

2767-5

RECEIVED  
JAN 08 2004  
KITSAP COUNTY  
PROSECUTOR  
NO. 299059-11

**COURT OF APPEALS  
DIVISION TWO  
OF THE STATE OF WASHINGTON**

---

**STATE OF WASHINGTON,**

**Respondent,**

**v.**

**NICHOLAS D. HACHENEY,**

**Appellant.**

BY \_\_\_\_\_  
DEPUTY  
*[Signature]*  
STATE OF WASHINGTON

04 JAN - 9 PM 12: 08

FILED  
COURT OF APPEALS  
DIVISION TWO

---

**APPEAL FROM THE SUPERIOR  
COURT FOR KITSAP COUNTY**

---

**BRIEF OF APPELLANT**

---

**JOHN L. CROSS  
WSBA No. 20142  
Attorney for Appellant  
RONALD D. NESS & ASSOC.**

**420 Cline Avenue  
Port Orchard, WA 98366  
(360) 895-2042**

pm 1-8-04

**TABLE OF CONTENTS**

	<u>Page</u>
<b>TABLE OF AUTHORITIES.....</b>	<b>i</b>
<b>ASSIGNMENTS OF ERROR.....</b>	<b>1</b>
<b>ISSUES PERTAINING TO ASSIGNMENTS OF ERROR....</b>	<b>3</b>
<b>STATEMENT OF THE CASE.....</b>	<b>5</b>
<b>ARGUMENT.....</b>	<b>26</b>
<b>CONCLUSION.....</b>	<b>98</b>

INDEX

TABLE OF AUTHORITIES

TABLE OF CASES

	<u>Page</u>
<u>State v. Aaron</u> , 49 Wn.App. 735, 745 P.2d 1316 (1987).....	42, 43
<u>State v. Allen</u> , 57 Wn.App. 134, 787 P.2d 566 (1990).....	33
<u>State v. Badda</u> , 63 Wn.2d 176, 183, 385 P.2d 859 (1963).....	67
<u>State v. Becker</u> , 132 Wn.2d 54, 935 P.2d 1321 (1997).....	29, 30
<u>State v. Blanchey</u> , 75 Wn.2d 926, 454 P.2d 841 (1969).....	33
<u>State v. Bogner</u> , 62 Wn.2d 247, 382 P.2d 254 (1963).....	29
<u>State v. Bokien</u> , 14 Wash. 403, 44 P. 889 (1896).....	62, 63
<u>State v. Bone-Club</u> , 128 Wn.2d 254, 906 P.2d 325 (1995).....	44, 45, 47
<u>State v. Brown</u> , 132 Wn.2d 529, 940 P.2d 546 (1997).....	24, 25, 26, 27, 28, 52
<u>State v. Byrd</u> , 72 Wn.app. 774, 868 P.2d 158 (1994).....	27

<u>State v. Chase</u> , 59 Wn.App. 501, 799 P.2d 272 (1990).....	33
<u>State v. Clark</u> , 96 Wn.2d 686, 638 P.2d 572 (1982).....	32
<u>State v. Crawford</u> , 147 Wn.2d 424, 54 P.3d 656 (2002) <u>cert. granted sub. nom.</u> <u>Crawford v. Washington</u> , ___ U.S. ___ (2003).....	41, 54
<u>State v. Dailey</u> , 93 Wn.2d 454, 610 P.2d 357 (1980).....	61
<u>State v. Darden</u> , 145 Wn.2d 612, 620, 41 P.3d 1189 (2002).....	66
<u>State v. Diebold</u> , 152 Wn. 68, 277 P.394 (1929).....	19, 20, 25
<u>State v. Dudley</u> , 30 Wn.App. 447, 635 P. 2d 750 (1981).....	21, 22, 24, 25
<u>State v. Fredrickson</u> , 40 Wn.App. 749, 752, 700 P.2d 369, <u>rev. denied</u> 104 Wn.2d 1013 (1985).....	62
<u>State v. Freeburg</u> , 105 Wn.App. 492, 497 P.2d 157 (1974).....	33
<u>State v. Gellein</u> , 112 Wn.2d 58, 768 P.2d 470 (1989).....	36
<u>State v. Golladay</u> , 78 Wn.2d 121, 470 P.2d 191 (1970).....	19, 20, 21, 24

<u>State v. Heffernan</u> , 59 Wn.2d 413, 367 P.2d 848 (1962).....	59
<u>State v. Hernandez</u> , 99 Wn.App. 312, 997 P.2d 923 (1999), <u>review denied</u> , 140 Wn.2d 1015 (2000).....	49
<u>State v. Jury</u> , 19 Wn.App. 256, 576 P.2d 1302 (1978).....	28
<u>State v. Lampshire</u> , 74 Wn.2d 888, 447 P.2d 727 (1968).....	29
<u>State v. Lane</u> , 125 Wn.2d 825, 889 P.2d 929 (1995).....	29
<u>State v. Leech</u> , 114 Wn.2d 700, 790 P.2d 160 (1990).....	22, 23, 24, 25
<u>State v. Michelli</u> , 132 Wn.2d 229, 937 P.2d 587 (1996).....	61
<u>State v. Nation</u> , 110 Wn.App. 651, 41 P.2d 1204 (2002).....	57, 58
<u>State v. Neal</u> , 144 Wn.App. 600, 30 P.3d 1255 (2001).....	58
<u>State v. Neslund</u> , 50 Wn.App. 531, 749 P.2d 725 (1988).....	42
<u>State v. Olmedo</u> , 112 Wn.App. 525, 49 P.2d 960 (2002).....	27
<u>State v. Olson</u> , 47 Wn.App. 514,	

735 P.2d 1362 (1987).....	32
<u>State v. Ortiz</u> , 981 P.2d 1127 (Haw. 1999).....	46
<u>State v. Painter</u> , 27 Wn.App. 708, 620 P.2d 1001 (1980).....	30
<u>State v. Purdom</u> , 106 Wn.2d 745, 750, 725 P.2d 622 (1986).....	66
<u>State v. Roberts</u> , 142 Wn.2d 471, 14 P.3d 713 (2000).....	51
<u>State v. Roche</u> , 114 Wn.App. 424, 59 P.3d 682 (2002).....	58
<u>State v. Sanders</u> , 66 Wn.App. 878, 833 P.2d 452 (1992).....	33
<u>State v. Tharp</u> , 42 Wn.2d 494, 499-500, 256 P.2d 482 (1953).....	63
<u>City of Seattle v. Boulanger</u> , 37 Wn.App. 357, 680 P.2d 67 (1984).....	34
<u>Gray v. Netherland</u> , 518 U.S. 152, 116 S.Ct. 2074, 135 L.Ed.2d 457 (1996).....	60
<u>Handshy v. Nolte Petroleum</u> , 421 S.W. 198 (Mo. Sup. Ct.) (1967).....	64
<u>Lilly v. Virginia</u> , 527 U.S. 116, 119 S.Ct. 1887, 144 L.Ed.2d 117 (1999).....	40, 58
<u>In re Oliver</u> , 333U.S. 257, 68 S.Ct. 499, 92 L.Ed. 682 (1948).....	44, 46

<u>In re the Personal Restraint of Andress</u> , 147 Wn.2d 602, 56 P.3d 981 (2002).....	19, 23, 32
<u>In re Winship</u> , 397 U.S. 358, 90 S.Ct. 1068, 25 L.Ed2d 368 (1970).....	17
<u>Lewis v. Peyton</u> , 352 F.2d 791 (4 <sup>th</sup> Cir. 1965).....	48
<u>Madhouse v. United States</u> , 156 U.S. 237 (1895).....	44
<u>Maryland v. Craig</u> , 497 U.S. 836, 110 S.Ct. 3157, 111 L.Ed.2d 666 (1990).....	45
<u>Neder v. United States</u> , 527 U.S. 1, 8, 119 S.Ct. 1827, 144 L.Ed.2d 35 (1999).....	48
<u>Ohio v. Roberts</u> , 448 U.S. 56, 100S.Ct. 2531, 65 L.ED.2d 597 (1980).....	40, 41, 54
<u>Thomas v. Maryland</u> , 372 Md. 392, 812 A.2d 1050 (2002).....	34, 35
<u>Tome v. U.S.</u> , 513 U.S. 150, 157, 115 S.Ct. 696, 130 L.Ed.2d 574 (1995).....	66
<u>Vidal v. Williams</u> , 31 F.3d 67, 69 (2d Cir. 1993).....	46
<u>Ulster County Court v. Allen</u> , 442 U.S. 140, 99S.Ct. 2213, 60 L.Ed.2d 777 (1979).....	34
<u>Walker v. Georgia</u> , 467 U.S. 39, 104 S.Ct. 2210, 81 L.Ed.2d 31 (1984).....	44, 47, 48

<u>White v. Illinois</u> , 502 U.S. 346, 112 S.Ct. 736, 144 L.Ed.2d 117 (1992).....	40, 43
--	--------

**TREATISES**

Joshua C. Dickson, "The Confrontation Clause and the Hearsay Rule: The Current State of a Failed Marriage in Need of a Quick Divorce," 33 Creighton L.Rev. 763 (2000).....	40
Margaret A. Berger, "The Deconstitutionalization of the Confrontation Clause: A Proposal for a Prosecutorial Restraint Model," 76 Minn. L.Rev. 559 (1992).....	40

**STATUTES & RULES**

ER 403.....	61
ER 404 (b).....	50
ER 801 (d) (1).....	65
Criminal Rule 4.7(g).....	61

**CONSTITUTIONAL PROVISIONS**

United States Constitution, Sixth Amendment.....	40, 44, 54
United States Constitution, Fourteenth Amendment.....	60
Washington Constitution Article 1, section 22.....	40, 44

## I. ASSIGNMENTS OF ERROR

1. The trial court erred by entering Judgment when the facts are insufficient to sustain a conviction for the aggravating factor that the murder was committed "in the course of" first degree arson.
2. The trial court erred by instructing the jury in instruction 12 on the definition of "in the course of."
3. The trial court erred by improperly commenting on the evidence by referring to the death of Ms. Hacheny as "the killing" in instruction 12.
4. The trial court erred by instructing the jury in instructions 7 that the actus reus of premeditated murder is assault and in instruction 8 defining the word "assault" as a crime.
5. The trial court erred by instructing the jury in instruction 14 on "consciousness of guilt."
6. The trial court erred in declining to answer three questions from the jury.
7. The trial court erred by declaring three witnesses unavailable and allowing them to testify in absentia via deposition.
8. The trial court erred in denying Mr. Hacheny the right to a public trial by ordering that the videotaped depositions be in a "nonpublic forum."
9. The trial court erred by admitting Mr. Hacheny's sexual relationship with Lindsay Latsbaugh, Annette Anderson, and Nichole Matheson.
10. The trial court erred by admitting statements allegedly made by Mr. Hacheny to Michael DeLashmutt about sex in heaven.
11. The trial court erred by admitting the e-mails sent by Mr. Hacheny.

12. The trial court erred by admitting statements allegedly made by Mr. Hacheny to Ms. Latsbaugh that he wished he could take her as a wife.
13. The trial court erred by admitting Mr. Hacheny's hug of Ms. Latsbaugh at Ms. Hacheny's memorial service.
14. The trial court erred by admitting the expert opinions of Dr. Logan.
15. The trial court erred by admitting the expert opinions of forensic pathologist Emmanuel Lacsina.
16. The trial court erred by admitting the expert opinions of forensic pathologist Robert Sealove.
17. The trial court erred in admitting the expert testimony of Mr. Krueger.
18. The trial court erred in allowing the prosecution to ask voir dire questions seeking a commitment to a guilty verdict.
19. The trial court erred in admitting the prior consistent statements of prosecution witness Sandra Glass.
20. The trial court erred in restricting Mr. Hacheny's right to cross-examine prosecution witness Sandra Glass.
21. The cumulative error of this trial requires reversal.

## **II. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR**

1. Whether evidence was sufficient to support a finding that the premeditated murder alleged was committed in the course of arson (Assignment of Error 1)
2. Whether the jury should be instructed on the definition of "in the course of" when those are words of common understanding and the alleged arson occurred after death. (Assignment of Error 2)

3. Whether the court commented on the evidence when it used the term “the killing” in an instruction intended to define “in the course of.” (Assignment of Error 3)
4. Whether in an elemental instruction for premeditated murder the act done can be defined in terms of the crime of assault. (Assignment of Error 4)
5. Whether an instruction limiting the use of admitted ER 404(b) evidence can include use to establish consciousness of guilt. (Assignment of Error 6)
6. Whether the trial court should have answered questions propounded by the jury during deliberations. (Assignment of Error 7)
7. Whether three witnesses were unavailable at the time of trial so that the depositions of those witnesses could be used instead of live testimony. (Assignment of Error 8)
8. Whether a preservation deposition in a criminal case may be taken in a forum not open to the public. (Assignment of Error 9)
9. Whether evidence of sexual relationships alleged to have occurred after the death of his wife is admissible in a prosecution of the husband for that death. (Assignments of Error 10, 11, 12, 13, & 14)
10. Whether statements about sexual relationships and correspondence between those so engaged are admissible. (Assignment of Error 13)
11. Whether expert witnesses may rely on laboratory reports prepared by others, and testify as to the conclusions, when the reports do not contain sufficient guarantees of trustworthiness with regard to chain of custody and do not qualify for a hearsay exception. (Assignments of Error 15, 16, & 17)

12. Whether the court should allow the last minute addition of an expert witness to the State's witness list. (Assignment of Error 18)
13. Whether during voir dire the prosecution may seek a commitment from jurors as to their votes for a guilty verdict. (Assignment of Error 19)
14. Whether witnesses may testify to the prior consistent statements of a key prosecution witness. (Assignment of Error 20)
15. Whether the trial court may restrict material cross examination of a key state's witness. (Assignment of Error 21)
16. Whether the accumulative effect of trial court errors denied appellate the right to a fair trial. (Assignment of Error 22)

### **III. STATEMENT OF THE CASE**

#### A. Procedural History

On September 17, 2001, Nicholas Hacheney was charged with first degree murder by felony murder with arson as the predicate offense. CP 17-26. That charge was amended on February 4, 2002 by First Amended Information charging first degree murder with aggravating circumstance of arson and first degree murder, felony-murder with arson as the predicate felony. RP 2/4/02 at 37; CP 196.

