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NO. 53570-6-I

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

STATE OF WASHINGTON,

Respondent,

v.

DARRELL EVERYBODYTALKSABOUT,

Appellant.

APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE PARIS KALLAS

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BRIEF OF RESPONDENT

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A. ISSUES PRESENTED

1. An interview of an incarcerated defendant is not “custodial” in the Miranda sense unless there is some additional restraint on the defendant beyond that inherent in his incarceration. Here, the presentence interview of the defendant by Community Corrections Officer (CCO) Diane Navicky took place in an attorney/client interview room at the King County Jail. While the door to the room was locked, the defendant had only to press a buzzer to be let out of the room. The defendant in fact chose to end the interview, and exited the room at a time of his own choosing; there was no attempt by any official to keep him in the room, or to return him to the room to complete the interview. Did the trial court correctly find that the interview was not “custodial” and that Miranda warnings were accordingly not required?

2. A question asked of a defendant in the course of a presentence interview is not “interrogation” for Miranda purposes unless the CCO should have known that the question would provoke an incriminating response, or the question is not necessary to prepare the presentence report. The defendant had previously denied any knowledge of the murder. CCO Navicky did not confront the defendant with evidence of his guilt, but simply invited him to give his version of the events in question; Navicky testified that this question was a consistent

part of the presentence interview. Did the trial court correctly find that Navicky did not “interrogate” the defendant?

3. A defendant’s Sixth Amendment right to counsel is not violated, even where he makes an incriminating statement in a presentence interview, unless the CCO either “knowingly circumvented” the defendant’s right to counsel or “deliberately elicited” the incriminating statement. CCO Navicky conducted a presentence interview of the defendant pursuant to a court order. Given that the defendant had previously denied any knowledge of the murder, Navicky could not reasonably have expected him to incriminate himself when she invited him to give his version of events for the court to consider at sentencing. Did the trial court correctly find that Navicky neither “knowingly circumvented” the defendant’s right to counsel nor “deliberately elicited” the incriminating statement?

4. The trial court retains the power to place some limits on the defendant’s cross-examination of the State’s witnesses. The court below precluded the defendant from inquiring into prison informant Vincent Rain’s status as a sex offender, his specific prison infractions that did not involve dishonesty, his specific probation violations, his conviction for assaulting his wife, and his request for a lawyer and to exercise his Fifth Amendment privilege; the court found that these specific topics were not

relevant to Rain's credibility. The court allowed the defendant to question Rain about the benefits he received from the State, including a transfer to a prison in Colorado at his request; about his lengthy history of prison infractions that would have prevented him from accomplishing the transfer on his own; about his specific infraction for possession of stolen property; about his poor adjustment to probation and his requests to the State for help in getting his conditions modified; and about any lack of cooperation with the defense. Did the trial court properly exercise its discretion in limiting the cross-examination of Rain to areas that were relevant to his bias and credibility?

5. A trial court should grant a motion for a mistrial only when the defendant has been so prejudiced that nothing short of a new trial can ensure that he will be fairly tried. After Yolanda Lopez had completed direct examination, Detective Ramirez told her that he was unhappy she had decided to testify inconsistently with what she had previously told police. The trial court found that this was a violation of its order excluding witnesses from the courtroom, and allowed the defense to bring out the details of the violation in questioning Ramirez before the jury. The defense made heavy use of this in closing argument, repeatedly telling the jury that Ramirez had violated the court's order and had intimidated the

witness. Did the trial court properly exercise its discretion in fashioning a remedy for the violation that preserved the defendant's right to a fair trial?

6. Dismissal of a prosecution under CrR 8.3(b) for governmental misconduct is appropriate only where there has been prejudice to the rights of the accused that materially affects his right to a fair trial. The State had cooperated in a subpoena duces tecum issued by the defense for Vincent Rain's prison file. The file contained correspondence concerning the State's agreement with Rain that the defense argued had been improperly withheld. The defense obtained the file five months before the start of trial, and in plenty of time to use it in interviewing Rain. Did the trial court properly exercise its discretion in denying the defendant's motion to dismiss for the State's alleged failure to provide discovery?

7. The State's failure to preserve evidence requires dismissal of the charges only if the evidence is both material and exculpatory. Failure to preserve evidence that is only *potentially* useful to the defendant requires dismissal only if the defendant can show bad faith on the part of the police. While Detective Ramirez recycled the audiotape of Vincent Rain's statement, the defendant had a transcript of that statement. The State kept clothing of a one-time potential suspect for more than a year after the defendant's first conviction; the defense never took the

opportunity to examine it during that time. Did the trial court properly find that these items of evidence were only potentially useful to the defense, and that there was no evidence that the State had acted in bad faith in failing to preserve them?

B. STATEMENT OF THE CASE

1. PROCEDURAL FACTS

Defendant Darrell Everybodytalksabout and codefendant Phillip Lopez were charged jointly with Murder in the First Degree in the death of Rigel Jones on February 3, 1996. The State alleged that the pair stabbed and killed Jones in the course of robbing him. The two were tried jointly before the Honorable Larry Jordan. Lopez was convicted as charged, and a mistrial was declared as to Everybodytalksabout. State v. Everybodytalksabout, 145 Wn.2d 456, 458-60, 39 P.3d 294 (2002).¹ Since that time, two juries have found Everybodytalksabout guilty of this murder beyond a reasonable doubt.

This case has a somewhat unusual procedural history. In the midst of the first trial, the State discovered that the purported eyewitness, Richard Prevost, could not have been present when Rigel Jones was murdered, and had accordingly committed perjury when he testified. The

¹ Additional factual detail may be found in the unpublished opinion of the Court of Appeals in this case, No. 41409-7-I (Nov. 13, 2000), 2000 WL 1701322.

State immediately informed the court and defense counsel, and a mistrial was declared as to Everybodytalksabout. Everybodytalksabout, 145 Wn.2d at 460, 476-78.

The State proceeded against Everybodytalksabout in a second jury trial, before the Honorable Donald Haley. Everybodytalksabout was convicted of Murder in the First Degree while armed with a deadly weapon. Everybodytalksabout, 145 Wn.2d at 460.

Everybodytalksabout's conviction was affirmed by the Court of Appeals, but the Washington Supreme Court reversed. The Supreme Court concluded that the trial court had erred in admitting the testimony of a police officer that, in conversations with Lopez and Everybodytalksabout in the Pioneer Square area, the officer had noticed that Everybodytalksabout "generally carried the conversation," while Lopez stood back or walked away. Everybodytalksabout, 145 Wn.2d at 462-73. The court remanded the case for a new trial. Id. at 482.

Everybodytalksabout's most recent trial was held before the Honorable Paris Kallas. He was again found guilty beyond a reasonable doubt of Murder in the First Degree, while armed with a deadly weapon. CP 834-35.

2. SUBSTANTIVE FACTS

Rigel Jones was 23 years old on February 3-4, 1996, the night of his murder. 19RP 59, 67. He worked as a trainman with the Burlington Northern Railroad. 19RP 47-49. A relatively new employee, his hours were irregular; the railroad would contact him for work via a pager, which he kept with him at all times. 19RP 49-50; 20RP 16-17, 100.

On the night of his murder, Rigel had been out on a date with Jessica Green.² Rigel had met Jessica while visiting New Orleans over the 1995-96 New Year's holiday. 20RP 20-21, 84-85. Rigel and Jessica stayed in touch after he returned to Seattle, and on Friday evening, February 2, 1996, she arrived in Seattle for a visit. 19RP 60; 20RP 21-23, 87-89. Rigel at that time was living with Andy and Sue Lind at their home in Kirkland. 20RP 14-16. On Saturday, February 3, Rigel and Jessica spent the day sightseeing in Seattle, and brought home food to cook dinner with the Linds. 19RP 60-61; 20RP 23, 89-91.

Sometime around 10:00 p.m., the two couples decided to go to Pioneer Square. 20RP 24-25, 29, 92-93. It was a typical Seattle February evening, rainy and cold. 20RP 26, 101. Rigel wore a new jacket that he had bought for himself on the previous Christmas. 19RP 55-59; 20RP

² Jessica had married since testifying at the previous trials in this case, and appeared in this trial under her married name, Scott. 20RP 82.

27-28, 107-08. Rigel and Jessica drove to Seattle in Rigel's red Toyota pickup truck, which had big tires and was higher than the average pickup; the Linds drove separately. 19RP 52-54; 20RP 29-30, 93. When they arrived in Seattle, Rigel and Jessica parked under the viaduct at Yesler and Alaskan Way; the Linds parked a few blocks north on First Avenue. 20RP 30-31.

The two couples met up at the J&M Café in Pioneer Square. 20RP 31-32, 93-95. Rigel and Jessica had several rounds of drinks; Rigel paid in cash. 20RP 33-35, 95-96, 99. They left the J&M after several hours, and the Linds headed home. 20RP 36. Rigel and Jessica stayed, wanting to continue the evening with some dancing. 20RP 36. They went to a few more night spots, and had at least one more drink. 20RP 98-99.

As they wrapped up their evening and headed toward the truck, the streets were still crowded and the bars were busy. 20RP 101. Jessica lingered for a moment, listening to a band; as she turned to suggest that they go inside, Jessica discovered that Rigel was no longer next to her. 20RP 102. She panicked – she had never been to Seattle before, she could not remember Rigel's phone number, and she did not know Andy and Sue's last name. 20RP 90, 102-04. As Jessica wandered the streets crying, two sailors who had missed the last ferry to Bremerton befriended her, and she joined them in getting a motel room for the night. 20RP

108-12. Eventually making her way back to Kirkland the next day, Jessica checked into a hotel, and called the police. 20RP 116-20. Detectives met Jessica at the hotel, and told her that Rigel had been killed. 20RP 121.

Samuel Franciscovich and Carl Olsen owned the Equinox Gallery and Theatre. 20RP 207, 210. On the night Rigel Jones was murdered, the gallery was holding an event that extended into the early hours of Sunday morning. 20RP 208. Olsen left the gallery a little before 4:00 a.m. to go to his car, which was parked in an adjacent lot. 20RP 210-14. Olsen returned in a panic, and asked Franciscovich to come outside with him. 20RP 214-15. Olsen led Franciscovich to a body lying face up in the parking lot next to a red pickup truck that was still running, with the driver's door open. 20RP 216-19. The man on the ground was wearing a shirt with an overshirt, and no jacket. 20RP 221. The man's face and neck were cold to the touch, but there was still some warmth in his body underneath his collar. The weather was "pretty cold," with a light rain. 20RP 224.

Lance Cannon, a paramedic for the Seattle Fire Department, arrived at the scene at 4:25 a.m. 22RP 8. A medic unit was already on the scene, performing CPR on a young white male lying at the back of a red pickup truck. 22RP 8-11. The man was clinically dead, without pulse or respiration. 22RP 10, 14. There wasn't a lot of blood visible, but stab

wounds on the man's chest led Cannon to suspect internal bleeding. 22RP 14. The man had no wallet, nor any identification. 22RP 15.

Dr. Norman Thiersch performed an autopsy on Rigel Jones's body. Rigel was 5'11" tall, and weighed 177 pounds. 21RP 13. The medical examiner's intake report listed no wallet or jewelry. 21RP 100. There were 15 areas of injury on Rigel's body. 21RP 18-19. Numerous injuries on his hands could be described as defensive wounds; they appeared to have occurred before his heart stopped beating. 21RP 22-25. Rigel had several injuries to his face that were also likely inflicted before his heart stopped beating. 21RP 28-31. There were two stab wounds to Rigel's chest, one of which was fatal. Both were inflicted with a single-edged blade. The fatal wound went through the sternum, which would have required significant force. 21RP 32-43. This wound caused blood to leak from the heart into the pericardium, the sac surrounding the heart. 21RP 44-45. Such a wound would not ordinarily be instantly fatal; the heart would gradually lose the ability to pump blood, and the injured person would lapse into unconsciousness at some point. 21RP 45-47, 100-02.

Seattle Police Detective Eugene Ramirez also responded to the murder scene. 25RP 159-60, 167. By that time, Rigel Jones's body was no longer there. 25RP 171. Police searched the pickup truck, but did not find Rigel's wallet, pager or jacket. 25RP 168-70; 26RP 75-79. When

Rigel's parents cleaned out his room in the Linds' home, they did not find his jacket, his pager, or any identification. 19RP 63-64; 26RP 77-79.

Yolanda Lopez ("Yolanda") also spent the evening of February 3 and the early morning hours of February 4 in the Pioneer Square area. Along with her longtime friend, Darrell Everybodytalksabout ("Diego"), and her boyfriend, Phillip Lopez ("Felipe"), Yolanda was drinking down on the waterfront. 24RP 70-76. Eventually, having run out of alcohol, they headed north toward downtown Seattle, walking under the Alaskan Way Viaduct. 24RP 76-78. They turned east up Yesler Way toward First Avenue to catch a bus, walking on the south side of the street. 24RP 78-79. Yolanda noticed a red truck in the parking lot; it was higher than a normal small truck.³ 24RP 79-80.

