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COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By: _____

NO. 26789-0

**COURT OF APPEALS, DIVISION III
OF THE STATE OF WASHINGTON**

STATE OF WASHINGTON,

Respondent,

v.

FREDERICK DAVID RUSSELL,

Appellant.

RESPONDENT'S BRIEF

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STATE OF WASHINGTON
2010 APR -5 PM 4:02

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I. ISSUES PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR

1. Did the trial court properly conclude that Russell was lawfully arrested in Idaho where the Idaho Uniform Act On Fresh Pursuit and an Interstate Mutual Aid Agreement between the Washington and Idaho State Patrols each independently authorized Russell's arrest?

2. Did the trial court properly conclude that medical blood test results contained within emergency room reports were within the scope of the search warrant where the warrant specifically authorized the seizure of "all records pertaining to Frederick D. Russell ... regarding or related to a motor vehicle collision on June 4, 2001, including, emergency department reports and notes"?

3. Where case law firmly establishes that medical blood-alcohol test results are admissible as evidence under the non-per se prong of intoxication without having to satisfy the foundational requirements of a forensic blood test, did this court properly admit the results?

4. Did the trial court properly deny Russell's motion to suppress the forensic blood test results where Russell waited five years before asking to retest the blood, where he conceded the sample was only "potentially useful" and where the court found that he had failed to meet his burden of showing the government acted in bad faith when it met its own retention periods but inadvertently failed to indefinitely preserve the forensic blood sample?

5. Where all jurors were questioned in open court and the trial judge simply reviewed juror questionnaires in chambers and exercised his administrative right to identify which jurors to excuse for hardship, did Russell receive a public trial?

6. Did the trial court clearly err when it denied Russell's Batson challenge of juror 39 where the State explained it had struck her because she repeatedly stated she did not want to serve on the jury?

7. Did the trial court clearly err in failing to find Russell had made a prima facie showing of discriminatory intent when he belatedly challenged the striking of two additional jurors without even establishing that they were members of a racially cognizable group?

8. Was Russell convicted by a fair and impartial jury where the trial court denied his motions to strike jurors 8 and 16 for cause, where any alleged error pertaining to juror 16 was cured when Russell subsequently used a peremptory challenge to remove him, and where juror 8 repeatedly assured the court and all parties that he could be fair and impartial and would follow the law regardless of any personal beliefs pertaining to alcohol?
9. Where during opening statement defense counsel accused the State of withholding evidence, notwithstanding the trial court's ruling to the contrary, did the State commit prosecutorial misconduct by objecting to the false accusation?
10. Did the trial court properly admit the results of the forensic blood draw where the record establishes that the State made a prima facie showing for admissibility by satisfying the criteria set forth in the Washington Administrative Code?
11. Did the trial court properly admit the results of the forensic blood draw where Russell never objected to chain of custody and where the State established a sufficient chain of evidence notwithstanding that Russell never objected?
12. Where the jury instructions as a whole correctly set forth the law and allowed both parties to argue their theory of the case did the trial court properly include instructions 14 and 20 which accurately set forth the law and properly refuse to give Russell's proposed instruction 7 which was duplicative of other instructions contained in the final packet?
13. Did the trial court properly allow the State to call an accident reconstruction expert retained by Russell's former defense counsel when the expert's report was willingly turned over to the State?
14. Did the trial court properly allow the State to ask a Washington State Patrol detective if investigative bias played a role in the investigation after Russell alleged that such bias had tainted the investigation?
15. Did the trial court abuse its discretion when it declined to give Russell credit for the time he spent confined in Ireland fighting extradition back to the United States where he was held there on multiple state and

federal charges and not solely on the vehicular charges for which he was being sentenced?

16. Where Washington's Implied Consent Statute explicitly authorizes the taking of a blood sample from "any person who operates a motor vehicle within this [Washington] state" provided "the arresting officer has reasonable grounds to believe the person had been driving or was in actual physical control of a motor vehicle while under the influence of intoxicating liquor or any drug" was Trooper Murphy authorized to take a blood sample from Russell while he was being treated in an Idaho hospital?

17. Did the trial court properly allow a trooper to testify as to the extent of the damage he observed to the victims' vehicle where such testimony provided evidence as to the speed Russell was traveling when he hit the vehicle and his culpability in the crimes?

18. Did the trial court properly admit statements Russell made prior to receiving his Miranda rights where during that period Russell was not advised he was under arrest or being detained, where no action was taken to block the room or prevent anyone from entering or leaving and where the trooper left the room to talk with other witnesses before returning to ultimately arrest Russell?

