

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

IN RE THE PERSONAL) NO. 37217-7-II
RESTRAINT PETITION OF) STATE'S THIRD
) SUPPLEMENTAL
FELIX D'ALLESANDRO) RESPONSE TO PRP

Comes now Jon Tunheim, Prosecuting Attorney in and for Thurston County, State of Washington, by and through Carol La Verne, Deputy Prosecuting Attorney, and files its response to petitioner's personal restraint petition pursuant to RAP 16.9.

I. INTRODUCTION.

This court has requested supplemental briefing in this personal restraint petition to address the application of four decisions of the Washington Supreme Court, all issued on November 21, 2012: In re Pers. Restraint of Morris, ___ Wn.2d ___, ___ P.3d ___, 84929-3 (2012); State v. Wise, ___ Wn.2d ___. ___ P.3d ___, 82802-4 (2012); State v. Paumier, ___ Wn.2d ___, ___ P.3d ___, 84585-9 (2012); and State v. Sublett, ___ Wn.2d ___, ___ P.3d ___, 84856-4 (2012).

II. STATEMENT OF PROCEEDINGS

Both the substantive and procedural facts of this case have been thoroughly described in the earlier briefing in this personal restraint petition (PRP) as well as in the unpublished opinion of the Court of Appeals, which is attached as Appendix A.

There is one procedural fact which is extremely important: D'Allesandro raised the issue of the closed courtroom during voir dire in his direct appeal. Appendix A, 29-30 of the opinion. The Court of Appeals affirmed, finding invited error. Id.

III. RESPONSE TO ISSUES RAISED

A. None of the four recent Supreme Court opinions are dispositive as to D'Allesandro's claim that his right to a public trial was violated when a portion of voir dire was conducted in a closed courtroom, because his procedural posture is different from all of them, and that posture should determine the outcome of this petition.

D'Allesdandro appealed following his conviction, and he raised the issue of the closed courtroom during voir dire in his statement of additional grounds. The Court of Appeals affirmed, finding that he had invited the error. Appendix A at page 30 of the opinion. He sought review in the Supreme Court; review was denied. While the petition was pending, he and his mother apparently contacted his

appellate attorney about the opinion in State v. Easterling, 157 Wn.2d 167, 137 P.3d 825 (2006). The attorney responded that if the Supreme Court denied review, D'Allesandro could bring a PRP. Appendix H to Opening Brief in Support of PRP. The State does not have the letter D'Allesandro wrote to his attorney, but he apparently felt that the Easterling decision was critical to his appeal. Having had the issue addressed on appeal, D'Allesandro is raising it here as ineffective assistance of appellate counsel for her failure to raise it on the petition for review, claiming that it was reversible error for her to fail to raise a meritorious claim. Petitioner's Opening Brief at 23.

A petitioner in a PRP is prohibited from renewing an issue that was raised and rejected on direct appeal unless the interests of justice require litigation of that issue. In re Pers. Restraint of Davis, 152 Wn.2d 647, 671, 101 P.3d 1 (2004). An issue is considered raised and rejected on direct appeal if the same ground presented in the petition was determined adversely to the petitioner on appeal and the prior determination was on the merits. Id. "The interests of justice are served by reexamining an issue if there has been an intervening change in the law or some other justification for having failed to raise

a crucial point or argument in the prior application.” Id. at n. 15 (citing In re Pers. Restraint of Stenson, 142 Wn.2d 710, 720, 16 P.3d 1 (2001). In D’Allesandro’s case, he has no new grounds for his underlying complaint, but frames it as an ineffective assistance of counsel claim.

In his opening brief, D’Allesandro asserted that Easterling constituted a change in the law sufficient to permit relitigating the issue. Opening Brief at 19-22. But Easterling did not articulate any new rule, it merely applied existing law to a new situation. A more detailed discussion of Easterling follows later in this argument.

The State does not dispute that it is error to conduct any part of voir dire out of public view without consideration of the Bone-Club¹ factors, nor that the trial court in this case closed the courtroom and failed to conduct the Bone-Club analysis. Failing to object in the trial court does not waive the right to raise the issue on appeal. Wise, 2012 Wash. LEXIS 796 at 18. It is a structural error not subject to a harmless error analysis. Id. at 15. Whether the constitutional right to a public trial has been violated is a question of law, and is reviewed

1 State v. Bone-Club, 128 Wn.2d 254, 258-59, 906 P.2d 325 (1995).

de novo on direct appeal. *Id.* at 6, quoting Easterling, 157 Wn.2d at 173-74 (emphasis added).

Wise, Paumier, and Sublett were all direct appeals. The standard of review for PRPs is different from that of appeals. A personal restraint petitioner claiming constitutional error must demonstrate actual prejudice from the error before a court will consider the merits. In re Pers. Restraint of St. Pierre, 118 Wn.2d 321, 328-30, 823 P.2d 492 (1992) (applying this threshold standard to deny relief for a constitutional error that would be per se prejudicial error on appeal). The only one of the four recent Supreme Court decisions that was presented as a PRP was Morris.

Morris is a plurality opinion. Four justices signed the lead opinion and one justice wrote a concurrence. Two justices wrote dissents, one of which was joined by two other justices. The split, then, is 4-1-4. Plurality opinions have limited precedential authority. State v. Gonzalez, 77 Wn. App. 479, 486, 891 P.2d 743 (1995). A plurality decision is considered highly persuasive, even if it is not completely binding. Koenig v. Pierce County, 151 Wn. App. 221, 231, 211 P.3d 423 (2009). When the rationale for a decision does not

receive a clear majority, the holding of that opinion becomes the position taken by the justices concurring on the narrowest grounds. Zueger v. Public Hospital Dist. 2, 57 Wn. App. 584, 591, 789 P.2d 326 (1990).

In Morris, the issue of a closed courtroom was not raised on direct appeal. The plurality opinion and the concurrence side-stepped the standard of review in a PRP by finding that appellate counsel was ineffective for failing to raise it in the Court of appeals. It found prejudice because “[h]ad Morris’s appellate counsel raised this issue on direct appeal, Morris would have received a new trial.” Morris, 2012 LEXIS 794 at 10.

A convicted criminal has the right to effective assistance of counsel on his first appeal of right. In re Pers. Restraint of Dalluge, 152 Wn.2d 772, 787, 100 P.3d 279 (2009) (*overruled in part on other grounds*, State v. Posey, 174 Wn.2d 131, 139, 272 P.3d 840 (2012)). In order to establish ineffective assistance of counsel, the defendant must prove that appellate counsel failed to raise issues which had merit and that he was actually prejudiced by the failure to raise or adequately raise the issues. Id. It is not ineffective assistance of

counsel to fail to raise all nonfrivolous issues on appeal; “the exercise of independent judgment in deciding what issues may lead to success is the heart of the appellate attorney’s role.” Id. The standard for evaluating the performance of appellate counsel is the same as that set forth in Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). Id. at 788.

An appellate court reviews a claim of ineffective assistance of counsel de novo based on the entire record below. There is a strong presumption that counsel provided adequate representation. State v. Pittman, 134 Wn. App. 376, 384, 166 P.3d 720 (2006).

Even though D’Allesdandro raised the closed courtroom issue himself in his statement of additional grounds, he cannot establish prejudice from his appellate counsel’s failure to do so. The court did consider the issue, thus no prejudice resulted. Unlike Morris, D’Allesandro cannot say, “If my counsel had raised the issue on appeal I would have received a new trial.” He did raise it, the Court of Appeals found invited error, and he did not receive a new trial. Instead, he essentially claims, “If my attorney had raised the issue in the petition for discretionary review to the Supreme Court, it would

have accepted review and reversed and I would have received a new trial.” However, he offers no reason to believe that this is so. He asserts that Easterling, decided while the petition for review was pending, was so clearly dispositive of his case that the Supreme Court would have had no choice but to accept review and reverse. Easterling, however, presented a much different situation. Easterling had, along with the public, been excluded from his own trial while a codefendant brought a motion to sever and dismiss. Easterling, 157 Wn.2d at 172. During the closure the codefendant reached an agreement with the State to testify against Easterling, and later in the day pled guilty to reduced charges. Id. at 172-73. Although Easterling did not object to the closure, nor did he assert a public trial claim on appeal, he claimed a public trial right violation in his petition for review to the Supreme Court. Id. at 173. Finding these facts presented a “unique situation,” the Supreme Court considered whether a codefendant’s motion to close a courtroom implicated the other defendant’s public trial right. Id. at 177. The court concluded that it did. Id. at 178. In reaching its decision, the Easterling court relied on Bone-Club, State v. Brightman, 155 Wn.2d 506,

122 P.3d 150 (2005), and In re Pers. Restraint of Orange, 152 Wn.2d 795, 100 P.3d 291 (2004). “In light of these precedents, we conclude that [the codefendant’s] motion to sever his trial from Easterling’s pertained to Easterling’s trial and thereby implicated his right to a public trial under the Washington Constitution.” Easterling, 157 Wn.2d at 177.

D’Allesandro now asserts that from this case his appellate attorney should have reasoned that even though the Court of Appeals found that he, not his co-defendant, had sought to close the courtroom for a portion of voir dire, not for a codefendant’s motion hearing, the case squarely supported his own argument. Appellate attorneys raise what they consider to be the strongest arguments in petitions for review, not necessarily every argument that could possibly be raised. D’Allesandro has not shown that his attorney did not make a strategic decision to go with what she considered stronger arguments, nor has he established that the Supreme Court would have accepted review and reversed. It is no secret that the Supreme Court grants only a small fraction of the petitions for review filed. The facts of D’Allesandro’s case are much different from Easterling, and

he has not, and cannot, show that the Supreme Court would have accepted review and granted him the relief he seeks.

A personal restraint petition is not a substitute for an appeal. Dalluge, 162 Wn.2d at 817. D'Allesandro must establish both that his appellate attorney's performance was deficient and that he was prejudiced thereby. He has not done so, and his petition should be denied.

B. The Court of Appeals was correct in holding that the closure of the courtroom for portions of voir dire was invited error. It was not deficient performance for D'Allesandro's appellate attorney to fail to raise it in a petition for review to the Supreme Court.

It is true, as noted above, that failure to object to the closure of the courtroom does not by itself waive the right to claim a violation of the right to a public trial. D'Allesandro maintains that while his attorney failed to object, he did not ask for the closure. That is not entirely accurate.