The defense objected to probable cause for both felony-murder and the aggravating factor. CP 202. After briefing, the trial court found probable cause on the aggravating factor in the course of first degree arson. RP 2/15/02 at 285. The trial court did not find probable cause for felony

murder. id. at 286-87. These findings were memorialized by Findings and Conclusion filed February 27, 2002. CP 348.

On February 19, 2002, Mr. Hacheny was arraigned on the Second Amended Information, which alleged first degree murder with aggravating circumstances of in the course of arson. RP 2/19/02 at 295; CP324. The Second Amended Information alleged "or accomplice" and Mr. Hacheny was arraigned on a Third Amended Information which deleted that allegation on August 23, 2002. RP 8/32/02 at 2-3; CP 919.

On February 4 and March 27 the court held pretrial hearings to determine the admissibility of certain evidence pursuant to ER 404(b). On February 4, 2002 the State proffered twelve items denominated as 404 (b) evidence. RP 2/4/02; CP 123-30. The defense objected to admissibility. RP id. at 223. The trial court ruled on these twelve items by Memorandum Opinion. CP 330 (amended at CP 437). On March 27, 2002 the State proffered of nine additional items of 404 (b) evidence. RP 3/27/02 at 46; CP 376. After defense objections, the court ruled on these nine on March 29, 2002. RP 3/29/02 at 3-8 (Findings and Conclusions at CP 568).

An issue arose as to the availability for trial testimony of three state's witnesses. The defense objected to the taking of preservation depositions of the witnesses. RP 5/23/02 at 434. The trial court ordered the depositions; they were taken in a closed courtroom. RP id. at 435; CP 623, et. seq. During the trial, the defense objected to the admission of the video

depositions. RP 12/10/02 at 3782 3800. The Judge overruled and admitted the depositions. RP id. at 3833.

Pretrial issues also arose, and hearings were had, with regard to the expert testimony of the State Toxicologist and the state's two forensic pathologists. On October 1, 2002, an ER 702 hearing was held regarding the admissibility of toxicology done on the blood and lung tissue of Dawn Hacheny. RP 10/1/02 at 475. The toxicological testing had been done by a now deceased employee of the state toxicology lab, Egle Weiss. The defense objected to admissibility on several grounds. RP id. at 566. The trial court admitted the toxicological evidence and the testimony of Dr. Logan for Dr. Weiss who did the testing. CP 708

Admissibility issues regarding the toxicological evidence were again litigated during trial. The defense objected to the use of the toxicological report in the testimony of Emanuel Lacsina, a forensic pathologist who performed the Dawn Hacheny autopsy. RP 11/12/02 at 891. After the prosecution's offer of proof regarding chain-of-custody, RP id. at 899, the trial court allowed use of the toxicological report. RP id. at 900.

Similar defense objections were made during the trial testimony of Dr. Logan. RP 11/18/03 at 1525, et. seq. The defense argued the reports were hearsay because prepared by another. RP id. at 1531 The court overruled that objection. RP id. The defense objected to Dr. Logan's testimony about procedures likely used, but not observed, by Dr. Weiss. RP id. at 1535-36. The trial court overruled the objection with regard to

hearsay and what Dr. Weiss did. RP id. at 1555. Further objections were focused on the results of tests on the lung tissue. The trial court overruled the defense chain-of-custody objection. RP id. at 1583.

Voir Dire commenced on October 16, 2002. During the several days of voir dire, the defense objected to the state's questions. In particular, the defense repeatedly objected to state's question asking jurors if they could convict if a circumstantial case was presented. See e.g. RP 10/22/02 at 610, 630; 10/23/02 at 755, 791; 10/24/02 at 929. The trial court seems to sustain some of the defense's concerns. RP 10/22/02 at 650. But thereafter the same question was asked.

The state endorsed an expert witness, Edward Krueger, on November 18, 2002, over a month into trial. RP 11/18/02 at 1428. A report by Mr. Krueger was provided to the defense later that day. id. at 1519. Krueger is a retired project safety engineer for Garrett Industries, the manufacturer of the propane canisters in issue in the case. RP 12/3/02 at 3308. The defense objected to Krueger's testimony on grounds of late notice and inability to prepare cross examination and rebuttal, citing due process. id. at 3268. The court allowed Krueger's testimony. id. at 3304-05.

On December 26, 2002, the jury returned a verdict of guilty and answered the special verdict regarding aggravating circumstances in the affirmative. RP 12/26/02; CP 1361, verdict; CP 1362, special verdict. Sentencing was done on February 7, 2003. CP 1663. Mr. Hacheny was sentenced to life in prison without possibility of release. id.

B. Factual History

On December 26, 1997, at 7:13 a.m., a 911 operator received a report of a fire on Jensen Street in Bremerton, Washington. RP 11/04/02 at 118. Neighbors had seen the fire, phoned it in, and gone to the scene to check for people inside. RP id. at 130; 11/5/2 at 167. Firefighters arrived around dawn and commenced suppression of the fire. RP 11/13/02 at 984.

Mr. Hacheny had agreed to go on a hunting trip at a Christmas gathering the night before the fire. RP 11/6/02 at 573. The trip was shorter than normal and the hunters went to breakfast. RP id. at 580-88. He arrived home at approximately 10:30 a.m. RP 11/04/02 at 124; 11/13/02 at 1031. As the realization of what had happened sunk in, Mr. Hacheny became increasingly upset. RP 11/13/02 at 1035-36.

The body of Dawn Hacheny was discovered during a search for victims of the fire. RP 11/13/02 at 999. Her body was approximately eighty percent burned. RP 11/12/02 at 861. She had suffered from pulmonary edema. Id. at 869. There was no soot found in here trachea. Id. at 872. Toxicology was asserted alleging that she had no elevated levels of carbon monoxide. RP id. at 875. The same reports alleged an elevated level of Benadryl in her system. RP id. at 901. It was also alleged that she had no propane in some of her lung tissue. RP 12/18/02 at 1584.

At the scene, a fire investigator had found a new case of propane canisters near Ms. Hacheny's bed. RP 11/14/02 at 1255. He lifted the canisters and noted that some were lighter than others, concluding therefrom

that propane had vented during the fire. Id. at 57-60. It was supposed that the canisters were discarded in the clean-up of the scene. RP id. at 1332.

From available information, the medical examiner's initial findings were that death could have been caused by asphyxia from a flash fire. RP 11/12/02 at 933. A reaction to heat called larangospasm could have led to closing of the trachea and asphyxia. RP 11/12/02. The medical examiner's opinion changed when he reviewed a toxicological report and police reports regarding Mr. Hachenev's alleged confession. Id. at 942. Although the opinion changed regarding the manner of asphyxia, the medical examiner conceded that the lack of carbon monoxide is consistent with flash fire. Id. at 959. A second medical examiner opined that suffocation by plastic bag was consistent with the findings of the autopsy. RP 11/18/03 at 1416. This examiner also admitted that his opinion would change to undetermined cause of death if there was in fact a flash fire. Id. at 1453. Purely on the scientific evaluation, the cause would be undetermined; with the police investigation, suffocation by plastic bag could be the cause. RP id. at 1493.

Fire investigation was of obvious importance to cause of death opinions. Six witnesses testified regarding various aspects of the cause and origin of the fire. An insurance company investigator opined that the fire started in the bedroom in which Dawn Hachenev's body was found. RP 12/5/02 at 3450. This investigator could not determine the exact point of origin. Id. at 3568. He was initially inclined to find the fire was accidental, possibly caused by arcing of an electrical cord under a carpet. Id. at 3551-

52. His opinion changed to a possible intentional fire after viewing photos showing paper around dawn Hachenev's body. Id. at 3558-59. He opined that the fire could have burned for one hour or less. Id. at 3573.

An agent from the Alcohol, Tobacco and Firearms (ATF) opined that the fire resulted from paper ignited by a hand-held flame. RP 12/16/02 at 4281-82. He concluded that a propane flash-over may have occurred late in an otherwise slow smoldering fire. Id. at 4217. He believed the fire lasted one or two hours. Id. at 4306.

A fire scientist did experiments on the possibility that a propane fueled flash fire had occurred. RP 12/1702 at 4477. A mock-up of the Hachenev bedroom was built. Id. at 4518. The conclusion reached after igniting propane in the mock-up was that propane release in the bedroom could have burst into a flash fire. Id. at 4542. The scientist disagreed with the ATF agent's assertion that lit paper had been the starting place of the fire because such a finding is inconsistent with the amount of heat necessary to breach the gypsum ceiling in the bedroom. Id. at 4572.

Another fire scientist testified regarding a computer fire modeling program that yielded results consistent with the opinions of the first fire scientist. RP 12/18/02 at 4701, et.seq. A second ATF agent then testified in rebuttal as to the limitations of the fire modeling program. RP 12/19/02.

Much of the trial revolved around the membership of Mr. Hachenev in a fundamentalist church called Christ Community Church. RP 11/17/02 at 1792. As a member of the church, Mr. Hachenev had relationships with

one parish women—one before the fire, Sandra Glass, and three after, Lindsey Smith (now Latsbaugh), Annette Anderson and Nicole Matheson.

Sandra Glass testified to a romantic relationship with Mr. Hachenev that became sexual in the late summer or fall of 1997. RP 11/21/02 at 2192-96. In that time frame, she received a prophesy that Mrs. Hachenev would die and that she and Mr. Hachenev would then be together. Id. at 2207. When advised of this, Mr. Hachenev allegedly said “I knew it.” Id. The two discussed marriage in the fall of 1997. Id. at 2209. They had purchased each other rings and had hoped to wed in December of 1997. RP 11/25/02 at 2300-03. She testified that on the morning of December 26, 1997, Mr. Hachenev had called her and said “it’s done.” Id. at 2316. Glass alleged that at some point, Mr. Hachenev confessed to her that he had suffocated his wife, lit the fire, and gone hunting. Id. at 2333-34. She testified that she told a friend (id. at 2347) and a boyfriend sometime later because she did not want to lie any more. Id. at 2338. The boyfriend later testified that she did in fact tell him of the confession. RP 11/26/02 at 2529-30. After the fire, her relationship with Mr. Hachenev continued but she became aware of the other three women. RP 11/25/02 at 2324, 2326, 2329.

Lindsay Latsbaugh was in the church youth group when Mr. Hachenev was first hired by the church in 1994. RP 11/6/02 at 548-49. Later she became an intern working under him. RP 11/06/02 at 549. By 1997, she and Mr. Hachenev had become very close friends as well as working together on church activities. RP at 11/06/02 at 551-52. He would

sometimes make jokes about how he wished he could take a second wife and marry her. RP 11/6/02 at 553. This occurred in the summer or fall of 1997. RP 11/6/02 at 553.

In the fall of 1997, Ms. Latsbaugh had a vision from God. RP 11/7/02 at 637. In her vision, she was thinking that the "something drastic" Mr. Hacheny was talking about could be the death of Ms. Hacheny and she would be free to marry Mr. Hacheny. RP 11/7/02 at 637. She believed this vision was consistent with Mr. Hacheny's vision. RP 11/7/02 at 638. On December 29, a memorial service was held for Ms. Hacheny. RP 11/6/02 at 598. Mr. Hacheny did the majority of the service himself. RP 11/6/02 at 598. Ms. Latsbaugh was permitted to testify over objection that she was surprised he was able to keep his composure given that he was presiding over his wife's memorial service. RP 11/6/02 at 589.

In the week following Ms. Hacheny's death, Mr. Hacheny and Ms. Latsbaugh became closer physically. RP 11/6/02 at 603. For instance, Mr. Hacheny would ask her to sit close to him in the car or he would hold her hand or he would ask her to lie next to him on the couch or bed so he could hold her. RP 11/6/02 at 603-04. This type of physical affection had never happened between them before Ms. Hacheny's death. RP 11/6/02 at 604.

Ms. Latsbaugh moved to Capetown, South Africa on December 31, 1997 for two years. RP 11/6/02 at 604. Mr. Hacheny went to the airport to see her off, along with many other people. RP 11/6/02 at 604-05. At one point, when they were alone, Mr. Hacheny gave her card and heart-shaped

earrings. RP 11/6/02 at 605. The card said that he loved and depended on her and that everything had changed between them. RP 11/6/02 at 605.