II. STATEMENT OF THE CASE

On June 4, 2001, at approximately 6:00 p.m., Russell told Cristin Capwell that his plan for the evening was "to be drinking with a friend." RP 3489. Some time between 7:00 and 7:30 p.m. Russell arrived at a party carrying a half gallon of Monarch vodka he had purchased that day. RP 3421, 3512, 3551. After he and six others consumed the entire bottle, Russell left for My Office Tavern. RP 3551-3555. Russell arrived at the tavern between 8:30 and 9:45 p.m. and drank at least two pints of beer before leaving the bar between 10:00 and 10:30 p.m. Russell was

driving his Blazer and headed eastbound on U.S. Route 270. RP 3290-3291, 3512, 3517-3519. Shortly thereafter, Russell sped into oncoming traffic and smashed into three vehicles, killing three people and severely injuring three more. RP 3713. At approximately 10:53 p.m. Brandon Clements, Kara Eichelsdoerfer, Eric Haynes, Stacy Morrow, Sameer Ranade, Ryan Sorensen and Matt Wagner were travelling westbound on U.S. Route 270. RP 3221-3228, 3233, 3713. That highway, also known as the Moscow-Pullman highway, has one eastbound and one westbound lane and a speed limit of 55 miles per hour. RP 2835-2836, 3970. The weather was clear and the roadway was bare and dry. RP 3058, 3971. The friends were all in Brandon's Cadillac travelling 55 miles per hour when Russell came into their lane and plowed into them. RP 3227-3232, 3354-3357. Eric and Matt were the only passengers able to get out of the Cadillac. RP 3234-3236. It was obvious that some of their friends were already dead. RP 3238. As Matt staggered around, Eric heard Kara and Sameer pleading for help, but due to the severity of the vehicle damage Eric was unable to pull his friends from the crumpled up car. RP 3236-3239.

The Cadillac was the third in a line of four westbound vehicles, three of which Russell careened into. The first was a Geo, the second a Civic driven by Jill Baird and the fourth a Prism driven by Vihn Tran.

RP 3461, 3831-3833. Baird was driving over a hill with her brother and son in the second car when she suddenly saw Russell come into her lane. RP 3833-3835. She saw Russell hit the Geo in front of her, and was able to pull off the road to avoid being hit as well. RP 3833. Vihn Tran, the driver of the fourth vehicle, saw Russell's vehicle come out of a dust cloud and into his lane before their vehicles collided. RP 3462-3463.

Prior to the collision Robert Hart observed Russell driving erratically behind him. RP 3589-3590. Hart pulled to the side of the road when he saw Russell approaching him from behind at a high rate of speed and blinking his lights at him. RP 3591-3594. Russell sped past him going at least 90 miles per hour and began swerving down the road and into the oncoming westbound lane. RP 3594. Hart observed several cars cresting the hill in the opposite direction and realized Russell was not going to make it back into his own lane in time. RP 3595. Russell struck one of the oncoming vehicles and then plowed into another. RP 3595-3596. Hart began flagging down cars and telling the occupants to call 911. RP 3596-3601. Hart contacted Russell, now out his Blazer, and asked him what he was thinking. RP 3599. Russell just stared blankly ahead. RP 3599. After people called 911 and those with aid training began assisting the injured, Hart left for work. RP 3601. He called the

police department after arriving, which sent an officer to take his statement. RP 3602-3603.

Detective David Fenn, an accident reconstruction expert with the Washington State Patrol, conducted an investigation and accident reconstruction analysis. RP 3965-3969. His analysis showed that Russell was travelling eastbound when he drove into the westbound lane and crashed into three oncoming vehicles. RP 4005. Russell was three and a half feet over the center lane into the westbound lane in a no passing zone when he struck the Geo. RP 3977-3980. He was travelling well above the speed limit and did not apply his brakes prior to smashing into the Geo. RP 3979, 3982, 4005. The Geo's driver attempted to take evasive action but was struck anyway. RP 3981. Russell was driving so fast that his impact with the Geo failed to slow the Blazer down or change its direction. RP 3992.

Russell next smashed into the Cadillac carrying the victims. The Cadillac's driver attempted to avoid Russell by steering towards the shoulder but Russell hit him anyway. Russell's Blazer pushed the Cadillac down the highway and into a rock wall. RP 3993-3997. This second impact caused the Blazer to lose a tire. RP 3986. Russell then careened towards Vihn Tran's Prism and struck it, causing both vehicles to burst into flames. RP 3986, 3994.