Yolanda saw a young man walking down Yesler, apparently headed toward the parking lot; he was tall with dark hair.⁴ 24RP 82-87. Yolanda, Diego and Felipe crossed the street. Diego walked toward the young man, and said, "What's up, homes?" 24RP 88-92, 96. Felipe told Yolanda to keep walking, and he went to join Diego. 24RP 88, 93-96.

³ Yolanda repeatedly claimed a lack of memory as to many of the events of that night. Thus, much of her testimony is based on her recorded testimony from the previous trial. This testimony was admitted as substantive evidence. 24RP 113-28; 25RP 6-9.

⁴ Yolanda identified a photograph of Rigel Jones as the young man she saw that night. 19RP 46; 24RP 87; Ex.1. She said that she recognized him because he had smiled at Diego. 24RP 154-55.

Yolanda heard loud talking. 24RP 97-99. When she turned to see if Felipe was coming, she saw that Felipe had the young man's arm and the three were wrestling around. 24RP 99-108. By the time Diego and Felipe caught up with her, Yolanda had already reached First and Yesler. Felipe had blood on his shirt, and his hair was messed up. Diego said, "Let's get out of here." Felipe took off his shirt and threw it away. 24RP 110-12, 130-34.

After waiting for a time at the bus stop, Diego said they had to get out of there, so they started walking. 24RP 135-36. The trio went to the OK Grocery on Pike Place to buy beer, but it was closed.⁵ 24RP 137-39. They went to the 7-11 on Fourth and Virginia. Diego and Felipe left Yolanda and returned with a bottle of beer and a bottle of "Mad Dog." 24RP 139-43. Diego gave Yolanda a few dollars to get home on the bus. 24RP 145. When Diego and Felipe got home later, Felipe told Yolanda that he had gotten into a fight with a white boy and "did him" pretty bad, and he didn't know if he killed him. 24RP 149-50.

The defendant did not testify at trial, nor did he present any evidence. See 28RP 39. However, a number of his statements were admitted through other witnesses. Detective Ramirez questioned the

⁵ In February 1996, the OK Grocery closed at 2:00 a.m. 27RP 137.

defendant on February 7, 1997, approximately a year after the murder of Rigel Jones. 26RP 95. After initially denying any knowledge of the murder, the defendant gave two taped statements to police. 26RP 96-103; Ex. 68, 69. He described a drug transaction in which Felipe was selling “weed” or “mota”⁶ for him. Ex. 68 at 2-3. According to the defendant, Felipe initially had trouble collecting payment from “the deceased.” Ex. 68 at 2. At the defendant’s insistence, Felipe went back across the street and returned with the defendant’s money and a jacket. Ex. 68 at 2-3. The defendant continued to profess no knowledge of any stabbing. Ex. 68 at 10.

Diane Navicky, an employee of the Department of Corrections (DOC), visited the defendant in the King County Jail to prepare an informational report after the first trial. 27RP 140-43. After talking about the defendant’s personal history and background for approximately 30-45 minutes, they came to the last part of the form, entitled “Defendant’s Version.” 27RP 144-46. The defendant told Navicky that he participated in the robbery, but he did not commit the murder. 27RP 146-47, 149, 151, 153.

⁶ “Mota” is a Spanish slang term for marijuana. 26RP 105.

Finally, while in prison, the defendant talked about the murder with a cellmate, Vincent Rain. 22RP 65-66. The defendant told Rain that he and Felipe, pretending to be selling drugs, planned to rob some guy. 22RP 67-68; 23RP 7. They got into an argument, and the defendant called for Felipe; while the defendant wrestled with the guy, Felipe came over and stabbed the guy. 22RP 68; 23RP 8. The defendant said that the guy started going weak and hit the ground. 22RP 68, 69. The defendant mentioned being in the guy's pickup truck, and he said they took a jacket. 22RP 68-69; 23RP 9.

During recreation time in the prison yard, the defendant would joke about the murder with Felipe, who was housed on the same tier with Rain and the defendant. 22RP 70; 23RP 10-13. The defendant would tease Felipe, saying "You killed him" and "It's your girlfriend." 23RP 11-13.

C. ARGUMENT

1. THE TRIAL COURT PROPERLY FOUND THAT THE DEFENDANT'S STATEMENTS TO CCO DIANE NAVICKY WERE OBTAINED WITHOUT VIOLATING THE DEFENDANT'S FIFTH OR SIXTH AMENDMENT RIGHTS.

The defendant contends that the admission at trial of statements he made in the course of a presentence interview at the King County Jail violated his Fifth Amendment protection against self-incrimination and his

Sixth Amendment right to the assistance of counsel. These claims should be rejected.

As to the Fifth Amendment claim, the trial court properly found that the voluntary presentence interview involved no additional restraint beyond that inherent in incarceration, and thus did not involve “custody” for purposes of the Miranda⁷ requirement. Moreover, because Diane Navicky had no reason to suspect that her invitation to the defendant to give his version of events would provoke an incriminating response, and because the invitation did not go beyond what was necessary to prepare the presentence report, the court properly found that there was no “interrogation” in the Miranda sense. With regard to the Sixth Amendment claim, the trial court properly found that Navicky, who viewed her role as a neutral one in which her responsibility was to the court that ordered the presentence report, neither deliberately elicited incriminating information from the defendant, nor knowingly circumvented his right to an attorney. The trial court’s rulings, based largely on its finding that Navicky was a highly credible witness, should be upheld in this appeal.

⁷ Miranda v. Arizona, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966).

a. Relevant Facts.

The State wished to offer statements made by the defendant to Community Corrections Officer (CCO) Diane Navicky during a presentence interview following the defendant's previous trial. Supp. CP ___ (sub #261, State's Trial Memorandum at 23); Supp. CP ___ (sub #264, State's Supplemental Trial Memorandum at 6-9). Navicky had written in her presentence report: "[H]e simply stated that he was not the one who murdered Rigel Jones. He did admit that he assisted in the robbery but would not comment any further. He said that he had been drinking at the time of the offense." Ex.1 at 4. The State requested a hearing pursuant to CrR 3.5. 9RP 153-54.

i. Testimony of Diane Navicky.

Diane Navicky testified in the CrR 3.5 hearing. 10RP 25-88. Navicky had worked in the DOC's presentence unit for 17 years, writing about 200 presentence reports per year. 10RP 25-26. By the time of her involvement in this case, she had gained the status of a lead officer, which carried supervisory responsibilities. This high-profile case was accordingly assigned to her. 10RP 27-29.

Navicky described her typical routine. Once a defendant had pled guilty or been found guilty of a felony, Navicky would conduct a presentence interview at the direction of the court. 10RP 26-27. She

would sit down with the defendant, tell him who she was, whom she represented, and why she had been asked by the court to do a presentence investigation. 10RP 40. She would then review confidentiality forms and the Miranda rights. 10RP 40. She would ask the defendant for certain basic information, assuring him that if he did not want to answer certain questions, that was his privilege. 10RP 40.

As part of her routine procedure, she would gather criminal history, as well as medical, social and financial information. 10RP 27, 45-46. She would review the prosecuting attorney's version of the offense and talk to victims; she would also ask the defendant for his version of the offense. She would gather all of this information and type up her report. 10RP 27. Navicky conducted her presentence interviews "[b]asically the same every time." 10RP 37.

Navicky was clear about how she viewed her role. She believed that the purpose of the presentence report was to give the judge a fair evaluation of the information that she could gather. 10RP 37. She tried to take into consideration both the client's⁸ view and the prosecutor's view, and present the information as accurately as she could. 10RP 83. She saw her role as being directly responsible to the court. 10RP 83. She never

⁸ It is telling that Navicky regularly referred to the defendants whom she interviewed as "clients." See, e.g., 10RP 27, 29, 35, 36, 45, 81, 83.

asked the prosecutor or law enforcement if they had questions they wanted her to ask. 10RP 37. She made a “concerted effort” not to take sides. 10RP 37, 83.

Navicky interviewed the defendant on August 21, 1997, in the King County Jail, most likely in an attorney/client interview booth. 10RP 31, 35-36, 61. The booths have a glass divider between the inmate and the visitor, and communication is via telephone. 10RP 66. A heavy glass door closes off each section of the booth from the rest of the jail; Navicky believed that the door behind the inmate locked. 10RP 66, 69. An inmate would walk up to the door and press a buzzer, the door would open, and the inmate would enter the booth; Navicky did not usually see officers accompanying the inmates at this point. 10RP 67. The inmate would leave the booth in the same way – press a buzzer and the door would open. 10RP 69-70.

While Navicky needed her report to refresh her memory on certain things like dates, she had an overall recollection of this case. 10RP 64. She recalled that the defendant was pleasant, polite and soft-spoken. 10RP 39. When she told him what she wanted to do, he said, “Okay.” 10RP 43. He was cooperative through most of the interview, which progressed uneventfully for about 30-45 minutes. 10RP 39, 51. When Navicky invited the defendant to give his version of what happened on the

night Rigel Jones was killed, the defendant responded that he did not murder Jones, but only assisted in robbing him. 10RP 50. After saying this, the defendant abruptly got up to leave, saying, “I don’t want to talk about this anymore.” 10RP 50. Navicky took no steps to get him to stay, nor did she ever contact him again to complete the interview. 10RP 58-59.

When asked whether she specifically recalled reading the defendant his Miranda rights, Navicky responded: “Specifically, no. The only response that I can say is, because this was a high profile case I am absolutely sure I would not forget that.” 10RP 44. While the defendant’s DOC file contains Navicky’s presentence report, it does not include any of her notes or other related materials. 10RP 88-89. The file contains nothing to show that Navicky read the defendant his Miranda rights. 14RP 2-6.

After being informed of his right to testify, the defendant chose not to do so. The defense did not present any witnesses at the CrR 3.5 hearing. 10RP 89-91.

- ii. Trial court’s findings of fact and conclusions of law.

The trial court began its oral ruling on the admissibility of the defendant’s statements to Diane Navicky by noting that there were no

disputed facts. 16RP 5-6. The court commented on the credibility of Navicky, who was the only witness to testify at the CrR 3.5 hearing:

This Court finds Ms. Novicky [sic] to be a credible witness, in fact, a highly credible witness. Her demeanor was thoughtful, she freely admitted what she recalled and what she doesn't recall. **In fact, it's difficult to imagine a witness who has more credibility.**

16RP 8 (emphasis added).

The court then made its findings of fact and conclusions of law pursuant to CrR 3.5, later including them in a written document (CP 851-57). The court found that the purpose of Navicky's interview with the defendant was to gather information to present to the sentencing judge pursuant to a court-ordered presentence report. CP 852. In allowing the defendant an opportunity to state his version of events, Navicky did not go beyond the scope of what was necessary to complete the report. 16RP 10; CP 852, 857.

The court found that Navicky did not operate as an advocate in doing her job – she did not “take sides.” 16RP 6-7; CP 852. If a defendant did not want to meet with her, she might “lightly encourage” him, but she would not continue with an interview against a defendant's wishes. 16RP 10; CP 854. As an “ultimate professional,” Navicky was there to do “one thing and one thing alone, and that was to complete an accurate and thorough presentence information report for the Court.”

16RP 18. The court found that the defendant's statements to Navicky were voluntarily made. 16RP 18; CP 856.

The court noted that the defendant's DOC file did not contain a Miranda advisement or waiver, nor any other forms or documents completed in preparation for the presentence report. 16RP 12; CP 855. In the absence of direct evidence of advisement, the court assumed that no such advisement was given. 16RP 13; CP 856 ("The court will not make an inference of advisement").

The court nevertheless found that Miranda warnings were not necessary because the defendant was not in "custody" for Miranda purposes, nor was he "interrogated" for Miranda purposes. CP 856. While the defendant resided in the King County Jail at the time of the presentence interview, there were no further limitations placed on his already limited freedom of movement. CP 856. The buzzer system and locked door are "part and parcel" of the jail setting, and represent no greater restriction than that inherent in such a setting. 16RP 16-17. "The defendant was not commanded to attend the interview, he was not handcuffed during the interview, he was not compelled to remain in the room during the interview, he was free to leave the room at a time of his own choosing, and indeed did so." CP 856. The evidence showed that the defendant was "cooperative, polite, and participated in the interview until

he decided he no longer wanted to so participate.” 16RP 17. His contact with Navicky was not custodial. CP 856.