D'Allesandro's attorney proposed and prepared questionnaires for potential jurors. A sample of the questionnaire is included in the State's Second Supplemental Response as Appendix A. Question No. 12 asked, "Do you wish to be interviewed privately

about any of the questions listed above? Please list the numbers of any such questions.” Appendix A, Second Supplemental Response, at 4. Each questionnaire was accompanied by an instruction sheet which advised potential jurors, in part, “Further questioning, if any, will be conducted privately if you request it. That is, *the public and other potential jurors will not be present.*” Appendix B to this response, at page 3 (emphasis added). Whether or not D’Allesandro’s attorney prepared the instruction or merely assented to it, there is no question but that D’Allesandro knew the plan was to question jurors who so requested out of the presence of the public. During voir dire, counsel said:

[N]ormally, at least in my experience, those interviews are conducted in chambers, and I would suggest that those interviews take place in an empty courtroom. By that I mean apart from the remaining prospective jurors.

03/08/04 RP 2. During the colloquy, the court remarked:

I’m thinking maybe what we’ll do is maybe close the courtroom temporarily. I mean the trial’s going to be open to the public, but for these in camera interviews, maybe we’ll just ask members of the public to leave.

03/08/04 RP 7. Shortly thereafter the court closed the courtroom.

03/08/04 RP 25. At no time did D’Allesandro’s attorney make any

objection or remarks. He did participate in the questioning of the potential jurors and the dismissal of some of them during the time the courtroom was closed. 03/08/04 RP 40, 50, 55, 74, 91, 98, 107, 120, 127-28, 135-37, 160. At one point, when the court indicated the individual questioning was completed, defense counsel said:

Before you ask the bailiff to do that, Your Honor, I'd ask the Court to consider doing some more individual questioning. The reason for that is there were, according to my calculation, nine other individuals who answered the—in the jury questionnaire that they could not be impartial, and rather than ask them questions about that, I have—I didn't get a chance to bring this to the Court's attention. I think probably what happened is Mr. Bruneau just handed up to the Court while we were in session a list of individuals that he wanted to question, but I have jurors number 28, 43, 49, 62, 64, 67, 73, 75 and 76 said they could not be impartial.

03/08/04 RP 120-21. The court took a recess, and then several more potential jurors were questioned while the courtroom was closed.
03/08/04 RP 122-69.

It seems apparent that defense counsel wanted the courtroom to be closed for the individual questioning of potential jurors. He knew that they were being told the public would be excluded if they asked. He participated in the closed courtroom questioning and benefited from the more candid responses they gave. He asked for the closed

courtroom questioning to extend to more potential jurors than the court had intended to include. Even if he only wanted the jurors questioned outside of the presence of the remainder of the panel but in the presence of the public, and the court misunderstood his request, it is one thing to fail to object, and quite another to deliberately fail to correct a court's misunderstanding of the nature of his request. This went beyond a failure to object, and the Court of Appeals was correct to find invited error.

The Washington appellate courts have never held that a courtroom closure cannot be invited error. In State v. Momah, 167 Wn.2d 140, 217 P.3d 321 (2009), the Supreme Court held that while that case was not a classic example of invited error, it applied the principles of that doctrine in affirming Momah's conviction. Id. at 154-55 ("In determining whether the invited error doctrine was applicable, courts have also considered whether a defendant affirmatively assented to the error, materially contributed to it, or benefited from it."). The invited error doctrine prevents a party from setting up an error at trial and then arguing it on appeal as a basis for reversal. State v. Pam, 101 Wn.2d 507, 511, 680 P.2d 762 (1984), *overruled*

on other grounds, State v. Olson, 126 Wn.2d 315, 893 P.2d 629 (1995). In Wise, the court held that the defense did not actively participate in bringing about the courtroom closure, and thus the invited error doctrine did not apply. Wise, 2012 LEXIS 796 at 18, n. 8. It did not say that the invited error doctrine can never apply to courtroom closures. Here, D'Allesandro's attorney did take part in effecting the closure of the courtroom, including preparation or approval of the instruction to the jury panel, participating in the questioning and excusing of potential jurors, asking to have the private questioning extended, and benefitting from the closed courtroom questioning. Even had the Supreme Court accepted review, it is by no means likely that D'Allesandro's conviction would be reversed.

C. The questioning of one sitting juror, in a closed courtroom, who indicated she might know a witness, did not implicate the core values of the public trial right, nor have such inquiries historically been public, and therefore there was no violation of D'Allesandro's right to a public trial.

During trial, Juror No. 11 notified the court that she thought she recognized the name of an upcoming witness. The court questioned her in a closed courtroom, with the defendants and all counsel

present. The juror explained that she knew the witness, if it was indeed the same person, only casually and had only the most incidental contact with her. The court found, without objection, that the acquaintance would not impact the juror's impartiality and the trial resumed. 03/11/04 RP 734-38. The court did not conduct a Bone-Club analysis before closing the courtroom. D'Allesdandro did not raise this specific closure on direct appeal, and now claims in this PRP that his public trial right was violated and his appellate counsel was ineffective for failing to raise it in a petition for review to the Supreme Court.

Of the four recent Supreme Court opinions which this court has asked the parties to address, Sublett is the most instructive on this issue. In that case, the trial court had received a question from the deliberating jury. After consulting with both the prosecution and counsel for the defendants, a written response was sent to the jury, advising it to reread the instructions. The written response was made part of the record as required by CrR 6.15. Sublett, 2012 Wash. LEXIS 797 at 5, 24. The Court of Appeals held that the right to a public trial did not extend to this proceeding because it was ministerial

or dealt with only legal issues. Id. at 13. While rejecting the ministerial/legal versus adversarial distinction, the Supreme Court agreed with the result of the Court of Appeals.

In place of the distinction used by the Court of Appeals, the Supreme Court articulated an experience and logic test. Citing to Press-Enterprise Co. v. Superior Court, 478 U.S. 1, 7-8, 106 S. Ct. 2735, 92 L. Ed. 2d 1 (1986) (Press II), the court said:

The first part of the test, the experience prong, asks “whether the place and process have historically been open to the press and general public.” . . . The logic prong asks “whether public access plays a significant positive role in the functioning of the particular process in question.” . . . If the answer to both is yes, the public trial right attaches and the *Waller* or *Bone-Club* factors must be considered before the proceeding may be closed to the public.

Sublett, 2012 Wash. LEXIS 797 at 15-16 (internal cites omitted).

The State has been unable to find any cases which indicate that the questioning of a sitting juror, to investigate any issue that could affect his or her impartiality or ability to remain on the jury, has historically been a proceeding open to the public. Most cases do not even indicate whether the questioning was done in an open or closed courtroom or in chambers. See e.g., State v. Elmore, 155 Wn.2d 758,

765, 123 P.3d 72 (2005); State v. Hopkins, 156 Wn. App. 468, 473, 232 P.3d 597 (2010). Without some such authority, the first prong of the experience and logic test has not been met and since both prongs must be met to prevail, D'Allesandro cannot show that the questioning of this juror in a closed courtroom implicated his public trial right.

The second prong of the test addresses the question of whether the proceeding serves the values served by a public trial. Those include reminding the prosecutor and the judge of their responsibilities to the defendant, encouraging witnesses to come forward, and discouraging perjury. Sublett, 2012 Wash. LEXIS 797 at 14-15. “[T]he trial court must consider whether openness will ‘enhance both the basic fairness of the criminal trial and the appearance of fairness so essential to public confidence in the system.’” Id. at 15, citing to Press-Enterprise, 464 U.S. at 508. In Sublett, the court found that no closure occurred because responding as it did to the jury question violated no values served by the public trial right. Id. at 24. No witnesses were involved, no testimony was taken, no risk of perjury existed. The question, answer, and any objections were placed on the record, thus satisfying the appearance

of fairness. Id. “This is not a proceeding so similar to the trial itself that the same rights attach, such as the right to appear, to cross-examine witnesses, to present exculpatory evidence, and to exclude illegally obtained evidence.” Id. at 25.

The hearing held in D’Allesandro’s trial did not implicate any of the concerns of the public trial right. The juror was not a witness and while counsel could question her, there certainly was no cross-examination. Risk of perjury was minimal; the juror herself brought the issue to the attention of the court. The hearing was transcribed and the record preserves the appearance of fairness, just as it did in Sublett. There was no question of encouraging witnesses to come forward, nor is there the likelihood that the prosecutor and judge would forget their responsibilities when investigating the ability of a sitting juror to remain on the jury.

Sublett is also a plurality opinion. Four justices signed the lead opinion and five wrote or signed concurrences. Justice Madsen’s concurrence agrees with the plurality on this holding. Id. at 62-64. The concurrence of Justice Stephens, joined by Justices Fairhurst

and Alexander, does not disagree with the logic and experience test.
Id. at 129-45.

Finally, D'Allesdandro does not claim any prejudice from this closure of the courtroom. It is his burden, in a collateral attack, to establish that there was error and that he was actually prejudiced by it. He had done neither.

IV. CONCLUSION

Applying the holdings of the four cases decided by the Supreme Court on November 21, 2012, D'Allesandro's PRP should be denied.

RESPECTFULLY SUBMITTED this 4th day of January,
2013.

JON TUNHEIM
Prosecuting Attorney



CAROL LA VERNE, WSBA#19229
Deputy Prosecuting Attorney

APPENDIX A

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STATE OF WASHINGTON, Respondent, v. MERT CEM CELEBISOY, Appellant, STATE OF WASHINGTON, Respondent, v. FELIX JOSEPH D'ALLESANDRO, Appellant.

No. 31597-1-II Consolidated with No. 31599-8-II

COURT OF APPEALS OF WASHINGTON, DIVISION TWO

2006 Wash. App. LEXIS 3

January 4, 2006, Filed

NOTICE: [*1] RULES OF THE WASHINGTON COURT OF APPEALS MAY LIMIT CITATION TO UNPUBLISHED OPINIONS. PLEASE REFER TO THE WASHINGTON RULES OF COURT.**SUBSEQUENT HISTORY:** Reported at State v. Mert Cem Celebisoy, 131 Wn. App. 1003, 2006 Wash. App. LEXIS 218 (2006)**PRIOR HISTORY:** Appeal from Superior Court of Thurston County. Docket No: 03-1-01390-4. Date filed: 03/31/2004. Judge signing: Hon. Richard D Hicks.**CASE SUMMARY****PROCEDURAL POSTURE:** Two defendants sought review of the decision of the Superior Court of Thurston County (Washington), which convicted defendants of first degree murder while armed with a deadly weapon. The second defendant also appealed his exceptional sentence as being in violation of Blakely.**OVERVIEW:** Defendants appealed their convictions, but the court affirmed, stating that the second defendant waived his Wash. Super. Ct. Crim. R. 3.3(b) right to have a trial commence within the specific period, by written agreement. Even assuming that the subsequent continuance was not granted for good cause, the delay was permissible under Rule 3.3(b)(5). Thus, he failed to show that his constitutional speedy trial rights were violated. The only substantial disagreement in defendants' testimonies was over who stabbed the victim. Such disagreement was not sufficient to demonstrate that the trial court abused its discretion in keeping the trials joined, especially in light of the trial court's articulated concern for judicial economy. Their constitutional right to confrontation under the Sixth Amendment was not denied because both defendants testified at trial and were subject to cross-examination by one another. Thus, their confrontation rights were not jeopardized by the introduction of their respective, redacted out-of-court statements. The trial court did not err in ruling that the first defendant did not require a simultaneous interpreter.**OUTCOME:** The court affirmed the judgment but vacated the second defendant's exceptional

sentence and remanded for resentencing.

