

77767-5

**RECEIVED**  
OCT 06 2005  
KITSAP COUNTY  
PROSECUTING ATTORNEY

FILED  
COURT OF APPEALS  
DIVISION II

05 OCT -7 AM 11:25

STATE OF WASHINGTON

BY [Signature]  
NO. 29965-BEJUTY

**IN THE SUPREME COURT OF THE STATE OF WASHINGTON**

**FILED**  
OCT 11 2005  
CLERK OF SUPREME COURT  
STATE OF WASHINGTON

**STATE OF WASHINGTON,**

**Respondent,**

v.

**NICHOLAS D. HACHENEY,**

**Petitioner.**

**PETITION FOR REVIEW**

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

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



## TABLE OF CONTENTS

	<u>Page</u>
<b>TABLE OF AUTHORITIES</b> .....	i
<b>I. IDENTITY OF PETITIONER</b> .....	1
<b>II. COURT OF APPEALS DECISION</b> .....	1
<b>III. ISSUES PRESENTED FOR REVIEW</b> .....	1
<b>IV. STATEMENT OF THE CASE</b> .....	2
<b>V. ARGUMENT</b> .....	5
<b>VI. CONCLUSION</b> .....	23

INDEX

TABLE OF AUTHORITIES

TABLE OF CASES

	<u>Page</u>
<u>State v. Aaron</u> , 49 Wn.App. 735, 745 P.2d 1316 (1987).....	12
<u>State v. Belgarde</u> 110 Wn.2d 504, 735 P.2d 174 (1986).....	21, 22
<u>State v. Bokien</u> , 14 Wn 403, 44 P.2d 889 (1896).....	19
<u>State v. Bone-Club</u> , 128 Wn.2d 254, 259 906 P.2d 325 (1995).....	13, 14
<u>State v. Brown</u> , 132 Wn.2d 529 940 P.2d 546 (1997), <u>cert. denied</u> , 523 U.S. 1007 (1998).....	7, 8
<u>State v. Byrd</u> , 72 Wn.App. 774, 868 P.2d 158 (1994) <u>affirmed</u> , 125 Wn.2d 707 (1995) .....	9
<u>Crawford v. Washington</u> , 541 U.S. 36 124 S.Ct. 1354, 158 L.Ed.2d 177 (2004).....	2, 17, 18
<u>State v. Diebold</u> , 152 Wn. 68, 277 P.394 (1929).....	5, 6
<u>State v. Dudley</u> , 30 Wn.App. 447, 635 P. 2d 750 (1981), <u>Rev. denied</u> , 96 Wn.2d 1026 (1982).....	7

<u>State v. Fredrickson</u> , 40 Wn.App. 749, 752, 700 P.2d 369, <u>rev. denied</u> , 104 Wn.2d 1013 (1985).....	19
<u>State v. Goddard</u> , 38 Wn.App. 509, 685 P.2d 674 (1984).....	12
<u>State v. Golladay</u> , 78 Wn.2d 121, 470 P.2d 191 (1970).....	5, 6, 7
<u>Handshy v. Nolte Petroleum</u> , 421 S.W. 198 (Mo. Sup. Ct.) (1967).....	19
<u>State v. Hernandez</u> , 99 Wn.App. 312, 997 P.2d 923 (1999), <u>review denied</u> , 140, Wn.2d 1015 (2000).....	20
<u>State v. Kreck</u> , 86 Wn.2d 1123 542 P.2d 782 (1975).....	17
<u>State v. Leech</u> , 114 Wn.2d 700, 790 P.2d 160 (1990).....	7
<u>State v. Myers</u> , 49 Wn.App. 243, 742 P.2d 180 (1987).....	21
<u>State v. Nation</u> , 110 Wn.App. 651, 41 P.2d 1204 (2002).....	16
<u>Neder v. United States</u> , 527 U.S. 1, 8 119 S. Ct. 1827, 144 L.Ed.2d 35 (1999).....	14
<u>In re Oliver</u> , 333 U.S. 257 270 Wn. 25, 68 S. Ct. 499, 92 L.Ed. 682 (1948).....	13

<u>State v. Olmedo</u> , 112 Wn. App. 525, 533-34 49 P.3d 860 (2002).....	9
<u>In re Orange</u> , 152 Wn.2d 795, 100 P.3d 291 (2004).....	13, 14
<u>State v. Roche</u> , 114 Wn.App. 424, 59 P.3d 682 (2002).....	18
<u>State v. Tharp</u> , 42 Wn.2d 494, 256 P.2d 482 (1953).....	19
<u>Walker v. Georgia</u> , 467 U.S. 39 104 S. Ct. 2210, 81 L.Ed.2d 31 (1984).....	13, 14
<u>In re Winship</u> , 397 U.S. 358, 90 S.Ct. 1068, 1972, 25 L.Ed2d 368 (1970).....	5

**STATUTES & RULES**

ER 403.....	21
RCW 5.45.020.....	17

**CONSTITUTIONAL PROVISIONS**

United States Constitution Fifth Amendment.....	21
United States Consitution Sixth Amendement.....	5, 11, 12
United States Constitution Fourteenth Amendment.....	5, 21
Washington Constitution Article 1, Sections 22.....	11, 12
Washington Constitution Article 1, Sections 23 and 25.....	5

**I. IDENTITY OF PETITIONER**

Appellant, NICHOLAS D. HACHENEY, by and through his counsel, JOHN L. CROSS, seeks review of the Court of Appeals decision terminating review designated below.

**II. COURT OF APPEALS DECISION**

Petitioner seeks review of the Unpublished Opinion of the Court of Appeals filed on August 3<sup>rd</sup>, 2005, under No. 29965-8 II (Appendix A) (Motion For Reconsideration denied by order dated September 8, 2005.(Appendix B)).

**III. ISSUES PRESENTED FOR REVIEW**

1. Whether evidence was sufficient to support a finding that the alleged murder was committed in the course of arson.
2. Whether an instruction defining “in the course of” constituted a correct statement of law.
3. Whether the right to confrontation is violated by the admission of deposition testimony.

4. Whether the right to a public trial was violated by closing of depositions.

5. Whether the right to confrontation is violated by the admission of uncross-examined laboratory reports.

6. Whether the prosecution may seek a commitment from juror as to their votes for a guilty verdict during voir dire.

7. Whether the right to a fair trial was violated by admission of alleged misconduct by the defendant after the crime.

8. Whether the right to a fair trial was violated by prosecutorial misconduct.

#### IV. STATEMENT OF THE CASE

This matter arose out of a house fire in Bremerton, Washington on December 26, 1997. RP 11/4/02 at 118. The body of Dawn Hacheny was found in the house. RP 11/13/02 at 999.

Petitioner, Nicholas Hacheny, had gone duck hunting that morning, arriving home to the aftermath of the fire at approximately 10:30 a.m. RP 11/4/02 at 124.

The fire was originally thought to be accidental. RP By the time of trial, nearly five years later, the issue of the cause and origin of the fire was hotly contested by six (6) investigators and five (5) scientists. RP 12/5/02 at 1350, RP 12/16/02 at 4281-82, RP 12/17/02 at 4477, RP 12/18/02 at 4701, RP 12/19/02.

Similarly, Mrs. Hacheneys' death was originally thought to be accidental - asphyxia from a flash fire. RP 11/12/02 at 933. Much later, after the medical examiner was made aware of information from a police investigation, that opinion began to change. RP 11/12/02 at 959. A second medical examiner opined that evidence was consistent with suffocation by plastic bag. RP 11/18/02 at 1416. Much of these opinions was based on the reports from a now deceased toxicologist. RP 10/1/02 at 475-88, 519.

Much of the trial involved the membership of the Hacheneys', and most of the lay witnesses, in a fundamentalist church called Christ Community Church. RP 11/17/02 at 1792. Mr. Hacheneys was involved romantically with several parish ladies. Testimony on this point involved incidents both before and after the death of Mrs. Hacheneys and took up days of trial time. Specifically, one such woman, Sandra Glass, alleged that some months later, Mr. Hacheneys confessed to her. RP 11/25/02 at 2333-34.

The matter went to trial under a Third Amended Information alleging first degree murder aggravated as in the course of arson. (P 919 The propriety of this charge was litigated pretrial.(CP 7, 196, 324) The trial court instructed the jury on the meaning of “in the course of”. (Instruction 12 at CP 1353)

Pretrial, the court ordered depositions of three witnesses that the state asserted would be unavailable at trial. RP 5/23/02 at 435, CP 623. The depositions were ordered taken in a closed courtroom Id. The depositions were admitted at trial over defense objection. RP 12/10/02 at 3782-3800.

During voir dire, the defense repeatedly objected to the repeated asking of the following: “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 upon the evidence?” RP 10/21/02 at 356.

On December 26, 2002, a verdict of guilty and an affirmative answer on the aggravating circumstances were returned. RP 12/26/02 (CP 1361- verdict, CP 1362 - special verdict). On February 7, 2003, Mr. Hacheny was sentenced to life in prison without possibility of parole. CP 1663.

A timely appeal was filed: sixteen (16) issues were raised by counsel and fifteen (15) issues were raised by Mr. Hacheny, pro se.

## V. ARGUMENT

1. Whether evidence was sufficient to support a finding that the alleged murder was committed in the course of arson.

The Court of Appeals decision conflicts with prior decisions of this court and impugns Mr. Hacheny's right under the Sixth and Fourteenth Amendments of the United States Constitution and Article 1, Sections 3 and 25 of the Washington Constitution to have each element of the crime charged proved beyond a reasonable doubt. RAP 13.4(b)(1) and (3); see In re Winship, 397 U.S. 358, 90 S. Ct. 1068, 1072, 25 L.Ed.2d 368 (1970).

The trial court found that there was probable cause for aggravated murder. CP-348. The trial court entered findings of fact that while Mrs. 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. CP-349. The court found that she was dead before the fire started. CP-349. The court concluded there was an "intimate connection" between the killing and the arson. The court found probable cause for first degree murder with aggravating circumstance that the murder was committed "in the course of" the crime of arson in the first degree. CP-349.

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 preparation 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 reached in Mr. Hacheny's case. The State presented no evidence that Mr. Hacheny was engaged in the performance of an arson and, while so engaged, and within the res gestae of the crime of arson, a killing resulted. Quite the contrary, the State's evidence was that the killing preceded the arson and that the defendant formed a separate intent after the killing to engage in arson. See CP 125. It is impossible, under the chronology of this case, for the death to be "probable consequence" of the arson. The victim was dead before the arson.

This court's line of the cases on this issue has a common thread -- temporal logic and causation compel the results reached. In Diebold,

supra, this court said “death must be the probable consequence of the unlawful act.” (emphasis added) In State v. Leech, 114 Wn.2d 700, 790 P.2d 160 (1990), this court used the term “proximate cause”. (emphasis added). In State v. Brown, 132 Wn.2d 529, 940 P.2d 546 (1997), cert. denied, 523 U.S. 1007 (1998), this court looked for a “casual connection”. (emphasis added) see also State v. Dudrey, 30 Wn.App. 447, 635 P.2d 750 (1981), rev. denied, 96 Wn.2d 1026 (1982)(“that the death was caused in the course of and furtherance of such a crime) (emphasis added). Thus, causation is necessary to a finding that a death occurred “in the course of” another crime.