Brandon, Stacy and Ryan were killed instantly due to blunt trauma resulting from the motor vehicle collision. RP 3021-3023, 3025-3036. Sameer sustained multiple rib fractures, a pelvis fracture, a kidney laceration and a life-threatening ruptured thoracic aorta. RP 3043, 3046, 3207. After emergency surgery was performed on the aorta he was flown to Harborview Medical Center for additional surgery. RP 3049-3051, 3261-3265. Thereafter, he spent two weeks on a ventilator in the intensive care unit followed by six weeks in a nursing home. 3274-3275, 3372. Kara's injuries included four broken ribs, pubic and tail bone fractures, heart and lung fractures, a brain injury which impaired her motor functioning for a full year and facial lacerations which resulted in permanent scarring. RP 3212-3215, 3345-3348. She spent several days in the Pullman Memorial Hospital Intensive Care Unit on a ventilator before being flown to Harborview for surgery to repair her pelvis. RP 3216-3218, 3267-3269. For three months thereafter she required round-the-clock care as she was unable to meet even her most basic needs without assistance. RP 3348-3349. Matt's injuries included a bruised kidney, seven broken transverse processes, a scraped cornea and a collar bone fracture which required surgical repair. RP 3331-3333. He remained hospitalized for two weeks and his vision remains impaired to this day. RP 3359-3361.

Russell sustained “a couple of scrapes” and a cut lip from the collision. RP 3780-3782. At the scene, he appeared unconcerned about his possessions or with others involved in the collisions and commented that he needed a new car anyway as he watched his Blazer go up in flames. RP 2855-2856, 2893.

Russell smelled heavily of alcohol at the collision scene. RP 3750-3751, 3881. Despite having a cut lip and later telling Dr. Kloepfer he didn't smoke, Russell began smoking. RP 2963, 3408-3410. Kayce Ramirez came upon the scene and offered Russell and his passenger Jacob McFarland a seat in her car. They accepted, causing Ramirez to have to exit because of the overwhelming smell of alcohol that filled her car. RP 3408-3409. It was especially strong in the front seat where Russell was sitting. RP 3409. Russell gave numerous conflicting accounts of how much alcohol he had consumed prior to the collision, telling Cristin Capwell it was one (RP 3492), firefighter Tony Catt it was two beers (RP 3883), Trooper Murphy it was one or one and a half beers (RP 3068) and finally Dr. Kloepfer that it was two and a quarter beers (RP 2963).

Washington State Patrol Trooper Michael Murphy arrived at the collision scene around 11:24 p.m. RP 3056. He surveyed the scene, interviewed several witnesses and then followed the ambulance

transporting Russell to Gritman Memorial Hospital in Idaho. RP 3061-3062. When he arrived he interviewed Tony Catt and David Uberuaga, the Moscow firefighters who had treated Russell and Jacob McFarland. They advised Trooper Murphy that Russell was the driver of the Blazer. RP 3063. Trooper Murphy spoke with Jacob McFarland and Vihn Tran and then contacted Russell in the emergency room. RP 3064.

Russell had bloodshot watery eyes and smelled of intoxicants. RP 3065-3066. When Trooper Murphy asked Russell what had happened he claimed a small sporty car had come into his lane and that he swerved right and then lost control when the car struck him. Trooper Murphy sought clarification, and received the same answer one or two more times after which Russell stated he could not remember what had happened. RP 3067-3068. Trooper Murphy asked Russell if he had consumed alcohol, to which Russell responded he had drank one or one and a half beers at My Office Tavern. RP 3068.

Trooper Murphy's prior review of the accident scene indicated that the impact did not occur as Russell had claimed so he called troopers at the scene to confirm his review. RP 3069. At that time he was also told that Mr. Hart had witnessed the collision. RP 3070. After talking by phone to the troopers on scene and to Mr. Hart, Trooper Murphy returned to Russell's room. He advised Russell he was under arrest, read him his

Miranda rights and special evidence warnings and advised him he was going to take a blood sample from him. RP 3071.

Trooper Murphy asked the hospital to provide someone to take Russell's blood. He retrieved a blood draw kit provided to him by the State Toxicology Lab from the locked trunk of his patrol vehicle, gave it to Judy Clark and then watched her clean Russell's skin with iodine and draw two vials of his blood at 01:34 a.m. RP 3073-3077. Trooper Murphy secured the vials and left the hospital. RP 3078. Trooper Murphy subsequently obtained an arrest warrant and took Russell into custodial arrest on June 5, 2001, at his home in Pullman, Washington. RP 3078-3079.