CORE TERMS: murder, trunk, interpreter, dismemberment, detectives, interview, lesser, deadly weapon, sentence, manslaughter, armed, premeditated, exceptional, prejudicial, venue, jurors, review denied, ineffective, accomplice, cumulative, pretrial, suppress, bag, degree murder, publicity, garbage, drove, trial counsel, abuse of discretion, antagonistic

LEXISNEXIS® HEADNOTES

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Criminal Law & Procedure > Pretrial Motions & Procedures > Continuances 

Criminal Law & Procedure > Appeals > Standards of Review > Abuse of Discretion > General Overview 

HN1  The decision to grant a continuance rests with the trial court. Appellate courts do not disturb such a decision absent a manifest abuse of discretion and prejudice. More Like This Headnote

Criminal Law & Procedure > Interrogation > Miranda Rights > Custodial Interrogation 

HN2  Miranda warnings are required when an interview constitutes (1) custodial (2) interrogation (3) by a State agent. A person is not under custodial interrogation if his freedom of action is not curtailed to a degree associated with a formal arrest. More Like This Headnote

Criminal Law & Procedure > Search & Seizure > Warrantless Searches > Consent to Search

HN3  Consent to a search excuses the need for a warrant. Whether consent to search is voluntary is a question of fact to be determined considering the totality of circumstances surrounding the consent. More Like This Headnote

Criminal Law & Procedure > Pretrial Motions & Procedures > Joinder & Severance > Severance of Defendants 

HN4  See Wash. Super. Ct. Crim. R. 4.4(c)(2).

Criminal Law & Procedure > Pretrial Motions & Procedures > Joinder & Severance > Severance of Defendants 

HN5  Wash. Super. Ct. Crim. R. 4.4(c)(2), the severance rule, requires a defendant to renew his motion before or at the close of all evidence if the motion was previously overruled in order to preserve it. More Like This Headnote

Criminal Law & Procedure > Pretrial Motions & Procedures > Joinder & Severance > Severance of Defendants 

Criminal Law & Procedure > Appeals > Standards of Review > Abuse of Discretion > General Overview 

HN6  Appellate courts review a trial court's decision on a severance motion for manifest abuse of discretion. Washington does not favor separate trials and, thus, the party seeking severance has the burden of demonstrating that a joint trial would be so manifestly prejudicial as to outweigh the concern for judicial economy. Accordingly, the defendant must point to specific prejudice to support his motion. This demonstration may show: (1) antagonistic defenses conflicting to the point of being irreconcilable and mutually exclusive; (2) a massive and complex quantity of

evidence making it almost impossible for the jury to separate evidence as it related to each defendant when determining each defendant's innocence or guilt; (3) a co-defendant's statement inculcating the moving defendant; (4) or gross disparity in the weight of the evidence against the defendants. More Like This Headnote

Criminal Law & Procedure > Pretrial Motions & Procedures > Joinder & Severance > Severance of Defendants 

HN7  Mutually antagonistic defenses alone are insufficient to warrant separate trials. Rather, the moving party must demonstrate that the conflict is so prejudicial that defenses are irreconcilable, and the jury will unjustifiably infer that this conflict alone demonstrates that both are guilty. More Like This Headnote

Criminal Law & Procedure > Pretrial Motions & Procedures > Joinder & Severance > Severance of Defendants 

HN8  Mutually antagonistic defenses may on occasion be sufficient to support a motion for severance but this is a factual question which must be proved by the defendant. It does not represent sufficient grounds as a matter of law. More Like This Headnote

Constitutional Law > Bill of Rights > Fundamental Rights > Criminal Process > Right to Confrontation 

HN9  When the declarant appears for cross-examination at trial, the Confrontation Clause places no constraints at all on the use of his prior testimonial statements. More Like This Headnote

Constitutional Law > Bill of Rights > Fundamental Rights > Criminal Process > Right to Confrontation 

HN10  A confession redacted to omit all references to the codefendant falls outside Bruton's prohibition because such a statement is not incriminating on its face and becomes incriminating only when linked with evidence introduced later at trial. More Like This Headnote

Constitutional Law > Bill of Rights > Fundamental Rights > Criminal Process > Right to Confrontation 

Criminal Law & Procedure > Pretrial Motions & Procedures > Joinder & Severance > Severance of Defendants 

HN11  See Wash. Super. Ct. Crim. R. 4.4(c).

Evidence > Procedural Considerations > Exclusion & Preservation by Prosecutor 

HN12  Redacted statements must be (1) facially neutral, i.e., not identify the nontestifying defendant by name; (2) free of obvious deletions such as "blanks" or "X"; and (3) accompanied by a limiting instruction. More Like This Headnote

Criminal Law & Procedure > Postconviction Proceedings > General Overview 

Criminal Law & Procedure > Appeals > Procedures > Records on Appeal 

HN13  Appellate courts will not consider on appeal matters not in the record. Wash. R. App. P. 9.2(b). Appellate courts will not review an argument if the facts necessary to adjudicate the alleged error are not in the record. And if there is no record below, a personal restraint petition is the appropriate means of having the reviewing court consider matters outside the record. More Like This Headnote

Criminal Law & Procedure > Appeals > Standards of Review > Harmless & Invited Errors > General Overview 

HN14  The doctrine of invited error prohibits a party from setting up an error at trial and then complaining of it on appeal. More Like This Headnote

Criminal Law & Procedure > Appeals > Standards of Review > Abuse of Discretion > General Overview 

Evidence > Competency > Interpreters 

HN15  When a defendant notifies the trial court about a significant language difficulty, the trial court must determine whether an interpreter is needed. Appointment of an interpreter is a matter of trial court discretion, which appellate courts will disturb only upon a showing of abuse. More Like This Headnote

Criminal Law & Procedure > Appeals > Standards of Review > Abuse of Discretion > General Overview 

Evidence > Procedural Considerations > Exclusion & Preservation by Prosecutor 

HN16  Appellate courts review a trial court's admission of evidence for abuse of discretion. Abuse occurs when the trial court's discretion is manifestly unreasonable, or exercised on untenable grounds, or for untenable reasons. The appellant bears the burden of proving abuse of discretion. Erroneous admission of evidence is not grounds for reversal unless, within reasonable probabilities, the outcome of the trial would have been materially affected had the error not occurred. Erroneous admission of evidence that is merely cumulative is not prejudicial. More Like This Headnote

Criminal Law & Procedure > Criminal Offenses > Homicide > Murder > General Overview 

HN17  Postmortem dismemberment is relevant to the issue of whether a defendant premeditated murder. More Like This Headnote

Evidence > Demonstrative Evidence > Photographs 

Evidence > Procedural Considerations > Exclusion & Preservation by Prosecutor 

HN18  Photographs are not inadmissible merely because they are gruesome. A bloody, brutal crime cannot be explained to a jury in a lily-white manner to save the members of the jury the discomfiture of hearing and seeing the results of such criminal activity. More Like This Headnote

Criminal Law & Procedure > Verdicts > Special Verdicts 

Criminal Law & Procedure > Sentencing > Guidelines > Adjustments & Enhancements > General Overview 

HN19  See Wash. Rev. Code § 9.94A.602.

Criminal Law & Procedure > Verdicts > Special Verdicts 

Criminal Law & Procedure > Sentencing > Guidelines > Adjustments & Enhancements > General Overview 

HN20  The State is not required to prove that a defendant had actual knowledge that an accomplice was armed in order to establish a deadly weapon sentencing enhancement. Use of the words "or an accomplice" leaves no doubt that the statute was intended to apply whenever the defendant or an accomplice was armed. Wash. Rev. Code § 9.94A.602. [More Like This Headnote](#)

[Criminal Law & Procedure > Counsel > Effective Assistance > Tests](#) 

HN21  To show ineffective assistance of counsel, an appellant must show that (1) trial counsel's performance was deficient, and (2) the deficient performance prejudiced him. Deficient performance occurs when counsel's performance falls below an objective standard of reasonableness. An appellant cannot rely on matters of legitimate trial strategy or tactics to establish deficient performance. Prejudice occurs when but for the deficient performance, the outcome would have differed. Courts give great judicial deference to counsel's performance and begin the analysis with a strong presumption that counsel was effective. [More Like This Headnote](#)

[Criminal Law & Procedure > Jury Instructions > Particular Instructions > General Overview](#) 

[Criminal Law & Procedure > Appeals > Standards of Review > Abuse of Discretion > General Overview](#) 

HN22  Appellate courts review for abuse of discretion a trial court's refusal to give instructions to a jury, if based on a factual dispute. The court review de novo a trial court's refusal to give an instruction based on a ruling of law. The usual test for the propriety of a requested jury instruction is whether it correctly states the law, is not misleading, and permits counsel to argue his theory of the case. A defendant is entitled to a jury instruction on a lesser included offense if (1) each of the elements is a necessary element of the charged offense (legal test), and (2) the evidence supports an inference that the defendant committed the lesser offense (factual test). To satisfy the factual prong, the evidence must raise an inference that only the lesser included offense was committed to the exclusion of the charged offense. A mere possibility that the jury might disbelieve the State's evidence is not justification for a lesser included offense instruction. Appellate courts view the evidence in support of a requested instruction in the light most favorable to the requesting party. It is error to give an instruction the evidence does not support. [More Like This Headnote](#)

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[Criminal Law & Procedure > Criminal Offenses > Homicide > Voluntary Manslaughter > General Overview](#) 

[Criminal Law & Procedure > Jury Instructions > Particular Instructions > Lesser Included Offenses](#) 

HN23  Manslaughter is not a lesser included offense of first degree felony murder. Nonetheless, first and second degree manslaughter may be lesser included offenses of premeditated murder and instructions should be given to a jury when the facts support such an instruction. [More Like This Headnote](#)

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HN24  Under the cumulative error doctrine, a defendant may be entitled to a new trial when errors cumulatively produced a trial that was fundamentally unfair. The

defendant bears the burden of proving an accumulation of error of sufficient magnitude that retrial is necessary. More Like This Headnote

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For Respondent(s): David Harold Bruneau, Thurston Co Pros Aty Office, Olympia, WA.