WPIC 25.02 defines proximate cause as “a cause which, in the direct sequence, unbroken by any new independent cause, produces the death, and without which the death would not have happened”. Death must be produced in a direct sequence from the felony. Presumably, that sequence is to be forward in time. The trial court and the Court of Appeals have asserted the novel notion that such a direct sequence can be backward in time.

The court below specifically analyzed Brown and Golladay. Decision at 6-7. From this, the court announced without further citation, that the rule allowed either an intimate connection or causation. Even in a light most favorable to the state, causation cannot be found. The holding below thus impacted Mr. Hacheny’s state and federal constitutional

rights. Moreover, that impact results from an erroneous application and amplification of this court's authority. This holding should be reviewed.

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

The foregoing analysis applies well to the giving of the aggravating circumstance instruction. Again, the Court of Appeals holding conflicts with this court's authority, conflicts with other Court of Appeals authority, and raises significant constitutional concerns. RAP 13.4(b)(1) and (3); Jury Instruction number 12 sought to define "in the course of":

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.

As argued above, the state's evidence is insufficient to show a casual connection between any crime and Mrs. Hacheney's death. The instruction is quoted from Brown above. The quoted language is a gloss on the entire phrase "in the course of", furtherance of, or in immediate flight from a felony". The Brown court notes that this language is essentially the res gestae of the underlying felony. The 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, the court allowed the jury to suppose, and find, that the mere coincidence in time 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.3rd 960 (2002). “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).

The Court of Appeals held that the instruction is merely an accurate definition of the “res gestae” rule. Decision at 8. However, as above, the court below is proceeding on an erroneous reading of this court’s authority. Instruction 12 constitutes a misuse of legal concepts in a manner likely to require legalistic analysis to explain and likely to mislead the ordinary mind. This issued should be reviewed.

3. Whether witness depositions were properly admitted at trial.
4. Whether the constitutional right to public trial was violated by the closing of depositions.

The third and fourth issues are combined as they involve the same facts and procedures. Regarding issue three, the holding of the court below conflicts with prior Court of Appeals authority and raises a substantial question under the Constitutions of the United States and Washington RAP 13.4(b)(2) and (3). Regarding issue four the holding of the Court of Appeals conflicts with this court's decision and raises a significant constitutional question. RAP 13.4(b)(1) and (3). Taken together, these issues are of substantial public interest. RAP 13.4(b)(4).

Prior to trial, the State moved to have three witnesses deposed CP 617. The three were expected to be out of the country during trial. CP 617, 18, 19. The trial court granted the motions to take the depositions and they were shown to the jury during trial. RP. 435.

The defense moved to allow Mr. Hachenev's father to watch the depositions. 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 depositions would take place and was advised in courtroom 268, which is described as a small room. RP 8/2/02 at 449. The court denied the request to have Mr. Hachenev's father present on the grounds that courtroom 268 is a small room and depositions are a "nonpublic forum". RP 8/2/02 at 449.

Initially, the State represented that the witnesses “said they would not come [to testify].” RP 12/10/02 at 3871. The defense pointed out that there was no evidence in the record to support that contention. RP 12/10/02 at 3818. Mr. Hacheny objected to the lack of any affidavits from anyone, including the prosecutor stating that they refused to come to court. State’s counsel evaded the issue of presenting an affidavit setting forth that the witnesses were refusing to come to court. RP 12/10/02 at 3824. The prosecutor said “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 as follows, “I believe what [the prosecutor] 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, the prosecutor said, “I have nothing to add to that, thank you, your Honor.” RP 12/10/02 at 3826.

The right to confrontation is guaranteed by both the Sixth Amendment of the United States Constitution and Article 1, Section 22 of the Washington Constitution. The Confrontation Clause normally guarantees the defendant the right to face-to-face confrontation at trial.

Washington Constitution Article 1, Section 22 (“in criminal prosecutions the accused shall have the right . . . to meet the witnesses against him face to face.”); see Crawford v. Washington, 541 U.S. 36, 124 S.Ct. 1354, 158 L.Ed.2d 177 (2004).

In State v. Aaron, 49 Wn. App. 735, 745 P.2d 1316 (1987), 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, citing State v. Goddard, 38 Wn. App. 509, 514, 685 P.2d 674 (1984). The record here shows that the state made no effort to procure attendance, relying on the depositions. Thus, the witnesses were not unavailable in terms of the Sixth Amendment. Crawford, supra, clearly requires that a witness be both unavailable and subject to cross-examination. The Court of Appeals failed to follow the clear authority of Crawford and Aaron with the resulting violation of Mr. Hachenev’s confrontation right.

Similar error attends sustaining the trial court’s ruling not permitting members of the public, including Mr. Hachenev’s father, from attending the depositions. The Sixth Amendment 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); accord Walker v. Georgia, 467 U.S. 39, 104 S.Ct. 2210, 81 L.Ed 2d 31 (1984). (“A public trial encourages witnesses to come forward and discourages perjury.”); In re Orange, *infra*.

Stronger yet is this court’s recent decision in In re Orange, 152 Wn.2d 795, 100 P.3d 291 (2004). There, this court quoted Walker, *supra*, and Bone-Club, *supra*, in setting 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 violation of the constitutional right to a public trial is 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; accord In re Orange supra. Moreover, “prejudice is presumed where a violation of the public trial right occurs.” In re Orange, at 814. The Court of Appeals failed to properly apply Bone-Club and Orange. This issued should be reviewed.

5. Whether the right to confrontation is violated by the admission of uncross-examined laboratory reports.

The Court of Appeals holding on this issue conflicts with prior case law of this court and the Court of Appeals and raises a significant issue of constitutional law. RAP 13.4(b)(1), (2) and (3). The issue arises from the toxicological testing of two items—blood and lung tissue samples taken from Mrs. Hacheny during autopsy. State Toxicologist Dr. Logan testified that the person actually doing the test was Egle Weiss, who has since died. RP id. at 480. Dr. Logan said of his lab, “we don’t have a detailed internal chain of custody.” RP id. 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 medical examiner Dr.

Lacsina with a request 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 that several contingencies concerning handling and storage might undermine that conclusion. RP Id. At 497. Dr. Logan did not observe Ms. Weiss's doing of the tests. RP id. at 519. He assumed that she did everything correctly. Id. But if the plastic container used to store the tissue was not properly handled and tested, propane that diffused from the sample would be lost. RP id. AT 528. This leads to another set of contingencies. RP id. at 531. 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 performed the autopsy on Dawn Hachaney. 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.

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. 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 Mrs. Hacheney was not breathing when the fire started. (Lacinsa 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 should have been excluded because they violated Mr. Hacheney’s confrontation rights. Further, the decision below is directly at odds with State v. Nation, 110 Wn. App. 651, 41 P.2d 1204 (2002) (lab supervisor not allowed to testify as to subordinate’s testing because hearsay).

Crawford v. Washington, 541 U.S. 36, 124 S.Ct 1354, 158

L.Ed.2d 177 (2004) has changed Confrontation Clause analysis. The Crawford test requires unavailability and opportunity to cross-examine. These requirements attend the admission of all “testimonial” extrajudicial statements. In part, the test flows from an historical disapproval of written evidence not cross examined before the trier of fact. 451 U.S. at 49. But historically non-testimonial hearsay such as business records has not implicated confrontation. *Id.* at 56.

The Court of Appeals took this portion of the Crawford Court’s historical review as justifying the admission of the tests. It then relied on State v. Kreck, 86 Wn.2d 1123, 542 P.2d 782 (1975), to affirm the trial court. But Kreck rests on the type of judicially determined reliability test overruled by Crawford. Moreover, the application of RCW 5.45.020 is similarly questionable since it also allows judicial determination of trustworthiness. It is an open question whether under Crawford the scientific evidence here in question is a mere business record. Reports of sophisticated science done by state officials at the request of state officials for the purpose of an official death investigation involve more than simple business record keeping. Moreover, the very nature of a death investigation must at some level presupposes some form of litigation. If nothing else, insurance litigation would be likely to follow. And, the facts

of this matter make clear that any such investigation could, in the short or long run, lead to criminal litigation.

The Crawford court overruled prior authority because it “allows a jury to hear evidence, untested by the adversary process, based on a mere judicial determination of reliability.” 451 U.S. at 62. The Supreme Court disapproved of courts making “assumptions” that should be tested by cross-examination. *Id.* at 66. Further, “early American authorities flatly rejected any special status for coroner statements.” *Id.* at 47 (footnote 2). Here, the Court of Appeals would allow a trial court to “infer” reliability and allow it “discretion” to ignore the requirement of cross-examination with regard to a coroner’s report. Decision at 21.

This scientific evidence must be subjected to cross-examination to be admitted consistently with Crawford. The more so because an inadequate chain of custody and speculation regarding the care and handling of the samples were exposed in the trial court. See State v. Roche, 114 Wn.App. 424, 59 P.3d 682 (2002). Here, again, with regard to chain of custody, the Court of Appeals would allow a trial court to find “inferentially” that the evidence is reliable. Decision at 23. Mr. Hacheney raised a strong attack on the methods of analysis, transportation, and storage of the items here in issued. He was denied confrontation by the absence of crucial witnesses in the chain of custody and by speculation as to the methods of storage and of analysis used.

Moreover, this inadmissible and speculative evidence was acutely necessary to the state's theory of the case. The issue should be reviewed.

6. Whether during voir dire the prosecution may seek a commitment from jurors that they could convict on a circumstantial case.

"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 law of voir dire in this state and authority from other jurisdictions indicate that the above is an improper question. State v. Tharp, 42 Wn.2d 494, 256 P.2d 482 (1953); State v. Bokien, 14 Wn. 403, 44 P.2d 889 (1896); Handshy v. Nolte Petroleum, 421 S.W. 198 (Mo. Sup. Ct.) (1967). Moreover, the question prejudiced Mr. Hachenev'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).

7. Whether the right to a fair trial is violated by the admission of evidence of misconduct by the defendant alleged to have occurred after the crime was committed.

As noted, much of the trial involved evidence of Mr. Hacheny's romances. Much litigation revolved around the state's offer of evidence of Mr. Hacheny's love life after the death of Mrs. Hacheny. Repeated references were made to Mr. Hacheny's affairs with four women after Mrs. Hacheny's death. Sandra Glass testified to a romantic relationship after the death. RP 11/21/02; 11/25-26/02. So did Lindsey Latsbaugh. RP 11/6-7/02. Similarly, Annette Anderson testified to sex with Mr. Hacheny after Mrs. Hacheny's death. RP 12/2/02 at 2897. And, finally, Nichole Mathison testified to the same. RP 12/9/02 at 3734-35.