In support of its finding that Navicky did not interrogate the defendant, the court found that she did not confront him with evidence of his guilt, but asked him to complete a court-ordered, standardized presentence interview form. 16 RP 17; CP 856. As part of her procedure, she gave him an opportunity to give his version of events, an opportunity he was free to refuse. CP 856. The defendant’s statements were the product of a completely voluntary exchange with Navicky. 18RP 18; CP 856. The court ultimately concluded that the defendant’s statements to Navicky, that he felt badly about Jones’s death, that he had been drinking, that he was innocent, and that he did not stab Jones but only assisted in the robbery, were admissible in the State’s case-in-chief. CP 855.

The trial court also made findings in response to the defendant’s argument that the presentence interview deprived him of his Sixth Amendment right to counsel. 16RP 19. The court found that Navicky had neither “knowingly circumvented” the defendant’s right to counsel, nor “deliberately elicited” incriminating statements from him. 16RP 19-20. Navicky “neither knew or had reason to believe that Mr. Everybodytalksabout would make incriminating statements. She had not encouraged him to do so, and she had no reason to believe he was on the

verge of doing so.” 16RP 21. To the contrary, Navicky was simply completing a standardized presentence information form authorized by RCW 9.95.200, which directs the CCO to report to the court “upon the circumstances surrounding the crime and concerning the defendant, his prior record, and his family surroundings and environment.” 16RP 21.

Nor did the court find that Navicky used “secret or evasive tactics.” 16RP 23. This was simply a straightforward presentence interview. Again, the court relied heavily on its assessment of Diane Navicky’s credibility:

And in this regard Ms. Novicky’s [sic] credibility comes into play, and in fact it plays a critical role. As I’ve indicated earlier, it’s difficult to imagine a witness with more credibility. There is no reason for the Court to believe she did anything other than what she testified she did, which was to go through the form of completing a standardized pre-sentence interview. . . . In short, Ms. Novicky did nothing to either take advantage of a situation or to create a situation in which she intended to interrogate Mr. Everybodytalksabout outside the presence of counsel.

16RP 23, 24. The court denied the defendant’s motion to exclude his statements under the Sixth Amendment. 16RP 24.

b. Standard Of Review.

The appellate court reviews a trial court’s decision on the admissibility of evidence under an abuse of discretion standard. The trial court’s decision will be upheld unless it is manifestly unreasonable or is

based upon untenable grounds or reasons. State v. Stenson, 132 Wn.2d 668, 701, 940 P.2d 1239 (1997) (citing State v. Pirtle, 127 Wn.2d 628, 648, 904 P.2d 245 (1995), cert. denied, 518 U.S. 1026 (1996); State v. Powell, 126 Wn.2d 244, 258, 893 P.2d 615 (1995); State v. Swan, 114 Wn.2d 613, 658, 790 P.2d 610 (1990)). The trial court's credibility determinations are not subject to review on appeal. In re Personal Restraint of Benn, 134 Wn.2d 868, 910, 952 P.2d 116 (1998) (citing State v. Camarillo, 115 Wn.2d 60, 71, 794 P.2d 850 (1990)).

c. Fifth Amendment.

The Fifth Amendment protection against self-incrimination is made applicable to the states through the Fourteenth Amendment. State v. Warner, 125 Wn.2d 876, 884, 889 P.2d 479 (1995) (citing Malloy v. Hogan, 378 U.S. 1, 84 S. Ct. 1489, 12 L. Ed. 2d 653 (1964)). A defendant retains this right at sentencing. State v. Post, 118 Wn.2d 596, 605, 826 P.2d 172, 837 P.2d 599 (1992). Generally, a person must invoke this protection in order for it to apply. Warner, 125 Wn.2d at 884. The Supreme Court has created an exception, however, in cases of custodial interrogation by a state agent. Id. (citing Miranda v. Arizona, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966)).

Some federal courts have held that a defendant is not entitled to Miranda warnings at a routine post-conviction presentence interview

conducted by a probation officer. These courts have reasoned that such an interview simply does not implicate the concerns addressed by the Supreme Court in Miranda. United States v. Rogers, 921 F.2d 975, 979-82 (10th Cir.), cert. denied, 498 U.S. 839 (1990); United States v. Jackson, 886 F.2d 838, 841-42, 841 n.4 (7th Cir. 1989); Baumann v. United States, 692 F.2d 565, 574-77 (9th Cir. 1982). Even if Miranda warnings may in some instances be required at such an interview, no such warnings were required under the facts of this case. The post-conviction, presentence interview of Darrell Everybodytalksabout conducted on behalf of the court by CCO Diane Navicky was not a custodial interrogation by a state agent.

Diane Navicky may have been acting as a “state agent” when she conducted the presentence interview of the defendant. See State v. Sargent, 111 Wn.2d 641, 652, 762 P.2d 1127 (1988) (probation officer assigned by Department of Corrections to prepare a sentencing statement at request of superior court judge is acting as an agent of the State). The CCO is not, however, a part of the “prosecution team”; rather, the CCO acts on behalf of the court when providing information through a presentence report, and thus has an independent duty of investigation. State v. Sanchez, 146 Wn.2d 339, 354, 46 P.3d 774 (2002); see also Rogers, 921 F.2d at 979-80 (federal probation officer conducting a routine

presentence interview is not performing a prosecutorial function, but rather acts as an agent of the court in the exercise of its sentencing responsibility). Navicky clearly viewed her role as acting on behalf of the court. See 10RP 36-37, 83.

Regardless of how Navicky's role is viewed, however, Miranda warnings were not required because the defendant was not in custody for Miranda purposes, and the presentence interview was not an interrogation. The defendant's statements were thus properly admitted at his trial.

i. The defendant was not in custody.

"Custody" for Miranda purposes is narrowly circumscribed; it requires formal arrest or restraint on freedom of movement to a degree associated with formal arrest. Post, 118 Wn.2d at 606. The traditional "custody" analysis is not appropriate, however, when the interview or questioning takes place in a prison setting; not every person serving a prison sentence is automatically "in custody" for Miranda purposes. Post, 118 Wn.2d at 606; United States v. Conley, 779 F.2d 970, 973 (4th Cir. 1985) (prisoner interrogation simply does not lend itself easily to analysis under the traditional formulations of the Miranda rule), cert. denied, 479 U.S. 830 (1986).⁹ While a convicted felon is "in custody" in the sense that

⁹ The United States Supreme Court, in holding that an undercover law enforcement officer posing as a fellow inmate was not required to give Miranda warnings to an incarcerated suspect before asking questions that could elicit an incriminating response,

his freedom of movement is undeniably restricted, “custodial” in the Miranda sense means more than just the normal restriction on freedom incident to incarceration – there must be more than the usual restraint to depart. Post, 118 Wn.2d at 606-07; Warner, 125 Wn.2d at 885.

Both Post and Warner relied on the analysis set forth in Conley, supra; Conley, in turn, relied on Cervantes v. Walker, 589 F.2d 424 (9th Cir. 1979).¹⁰ Defendant Cervantes was incarcerated in the county jail. While being moved from one cell to another due to his involvement in a fight, Cervantes was brought to the jail library to speak with the shift commander. A search of Cervantes’ belongings, which he carried with

stated in dicta that “[t]he bare fact of custody may not in every instance require a [Miranda] warning even when the suspect is aware that he is speaking to an official.” Illinois v. Perkins, 496 U.S. 292, 299, 110 S. Ct. 2394, 110 L. Ed. 2d 243 (1990).

¹⁰ The defendant asserts that there is a split in authority as to “whether interrogation of an incarcerated inmate presumptively violates the Fifth Amendment right to counsel,” and cites three cases as espousing a “bright-line rule” in opposition to Conley and Cervantes. Brf. of App. at 36 n.13. Two of the cases cited by the defendant, however, deal with the “bright-line” rule of Edwards v. Arizona, 451 U.S. 477, 101 S. Ct. 1880, 68 L. Ed. 2d 378 (1981), that once an accused has expressed a desire to deal with the police only through counsel, he is not subject to further interrogation by the authorities until counsel has been made available; they specifically address whether a long gap in time between the invocation of the right to counsel and the subsequent interrogation without counsel can take a case outside this “bright-line” rule. Commonwealth v. Perez, 581 N.E.2d 1010, 1016 (Mass. 1991); United States v. Green, 592 A.2d 985 (D.C. 1991), cert. granted, 504 U.S. 908 (1992), vacated and cert. dismissed, 507 U.S. 545 (1993). These cases do not address whether a custodial interrogation has occurred, but whether a lengthy break between custodial interrogations can vitiate the request for an attorney. In the third case, Border Patrol agents lined up inmates and questioned them about their citizenship. Any inmate who refused to answer would be returned to his cell to reconsider, and questioning would later be reinitiated. The court found that the inmates were not free to refuse to answer the questions, nor were they free to leave. United States v. Lugo, 289 F. Supp. 2d 790, 796 (S.D. Tex. 2003). None of these cases would require this Court to find custodial interrogation in this case.

him, revealed a green odorless substance in a matchbox. The shift commander confronted Cervantes in the small library room with the opened matchbox and asked, “What’s this?” Cervantes replied, “That’s grass, man.” Cervantes, 589 F.2d at 426-27.

The issue for the Ninth Circuit was whether the questioning of Cervantes constituted custodial interrogation such that Miranda warnings were required. Rejecting the conclusion that all prison questioning is per se custodial, the court found that, in the prison situation, custody “necessarily implies a change in the surroundings of the prisoner which results in an added imposition on his freedom of movement.” Cervantes, 589 F.2d at 428; accord Garcia v. Singletary, 13 F.3d 1487, 1492 (11th Cir.), cert. denied, 513 U.S. 908 (1994).¹¹ The court put forth an objective, reasonable-person standard for determining whether a prisoner being questioned would nevertheless feel “free to leave” within the context of the prison surroundings. The court relied on four factors in making this determination: 1) the language used to summon the prisoner; 2) the physical surroundings of the interrogation; 3) the extent to which

¹¹ The defendant argues that the “custody” analysis should be different when an inmate is questioned about the crime for which he is incarcerated. Nothing in the Miranda analysis supports this distinction. See Mathis v. United States, 391 U.S. 1, 4-5, 88 S. Ct. 1503, 20 L. Ed. 2d 381 (1968) (Miranda does not recognize distinction based on reason person questioned is in custody).

the prisoner is confronted with evidence of his guilt; and 4) the additional pressure exerted to detain him. Cervantes, 589 F.2d at 427-28.

The record does not disclose the language used to summon the defendant to the interview room at the jail where he spoke with Diane Navicky.¹² However, Navicky, who had conducted countless such interviews over her 17-year career in the presentence unit of the DOC, testified that she did not usually see jail guards escort defendants to the interview room. 10RP 25-26, 67. She emphasized that, while she might encourage a reluctant defendant, she never made any effort to compel or coerce a defendant to participate in the presentence interview. 10RP 41-42, 59-60. When she explained the interview process to the defendant in this case, he readily agreed. 10RP 43. The trial court found no evidence of compulsion:

There is no evidence he was compelled to attend the interview; there is no evidence that he was handcuffed. While it may have been an unannounced appointment, there is no evidence that Mr. Everybodytalksabout was commanded to enter in the room or remain in the room. Most telling of all, when Mr. Everybodytalksabout wanted to leave he did so.

¹² The defendant could have provided information to the court on the manner in which he was summoned for the presentence interview, and how it was conducted. Because he chose not to testify at the CrR 3.5 hearing, the trial court properly relied on Diane Navicky's testimony, which the court found credible.

16RP 16. The first Cervantes factor supports the trial court's conclusion that the defendant was not in custody during the presentence interview. See CP 856.

Nor do the physical surroundings of the interview point to a custodial situation. Navicky testified that the attorney booths in the jail, in which the presentence interviews typically took place, had a glass divider separating the inmate and his visitor; the two communicated via a telephone. 10RP 36, 66. Access to each side was through a heavy glass door. 10RP 66. When the inmate wished to leave, he would buzz and the door would open. 10RP 70. This system of locked doors and buzzers was "part and parcel of the jail setting," and thus not more restrictive than any other part of the jail. 16RP 16-17. The second Cervantes factor supports the conclusion that the interview was not custodial.

Turning to the third factor, there is no evidence that the defendant was confronted with evidence of his guilt at the presentence interview.¹³ 16RP 17. Rather, as part of her standard protocol, Navicky would invite the defendant to give his version of the offense. 10RP 26-27. She would typically phrase the invitation as follows: "This is the part where the Department of Corrections would ask you for your version of the offense,

¹³ There is little reason to confront a defendant with evidence of his guilt at the presentence stage. The defendant has already been found guilty beyond a reasonable doubt.

and you don't have [to] give us the police or the prosecuting [version] but what you say happened on that night." 10RP 50. Navicky never inquired of the prosecutor or law enforcement whether they had questions that they wanted her to ask the defendant; she made a concerted effort not to take sides. 10RP 36-37. Recalling this case specifically, Navicky remembered feeling that "Mr. Everybodytalksabout deserved every opportunity to present his side." 10RP 84. The third Cervantes factor supports the trial court's conclusion that Navicky's interview of the defendant was not custodial.