While Ms. Latsbaugh was at South Africa, she and Mr. Hacheny communicated by e-mail. RP 11/6/02 at 606. They sent between one and two e-mails per day. RP 11/6/02 at 607. Mr. Hacheny declared his love for her within the first few weeks. RP 11/6/02 at 606. Mr. Hacheny expressed that he was God's gift to her and that their love had a divine purpose. RP 11/7/02 at 631. Over time, the e-mails became sexually explicit. RP 11/7/02 at 629. The e-mails, which were admitted as exhibits for the jury, are contained in the record at CP, 272-93.

In late-November 1998, Mr. Hacheny went to Tanzania to meet with Ms. Latsbaugh. RP 11/7/02 at 641. Ms. Latsbaugh arrived in early-December of 1998. RP 11/7/03 at 651. They engaged in sexual activities with each other, though they never engaged in sexual intercourse. RP 11/7/02 at 642. During the trip, Mr. Hacheny told Ms. Latsbaugh that he had decided to pursue a relationship with Nichole Matheson and marry her. RP 11/7/02 at 643. This news was painful for Ms. Latsbaugh but she accepted the decision. RP 11/7/02 at 644. After that, they continued to e-mail, but the romantic nature of the e-mails ceased. RP 11/7/02 at 646.

Annette Anderson met Mr. Hacheny when he came to the church in 1993. RP 12/2/02 at 2883. Ms. Anderson is married. RP 12/2/02 at 2880. In the fall of 1997, she and Mr. Hacheny's relationship changed from a casual one to a friendship where Mr. Hacheny would confide things to her.

RP 12/2/02 at 2884. Among the things he confided was that he was being accused of inappropriate behavior with Sandra Glass. RP 12/2/02 at 2885. During this period, Ms. Anderson indicated they had a "special relationship" that was not physical beyond an occasional hug. RP 12/2/02 at 2887.

On December 26, the day of Ms. Hachenev's death, Ms. Anderson went to Pastor Bob Smith's house to see Mr. Hachenev. RP 12/2/02 at 2888. Mr. Hachenev gave her a hug. Ms. Anderson described the hug as a "different type of hug," a "no-hold barred, 'I'm giving you a full body hug thing.'" RP 12/2/02 at 2888.

At the Sunday service and also at the memorial service, Mr. Hachenev spoke. RP 12/2/02 at 2889-90. Ms. Anderson described his demeanor on each occasion as "heroic, continuing in his charismatic fashion" and "amazing." RP 12/2/02 at 2889-90. He said at the Sunday service, "I will not ask God, I will not question my God why he did this." RP 12/2/02 at 2890.

At some point in January, Ms. Anderson assisted Mr. Hachenev with an inventory list of items that were lost in the fire. RP 12/2/02 at 2893. Ms. Anderson believed this happened on January 24, 1998. RP 12/2/02 at 2910. While working, Mr. Hachenev kissed Ms. Anderson. RP 12/2/02 at 2893-94. He told Ms. Anderson he wished to "make mad passionate love" to her. RP 12/2/02 at 2894. Ms. Anderson rebuffed his statements saying it was a sin to think and talk that way. RP 12/2/02 at 2894.

Later in January, 1998, Ms. Anderson and Mr. Hacheny's relationship became physical. RP 12/2/02 at 2895. Mr. Hacheny asked her "how [she] would like God to bless [her] with him physically." RP 12/2/02 at 2896. They then engaged in oral sex. RP 12/2/02 at 2897. A couple of weeks later, on February 15, they engaged in sexual intercourse for the first time. RP 12/2/02 at 2897-98. In March of 1998, Mr. Hacheny had a conversation with Ms. Anderson about Benadryl. RP 12/2/02 at 2924. Mr. Hacheny instructed her to give Benadryl to her two-year-old daughter so she could do other things. RP 12/2/02 at 2924.

From that point, Mr. Hacheny and Ms. Anderson would meet for sexual relations fairly frequently, sometimes meeting a couple times a week and sometimes going a couple weeks without seeing each other. RP 12/2/02 at 2899. Mr. Hacheny expressed the opinion that "God had given him prophesies and told him that, basically, he had special privileges, that God was doing things that were completely different from any other time, that he had heard from God, God gave him a green light to do this." RP 12/2/02 at 2901. The last time they had sexual relations was in the fall of 1998. RP id at 2902. They ended their sexual relationship as "friends." RP id at 2904.

During this relationship, Ms. Anderson knew that Mr. Hacheny had been with Ms. Glass and Ms. Matheson sexually. RP12/2/02 at 2900. Ms. Anderson knew as early as January of 1998 that Mr. Hacheny and Ms. Matheson had a romantic relationship because he told her. RP 12/2/02 at 2922. In the spring of 1998, Mr. Hacheny, Ms. Anderson, and Ms.

Matheson all went on a shopping trip together. RP 12/2/02 at 2927. He bought gifts for both women. RP 12/2/02 at 2927. Ms. Anderson also knew that he gave Ms. Glass one thousand dollars in 1998. RP 12/2/02 at 2929.

Ms. Anderson moved in July of 2000. RP 12/2/02 at 2911. Just prior to moving, Ms. Anderson indicated she no longer wished even to be friends because of all that had happened between Mr. Hacheny, her, and the other women. RP 12/2/02 at 2911. Mr. Hacheny responded that the problem was that he could be friends. RP 12/2/02 at 2911. But he respected her choice. RP 12/2/02 at 2912. Mr. Hacheny objected to this line of questioning but the court found that it had "marginal relevance" and was admissible. RP 12/2/02 at 2909.

Nichole Matheson met Mr. Hacheny in 1995 or 1996. RP 12/9/02 at 3730. At that time, she was married to Ed Matheson. RP 12/9/02 at 3730. Mr. and Ms. Matheson separated in July of 1996 and divorced in January of 1998. RP 12/9/02 at 3731. Mr. and Ms. Matheson each developed a friendship with Mr. Hacheny. RP 12/9/02 at 3730-31. Prior to Ms. Hacheny's death, Mr. Hacheny and Ms. Matheson's relationship was just a friendship. RP 12/9/02 at 3733. In January of 1998, their relationship began to be romantic. RP 12/9/02 at 3734. Although their relationship also started getting physical, they did not engage in sexual intercourse until April of 1998. RP 12/9/02 at 3735. In January of 2001, Mr. Hacheny and Ms. Matheson became engaged to get married. RP 12/9/02 at 3735. They were still engaged at the time of the trial. RP 12/9/02 at 3730.

Michael DeLashmutt testified he had a conversation with Mr. Hachenev in the summer of 1997. CP, 1272. During the conversation, Mr. Hachenev made the statement, "I can't wait to get to heaven so I can have sex with whoever I want." CP, 1274. Mr. Hachenev's objection to this question was overruled. CP, 1011. On cross-examination, the defense tried to establish that the conversation was in fact about the Muslim religion and specifically about the Islamic doctrine that Muslim men would be greeted in heaven by a thousand virgins. CP, 1299. Mr. DeLashmutt did not recall the conversation being about Islam. CP, 1299.

#### **IV. ARGUMENT**

**1. The evidence is insufficient to sustain a conviction for the aggravating factor that the murder was committed "in the course of" first degree arson.**

A recurring issue in this case was whether the State would be permitted to charge Mr. Hachenev with the offense of first degree murder with aggravating circumstances in violation of RCW 10.95.020 (hereinafter "aggravated murder"). The only aggravating factor the court instructed the jury on was that the murder was committed "in the course of" the crime of first-degree arson. Mr. Hachenev has the right under the Sixth and Fourteenth Amendments to have each element of the crime charged proved beyond a reasonable doubt and the evidence presented was insufficient to sustain Mr. Hachenev's conviction for the aggravating factor. In re Winship, 397 U.S. 358, 90 S. Ct. 1068 (1970).

The State filed its First Amended Information on February 4, 2002. CP, 196. The single count charges Mr. Hacheny with aggravated murder. It alleges two aggravating circumstances: that the murder was done (1) to conceal the commission of a crime or to conceal the identify of any person committing a crime under RCW 10.95.020(9), or (2) in the course of, in furtherance of, or immediate flight from the crime of arson in the first degree under RCW 10.95.020(11)(e). CP, 196. The amended information also alleges felony murder in the alternative. CP, 197.

Mr. Hacheny objected in writing to the filing of the Amended Information. CP-202. He argued there was no probable cause for the Amended Information, citing the due process clause of the Fourteenth Amendment and Article 1, sections 3 and 25 of the Washington Constitution. CP-204. The State argued that there was an "intimate connection" between the arson and the murder, citing State v. Brown, 132 Wn.2d 529, 940 P.2d 546 (1997). CP-230, 232.

The trial court found that there was probable cause for aggravated murder. CP-348. In reaching this conclusion, the court entered findings of fact that while Ms. Hacheny was asleep on December 25-26, after taking additional amounts of Benadryl, Mr. Hacheny placed a plastic bag over her head, causing her to stop breathing and her death. CP-349. Specifically, the court found that she was dead before the fire was started. CP-349. Based upon this, the court concluded there was an "intimate connection" between the killing and the arson. The court found probable cause for first degree

murder with the aggravating circumstance that the murder was committed “in the course of” the crime of arson in the first degree. CP-349. The court did not find probable cause for felony murder or for the aggravating circumstances of concealment under RCW 10.95.020(9) or “in furtherance of” or “in immediate flight from” first degree arson under RCW 10.95.020(11)(e). CP-350. A third amended information was filed on October 16, 2002, to reflect the court’s final ruling. CP-919. The defense filed a motion for reconsideration in light of Personal Restraint Petition of Address, 147 Wn.2d 602, 56 P.3d 981 (2002), amended and reconsideration denied, \_\_ Wn.2d. \_\_. CP 934. Reconsideration was denied. CP 961.

State v. Golladay, 78 Wn.2d 121, 470 P.2d 191 (1970) lists State v. Diebold, 152 Wn. 68, 277 P. 394 (1929) as the “leading case” in this area. Both Diebold and Golladay pre-date the current aggravated murder statute but both address the related issue of when a homicide committed in the course of a felony can be charged as murder. The Court in Golladay quoted from Diebold as follows:

It may be stated generally that a homicide is committed in the perpetration of another crime, when the accused, intending to commit some crime other than the homicide, is engaged in the performance of any one of the acts which such intent requires for its full execution, and, while so engaged, and within the res gestae of the intended crime, and in consequence thereof, the killing results. It must appear that there was such actual legal relation between the killing and the crime committed or attempted, that the killing can be said to have occurred as a part of the perpetration of the crime, or in furtherance of an attempt or purpose to commit it. In the usual terse legal phraseology, death must have been the probable consequence of the unlawful act.

State v. Diebold, 152 Wn. at 72. This analysis precludes the result that was reached in Mr. Hachenev's case. The State presented no evidence that Mr. Hachenev was engaged in the performance of an arson and, while so engaged, and within the res gestae of the crime of arson, a killing results. It is impossible to conclude, under the chronology of this case, that the death was the "probable consequence" of the arson because the victim was already dead prior to the arson.

This conclusion is consistent with the case law since the Diebold decision. In Golladay, the State's theory was that the defendant picked up a woman hitchhiker and murdered her. The victim's purse and shoes were left in the vehicle. Driving away from the scene of the murder, he lost control of his vehicle and careened into an embankment. He was observed by passers-by disposing of the purse and shoes while waiting for assistance. The Court addressed the State's theory that the act of throwing the purse and shoes was a larceny sufficient to constitute felony murder. The applicable statute required proof that the death result while the defendant was "engaged in the commission" of a larceny. While agreeing that the acts alleged constituted the crime of larceny, the Court disagreed that the death occurred while the defendant was engaged in the commission of a larceny.

In the present case there is no evidence to show a larceny at the scene of the attack, but only a larceny *after* the defendant's automobile accident when he disposed of the victim's property mistakenly in his possession. The larceny established by the evidence was entirely separate, distinct, and independent from the homicide. The intimate connection between the killing and the crime, . . . is lacking in the instant case.

Golladay at 132 (emphasis added). Again, as in Diebold, the emphasis is on the chronology. Because the larceny occurred after the death, the conviction for felony murder was invalid.

While the Golladay case does not specifically mention the defendant's motive for committing the larceny, implicit in the court's lengthy recitation of the facts is that the defendant was seeking to destroy evidence linking him to the murder "when he disposed of the victim's property mistakenly in his possession." Golladay at 132. Having been in a one car accident, confronted with several passers-by, and discovering the victim's property in his car, he decided to get rid of the evidence.

Under the State's theory of Mr. Hachenev's case, this is exactly what happened on December 26, 1997. Mr. Hachenev suffocates his wife and, in an effort to destroy evidence linking him to the murder, sets fire to the house and leaves. This act was no more committed in the course of an arson than the Golladay murder was done in the commission of a larceny.

The requirement that the felony precede the killing was emphasized in the case of State v. Dudley, 30 Wn. App. 447, 635 P.2d 750 (1981). In Dudley, the defendant testified that he and an accomplice planned a burglary. The defendant threw a rock into a sliding glass door. When he realized the house was not empty, he ran away. A few minutes later, he went back to the house to check on the status of his accomplice. He discovered the accomplice choking and assaulting the victim. The

defendant's theory was that he had extricated himself from the murder when he ran away.