This 404(b) evidence was so inflammatory as to deny Mr. Hacheny of a fair trial. To admit such evidence a trial court must (1) find that the misconduct occurred, (2) identify its purpose, (3) determine its relevance, and (4) balance probative value against prejudicial effect. See State v. Hernandez, 99 Wn.App. 312 997 P.2d 923 (1999), rev. denied, 140 Wn.2d 1015 (2000). The trial court, ruling that this evidence meets the test said: "It is obvious that the trier of fact may be moved to some level of disgust at Mr. Hacheny's quickening relationship with [these women]." CP 337. Thus the trial court at once let it in and recognized its inflammatory nature.

Even if the evidence had some tendency to prove some proposition in the case, it should not have been allowed. It is difficult to see the relevance of post-death actions when discussing a motive for

causing the death. Moreover, the mixture of sex and God found in this case is obviously and substantially prejudicially. ER 403. The state certainly would like the jury to hold Mr. Hachenev in disgust. Character assassination of the defendant is precisely the evil that the rules are intended to avoid. ER 403; State v. Myers, 49 Wn.App. 243, 742 P.2d 180 (1987)( "When considering misconduct that does not rise to a level of criminal activity, but which may nonetheless disparage the defendant, extreme caution must be used to avoid prejudice. Where the decision is doubtful, the scale must tip in favor of the defendant and the exclusion of the evidence." ). This issue should be reviewed.

8. Whether the right to a fair trial was violated by prosecutorial misconduct.

On appeal, Mr. Hachenev raised several instances of prosecutorial misconduct. Prosecutorial misconduct implicates a defendant's right to a fair trial under the Fifth and Fourteenth Amendments to the United States Constitution. RAP 13.4(b)(3); see e.g. State v. Belgarde, 110 Wn.2d 504, 755 P.2d 174 (1986). The Court of Appeals rejected the claims asserted based primarily on the defense's failure to object to the offending statements. Decision at 35-7.

Two of the claims nonetheless should be reviewed. First, the prosecution argued evidence that had been ruled inadmissible. The trial court had ruled that an alleged phone call and conversation between Mr.

Hachenev and witness Scott Nickell was inadmissible. RP at 2538.

However, during closing, the prosecutor alluded to that phone call asserting that the same bolstered the testimony of the alleged confession witness, Sandra Glass. RP 5169-70. Although not objected to, certain misconduct impinges on the right to a fair trial even if not objected to at the time. State v. Belgarde, supra. The case hinged on the credibility of Ms. Glass. Arguing inadmissible evidence in order to bolster a crucial witness should be held to be flagrant misconduct.

Second, there was much speculation at trial about the timing of Mr. Hachenev's duck hunting trip on the morning of trial. Two witnesses put the hunters at the hunting blinds well before it was light out. (Phil Martini RP 513; Lindsey Smith (ne Latsbaugh) RP 748). Neither witness put a definite time on the hunting party's movements. The parties had stipulated that sunrise was 7:58 a.m. on December 26, 1997. Timing was important to the case because of the various opinions as to the time of ignition of the fire and the fire's duration.

In closing, the prosecution said: "From Lindsey Smith we can conclude that they're in the blinds and ready to hunt at approximately 7:50 a.m." And, "the testimony is undisputed, Lindsey Smith and Phil Martini. . .[said] that these people were to meet at the Hood Canal Bridge at 7:00 a.m." The defense objected to this evidence. RP at 5151. This objected to

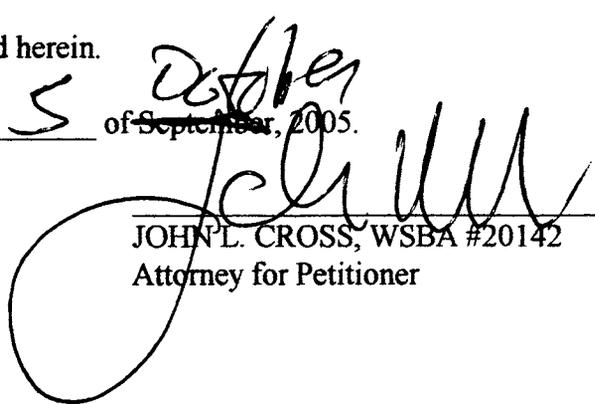
misstatement of the evidence is misconduct. It is misconduct that went to the heart of Mr. Hacheny's alibi defense.

This issue should be reviewed.

**VI. CONCLUSION**

Petitioner argues that issues in this matter meet the considerations listed in RAP 13.4(b). The Court of Appeals decision should be reviewed as to the issues asserted herein.

DATED this 5 <sup>October</sup> of ~~September~~, 2005.

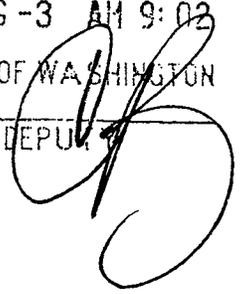
  
\_\_\_\_\_  
JOHN L. CROSS, WSBA #20142  
Attorney for Petitioner

FILED  
COURT OF APPEALS  
DIVISION II

05 AUG -3 AM 9:02

STATE OF WASHINGTON

BY \_\_\_\_\_  
DEPUTY



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

STATE OF WASHINGTON,  
  
Respondent,

No. 29965-8-II

v.

NICHOLAS DANIEL HACHENEY,  
  
Appellant.

UNPUBLISHED OPINION

MORGAN, J. – In this appeal from a conviction for aggravated premeditated first degree murder committed in the course of an arson, Nicholas Hacheny raises 29 issues. We affirm.

On December 26, 1997, Nicholas and Dawn Hacheny’s house burned. A firefighter discovered Dawn, deceased, on a bed in the debris. Several propane canisters and an electric space heater were found near the bed. For the next couple of years, the fire marshal, medical examiner, and other investigators thought both the fire and Dawn’s death were accidental. In 2001, however, they came to suspect foul play.

On December 29, 1997, Dr. Emmanuel Lacsina performed an autopsy. He found that although Dawn did not have soot in her trachea or lungs, she did have pulmonary edema, which can result from congestive heart failure, drowning, a drug overdose, head injury, or suffocation.

*Appendix A*

No. 29965-8-II

He initially thought that she had been asphyxiated when, during a flash fire, her larynx had spasmed reflexively.

During the autopsy, Dr. Lacsina collected blood and lung samples that were later tested by Egle Weiss, an employee of the state toxicology laboratory. Weiss performed the tests about ten days after the fire, at a time when she and the investigators were thinking that the fire had been accidental. She found little carbon monoxide and no propane in the lungs, no carbon monoxide in the blood, and an elevated level of Benadryl. Weiss died unexpectedly before trial.

Like the others, John Rappleye, a fire investigator for the Bremerton Fire Department, initially thought the fire was accidental. He also noted that some of the propane canisters had "vented" during the fire,<sup>1</sup> and that the area around the canisters had burned more heavily than other areas in the room.

On January 26, 1998, Hachenev was interviewed by Rappleye and Detective Daniel Trudeau. Hachenev said that he and Dawn had opened Christmas presents in the bedroom, that they had strewn wrapping paper around the room, and that the bedroom space heater was the only source of heat in the house. He had been duck hunting when the fire occurred.

During the summer and fall of 1997, Hachenev was having an affair with a woman named Sandra Glass. During the spring of 2001, Glass mentioned to her then-boyfriend that while she and Hachenev had been alone in the basement of their church, Hachenev had admitted giving Dawn some Benadryl and lying awake until God told him, "[G]o take something that you

---

<sup>1</sup> Report of Proceedings (Trial) (RP) at 1260.

want.”<sup>2</sup> He held a plastic bag over Dawn’s head until she was no longer breathing, set the fire, and left.

In September 2001, the State charged Hacheny with first degree premeditated murder.

In February 2002, the State amended its charge to allege that Hacheny,

on or about the 26th day of December, 1997, with a premeditated intent to cause the death of another person, did cause the death of such person: to-wit: DAWN M. HACHENEY, AND FURTHERMORE, the defendant committed the murder in the course of the crime and/or attempted crime of arson in the first degree; contrary to [RCW] 9A.32.030(1)(a) and RCW 10.95.020(11)(e).<sup>[3]</sup>

In February and March 2002, the trial court held pretrial hearings to determine whether certain evidence was admissible under ER 404(b). The State offered Hacheny’s alleged statements, made before the fire, that he could not wait to go to heaven because then he could have sex with whomever he wanted. The State also offered that shortly after the fire, Hacheny had begun sexual relationships with women named Latsbaugh, Anderson, and Matheson; and that at Dawn’s funeral, he had given Anderson a hug of questionable propriety. Hacheny objected, but the trial court admitted. Later, at trial, the court gave the following limiting instruction:

Evidence has been introduced in this case on the subject of the Defendant’s relationships with several women for the limited purposes of whether the Defendant acted with motive, intent or premeditation, or as evidence of consciousness of guilt. You must not consider this evidence for any other purpose.<sup>[4]</sup>

---

<sup>2</sup> RP at 2335.

<sup>3</sup> Clerk’s Papers (CP) at 324.

<sup>4</sup> CP at 1355.

On June 28, 2002, over Hachenev's objection, the trial court granted the State's request to take depositions from three witnesses who were planning to be in other countries at the time of trial. Two of those witnesses, Michael and Julia DeLashmutt, were moving to Scotland for three years so Michael could obtain an advanced degree. The third, David Olson, was moving for at least six months to a rural area in Bolivia. Hachenev's father asked to attend the depositions, but the trial court denied his request.

On October 1, 2002, the court held a hearing on the admissibility of testimony from Drs. Logan, Lacsina, and Selove. At the end of the hearing, the trial court indicated it would admit the offered testimony.

On October 16, 2002, a jury trial began. During voir dire, the trial court permitted the prosecutor to ask potential jurors, over Hachenev's objections, whether they could convict on circumstantial evidence if otherwise convinced that the State had met its burden of proving the case beyond a reasonable doubt.

Drs. Lacsina, Selove, and Logan all testified. Based in part on the lab report in which Weiss had described the results of her tests, Lacsina and Selove opined that Dawn had died from suffocation prior to the fire. Dr. Logan testified to being Weiss' supervisor in late 1997 and to the lab's general procedures for handling and testing blood and tissue samples. Over Hachenev's objections, the trial court admitted Exhibit 323, the report in which Weiss described her test results. No one has included Exhibit 323 in the record on appeal.

On November 18, 2002, the State informed the trial court that it had identified a new witness, Eduard Krueger, a retired employee of the manufacturer of the propane canisters found

near Dawn's body. Until about a week before trial, the parties had thought the canisters had been manufactured by Coleman. A week before trial, the State had discovered that the canisters had actually been manufactured by Garrett Industries. Active Garrett employees proved reluctant to testify, so the prosecutor found Krueger, a retired Garrett employee. Hacheney objected to the late disclosure and asked that Krueger's testimony be excluded. The trial court offered a continuance so Hacheney could prepare to meet Krueger's testimony. Hacheney declined the continuance, the trial court overruled his objection, and Krueger testified.

The jury received the case on December 26, 2002. During deliberations, it submitted three written questions to the court. (1) "Would Arson be an aggravating circumstance if Dawn Hacheney was all ready dead but other people were injured by the fire. For instance the insurance company, Dawn's parents and Dawn's body." (2) "Does malice have to be specifically w/ intent to injure another person." (3) "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 all ready dead."<sup>5</sup> After hearing from the parties, the court responded in writing that it "will not provide further instructions in response to this inquiry. Please review the instructions provided."<sup>6</sup>

Also on December 26, 2002, the jury found Hacheney guilty of first degree premeditated murder and answered "yes" to a special interrogatory asking whether Hacheney had killed in the

---

<sup>5</sup> CP at 1358-60.