Finally, no pressure was exerted to detain the defendant in the interview room. Navicky recalled that the defendant was polite and cooperative for most of the interview. 10RP 39. When Navicky told the defendant what she wanted to do, he said, "Okay." 10RP 43. When the defendant abruptly terminated the interview and got up to leave, Navicky did not ask jail personnel to force him to remain. 10RP 58. Navicky explained that "he was upset and I was going to respect him." 10RP 50. Navicky did not push the defendant for any further information at the time, nor did she ever try to contact him again to complete the interview. 10RP 50, 58-59. Significantly, Navicky said that she never told defendants that her recommendation depended on compliance with the presentence process; she believed that such a practice would be unethical.

10RP 40-41. The last Cervantes factor supports a finding that the defendant was not in custody.

Based primarily on the testimony of Diane Navicky, whom the trial court found to be a “highly credible witness,” the court properly concluded that the presentence interview was not custodial for Miranda purposes. 16RP 8, 17-18; CP 856.

ii. The defendant was not interrogated.

The United States Supreme Court in Miranda intended to protect “persons suspected or accused of crime” from “inherently compelling pressures which work to undermine the individual’s will to resist and to compel him to speak where he would not otherwise do so freely.” Miranda, 384 U.S. at 467. “‘Interrogation,’ as conceptualized in the Miranda opinion, must reflect a measure of compulsion above and beyond that inherent in custody itself.” Rhode Island v. Innis, 446 U.S. 291, 300, 100 S. Ct. 1682, 64 L. Ed. 2d 297 (1980).

A presentence interview of the sort that took place in this case would not appear to fall within the purview of Miranda. A defendant in the presentence stage of his case is hardly a person “suspected or accused of a crime”; rather, he has already been found guilty beyond a reasonable doubt of the crime with which the State has charged him. The State has no need for further evidence at this point in the proceedings. Moreover, the

wholly voluntary presentence interview can hardly be said to create “compelling pressures” that “undermine the individual’s will to resist.”

The Washington Supreme Court has addressed the meaning of “interrogation” where a defendant was interviewed by a DOC employee. Questioning in this context is deemed to be “interrogation” for Miranda purposes when “the probation officer should have known that his questioning would have provoked an incriminating response.” Post, 118 Wn.2d at 606; Sargent, 111 Wn.2d at 650 (citing Rhode Island v. Innis, 446 U.S. at 301). In addition, any questioning not necessary to prepare the presentence report amounts to interrogation. Post, 118 Wn.2d at 606; Sargent, 111 Wn.2d at 651-52.

There was no reason for Diane Navicky to expect that her invitation to the defendant to articulate his version of events for the sentencing judge would provoke an incriminating response. She told him that this was his chance to give **his** version, as opposed to the official, law-enforcement version.¹⁴ 10RP 50. In his statement to police, the defendant had denied any knowledge of the stabbing of Rigel Jones. Ex. 68.

¹⁴ This is akin to the invitation to allocution at sentencing.

Moreover, while his statement to Navicky may have been legally inculpatory based on principles of accomplice liability and the law of felony murder, it is unlikely that the defendant believed that he was incriminating himself. While he admitted assisting in a robbery, he was adamant that he was not the one who stabbed Jones, and therefore should not have been convicted of murder. 10RP 50, 56; Ex. 1 at 4, 12. After terminating the interview, and prior to leaving the interview room, the defendant “emphasized that he was innocent and did not stab the victim.” Ex. 1 at 11.

Whether looked at from the standpoint of Navicky’s intentions in eliciting the defendant’s version of events, or the defendant’s perception of this portion of the interview, the defendant’s statements just before he terminated the interview were not the result of interrogation. See Rhode Island v. Innis, 446 U.S. at 301.

Nor did Navicky’s interview exceed what was necessary to prepare the presentence report. The Superior Court Criminal Rules provide that the DOC should conduct a presentence investigation and prepare a report if directed to do so by the trial court. CrR 7.1(a). The report “shall contain,” among other things, “the circumstances affecting the defendant’s behavior” as well as “such other information as may be required by the court.” CrR 7.1(b). Navicky testified that asking a defendant for his or

her version of the offense was a consistent part of the presentence investigation. 10RP 26-27, 37. Given the broad language of the mandate quoted above, the trial court reasonably found that Navicky did not go beyond the scope of what was necessary to complete the presentence report. 16RP 10; CP 857.

Again, based upon the “highly credible” testimony of Diane Navicky, the trial court properly found that the defendant was not interrogated for purposes of Miranda when he gave the statements he now challenges on appeal. CP 856-57.

d. Sixth Amendment.

The Sixth Amendment to the United States Constitution guarantees a criminal defendant the right to the assistance of counsel at every critical stage of the proceedings. State v. Tinkham, 74 Wn. App. 102, 109, 871 P.2d 1127 (1994) (citing United States v. Wade, 388 U.S. 218, 224-27, 87 S. Ct. 1926, 18 L. Ed. 2d 1149 (1967)). The sentencing hearing is such a critical stage. Tinkham, 74 Wn. App. at 109-10 (citing Gardner v. Florida, 430 U.S. 349, 358, 97 S. Ct. 1197, 51 L. Ed. 2d 393 (1977)).

Some federal courts have held that the Sixth Amendment right to counsel does not extend to a routine post-conviction presentence interview conducted by a probation officer. These cases emphasize the role of the probation officer as a neutral gatherer of information for the court.

Jackson, 886 F.2d at 843-45; Brown v. Butler, 811 F.2d 938, 940-41 (5th Cir. 1987).

Even if the constitutional right to counsel applies in this context, the Sixth Amendment is not violated every time the State obtains an incriminating statement from a defendant after the right to trial has attached. Maine v. Moulton, 474 U.S. 159, 176, 106 S. Ct. 477, 88 L. Ed. 2d 481 (1985). Courts have at various times applied two different standards in testing whether a defendant's Sixth Amendment right to an attorney was violated in such situations: 1) whether the State "knowingly circumvented" the defendant's right to counsel, and 2) whether the State "deliberately elicited" the incriminating statement. Compare Moulton, 474 U.S. at 176 (knowingly circumvent) and Sargent, 111 Wn.2d at 645 (knowingly circumvent)¹⁵ with Fellers v. United States, 540 U.S. 519, 523-24, 124 S. Ct. 1019, 157 L. Ed. 2d 1016 (2004) (deliberately elicit); Kuhlmann v. Wilson, 477 U.S. 436, 457-59, 106 S. Ct. 2616, 91 L. Ed. 2d 364 (1986) (deliberately elicit); and In re Personal Restraint of Benn, 134 Wn.2d 868, 911, 952 P.2d 116 (1998) (deliberately elicit). While more

¹⁵ Eight justices participated in the Sargent decision; the three who signed the "majority" opinion applied the "knowingly circumvent" test, three who concurred would not have reached the Sixth Amendment issue, and two in dissent argued that "deliberately elicit" was the proper standard. Sargent, 111 Wn.2d at 645-46, 656, 664-66.

recent authority supports the “deliberately elicit” test, the defendant’s statements to Navicky are admissible under either test.

- i. Navicky did not “deliberately elicit” incriminating information from the defendant.

A “deliberate” action is “premeditated” and “intentional.” The American Heritage Dictionary of the English Language 349 (1973). Diane Navicky emphasized repeatedly that she had employed a consistent approach in conducting presentence interviews. 10RP 33, 37, 40-42, 81-82. She never asked questions on behalf of law enforcement or the prosecutor’s office. 10RP 36-37. She saw her role as a neutral one: “The purpose of the pre-sentence [interview] was to give the judges, as much as we could, a fair evaluation of what we could gather for pre-sentence information and make a concerted effort not to take sides.” 10 RP 37. Navicky believed that her responsibility was to the court – she was putting together a presentence report because the judge had asked for it. 10RP 83.

Navicky described the manner in which she would have introduced the question asking for the defendant’s version of the offense: “And what I would have asked him is, I would have said, ‘This is the part where the Department of Corrections would ask you for your version of the offense, and you don’t have [to] give us the police or the prosecuting [version] but what you say happened on that night.’” 10RP 50. Given that the

defendant had pled not guilty, and his previous statement to police in which he had claimed no knowledge of the stabbing (Ex. 68), Navicky's invitation to give his version of the offense was in no way a deliberate elicitation of an incriminating statement.

It is possible that Navicky did not herself understand the inculpatory nature of the defendant's statements. She included in her report this observation: "However, prior to his leaving Mr. Everybodytalksabout emphasized that he was innocent and did not stab the victim." Ex. 68 at 11. When questioned about this, Navicky explained: "I believe that I was pointing out that I didn't want the court to miss the fact that Mr. Everybodytalksabout was saying he did not kill the man. . . . that was in my opinion the most important thing he was trying to tell me is that he did not stab Mr. Jones." 10RP 58. This shows that Navicky did not intend to elicit an incriminating response, but instead believed that she was offering the defendant an opportunity to help himself.

Distinguishing cases where the courts found that the State had "deliberately elicited" incriminating responses,¹⁶ the trial court concluded:

We have no such secret or evasive tactics being used in this case. Instead, this was a straightforward pre-sentence information interview. And in this regard Ms. Novicky's [sic] credibility comes into play, and in fact it plays a critical role. As I've indicated earlier, it's difficult to

¹⁶ Massiah v. United States, 377 U.S. 201, 84 S. Ct. 1199, 12 L. Ed. 2d 246 (1964); United States v. Henry, 447 U.S. 264, 100 S. Ct. 2183, 65 L. Ed. 2d 115 (1980).

imagine a witness with more credibility. There is no reason for the Court to believe she did anything other than what she testified she did, which was to go through the form of completing a standardized pre-sentence interview.

16RP 23. Based on the testimony, and on the trial court's unique ability to evaluate the credibility of a witness, the trial court properly found that Diane Navicky did not "deliberately elicit" the defendant's incriminating statement.

- ii. Navicky did not "knowingly circumvent" the defendant's right to an attorney.

"[K]nowing exploitation by the State of an opportunity to confront the accused without counsel being present is as much a breach of the State's obligation not to circumvent the right to the assistance of counsel as is the intentional creation of such an opportunity." Moulton, 474 U.S. at 176. In applying the "knowingly circumvent" test, the standard of knowledge is objective: "whether the State knew or should have known that the contact in the absence of counsel would prejudice the defendant." Sargent, 111 Wn.2d at 645.

Diane Navicky testified that it was not her practice to notify a defendant's attorney before contacting the defendant for the presentence interview:

Q: Did you call Mr. McGary prior to August 21st of 1997 and ask whether you could have permission to go and interview his client?

A: No.

Q: You're aware that Mr. McGary was the attorney at the time for Mr. Everybodytalksabout; correct?

A: Yes. And it's our custom that we never do that, we were just told that – we were asked by the court to do a pre-sentence report and we went to do the interview. Rarely did we ever – I can't even think of ever contacting an attorney to do that.

10RP 71.

Navicky's subjective intent is clear from the testimony set out in § C.1.a.i., supra. She visited the defendant pursuant to a court order to prepare a presentence report, and she followed her standard procedure in doing this, including a standard script that invited the defendant to give his version of events for presentation to the court. She clearly did not intend to circumvent the defendant's attorney to the detriment of the defendant. Nor did Navicky have any objective reason to think that the defendant would be prejudiced by the invitation to give his version of the events in question. Where a defendant has maintained his innocence throughout a trial, and has told police that he had nothing to do with the murder with which he is charged, there is no reason to expect that an invitation to give his version of events will cause the defendant to incriminate himself.

In ruling on this issue, the trial court found that Navicky "neither knew or had reason to believe that Mr. Everybodytalksabout would make incriminating statements. She had not encouraged him to do so, and she

had no reason to believe he was on the verge of doing so.” 16RP 21.

Distinguishing this case from the facts in Sargent, the trial court reasoned:

“Asking a defendant to give his version of the circumstances surrounding the crime as required by the statute is a far cry from asking a defendant to confess, as the C.C.O. did in Sargent.” 16RP 22. The court concluded:

“[T]here is no evidence before this court that Ms. Novicky [sic] took advantage of an opportunity to bypass counsel, or that she in any way knowingly circumvented Mr. Everybodytalksabout’s right to counsel.”

16RP 22. Based on the evidence and the trial court’s finding that Navicky was credible, this was a correct conclusion.