JUDGES: Authored by J. Robin Hunt. Concurring: C. C. Bridgewater, Christine Quinn-Brintnall.

OPINION BY: J. Robin Hunt

OPINION

Hunt, J. -- Mert Celebisoy and Felix D'Allesandro appeal their convictions for first degree murder while armed with a deadly weapon. ¹ Additionally, D'Allesandro appeals his exceptional sentence, arguing that it violates the recent Supreme Court decision in *Blakely v. Washington*, 542 U.S. 296, 124 S. Ct. 2531, 159 L. Ed. 2d 403 (2004).

FOOTNOTES

¹ The State charged both Celebisoy and D'Allesandro as principal or accomplice; the State charged them alternatively with premeditated intentional murder or felony murder during the course of a kidnapping or attempted kidnapping. The trial court instructed the jury on the lesser included offense of second degree murder. A jury found D'Allesandro guilty of first degree premeditated murder. It found Celebisoy guilty of first degree felony murder.

[*2] Both defendants argue that the trial court erred by (1) refusing to instruct the jury on the lesser included offenses of first or second degree manslaughter; (2) denying a motion to sever their trials; (3) allowing evidence of the victim's dismemberment; and (4) denying a motion for change of venue. In addition, Celebisoy argues that (1) a deficient court interpreter deprived him of due process; and (2) he received ineffective assistance of counsel. D'Allesandro also argues: (1) denial of his right to a speedy and public trial; (2) erroneous admission of interrogation statements and physical evidence; and (3) lack of the proper nexus to support the deadly weapon enhancement. Both defendants further contend that cumulative error denied them fair trials.

The State concedes that we should vacate D'Allesandro's exceptional sentence and remand for resentencing. Finding no other reversible error, we otherwise affirm.

FACTS

I. MURDER AND MAYHEM

On July 17, 2003, on his rural Thurston County property, Jay Barrett discovered a human leg lying on a trail and other skeletal remains in two disinterred shallow graves; he called the police. Police found two legs, a left arm, a partial shoulder, **[*3]** and a torso, with five stab wounds to the back, of a dismembered, decomposing body. The arm and partial shoulder were in a garbage bag. The right arm and head were missing.

That same day, while cleaning out his Olympia home's attic, Barrett's friend Charlie Cortelyou discovered a pile of foul-smelling garbage bags. With the assistance of his wife, Jessica

Hunting, Cortelyou put the bags into the garbage bin. After Barrett told them about finding human remains on his property, Hunting contacted the police about the garbage bags from their attic. When police inspected the attic debris, they found blood-covered floor mats, a trunk liner, clothing, a spare tire cover, an insurance card for Felix D'Allesandro with a description of a 1994 Toyota, and a notebook containing D'Allesandro's name.

Both Barrett and Cortelyou gave Mert Celebisoy's name to police. Celebisoy had lived for a time at the Cortelyou residence, and Cortelyou had obtained a job for Celebisoy on the Barrett property. Cortelyou had moved away, but when he returned to his vacant home and unexpectedly discovered Celebisoy at the residence, he demanded Celebisoy's key. When Celebisoy did not return the key, Cortelyou changed [*4] the locks and subsequently discovered the foul-smelling garbage bags in the attic.

Believing that they had identified D'Allesandro as a possible homicide victim, police went to his address. There, police found the Toyota described on the insurance card in Cortelyou's attic debris. Speaking with D'Allesandro's father, Detective Haller learned that D'Allesandro was alive and at home. D'Allesandro appeared and told police that his father owned the Toyota but that he drove it.

When Detective Haller asked D'Allesandro if he had ever loaned the Toyota to anyone, D'Allesandro replied that he was the only driver and he had not loaned it to anyone. Haller told D'Allesandro that he wanted to look in the car's trunk. D'Allesandro asked, "Why?" and D'Allesandro's father directed D'Allesandro to retrieve the car keys. When D'Allesandro opened the trunk, Haller observed it was clean and empty, with no spare tire cover and an ill-fitting floor covering that appeared to have been freshly cut.

Detective Haller told D'Allesandro and his parents that he was investigating a homicide and that bloodstained items had been found with D'Allesandro's insurance card. When Haller again asked D'Allesandro whether [*5] he had loaned his car to anyone, D'Allesandro replied that a month before he had loaned the car to Celebisoy, who had failed to return it when he was supposed to. When Haller reminded D'Allesandro that he was conducting a homicide investigation in which it appeared the Toyota was involved, D'Allesandro replied that "there was more to be told."

D'Allesandro then admitted having driven the Toyota when Celebisoy killed a man named "Dave" ² during a meeting about drugs; D'Allesandro also gave a tape recorded statement in his parents' presence at their home, during which Detective Haller told D'Allesandro he was not under arrest. ³

FOOTNOTES

² The victim's name was David George.

³ Detective Haller neither arrested nor advised D'Allesandro of his *Miranda* warnings at this time. *Miranda v. Arizona*, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966).

D'Allesandro's parents signed a consent form, authorizing Haller to take the Toyota into evidence. Haller took possession of the Toyota. Detectives [*6] then went to arrest Celebisoy, about whom Haller was already aware from the information Barrett and Cortelyou had previously provided.

Detective Bergt interviewed Celebisoy in custody. Celebisoy related an account of events similar to D'Allesandro's but claimed D'Allesandro had done the killing and that he had only helped dispose of the body afterwards.

II. PROCEDURE

The State charged Celebisoy and D'Allesandro, each as principal or accomplice, with first degree murder of George while armed with a deadly weapon. The State charged them alternatively with premeditated intentional murder or felony murder during the course of a kidnapping or attempted kidnapping.

A. Pretrial

1. D'Allesandro

D'Allesandro waived his speedy trial rights until February 15, 2004; trial was set for February 9. On January 23, the State moved to continue because the forensic analysis of physical evidence was not complete. D'Allesandro objected, but the trial court found good cause and granted a continuance until the week of March 8, noting the "large body of evidence," which could be inculpatory or exculpatory, and that the delay would be 22 additional days.

D'Allesandro moved in limine to suppress evidence [*7] from the trunk of his car and his statements. After a hearing, the trial court entered unchallenged findings of fact, including that (1) D'Allesandro's father had cooperated voluntarily in the search of the Toyota's trunk; (2) D'Allesandro had made his statements at home, in the presence of both parents; and (3) Detective Haller had said he would not arrest and did not arrest D'Allesandro.

The trial court ruled that (1) Detective Haller had valid consent to search the Toyota's trunk; (2) D'Allesandro was not in custody at the time of his statements; (3) because there was no custodial interrogation, *Miranda* warnings were not required; and (4) therefore, D'Allesandro's statements were admissible. The trial court denied the motions to suppress, but it ordered redaction of D'Allesandro's statement to replace references to Celebisoy with "the driver" and "friend."

2. Celebisoy

Celebisoy moved to sever his trial from D'Allesandro's, arguing mutually antagonistic defenses. The trial court denied the motion, ruling that Celebisoy had failed to demonstrate that any prejudicial effect of joinder outweighed concerns of judicial economy.

Celebisoy also moved to suppress all testimony regarding [*8] dismemberment, arguing that such testimony was not relevant to the murder and was highly prejudicial and inflammatory. The trial court denied the motion, ruling that dismemberment of the body was "part of this case and so to deny all reference to the dismemberment or to not allow any reference to dismemberment . . . would even be an error . . ." Report of Proceedings (RP) at 242.

B. Trial

Defendants' joint jury trial commenced on March 9, 2004. Both defendants testified similarly to their police interview statements.

1. Celebisoy's testimony

Celebisoy testified that D'Allesandro had asked him to drive to a meeting with George. D'Allesandro was not satisfied with a recent marijuana purchase and wanted to talk with George. They met George on the street and he got into the car and Celebisoy drove while George and D'Allesandro talked. D'Allesandro demanded his money back and George refused. D'Allesandro became irate, reached over the seat, and stabbed George several times. Celebisoy stopped the car and got out; then George got out of the car, stumbled, and fell near the trunk. Threatening with the bloody knife, D'Allesandro ordered Celebisoy to "[p]op the trunk." Celebisoy complied [*9] and, at D'Allesandro's request, helped lift George into the trunk.

Celebisoy denied having any advance knowledge that D'Allesandro was planning to kill George.

D'Allesandro then drove to his parents' home, where he ordered Celebisoy to help clean the blood out of the car. When D'Allesandro threatened Celebisoy and his family, Celebisoy suggested that they take the car to the Cortelyou residence to finish cleaning the car. At the Cortelyou residence, they removed the victim from the trunk and moved his body to a bathroom, where Celebisoy provided D'Allesandro with a "Sawzall" power saw. D'Allesandro dismembered the body, and Celebisoy helped place the pieces in garbage bags.

D'Allesandro placed six bags of dismembered parts into the car's trunk and then Celebisoy helped him move the blood-soaked debris (floor mats, trunk liner, clothing, spare-tire cover, notebook, and D'Allesandro's insurance card) from the Toyota to Cortelyou's attic. After borrowing jumper cables from a neighbor to start D'Allesandro's car, they left.

Two days later, D'Allesandro called Celebisoy and told him they needed to get rid of George's body. Celebisoy took D'Allesandro to the Barrett property, where D'Allesandro [*10] buried some of the remains while Celebisoy remained in the barn.

2. D'Allesandro's testimony

D'Allesandro testified that Celebisoy called him to arrange a meeting so he (Celebisoy) could purchase cocaine from George. D'Allesandro arranged the meeting and drove Celebisoy to meet George. George sat in the front passenger seat while Celebisoy sat in the back seat. As D'Allesandro drove around, Celebisoy and George conversed. They started to argue loudly, and Celebisoy said, "Here you go, motherf***er," and Celebisoy stabbed George multiple times in the back. RP at 1658.

D'Allesandro stopped the car, George staggered out of the car, and Celebisoy guided George toward the trunk. Celebisoy ordered D'Allesandro to "pop" the trunk, but D'Allesandro stayed immobilized in a state of shock. Celebisoy left George slumped over the trunk and came around the car to pop open the trunk using the driver's side release. Celebisoy returned to George and pushed him into the trunk.