<sup>6</sup> CP at 1358-60.

course of first degree arson. The trial court imposed a sentence of life without parole, and this appeal followed.

I.

Citing *State v. Golladay*,<sup>7</sup> *State v. Diebold*,<sup>8</sup> *State v. Dudrey*,<sup>9</sup> *State v. Leech*,<sup>10</sup> and *State v. Brown*,<sup>11</sup> Hacheny claims that the evidence is insufficient to support the jury's finding that he committed the murder "in the course of" first degree arson. This is true, he says, because the evidence shows that Dawn was dead before the fire started. The State responds that Washington law requires only an "intimate connection" between the arson and the murder, and that such a connection exists here.

RCW 10.95.020(11)(e) states in pertinent part:

A person is guilty of aggravated first degree murder . . . if he or she commits first degree murder as defined by RCW 9A.32.030(1)(a) . . . and . . . [t]he murder was committed in the course of . . . [a]rson in the first degree.

"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."<sup>12</sup> An

---

<sup>7</sup> 78 Wn.2d 121, 470 P.2d 191 (1970), *overruled on other grounds*, *State v. Arndt*, 87 Wn.2d 374, 553 P.2d 1328 (1976).

<sup>8</sup> 152 Wash. 68, 277 P. 394 (1929).

<sup>9</sup> 30 Wn. App. 447, 635 P.2d 750 (1981), *review denied*, 96 Wn.2d 1026 (1982).

<sup>10</sup> 114 Wn.2d 700, 790 P.2d 160 (1990).

<sup>11</sup> 132 Wn.2d 529, 940 P.2d 546 (1997), *cert. denied*, 523 U.S. 1007 (1998).

<sup>12</sup> *Brown*, 132 Wn.2d at 607-08 (quoting *Golladay*, 78 Wn.2d at 132).

“intimate connection” between a killing and a felony charged as an aggravating circumstance is established when the killing is “part of the ‘res gestae’ of the felony.”<sup>13</sup> A killing and an aggravating felony are part of the same *res gestae* where the killing occurs in “close proximity in terms of time and distance,”<sup>14</sup> and there is a “causal connection” clearly established between the killing and the felony.<sup>15</sup>

In *Brown*, the defendant kidnapped, robbed, and raped a woman for two days before killing her. On appeal, he argued that the evidence was insufficient to prove that he had committed first degree murder “in furtherance of” kidnap, rape, or robbery because the murder had occurred “hours” after the other felonies.<sup>16</sup> Declining to read “in furtherance of” literally, and “look[ing] instead to whether the killing was part of the res gestae of the felony,” the Washington Supreme Court required a “‘causal’ or ‘intimate’ connection between a killing and a related felony to establish the killing was committed in the course of, in furtherance of, or in immediate flight from the felony.”<sup>17</sup> Finding that the evidence supported such a connection, the *Brown* court affirmed.

Taken in the light most favorable to the State, the evidence recited above is sufficient to

---

<sup>13</sup> *Brown*, 132 Wn.2d at 608.

<sup>14</sup> *Brown*, 132 Wn.2d at 608 (quoting *Leech*, 114 Wn.2d at 706).

<sup>15</sup> *Brown*, 132 Wn.2d at 608 (quoting *Golladay*, 78 Wn.2d at 130); see also *Dudrey*, 30 Wn. App. at 450.

<sup>16</sup> *Brown*, 132 Wn.2d at 609.

<sup>17</sup> *Brown*, 132 Wn.2d at 610 (emphasis added).

show that Dawn's murder was "intimately connected" with the arson, and was part of the arson's "res gestae." Thus, the evidence is also sufficient to show that Dawn's murder was committed "in the course of" arson.

II.

Hachenev argues that the trial court should not have instructed the jury to decide whether the murder was committed "in the course of" the arson. In Instruction 12, the court told the jury:

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.<sup>[18]</sup>

While considering Hachenev's objections, the trial court correctly stated that, "under the circumstances of this case [Instruction 12] takes the place of the words 'res gestae,' which would not be used in normal conversations, and, consequently, Instruction No. 12 is necessary."<sup>19</sup> With this one exception, the instruction followed *Brown*, and the trial court did not err.

III.

Hachenev argues that the trial court impermissibly commented on the evidence when, in Instruction 12, it referred to "the killing." Jury instructions must be read as a whole and in context,<sup>20</sup> and the trial court so informed the jury.<sup>21</sup> Instruction 11 said that *if* the jury found

---

<sup>18</sup> CP at 1353.

<sup>19</sup> RP at 4961.

<sup>20</sup> *State v. Woods*, 143 Wn.2d 561, 590, 23 P.3d 1046, cert. denied, 534 U.S. 964 (2001).

<sup>21</sup> CP at 1341 ("You should consider the instructions as a whole and should not place undue emphasis on any particular instruction or part thereof.").

Hachenev guilty of premeditated first degree murder, the jury must determine whether the murder was committed in the course of first degree arson. Instruction 12 said that an "intimate connection" had to be shown before "the killing"—to be fully consistent with Instruction 11, Instruction 12 really should have said "the murder"—could be considered to have occurred in the course of another crime.<sup>22</sup> Instructions 11 and 12 were both conditioned on the jury's first finding Hachenev guilty of first degree murder, and thus neither commented on that issue.<sup>23</sup>

Because Instructions 11 and 12 were conditional, *State v. Becker*<sup>24</sup> is distinguishable from this case. The issue in *Becker* was whether a particular facility was a "school," and the trial court improperly instructed that it was. The issue here is whether Hachenev committed murder, and the trial court properly instructed that *if* Hachenev had committed the murder, the jury should go on to decide whether the murder was intimately connected with the arson. Instruction 12 was not an impermissible comment on the evidence.

#### IV.

Hachenev argues that the trial court erred by using "assault" to describe the actus reus of first degree murder. Reasoning from WPIC 26.02, he claims that the trial court should have said

---

<sup>22</sup> CP at 1353.

<sup>23</sup> *See also* CP at 1342 ("The law does not permit a judge to comment on the evidence in any way. A judge comments on the evidence if the judge indicates, by words or conduct, a personal opinion as to the weight or believability of the testimony of a witness or of other evidence. Although I have not intentionally done so, if it appears to you that I have made a comment during the trial or in giving these instructions, you must disregard the apparent comment entirely.").

<sup>24</sup> 132 Wn.2d 54, 935 P.2d 1321 (1997).

“drugged and suffocated,” instead of “assault.”<sup>25</sup> But even if the trial court had accepted Hachenev’s proposal that it say “drugged and suffocated,” it would have been describing a particular type of assault. We see no reason not to describe the assault more generally, and no prejudice to Hachenev from the trial court’s having done that. The trial court had discretion to decide how its jury instructions would be worded,<sup>26</sup> and it did not abuse that discretion here.<sup>27</sup>

V.

Hachenev argues that the trial court erred when, in response to the three questions

---

<sup>25</sup> WPIC 26.02 recommends that a trial court describe the elements of premeditated first degree murder as follows:

- (1) That on or about the \_\_\_ day of \_\_\_\_\_, 19\_\_\_, the defendant \_\_\_\_\_ (briefly describe the act charged);
- (2) That the defendant acted with intent to cause the death of \_\_\_\_\_ (name of person);
- (3) That the intent to cause the death was premeditated;
- (4) That \_\_\_\_\_ (name of decedent) died as a result of the defendant’s acts; and
- (5) That the acts occurred in the State of Washington.

11 WASHINGTON PATTERN JURY INSTRUCTIONS: CRIMINAL (WPIC) 26.02, at 284 (2d ed. 1994). Instruction 7 said:

- (1) That on or about the 26th day of December 1997, the defendant *assaulted* Dawn Hachenev;
- (2) That the defendant acted with intent to cause the death of Dawn Hachenev;
- (3) That the intent to cause the death was premeditated;
- (4) That Dawn Hachenev died as a result of the defendant’s acts; and
- (5) That the acts occurred in the State of Washington.

CP at 1348 (emphasis added). Instruction 8 defined “assault” as “an intentional touching or striking of another person that is harmful.” CP at 1349.

<sup>26</sup> *State v. Dana*, 73 Wn.2d 533, 536, 439 P.2d 403 (1968); *State v. Ellison*, 36 Wn. App. 564, 576, 676 P.2d 531, *review denied*, 101 Wn.2d 1010 (1984).

<sup>27</sup> Nor do we find *In re Andress*, 147 Wn.2d 602, 56 P.3d 981 (2002), *State v. Clark*, 96 Wn.2d 686, 638 P.2d 572 (1982), or *State v. Olson*, 47 Wn. App. 514, 735 P.2d 1362 (1987), all cited by Hachenev, to be on point or helpful here.

submitted during deliberations, it told the jurors to reread the instructions they already had. According to Hachenev's argument, the instruction defining "in the course of" was ambiguous, and the ambiguity would have been clarified by additional instructions.

The doctrine of invited error bars a party from asking for an instruction, then "later complain[ing] on appeal that the requested instruction was given."<sup>28</sup> Logically extended, it also bars a party from asking a trial court *not* to give an instruction, then later complaining on appeal that the trial court failed to give it. In this case, Hachenev asked the trial court to tell the jury "[t]hat you have the instructions; you should reread them."<sup>29</sup> He also said that he did not object to the trial court's telling the jury, "The Court will not provide further instructions in response to this inquiry. Please review the instructions provided."<sup>30</sup> The court acted as Hachenev asked it to, and he may not now claim error on that basis.<sup>31</sup>

## VI.

The closest question in this case is whether the trial court, before permitting the use of Olson's and the DeLashmutts' depositions at trial, properly found that the State made good faith efforts, through "process or other reasonable means," to obtain their presence at trial. Hachenev contends that when the trial court admitted the three witness' pre-trial depositions in lieu of their

---

<sup>28</sup> *State v. Studd*, 137 Wn.2d 533, 546, 973 P.2d 1049 (1999) (quoting *State v. Henderson*, 114 Wn.2d 867, 870, 792 P.2d 514 (1990) (emphasis omitted from original)).

<sup>29</sup> Report of Proceedings: Jury Inquiry (RPJ) at 3.

<sup>30</sup> RPJ at 9.

<sup>31</sup> *Studd*, 137 Wn.2d at 546.

live testimony, it violated his Sixth Amendment right to confront the witnesses against him.