Russell was treated at the hospital by Dr. Randy Kloepfer. RP 2959. Russell told Dr. Kloepfer he had drank two and a quarter beers that evening. RP 2963. Dr. Kloepfer ordered that a medical blood-alcohol test be done. RP 2968. At 12:30 a.m., a registered nurse drew Russell's blood. RP 3181. The medical blood was analyzed by Dr. Clark using a method called fluorescent polarization. RP 3182. Dr. Clark is a PhD in biochemistry employed by the hospital. RP 3161. The results of the medical blood test showed Russell had a blood-alcohol level of .128 grams per one hundred milliliters of serum blood. RP 3175. Russell's chief complaint was that he had a cut lip. RP 2963. After being examined and

treated Russell was released from the hospital with recommendations to use ice and take Tylenol. RP 2975.

On June 8, 2001, Toxicologist Eugene Schwilke from the State Lab tested the forensic blood draw. RP 4096, 4113. The results showed Russell had a blood alcohol level of .12 per one hundred milliliters of whole blood. RP 4115. Schwilke testified that this result meant Russell had the equivalent of six one point five ounce shots of alcohol in his system at the time his blood was drawn, and that his blood alcohol concentration within two hours of driving would have been .13 to .14 per one hundred milliliters of whole blood. RP 4130, 4212-4215.

Schwilke further testified that he is familiar with the fluorescent polarization method the hospital used to test Russell's blood-alcohol level and that this method is generally accepted in the scientific community. RP 4118-4119. He explained that the serum blood result obtained by the hospital can be converted into a whole blood result which is what the State Lab uses, and when this is done the serum blood result translates into a whole blood result of .10. RP 4198- 4200. He further explained that at a blood alcohol concentration of .08 per one hundred milliliters of whole blood everyone is affected to such a degree that they should not drive a motor vehicle. RP 4117-4118. Mr. Schwilke concluded that the results of both the forensic and medical blood test established that at the time of

driving Russell had a blood alcohol content at which his driving would have been adversely affected. RP 4117-1222.

III. ARGUMENT

A. THE ARREST OF RUSSELL IN IDAHO BY A WASHINGTON STATE PATROL OFFICER WAS LAWFUL.

Russell disputes the lawfulness of his arrest in Idaho by Washington State Patrol Trooper Michael Murphy. He contends his arrest was not authorized by the Uniform Act On Fresh Pursuit, found at RCW 10.89, by an Interstate Mutual Aid Agreement (IMAA) entered into under the authority of the Washington Mutual Aid Peace Officers Powers Act found at RCW 10.93, or by the common law fresh pursuit test.

Because both the Uniform Act On Fresh Pursuit and the IMAA independently authorized Officer Murphy's arrest of Russell in Idaho there is no need to reach the common law fresh pursuit test, and Russell's challenge fails.

1. The Trial Court Properly Applied Idaho's Uniform Act On Fresh Pursuit When It Held That Trooper Murphy's Arrest Of The Defendant In Idaho Was Lawful.

Russell asserts that "[t]he trial court's reliance upon Chapter RCW 10.89 is flawed," and that "[b]y its terms, Washington's fresh pursuit statute is inapplicable to arrests made in other states." Brief of

App. at 25-26, citing *License Suspension of Richie*, 127 Wn.App. 935, 940, 113 P.3d 1045 (2005). The State agrees that *Richie* held that Washington's fresh pursuit statute does not authorize arrests outside of Washington. The record, however, contradicts Russell's assertion that the trial court relied on Washington's fresh pursuit statute as codified in RCW 10.89 and shows that it properly relied on Idaho's fresh pursuit statute.

The State's trial brief explained that "the trooper's pursuit and arrest of the defendant was authorized by Idaho Code Section 19-705 through 19-707." CP 156. The court agreed, concluding that "Trooper Murphy's pursuit and arrest of the defendant was authorized by Idaho Code Sections 19-705 through 19-707." CP 978.

Russell agrees that Idaho's fresh pursuit statute authorized Trooper Murphy to arrest him in Idaho.¹ However, he argues that Idaho Code Section 19-702 required Trooper Murphy to bring him immediately to a magistrate, notwithstanding the fact that he was injured, suspected of being intoxicated, and strapped to a gurney. Idaho Code 19-702 provides:

¹ Both Idaho and Washington's Fresh Pursuit statutes require that a pursuing peace officer have only a reasonable suspicion of criminal activity before pursuing a suspect into another state. *Compare*, Idaho Code 19-701 authorizing the pursuit of a suspect "on the ground that he is believed to have committed a felony in such other state ..." to RCW 10.89.050 authorizing "the pursuit of a person who has committed a felony or who reasonably is suspected of having committed a felony ...[.]" The Idaho statute merely requires a belief that an individual has committed a felony not probable cause. *See* I.C. 19-701; *see also State v. Steinbrunn*, 54 Wn.App. 506, 510, 774 P.2d 55 (1989) (recognizing probable cause to arrest is not required at the time of pursuit).