The Court emphasized that, for purposes of felony murder, the felonious intent from the underlying felony is transferred to the homicide. It is therefore irrelevant whether the defendant extricated himself from the burglary. What is relevant is the chronology. As the Court said:

Here, the jury was properly instructed that in order to convict the defendant of the offense charged, the State was required to prove beyond a reasonable doubt that, at the time of the killing, the appellant was committing or attempting to commit the crime of first degree burglary and that death was caused in the course of and furtherance of such a crime."

Dudley at 451-52. Under this analysis, it would be impossible to convict of felony murder if the felony followed the killing.

The two cases relied upon by the State in the trial court are not to the contrary. In State v. Leech, 114 Wn.2d 700, 790 P.2d 160 (1990) the defendant committed an arson. While attempting to extinguish the fire, a firefighter's air bottle ran out of air and the firefighter died of carbon monoxide poisoning. The defendant argued, among other things, that the firefighter had been negligent in his use of the air bottle. The Court found it unnecessary to decide whether the firefighter was or was not negligent, saying, "We find it sufficient to simply note here that the fire fighter's alleged negligence in using his breathing apparatus was not the sole cause of his death. Since his failure to use the apparatus would not have killed him had the defendant not set the arson fire," the defendant's conduct in setting the fire was a proximate cause of Earhart's death." Leech at 705. Once

again, the chronology is significant because Mr. Hachenev's conduct in setting the fire was not the proximate cause of Ms. Hachenev's death.

The Court in Leech also discussed chronology while analyzing the phrases "in the furtherance of" or "in the commission of." The Court quoted approvingly from LaFave and Scott:

Yet for purposes of the time connection implicit in the expression "in the commission of," the crimes of arson, burglary and rape may be considered to continue while the building burns, while the burglars search the building and while the sexual connection is maintained.

Leech at 707, quoting 2 W. LaFave & A. Scott 7.5, at 224-25. Under this analysis, the killing may be considered "in the course of" a felonious arson as long as the building burns, but not before the ignition. Because Ms. Hachenev was dead the entire time the fire burned, Leech does not assist the State's position.

The Washington Supreme Court has recently reaffirmed the res gestae rule of Leech in the context of felony murder where assault is the underlying felony. In Andress, the Court noted the 1976 amendments to the felony murder statute that changed the language from "engaged in the commission of" to "in the course of and in furtherance of such crime or in immediate flight therefrom." The Court began its analysis by reaffirming the rule from Leech that a death can be charged as felony murder when it "was sufficiently close in time and place to the [felony] to be part of the res gestae of [felony]." Andress. But when the felony is assault, it is "nonsensical" to charge felony murder because "the assault is not

independent of the homicide." Mr. Hachenev's arson of his home is independent of the homicide because the homicide preceded the fire and, therefore, the arson could not be in furtherance of or in the course of the killing.

The second case relied upon by the State in the trial court is State v. Brown, 132 Wn.2d 529, 940 P.2d 546 (1997). Defendant Cal Brown argued that there was insufficient evidence of the aggravating factors that the murder was committed in the course of or in furtherance of rape, robbery, and kidnaping. The Court discussed Leech, Dudley, and Golladay before ruling against Mr. Brown's position. Relying upon language from those three decisions, the Court said,

To establish that a killing occurred in the course of, in furtherance of, or in immediate flight from a felony, there must be an intimate connection between the killing and the felony. The killing must be part of the *res gestae* of the felony, that is, in close proximity in terms of time and distance. A causal connection must clearly be established between the two. In other words, more than a mere coincidence of time and place is necessary.

Brown at 607-08 (citations omitted). But the Court noted that the facts of Brown were significantly different than those of Leech, Dudley, and Golladay. Mr. Brown argued that there was not an intimate connection between the aggravating felonies and the killing because the felonies were committed significantly *before* the killing by as much as two days. But the Court disagreed pointing out that although the felonies commenced two days prior with the kidnaping of the victim, the kidnaping was just the first in a series of felonious and torturous acts that culminated with her death.

Therefore, the murder was committed in the course of and in furtherance of a two-day series of felonies.

The analysis found in each of the cases has a common thread (at least *sub rosa*)--that plain logic and the legal notion of causation compel the results reached. In Diebold, the court, as noted, said "death must be the *probable consequence* of the unlawful act." (emphasis added) In Dudley, the court said "that the *death was caused* in the course of and furtherance of such a crime." (emphasis added) In Leech, the court used the term "*proximate cause*." (emphasis added) In Brown, the court looked for a "*causal connection*." (emphasis added) And, finally, the above analysis is consistent with the general notion that in felony-murder situations the intent to commit the felony is essentially transferred into intent to cause death.

WPIC 25.02 defines proximate cause as "a cause which, in a direct sequence, unbroken by any new independent cause, produces the death, and without which the death would not have happened." This definition is consistent with the cases cited. Death must be produced in a direct sequence from the felony. Presumably, that sequence is to be forward in time. The trial court herein has asserted the novel notion that such a direct sequence can in fact be backward in time. Simple logic forecloses that notion: an act, criminal or otherwise, lasting minutes or days, simply cannot *cause* death if the act occurs *after* the death. Leaving the plain chronological logic of causation behind, as the trial court did here, will certainly lead to many a strained and absurd result.

The Court in Brown did not include the LaFave and Scott quotation from Leech in its opinion, but the analysis applies equally well. Once a person chooses to commit a felony, the person is responsible for all of the fatal consequences of that felony. But the condition precedent is that the felony be committed first. In Mr. Hachenev's case, the killing occurred first and the felony later. The evidence is insufficient to sustain a conviction for the aggravating circumstance of killing in the course of first degree arson.

**2. The trial court erred by instructing the jury on the definition of "in the course of."**

The foregoing analysis applies equally to the giving of the aggravating circumstance instruction itself. Moreover, it was error to then define "in the course of" to the jury. Jury instruction number 12 sought to define "in the course of" thus:

To establish that the killing occurred 'in the course of' another crime, there must be an intimate connection between the killing and the other crime. The killing and the other crime must be in close proximity in terms of time and distance. However, more than a mere coincidence of time and place is necessary: A causal connection must clearly be established between the two crimes.

CP 1353. The defense objected to this instruction, RP 12/19/02 at 4940, and took formal exception to it, RP 12/23/02 at 4987.

As argued above, this instruction should not have been given because, on the state's evidence, there is no causal connection between any crime and Dawn Hachenev's death. The difficulty here is that the trial court used the quotation from Brown supra in disregard of the causation analysis in that and the other cases addressed above. At best, this instruction was bound to

confuse the jury. See Assignment of Error 5 infra. But, it is more egregious that the instruction is a misstatement of the law.

It is clear that this instruction is a variation on the quotation from Brown above. And, it is as clear that the Brown court was not there asserting a definition of “in the course of” as such. The quoted language is a gloss on the entire phrase “in the course of, in furtherance of, or in immediate flight from a felony.” The Brown court then goes on to note that this language, taken together, is essentially the res gestae of the underlying felony. As argued above, said felony must commence before and be continuing, including flight therefrom, if the res gestae rule is to make sense. By giving the jury language like “intimate connection” and “close proximity” without clearly defining the legal concept of causation, i.e., that the felony of arson caused the death of Dawn Hacheney, the court allowed the jury to suppose, and find, that the mere close proximity of the alleged acts satisfied the aggravating circumstance alleged.

Jury instructions “are sufficient if, when read as a whole, they are readily understood, not misleading to the ordinary mind, and properly inform the jury of the applicable law.” See State v. Olmedo, 112 Wn.App. 525, 533-34, 49 P.3d 960 (2002). Moreover, “jurors should not have to speculate about [the law], nor should counsel have to engage in legalistic analysis or argument in order to persuade the jury as to what the instructions mean or what the law is.” Id. at 534-35; quoting State v. Byrd, 72 Wn.App. 774, 780, 868 P.2d 158 (1994) affirmed, 125 Wn.2d 707 (1995). As noted,

instruction number 12 did not properly instruct the jury on the applicable law. Further, it is manifest from the jury questions to the court that this instruction misled the jurors and caused them to speculate about the law.

Ultimately, it is ironic that the trial court used a quotation from Brown in its vain attempt to define “in the course of.” Appellant Brown had in fact assigned error to his trial court’s refusal to instruct the jury on that very term (and “in furtherance of” and “in immediate flight”). Brown, supra at 611. The Brown court noted that the terms are not defined by statute, appellate court or pattern jury instruction. The Supreme Court concluded that “the phrases are expressions of common understanding to be given meaning from their common usage.” Id. In the exercise of sound discretion, the trial court need not define such words of common understanding. Id. at 612.

Thus, the trial court’s attempt to define words of common understanding was misplaced. Further still, it is manifest that the attempted definition is inaccurate and misled the jury. “An instruction which misstates the applicable law is presumed to have misled the jury and to result in prejudice.” State v. Jury, 19 Wn.App. 256.

**3. The trial court erred by improperly commenting on the evidence by referring to the death of Ms. Hacheney as “the killing.”**

Jury instruction 12 says, “To establish that *the killing* occurred in the course of another crime, there must be an intimate connection between *the killing* and the other crime.” CP 1353. The use of the word “killing” in this instructions constitutes a comment on the evidence and violates Article 4,

section 16 of the Washington Constitution. The provision reads: "Judges shall not charge juries with respect to matters of fact, nor comment thereon, but shall declare the law." This rule is of constitutional magnitude and may be raised for the first time on appeal. State v. Becker, 132 Wn.2d 54, 935 P.2d 1321(1997); State v. Lampshire, 74 Wn.2d 888, 447 P.2d 727 (1968). "The touchstone of error in a trial court's comment on the evidence is whether the feeling of the trial court as to the truth value of the testimony of a witness has been communicated to the jury." State v. Lane, 125 Wn.2d 825, 889 P.2d 929 (1995). The use of the word "killing" expresses the feeling of the trial court as to the truth value of the State's theory of the case.

"Even if the evidence commented upon is undisputed, or 'overwhelming,' a comment by the trial court, in violation of the constitutional injunction, is reversible error unless it is apparent that the remark could not have influenced the jury." Lane at 839 citing State v. Bogner, 62 Wn.2d 247, 382 P.2d 254 (1963). In Bogner, the Court further explained, "The burden is not upon appellant to prove prejudice in this situation because prejudice is presumed. Reversible error has been committed unless it affirmatively appears from the record that appellant could not have been prejudiced by the trial judge's comments." Bogner.

In State v. Becker, 132 Wn.2d 54, 935 P.2d 1321(1997) the issue was whether the special verdict form impermissibly commented that the Youth Employment Program is a "school" for purposes of the school enhancement on drug offenses. The special verdict referred to it as "Youth Employment

Program School." The Court found that the use of the word "School" improperly conveyed to the jury that the program is a school. Referring to the verdict form as "tantamount to a directed verdict," the Court said, "By effectively removing a disputed issue of fact from the jury's consideration, the special verdict form relieved the State of its burden to prove all elements of the sentence enhancement statute." Becker at 65.

In Becker, as in Painter, no harmless error analysis was employed. In fact, the Supreme Court specifically declined to review whether the error affected the verdict. Rather, the Court said,

Whether the State produced sufficient evidence for a rational juror to find YEP was a school is irrelevant to whether the jury instruction was correctly drafted. Nor did the other instructions cure the defect inherent in the special verdict form. The verdict form explicitly stated that YEP was a school.

Becker at 65 (citations omitted). The concurring opinion of Justice Alexander, joined by Justice Johnson, is even stronger. Justice Alexander wrote, "By informing the jury in the special verdict form that the Youth Education Program is a school, the trial court essentially resolved that factual issue." Becker at 66 (Justice Alexander, concurring). This was error that required reversal without any harmless error analysis. "By telling the jury in the instruction that it was a school the trial court took that issue from the jury. It is hard to view that error as anything other than fundamental and harmful." Becker at 67 (Justice Alexander, concurring). Accord State v. Painter, 27 Wn.App. 708, 713, 620 P.2d 1001 (1980), review denied.

Just as the use of the word "school" in Becker expressed the court's

opinion of the disputed fact, the use of the word "killing" expressed the court's opinion. There was no dispute that Ms. Hacheny had died on December 26, 1997 and the use of the word "death" in instruction 12 would have adequately explained the issue to the jury without expressing an opinion as to how she died. The court erred and prejudice is presumed.

**4. The trial court erred by instructing the jury on "assault" and by defining that term as a crime.**

Similarly, the trial court's use of the word "assault" in its instructions number 7 and 8 was an abuse of discretion. CP 1348 (#7 "to convict" has that the defendant "assaulted" Dawn Hacheny; CP 1349, (#8 defines "assault"). Mr. Hacheny objected to the giving of this instruction. RP 12/19/02 at 4939. The trial court overruled. RP 12/20/02 at 4951-52.

WPIC 26.02 is the pattern "to convict" or elemental instruction. Mr. Hacheny proposed that the blank in this instruction calling for "briefly describe the act charged" should be filled with the actual act alleged, to wit, "drugged and suffocated." CP 970. The state proposed that the word "assaulted" be inserted. CP 898.