The Sixth Amendment provides that the accused shall enjoy the right to confront the witnesses against him. It bars the use of a witness' deposition unless the witness was previously cross-examined and is unavailable at the time of trial despite the State's good faith efforts to obtain his or her presence "by process or other reasonable means."<sup>32</sup>

Whether a witness is unavailable despite the State's good faith efforts to obtain his or her presence is a question of preliminary fact that the trial court decides under ER 104(a).<sup>33</sup> The trial court considers all the facts and circumstances<sup>34</sup> according to a preponderance of the evidence,<sup>35</sup> and we reverse only if the record does not support its decision.<sup>36</sup>

In *State v. Aaron*,<sup>37</sup> the defendant was charged with burglary. He failed to appear in court

---

<sup>32</sup> ER 804(a)(5); *Ohio v. Roberts*, 448 U.S. 56, 65-66, 100 S. Ct. 2531, 65 L. Ed. 2d 597 (1980), overruled on other grounds, *Crawford v. Washington*, 541 U.S. 36, 124 S. Ct. 1354, 158 L. Ed. 2d 177 (2004); *Mancusi v. Stubbs*, 408 U.S. 204, 210-213, 92 S. Ct. 2308, 33 L. Ed. 2d 293 (1972); *Barber v. Page*, 390 U.S. 719, 723-25, 88 S. Ct. 1318, 20 L. Ed. 2d 255 (1968).

<sup>33</sup> *State v. Allen*, 94 Wn.2d 860, 866, 621 P.2d 143 (1980) (pre-rules trial; "question of 'unavailability to testify at trial' is one of fact to be determined by the trial judge").

<sup>34</sup> *State v. Aaron*, 49 Wn. App. 735, 740, 745 P.2d 1316 (1987) ("Whether the State has made a sufficient effort to satisfy the good faith requirement of ER 804 is a determination that necessarily depends on the specific circumstances of the case and rests largely within the discretion of the trial court.").

<sup>35</sup> ER 104(a); *Bourjaily v. United States*, 483 U.S. 171, 176, 107 S. Ct. 2775, 97 L. Ed. 2d 144 (1987); *Condon Bros., Inc. v. Simpson Timber Co.*, 92 Wn. App. 275, 285-89, 966 P.2d 355 (1998); *State v. Pinnell*, 311 Or. 98, 114, 806 P.2d 110 (Or. 1991); Advisory Committee's Note to FRE 104(a), 56 F.R.D. 183, 197 (1973).

<sup>36</sup> See *State v. DeSantiago*, 149 Wn.2d 402, 411, 68 P.3d 1065 (2003).

<sup>37</sup> 49 Wn. App. 735.

as scheduled, but was arrested and arraigned ten days later. At his arraignment, the State moved to depose the key eyewitness, who wanted to leave for England the next day. The court granted the motion and the deposition took place that same afternoon, over defense counsel's objection that he had had the case only an hour and a half and was not prepared. When the witness failed to appear at trial, the State moved to admit the deposition, and the trial court granted the motion. Emphasizing that the State had made "no effort" to procure the witness' return for trial,<sup>38</sup> Division One reversed.

In *State v. Hobson*,<sup>39</sup> on the other hand, the defendant was charged with second degree theft. His trial was set for September 15, reset for October 3, then reset again for October 21. On October 19, the State moved to continue the October 21st trial date because a witness whom it had previously subpoenaed for trial planned to be gone on a pre-paid hunting trip. The trial court denied the motion. The State then moved to depose the witness, the trial court granted that motion, and the witness was deposed. Later, at trial, the witness failed to appear. The State then moved to admit the deposition, representing that even though the witness had remained under subpoena, "he had indicated that he would not forgo his trip to testify at Hobson's trial."<sup>40</sup> The trial court granted the motion, and Division One affirmed.

The facts and circumstances here resemble *Hobson* more than *Aaron*. The State served all three witnesses with enforceable trial subpoenas before they left Washington. As far as the

---

<sup>38</sup> *Aaron*, 49 Wn. App. at 741 (emphasis added).

<sup>39</sup> 61 Wn. App. 330, 810 P.2d 70, *review denied*, 117 Wn.2d 1029 (1991).

<sup>40</sup> *Hobson*, 61 Wn. App. at 333.

record shows, the State never hinted to them that they did not have to obey, or that they would not be punished if they failed to obey. Reasoning that the witnesses' depositions said or implied, "We're leaving and not coming back,"<sup>41</sup> and that the prosecutor had "revealed [that] all three witnesses refused to come and refused to honor the subpoena,"<sup>42</sup> the trial court seems to have inferred that the witnesses would not have returned for trial even if the State had offered to reimburse them for their reasonable travel expenses. That inference was reasonably available from the record, which as a consequence is sufficient to support findings that the State could not procure the witnesses' attendance "by process or other reasonable means" and that the State was acting in good faith.

Although we resolve this question in favor of the State, we consider it close because the State, quite inexplicably, failed to offer to pay the travel expenses that the DeLashmutts and Olson would reasonably and necessarily incur to return for trial. We might reach a different result if the record showed that the State had suggested or even hinted to a witness that the witness could ignore his or her subpoena once he or she had been deposed, for such a showing might have precluded the trial court's finding that the State had made a good faith effort to obtain the witness's attendance at trial. Because the record is devoid of such facts, however, we conclude that the trial court did not abuse its discretion.

---

<sup>41</sup> RP at 3833.

<sup>42</sup> RP at 3833.

VII.

Hachenev argues that the trial court violated his constitutional right to a public trial by not allowing his father to attend the depositions. The State responds that the depositions were not used until trial, and that the trial was open to the public.

Both the Sixth Amendment to the United States Constitution and Article I, section 22 of the Washington Constitution give an accused the right to a public trial.<sup>43</sup> If that right is violated, the remedy is to reverse and remand for a new trial.<sup>44</sup>

The federal cases help here. In *United States v. Bertoli*,<sup>45</sup> the public was excluded as several depositions were being taken, but the testimony was later “offered into evidence at a public trial.” In *United States v. Acevedo-Ramos*,<sup>46</sup> the public was excluded as a deposition was being videotaped, but again the testimony “aired in public, via the videotape, at trial.” In each case, the court found that the right to public trial was not violated by excluding the public from the deposition because the public had not been not excluded from the trial at which the deposition was later used.<sup>47</sup>

---

<sup>43</sup> *Cohen v. Everett City Council*, 85 Wn.2d 385, 387, 535 P.2d 801 (1975).

<sup>44</sup> *State v. Rivera*, 108 Wn. App. 645, 652, 32 P.3d 292 (2001), *review denied*, 146 Wn.2d 1006 (2002).

<sup>45</sup> 854 F. Supp. 975, 1019 (D.N.J.), *vacated in part on other grounds*, 40 F.3d 1384 (3d Cir. 1994).

<sup>46</sup> 842 F.2d 5, 8 (1st Cir. 1988).

<sup>47</sup> Hachenev also cites *Lewis v. Peyton*, 352 F.2d 791 (4th Cir. 1965), a case in which the trial judge failed to follow the statutory procedure for taking depositions in a criminal case. *Lewis* does not help here.

Here as in *Bertoli* and *Acevedo-Ramos*, the trial court excluded a citizen from depositions that were later used in a public trial that the citizen had every right to attend. Accordingly, Hacheny's right to public trial was not abridged.

VIII.

Hacheny argues that the trial court erred by admitting evidence of the sexual relationships in which he engaged shortly after Dawn's death. More specifically, he contends that the trial court abused its discretion by admitting (1) the testimony of Michael DeLashmutt that Hacheny had said he could not wait to get to heaven because then he could have sex with whomever he wanted; (2) the testimony of Latsbaugh, Anderson, and Matheson that each of them had a sexual relationship with Hacheny shortly after Dawn's death; (3) e-mails from Hacheny to Latsbaugh with sexual content; (4) the testimony of Latsbaugh that before Dawn's death, Hacheny had said that he wished he could take Latsbaugh as his wife; and (5) testimony that Hacheny inappropriately hugged a woman at Dawn's funeral.

ER 404(b) allows proof of motive. The State's theory of the case was that Hacheny was motivated to murder Dawn because he desired to pursue other women whom he knew through his church. The evidence showed motive, and its use for that proper purpose (probative value) was not substantially outweighed by the danger it might be improperly used to show a propensity to be a bad person (unfair prejudice). The trial court did not abuse its discretion.

IX.

Hacheny argues that the trial court erred by including "consciousness of guilt" in the instruction by which it limited the use of the evidence discussed in the preceding section. Even assuming error, however, we do not perceive how it could have made a difference to this case.

Consciousness of guilt is a state of mind similar to motive and intent,<sup>48</sup> and under the particular circumstances here it seems unlikely that the jury would have understood it to mean anything different from motive. It could not have affected the outcome of the trial, and any error was harmless "within reasonable probabilities."<sup>49</sup>

X.

Hachenev asserts that the trial court erred by allowing Drs. Lacsina, Logan, and Selove to rely on Exhibit 323, the written lab report in which Weiss described the results of her tests.<sup>50</sup> Hachenev asserts that none of the doctors should have been permitted to rely on that report because it (A) was inadmissible hearsay, (B) violated his right to confrontation, and (C) was not supported by an adequate chain of custody. The State responds (A) that the report was admissible under RCW 5.45.020, Washington's business records exception to the hearsay rule; (B) that the report did not violate the confrontation clause because it was not "testimonial"

---

<sup>48</sup> *State v. Messinger*, 8 Wn. App. 829, 837, 509 P.2d 382 ("conduct indicates a consciousness of guilt, an inconsistency with innocence, or the intent with which the act was committed") (quoting 1 C. Torcia, WHARTON'S CRIMINAL EVIDENCE § 209, at 437 (13th ed. 1972)), *review denied*, 82 Wn.2d 1010 (1973), *cert. denied*, 415 U.S. 926 (1974).

<sup>49</sup> *State v. Jackson*, 102 Wn.2d 689, 695, 689 P.2d 76 (1984).

<sup>50</sup> In Assignments of Error 14, 15, and 16, Hachenev asserts in his brief that "[t]he trial court erred by admitting the expert testimony of Dr. Logan, Mr. Lacsina, and Mr. Selove." Br. of Appellant at 54; *see also* Br. of Appellant at 2. In his statement of the issues however, he claims that the issue is "[w]hether expert witnesses may rely on laboratory reports prepared by others, and testify as to the conclusions [of others], when the reports do not contain sufficient guarantees of trustworthiness with regard to chain of custody and do not qualify for a hearsay exception." Br. of Appellant at 3. In the argument section of his brief, he argues in accordance with his issue statement and adds a claim that his right to confront was violated.

within the meaning of *Crawford v. Washington*<sup>51</sup>; and (C) that the report was supported by an adequate if not perfect chain of custody. Accordingly, we turn to those issues.

A.

The first question is whether Weiss' report was admissible under RCW 5.45.020. That statute provides:

A record of an act, condition or event, shall in so far as relevant, be competent evidence if the custodian or other qualified witness testifies to its identity and the mode of its preparation, and if it was made in the regular course of business, at or near the time of the act, condition or event, and if, in the opinion of the court, the sources of information, method and time of preparation were such as to justify its admission.

According to the Washington Supreme Court, this statute contains five requirements.<sup>52</sup> First, the offered evidence must be in the form of a record. Second, the record must be of an act, condition, or event. Third, the record must be made in the regular course of business (and thus not primarily in anticipation of litigation). Fourth, the record must be made at or near the time of the act, condition or event. And fifth, the trial court in its discretion must believe that the sources of information and the method and time of preparation justify admission.<sup>53</sup>

The Washington Supreme Court has applied these requirements to facts like those here. In *State v. Kreck*, the defendant's wife was found dead. The police received information that the defendant had bought chloroform to use while robbing her. The medical examiner in Spokane

---

<sup>51</sup> 541 U.S. 36.