If an arrest is made in this state by an officer of another state in accordance with the provisions of section 1 of this act he shall without unnecessary delay take the person arrested before a magistrate of the county in which the arrest was made, who shall conduct a hearing for the purpose of determining the lawfulness of the arrest. If the magistrate determines that the arrest was lawful he shall commit the person arrested to await for a reasonable time the issuance of an extradition warrant by the governor of this state or admit him to bail for such purpose. If the magistrate determines that the arrest was unlawful he shall discharge the person arrested.

Washington law contains the same provision in RCW 10.89.020.²

Washington courts explicitly rejected Russell's argument about this language in *State v. Steinbrunn*. 54 Wn. App. 506, 512, 774 P.2d 55 (1989). In *Steinbrunn*, a trooper advised the defendant he was under arrest for vehicular homicide, obtained a blood sample from him and then left the hospital. *Id.* at 507. On appeal, the defendant argued that the trooper did not follow the provisions of the Washington Fresh Pursuit Act because he arrested him in Oregon but did not take him before a magistrate of the county in which the arrest was made "for the purpose of determining the lawfulness of the arrest." *Id.* at 512. In rejecting this argument the

² If an arrest is made in this state by an officer of another state in accordance with the provisions of RCW 10.89.010, he shall, without unnecessary delay, take the person arrested before a magistrate of the county in which the arrest was made, who shall conduct a hearing for the purpose of determining the lawfulness of the arrest. If the magistrate determines that the arrest was lawful, he shall commit the person arrested to await for a reasonable time the issuance of an extradition warrant by the governor of this state. If the magistrate determines that the arrest was unlawful, he shall discharge the person arrested.

Steinbrunn court explained that “[t]his procedure does not apply here,” because “[the trooper’s] purpose was not to keep [the defendant] in custody and he made no attempt to do so.” *Id.*

Both fresh pursuit statutes explicitly state that the magistrate’s purpose in assessing the lawfulness of an arrest is to determine whether the defendant should be held or released. Upon determining Russell may be intoxicated Trooper Murphy advised him he was under arrest, obtained a blood sample, and then left the hospital and never returned. Clearly, Trooper Murphy had no intention of keeping Russell in custody. As such, there was no practical reason to determine the lawfulness of the temporary arrest³ and the defendant’s future custodial status because he had already been released. Finally, it is noteworthy that the court in *Richie* also upheld the defendant’s arrest even though the court did not state that the trooper brought him in front of an Idaho magistrate. *License Suspension of Richie*, 127 Wn.App. 935, 114 P.3d 1045 (2005).

Lastly, even if Russell’s argument that Trooper Murphy was required to take him in front of a magistrate was persuasive he

³ An officer may make an arrest for the limited purpose of obtaining a forensic blood draw under the Implied Consent Statute. *State v. Turpin*, 25 Wn.App. 493, 500, 607 P.2d 885 (1980), *reversed on other grounds*, 94 Wn.2d 820, 620 P.2d 990 (1980); *State v. Steinbrunn*, 56 Wn.App. 506, 512, 774 P.2d 55 (1989).

cites no authority to support his contention that failure to do so invalidates the arrest.

2. Russell Did Not Preserve For Appeal His Claim That The Interstate Mutual Aid Agreement Is Invalid.

Russell contends that the Interstate Mutual Aid Agreement (IMAA) entered into between Washington and Idaho, pursuant to RCW 10.93 and RCW 39.34, did not authorize Trooper Murphy's arrest of him, because (1) it appears that the IMAA was not recorded as required by former RCW 39.34.040; and (2) there is no proof that any legislative authority approved the agreement. The Agreement is located at CP 159-165.

This Court should decline to review these arguments because Russell did not properly preserve them for appeal. Washington Rule of Appellate Procedure 2.5(a) states that "[t]he appellate court may refuse to review any claim of error which was not raised in the trial court." RAP 2.5(a); *State v. Powell*, 166 Wn.2d 73, 82, 206 P.3d 321 (2009). A specific objection is necessary to preserve an issue for appeal. *State v. Black*, 109 Wn.2d 336, 340, 745 P.2d 12 (1987).

The first mention Defendant made of the IMAA was in a brief dated September 13, 2001 in which he incorrectly stated that "no such compact exists between the states of Idaho and Washington." CP 85.