Mr. Hacheny has found no Washington case which squarely addresses this issue. Thus a resort to first principles is indicated. It is fundamental that crimes include both mens rea and actus reus. With regard to premeditated first degree murder, the statute "requires a mens rea of premeditated intent to kill and an actus reus that causes the death of the victim." State v. Roberts, 142 Wn.2d 471, 502. It is obvious that under this

charge, no other crime need be committed; an act causing death stands alone as the actus reus of the offense. The term actus reus is defined as “a wrongful deed which renders the actor criminally liable if combined with mens rea.” Blacks Law Dictionary, 5<sup>th</sup> Ed., West Pub., 1979.

Some guidance as to what an actus reus actually is can be found in State v. Olson, 47 Wn.App. 514, 735 P.2d 1362 (1987). There, the Court of Appeals was interpreting the computer trespass statute. Citing the Supreme Court's analysis in State v. Clark, 96 Wn.2d 686, 638 P.2d 572 (1982) the court said “the actus reus of joyriding is the taking or driving away of a vehicle without permission. The actus reus of the computer trespass statute is accessing a computer without authorization.” Significantly, neither actus reus is defined with the term “theft.” But by parity of reasoning, that is precisely what the trial court did in the present case.

The analysis of the Supreme Court in In re PRP of Andress, 147 Wn.2d 602, 56 P.3d 981, provides further guidance. There, the court disallowed the use of assault as a predicate offense for second degree felony-murder. Id. at 616. The same problem with Andress exists in the present case in that merely saying assault does not define the level of assault. Moreover, assault is not an element of aggravated premeditated first degree murder. By inserting that crime into a premeditated murder instruction, the trial court has inserted a rather hopeless morass of legal definitions and contingencies, which are only compounded by then providing a legal definition of assault. This is an abuse of discretion.

**5. The trial court erred by instructing the jury on the definition of "consciousness of guilt."**

Sigmund Freud's remarks in "Fragments of an Analysis of Hysteria"<sup>1</sup> well describe the reason courts accept certain evidence of consciousness of guilt. A person's actions, as well as his words, can betray his or her knowledge of his or her guilt. The actions allow an inference of that knowledge. That knowledge, in turn, allows an inference of guilt. Difficulty, however, arises in defining the term itself. No Washington case has been found which particularly defines the term. Rather, consciousness of guilt is a conclusion. It has no content neutral definition and follows from an appraisal of the quality of the act.

In this vein, the court in State v. Freeburg, 105 Wn. App. 492, 497 P.2d (19), analyzed flight as "an admission by conduct." Moreover, cases discussing consciousness of guilt nearly uniformly deal with conduct like flight, concealment and lying. See e.g. State v. Blanchey, 75 Wn.2d 926, 454 P.2d 841 (1969) (defendant absconded from work release on day of victim's death); State v. Sanders, 66 Wn.App. 878, 833 P.2d 452 (1992) (encouraging witness to hide); State v. Allen, 57 Wn.App. 134, 787 P.2d 566 (1990) (giving false name and false identification to police); State v. Chase, 59 Wn.App 501, 799 P.2d 272 (1990) (giving false name to police);

---

<sup>1</sup> When I set myself the task of bringing to light what human beings keep hidden within them, not by the compelling power of hypnosis, but by observing what they say and what they show, I thought the task was a harder one than it really is. He that has eyes to see and ears to hear may convince himself that no mortal can keep a secret. If his lips are silent, he chatters with his finger tips; betrayal oozes out of him at every pore.

City of Seattle v. Boulanger, 37 Wn.App. 357, 680 P.2d 67 (1984) (refusal to submit to breathalyzer).

The trial court erred by trying to fit the romantic relationships of a widowed man into this list. The error was made prejudicial by instructing the jury in the manner of Instruction # 14. By so doing, the trial court erroneously highlighted the inference that the state wished the jury to make.

The danger of allowing jurors to make unguided inferences is manifest. The jurisprudence of the United States Supreme Court is clear on this point. See e.g. Ulster County Court v. Allen, 442 U.S. 140, 99 S.Ct. 2213, 60 L.Ed.2d 777 (1979) (regarding elements of an offense, inference must be "rationally connected" to fact from which it follows).

The Maryland Court of Appeals thoroughly analyzed consciousness of guilt in Thomas v. Maryland, 372 Md. 392, 812 A. 2d 1050 (2002). In a murder prosecution, the state sought to introduce evidence that the defendant resisted having blood and hair samples taken. Id. at 347-48. The Maryland Court noted that admission of consciousness of guilt evidence is a question of relevance and is subject to a probative value versus prejudicial effect balancing. Id. at 351.

The court said that "as in the nature of circumstantial evidence, the probative value of guilty behavior depends upon the degree of confidence with which certain inferences may be drawn." Id. at 352. The court then went on to describe a complex string of inferences underlying the probative value of such evidence. Id. at 352.

That string of inferences does not apply well to the present case because there the analysis was driven by the notion that Thomas resisted from a desire to conceal evidence. Here, Mr. Hachenev's behavior cannot be fitted into the sort of common behavior, flight, concealment or lying, which drives inferences of this sort. The Thomas court addressed this problem in noting that if there are too many other reasons for the behavior, the evidence is not probative of guilt and "could cause the jury to make other, impermissible inferences about [the defendant]." Id. at 356.

This is precisely the problem with the instruction here. The romantic endeavors of a widowed man do not fit the mold of guilty consciousness. The instruction here allowed the jury to make just that inference without guidance.

Significantly, Maryland has a pattern instruction dealing with consciousness of guilt. Id. at 348, note 2. That instruction recognizes the inherent problem with inferences such as this one. The instruction properly advises the jury that such an inference is permissive only: "This is another one of those inferences that your're permitted but don't have to draw." Id.

The instruction in Mr. Hachenev's case failed to advise the jury of the proper use of permissive inferences. Moreover, the instruction addressed conduct far beyond and different from our common understanding of guilty knowledge. We guess that even Freud would not hold that the seeking of sexual relationships has anything at all to do with

secrets or consciousness of guilt. Here, the trial court essentially instructed the jury that it does. To so instruct was error and warrants reversal.

**6. The trial court erred in declining to answer three questions from the jury during deliberations.**

Mr. Hacheney's assigns error relating to three questions submitted by the jury during its deliberations. The three questions are as follows: "Would arson be an aggravating circumstance if Dawn Hacheney were already dead but other people were injured by the fire? For instance the insurance company, Dawn's parents and Dawn's body." CP 1358. "Does malice have to be specifically with intent to injure another person." CP 1359. "For arson to be an aggravating circumstance did the fire have to result in the injury to a living person or only related to the murder, assuming Dawn Hacheney was already dead." CP 1360. The trial court declined to answer any of the questions. This was error.

It is of course a difficult task to discern from a jury question what the jury was thinking. But jury questions can be helpful in highlighting ambiguous jury instructions. Seattle v. Gellein, 112 Wn. 2d 58, 768 P.2d 470 (1989). As discussed above, Mr. Hacheney objected to jury instruction #12 defining "in the course of." The correct answer to each of the three jury questions is "no." But by refusing to answer the questions, the court added to the confusion of the jury.

The questions highlight the ambiguities of the court's instructions. If the answer to the first question is "yes," it would permit the jury to find

that Ms. Hachenev's death was aggravated by the fact that her family and insurance company experienced emotional and financial harm from the killing. That is not the law.

**7. The trial court erred by declaring three witnesses unavailable and allowing them to testify in abstentia via deposition.**

Prior to trial, the State brought a motion to have three witnesses submit to depositions. CP 617. The witnesses were Michael and Julia DeLashmutt and David Olson. CP 618. The DeLashmutts were scheduled to move to Scotland for about one year beginning September 3, 2002. CP 618. (The State represented that the trip was for three years at the hearing. RP 6/28/02 at 434.) Mr. Olson explained by letter that he was traveling to South America September for the purpose of constructing a radio network. CP 619. He would be gone for six to nine months. CP 619. The State's position was that it would be "very burdensome" to bring the witnesses back to testify. RP 6/28/02 at 434. Mr. Hachenev objected to the depositions. RP 6/28/02 at 434. The court granted the motions to take the depositions but reserved ruling on how the depositions would be used at trial. RP, 435.

On August 2, 2002 the issue of the depositions was again addressed. The defense made a motion to allow Mr. Hachenev's father watch the deposition. RP 8/2/02 at 448. It was explained that Mr. Hachenev's father had been in court for every hearing and wished to be present whenever something occurred in his son's case. RP 8/2/02 at 448. The court inquired where the deposition was scheduled to take place and was advised

courtroom 268, which is described as a small room. RP 8/2/02 at 449. The court denied the request on the grounds that courtroom 268 is a small room and depositions are a "nonpublic forum." RP 8/2/02 at 449.

David Olson testified at a deposition on August 5, 2002. CP 1018. He testified that he was expecting to leave on October 1, 2002 for Bolivia and spend six months to a year in South America. CP 1022.

Julia DeLashmutt testified at a deposition on August 13, 2002. CP 1194. She testified that she was under subpoena to testify at Mr. Hachenev's trial. CP 1198. On September 2, 2002 she and her husband were planning to move to Glasgow, Scotland. CP 1199. She would be there for three years so her husband could work on his Ph.D. CP 1199. It would be a substantial hardship for her to come back to Washington to testify at trial. CP 1199. Mr. DeLashmutt was required to check in with his advisor at the University in the first week of October. CP 1243. While in Scotland, Ms. DeLashmutt had no specific responsibilities such as education, employment, or child rearing to occupy her time. CP 1243.

Michael DeLashmutt testified on August 13, 2002 at a deposition. CP 1261. He was under subpoena to testify at Mr. Hachenev's trial. CP 1266. He planned to leave on September 2, 2002 for Scotland to purpose post-graduate education. CP 1266.

On the eve of trial, the defense filed a brief in opposition to the use of the depositions at trial. CP 998. Mr. Hachenev objected on state grounds as well as a violation of his right to confront witnesses pursuant to Ohio v.

Roberts, infra. CP 1000. The depositions were eventually admitted as exhibits and shown to the jury.

The court entertained argument on this issue on December 10, 2002.

An argument arose about whether the witnesses were refusing to return to Washington to testify. Initially, the State represented that the witnesses "said they would not come [to testify]." RP 12/10/02 at 3817. The defense immediately challenged the State on this point, pointing out that there was no evidence in the record to support that contention. RP 12/10/02 at 3818. Specifically, Mr. Hacheney objected to the lack of any affidavits from anyone, including the prosecutor, stating that they refused to come to court. DPA Neil Wachter carefully evaded the issue of presenting an affidavit setting forth that the witnesses were refusing to come to court, despite being invited to do so by the court. RP 12/10/02 at 3824. Mr. Wachter then admitted that the State never specifically offered to bring the witnesses back to Washington to testify, saying, "As I've previously said, during the pendency of the trial we have not said to these witnesses, "We will pay for your plane tickets back and put you up, come back so you can testify in person." RP 12/10/02 at 3825. Defense counsel responded to this statement as follows, "I believe what [Mr. Wachter] is representing to the court at this time, and -- I believe that the state at no time has offered to return these individuals to the state of Washington for testimony, and I will accept that for the record . . . The state has never offered to return them" RP 12/10/02 at

3825-26. In the face of this direct challenge from defense counsel, Mr. Wachter said, "I have nothing to add to that." RP 12/10/02 at 3826.

Mr. Hachenev assigns error to the trial court's decision to admit videotaped depositions without an adequate showing of unavailability. The right to confrontation is guaranteed by both the Sixth Amendment of the United States Constitution and the Article 1, section 22 of the Washington Constitution. The Confrontation Clause normally guarantees the defendant the right to face-to-face confrontation at trial. As the United States Supreme Court said, "[I]n conformance with the Framers' preference for face-to-face accusation, the Sixth Amendment establishes a rule of necessity. In the usual case (including cases where prior cross-examination has occurred), the prosecution must either produce, or demonstrate the unavailability of, the declarant whose statement it wishes to use against the defendant." Ohio v. Roberts, 448 U.S. 56, 65, 100 S. Ct. 2531, 65 L. Ed. 2d 597 (1980). The holding of Roberts was summarized at page 66 as follows:

[W]hen a hearsay declarant is not present for cross-examination at trial, the Confrontation Clause normally requires a showing that he is unavailable. Even then, his statement is admissible only if it bears adequate "indicia of reliability." Reliability can be inferred without more in a case where the evidence falls within a firmly rooted hearsay exception. In other cases, the evidence must be excluded, at least absent a showing of particularized guarantees of trustworthiness.<sup>2</sup>

---

<sup>2</sup> This holding has not been without its critics, however. See Lilly v. Virginia, 527 U.S. 116, 119 S.Ct. 1887, 144 L.Ed.2d 117 (1999) (Justice Breyer, concurring); White v. Illinois, 502 U. S. 346, 112 S. Ct. 736, 116 L. Ed. 2d 848 (1992) (Justice Thomas, concurring); Joshua C. Dickson, "The Confrontation Clause and the Hearsay Rule: The Current State of a Failed Marriage in Need of a Quick Divorce," 33 Creighton L.Rev. 763 (2000); Margaret A Berger, "The Deconstitutionalization of the Confrontation Clause: A Proposal for a Prosecutorial Restraint Model," 76 Minn. L. Rev. 559 (1992). In response to this criticism, the Supreme Court has recently granted certiorari to the question of whether

In Roberts, the Supreme Court defined unavailability as follows:

A witness is not unavailable for purposes of the exception to the confrontation requirement unless the prosecutorial authorities have made a good-faith effort to obtain his presence at trial. But if there is a possibility, albeit remote, that affirmative measures might produce the declarant, the obligation of good faith may demand their effectuation. The lengths to which the prosecution must go to produce a witness is a question of reasonableness.