<sup>52</sup> *State v. Kreck*, 86 Wn.2d 112, 118, 542 P.2d 782 (1975).

<sup>53</sup> *Kreck*, 86 Wn.2d at 118-19.

forwarded to the state toxicology lab in Seattle a blood sample from the wife's autopsy, asking that it be tested for chloroform. The head of the state lab, Dr. Loomis, directed a qualified lab employee named Skinner to do the test, and Skinner reported in writing, "Test: chloroform; Result: 26.0 mg%."<sup>54</sup> Skinner was in Germany during the defendant's trial for murder, so the State offered his written report after having Loomis testify to how the test was conducted, how the report was prepared, and to Loomis' own role as supervisor. The trial court admitted the report, and the Supreme Court affirmed, holding that the requirements of RCW 5.45.020 had been met.

In *State v. Rutherford*,<sup>55</sup> the defendant asked the Air Force to test a product that he wanted the Air Force to buy. Hopkins did some of the testing, which he reported to his supervisor, Spellman, and which Spellman incorporated into a report that Spellman wrote. Hopkins had a stroke before trial and thus could not testify. At trial then, the State asked that Spellman be "allowed to testify concerning reports made to him by Mr. Hopkins and others in the laboratory."<sup>56</sup> The defendant objected on hearsay grounds, claiming that Spellman had "not personally conduct[ed] the tests," that he "could not be cross-examined on the procedures followed," and that he lacked "knowledge concerning what [had been] done."<sup>57</sup> The trial court

---

<sup>54</sup> *Kreck*, 86 Wn.2d at 114.

<sup>55</sup> 66 Wn.2d 851, 405 P.2d 719 (1965).

<sup>56</sup> *Rutherford*, 66 Wn.2d at 852-53.

<sup>57</sup> *Rutherford*, 66 Wn.2d at 853.

overruled, and the Washington Supreme Court affirmed. According to the Supreme Court, “the trial court did not abuse its discretion in permitting [Spellman] to give the results of tests performed under his supervision and control, even though he did not personally conduct the tests or witness their performance.”<sup>58</sup>

In *State v. Ecklund*,<sup>59</sup> the defendant was charged with murder. At trial, the State presented the testimony of a blood expert named Boughton. As an employee of the FBI laboratory, Boughton relied in part on the summary reports and lab work sheets that related the results of blood tests done on the defendant’s shoes “by a technician working under [Boughton’s] supervision and control and recorded on laboratory work sheets.”<sup>60</sup> The defendant claimed “that because Boughton did not personally perform the laboratory tests, his testimony [was] inadmissible hearsay and its admission denied defendant his constitutional right of confrontation.”<sup>61</sup> Although neither the summary report nor the lab work sheets had been offered into evidence, this court stated in dictum that they “would have been admissible under RCW 5.45.020 had they been offered into evidence.”<sup>62</sup>

---

<sup>58</sup> *Rutherford*, 66 Wn.2d at 855.

<sup>59</sup> 30 Wn. App. 313, 633 P.2d 933 (1981).

<sup>60</sup> *Ecklund*, 30 Wn. App. at 317.

<sup>61</sup> *Ecklund*, 30 Wn. App. at 317.

<sup>62</sup> *Ecklund*, 30 Wn. App. at 319 (emphasis added). *State v. Nation*, 110 Wn. App. 651, 41 P.3d 1204 (2002), *review denied*, 148 Wn.2d 1001 (2003), contains similar dictum. Although the question in *Nation* was the admissibility of an expert’s oral opinion, and not the admissibility of a business record, Division Three commented, based in part on *Ecklund*’s dictum, that if the question were the admissibility of a business record, the record it was hypothesizing would not be admissible. *Nation*, 110 Wn. App. at 665-66.

Together, these cases allow a laboratory employee to relate his or her personal knowledge of how the lab generally conducts its tests, and the trial court to infer that the particular tests in question were done in the same way.<sup>63</sup> These cases also show that testing by a state laboratory is sometimes done in the regular course of the laboratory's business, and not solely in anticipation of litigation.

In this case, the trial court had discretion to infer from Dr. Logan's testimony that he had personal knowledge of the way in which the lab generally conducted its tests, and that Weiss, an employee of the state lab, conducted her tests in accordance with those procedures. The trial court had discretion to infer from evidence showing that Weiss conducted her tests while the fire was thought to be accidental, and more than two years before any criminal suspicion arose, that Weiss was not acting in anticipation of litigation. It is undisputed that Weiss' report was a business record, that she was working under a business duty to her employer when she prepared it, and that she was describing an act, condition or event at or near the time of its occurrence. The trial court had discretion to conclude that the sources of information, method and time of preparation were trustworthy. Accordingly, we hold that all the requirements of RCW 5.45.020 had been met, and that Exhibit 323 was properly admitted.

B.

The next question is whether the admission of Weiss' report under RCW 5.45.020 violated Hachenev's Sixth Amendment right to confront the witnesses against him. In general, the Sixth Amendment insures that every accused shall enjoy the right to confront the witnesses

---

<sup>63</sup> This same idea is embodied in ER 406.

against him. In *Crawford v. Washington*, the United States Supreme Court held that the Sixth Amendment's confrontation clause applies only when a witness' statement is "testimonial."<sup>64</sup> The Court declined "to spell out a comprehensive definition of 'testimonial,'" but it said that the term at least applies "to prior testimony at a preliminary hearing, before a grand jury, or at a former trial; and to police interrogations."<sup>65</sup> The Court also said that the term does not apply to most of the common law's hearsay exceptions— "for example, business records or statements in furtherance of a conspiracy."<sup>66</sup>

Assuming without holding that an employee of Washington's toxicology laboratory can sometimes make a "testimonial" statement within the meaning of *Crawford*, Weiss did not do so here. She made her statements while she, the investigating officers, and the medical examiner all thought the fire was accidental. She made her statements more than two years before any criminal suspicion arose and before any criminal investigation was started. As she was merely performing her duty to her employer in the course of the lab's regular routine, her report was not "testimonial," and its admission did not violate Hachenev's right to confront witnesses.

C.

We do not overlook Hachenev's argument that Weiss' lab report did not have "sufficient guarantees of trustworthiness with regard to chain of custody"<sup>67</sup> on the blood and lung-tissue

---

<sup>64</sup> *Crawford*, 541 U.S. at 51.

<sup>65</sup> *Crawford*, 541 U.S. at 68.

<sup>66</sup> *Crawford*, 541 U.S. at 56.

<sup>67</sup> Br. of Appellant at 3.

samples. When an item is offered as an exhibit in court, or when it is merely referred to in a business record, the chain of custody need not be perfect, though it must be sufficient.<sup>68</sup> The record in this case shows that Dr. Lacsina took blood and lung-tissue samples during the autopsy;<sup>69</sup> that a deputy coroner named Zink packaged the samples and, inferentially, delivered them to an employee of the state lab named Case; and that the samples were thereafter subject to the lab's internal procedures as described by Dr. Logan.<sup>70</sup> Like Lacsina and Weiss, Zink and Case were professionals acting under their own business duties to their employers. "[B]eyond mere speculation and innuendo, there is not the least indication in the evidence that the questioned exhibits were anything other than what they were represented to be or that they were contaminated in the course of their journey to the testing laboratory."<sup>71</sup> Even though Zink and

---

<sup>68</sup> ER 901(a) ("requirement of authentication or identification as a condition precedent to admissibility is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims"); *United States v. Smith*, 308 F.3d 726, 739 (7th Cir. 2002) (perfect chain of custody is not prerequisite to admission); *United States v. Humphrey*, 208 F.3d 1190, 1205 (10th Cir. 2000) (chain of custody need not be perfect); *United States v. Lott*, 854 F.2d 244, 250 (7th Cir. 1988) ("government need not prove a perfect chain of custody for evidence to be admitted at trial"); *State v. Campbell*, 103 Wn.2d 1, 21, 691 P.2d 929 (1984), cert. denied, 471 U.S. 1094 (1985); *State v. Roy*, 126 Wn. App. 124, 130, 107 P.3d 750 (2005); *State v. Roche*, 114 Wn. App. 424, 436, 59 P.3d 682 (2002); *State v. Picard*, 90 Wn. App. 890, 897, 954 P.2d 336, review denied, 136 Wn.2d 1021 (1998); *State v. DeCuir*, 19 Wn. App. 130, 135, 574 P.2d 397 (1978); *State v. McGinley*, 18 Wn. App. 862, 866-67, 573 P.2d 30 (1977).

<sup>69</sup> The record does not show, however, that the blood or tissue samples were ever marked for identification or offered as exhibits.

<sup>70</sup> See, e.g., RP at 1535.

<sup>71</sup> *State v. Boehme*, 71 Wn.2d 621, 638, 430 P.2d 527 (1967), cert. denied, 390 U.S. 1013 (1968).

Case did not testify, the trial court had discretion to infer they acted reliably and trustworthily,<sup>72</sup> leaving any defect for the parties to argue to the jury as a matter of weight.

XI.

Hacheny argues that the State tardily disclosed Krueger as an expert witness, that the trial court was required to exclude his testimony, and that the trial court erred by not doing that. A trial court has broad discretion when ruling on a discovery violation, and we review its ruling only for abuse of that discretion.<sup>73</sup>

Until about a week before trial, the State did not know that the propane canisters had been manufactured by Garrett rather than Coleman. After discovering that fact and finding that Garrett's active employees were unwilling to testify, the State located Krueger, a retired Garrett employee. The State disclosed Krueger's identity and summarized his testimony as soon as it knew about him. The trial court offered a continuance to give Hacheny time to prepare, but Hacheny declined. The trial court had discretion to allow Krueger to testify, and it did not abuse that discretion by ruling that he could.

XII.

Citing *State v. Bokien*<sup>74</sup> and *Handshy v. Nolte Petroleum Co.*,<sup>75</sup> Hacheny argues that the

---

<sup>72</sup> *Kreck*, 86 Wn.2d at 118-19; *Boehme*, 71 Wn.2d at 638; *Rutherford*, 66 Wn.2d at 855.

<sup>73</sup> *State v. Williams*, 96 Wn.2d 215, 221, 634 P.2d 868 (1981).

<sup>74</sup> 14 Wash. 403, 44 P. 889 (1896).

<sup>75</sup> 421 S.W.2d 198 (Mo. 1967).

trial court erred by allowing the prosecutor to ask during voir dire: “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?”<sup>76</sup>

A trial court has broad discretion in determining the scope and extent of voir dire.<sup>77</sup> “Absent an abuse of discretion and a showing that the accused’s rights have been substantially prejudiced thereby, the trial judge’s ruling as to the scope and content of voir dire will not be disturbed on appeal.”<sup>78</sup>

*Bokien* does not support Hachenev’s position. It held that the trial court had discretion to reject such a question, a proposition not involved here. It did not hold that the trial court lacked discretion to allow such a question, as Hachenev now asserts.