Because D'Allesandro was unable to drive at this point, Celebisoy started driving. When Celebisoy drove erratically, D'Allesandro took over and drove to his parents' home. At the D'Allesandro residence, they [*11] changed clothes and gathered garbage bags, gloves, and cleaning supplies. They left seven hours later.

D'Allesandro followed Celebisoy to the Cortelyou residence. There, Celebisoy removed the body from the trunk, wrapped it in tarps, and told D'Allesandro to start cleaning the car. Celebisoy first dragged the body into the house and later placed it in a yard trash bin along the side of the house. Celebisoy then gathered the contents of D'Allesandro's car in garbage bags while D'Allesandro cleaned the front seat. After cleaning for four or five hours, D'Allesandro tried to leave. But his car would not start, so he borrowed jumper cables from a neighbor. Celebisoy and D'Allesandro then drove back to D'Allesandro's parents' house.

D'Allesandro further testified that he did not find out that the body had been dismembered until the next month and that he had never been to the Barrett property.

3. Instructions

Both defendants took exception to the trial court's failure to give their proposed instructions on the lesser included offenses of first and second degree manslaughter.

4. Verdict

The jury found D'Allesandro guilty of first degree premeditated murder with a deadly weapon.

The [*12] jury found Celebisoy guilty of felony first degree murder while armed with a deadly weapon. ⁴

FOOTNOTES

⁴ The verdict forms contained blank spaces with instructions to write in "yes," "no," or "unable to unanimously agree." In finding D'Allesandro "guilty," the jury wrote "yes" under Alternative A, Premeditated First Degree Murder. In finding Celebisoy "guilty," the jury wrote "unable to unanimously agree" under Alternative A, Premeditated First Degree Murder, and "yes" under Alternative B, Felony First Degree Murder.

C. Sentencing

The State requested exceptional sentences for both defendants based on "the manner in which death was inflicted as well as the dismemberment of the victim thereafter." Clerk's Papers (CP) (Celebisoy) at 178.

The trial court denied the State's request for an exceptional sentence for Celebisoy and sentenced him to a standard range sentence of 320 months, with an additional 24-month deadly weapon enhancement, for a total of 344 months.

The trial court sentenced D'Allesandro to an exceptional [*13] sentence of 360 months, with an additional 24-month deadly weapon enhancement, for a total of 384 months. Because the Supreme Court had not yet issued its *Blakely* decision, the trial court did not submit the exceptional sentence factual issues to the jury. The trial court entered written findings presenting substantial and compelling reasons to justify an exceptional sentence: (1) abuse of trust, (2) dismemberment of the victim's body, (3) lack of remorse, (4) deliberate cruelty, and (5) efforts to conceal the commission of the crime.

Celebisoy and D'Allesandro appeal.

ANALYSIS

I. SPEEDY TRIAL

In his Statement of Additional Grounds ⁵ (SAG), D'Allesandro asserts that the trial court denied his constitutional right to a speedy trial. He focuses his challenge on the trial court's grounds for granting the State's request for a continuance of the trial date under CrR 3.3. He argues that the delay improperly served the State's purpose to augment its dismemberment evidence. We disagree.

FOOTNOTES

⁵ RAP 10.10.

HN1 The [*14] decision to grant a continuance rests with the trial court. We do not disturb such a decision absent a manifest abuse of discretion and prejudice. *State v. Torres*, 111 Wn. App. 323, 330, 44 P.3d 903 (2002), review denied, 148 Wn.2d 1005, 60 P.3d 1212, (2003). We find no such abuse or prejudice here.

First, D'Allesandro waived his CrR3.3(b) right to have trial commence within the specified period, by written agreement, continuing the trial until February 15, 2004. Thereafter, the trial court granted the State's request for a continuance until March 8, 2004, to complete forensic analysis of physical evidence. This continuance delayed the trial by 22 days. Even assuming,

without deciding, that this continuance was not granted for good cause, this short delay was permissible under CrR 3.3(b)(5), which allows up to 30 days delay, after excluded periods such as the period covered by D'Allesandro's agreed continuance.

We hold, therefore, that (1) D'Allesandro's trial commenced within the time requirements of CrR 3.3, and (2) he has failed to show any violation of his constitutional right to a speedy trial under either the state or federal constitutions.

II. D'ALLESANDRO'S [*15] MOTIONS TO SUPPRESS

D'Allesandro next argues that the trial court erred in denying his motions to suppress statements he made to detectives at his parents' home and the evidence seized during a search of his car. We disagree.

A. Police Interview

D'Allesandro contends he was in custody when he gave his statement and, therefore, police should have read him the required *Miranda* warnings. Our Supreme Court has held that ^{HN2} ~~¶~~ *Miranda* warnings are required when an interview constitutes (1) custodial (2) interrogation (3) by a State agent. *State v. Sargent*, 111 Wn.2d 641, 647, 762 P.2d 1127 (1988). Here, the police first went to D'Allesandro's home thinking he was a possible murder victim. When they discovered he was alive, they interviewed him as part of their investigation to determine who had been murdered, noting specifically that D'Allesandro was not then a suspect, nor was he under arrest.

A person is not under custodial interrogation "if [his] freedom of action is not curtailed to a degree associated with a formal arrest." *State v. Harris*, 106 Wn.2d 784, 790, 725 P.2d 975 (1986). Such is the case here. The police were inside D'Allesandro's [*16] parents' home with permission. D'Allesandro was not in custody; rather, he was free to leave. Because the police interview of D'Allesandro was not custodial, *Miranda* warnings were not required. *Harris*, 106 Wn.2d at 790.

Moreover, D'Allesandro does not challenge the trial court's findings of fact that he made his statements at home, in the presence of both parents, and that Detective Haller said he would not and did not arrest him. These "[u]nchallenged findings of fact entered following a suppression hearing are verities on appeal." *State v. Gaines*, 154 Wn.2d 711, 716, 116 P.3d 993 (2005). These unchallenged findings support the trial court's conclusion of law that D'Allesandro was not in custody when he made his statements. We agree with the trial court that no "reasonable person [would feel] he or she was not at liberty to terminate the interrogation and leave." *State v. Rehn*, 117 Wn. App. 142, 152, 69 P.3d 379 (2003) (quoting *Thompson v. Keohane*, 516 U.S. 99, 112, 116 S. Ct. 457, 133 L. Ed. 2d 383 (1995)).

Accordingly, we hold that the trial court did not err in denying D'Allesandro's motion to suppress [*17] his statements.

B. Evidence Seized During Car Search

D'Allesandro argues that (1) the warrantless search of the car violated his state and federal constitutional rights against unreasonable searches and seizures; and (2) "Haller's failure to tell D'Allesandro that he was considered a suspect and to produce a valid consent form makes his search illegal." SAG at 34. Again, we disagree.

^{HN3} ~~¶~~ Consent to a search excuses the need for a warrant. *Schneckloth v. Bustamonte*, 412 U.S. 218, 242-43, 93 S. Ct. 2041, 36 L. Ed. 2d 854 (1973); *State v. Walker*, 136 Wn.2d 678, 682, 965 P.2d 1079 (1998). Whether consent to search is voluntary is a question of fact to be determined considering the totality of circumstances surrounding the consent. *State v. Smith*, 115 Wn.2d 775, 789, 801 P.2d 975 (1990).

Here, the trial court entered the following finding of fact regarding consent to search the car's trunk:

The senior D'Allesandro said to his son: "go get the keys", and the defendant did. It is clear that when Detective Haller asked to look into the trunk of the vehicle that Mr. D'Allesandro (senior) was cooperating voluntarily. He had nothing [*18] to hide, and only desired to assist the investigation. The defendant was likewise cooperative.

CP (D'Allesandro) at 208 (Finding # 8). Because D'Allesandro failed to assign error to this finding, we treat it as a verity on appeal. *Gaines, supra*. This finding supports the trial court's legal conclusion that Detective Haller had valid consent to look in the trunk. ⁶ We hold, therefore, that the trial court did not err in denying D'Allesandro's motion to suppress the evidence seized from the Toyota's trunk.

FOOTNOTES

⁶ Additionally, we note, the record does not suggest that D'Allesandro's father, who gave the consent to search, was not of average or higher intelligence and education. And although Detective Haller did not affirmatively advise D'Allesandro's father of his right to refuse consent, Haller made no show of authority to induce consent; rather, he merely explained that he was investigating a possible murder. Moreover, there was no prior illegal police action. Nor did D'Allesandro or his father previously or contemporaneously refuse to cooperate. *Smith, supra*.

[*19] III. CELEBISOY'S MOTION TO SEVER

Celebisoy and D'Allesandro argue that the trial court abused its discretion in denying Celebisoy's pre-trial motion to sever their trials. Defendants contend that their defenses were mutually antagonistic because the jury must disbelieve one defendant's testimony if they were to believe the other's testimony, resulting in prejudice. We disagree.

CrR 4.4(c)(2) provides:

HN4 (2) The court, on application of the prosecuting attorney, or on application of the defendant other than under subsection (i), should grant a severance of defendants whenever:

(i) if before trial, it is deemed necessary to protect a defendant's rights to a speedy trial, or it is deemed appropriate to promote a fair determination of the guilt or innocence of a defendant; or

(ii) if during trial upon consent of the severed defendant, it is deemed necessary to achieve a fair determination of the guilt or innocence of a defendant. [?]

FOOTNOTES

⁷ *HN5* The severance rule also requires a defendant to renew his motion before or at the close of all evidence if the motion was previously overruled in order to preserve it. Celebisoy renewed his motion to sever during trial; thus, he has preserved this issue for appeal. CrR

4.4(a)(2).

[*20] A. Standard of Review

HN6 We review a trial court's decision on a severance motion for manifest abuse of discretion. *State v. Hoffman*, 116 Wn.2d 51, 74, 804 P.2d 577 (1991). Our state does not favor separate trials and, thus, the party seeking severance has "the burden of demonstrating that a joint trial would be so manifestly prejudicial as to outweigh the concern for judicial economy." *Hoffman*, 116 Wn.2d at 74. Accordingly, the defendant must point to specific prejudice to support his motion. *State v. Canedo-Astorga*, 79 Wn. App. 518, 527, 903 P.2d 500 (1995), *review denied*, 128 Wn.2d 1025, 913 P.2d 816 (1996).