Under this definition, the witnesses were not unavailable. The three witnesses in question were very cooperative with the prosecution and were going to satisfy their legal requirements, albeit at great inconvenience to themselves. At the time this issue first arose, all three witnesses were within the jurisdiction of the State of Washington and amenable to process. In fact, they were each served notice of the time and date of the depositions. There is nothing legally significant about a witness, having been duly served with a subpoena, who chooses to leave the jurisdiction of the court. Mr. Olson in particular appeared to be ready to satisfy his legal obligations despite the inconvenience. He sent the prosecutor's office a letter on company letterhead expressing his appreciation for being kept informed and asking if there were any suggestions for alternatives to live testimony. CP 619. This is not the letter of a man fleeing the jurisdiction or the trial.

It appears from this record that the State relied on the fact that a deposition was ordered and that the deposition would be admissible at trial. Mr. Watcher's comments to the court on December 10 provide ample

---

Ohio v. Roberts should be overruled. State v. Crawford, 147 Wn.2d 424, 54 P.3d 656 (2002), cert. granted sub. nom. Crawford v. Washington, \_\_\_ U.S. \_\_\_ (2003).

evidence that no effort was made, once the depositions were completed, to secure the attendance of the witnesses. (Mr. Watcher's refusal to respond when directly confronted by Mr. Yelish to explain what efforts he had made to secure the attendance of the witnesses constitutes an admission by silence. State v. Neslund, 50 Wn.App. 531, 749 P.2d 725 (1988).) The trial court found that the State did not offer to pay travel expenses or obtain material witness warrants. RP 12/10/02 at 3831.

In State v. Aaron, 49 Wn. App. 735, 745 P.2d 1316 (1987) the State sought to introduce the deposition of a witness who was in England teaching at the time of trial. The Court of Appeals reversed the conviction on the grounds that an insufficient showing had been made of unavailability.

The Court said,

We agree, however, with the observation that at the very least, under ER 804, before a witness can be said to be unavailable, a party offering the out-of-court statement should be required to represent to the court that it made an effort to secure the witness' attendance at trial.

Aaron at 740, (citation omitted). The Court expressed that insufficient efforts were made to procure the witness, at page 741.

The record before us does not reveal any effort by the State to obtain Schwedop's presence at the time of trial. In fact, the prosecutor candidly acknowledged just prior to trial that no effort was made because of the cost of flying the witness back to Seattle and the nature of the case, i.e., second degree burglary.

We recognize, of course, the practical and economic considerations involved in obtaining and scheduling the presence of a witness who is no longer in the jurisdiction at the time of trial. Such difficulties may be exacerbated when the witness, as here, is temporarily outside the country. Although courts have

---

considered numerous factors in determining whether the State made a sufficient effort to obtain a witness' presence under such circumstances, we have discovered no authority for the proposition that the requirement is met merely by a recitation that the witness is temporarily out of the country and that obtaining her presence is "just not something we could do" because of the cost and nature of the charge. The State's obligation is not met by obtaining the witness' presence at the deposition.

The trial court ruled that the issue involved balancing the hardship on the witnesses against the relative importance of their testimony. RP 12/10/02 at 3831. Balancing these two factors, the trial court concluded it was not a reasonable requirement for the State to offer plane fare or obtain a material witness warrant. RP 12/10/02 at 3832. The trial court's findings and conclusions fail to even mention State v. Aaron, an omission pointed out by defense counsel. RP 12/10/02 at 3834.

The Sixth Amendment of the Constitution does not recognize such a balancing test. Just as the Confrontation "Clause makes no distinction based on the reliability of the evidence presented," White v. Illinois, supra (Justice Thomas, dissenting), it also makes no distinction between the relative materiality of the evidence. The State made no effort to request that the witnesses appear or to offer to pay for travel expenses. This case is indistinguishable from State v. Aaron and must be reversed.

**8. The trial court erred in denying Mr. Hachenev the right to a public trial by ordering that the videotaped depositions be in a "nonpublic forum."**

The trial court also erred in ruling that the videotaped depositions were "nonpublic forums" and not permitting members of the public, including Mr. Hachenev's father, from attending. The Sixth Amendment of

the United States Constitution and Article 1, section 22 of the Washington Constitution both guarantee the right to a public trial. The purpose of this right is to ensure confidence in the judicial system and is for the benefit of both the accused and the public.

The requirement of a public trial is for the benefit of the accused; that the public may see he is fairly dealt with and not unjustly condemned, and that the presence of interested spectators may keep his tiers keenly alive to a sense of their responsibility and to the importance of their functions.

State v. Bone-Club, 128 Wn.2d 254, 259, 906 P.2d 325 (1995), quoting In re Oliver, 333 U.S. 257, 270 n.25, 68 S. Ct. 499, 92 L. Ed. 682 (1948).

It is no accident that in both the Sixth Amendment and Article I, section 22 of the Washington Constitution the right to a public trial and the right to face-to-face confrontation of one's accuser come side-by-side. By requiring witnesses to testify before both the accused and the public in general, the two clauses work together to help ensure that testimony has an air of reliability. "A public trial encourages witnesses to come forward and discourages perjury." Walker v. Georgia, 467 U.S. 39, 104 S. Ct. 2210, 81 L. Ed. 2d 31 (1984). Similarly,

The central concern of the Confrontation Clause is to ensure the reliability of the evidence against a criminal defendant by subjecting it to rigorous testing in the context of an adversary proceeding before the trier of fact . . . As we noted in our earliest case interpreting the Clause:

The primary object of the constitutional provision in question was to prevent *depositions* or *ex parte* affidavits, such as were sometimes admitted in civil cases, being used against the prisoner in lieu of a personal examination and cross-examination of the witness in which the accused has an opportunity, not only of testing the recollection and sifting the conscience of the witness,

but of compelling him to stand face to face with the jury in order that they may look at him, and judge by his demeanor upon the stand and the manner in which he gives his testimony whether he is worthy of belief.

Maryland v. Craig, 497 U.S. 836, 110 S. Ct. 3157, 111 L. Ed. 2d 666 (1990), (emphasis added)(citation omitted).

In Bone-Club, the trial court held a hearing to determine the admissibility of statements at the defendant's trial. Upon calling one of the State's witnesses, an undercover police officer, the State asked that the courtroom be cleared. The court granted the motion without stating any reasons on the record. The Supreme Court reversed for a new trial.

The Court set out a five-part test that must be satisfied before a criminal hearing is closed. (1) The proponent of closure or sealing must make some showing of a compelling interest, and where that need is based on a right other than an accused's right to a fair trial, the proponent must show a serious and imminent threat to that right. (2) Anyone present when the closure motion is made must be given an opportunity to object to the closure. (3) The proposed method for curtailing open access must be the least restrictive means available for protecting the threatened interests. (4) The court must weigh the competing interests of the proponent of closure and the public. (5) The order must be no broader in its application or duration than necessary to serve its purpose.

In applying these five criteria, the trial court erred in closing the depositions from the public. The depositions were held in Kitsap County Courtroom 268. The record does not say much about Courtroom 268 except

that it is a small room. But it is apparently large enough to accommodate a video camera and camera operator, four attorneys, the defendant, and a witness. Given that, it is unlikely it would be unable to accommodate Mr. Hachenev's father and the few remaining spectators. The size of the courtroom does not constitute a compelling reason for closing the hearings.

Second, the court made no effort to allow spectators other than Mr. Hachenev's father to object. The fact that Mr. Hachenev's father did object to the closure further aggravates the situation. The importance of having the friends and relatives of the accused present was underscored in Oliver when it said, after reviewing the law across the United States, "And without exception all courts have held that an accused is at the very least entitled to have his friends, relatives and counsel present, no matter with what offense he may be charged." Oliver at 271-72; see Vidal v. Williams, 31 F.3d 67, 69 (2d Cir. 1993)(habeas corpus writ granted after court excluded defendant's parents from testimony of police officer); State v. Ortiz, 981 P.2d 1127 (Haw. 1999)(new trial necessary when trial was closed family members).

Third, the court did not use the least restrictive means available for closing the hearing. The only concern cited is the size of Courtroom 268. Assuming *arguendo* that Courtroom 268 is too small to accommodate one additional spectator, there is nothing in the record that the trial court considered transferring the case to a larger room or what the availability of other rooms might be.

Fourth, because the trial court cited no compelling interests for closing the depositions, it also did not weigh those interests against the right to a public trial. Fifth, because the only benefit cited for closing the depositions was the need to accommodate a small room, the order was much broader than needed to accommodate the cited reason. Mr. Hacheney's father and the other potential spectators were advised prior to the depositions that they would not be permitted to watch. The public was given no opportunity to observe the depositions on a space available basis.

Having shown that the trial court clearly failed to conduct the proper analysis before closing the depositions from the public, the question remains whether a criminal deposition falls within the parameters of a public forum such that the Sixth Amendment and Article I, section 22 require it be public. As noted above in the Madhouse case, depositions held outside the presence of the accused violate the Confrontation Clause. Because the public trial right and right of confrontation are designed to ameliorate overlapping concerns, the analysis for closing depositions should be the same as for other pre-trial hearings. The goal of discouraging perjury in a deposition that is intended to be used in lieu of trial testimony requires that the witness be subject to public scrutiny at the time of the testimony.

In Bone-Club, the Court was unpersuaded that pre-trial suppression hearings are any different than trials in applying the right to a public trial. Accord Walker v. Georgia, supra. In response to the State's argument that a new pre-trial hearing would be sufficient unless the hearing resulted in a

different ruling, the Court disagreed at page 262 saying that "prejudice is presumed where a violation of the public trial right occurs."

Notwithstanding, we are persuaded by Defendant's argument that the nature of Frakes' testimony may differ in an open hearing from that presented in closed court. Even if the new suppression hearing again results in the admission of Frakes' testimony, Defendant should have the opportunity to use any such variances in testimony for impeachment purposes in a new trial.

The violation of the constitutional right to a public trial is a structural error and not subject to harmless error analysis. Neder v. United States, 527 U.S. 1, 8, 119 S.Ct. 1827, 144 L.Ed.2d 35 (1999); Walker v. Georgia, supra at 49-50, footnote 9.

In Lewis v. Peyton, 352 F.2d 791 (4th Cir. 1965), the Fourth Circuit reversed a rape conviction on habeas corpus under identical facts to those at issue here. The defendant was ordered to appear with counsel at the home of an elderly, bedridden rape victim for a deposition. Neighbors were told to leave the tiny bedroom in order to make space for the court officials. The Court found a violation of the right to a public trial at the deposition, which was later introduced as evidence against the accused at his trial, and reversed the conviction.

The understood purpose of the depositions of Michael and Julia DeLashmutt and David Olson is to preserve their testimony for trial. At trial, the State introduced the depositions over objection in lieu of live testimony. The procedure used in taking the depositions should have been the same as if they were in-court testimony. The trial court erred in closing

the depositions to the public. Mr. Hacheny is under no duty to show prejudice. The remedy is automatic reversal.

**9, 10, 11, 12, & 13. The trial court erred by admitting various evidence pertaining to Mr. Hackeney's various sexual relationships.**

Five assignments of error relate to the trial court's admission of sexual acts committed by Mr. Hacheny after his wife's death and statements made by Mr. Hacheny related to those sexual acts. The acts and statements were admitted under ER 404(b) and will be addressed together. This evidence was primarily brought out through the testimony of four witnesses: Lindsay Latsbaugh (ne Smith), Annette Anderson, Nichole Matheson, and Michael DeLashmutt. The trial court abused its discretion by admitting evidence of these sexual relationship affairs.

The issue of admitting evidence under ER 404(b) arose early in this case. CP 107. Both sides briefed the issues extensively. As cited in briefs by both parties, Washington uses a four-part test. Before admitting evidence under ER 404(b), a trial court must: (1) find by a preponderance of the evidence that the misconduct occurred; (2) identify the purpose for which the proffered evidence is introduced; (3) determine that the evidence is relevant; and (4) find that its probative value outweighs its prejudicial effect. CP 124, citing State v. Hernandez, 99 Wn.App. 312, 997 P.2d 923 (1999), review denied, 140 Wn.2d 1015 (2000), and CP 153. In its initial brief to the court, the State outlined its theory for the admissibility of the testimony of Lindsey Latsbaugh, Annette Anderson, Nichol Matheson, and

Michael DeLashmutt. CP 128-30. Mr. Hacheny objected. CP 149. The State filed supplemental briefing on January 28, 2002. CP 165. The defense filed further briefing on January 31, 2002. CP 176.

In a series of rulings, Judges Costello and Laurie ruled on the admissibility of the ER 404(b) evidence. The statement of Mr. Hacheny to Mr. DeLashmutt that he couldn't wait to get to heaven to have sex with whoever he wanted was admissible to prove motive, intent, and premeditation. CP 335. The court admitted the sexual relationships with Ms. Latsbaugh, Ms. Anderson, and Ms. Matheson as relevant to motive, res gestae, inconsistent with innocence, and consciousness of guilt. CP 337-39. Mr. Hacheny's embrace of Ms. Anderson at the funeral was admissible to show behavior "inconsistent with an innocent grieving spouse." CP 338.