2. THE TRIAL COURT PROPERLY EXERCISED ITS DISCRETION IN LIMITING CROSS-EXAMINATION OF VINCENT RAIN.

The defendant claims that the trial court violated his Sixth Amendment right to confront witnesses by placing some limits on his cross-examination of Vincent Rain. Specifically, he argues that he should have been allowed to cross-examine Rain on Rain’s status as a sex offender, his specific prison infractions, his specific probation violations, and his expressed desire to retain an attorney and exercise his Fifth Amendment rights.

The defendant has failed to show a constitutional violation. In placing some limitations on cross-examination of Rain, the trial court

carefully considered the relevance of the information that the defense proposed to elicit, and excluded evidence that was not relevant to Rain's credibility or bias, or to any issue properly before the jury. At the same time, the court allowed the defendant to cross-examine Rain extensively, and fully expose any reasons for bias. The limitations were within the trial court's discretion.

a. Relevant Facts.

i. CrR 3.5 hearing.

The court held a CrR 3.5 hearing to determine whether the defendant's statements to Vincent Rain, a jailhouse informant, would be admissible at trial.¹⁷ Both Detective Ramirez and Vincent Rain testified at the hearing. 15RP 8-49, 59-77.

On February 22, 1999, Detective Ramirez received a telephone call from Vincent Rain. 15RP 13-14. Rain, an inmate at the Washington State Penitentiary at Walla Walla, was calling with the help and at the suggestion of his counselor, Aurelio ("Speedy") Gonzales. 15RP 14, 60-61. Rain told Detective Ramirez that he had had a number of conversations with Diego Everybodytalksabout and Felipe Lopez, during

¹⁷ The principal issue regarding the defendant's statements to Rain was whether Rain was acting as a state agent when he heard the statements. 15RP 78, 86-87. The trial court ruled that Rain was not acting as a state agent. CP 862-64. The defendant has not challenged this ruling on appeal.

which the pair had talked about the crime for which they were incarcerated.¹⁸ 15RP 15, 61. Ramirez thanked Rain for the call, telling him there was no need for the information because both defendants had been convicted. 15RP 15-16, 61. Ramirez made a brief record of the call, noting that it was a robbery that went bad and turned into a fight, and that Everybodytalksabout held the victim down while Lopez stabbed him. 15RP 16; Ex. 73.

Over the next two years, Rain called Ramirez a number of times, principally for help in transferring calls to Rain's wife. 15RP 18, 62-63. After learning that the defendant's conviction had been reversed on appeal, Ramirez reestablished contact with Rain, who was in the Spokane County Jail; the two spoke by telephone on April 2, 2002. 15RP 18-19. Ramirez asked Rain if he would be willing to testify in the retrial; Rain said he needed to think about it. 15RP 20. Rain called back the next day and said he was willing to testify, but wanted assistance in moving to a safe place. 15RP 21.

Detective Ramirez took a taped statement from Rain on May 13, 2002. 15RP 21, 23; Ex.7 (pretrial).¹⁹ Rain was at that time incarcerated at

¹⁸ DOC records showed that Rain and Everybodytalksabout were housed in the same cell during a period in 1998-99, that they were in the same tier with Lopez, and that all three had recreation in the prison yard at the same time. 15RP 25; 24RP 18-24; CP 860.

¹⁹ Rain was interviewed at least two more times: by King County prosecutors at Monroe in 2002 (15RP 43-44), and by the defense at Shelton in 2003 (Ex. 13 (pretrial)).

the Monroe Correctional Facility. Ex. 7 at 1. Ramirez believed that he had contacted someone at DOC to facilitate Rain's desired placement at Monroe. 15RP 42. Rain also believed that Ramirez had assisted in his placement at Monroe, although Rain said that he had enough "points" to gain such a minimum security placement. 15RP 63-68.

The defense did not present any evidence at the hearing. 15RP 80. The trial court found that both Detective Ramirez and Vincent Rain were credible witnesses. CP 864. Concluding that Rain was not acting as a state agent when he heard the defendant's description of the crime, the court denied the defense motion to exclude Rain's testimony. 16RP 24-35; CP 858-65.

ii. Impeachment on bias/motive.

The State agreed from the outset that Vincent Rain's relationship with the prosecutor's office was a proper subject for cross-examination. 14RP 37. The State agreed that any requests that Rain had made, whether granted or not, were subject to cross-examination. 14RP 38-39. The State agreed that the State's assistance in transferring Rain to Colorado, a transfer that he could not have accomplished on his own, was a valid subject of cross-examination. 14RP 39-40. The State agreed that Rain's history as a "problem prisoner," including the fact that he had a lengthy history of infractions, was relevant to bias in that it contributed to his

inability to effect a transfer to Colorado on his own; the State did not believe that the defense should be allowed to bring out the underlying facts of specific infractions. 14RP 51-53. The State deferred to the court as to Rain's infraction for possession of stolen property, however, acknowledging that it amounted to a crime of dishonesty that would ordinarily be relevant to truthfulness. 14RP 55-56. The State did not believe that Rain's history of misconduct with his wife, Melody Rain, and especially his conviction for third-degree assault, was a proper subject of cross-examination. 14RP 58. The State agreed that Rain's poor adjustment to probation in Colorado was unavoidable, since Rain had asked the State for favors in connection with that; again, though, the State did not believe that the underlying facts of any probation violations were relevant. 14RP 66-72.

The court held that the defense could cross-examine Rain on his extensive history of prison infractions. 14RP 56. The defense could question Rain specifically about his possession of stolen property infraction, but the court found that details regarding narcotics infractions or those related to assaultive behavior went beyond what was necessary to show bias. 14RP 56-57. The court excluded evidence of Rain's third-degree assault conviction relating to Melody Rain. 14RP 72-73. The court would allow the defense to establish that Rain adjusted poorly to

probation in Colorado, but would not allow evidence of the specific violations. 14RP 73-74. After extensive discussion of the admissibility of Rain's psychological history, the court concluded that, in light of all the other evidence going to Rain's credibility and his motive for testifying, the psychological history would be excluded. 14RP 83-90. Finally, again after extensive discussion, the court reserved its ruling on Rain's status as a sex offender. 14RP 90-104.

The court later returned to the question of whether the defense would be allowed to cross-examine Rain on his sex offender status. 17RP 3. The court outlined the defense theory of admissibility: that Rain's desire to move to a different facility, a goal that motivated his testimony, resulted from the fact that other inmates had learned of his sex offender status. 17RP 4. After reviewing the transcript of the defense interview with Rain (Ex. 13 (pretrial)), the court found no factual nexus between Rain's desire to move and any fear resulting from other inmates having learned of his sex offender status. 17RP 4-5. Moreover, the court found that "[t]he relevant question is bias and whether Mr. Rain wanted a transfer. That evidence is already coming in. Why he wanted a transfer is secondary, and the evidence of his sex offender status would not shed much light on that bias, but it would certainly be considered improper

character evidence.” 17RP 5-6. The court granted the State’s motion to exclude Rain’s sex offender status. 17RP 6.

Immediately prior to Rain’s testimony before the jury, the parties again explored the court’s limitations on impeachment for bias or motive. The trial court reiterated its reasons for not allowing cross-examination on Rain’s sex offender status. 22RP 52-56. The court ruled that “[f]or that same reason we are not bringing in evidence that he is concerned for his safety because he may have gotten threats from Mr. Everybodytalksabout.” 22RP 56. Should Rain’s concern about being labeled a “snitch” come up, defense would be allowed to ask Rain if there was any other reason that he was concerned for his safety.²⁰ 22RP 56-60. The court also clarified that, while the defense could not generally explore specific probation violations on cross-examination, Rain could be questioned on his current violation (leaving the state without permission), for which an administrative hearing was pending. 22RP 60-63.

The final area of disagreement came to the fore during Rain’s trial testimony. Defense counsel wanted to cross-examine Rain about his repeated requests for a lawyer during contacts with the defense

²⁰ When defense counsel noted “potential rebuttal testimony” from Melody Rain that her husband had safety concerns based on being incarcerated for a sex offense, the court responded, “I need something more directly related to Mr. Rain. I am not going to hear it from another witness.” 22RP 57.

investigator,²¹ and about the fact that he had once stated a desire to exercise his Fifth Amendment privilege. 23RP 123-32. The court ruled that the defense could cross-examine Rain on the extent of his cooperation with the defense, but whether Rain asked for an attorney or stated an intention to invoke a Fifth Amendment privilege was not relevant to either bias or credibility, and was thus beyond the scope of proper questioning. 23RP 132-34.

iii. Trial testimony.

On direct examination, Rain reiterated what the defendant had told him about the robbery and murder of Rigel Jones. 22RP 65-70; 23RP 6-14. He told the jury how he had contacted police through his counselor at Walla Walla in 1999. 23RP 14-15. When Detective Ramirez recontacted Rain in early 2001, Rain did not agree to give a taped statement until after Ramirez had made some calls for Rain to Rain's wife in Colorado. 23RP 15-16. Rain eventually asked Ramirez to help him get his custody transferred to Colorado; Rain ultimately reached agreement with the King County Prosecutor's Office to facilitate the transfer in return for his testimony in this case. 23RP 17-18; Ex. 38.²²

²¹ The court had "in the interest of caution" appointed an attorney for Rain; the attorney was with Rain throughout the proceedings. 23RP 133; *see also* 15RP 56.

²² This exhibit, which is a letter setting out the agreement between the State and Rain, was read into the record. 23RP 19-20.

Rain agreed that it was possible that he had previously requested a transfer to Colorado, but had been turned down because of his long infraction history in prison. 23RP 20-21. He was flown to Colorado in 2003, to a minimum security prison; he had been held in a higher level of security in Washington. 23RP 21-22. Rain served out his full sentence in Colorado, and was released on parole. 23RP 22. He did not adjust well to parole; he asked the State to assist him in changing the conditions of his parole, but the State refused. 23RP 22. He was eventually transferred back to Washington for a parole violation, and served his time in Washington. 23RP 23.

On the day of his scheduled release from custody, Rain was interviewed by the defense at Shelton.²³ 23RP 23. Due to difficulties with the bus, the prosecutors gave Rain a ride to Seattle, buying him lunch along the way. 23RP 24. The State gave Rain a bus ticket to Spokane, where he was again placed on probation. 23RP 25. Rain left the State without permission, and was at the time of trial facing a parole violation hearing. 23RP 25. Rain had asked the State to contact his probation officer and let that person know about Rain's participation in this trial; the State agreed to do so. 23RP 25, 27-28.

²³ Rain's interview with the defense was admitted at trial as State's Ex. 40. 23RP 23. This Court has the same interview in Ex. 13 (pretrial).

Rain was cross-examined on many areas relevant to bias. He admitted that, just before taking the stand at trial, he had asked his attorney to ask the State to notify his community corrections officer that he was testifying in this trial. 23RP 26-28. When questioned about the “pecking order” in prison, Rain said those at the bottom included those who weigh less than 90 pounds and sex offenders; he agreed that snitches are also treated badly. 23RP 44-47. Rain said that he did not think of himself as a snitch, although he did not contest that he had gotten information from another inmate and was cooperating with the State. 23RP 48-49. Rain agreed that he had a lengthy history of infractions in prison. 23RP 71-82. He admitted that one of those infractions was for possessing stolen property in his cell. 23RP 76.

b. The Trial Court Did Not Abuse Its Discretion In Limiting Cross-Examination Of Vincent Rain.

The Sixth Amendment to the United States Constitution and Const. art. I, § 22 grant criminal defendants the right to confront and cross-examine adverse witnesses. State v. Hudlow, 99 Wn.2d 1, 14-15, 659 P.2d 514 (1983) (citing Davis v. Alaska, 415 U.S. 308, 94 S. Ct. 1105, 39 L. Ed. 2d 347 (1974)). Courts should zealously guard this right and allow the defendant great latitude to expose a witness’s bias, prejudice or

interest. State v. Kilgore, 107 Wn. App. 160, 184-85, 26 P.3d 308 (2001), aff'd on other grounds, 147 Wn.2d 288, 53 P.3d 974 (2002).

The scope of such cross-examination is nevertheless within the discretion of the trial court. Hudlow, 99 Wn.2d at 22. An appellate court will not reverse a trial court's ruling on the scope of cross-examination absent a manifest abuse of discretion; i.e., discretion that is manifestly unreasonable, or is exercised on untenable grounds or for untenable reasons. State v. McDaniel, 83 Wn. App. 179, 184-85, 920 P.2d 1218 (1996).