This demonstration may show:

(1) antagonistic defenses conflicting to the point of being irreconcilable and mutually exclusive; (2) a massive and complex quantity of evidence making it almost impossible for the jury to separate evidence as it related to each defendant when determining each defendant's innocence or guilt; (3) a co-defendant's statement inculcating the moving defendant; (4) or gross disparity in the weight of the evidence against the defendants.

Canedo-Astorga, 79 Wn. App. at 528 **[*21]** (quoting *United States v. Oglesby*, 764 F.2d 1273, 1276 (7th Cir. 1985)).

B. Mutually Antagonistic Defenses

HN7 Mutually antagonistic defenses alone are insufficient to warrant separate trials. *Hoffman*, 116 Wn.2d at 74. Rather, the moving party must demonstrate "that the conflict is so prejudicial that defenses are irreconcilable, and the jury will unjustifiably infer that this conflict alone demonstrates that both are guilty." *Hoffman*, 116 Wn.2d at 74.

The trial court here relied on *State v. Grisby*, 97 Wn.2d 493, 647 P.2d 6 (1982), in ruling that Celebisoy failed to establish that "a joint trial would be so prejudicial as to outweigh the concerns for judicial economy." RP at 199. We agree and find *Grisby* dispositive:

HN8 Mutually antagonistic defenses may on occasion be sufficient to support a motion for severance but this is a factual question which must be proved by the defendant. It does not represent sufficient grounds as a matter of law. Furthermore, in this case the defenses do not appear to be inherently antagonistic. Both agree they went to the Walker apartment armed with two pistols to resolve **[*22]** the drug dispute. *The sole disagreement is who killed which victims. This conflict is not sufficient to find an abuse of discretion by the trial court for failing to grant a motion to sever.*

97 Wn.2d at 508 (emphasis added). As in *Grisby*, here, the only substantial disagreement in defendants' testimonies was over who stabbed George. Such disagreement is not sufficient to demonstrate that the trial court abused its discretion in keeping the trials joined, especially in light of the trial court's articulated concern for judicial economy.

Accordingly, we hold that the trial court did not abuse its discretion in denying Celebisoy's motion to sever.

C. Redaction of Defendants' Statements

Defendants further argue that the trial court abused its discretion in admitting redacted versions of statements they had made to police investigators, because the cross-implicating statements violated each other's confrontation rights. ⁸ We disagree.

FOOTNOTES

⁸ U.S. Const. amend. VI.

We first note that [*23] both defendants testified at trial and were subject to cross examination by each other. Thus, under the Supreme Court's recent *Crawford* decision, their confrontation rights were not jeopardized by the introduction of their respective, redacted out-of-court statements. *Crawford v. Washington*, 541 U.S. 36, 59 n.9, 124 S. Ct. 1354, 158 L. Ed. 2d 177 (2004) ^{HN9} ("[W]hen the declarant appears for cross-examination at trial, the Confrontation Clause places no constraints at all on the use of his prior testimonial statements.").

In *Bruton v. United States*, 391 U.S. 123, 127-28, 88 S. Ct. 1620, 20 L. Ed. 2d 476 (1968), the United States Supreme Court held that admission of a co-defendant's incriminating pretrial statement denied a defendant his constitutional confrontation rights where the co-defendant did not testify at trial. The Supreme Court refined the *Bruton* rule in *Richardson v. Marsh*, when it held that ^{HN10} a confession redacted to omit all references to the codefendant falls outside *Bruton's* prohibition because such a statement is not "incriminating on its face" and becomes incriminating "only when linked with evidence introduced later at [*24] trial." ⁹ 481 U.S. 200, 208, 107 S. Ct. 1702, 95 L. Ed. 2d. 176 (1987).

FOOTNOTES

⁹ We followed *Richardson* in *State v. Cotten*, 75 Wn. App. 669, 691, 879 P.2d 971 (1994), review denied, 126 Wn.2d 1004 (1995), remarking:

The only way in which Cotten is implicated by the out-of-court statements is through linkage with other evidence presented by the State. The fact that the State links a nontestifying codefendant's confession through other evidence to the defendant's complicity in the crime is not, however, a sufficient reason to exclude the testimony under *Bruton*, nor does it mandate severance.

Similarly, CrR 4.4(c) contemplates redaction of co-defendants' statements:

^{HN11} (1) A defendant's motion for severance on the ground that an out-of-court statement of a codefendant referring to him is inadmissible against him shall be granted unless:

....

(ii) deletion of all references to the moving defendant will eliminate any prejudice to him from the admission [*25] of the statement.

We have previously enumerated the following related requirements for admission of co-defendants' out-of-court statements:

HN12 Redacted statements must be (1) facially neutral, i.e., not identify the nontestifying defendant by name (*Bruton* [391 U.S. 123, 88 S. Ct. 1620, 20 L. Ed. 2d 476]); (2) free of obvious deletions such as "blanks" or "X" (*Gray*[¹⁰]); and (3) accompanied by a limiting instruction (*Richardson* [481 U.S. 200, 107 S. Ct. 1702, 95 L. Ed. 2d 176]).

State v. Larry, 108 Wn. App. 894, 905, 34 P.3d 241 (2001).

FOOTNOTES

¹⁰ *Gray v. Maryland*, 523 U.S. 185, 118 S. Ct. 1151, 140 L. Ed. 2d. 294 (1998).

Our review of the State's offer of proof, and the actual statements admitted through Detectives Haller's and Bergt's testimonies, reveals that both defendants' statements were properly redacted to be facially neutral: The redacted statements contained no obvious deletions, and they referred to the codefendant as "friend" or "driver" on the few occasions that they specifically [***26**] mentioned a third party. In addition, the trial court properly instructed the jury not to consider "an admission or incriminating statement made out of court by one defendant as evidence against a codefendant." CP (Celebisoy) at 142.

Accordingly, we hold that the trial court did not violate the defendants' constitutional confrontation rights in admitting the redacted statements.

IV. VENUE

Both defendants argue that, in light of prejudicial pretrial publicity, the trial court should have granted the defense motion to change venue. D'Allesandro also argues pro se that the trial court erred in denying a change of venue in light of pretrial publicity.

Although Celebisoy claims his trial counsel was ineffective in failing to move for a change of venue, the record shows that his trial counsel did move for a change of venue, apparently in connection with the discussion about how best to conduct voir dire to minimize the impact of pretrial publicity on potential jurors. Celebisoy's trial counsel stated:

I think preliminarily in order to preserve the issue, a motion to change venue should be made at this time, although I understand we have not interviewed the jurors. We do have [***27**] a questionnaire which demonstrates that well over half the panel has read about this case in the paper or has heard it on the news, and it's quite concerning to me and so I want to make the record that we would at this point move for a change of venue. Understanding that the court is not yet in a position to rule on that, we can leave it in a preliminary status right now.

RP (Voir Dire) at 5.

We cannot locate in the record before us where the trial court ruled on the motion for change of venue. But because the trial took place in the same county where the murder had occurred, we presume the trial court denied the motion. The lack of a detailed record on appeal, however, prevents our consideration of the substantive issue.

Defendants have failed to identify any portion of the record detailing the extent of pretrial publicity and its potential prejudicial effect on the fairness of their trial. Moreover, although Celebisoy alleges pretrial publicity about gruesome and inflammatory facts, he expressly acknowledges the lack of a record to support these allegations: "Although not contained in the record, *it is reasonable to presume* that aspects of the case were reported to [***28**] the community." Br. of Appellant (Celebisoy) at 40 (emphasis added). Nor does our review of the

record reveal any details about the extent of pretrial publicity or its impact on the trial.

HN13 ¶ We will not consider on appeal matters not in the record. ¹¹ RAP 9.2(b). See *State v. Cerrillo*, 122 Wn. App. 341, 347, 93 P.3d 960 (2004) (noting that appellate courts will not review an argument "if the facts necessary to adjudicate the alleged error are not in the record."). Accordingly, we do not further address the venue issue.

FOOTNOTES

¹¹ And if there is no record below, "a personal restraint petition is the appropriate means of having the reviewing court consider matters outside the record." *State v. McFarland*, 127 Wn.2d 322, 338 n.5, 899 P.2d 1251 (1995).

V. VOIR DIRE

D'Allesandro next argues that the trial court violated his right to a public trial by closing the courtroom and excluding the public and his family during a portion of the voir dire process. Because the trial court took this [***29**] action at D'Allesandro's request to protect his right to a fair and impartial jury, we disagree.

Before voir dire, D'Allesandro's counsel asked the trial court to interview privately certain prospective jurors who had responded to a questionnaire about pretrial publicity and personal privacy. ¹² All trial counsel and the trial court agreed that this procedure was the best way to avoid tainting the whole jury pool with individual recollections of publicity reports and to expedite the jury selection process. Because of the large number of potential jurors, the trial court decided to conduct these interviews in camera, using the closed courtroom because there were too many people to accommodate in chambers.

FOOTNOTES

¹² D'Allesandro's attorney expressly requested that certain jurors be interviewed privately:

[I]t would make sense for the parties and the Court to interview prospective jurors who wished to speak with us privately, to do those interviews prior to voir dire, and my rationale is that if those interviews result in any excuses for cause, it would diminish the pool right off the bat, and secondly and perhaps more importantly from my perspective we don't run the risk of tainting the remaining pool, if we do it on the front end as opposed to doing it on the back end. And I know . . . at least in my experience, those interviews are conducted in chambers, and I would suggest that those interviews take place in an empty courtroom.

RP (Voir Dire) at 2.

[***30**] During the in camera interviews, the trial court excused some jurors. Those whom the court did not excuse rejoined the jury pool for voir dire in open court, where the trial court conducted most of the jury voir dire.

HN14 ¶ The doctrine of invited error "prohibits a party from setting up an error at trial and then complaining of it on appeal." *State v. Pam*, 101 Wn.2d 507, 511, 680 P.2d 762 (1984), *overruled on other grounds*; *State v. Olson*, 126 Wn.2d 315, 893 P.2d 629 (1995). Moreover, we note that D'Allesandro has failed to demonstrate any prejudice flowing from the trial court's limited interviewing of potentially tainted jurors in camera, as he requested. Thus,

D'Allesandro's claim fails. ¹³

FOOTNOTES

¹³ We note our Supreme Court's recent decision in *State v. Brightman*, 155 Wn.2d 506, 517-18, 122 P.3d 150 (2005), which followed *In re Personal Restraint of Orange*, 152 Wn.2d 795, 100 P.3d 291 (2004), in holding that the trial court erred in closing the courtroom to spectators during the entire jury selection process, even though the defendant did not object to the closure.