The Italian author Boccaccio set forth a scenario eerily prophetic of Mr. Hackeney's situation in what may be the first example in western literature of a person using religion to manipulate and cajole women into bed.<sup>3</sup> Written over 650 years, society has not changed so much as to cease to be shocked and incensed against any man who would use God in such a way. Judge Laurie acknowledged as much when she wrote, "It is obvious that the trier of fact may be moved to some level of disgust at Mr.

---

<sup>3</sup> "Casting aside pious thoughts, prayers, and penitential exercises, he began to concentrate his mental faculties upon the youth and beauty of the girl, and to devise suitable ways and means for approaching her in such a fashion that she should not think it lewd of him to make the sort of proposal he had in mind. By putting certain questions to her, he soon discovered she had never been intimate with the opposite sex and was every bit as innocent as she seemed; and he therefore thought of a possible way to persuade her, with the pretext of serving God, to grant his sexual desires." -- Boccaccio, "The Decameron," Third Day, Tenth Story, ca. 1350.

Hachenev's quickening relationship with [these women]." CP 337. Given the incredibly high prejudicial value attached to this testimony, it must be deemed an abuse of discretion to admit the evidence absent a compelling high degree of materiality. ER 403. Such a nexus is lacking in this case.

The State attempted in its case-in-chief to draw parallels between Sandra Glass and the other women. The State's theory was that Ms. Hachenev's death was a concerted effort by Mr. Hachenev to sexually liberate himself. According to the testimony of Ms. Glass, her sexual relationship with Mr. Hachenev commenced long before Ms. Hachenev's death and continued after her death. This is in sharp contrast with his relationships with Ms. Latsbaugh, Ms. Anderson, and Ms. Matheson. The State was unable to present any evidence at trial to establish that Mr. Hachenev was anything more than a friend to these three women before his wife's death. Mr. Hachenev's physical relationship with Ms. Latsbaugh did not begin for nearly eleven months after Ms. Hachenev's death. They never engaged in sexual intercourse. His physical relationship with Ms. Anderson began in late-January with their first sexual intercourse on February 15, 1998. His romantic relationship with Ms. Matheson commenced in late-January, 1998, culminating in sexual intercourse in April of 1998.

Mr. Hachenev had demonstrated through his relationship with Ms. Glass that he apparently did not view marriage as an impediment to sexual relations with other women. The record also reveals that he was apparently

---

open with his various girlfriends about the existence of other women in his life, going so far as taking two girlfriends shopping at the same time and buying them both gifts. There is nothing about these sexual relationships that is relevant to prove motive for the crime of murder. Mr. Hacheney is repeatedly described as being charismatic and heroic; he was apparently able to manipulate these women into believing he was a gift from God. But that does not provide a motive for murder.

The State also admitted evidence of the relationships as part of the res gestae of the murder. In State v. Brown, 132 Wn.2d 529,940 P.2d 546 (1997) the Supreme Court reviewed the doctrine of res gestae.

In addition to the non-exhaustive list of exceptions identified in Rule 404(b) itself, this court has recognized a res gestae or "same transaction" exception to the rule. Under this exception, evidence of other crimes or misconduct is admissible to complete the story of the crime by establishing the immediate time and place of its occurrence. Where another offense constitutes a "link in the chain" of an unbroken sequence of events surrounding the charged offense, evidence of that offense is admissible "in order that a complete picture be depicted for the jury."

Brown (citations omitted). But for the same reasons that the relationships are inadmissible as motive, they are also inadmissible as res gestae. The relationships do not constitute an unbroken sequence of events surrounding the murder.

The trial court also erred in admitting two comments attributed to Mr. Hacheney before Ms. Hacheney's death. The statements to Mr. DeLashmutt and Ms. Latsbaugh about having sex with many women in heaven and taking Ms. Latsbaugh as his second wife do not demonstrate

intent to kill. The former was made about six months before Ms. Hachenev's death. The defense offered an innocent explanation that the statement was made while discussing Islam and having a thousand virgins in heaven. The latter statement was described by Ms. Latsbaugh as being said "jokingly." Ms. Latsbaugh is someone who knows Mr. Hachenev intimately. She was present when he described himself as "God's gift to her." RP 631. She carried on a one year e-mail correspondence with him where he expressed that God had given him a love for her that "feels totally inappropriate" (CP 277) and that God was instructing him to come to Africa to make love to her. CP 288. If Ms. Latsbaugh characterizes his statements as jokes, it is a logical leap to use the statement as a basis for murder.

The e-mails to Ms. Latsbaugh also should not have been admitted into evidence. The explicit sexual nature of the e-mails, coupled with their religious flavor, could only serve to inflame the jury against Mr. Hachenev. Mr. Hachenev, who had never had sexual contact with Ms. Latsbaugh, was a single man at the time all the e-mails were written.

Likewise, Mr. Hachenev's supposed inappropriate hug of Ms. Latsbaugh at the memorial service should have been suppressed. Different people grieve in different ways. The bear hug at the service was designed to create a suggestion, along with the plethora of evidence of inappropriate sexual relationship, that Mr. Hachenev lacked grief at the death of his wife. But Mr. Hachenev was described as a gregarious, affectionate man before his wife's death. There is no reason that should cease upon his wife's death.

In sum, the jury heard a great deal about Mr. Hachenev's sexual proclivity after his wife's death. While the sordid details make a great story and are certainly appropriate for an episode of "The Young and the Restless," they did not belong in this trial. The fact that Mr. Hachenev apparently used religion to manipulate these women only makes the sex more prejudicial and less probative. The trial court abused its discretion by admitting Mr. Hachenev's sexual relationship love affairs and the related statements and acts into evidence.

**14, 15, & 16. The trial court erred by admitting the expert testimony of Dr. Logan, Mr. Lacsina, and Mr. Selove.**

The trial court's failed to ensure that the scientific tests admitted here were reliable and properly admissible in light of Mr. Hachenev's Sixth Amendment right to Confrontation. Ohio v. Roberts, supra.<sup>4</sup> The Roberts test is not satisfied in regard to toxicological evidence asserted by State Toxicologist Dr. Barry Logan and relied upon by medical examiners Dr. Emmanuel Lacsina and Dr. Robert Selove. The issue arises because of the toxicological testing of two items--blood and lung tissue samples taken from Dawn Hachenev's body during autopsy. This evidence was first addressed at an ER 702 hearing on October 1, 2002. RP 10/1/02 at 475. Dr. Logan testified that the person actually doing the tests was Egle Weiss, who had since died. RP id. at 480. Dr. Logan testified as to the normal

---

<sup>4</sup> As noted above, the Supreme Court's Confrontation Clause analysis is being reviewed in State v. Crawford, 147 Wn.2d 424, 54 P.3d 656 (2002), cert. granted sub. nom. Crawford v. Washington, \_\_ U.S. \_\_ (2003).

assignment of cases in his lab. RP id. at 482. He was asked about chain of custody procedures in his lab and said "we don't have a detailed internal chain of custody." RP id. Further, Ms. Weiss had taken no bench notes regarding her care and storage of the sample. RP id. at 519. His file notes indicated that the samples had been sent by Dr. Lacsina with a requests to test the blood for the presence of carbon monoxide, cyanide, and drugs and the lung tissue for presence of propane. RP id. at 483. Dr. Logan then proceeded to testify regarding the packaging and storage of the samples, including that the lung sample was received in a plastic container and that his laboratory had no written protocol for the storage of such samples in 1997. RP id. at 488.

Ultimately, Dr. Logan was asked about the presence of propane in the lung tissue. RP id. at 496. He opined that there was none. Id. But when asked about the certainty of this conclusion, he answered at RP Id. 497:

The only issue that raises questions about whether propane, in fact, was present in the lung at the time of Ms. Hacheney's death would be the way in which that lung tissue was handled and stored. If it was removed from the body and placed into a sealed container, a plastic bag in this case, within a short period of time, and wasn't left out on the autopsy table prior to being bagged, and if it was then. . . if the bag, in fact was sealed, and the plastic container into which the plastic bag was placed was also sealed, and it wasn't subject to any unusual conditions of heat during the process of being shipped to the laboratory, then it would be a perfectly acceptable specimen to test for volatiles.

Thus, the lung tissue sample was acceptable *if* four or five contingencies are true. Moreover, no where in the record does Dr. Logan indicate that these contingencies were in fact ever satisfied.

Dr. Logan did not observe Ms. Weiss's doing of the tests. RP id. at 519. He only assumed that she did everything correctly. Id. Dr. Logan also admitted that if the plastic container used to store the tissue was not properly handled and tested, that propane that may have diffused from the sample might be lost. RP id. at 528. This leads to another set of contingencies, as set out at RP id. at 531:

If you imagine a scenario where the specimen was left out before it was packaged, if the plastic bag leaked, if there was only a very small amount there in the first place, that some of it diffused out and was lost when the container was opened to be sampled by Ms. Weiss, that if you make all these assumptions then there could have been propane present in the lung at the time of her death that would not be demonstrated by the tests that we performed.

Dr. Logan conceded that much speculation regarding the testing could have been eliminated if a proper air-tight container had been used. RP id. 550.

Dr. Emmanuel Lacsina, forensic pathologist, testified at the same hearing. RP id. at 552. He performed the autopsy on Dawn Hacheny. Id. He sent the samples in question to the toxicology laboratory for testing. RP id. at 554. Dr. Lacsina had no specific recollection of how he packaged the lung tissue sample, RP id. at 555; he believed it was in a plastic zip-lock, but "won't swear to it." RP id. at 564. He believes that the samples were delivered by Ted Zink, then the Kitsap County Coroner. RP id. at 557. Delivery by Mr. Zink was not standard procedure. Id. He merely assumed that Mr. Zink transported the sample directly from Dr. Lacsina's refrigerator to the toxicology lab. RP id. at 560.

During trial, the defense objected to foundation, RP 11/18/02 at 1535-36, and chain of custody. RP id. at 1540. During lengthy argument and voir dire, Dr. Logan could give no better assurance than that he believed that Ms. Weiss had followed proper procedure. The court overruled the objections. RP id. at 1555-56. Later, Dr. Logan testified that the samples would have been received by a Glenn Case at his laboratory. RP id. 1575. Logan then speculated that Mr. Case would have handled the packaged samples appropriately. RP id. 1581-82. And, again, the trial court overruled the defense's objection to chain of custody. RP id. at 1583. Neither Ted Zink nor Glenn Case were called as witnesses in this case.

After admission of the toxicological evidence, it was used by both Dr. Lacsina and forensic pathologist Dr. Daniel Selove to support conclusions that Ms. Hacheney was not breathing, and therefore likely already dead, when the fire started. (Lacsina RP 11/12/02 at 838 et. seq.; Selove RP 11/13/02 at 1369 et seq.) These conclusions were crucial to the state's theory of the case.

The toxicological evidence and the various conclusions based thereupon should have been excluded because they violated Mr. Hacheney's Confrontation rights. First, Dr. Logan's testimony as to Egle Weiss's work constituted hearsay and qualified to no hearsay exception, firmly rooted or otherwise. State v. Nation, 110 Wn.App. 651, 41 P.2d 1204 (2002). The Nation case is particularly on point. There, a State Patrol Crime Laboratory supervisor testified as to the testing done by a subordinate lab technician.

Id. at 656. In reversing, the Court of Appeals reviewed theories of admissibility asserted by the state and rejected each one. The court noted that ER 703 does allow experts to base their opinions on the work of others.

Id. at 662. However, “ER 705 may not be used as a mechanism for admitting otherwise inadmissible evidence as an explanation of an expert’s opinion.” Id. Moreover, even though some business records may be admissible under CrR 6.13(b), that does not cure the hearsay problem underlying the supervising scientist’s testimony. Id. at 666, citing, State v. Neal, 144 Wn.App. 600, 30 P.3d 1255 (2001). Thus, the analysis in Nation directly forecloses the first prong of Lilly; the evidence was hearsay and no hearsay exception applies.

Second, the obvious problems with chain of custody foreclose a finding that this evidence has the required “particularized guarantees of trustworthiness.” Lilly, supra. The Court of Appeals in State v. Roche, 114 Wn.App. 424, 59 P.3d 682 (2002), reviewed the rules in this context thus:

Before a physical object connected with the commission of a crime may properly be admitted into evidence, it must be satisfactorily identified and shown to be in substantially the same condition as when the crime was committed. Evidence that is unique and readily identifiable may be identified by a witness who can state that the item is what it purports to be. However, where evidence is not readily identifiable and is susceptible to tampering or contamination, it is customarily identified by the testimony of each custodian in the chain of custody from the time the evidence was acquired.

Id. at 436 (internal quotations and citations omitted). Here, neither Ted Zink nor Glenn Case was called to testify to establish each link in the chain.

State v. Heffernan, 59 Wn.2d 413, 367 P.2d 848 (1962), provides more guidance on this point. In Heffernan, a chain of custody objection was lodged regarding a vaginal swab slide taken from a sexual assault victim.

The Supreme Court affirmed the trial court's refusal to admit the test results:

Since the slide which was examined by the laboratory technician contained no identifying marks and was handled by at least one other person before he received it, a person who is not present to identify the slide and was not available for cross-examination, the court properly refused to allow testimony as to the results of the test.