The trial court exercised its discretion properly in placing some limits on cross-examination of Vincent Rain.²⁴ The court carefully considered the relevance of Rain's status as a sex offender. The court first combed through the transcript of the defense interview with Rain, and found no factual nexus between Rain's safety concerns and his sex offender status. 17RP 4-5. The court then made an independent ruling that, even if there were such a factual nexus, Rain's sex offender status was simply an explanation for his desire to be transferred to another facility – it was that desire to be transferred that was the source of

²⁴ The defendant complains that the trial court did not specifically instruct the jury to view the testimony of an informant with special caution. Brf. of App. at 51. The defendant points to no authority in Washington that requires such an instruction, nor to any specific request for such an instruction in the trial court.

potential bias, in that Rain saw his cooperation with the State as a means to that end. 17RP 5-6. The desire to be transferred, and its implications for bias, were subject to full cross-examination. The court properly concluded that the chance of unfair prejudice to the State if the jury heard that Rain was a sex offender outweighed the minimal probative value of the evidence. This was not an abuse of discretion.

The trial court also properly limited questioning of Rain on specific prison infractions. The fact that Rain had a significant history of infractions in prison was relevant to his inability to obtain a transfer to Colorado on his own, and his incentive to cooperate with the State in this case to obtain the State's assistance in a transfer. This was a proper subject for cross-examination, and the defense questioned Rain at length on this. The court properly precluded the defense from going into detail on specific infractions regarding narcotics or assaultive behavior; the nature of these infractions carried unfair prejudice, and no relevance to Rain's motive for or bias in testifying in this trial. The court exercised its discretion and allowed the defense to question Rain about his infraction for possessing stolen property in his cell, since this infraction could reflect on Rain's credibility. The court's limitations were not an abuse of discretion.

The court placed similar discretionary limits on the defendant's ability to cross-examine Rain about specific probation violations. The court allowed the defense to question Rain about the fact that he did poorly on probation, and that he asked the State for help in getting his conditions modified. Again, this was relevant to Rain's motive for cooperating with the State, and allowed the jury to judge any bias he might have in testifying as he did. The court explained its limitations:

We do not need to get into the underlying facts of that, again, for some of the same reasons. It's not only cumulative, but it does create a potential for confusion for the jury, and we would have to get into quite a bit of explanation of what those conditions were, why they were set, how one violates them, and those are issues that are simply not probative of bias and motive.

14RP 74. This was a careful and proper exercise of the trial court's discretion.

The trial court specifically precluded the defense from questioning Rain about his conviction for third-degree assault against Melody Rain.

This too was a proper exercise of discretion. The court explained its decision:

We already have evidence that will be coming in regarding his motive, the fact that he wants to go to Colorado, that the reason he wants to go to Colorado is that Melody Rain is there. His motive in that regard will already be before the jury. The question then is whether the additional evidence regarding a third degree assault conviction would be relevant.

The defense argues that this provides additional evidence of motive, specifically domestic violence, and the psychology that may be attached to a domestic violence abuser.

The question for the court is to do the balancing under ER 609(a). A violence conviction is not probative of veracity, it would not really add anything to this, it's certainly prejudicial, it simply creates the impression the person is violent. It also creates quite a bit of confusion here. I think it's fair to say that domestic violence abusers operate on a lot of different grounds, and there is no single profile that one can attribute to a domestic violence abuser. So to add that would not even necessarily add anything to his motive without quite a bit of additional discussion about him and his relationship with Melody Rain, and that becomes then too much of a side trial that is really not probative of motivation and the bias.

14RP 72-73. The court's decision, after careful weighing of the minimal probative value of Rain's violence toward Melody Rain against its clear potential for confusion and unfair prejudice, was a proper exercise of its discretion.

Finally, the court wholly precluded any mention of Rain's desire for a lawyer, or any intention to invoke his Fifth Amendment privilege. Such matters are not ordinarily made known to the jury. State v. Smith, 74 Wn.2d 744, 759, 446 P.2d 571 (1968) (a witness's claim of the privilege against self-incrimination may not be used as evidence by any party in a criminal prosecution), vacated in part, 408 U.S. 934, 92 S. Ct. 2852, 33 L. Ed. 2d 747 (1972), overruled on other grounds, State v.

Gosby, 85 Wn.2d 758, 539 P.2d 680 (1975). Again, the court carefully identified the appropriate area for questioning:

Whether he wants a lawyer and whether he thinks he is subject to incriminating himself at this point does not cast any question as to his bias as a witness here. . . . It does not go toward his bias or his unwillingness to be cooperative with the defense. That area can be explored, whether he has been cooperative and whether he has been willing to follow up on questions with you, but the fact that he has either invoked an attorney, the right to wanting an attorney, or invoked his Fifth Amendment is off limits. That's simply not relevant towards bias.

23RP 133-34. The court identified the relevant area: whether Rain had cooperated with the defense. If he had not, the jury could infer that he was biased toward the State – and the jury had heard a multitude of reasons why that might be so. The trial court did not abuse its discretion in keeping Rain's exercise of his constitutional rights, or his plans to exercise them, off-limits in front of the jury.

The defendant's proposed approach would leave the trial court no discretion to place reasonable limits on his right to confront the State's witnesses. The defendant's confrontation right is not so absolute, and may be limited by the concerns expressed by the court in this case: unfair prejudice, injection of extraneous issues, and confusion of the jury. In exercising discretion in this case, the trial judge recognized that the State also has a right to a fair trial. See Snyder v. Massachusetts, 291 U.S. 97,

122, 54 S. Ct. 330, 78 L. Ed. 2d 674 (1934) (“But justice, though due to the accused, is due to the accuser also.”).

The defendant relies principally on cases where a witness’s relationship with the government was wholly unavailable for cross-examination. For example, in Davis v. Alaska, 415 U.S. 308, 94 S. Ct. 1105, 39 L. Ed. 2d 347 (1974), a safe that had been taken in a burglary and pried open was found near the home of Richard Green. When questioned by police, Green identified Davis as one of two men he had seen near the spot where the safe was later discovered. Davis, 415 U.S. at 309-10. Davis wished to cross-examine Green about the fact that Green was on probation as a result of a juvenile adjudication for burglary; Davis planned to argue that Green identified Davis to shift suspicion away from himself, fearing possible revocation of his probation. Davis, at 311. The trial court granted the State’s motion for a protective order, preventing the defense from mentioning Green’s juvenile record and resulting probation status. Davis, at 310-11.

Similarly, in Banks v. Dretke, 540 U.S. 668, 124 S. Ct. 1256, 157 L. Ed. 2d 1166 (2004), the State did not disclose evidence that would have allowed Banks to discredit two essential prosecution witnesses: one of those witnesses (Farr) was a paid police informant, and another (Cook) had been intensively coached by prosecutors and law enforcement officers

prior to his testimony. Banks, 540 U.S. at 675. When Farr testified falsely before the jury that he had never given the police any statement and had not talked to police until a few days before trial, and Cook testified that his testimony was entirely unrehearsed, the State stood silent, and argued before the jury that Farr had been “open and honest with you in every way,” and that Cook “brought you absolute truth.” Id. The State allowed the false statements to stand uncorrected throughout state appellate proceedings. Id.

In light of the broad cross-examination of Vincent Rain allowed in this case, neither Davis nor Banks supports a conclusion that the trial court erred in limiting that cross-examination to avoid placing irrelevant and unfairly prejudicial information before the jury.

The defendant cites United States v. Bagley, 473 U.S. 667, 105 S. Ct. 3375, 87 L. Ed. 2d 481 (1985), for the proposition that “[t]he Davis Court’s holding prohibits ‘direct restriction on the scope of cross-examination of a crucial prosecution witness.’” Brf. of App. At 49. This is not accurate. In Bagley, the government had failed to disclose contracts that it had with two of its witnesses, despite a specific defense request for discovery. Bagley, 473 U.S. at 669-71. The Ninth Circuit, relying on Davis v. Alaska, supra, held that the government’s “failure to

provide requested Brady²⁵ information to Bagley so that he could effectively cross-examine two important government witnesses requires an automatic reversal.” Bagley, at 673-74.

The Supreme Court rejected this “automatic reversal” rule for impeachment evidence. Bagley, 473 U.S. at 676. After describing the limitation placed on cross-examination by the trial court in Davis, the Supreme Court said: “The present case, in contrast, does not involve any direct restriction on the scope of cross-examination.” Bagley, at 677-78. The Court emphasized that even discovery violations related to impeachment evidence do not require reversal unless “the evidence is material in the sense that its suppression undermines confidence in the outcome of the trial.” Bagley, at 678. The Court reversed and remanded for such a factual finding. Bagley, at 684.

The ruling that the defendant appears to seek – that virtually *any* restriction on his right to cross-examine an important witness against him will be reversible error – is thus unsupported by case law. In light of the extensive impeachment of Vincent Rain allowed by the trial court, it cannot be said that the court abused its discretion in precluding the defendant from asking specific questions that the court deemed more

²⁵ Brady v. Maryland, 373 U.S. 83, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963).

prejudicial to a fair trial than probative of the defendant's claim that Rain was lying.

3. THE TRIAL COURT PROPERLY EXERCISED ITS DISCRETION IN DENYING THE DEFENDANT'S MOTION FOR A MISTRIAL AND IN FASHIONING AN ALTERNATIVE REMEDY.

The defendant maintains that the trial court erred in denying his motion for a mistrial based on Detective Ramirez's contact with Yolanda Lopez after her first day of trial testimony. Ramirez had told Yolanda that he was unhappy that she had testified inconsistently with her previous testimony and her previous statements to police. The defense argued that this was a violation of the court's order in limine excluding witnesses from the courtroom.

This claim should be rejected. The trial court afforded the defendant a sufficient remedy by allowing him to bring the detective's violation of the court's order to the attention of the jury through cross-examination. The court reasonably found that the defendant's right to a fair trial could be protected in this manner, and properly exercised its discretion in denying the motion for a mistrial.

a. Relevant Facts

Defense counsel first raised the issue of Ramirez's contact with Yolanda Lopez on the second day of Yolanda's testimony, at the very end of cross-examination:

Q: Detective Ramirez gave you a ride home after testifying yesterday; correct?

YL: Yes.

Q: He made it clear that he didn't like the way you were testifying; right?

YL: Yes.

25RP 137.

On the next trial day, during a break in the direct examination of Ramirez, the prosecutor asked that the State be allowed to question the detective about his contact with Yolanda. The defense did not object. 26RP 157-60. When direct examination resumed, the prosecutor elicited from Ramirez that the detective had given Yolanda a ride home after her first day of testimony, and that he had "expressed [his] displeasure to her as to what had happened that day." 26RP 171-72. When asked specifically what he had told Yolanda, the detective replied: "I told her that I was unhappy that she had decided to testify inconsistent to what she had told us before and that if she had taken that route, obviously, it was her decision, that that was not going to prevent her previous statements from coming in." 26RP 172-73. Detective Ramirez said that the tone of

the conversation was cordial and friendly, and that the two parted on good terms. 26RP 173.

Defense counsel that same day alerted the court and the State that the defense believed that Ramirez had violated the court's order excluding witnesses from the courtroom. Counsel gave notice that, pending further consultation, the defense might move for a mistrial on this basis. The court observed that, while Ramirez had been excepted from the order, the court had directed the attorneys, pursuant to ER 615, to instruct witnesses not to discuss their testimony with other witnesses. 26RP 210-12.

On the following day, defense counsel moved for a mistrial based on Ramirez's alleged violation of the order. 27RP 6-7. The State contested whether Ramirez's action had even violated the court's order, pointing out that the conversation with Yolanda had not been directed at the specifics of any particular testimony.²⁶ 27RP 7. Moreover, the State argued, the defense could not show any prejudice from Ramirez's contact with Yolanda. 27RP 7-8. The defense responded that no showing of prejudice was necessary. 27RP 9. Assuming that some showing of prejudice were required, the defense could point to nothing specific,

²⁶ When it originally granted the motion to exclude witnesses, the court had explained: "The only reason for excluding witnesses is to make sure that they don't listen to another witness's testimony, couch their testimony to coincide with another witness's testimony. That's the only basis for that ruling." 7RP 43-44.

noting only that Yolanda's demeanor on the second day of her testimony "could be interpreted as being more compliant with the State," and that Ramirez's conduct "certainly had the ability to influence or impact [Yolanda] while testifying."²⁷ 27RP 9-11. Counsel offered no examples to support this argument.

The trial court found that, while Ramirez had violated the order, the violation did not go to the purpose of ER 615, which is to ensure witness credibility by precluding witnesses from getting together in advance of their testimony to discuss what the testimony will be and how they will fill in any gaps. 27RP 13-14. The court elaborated:

This is hardly an instance where witnesses got together to collude or discuss how to make their testimony consistent to harm the defendant. To the contrary, this is a situation where a person who is intimately familiar with Ms. Lopez's prior statements and her prior testimony expressed displeasure. I don't think that would come as any surprise, given that the court had already declared Ms. Lopez a hostile witness to the State.^[28] She had already completed her direct examination. This took place on November 24th. Her cross examination had begun. So she had already given her testimony before this conversation took place.

27RP 14. The court concluded that the violation had not denied the defendant a fair trial. 27RP 17.

