason why the trial court's ruling was so unreasonable, so incorrect, that no reasonable person would have so ruled.

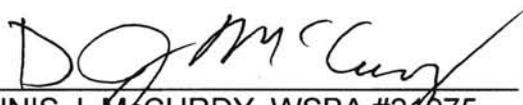
D. CONCLUSION

For the reasons cited above this Court should affirm the defendant's conviction.

DATED this 16 day of August, 2012.

Respectfully submitted,

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APPENDIX A

23 Phongmanivan Volumes

<u>Volumes</u>	<u>Dates</u>	<u>Additional Notation</u>
1	8/5/09; 8/25/09; 3/4/10; 3/9/10	
2	3/10/10; 3/17/10; 4/16/10; 4/29/10; 6/11/10	
3	3/15/10	
4	4/5/10	
5	5/20/10	
6	7/2/10	
7	7/22/10	
8	8/30/10; 3/4/11	
9	9/7/10; 12/14/10	
10	12/1/10	Pretrial Hearing – Hayden
11	12/1/10; 12/2/10; 12/3/10	Second volume
12	12/6/10	Opening Statement
13	12/6/10	Second volume
14	12/7/10	
15	12/8/10	
16	12/9/10	
17	12/10/10	
18	12/13/10	
19	12/14/10	
20	1/3/11	
21	1/4/11	Incorrectly listed as 2010
22	1/5/11	Incorrectly listed as 2010
23	1/6/11; 1/7/11	

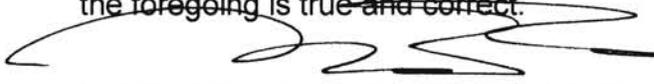
Hearing Dates in Chronological Order

8/5/09	1/3/11
8/25/09	1/4/11
3/4/10	1/5/11
3/9/10	1/6/11
3/10/10	1/7/11
3/15/10	3/4/11
3/17/10	
4/5/10	
4/16/10	
4/29/10	
5/20/10	
6/11/10	
7/2/10	
7/22/10	
8/30/10	
9/7/10	
12/1/10	
12/2/10	
12/3/10	
12/6/10	
12/7/10	
12/8/10	
12/9/10	
12/10/10	
12/13/10	
12/14/10	

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 Susan Wilk, the attorney for the appellant, at Washington Appellate Project, 701 Melbourne Tower, 1511 Third Avenue, Seattle, WA 98101, containing a copy of the Brief of Respondent, in STATE V. PHONGMANIVAN, Cause No. 66858-7-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

08-17-12

Date