The State filed a response brief and attached a copy of the IMAA to the brief. CP 159-165. Russell responded by filing a supplemental memorandum in which he argued that the IMAA violated the Compact and Extradition Clauses of the Federal Constitution and Idaho Law. CP 190-196. Lastly, in a brief filed by his new counsel on June 21, 2007 he made no mention of the IMAA, arguing only that Trooper Murphy lacked authority under Idaho's fresh pursuit statute to follow and arrest him in Idaho. CP 244-245. By incorrectly stating that the IMAA does not exist, then claiming it violates federal and Idaho law, and finally abandoning the issue altogether Russell did not preserve any challenges based on claimed filing and legislative ratification requirements. This Court should refuse to address these issues for the first time on appeal.

3. The Mutual Aid Agreement Between Washington And Idaho Authorized Trooper Murphy To Arrest Russell In Idaho.

If the Court considers the merits of these issues Russell's new arguments should be rejected. Preliminarily, Russell fails to provide any evidence to support his contention that the IMAA was neither filed nor legislatively ratified. Instead, he merely states that "[i]t does not appear that the agreement was ever recorded," and "there is no proof that any legislative authority approved the agreement." Brief of App. at 23. More

should be required of an Appellant asking a court to invalidate his arrest on an issue not even preserved for appeal.

Russell cites to *State v. Plaggemeier* for his assertion that the IMAA between Washington and Idaho was invalid. 93 Wn.App. 472, 969 P.2d 519 (1999). *Plaggemeier* reviewed a Mutual Aid Agreement entered into pursuant to RCW 10.93.070, Washington's Mutual Aid Peace Officers Powers Act, and RCW 39.34, the Interlocal Cooperation Act.⁴ The Agreement contained sections addressing administrative and policy matters between law enforcement agencies, as well as consent provisions in which the agencies agreed to allow peace officers from agencies outside their jurisdiction to exercise their police powers within the territories covered in the agreement. *Id.* at 474-76. None of the five agencies which entered into the Agreement submitted it to their governing legislative bodies, nor did any of them file the Agreement with their county auditor as required by RCW 39.34. *Id.* at 475. Defendant challenged the lawfulness of his arrest made under the authority of the Agreement by arguing that these deficiencies rendered the Agreement invalid. *Id.*

The *Plaggemeier* court held that the portions of the Agreement which established an administrative body were invalidated by the lack of

⁴ RCW 10.93.130 provides: Under the interlocal cooperation act, chapter 39.34 RCW, any law enforcement agency referred to by this chapter may contract with any other such agency and may also contract with any law enforcement agency of another state, or such state's political subdivision, to provide mutual law enforcement assistance.

legislative ratification, but that the extra jurisdictional law enforcement consent provisions entered into under RCW 10.93.070(1) remained effective. *Plaggemeier*, 93 Wn.App. at 483-84. The Court explained that “[l]egislative ratification of mutual aid agreements are necessary because such provisions involve the allocation of fiscal resources that properly falls under the function of local legislative bodies.” *Id.* at 478-79, *citing In re Juvenile Director*, 87 Wn.2d 232, 248, 552 P.2d 163 (1976). However, consent agreements involving cross-border law enforcement authority do not require legislative approval because they are “not concerned with the allocation of fiscal resources, but rather with extra jurisdictional arrests”. *Id.* at 483. As such, the court held that the consent provision of the agreement which allowed officers of each jurisdiction to exercise its police powers within the other’s jurisdiction was independently enforceable without satisfying the ratification and filing requirements of RCW 39.34. *Id.* at 474.

Russell concedes that under *Plaggemeier* consent provisions of mutual aid agreements entered into under RCW 10.93.070 and RCW 39.34 are enforceable regardless of compliance with filing and legislative ratification requirements. Brief of App. at 28. However, he seeks to distinguish the IMAA utilized in his case with the agreement reviewed by the *Plaggemeier* court by arguing that “there is no indication

in the IMAA to indicate that it [the consent provision] is divisible” because “no severability clause is included in the agreement.” *Id.* at 29. By arguing severability Russell misses the point of *Plaggemeier*’s holding. Whether or not the consent provision of the Mutual Aid Agreement is severable or not does not affect the validity of the agreement. *Plaggemeier* upheld the defendant’s arrest because it determined that consent provisions granting extra jurisdictional arrests among signatory agencies do not need to meet the legislative ratification and filing requirement of RCW 39.34.⁵ *Id.* at 478-84.