²⁷ The State had completed its direct examination of Yolanda Lopez on the first day of her testimony, before the contact with Detective Ramirez. 24RP 165.

²⁸ 25RP 89, 92-93.

Moving to the remedy, the court noted that, while it had found no cases granting a mistrial for a violation of this nature, such a remedy would nevertheless be appropriate if the defendant's right to a fair trial had been violated in a manner that could not be cured. 27RP 15. Finding that this was not the case, the court concluded that the appropriate sanction was to allow impeachment and exploration of the violation in cross-examination. 27RP 15-16. The court ruled that either party could recall Yolanda and question her about the contact; the defense was entitled to cross-examine Ramirez on the existence of the order, the conversation with Yolanda, and the fact that the conversation violated the order. 27RP 16. The court denied the motion for a mistrial. 27RP 17.

The defense resumed cross-examination of Detective Ramirez. At the very end of cross-examination, the following colloquy occurred:

Q: Detective, yesterday you talked about the fact that you had given Yolanda Lopez a ride home after one of the days in which she testified. Do you remember that?

DR: I did.

Q: And you admitted that when you gave her a ride home you expressed dissatisfaction about the way she was testifying; is that right?

DR: You can say that, yes.

Q: Detective Ramirez, you're aware of what's called a motion in limine or the court's order that witnesses are not supposed to talk to other witnesses about their testimony; correct?

DR: We did not discuss her testimony. We discussed her previous statements that she had given to me and others.

Q: You told her that you were dissatisfied with the way she was testifying; correct?

DR: I believe I've already testified to that, yes.

Q: And she came and testified again the following day after you gave her a ride home; is that correct?

DR: She did. She had not completed her testimony.

Q: And you're aware that you violated the court's order when you talked to her and said you were dissatisfied with the way she was testifying; correct?

DR: I am aware now that I violated a court order, yes.

Q: Detective, are you trying to tell us that the prosecutors didn't make you aware of that motion in limine?

DR: I didn't feel that I was in violation to tell her that I was unhappy with the way she was testifying, it was inconsistent with her previous testimony, it was inconsistent with what she told me a few days prior. I didn't discuss the details of what she needed to say.

Q: Detective, you've testified many times over your 20 plus years of experience; correct?

DR: I have.

Q: You're aware that courts frequently order that witnesses are not supposed to talk to other witnesses; correct?

DR: About their testimony. As a detective I have contact with many of the witnesses over the past many years, so if it's a violation I have done it many times, and I apologize.

Q: And you know that the court found that you violated that order; correct?

DR: Yes.

27RP 66-69. Counsel did not recall Yolanda to question her about the contact.

In closing argument, defense counsel again drew the jury's attention to Detective Ramirez's contact with Yolanda, commenting on it at length. 28RP 146-48. Counsel argued: "What does the State do when

ever [sic] it is they don't like the way the evidence is turning out for them? They either buy somebody's testimony, they try to influence or intimidate them." 28RP 146-47. "What does Detective Ramirez do when the court is not watching over him? When the State has a week [sic] case what do they do? They rely on snitches; they buy testimony; and they try and intimidate people." 28RP 148. Counsel reminded the jury, "He violated the court's order, and he admitted that the court found he violated that order." 28RP 148.

b. The Trial Court's Chosen Remedy Was Not An Abuse Of Discretion.

A trial court's denial of a motion for a mistrial is reviewed under an abuse of discretion standard. State v. Lewis, 130 Wn.2d 700, 707, 927 P.2d 235 (1996). The court abuses its discretion if its decision is manifestly unreasonable, or if the discretion is exercised on untenable grounds or for untenable reasons. State ex rel. Carroll v. Junker, 79 Wn.2d 12, 26, 482 P.2d 775 (1971). The court should grant a mistrial only when the defendant has been so prejudiced that nothing short of a new trial can ensure that the defendant will be tried fairly. Lewis, 130 Wn.2d at 707. The trial judge is in the best position to evaluate the prejudice of any irregularity. Id.

The trial court properly exercised its discretion in determining that there was a remedy short of a mistrial that would preserve the defendant's right to a fair trial. The trial court allowed defense counsel to fully cross-examine Ramirez about the facts of his contact with Yolanda, and to bring out before the jury the fact that the trial court had found that the contact violated its order. This remedy was not an abuse of discretion.

In fashioning the remedy, the trial court relied in part on a decision of the Seventh Circuit under somewhat similar circumstances. In United States ex rel. Clark v. Fike, 538 F.2d 750 (7th Cir. 1976), cert.denied, 429 U.S. 1064 (1977), the prosecutor had held a pretrial meeting attended by the major prosecution witnesses. At this meeting, some of the witnesses had discussed their "general impressions" of the defendant, including the fact that he was "substantially younger" than he was said to be by one of the witnesses in a prior statement. Fike, 538 F.2d at 757. The court found that the admission of the witnesses' testimony did not violate the defendant's right to a fair trial:

The rule that the prosecution cannot bring all its witnesses together prior to trial to discuss their testimony is one to ensure the credibility of the witnesses. That the witnesses in this case did meet together, and did discuss some aspects of their testimony, was a proper subject for impeachment on cross-examination and for comment during closing argument. However, the violation here is not so extreme as to render the witnesses' testimony incredible as a matter of

law, nor is it so extreme as to deny the petitioner fundamental fairness in his trial.

Clark, 538 F.2d at 758.

The defendant's reliance on State v. Cory, 62 Wn.2d 371, 382 P.2d 1019 (1963), and State v. Granacki, 90 Wn. App. 598, 959 P.2d 667 (1998), is misplaced. In those cases, state agents had deliberately and surreptitiously gained access to privileged communications between the defendant and his attorney. In Cory, the appellate court found that the State's actions in eavesdropping on the defendant's conversations with his attorney deprived the defendant of his right to the effective assistance of counsel, and thus vitiated the entire proceeding such that dismissal was the only appropriate remedy. Cory, 62 Wn.2d at 378. While the appellate court in Granacki affirmed the trial court's dismissal of the case based on a detective's reading of privileged attorney-client communications during trial, the court was careful to point out that, even in such an egregious case, a lesser sanction (banning the detective from the courtroom, excluding his testimony, and prohibiting him from discussing the case with anyone) would have been within the trial court's discretion.

Granacki, 90 Wn. App. at 604.

Here, the trial court carefully considered the appropriate remedy for the violation of its order. 27RP 13-17. The court readily

acknowledged that “a mistrial would be appropriate if the defendant’s right to a fair trial had been violated and violated in such a way that it simply could not be cured.” 27RP 15. The court concluded that this was not the case here. 27RP 15. This was not an abuse of discretion.

The defendant complains that the trial court’s remedy “permitted Ramirez to comment on Yolanda’s recantation and bolster the credibility of her previous testimony.” Brf. of App. at 68. But the trial court simply permitted defense counsel to cross-examine the detective on his contact with Yolanda. If counsel felt that Detective Ramirez’s answers were unresponsive, counsel could have objected on this basis and asked the court to strike the answers. Counsel did not do this. Moreover, counsel chose not to recall Yolanda, who presumably could have testified to any intimidation that she may have felt as a result of the contact with Detective Ramirez. Finally, counsel did not ask the court to exclude Ramirez from the courtroom. The argument that the detective’s continuing presence rendered the court’s sanction “toothless” (Brf. of App. at 68) is not only unsupported by the record, it comes too late.

The trial court acted well within its discretion in fashioning a remedy for the violation of its order that witnesses not talk to each other about their testimony. This Court should leave the trial court’s decision undisturbed.

4. THE TRIAL COURT PROPERLY DENIED THE DEFENDANT'S MOTION TO DISMISS FOR AN ALLEGED DISCOVERY VIOLATION AND FOR DESTRUCTION OF EVIDENCE.

The defendant contends that the trial court should have dismissed this case for an alleged discovery violation and destruction of evidence. He points to the State's failure to provide Vincent Rain's DOC file, and failure to preserve an audiotape of an interview with Rain and clothing of an early potential suspect in the murder. These claims fail.

Dismissal under CrR 8.3(b) is an extraordinary remedy, reserved for egregious cases where a defendant can show prejudice. The failure to preserve evidence supports dismissal only where the evidence was both material and exculpatory. The State facilitated defense efforts to obtain Rain's file from DOC, and the defense actually obtained the file five months before trial. The defense had a transcript of the interview with Rain. The clothing of the potential suspect was preserved until after the defendant had been convicted the first time, and no connection with this murder was ever shown. The trial court did not abuse its discretion in refusing to dismiss this case.

a. Relevant Facts.

The defense moved prior to trial, on October 1, 2003, to dismiss the case based on alleged prosecutorial misconduct and destruction of

evidence. 8RP 4; CP 344-432.²⁹ The court heard lengthy argument on the motion. 9RP 14-126. The defendant has pursued three of the bases for the motion in this appeal, alleging that the State violated its discovery obligations by failing to provide Vincent Rain's DOC file to the defense; that the State acted in bad faith by failing to preserve an audiotape of the statement that Detective Ramirez took from Rain by telephone; and that the State acted in bad faith by failing to preserve clothing collected from Ron Hay, who had once been a potential suspect in the murder of Rigel Jones.

i. Vincent Rain's DOC file.

Sometime in the early months of 2003, the State agreed to, and signed off on, a subpoena duces tecum proffered by the defense to obtain Vincent Rain's DOC file. The State did not sign off on a subsequent request for Rain's mental health records, believing that those were privileged. 11RP 79-82, 84-86. At a hearing held on October 27, 2003, the State asked for a copy of Rain's DOC file, which the defense had received in May of that year. 11RP 80-81. As to why the State had not independently obtained a copy of Rain's file from DOC, the prosecutor explained:

²⁹ The State's written response to the motion is at CP 435-56; the defendant's reply is at CP 476-536.

I guess when we signed off on the subpoena ducus [sic] tecum back in the first part of this year, I guess I always assumed that the D.O.C. would send us a copy and they never did, so we asked [defense counsel] for one.

Should we have asked D.O.C.? Again, probably we should have. Should I have to go back through the process to get it when [defense counsel] has received the information we didn't, and we know she received it in May, according to D.O.C.? I don't know.

I mean, she has had the information for some time, but I guess from the fact she has the information, and we signed off in agreement that she should have the information, that we should get a copy of it as well.

11RP 80-81. The State asked that it be provided with Rain's DOC file, or at least any material that the defense planned to use to impeach Rain so that those issues could be litigated in advance of trial. 11RP 82. The court refused to order the defense to turn over Rain's entire DOC file to the State. 11RP 86. The court did order the defense to inform the State of any evidence under ER 609 or ER 404(b) that the defense intended to use to impeach Rain. 11RP 86-88.

The defense alleged that the State had committed prosecutorial misconduct by withholding allegedly material evidence contained in the DOC file – specifically, correspondence between the State and DOC concerning the State's agreement with Vincent Rain. 16RP 40; CP 421-32. The State responded that its agreement with Rain was contained in a one-page letter, a copy of which had been sent to the defense on

January 9, 2003. CP 440, 453, 454; Ex. 38 The State argued that the additional correspondence with DOC had nothing to do with Rain's agreement to testify, but involved only the logistics of transferring him to Colorado under the agreement. CP 440-42. The State pointed out that Rain was not a party to the correspondence between the prosecutor and DOC, and that the defense had been in possession of the correspondence since May 9, 2003, when it had received Rain's file from DOC. CP 442, 456. The defense nevertheless argued that the State had committed a Brady violation that required dismissal under CrR 8.3(b). 16RP 40.

The trial court found that, in return for Rain's testimony at trial, the State had agreed to transfer Rain to an out-of-state prison as soon as possible. The court added: "There was no other legal benefit offered to Mr. Rain. There was no reduction in criminal charges, no reduction in the sentence he was serving, and no consideration toward future charges." 16RP 41. The court outlined events relevant to the motion: in November 2002, an e-mail correspondence began between DOC and the prosecutor's office regarding transfer arrangements for Rain (CP 424-32); a memorandum of understanding between DOC and the prosecutor's office was signed in January 2003 (CP 421-22); on January 9, 2003, the prosecution sent a letter to defense counsel regarding the agreement the

State had reached with Rain (CP 453, 454); in May 2003, the DOC provided Rain's DOC file to the defense (CP 456). 16RP 41-42.

While agreeing with the State "at least on a technical level" that the correspondence with DOC added nothing to the State's agreement with Rain, the court noted that "the more prudent course would have been disclosure." 16RP 42. The court observed, however, that dismissal under CrR 8.3(b) "is indeed an extraordinary remedy" that is reserved for a "truly egregious case" in which the defendant has established prejudice. 16RP 43. The court found no basis to dismiss this case:

There was certainly no surprise here. The defendant had the file, the D.O.C. file, with this correspondence from May 2003, at this point over five months. There's been no showing that the non-disclosure has hampered the defense's ability to prepare for the trial. Moreover, on a substantive basis, this correspondence adds nothing regarding the impeachment and exposure of Rain's incentive. These are not promises or inducements with Rain. Instead, it simply shows the State was invested in meeting its agreement in order to secure Mr. Rain's testimony, and it shows that Mr. Rain's testimony was important to the State.