Even assuming, without deciding, that the partial courtroom closure here rose to the level of the closures in *Brightman* and *Orange*, these cases are distinguishable. D'Allesandro not only failed to object to the closure, as in *Brightman* and *Orange*; but also he expressly requested in camera interviews of prospective jurors in order to avoid tainting the jury pool. The trial court granted this request for a limited time and a limited purpose, resulting in excusing several potentially tainted jurors for cause.

We acknowledge that our review would have been easier had the trial court articulated its application of the five *Brightman* and *State v. Bone-Club*, 128 Wn.2d 254, 906 P.2d 325 (1995), factors before granting D'Allesandro's request to exclude the public from this limited portion of the jury voir dire. We further note, however, that even had D'Allesandro not requested limited "closure" of the courtroom, (1) such in camera interviews are appropriate, and (2) it could be a legitimate trial strategy not to object where such proceedings preserve the impartiality of the jury pool.

[*31] VI. INTERPRETER

Celebisoy contends the trial court denied his right to due process ¹⁴ by appointing an uncertified interpreter to aid in the court proceedings rather than to perform as a sequential or simultaneous interpreter. The record does not support this contention.

FOOTNOTES

¹⁴ Right to confront witnesses. U.S. Const. amend. VI.

HN15 When a defendant notifies the trial court about a significant language difficulty, the trial court must determine whether an interpreter "is needed." *State v. Woo Won Choi*, 55 Wn. App. 895, 901, 902, 781 P.2d 505 (1989), review denied, 114 Wn.2d 1002, 788 P.2d 1077 (1990). Appointment of an interpreter is a matter of trial court discretion, which we disturb only upon a showing of abuse. *State v. Trevino*, 10 Wn. App. 89, 94-95, 516 P.2d 779 (1973), review denied, 83 Wn.2d 1009 (1974). We find no abuse of discretion here.

The State made an offer of proof comprising evidence from witnesses who had contacts with Celebisoy, tape recordings [*32] of his extensive conversations with police, and court records of other criminal proceedings in which Celebisoy had not requested or used an interpreter. The trial court ruled:

But I also after listening to this and keeping it in the context, not just of the two prior District Court cases, but even in this case with months of communication between he and his counsel, this issue has never come up. But even more strongly than that is my own impression after listening to his live discourse or recorded discourse on the tapes that he does readily speak and understand the English language, and I think his language skills are adequate enough to attend trial

proceedings, and as a consequence I think if an interpreter were not available that one would not be necessary. He can and does understand what's going on and can communicate.

RP at 178.

Having decided that Celebisoy did not need an interpreter to understand the proceedings, the trial court denied his request for an interpreter "as a simultaneous [] or a sequential interpreter." Nonetheless, "in an abundance of caution," the trial court appointed an interpreter "as an aid to the defendant and/or his counsel," in case [*33] Celebisoy were to need clarification on "some English presentation." RP at 179-81.

We hold that the court did not abuse its discretion in ruling that Celebisoy did not require a simultaneous interpreter and in appointing instead an interpreter to aid Celebisoy and his counsel to clarify the proceedings when needed.

VII. EVIDENCE

Defendants argue that we should reverse their convictions because the trial court improperly admitted evidence that was more prejudicial than probative. We disagree.

A. Standard of Review

HN16 We review a trial court's admission of evidence for abuse of discretion. *State v. Pirtle*, 127 Wn.2d 628, 648, 904 P.2d 245 (1995), cert. denied, 518 U.S. 1026, 116 S. Ct. 2568, 135 L. Ed. 2d 1084 (1996). Abuse occurs when the trial court's discretion is "manifestly unreasonable, or exercised on untenable grounds, or for untenable reasons." *State ex rel Carroll v. Junker*, 79 Wn.2d 12, 26, 482 P.2d 775 (1971). The appellant bears the burden of proving abuse of discretion. *State v. Hentz*, 32 Wn. App. 186, 190, 647 P.2d 39 (1982), reversed on other grounds, 99 Wn.2d 538, 663 P.2d 476 (1983).

Erroneous admission [*34] of evidence is not grounds for reversal "unless, within reasonable probabilities, the outcome of the trial would have been materially affected had the error not occurred." *State v. Tharp*, 96 Wn.2d 591, 599, 637 P.2d 961 (1981). Erroneous admission of evidence that is merely cumulative is not prejudicial. *State v. Acheson*, 48 Wn. App. 630, 635, 740 P.2d 346 (1987), review denied, 110 Wn.2d 1004 (1988).

B. Dismemberment

Defendants argue that the trial court abused its discretion in admitting evidence of the victim's dismemberment because it (1) was not necessary to prove any essential element of the charged crimes; and (2) inflamed the passions of the jury, thus prejudicing both defendants.

The trial court admitted extensive testimony concerning the post-mortem dismemberment of the victim and disposal of his remains, and photographic and videographic exhibits depicting the remains discovered at the Barrett property. In denying defendants' motion to suppress, the trial court ruled that dismemberment was "part of this case and so to deny all reference to the dismemberment or to not allow any reference to dismemberment I think [*35] would even be an error." RP at 242.

No published Washington cases address this issue. Several other states' courts, however, have held that **HN17** postmortem dismemberment is relevant to the issue of whether a defendant premeditated murder. See, e.g., *Mason v. Lockhart*, 881 F.2d 573 (8th Cir. 1989); *State v. Smith*, 669 N.W.2d 19 (Minn. 2003); *State v. Sokolowski*, 351 N.C. 137, 522 S.E.2d 65 (N.C. 1999); *State v. Helmer*, 1996 SD 31, 545 N.W.2d 471 (S.D. 1996). Agreeing with these cases and the trial court below, we hold that dismemberment and disposal of the victim's body here was circumstantial evidence that defendants planned to kill George and then to dispose of the

evidence to avoid discovery. We further note that evidence of the police discovery of the victim's dismemberment and the police investigative follow up was relevant to inform the jury about (1) the progression of the police investigation, including that it was their initial belief that D'Allesandro was the murder victim that lead them to his house; (2) the identification of the defendants and the relationship between them; (3) the location of the [*36] murder (the D'Allesandro Toyota) and the resulting evidence trail; and (4) the cause and manner of the victim's death.

C. Photos and Videotape

We next turn to the photographs and videotapes of the Barrett property where police discovered the victim's body parts. *HN18* "Photographs are not inadmissible merely because they are gruesome." *State v. Adams*, 76 Wn.2d 650, 655, 458 P.2d 558 (1969). "A bloody, brutal crime cannot be explained to a jury in a lily-white manner to save the members of the jury the discomfort of hearing and seeing the results of such criminal activity." *Adams*, 76 Wn.2d at 656. And here, although the subject matter was obviously gruesome, the photos and videotape did not focus on or amplify the gruesomeness of the victim's remains; rather, they depict where and how the remains were found.

With the exception of one leg in the middle of the trail, the objects in the photos, taken from some distance away, are not readily distinguishable as body parts. The pictures are not needlessly replicated, nor do they create an overwhelming sense of revulsion at first sight. Similarly, the video depicts the same scene, briefly panning over the [*37] remains and zooming in on the nearly unrecognizable leg for a brief moment before surveying the surrounding crime scene. As in *Adams*, the photos and video here "were used to prove relevant and material facts such as the scene of the crime and the physical facts of the case. The potential prejudicial effect of these photographs does not appear to be great and does not outweigh their probative value." *Adams* 76 Wn.2d at 658.

Accordingly, we hold that the trial court did not abuse its discretion in denying Celebisoy's motion to suppress the dismemberment evidence, including the photos and video tape.

D. Deadly Weapon

D'Allesandro also argues that the State failed to demonstrate the requisite nexus connecting him to the weapon that Celebisoy used to murder George. We disagree. Regardless of whether D'Allesandro was the principal or the accomplice, the sentence enhancement of RCW 9.94A.602 applies to him.

RCW 9.94A.602 provides, in part:

HN19 "In a criminal case wherein there has been a special allegation and evidence establishing that the accused or an accomplice was armed with a deadly weapon at the time of the [*38] commission of the crime, the court shall make a finding of fact of *whether or not the accused or an accomplice was armed with a deadly weapon* at the time of the commission of the crime, or if a jury trial is had, the jury shall, if it find[s] the defendant guilty, also find a special verdict *as to whether or not the defendant or an accomplice was armed with a deadly weapon* at the time of the commission of the crime.

(emphases added).

Relying on the plain language of this statute, Division I of this court has held that *HN20* the State is not required to prove that a defendant had actual knowledge that an accomplice was armed in order to establish a deadly weapon sentencing enhancement. *State v. Bilal*, 54 Wn. App. 778, 781-82, 776 P.2d 153, *review denied*, 113 Wn.2d 1020, 781 P.2d 1322 (1989). The

Bilal court reasoned that use of "the words 'or an accomplice' leaves no doubt that the statute was intended to apply whenever the defendant or an accomplice was armed." *Bilal*, 54 Wn. App at 782.

Here, the State presented substantial evidence, and both defendants so testified, that the co-defendant in the back seat of the car was armed with [*39] a knife and stabbed George in the back. The jury answered "yes" on the special verdict forms, finding that both defendants were armed with a deadly weapon during the murder.

The record shows that the State proved a sufficient nexus between the murder weapon and D'Allesandro's role in George's murder to support the jury's special verdict and the trial court's deadly weapon sentence enhancement under RCW 9.94A.602.

VIII. INEFFECTIVE ASSISTANCE OF COUNSEL

Celebisoy argues that his trial counsel was ineffective because (1) he failed to cross examine Keith Baker, and (2) Celebisoy was unable to assist or to consult with his counsel while the interpreter was busy interpreting on behalf of his mother during her testimony. These arguments fail.

A. Standard of Review

HN21 To show ineffective assistance of counsel, an appellant must show that (1) trial counsel's performance was deficient, and (2) the deficient performance prejudiced him. *State v. Thomas*, 109 Wn.2d 222, 225, 743 P.2d 816 (1987). Celebisoy fails to meet this test.

Deficient performance occurs when counsel's performance falls below an objective standard of reasonableness. *State v. Stenson*, 132 Wn.2d 668, 705, 940 P.2d 1239 (1997), [*40] cert. denied, 523 U.S. 1008, 118 S. Ct. 1193, 140 L. Ed. 2d 323 (1998). An appellant cannot rely on matters of legitimate trial strategy or tactics to establish deficient performance. *State v. Hendrickson*, 129 Wn.2d 61, 77-78, 917 P.2d 563 (1996). Prejudice occurs when but for the deficient performance, the outcome would have differed. *In the Matter of the Personal Restraint Petition of Pirtle*, 136 Wn.2d 467, 487, 965 P.2d 593 (1998). We give great judicial deference to counsel's performance and begin our analysis with a strong presumption that counsel was effective. *Strickland v. Washington*, 466 U.S. 668, 689, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); *State v. McFarland*, 127 Wn.2d 322, 335, 899 P.2d 1251 (1995).