The Washington Mutual Aid Peace Officers Powers Act, RCW 10.93, was enacted “to modify common law restrictions on law enforcement authority.” *State v. Plaggemeier*, 93 Wn. App. 472, 476, 969 P.2d 519 (1999) (citing *State v. Rasmussen*, 70 Wn. App. 853, 855, 855 P.2d 1206 (1993)). The Act is to be “liberally construed to effectuate the intent of the legislature to modify current restrictions upon the limited territorial and enforcement authority of...peace officers and to effectuate mutual aid among agencies.” RCW 10.93.001(3). As in *Plaggemeir*, the IMAA here contains the written consent of the Washington State Patrol

⁵ Furthermore, even if the validity of the arrest under the Agreement rested on a severability analysis Russell’s argument that the Agreement is invalid because it does not contain a severability clause is unpersuasive because the agreement under review in *Plaggemeier* also did not contain such a clause. The finding of severability was made simply because like here the consent provisions in *Plaggemeier* did not cross reference any other parts of the agreement.

and the Idaho State Patrol to give each other authority to “extend[] into the jurisdiction or territory” of the other. CP 160. Therefore, the IMAA authorized Trooper Murphy’s arrest of Russell in Idaho.

Lastly, citing to *State v. Barker*, Russell argues that if the court accepts his contention that the IMAA did not provide Trooper Murphy with the authority to arrest him then the lawfulness on the arrest must be decided purely on common law grounds. 98 Wn.App. 439, 990 P.2d 438 (1999), *reversed on other grounds*, 143 Wn.2d 915, 25 P.3d 423 (2001). This interpretation of *Barker* is incorrect. In *Barker*, the court found that an Oregon Trooper was not authorized to arrest the defendant in Washington because she lacked the statutorily authorized training to do so. *Id.* at 445. The court then looked to common law to determine that this statutory violation did not trigger the exclusionary rule and therefore the fruits of the arrest remained admissible. *Id.* at 447-48. *Barker* is inapplicable, and as explained in *Plaggemeier* a court “may preserve certain contract rights even if a party violates a statute.” *Plaggemeier*, 93 Wn.App. at 482, citing *Davidson v. Hensen*, 135 Wn.2d 112, 130, 954 P.2d 1327 (1998).

Russell’s arrest was lawful because both Idaho’s Uniform Act On Fresh Pursuit *and* the IMAA entered into between the Washington and Idaho State Patrols independently authorized Officer Murphy’s arrest of

him in Idaho. Idaho's Uniform Act On Fresh Pursuit was properly applied by the trial court, and the consent provision of the IMAA is valid notwithstanding claimed statutory deficiencies because legislative approval is not required for inter-jurisdictional arrest agreements.

B. THE STATE DID NOT EXCEED THE SCOPE OF THE SEARCH WARRANT WHEN IT SEIZED EMERGENCY DEPARTMENT REPORTS AS SPECIFICALLY AUTHORIZED BY THE WARRANT.

The Fourth Amendment prohibits the issuance of any warrant except one “particularly describing the place to be searched and the persons or things to be seized.” *Maryland v. Garrison*, 480 U.S. 79, 84, 107 S.Ct. 1013, 1016, 94 L.Ed.2d 72 (1987). The Washington Constitution contains a similar requirement. *State v. Myrick*, 102 Wn.2d 506, 510, 688 P.2d 151 (1984). Russell notes that the magistrate altered some language when the search warrant was presented to him in order to ensure that the particularity requirement was met. Russell does not challenge whether the particularity requirement was satisfied. Instead, he challenges the trial court's conclusion of law that all records seized pursuant to the search warrant, including those records documenting his medical blood draw results, were within the scope of search warrant. CP 995. The court did not err when it read the warrant in a common sense fashion and

recognized that it included those records.⁶

A trial court's conclusions of law are reviewed de novo. *State v. Cheatam*, 112 Wn.App. 778, 780, 51 P.3d 138 (2002), *aff'd*, 150 Wn.2d 626, 81 P.3d 830 (2003). Search warrants are to be interpreted in a commonsense, practical manner, rather than in a hyper technical sense. *United States v. Turner*, 770 F.2d 1508, 1510 (9th Cir. 1985), *cert. denied*, 475 U.S. 1026 (1986); *State v. Perrone*, 119 Wn.2d 538, 549, 834 P.2d 611 (1992); *State v. Sapp*, 110 Idaho 153, 155, 715 P.2d 366, 368 (Ct.App.1986). Whether a search exceeds the scope of a warrant depends on a common sense reading of the warrant. *State v. Anderson*, 41 Wn.App. 85, 96, 702 P.2d 481 (1985), *rev'd on other grounds*, 107 Wn.2d 745, 733 P.2d 517 (1987); *State v. Holman*, 109 Idaho 382, 388, 707 P.2d 493, 499 (Ct.App.1985).