Id. at 415. Although the record in the present case does indicate appropriate labeling of the samples, it is significant that at least two individuals who had custody of these samples were not called. Those individuals were then not available for cross-examination or, as the United States Supreme Court puts it, "adversarial testing." Mr. Hackeney's confrontations rights were violated.

**17. The trial court erred by allowing the testimony of prosecution expert witness Eduard Krueger.**

As noted, evidence surrounding the discovery of propane canisters at the fire scene was a central issue in the case. Two witnesses from propane canister manufacturers were called by the prosecution—Rex Wigland and Eduard Krueger. Mr. Wigland is Director of Product Safety at Coleman Company. RP 11/25/02 at 2252. It was established that Coleman Company was not the manufacturer of the canisters found at the fire scene. RP id. at 2220. The defense objected to Wigland's testimony as not relevant. Id.

The canisters in question were manufactured by Garrett Industries. Eduard Krueger is a retired project engineer from Garrett. RP 12/4/02 at

3308. Krueger was first endorsed by the prosecution on November 18, 2002. RP 11/18/02 at 1428. The prosecution provided the defense with a report concerning Krueger's testimony later that day. Id. at 1519. Krueger testified on December 3, 2002 over defense objection. RP 12/4/02 at 3268. The trial court noted that the defense should not be surprised that the propane canisters would be an issue in the case. Id. The trial court overruled the defense on both discovery violation and due process grounds. Id.

It became apparent during argument that Garrett Industries had essentially stone-walled the parties when they had inquired regarding the manufacture of the canisters. RP 12/4/02 at 3268-97. They had been told by a company officer to speak with the company's attorney. Id. Doing so led to no discovery coming from Garrett. Id. Thus, the defense was surprised when the retired engineer was endorsed by the prosecution.

In Gray v. Netherland, 518 U.S. 152, 116 S.Ct. 2074, 135 L.Ed.2d 457 (1996), the Supreme Court held that although the Fourteenth Amendment Due Process clause requires that a defendant have notice of the charges against her, she does not have the same protection as to notice of the evidence to be presented against her. The remedy is that which is available under the court rules; that remedy is typically continuance. The trial court offered the defense a continuance on this issue.

However, Washington courts have noted with approval cases in which trial courts have dismissed prosecutions in the interests of justice because of discovery violations amounting to prosecutorial misconduct. See

e.g. State v. Dailey, 93 Wn.2d 454, 610 P.2d 357 (1980)(CrR 8.3 dismissal affirmed where prosecutor sought to add eleven witnesses three days before trial). Further, in the context of late charges (which as noted do receive Due Process protection), prejudice to a defendant includes that he or she must waive speedy trial. State v. Michelli, 132 Wn.2d 229, 937 P.2d 587 (1996).

It is manifest that Mr. Hachenev was confronted with the classic Hobeson's choice of continuing a complex and lengthy trial midstream or proceeding with counsel unprepared to effectively cross-examine the witness. The prosecution is obligated under CrR 4.7(a)(1)(i) to disclose its witnesses to the defense no later than omnibus. An omnibus order was entered in this matter on October 24, 2001. CP 100. The last witness list filed by the prosecution was nearly a year later on October 16, 2002. CP 914. Mr. Krueger is not identified on that list. Here, the trial court's remark that the defense knew that the propane issue was at play in the case cuts the other way. Certainly the prosecution must also have known, in particular because of the trial court's orders requiring the defense to allow the prosecution experts to view the work of the defense experts.

The present case therefore raises a significant issue of fairness unlike those found in the reported cases. This court should recognize that the CrR 4.7(h)(7)(i) power of the trial court to "dismiss the action or enter such other orders as it deems just under the circumstances" includes the power to suppress testimony under the circumstances presented here.

**18. The trial court erred by allowing the prosecution to ask improper questions during jury voir dire.**

During jury voir dire the prosecution asked most if not all jurors the following or similar question: "If you heard the case and it was based largely upon circumstantial evidence, but you were convinced beyond a reasonable doubt, do you think you could convict based upon that evidence?" RP 10/21/02 at 356. The defense objected to this question. The court allowed it. Similar questions were asked of jurors throughout the voir dire process. See, e.g., RP 10/22/02 at 583; RP 10/23/02 at 679, 791, 825, 855, 881; RP 10/24/02 at 929, 1021; RP 10/29/02 at 1144-45, 1202, 1258, 1298, 1337, 1428; (etc, throughout the process).

The defense objected at length to various questions, including this question. RP 10/22/02 p. 610-11. The law of voir dire in this state and authority from other jurisdictions indicate that the above is an improper question. Moreover, the question prejudiced Mr. Hacheney's right to a fair trial. Questions of proper voir dire are left to the sound discretion of the trial court "limited only by the need to assure a fair trial by an impartial jury." State v. Fredrickson, 40 Wn.App. 749, 752, 700 P.2d 369, rev. denied 104 Wn.2d 1013 (1985).

The Washington Supreme Court has a long history of disapproval of questions like the one here in issue. In State v. Bokien, 14 Wn. 403, 44 P. 889 (1896), the court disapproved of this question: "After hearing all the evidence and the testimony and instructions of the court in this cause, if

there yet remains in your mind a reasonable doubt regarding the guilt of the defendant, would you return a verdict of not guilty, in his favor." Id. at 410.

The trial court did not allow the question and Bokien appealed. The language of the Supreme Court affirms the trial court at page 410-11:

Considered by itself we think the question was objectionable, as it did not tend to show bias or prejudice on the part of the juror, or want of any of the qualifications prescribed by law for a juror. It simply called for a statement by the juror as to what he would or would not do in a supposed state of mind, which mental state or condition would, no doubt, depend to a greater or less degree upon the instruction of the court. The object and purpose of the examination of a juror is to determine whether or not he is qualified to sit in the trial, and for this purpose a rigid examination is allowed before his acceptance by the parties to the cause. But the examination should be such as is calculated to disclose his relation to the parties or the cause, and the actual disposition of his mind as to the parties or the subject matter of the action, for either of these conditions may render the juror incompetent. The examination should also, as a general rule, be directed to existing facts, and hence merely hypothetical questions should not be propounded.

In State v. Tharp, 42 Wn.2d 494, 499-500, 256 P.2d 482 (1953), the court discussed the purpose of voir dire and concluded that voir dire should not be used "to educate the jury panel to the particular facts of the case, to compel the jurors to commit themselves to vote a particular way, to prejudice the jury for or against a particular party, to argue the case, to indoctrinate the jury, or to instruct the jury in matters of law." Here, the offending question sought a commitment from the jurors, sought to indoctrinate the jurors on the state's theory of the case, and sought to instruct the jury in matters of law.

In Handshy v. Nolte Petroleum, 421 S.W. 198 (Mo. Sup. Ct.) (1967) and cases cited therein, the Supreme Court of Missouri disapproved of the asking of a very similar question. There defendant's counsel asked "If the law and the evidence shows you Mr. Handshy is not entitled to recover, are there any of you who couldn't give a verdict for the defendant?" Id at 200. Although not reversing on this issue, the court said "We do not approve of asking veniremen questions such as the one before us because it does, in a sense, involve speculation as to the future action of the jurors in the event of certain contingencies." Id.

In the present case, the prosecution sought to have the jurors speculate as to their actions if the state alleged a strong circumstantial case. The prosecution sought to educate the jury on the principle that they could convict on circumstantial evidence alone. And, finally, the prosecution sought to indoctrinate the jurors on its theory that its circumstantial evidence presentation warranted a finding of guilt. All of these are improper in the voir dire process. Moreover, Mr. Hacheney was prejudiced thereby in that the state may have then been able to essentially stack the jury with those who answered the question to its satisfaction.

**19 & 20. The trial court erred by admitting prior consistent statements of Ms. Glass and restricting the cross-examination of her.**

The State sought to bolster the testimony of Sandra Glass by presenting her consistent statements to two witnesses, Scott Nickell and

Allison LeGendre. The trial court then prohibited the defense from cross-examining Mr. Nickell on his Lieutenant marital status.

Ms. Glass alleged that Mr. Hacheny had confessed the murder of his wife to her. RP 11/25/02 at 2333-34. She told her boyfriend, Mr. Nickell, about that confession. Id. 2338. She also shared the information with Ms. LeGendre. RP Id. At 2347. Ms. Glass said she was motivated to make these revelations because she no longer wanted to lie. RP Id. at 2341.

The defense objected to the telling of Nickell and LeGendre as irrelevant and as prior consistent statements.. RP 11/25/02 at 2343-48. The trial court overruled these objections. Id. at 2351. Mr. Nickell testified to what Ms. Glass had told him. RP 11/26/02 at 2529-30. Allison LeGendre testified to what Ms. Glass had told her. RP 11/26/02 at 2553. Timely objections were overruled because the trial court believed that an issue of recent fabrication had been raised by the defense cross examination of Ms. Glass.

Mr. Nickell was married at the time his relationship with Ms. Glass began. RP 11/21/02 at 2155. The trial court prohibited the defense from questioning Ms. Glass on this topic. Id. Later, the defense asked the court to reconsider in light of Ms. Glass' testimony that she came forward because she was tired of lies. RP 11/25/02 at 2361. The trial court declined to change its ruling. Id. at 2365.

A statement is not hearsay if consistent with a declarant's testimony and offered to rebut a charge of recent fabrication. ER 801(d)(1). "Prior consistent statements may not be admitted to counter all forms of

impeachment or to bolster the witness merely because she has been discredited." Tome v. U.S., 513 U.S. 150, 157, 115 S.Ct. 696, 130 L.Ed.2d 574 (1995); accord State v. Purdom, 106 Wn.2d 745, 750, 725 P.2d 622 (1986) (mere repetition does not imply veracity). "The Rule speaks of a party rebutting an alleged motive [to fabricate], not bolstering the veracity of the story told." Tome at 158. The prior consistent statement must have occurred before the alleged motive to fabricate arose or it has little value in rehabilitation. Tome at 158-59.

Here, the defense's cross-examination supposed that at any time that Ms. Glass had made the consistent statement, her motive to fabricate would have existed. The theory was that at any time she discussed his alleged confession, it was false. There were no statements, then, on this point that predated the alleged motive. The testimony was inadmissible hearsay.

"The right to confront and cross-examine adverse witnesses is guaranteed by both the federal and state constitutions." State v. Darden, 145 Wn.2d 612, 620, 41 P.3d 1189 (2002)(citation omitted). Moreover, "the primary and most important component is the right to conduct meaningful cross-examination of adverse witnesses." Id. A compelling state interest must be asserted in order to overcome this right. Id.

Here, the trial court merely found that cross-examination on the point of Mr. Nickell's marital status was not relevant. RP 11/25 /02 at 2365. No balancing of interests nor any consideration of Mr. Hachene's right to cross-examination was considered. Further, this ruling completely

disregards the testimony of Ms. Glass that her revelations regarding Mr. Hacheny's alleged confession were motivated by her desire to, in effect, come clean regarding her affairs and lies. The fact that Ms. Glass was embroiled in an extra-marital affair at that very time is obviously material to that testimony and does tend to impeach its veracity. The trial court abused its discretion and violated Mr. Hacheny's right to confront Ms. Glass.

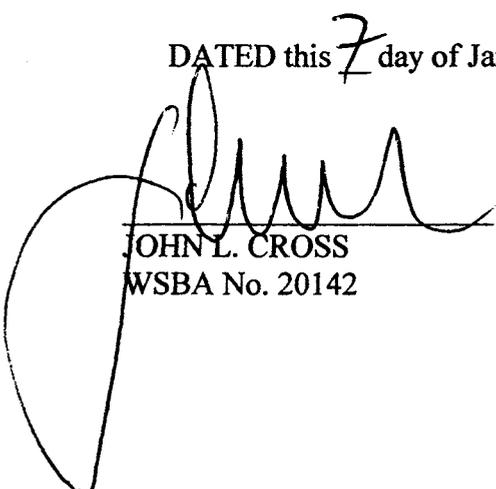
**21. The erred by entering Judgment when the accumulative effect of trial court errors denied Mr. Hacheny a fair trial.**

"The combined effect of an accumulation of errors, no one of which, perhaps, standing alone might be of sufficient gravity to constitute reversal, may well require a new trial." State v. Badda, 63 Wn. 2d 176, 183, 385 P.2d 859 (1963). Cumulative error analysis, then, is focused on the effect of all the errors in the case with regard to the fairness of a trial. Should this Court find multiple errors, it should reverse due to the accumulative effect.

**V. CONCLUSION**

This Court should reverse Mr. Hacheny's conviction, dismiss the aggravating circumstance, and remand for a new trial.

DATED this 7 day of January, 2004.

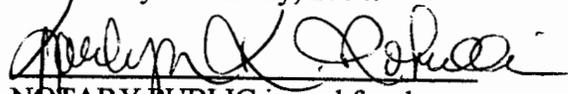
  
\_\_\_\_\_  
JOHN L. CROSS  
WSBA No. 20142

  
\_\_\_\_\_  
THOMAS E. WEAVER  
WSBA #22488



1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28  
29  
30  
31  
32

SUBSCRIBED AND SWORN to before me this 8th day of January, 2004.



NOTARY PUBLIC in and for the  
State of Washington.

My Commission Expires: 12/09/04