B. Examination of Keith Baker

Celebisoy argues that his trial counsel was ineffective for failing to cross examine Keith Baker about D'Allesandro's alleged propensity to carry weapons. We disagree.

The State called Keith Baker to testify about D'Allesandro's drug association with Celebisoy as well as about D'Allesandro's remarks that he was "getting away" with murder. After resting, Celebisoy's counsel [*41] moved to reopen his case in order to question Baker about whether D'Allesandro carried weapons.

The trial court denied the motion, noting that Baker had already been cross examined and that "there was a full opportunity to ask him these kinds of questions" during the State's case or during Celebisoy's case in chief. RP at 1725. The trial court also noted, "[T]his is somewhat redundant because we've got people saying that Mr. D'Allesandro carries knives, carries a Leatherman, carries a Taser. There's plenty of evidence of that so this would be somewhat cumulative and redundant." RP at 1725. After D'Allesandro's testimony, the court denied Celebisoy's motion to introduce Baker's testimony in rebuttal to D'Allesandro's testimony.

Even assuming, without deciding, that Celebisoy's attorney performed deficiently in failing to cross examine Baker about D'Allesandro's carrying weapons, Celebisoy fails to show how this

alleged deficiency prejudiced his case. In his case in chief, Celebisoy had already elicited testimony from Josh Gertsner that D'Allesandro carried a knife and a Taser. Thus, cross examination of Baker on the same or similar issue would have been [*42] "cumulative and redundant." We hold, therefore, that counsel's failure to cross examine Baker on this matter does not amount to ineffective assistance. See *United States v. Schaflander*, 743 F.2d 714, 718 (9th Cir. 1984) (holding that appellant failed to show prejudice where uncalled witnesses would have presented testimony cumulative to the evidence already presented at trial).

C. Mother's Testimony

Celebisoy also claims ineffective assistance because he was unable to consult with his counsel during trial while the interpreter was translating his mother's testimony. He asserts, "Without a second interpreter during the portion of his mother's testimony, Celebisoy did not have the protection of the opportunity for continual consultation during trial." Br. of Appellant (Celebisoy) at 27. But Celebisoy not only fails to show how the interpreter's actions caused counsel to render ineffective assistance, but he also acknowledges the record's lack of any specific thwarted attempt by him to consult with counsel.

Having already affirmed the trial court's exercise of discretion in deciding Celebisoy did not need a simultaneous interpreter, we do not further address this issue.

[*43] IX. LESSER INCLUDED OFFENSE INSTRUCTION

Defendants both argue that the trial court erred in denying their requests for jury instructions on the lesser included offenses of first and second degree manslaughter. They contend their individual testimonies support a manslaughter instruction because the driver's actions could be characterized as merely reckless or criminally negligent. We disagree.

A. Standard of Review

HN22 We review for abuse of discretion a trial court's refusal to give instructions to a jury, if based on a factual dispute. *State v. Lucky*, 128 Wn.2d 727, 731, 912 P.2d 483 (1996), *overruled on other grounds by State v. Berlin*, 133 Wn.2d 541, 947 P.2d 700 (1997). We review de novo a trial court's refusal to give an instruction based on a ruling of law. *Lucky*, 128 Wn.2d at 731. The usual test for the propriety of a requested jury instruction is whether "it correctly states the law, is not misleading, and permits counsel to argue his theory of the case." *State v. Mark*, 94 Wn.2d 520, 526, 618 P.2d 73 (1980).

A defendant is entitled to a jury instruction on a lesser included offense if (1) each of the elements is [*44] a necessary element of the charged offense (legal test), and (2) the evidence supports an inference that the defendant committed the lesser offense (factual test). *State v. Berlin*, 133 Wn.2d 541, 545-46, 947 P.2d 700 (1997). To satisfy the factual prong, "the evidence must raise an inference that only the lesser included . . . offense was committed to the exclusion of the charged offense." *State v. Fernandez-Medina*, 141 Wn.2d 448, 455, 6 P.3d 1150 (2000). A mere possibility that the jury might disbelieve the State's evidence is not justification for a lesser included offense instruction. *State v. Pettus*, 89 Wn. App 688, 700, 951 P.2d 284, *review denied*, 136 Wn.2d 1010, 966 P.2d 904 (1998).

We view the evidence in support of a requested instruction in the light most favorable to the requesting party. *Fernandez-Medina*, 141 Wn.2d at 455-56. It is error to give an instruction the evidence does not support. *State v. Benn*, 120 Wn.2d 631, 654, 845 P.2d 289 (1993).

B. Manslaughter

HN23 Manslaughter is not a lesser included offense of first degree felony murder. *State v. Dennison*, 115 Wn.2d 609, 627, 801 P.2d 193 (1990). [*45] Nonetheless, "first and second degree manslaughter may be lesser included offenses of premeditated murder and instructions

should be given to a jury when the facts support such an instruction." *State v. Warden*, 133 Wn.2d 559, 563, 947 P.2d 708 (1997). Thus, we turn to whether the testimonies of Celebisoy and D'Allesandro supported a manslaughter instruction.

We agree with the trial court that neither testimony, even if taken as true, warranted a manslaughter instruction: The asserted negligence or recklessness of driving with a mortally wounded man in the trunk neither bore on the charged offense of premeditated first degree murder nor described a lesser negligent or reckless manslaughter offense. All the evidence and reasonable inferences about George's killing led only to the conclusion that the killer acted intentionally; there was no evidence that the killing was only reckless or negligent. ¹⁵

FOOTNOTES

¹⁵ Even if the stabbing was not premeditated, letting George bleed to death was evidence of premeditation of his death.

[*46] Both defendants testified that his codefendant in the back seat became angry with George during an argument about drugs and reached over the back seat to stab George multiple times in the back. This intentional stabbing was the act that caused George's death, even if he did not die immediately. Moreover, both defendants' failure to obtain medical treatment for George after the stabbing and, instead, letting him bleed to death was neither negligent nor reckless; rather, it showed their intention that George die. Thus, neither defendant's testimony supported instructions on the lesser manslaughter offenses, and the trial court did not abuse its discretion. ¹⁶

FOOTNOTES

¹⁶ We note that the trial court thought there might be a genuine issue as to premeditation and, thus, allowed an instruction on the lesser included offense of second degree murder.

X. CUMULATIVE ERROR

Defendants argue that cumulative error denied them a fair trial.

HN24 Under the cumulative error doctrine, a defendant may be entitled to a new trial when [*47] errors cumulatively produced a trial that was fundamentally unfair. *In re Personal Restraint of Lord*, 123 Wn.2d 296, 332, 868 P.2d 835, *clarified*, 123 Wn.2d 737, 870 P.2d 964, *cert. denied*, 513 U.S. 849, 115 S. Ct. 146, 130 L. Ed. 2d 86 (1994). The defendant bears the burden of proving an accumulation of error of sufficient magnitude that retrial is necessary. *Lord*, 123 Wn.2d at 332.

Having found no single error, we do not address the cumulative error issue. *State v. Stevens*, 58 Wn. App. 478, 498, 794 P.2d 38, *review denied*, 115 Wn.2d 1025, 802 P.2d 128 (1990).

XI. EXCEPTIONAL SENTENCE

Finally, D'Allesandro argues that his exceptional sentence violated his Sixth Amendment ¹⁷ right to a jury trial, contrary to the Supreme Court's recent decision in *Blakely v. Washington*, 542 U.S. 296, 124 S. Ct. 2531, 159 L. Ed. 2d 403 (2004). We accept the State's concession that *Blakely* mandates re-sentencing of D'Allesandro.

FOOTNOTES

17 U.S. Const. amend. VI.

Accordingly, [*48] we affirm both defendants' convictions, vacate D'Allesandro's exceptional sentence, and remand D'Allesandro's case for resentencing.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record pursuant to RCW 2.06.040, it is so ordered.

Hunt, J.

We concur:

Bridgewater, J.

Quinn-Brintnall, C.J.

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APPENDIX B

Signed this 4th day of January, 2013, in Olympia, Washington.



CAROL LA VERNE, WSBA #19229
Deputy Prosecuting Attorney

COURT'S INSTRUCTION TO PROSPECTIVE JURORS

Juror Number: 2

Seating Number: 2

Do not discuss these questions, your answers, or issues raised by these questions with anyone until you are excused from further jury service. Please consider yourself under oath when answering these questions.

You are being presented with a questionnaire regarding sensitive matters. It is important that you answer the questions completely and truthfully so that the Court and the parties to this action can determine if any one or more of you may be biased or prejudiced in favor of or against a party. We are using a questionnaire because we want to minimize any embarrassment anyone might feel. Further questioning, if any, will be conducted privately if you request it. That is, the public and other potential jurors will not be present. We are protecting your right to privacy, and we appreciate your cooperation. We will destroy these questionnaires following jury selection.

Fill out the questionnaire and hand it to the bailiff when you are finished.

CERTIFICATE OF SERVICE

I certify that I served a copy of State's Third Supplemental Response to PRP, on the date below as follows:

Electronically filed at Division II

TO: DAVID C. PONZOHA, CLERK
COURTS OF APPEALS DIVISION II
950 BROADWAY, SUITE 300
TACOMA, WA 98402-4454

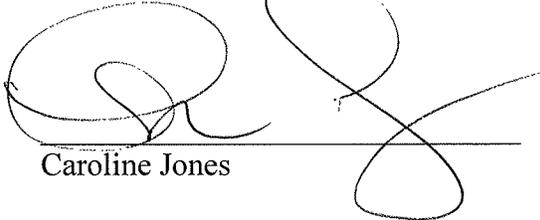
JEFFREY E. ELLIS
ATTORNEY AT LAW
JEFFREYERWINELLIS@GMAIL.COM

--AND VIA US MAIL TO--

RITA J. GRIFFITH
ATTORNEY AT LAW
4616 25TH AVE NE, PMB 453
SEATTLE, WA 98105

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

Dated this 7 day of January, 2013, at Olympia, Washington.



Caroline Jones

THURSTON COUNTY PROSECUTOR

January 07, 2013 - 8:14 AM

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