16RP 43-44. Finally, the court found that the remedy the court had afforded the defense, a continuance to accomplish the interview with Vincent Rain, was sufficient to protect the defendant's rights; the court thus denied the motion to dismiss on this basis. 16RP 44.

ii. Audiotape of Rain interview.

The State confirmed that there was no audiotape of Detective Ramirez's telephone interview with Vincent Rain. 10RP 13. Ramirez had informed the State that, while tapes of interviews with suspects are normally preserved, tapes of interviews with witnesses are recycled once they have been transcribed. 10RP 13-14. The defense claimed that destruction of the tape of the Rain interview was a breach of the Seattle Police Department's own policy, which provided that "[t]apes which are not required for evidence should be recycled as soon as possible." 12RP 119-21.

Again, the court outlined the relevant facts: Detective Ramirez interviewed Vincent Rain by telephone on May 13, 2002; the detective taped the interview, which lasted approximately nine minutes; once the tape was transcribed, the detective had the tape recycled; according to the State, the detective's policy or practice was to save only the tapes of defendant or suspect statements, and recycle those containing witness statements. 16RP 45-46.

After reviewing the relevant case law (16RP 46-48), the court concluded that "it cannot be said that the exculpatory value of having the audiotape of a brief telephone call was so apparent that failure to preserve

it rises to a level of bad faith.” 16RP 48-49. The court rejected the claim that Ramirez had violated departmental policy:

Frankly, I don't think that policy is so straightforward. There's nothing in evidence before this court that indicates the audiotape was or was not "required for evidence." Absent a more explicit guideline, it cannot be said that Detective Ramirez failed to follow the SPD policy.

16RP 49. Finding no bad faith, the court denied the motion to dismiss on this basis. 16RP 49.

iii. Ronald Hay's clothing.

Ronald Hay had come to the attention of police investigating the murder of Rigel Jones in November or December of 1996. Hay was wanted in Oregon for a murder, and the victim's sister had called police in Seattle to inquire whether there might be a connection between the two cases. The knife Hay had on his person when arrested was tested for blood traces at a crime lab in Oregon; no blood was found. Hay's clothing was sent to the Seattle Police; it was never tested for blood, and was ultimately destroyed on August 6, 1999. 16RP 50-51.

The court found that the defendant had failed to establish that Hay's clothing had material exculpatory value. By the time the clothing was destroyed, the defendant had already been convicted, and other-suspect evidence had been excluded at his trial. Even if the evidence was potentially exculpatory, the court found no evidence of bad

faith in its destruction. The evidence had long been available to the defense, had it wished to conduct any tests. The court denied the motion to dismiss on this basis. 16RP 51-54.

b. The Trial Court Properly Denied The Motion To Dismiss.

i. CrR 8.3(b)

A trial court may dismiss a criminal prosecution due to arbitrary action or governmental misconduct “when there has been prejudice to the rights of the accused which materially affect the accused’s right to a fair trial.” CrR 8.3(b). “The trial court’s power to dismiss is discretionary and is reviewable only for manifest abuse of discretion. Discretion is abused when the trial court’s decision is manifestly unreasonable, or is exercised on untenable grounds, or for untenable reasons.” State v. Blackwell, 120 Wn.2d 822, 830, 845 P.2d 1017 (1993). Governmental misconduct need not be of an evil or dishonest nature; simple mismanagement is sufficient. Blackwell, 120 Wn.2d at 831. Nevertheless, dismissal of criminal charges is an extraordinary remedy, and is reserved for “truly egregious” cases of mismanagement or misconduct. Blackwell, at 830; State v. Koerber, 85 Wn. App. 1, 4-5, 931 P.2d 904 (1996).

Under the facts of this case, the trial court’s finding that there had been no showing of the prejudice required under the rule was a proper exercise of its discretion. At the time of the motion to dismiss, which was

brought before the trial court in October of 2003, prior to trial, the defendant had already had Rain's DOC file for five months. The file contained not only the usual records of an inmate's infractions and adjustment to prison and probation, but the State's correspondence with DOC aimed at effecting Rain's transfer to Colorado. All this information was available to the defense when Rain was interviewed on October 13, 2003; when he was examined in the pretrial hearing on November 5, 2003; and when he was cross-examined at trial on November 19, 2003. 15RP 59; 16RP 44; 23RP 26. The correspondence between the State and DOC, while it evidenced the extent to which the State was "invested in meeting its agreement in order to secure Mr. Rain's testimony" (16RP 44), did not contain additional promises or inducements to that end. The lack of prejudice alone is sufficient under the rule to support the trial court's denial of the motion to dismiss.

In addition, there was no showing of governmental mismanagement. The State had joined in the defense request for a subpoena duces tecum for Rain's DOC file.³⁰ The prosecutor reasonably believed that, when DOC produced the file, both the State and the defense would get a copy. There was no reason for the prosecutor to attempt to

³⁰ The State objected only to release of Rain's mental health records, which the State believed were privileged. 11RP 79-80. Nothing that comes under this category appears to be at issue here.

obtain the file by independent, and duplicative, means. The motion to dismiss based on Rain's DOC file was properly denied.

The cases on which the defendant relies do not require a different result here. In Banks v. Dretke, the government wholly failed to disclose to the defense that an essential prosecution witness was a paid police informant. Banks, 540 U.S. at 675. In State v. Martinez, 121 Wn. App. 21, 24-27, 86 P.3d 1210 (2004), the State withheld from the defense, until mid-trial, evidence that the gun that a State's witness had identified could not have been the gun used in the robbery. The prosecutor's conduct with respect to the DOC file in this case does not approach the type of governmental action that courts have found to support dismissal of criminal charges.

ii. Due process.

The Fourteenth Amendment requires that criminal prosecutions conform to prevailing notions of fundamental fairness, and that criminal defendants be given a meaningful opportunity to present a complete defense. State v. Wittenbarger, 124 Wn.2d 467, 474, 880 P.2d 517 (1994) (citing California v. Trombetta, 467 U.S. 479, 104 S. Ct. 2528, 81 L. Ed. 2d 413 (1984)). To comport with due process, the State has a duty to disclose material exculpatory evidence to the defense, and a related duty to preserve such evidence for use by the defense. Wittenbarger, 124

Wn.2d at 475 (citing Brady v. Maryland, *supra*; California v. Trombetta, *supra*).

The test to determine whether the government's failure to preserve evidence significant to the defense violates a defendant's due process rights is contained in two United States Supreme Court cases: California v. Trombetta, *supra*; and Arizona v. Youngblood, 488 U.S. 51, 109 S. Ct. 333, 102 L. Ed. 2d 281 (1988). Wittenbarger, 124 Wn.2d at 475. If the State has failed to preserve "material exculpatory evidence," criminal charges must be dismissed. Wittenbarger, at 475. A showing that the evidence *might* have exonerated the defendant is insufficient. Id. In order to be considered "material exculpatory evidence," the evidence must possess an exculpatory value *that was apparent before it was destroyed*, and must be of such a nature that the defendant would be unable to obtain comparable evidence by other reasonably available means. Id.

The failure to preserve evidence that is only *potentially* useful does not constitute a denial of due process unless the defendant can show bad faith on the part of the police. State v. Ortiz, 119 Wn.2d 294, 301-02, 831 P.2d 1060 (1992). Washington courts have held that compliance with an established policy regarding the evidence at issue is determinative of good faith. Wittenbarger, 124 Wn.2d at 477; *see also* State v. Copeland, 130 Wn.2d 244, 280-81, 922 P.2d 1304 (1996).

The defendant here cannot win dismissal on due process grounds. Neither the audiotape of Detective Ramirez's telephone interview with Vincent Rain nor the clothing of Ronald Hay qualifies as material exculpatory evidence under the controlling case law. There is no basis to conclude that the audiotape would have been exculpatory. The transcript of the telephone conversation, in which Rain recounted the defendant's recitation of his part in the robbery and murder of Rigel Jones, was highly *inculpatory*. Ex. 7 (pretrial). In addition, the transcript, which was available to the defendant, surely constituted "comparable evidence." As to Ronald Hay's clothing, there is nothing in the record that would support a reasonable conclusion that it possessed exculpatory value that was apparent before the clothing was destroyed.³¹

Nor is there any evidence that the police acted in bad faith in destroying evidence that was even *potentially* useful to the defense. The police held Hay's clothing for over a year-and-a-half after the defendant was convicted in a jury trial at which other-suspect evidence had been excluded. 16RP 52. The clothing was available to the defense for testing up until its destruction. 16RP 52. As to the audiotape, Detective Ramirez said that tapes of witness statements, unlike those containing statements of

³¹ The defense repeatedly referred to Ronald Hay's clothing as "bloody clothing." 12RP 114, 115, 127, 133, 134. The court found that the record showed only that the clothing was submitted for testing to determine *if* there were any traces of blood. 16RP 50, 51.

suspects, were routinely recycled. 10RP 13. Noting the Seattle Police Department policy that “tapes which are not required for evidence should be recycled as soon as possible,” the court found that it was not clear that tapes of witness interviews were “required for evidence.” 16RP 46, 49. “Absent a more explicit guideline, it cannot be said that Detective Ramirez failed to follow the SPD policy.” 16RP 49.

The trial court found that the defendant had not shown that the destruction of the audiotape adversely affected his ability to present a defense. 16RP 47. The court found that the transcript of the interview was comparable evidence available to the defendant, and that the audiotape would have been only potentially useful. 16RP 47. The court found that Ronald Hay’s clothing was only potentially useful, and that no bad faith had been shown in its destruction. 16RP 52. The record supports these conclusions. The trial court properly denied the defendant’s motion to dismiss this case. 16RP 49, 53-54.

5. THE DEFENDANT WAS NOT DENIED HIS RIGHT TO A FAIR TRIAL BY CUMULATIVE ERROR.

The defendant finally argues that, even if he cannot gain reversal of his conviction on any individual claim of error, this Court should nevertheless find that cumulative error denied him a fair trial. This claim is unavailing.

The cumulative error doctrine is limited to cases where there have been several trial errors that, standing alone, may not justify reversal; when combined, however, they may deny a defendant a fair trial. State v. Greiff, 141 Wn.2d 910, 929, 10 P.3d 390 (2000). As argued above, the defendant's claims are without merit. There is no trial error to cumulate in this case. See State v. Hodges, 118 Wn. App. 668, 674, 77 P.3d 375 (2003) (where defendant identified no errors, cumulative error doctrine does not apply).

D. CONCLUSION

For all of the foregoing reasons, the State asks this Court to affirm the defendant's conviction for Murder in the First Degree while armed with a deadly weapon.

DATED this 31st day of May, 2005.

Respectfully submitted,

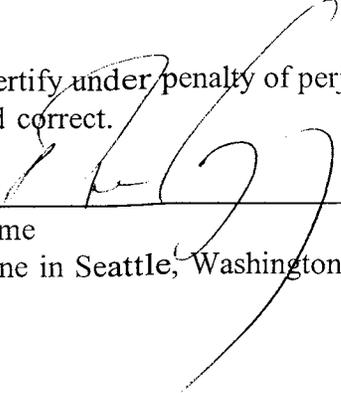
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King County Prosecuting Attorney

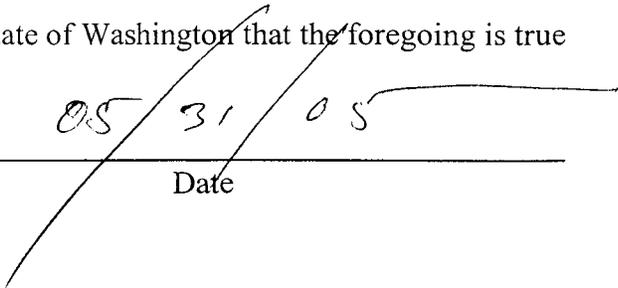
By: Deborah A. Dwyer
DEBORAH A. DWYER, WSBA #18887
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Certificate of Service by Mail

Today I deposited in the mails of the United States of America, postage prepaid, a properly stamped and addressed envelope directed to **Susan F. Wilk** at Washington Appellate Project, the attorney for the defendant, at the following address: 1511 Third Avenue, Suite 701, Seattle, WA 98101, containing a copy of the **Brief of Respondent** in **State v. Darrell Everybodytalksabout**, Cause No. **53570-6-I**, in the Court of Appeals of the State of Washington, Division I.

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


Name
Done in Seattle, Washington


Date

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