Nor does *Handshy* support Hachenev’s position. Although the question asked there was similar to the one asked here— “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?”<sup>79</sup>—the court held that it did not warrant reversal, a conclusion with which we agree. The question asked here called for an answer so obvious as to be virtually meaningless, and we cannot say that the trial court abused its discretion by allowing it.

---

<sup>76</sup> Report of Proceedings: Voir Dire at 356.

<sup>77</sup> *State v. Davis*, 141 Wn.2d 798, 826, 10 P.3d 977 (2000); see also CrR 6.4(b).

<sup>78</sup> *State v. Frederiksen*, 40 Wn. App. 749, 752-53, 700 P.2d 369, review denied, 104 Wn.2d 1013 (1985).

<sup>79</sup> *Handshy*, 421 S.W.2d at 200.

XIII.

Hachenev argues that the trial court erred by allowing Scott Nickell and Allison LeGedre to testify that Sandra Glass had told them, outside of court, that Hachenev had told her that Hachenev had killed Dawn. The State responds that Hachenev implied during his cross-examination of Glass that she was fabricating her story in exchange for immunity from prosecution, and thus that her prior statements were admissible under ER 801(d)(1)(ii).

According to ER 801(d)(1)(ii), a prior consistent statement is not hearsay if the declarant testifies at trial and the statement is relevant "to rebut an express or implied charge against the declarant of recent fabrication or improper influence or motive." To rebut such a charge, a statement must be made *before* the charge.<sup>80</sup> Thus, the questions here are whether Hachenev expressly or impliedly charged Glass with fabrication, and whether the fabrication was "recent" because it came after the offered statement.

Hachenev elicited from Glass that when she met with law enforcement officials, the first thing she did was "negotiate[] this immunity agreement" that gave her "absolute immunity from prosecution for anything [she] might have told the investigator's throughout this investigation."<sup>81</sup> A motive to fabricate arguably arose at that time, and Glass' statements to Nickell and LeGedre were made before that time. Accordingly, the trial court properly admitted Nickell's and LeGedre's testimony concerning Glass's prior statement.

---

<sup>80</sup> *Tome v. United States*, 513 U.S. 150, 157, 115 S. Ct. 696, 130 L. Ed. 2d 574 (1995).

<sup>81</sup> RP at 2368-69.

XIV.

Hachenev argues that the trial court erred by refusing to allow Hachenev to ask Glass about Nickell's marital status at the time Nickell and Glass began a sexual relationship. The State responds that Nickell's marital status was irrelevant. Agreeing with the State and the trial court, we hold that Nickell's marital status long before trial was not relevant.

XV.

Pro se, Hachenev makes two assertions regarding preservation of the blood and lung tissue samples. First, he claims that the State failed to prove that the samples were preserved in accordance with WAC 448-14-020(3)(b). By its terms, however, WAC 448-14-020(3)(b) applies to blood *alcohol* analysis, a matter not relevant here. Second, he claims that the State failed to prove that the blood and tissue samples were properly collected, stored, and tested. As discussed in Section X, however, Dr. Logan's testimony regarding the state laboratory's general procedures for collecting, storing, and testing blood and tissue provided a basis to reasonably infer that the samples in issue here were handled in the same way.

XVI.

Hachenev contends that the trial court erred "by allowing the State to present volumes of phone records and summary charts that were not authenticated."<sup>82</sup> ER 901(a) provides that "[t]he requirement of authentication or identification . . . is satisfied by evidence sufficient to

---

<sup>82</sup> Appellant's Statement of Additional Grounds (SAG) at 4.

support a finding that the matter in question is what its proponent claims.”<sup>83</sup> At trial, the State called Horacio Delgado, the manager of Qwest’s business office. He identified the records and explained how they had been maintained. This was enough to support inferences that the records were what they purported to be and that the records had not been altered. Hence, it was also sufficient to authenticate under ER 901.<sup>84</sup>

## XVII.

Hachenev claims that summary charts were improperly authenticated and that Richard Kitchen, the investigator who authenticated them, was improperly allowed to testify as an expert. Under ER 1006, “[t]he contents of voluminous writings, recordings, or photographs which cannot conveniently be examined in court may be presented in the form of a chart, summary, or calculation.” The proponent must show that (1) the original materials are voluminous and an in-court examination would be inconvenient,<sup>85</sup> (2) the originals are authentic and the summary accurate,<sup>86</sup> (3) the underlying materials would be admissible as evidence,<sup>87</sup> and (4) the originals

---

<sup>83</sup> See also *State v. Payne*, 117 Wn. App. 99, 106, 69 P.3d 889 (2003) (ER 901 satisfied by “sufficient proof to permit a reasonable juror to find in favor of authenticity or identification”), review denied, 150 Wn.2d 1028 (2004).

<sup>84</sup> *Campbell*, 103 Wn.2d at 21.

<sup>85</sup> *State v. Barnes*, 85 Wn. App. 638, 662-63, 932 P.2d 669, review denied, 133 Wn.2d 1021 (1997).

<sup>86</sup> 5C Karl B. Tegland, WASHINGTON PRACTICE: EVIDENCE LAW AND PRACTICE § 1006.3, at 271 (4th ed. 1999) (citing *Needham v. White Labs., Inc.*, 639 F.2d 394 (7th Cir.), cert. denied, 454 U.S. 927, (1981); *United States v. Scales*, 594 F.2d 558 (6th Cir.), cert. denied, 441 U.S. 946 (1979)).

<sup>87</sup> *State v. Kane*, 23 Wn. App. 107, 110-11, 594 P.2d 1357 (1979).

or duplicates have been made available for examination and copying by the other parties.<sup>88</sup>

These factors were met here. At trial, Hacheney did not object to factor one or factor four. Factor two was met because Delgado properly authenticated the phone records and Kitchen properly explained how he had prepared the summary charts. Factor three was met because the charts were relevant and, if hearsay, within the business records exception to the hearsay rule.

Nor did Kitchen improperly testify as an expert. "Every opinion must be based on knowledge."<sup>89</sup> Lay opinion must be based on personal knowledge and expert opinion must be based on scientific, technical, or specialized knowledge.<sup>90</sup> Kitchen merely explained, based on his personal knowledge, how he had collected the relevant phone records and summarized them into the charts that the State then offered. He did not give expert testimony, and Hacheney's objection on that ground was correctly overruled.

#### XVIII.

Hacheney argues that the trial court erred by permitting the jury to have Kitchen's summary charts in the jury room during deliberations. Based on *State v. Lord*,<sup>91</sup> we hold that the trial court did not err.

---

<sup>88</sup> ER 1006.

<sup>89</sup> *State v. Dolan*, 118 Wn. App. 323, 329, 73 P.3d 1011 (2003); *State v. Kunze*, 97 Wn. App. 832, 850, 988 P.2d 977 (1999), *review denied*, 140 Wn.2d 1022 (2000).

<sup>90</sup> *Dolan*, 118 Wn. App. at 329; *Kunze*, 97 Wn. App. at 850.

<sup>91</sup> 117 Wn.2d 829, 856 n.5, 822 P.2d 177 (1991), *cert. denied*, 506 U.S. 856 (1992).

XIX.

Hachenev argues that the trial court erred by not sending to the jury room CD-ROMs with computerized simulations of the fire. CrR 6.15(e) provides that the “jury shall take with it . . . all exhibits received in evidence.” Notwithstanding this wording, however, the decision to allow exhibits to go into the jury room lies within the sound discretion of the trial court.<sup>92</sup> Here, the trial court said it would address the jury’s request to play the CD-ROMs if and when one was ever made. No request was ever made, and we perceive no abuse of discretion.

XX.

Hachenev argues that the trial court erred because the bailiff communicated with the jury in two instances. During the trial, Juror No. 8 sent the court a note asking (1) why one of the State’s witnesses had been permitted to be present in court during another witness’ testimony; and (2) why one of the State’s witnesses was allowed to testify over a hearsay objection when other witnesses were not. After discussing the note with the parties, the trial court decided not to respond and instructed the bailiff to inform Juror No. 8.

During deliberations, the same juror, No. 8, asked for an exhibit list. The parties agreed on a list that the bailiff gave to the jury. The trial court stated that “[w]hen the jury was handing [the bailiff] their earlier inquiry, they also said something to the effect to her, ‘Do we have all of the admitted exhibits?’ And she said, ‘You have everything you’re supposed to have,’ and I assume that was the end of their inquiry.”<sup>93</sup>

---

<sup>92</sup> *State v. Frazier*, 99 Wn.2d 180, 189, 661 P.2d 126 (1983); *State v. Strandy*, 49 Wn. App. 537, 542, 745 P.2d 43 (1987), *review denied*, 109 Wn.2d 1027 (1988).

<sup>93</sup> RP at 5190.

“A bailiff is forbidden to communicate with the jury during deliberations except to inquire if it has reached a verdict, or to make innocuous or neutral statements.”<sup>94</sup> If a bailiff improperly communicates, however, the error will be deemed harmless if the record demonstrates the absence of prejudice beyond a reasonable doubt.<sup>95</sup> Assuming without finding error here, the record plainly shows the absence of prejudice beyond a reasonable doubt.<sup>96</sup> Hence, this argument fails.

XXI.

Hacheney argues that the trial court erred by admitting a photo of a plastic bag and testimony concerning its contents. As he did not object at trial, he has not preserved this issue for review.<sup>97</sup>

XXII.

Hacheney argues that the trial court erred by permitting Robert Bily, Robert Smith, Ron McClung, and Carol McClung to testify about a church meeting held several months after Dawn’s death. Earlier in the trial, however, he had suggested that Bily was so biased against him as to cause him to leave the church. The trial court had discretion to allow the State to explain

---

<sup>94</sup> *State v. Johnson*, 125 Wn. App. 443, 460, 105 P.3d 85 (2005).

<sup>95</sup> *State v. Bourgeois*, 133 Wn.2d 389, 407, 945 P.2d 1120 (1997); *State v. Caliguri*, 99 Wn.2d 501, 508-09, 664 P.2d 466 (1983).

<sup>96</sup> *State v. Johnson*, 56 Wn.2d 700, 709, 355 P.2d 13 (1960), *cert. denied*, 366 U.S. 934 (1961).

<sup>97</sup> *See* RAP 2.5(a).

Bily's bias, and the court did not abuse that discretion here.<sup>98</sup>

XXIII.

Hachenev argues that the trial court should not have admitted an in-life photo of Dawn because the defense had offered to stipulate to her identity. A single in-life photograph is not inherently prejudicial, "especially when the jury also sees after death pictures of the victim's body."<sup>99</sup> Nor must the State accept a defendant's offer to stipulate to the identity of the victim.<sup>100</sup> Given that the jury in this case saw several "after death" pictures, and that the trial court admitted a single four-by-six inch in-life picture, we perceive no abuse its discretion.

XXIV.

Hachenev argues that the trial court erred by allowing Sandra Glass to speculate about a "prophecy" that she had discussed with Hachenev. Glass testified that about a week before the fire, while she and Hachenev were praying in the sanctuary of their church, she thought, "Your hands are no longer tied."<sup>101</sup> She related her thought to Hachenev, whose non-verbal response

---

<sup>98</sup> *State v. Gefeller*, 76 Wn.2d 449, 455, 458 P.2d 17 (1969) ("when a party opens up a subject of inquiry on direct or cross-examination, he contemplates that the rules will permit cross-examination or redirect examination, as the case may be, within the scope of the examination in which the subject matter was first introduced"); *Ang v. Martin*, 118 Wn. App. 553, 562, 76 P.3d 787 (2003), *aff'd*, \_\_\_ Wn.2d \_\_\_, 114 P.3d 637 (2005); *State v. Horton*, 116 Wn. App. 909, 917-18 n.26, 68 P.3d 1145 (2003).

<sup>99</sup> *State v. Brett*, 126 Wn.2d 136, 159, 892 P.2d 29 (1995) (quotations omitted), *cert. denied*, 516 U.S. 1121 (1996).

<sup>100</sup> *Brett*, 126 Wn.2d at 159.

<sup>101</sup> RP at 2298.

was "Accepting. Okay."<sup>102</sup>

ER 701 permits lay opinion when rationally based on the witness' perception and helpful to a clear understanding of the testimony or issue.<sup>103</sup> These criteria were met here, and the trial court did not err.

XXV.

Hacheny contends that his Sixth Amendment right to confront witnesses was violated because the trial court prevented him from questioning Glass about a "prophecy" in which God spoke to her about killing her own husband. By virtue of the Sixth Amendment, an accused has a right to cross-examine witnesses "to elicit facts which tend to show bias, prejudice or interest . . . but the scope or extent of such cross-examination is within the discretion of the trial court."<sup>104</sup> A trial court can reject or limit cross examination if the circumstances only remotely tend to show the witness' bias or prejudice.<sup>105</sup>

Before trial, Glass disclosed that she had received a "prophecy" that her husband was going to die, as well as a "prophecy" about a specific way to kill him. She received the first prophecy before Dawn's death, and the second one after Dawn's death. The trial court permitted cross-examination on the first but not the second, and Hacheny's counsel agreed to "leave [the

---

<sup>102</sup> RP at 2299.

<sup>103</sup> See also *State v. Stenson*, 132 Wn.2d 668, 724, 940 P.2d 1239 (1997) (citing *State v. Craven*, 69 Wn. App. 581, 586, 849 P.2d 681, review denied, 122 Wn.2d 1019 (1993)), cert. denied, 523 U.S. 1008 (1998); *State v. Day*, 51 Wn. App. 544, 552, 754 P.2d 1021, review denied, 111 Wn.2d 1016 (1988).

<sup>104</sup> *State v. Roberts*, 25 Wn. App. 830, 834, 611 P.2d 1297 (1980).

<sup>105</sup> *State v. Kilgore*, 107 Wn. App. 160, 185, 26 P.3d 308 (2001), aff'd, 147 Wn.2d 288 (2002).

second] out.”<sup>106</sup>

The second “prophecy” was minor and inconsequential, given that Glass was fully cross-examined about her marriage, her marital problems, and various other “thoughts” and “prophecies” in which she visualized her husband’s death. Its exclusion did not affect the fairness of the trial, and the trial court did not err.

XXVI.

Hachenev argues that the State did not establish the corpus delicti of homicide or arson. To prove corpus delicti, the State must produce evidence other than the accused’s confession that is sufficient to show that a criminal act occurred through human agency.<sup>107</sup> Those requirements were amply met here with respect to both murder and arson, and there was no error.

XXVII.

Hachenev argues that the trial court erred by not giving a limiting instruction, *sua sponte*, on how the jury could properly use the State’s ER 404(b) evidence. The trial court gave a limiting instruction, but even if it had not, ER 105 expressly provides that the trial court shall give a limiting instruction “upon request” by a party. The court did not err.

XXVIII.

Hachenev argues that the trial court erred by permitting Scott Roberts, a fire investigator employed by an insurer, to testify to autopsy results that were not within the scope of his expertise. But rather than testifying about autopsy results, Roberts testified that (1) he disagreed

---

<sup>106</sup> RP at 2157.

<sup>107</sup> *State v. Pineda*, 99 Wn. App. 65, 76-77, 992 P.2d 525 (2000); *State v. Flowers*, 99 Wn. App. 57, 59-60, 991 P.2d 1206 (2000).

with the part of the autopsy report that concluded Dawn died as result of a flash fire because, in Roberts' opinion, there was no evidence of a flash fire; and (2) based on his prior experience and knowledge about propane, the autopsy report's findings regarding the absence of propane were significant because "there should have been [propane] present," considering the distance between the propane canisters and a heater.<sup>108</sup> The trial court did not err.

XXIX.

Hachenev asserts that the prosecutor committed misconduct in opening statement and closing arguments. Absent a timely objection, a defendant's challenge to an allegedly improper remark by opposing counsel is waived unless the remark was "so flagrant and ill-intentioned that it evinces an enduring and resulting prejudice that could not have been neutralized by an admonition to the jury."<sup>109</sup> "The absence of a motion for mistrial at the time of the argument strongly suggests to a court that the argument or event in question did not appear critically prejudicial to an appellant in the context of the trial."<sup>110</sup> We review misconduct claims in the context of the entire argument, the issues in the case, the evidence addressed in the argument, and the instructions given.<sup>111</sup>

Hachenev argues that the prosecutor made "numerous [] inflammatory and erroneous

---

<sup>108</sup> RP at 3588.

<sup>109</sup> *State v. Finch*, 137 Wn.2d 792, 839, 975 P.2d 967 (quoting *Stenson*, 132 Wn.2d at 719), *cert. denied*, 528 U.S. 922 (1999).

<sup>110</sup> *State v. Swan*, 114 Wn.2d 613, 661, 790 P.2d 610 (1990), *cert. denied*, 498 U.S. 1046 (1991).

<sup>111</sup> *State v. Russell*, 125 Wn.2d 24, 85-86, 882 P.2d 747 (1994), *cert. denied*, 514 U.S. 1129 (1995).

statements during opening argument which were never testified to.”<sup>112</sup> A prosecutor is permitted to outline “anticipated material evidence” in his or her opening statement so long he or she believes in good faith that such testimony will be forthcoming.<sup>113</sup> Here, Hacheny has not shown that the prosecutor did not have a good faith belief that the described testimony would be produced.

Hacheny argues that the prosecutor misstated scientific and medical facts in opening and closing arguments. Hacheny did not object, and the statements are supported by the record.

Hacheny argues that the prosecutor injected inadmissible testimony when, in closing, he asserted that Nickell told Hacheny on the phone, “You better not call Sandy Glass, and you better go to the authorities. I know what you did.”<sup>114</sup> Hacheny did not object, and those two sentences were not so flagrant and ill-intentioned that a curative instruction would not have been effective.

Hacheny argues that the prosecutor misrepresented the time at which Hacheny went hunting with friends on the day of fire, and also whether Glass had received a copy of the autopsy report. Hacheny’s counsel objected, the trial court gave a curative instruction, and the problem was so minor that the instruction was necessarily effective.

Hacheny argues that the prosecutor made remarks during rebuttal that were not really rebuttal, and that the prosecutor personally vouched for Glass’ credibility. In our view, however,

---

<sup>112</sup> SAG at 37 (emphasis omitted).

<sup>113</sup> *Campbell*, 103 Wn.2d at 15-16; *State v. Grisby*, 97 Wn.2d 493, 499, 647 P.2d 6 (1982), *cert. denied*, 459 U.S. 1211 (1983).

<sup>114</sup> RP at 5170.

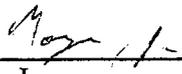
No. 29965-8-II

the prosecutor was rebutting the arguments concerning Glass' credibility that defense counsel had advanced in the defense closing argument.

Arguments not discussed are meritless or need not be reached.

Affirmed.

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

  
\_\_\_\_\_  
Morgan, J.

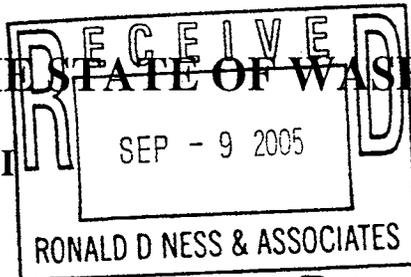
We concur:

  
\_\_\_\_\_  
Quinn-Brintnall, C.J.

  
\_\_\_\_\_  
Van Deren, A.C.J.

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II



STATE OF WASHINGTON,  
Respondent,  
v.  
NICHOLAS D. HACHENEY,  
Appellant.

No. 29965-8-II

ORDER DENYING MOTION  
RECONSIDER

FILED  
COURT OF APPEALS  
DIVISION II  
05 SEP - 8 AM 9:04  
STATE OF WASHINGTON  
BY [Signature] DEPUTY

APPELLANT moves for reconsideration of the court's decision terminating review, filed August 3, 2005. Upon consideration, the Court denies the motion. Accordingly, it is

SO ORDERED.

PANEL: Jj. Quinn-Brintnall, Morgan, Van Deren

DATED this 8<sup>th</sup> day of September, 2005.

FOR THE COURT:

[Signature]  
CHIEF JUDGE

Thomas E. Weaver  
Attorney at Law  
PO Box 1056  
Bremerton, WA, 98337-0221

John L. Cross  
Ness & Associates  
420 Cline Ave  
Port Orchard, WA, 98366-4698

Randall Avery Sutton  
Kitsap Co Dep Pros Atty  
614 Division St  
Port Orchard, WA, 98366-4681

Appendix B  
→

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

STATE OF WASHINGTON, )  
 )  
 Respondent, )  
 vs. )  
 )  
 NICHOLAS D. HACKENEY, )  
 )  
 Appellant. )  
 \_\_\_\_\_ )

NO. 29965-8-II

AFFIDAVIT OF MAILING

FILED  
COURT OF APPEALS  
DIVISION II  
05 OCT -7 AM 11:26  
STATE OF WASHINGTON  
BY L. DEPUTY

STATE OF WASHINGTON )  
 : s.  
 COUNTY OF KITSAP )

The undersigned, being first duly sworn on oath, deposes and states:

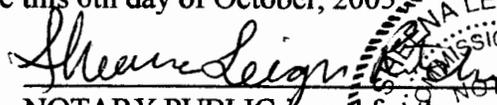
That on the 6th day of October, 2005, affiant deposited in the mails of the United States of America, a properly stamped and addressed envelope directed to:

Nicholas D. Hackeney #851884  
MCC-WSRU C-402  
P.O. Box 777  
Monroe, WA 98272

containing Petition For Review to the Supreme Court of the State of Washington.

  
LINDA L. MALCOM

SUBSCRIBED AND SWORN to before me this 6th day of October, 2005

  
NOTARY PUBLIC in and for the State of Washington.  
My Commission Expires: 11/29/07  




SIGNED AND SWORN to before me this 6<sup>th</sup> day of October, 2005

Sheena Leigh Ritchie  
NOTARY PUBLIC in and for the State  
of Washington. My commission  
expires: 11/29/07