The search warrant authorized the seizure of:

Any and all records pertaining to Frederick D. Russell, dob 12-20-78, regarding *or related to a motor vehicle collision on June 4, 2001*, including, *emergency department reports and notes, chart notes, doctor's notes and discharge*

⁶ Russell contends that his argument should be reviewed under Idaho law, but he cites no authority to support either that Idaho law controls or what Idaho law says on this matter. Instead, he makes the choice of law argument only in the context of noting that the Idaho and U.S. Constitution both contain a particularity requirement. As noted in the State's response, WA law contains the same particularity requirement and Russell concedes that it was met. Russell challenges the court's conclusion that the seizure of his medical records was within the scope of the search warrant. Because WA and Idaho's law on that issue are the same Russell's challenge does not hinge on a choice of law analysis, and the State's response cites case law from both jurisdictions supporting its argument.

summary which detail or identify Russell's injuries and any medications administered by Gritman Hospital personnel or attending physicians. CP 988. (emphasis added).

Russell contends that the seizure of his medical records was beyond the scope of the warrant, because parts of those reports contained the results of the hospital-ordered blood draw. This argument ignores two common sense readings of the search warrant. First, the search warrant specifically authorized the seizure of "*emergency department reports*," and Russell's blood alcohol level is contained on the same page of an *emergency department report* in which the treating physician described his injuries and the medications which were administered to him. CP 38. This data was interspersed throughout the treating physician's report. See CP 38, 42, 43. Second, the warrant particularly described "records" pertaining to Russell "regarding or related to a motor vehicle collision on June 4, 2001." CP 988. The records, including the medical blood draw results, are readily within this particularized description of records to be seized.

The United States Supreme Court has advised that practical accuracy, rather than technical precision, controls the interpretation of warrants. *United States v. Ventresca*, 380 U.S. 102, 108, 85 S.Ct. 741, 744, 13 L.Ed.2d 684, 688 (1965). The information to which Russell objects was intermingled with information about his injuries and the

medications utilized by the treating physician, because all this information was relevant in determining and documenting an appropriate course of treatment. The officer did not exceed the scope of the warrant in seizing the emergency department reports as those documents were specifically authorized by the warrant.

C. THE MEDICAL BLOOD TEST RESULTS WERE PROPERLY ADMITTED.

Russell concedes that the results of medical blood-alcohol tests are generally admissible. He argues that the trial court nonetheless erred in admitting the results because the foundational requirements were not met. Russell's objection regarding a lack of foundation is without merit because (1) the alleged error was not preserved for appeal, (2) the medical blood test results were properly admitted as a business record, and (3) a medical blood test does not need to meet the same foundational requirements as a forensic blood test conducted by the state toxicology lab to be admissible. Russell also argues that admission of the medical blood test result is dependant on being lawfully arrested. This argument is also meritless because it is contrary to case law.

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1. Russell Did Not Preserve An Objection To The Medical Blood Test Results Based On Lack Of Foundation.

During motions in limine Russell made a broad general objection to the admissibility of the medical blood test result on foundational grounds, but never followed up by identifying what foundational requirements he felt were necessary to admit the results.⁷ When the State moved to admit the results Russell did not object that they lacked foundation. RP 4115. Having raised no specific objection, Russell has failed to preserve a challenge to foundation for appeal. *See, State v. Black*, 109 Wn.2d 336, 340, 745 P.2d 12 (1987);ER 103. (issue is not preserved for appeal unless a timely objection or motion to strike is made which states the specific ground of the objection).

2. The Medical Blood Test Results Were Properly Admitted Under ER 803(a)(6).

At trial, Russell objected that the medical reports which contained the blood test result should not be admitted as a business record, arguing that the State was required to provide testimony by a records custodian instead of his treating physician to satisfy the business records rule. The court properly overruled this objection, and admitted the document as a

⁷ “We still have some motions in limine before the Court, on foundational challenges mainly. Uh ... the admissibility of – the – blood evidence in this case; both the legal and the medical blood draw. RP 1513.

business record pursuant to Evidence Rule 803(a)(6).⁸ RP 2939–2955.

A decision to admit evidence is reviewed for abuse of discretion. *State v. Powell*, 126 Wn.2d 244, 258, 893 P.2d 615 (1995). Washington courts admit medical records maintained by a physician under the business records exception, even when the records consist partly of laboratory reports and other information supplied by persons who are not part of the physician's business. 5D Karl B. Tegland, Courtroom Handbook on Washington Evidence, (Thomson West publishing, 2006). In doing so, courts have emphasized the likelihood that these records are trustworthy.⁹ *See, e.g., State v. Sellers*, 39 Wn.App. 799, 695 P.2d 1014 (1985).

Tennant v. Roys is on point. 44 Wn.App. 305, 722 P.2d 848 (1986). *Tennant* held that medical blood-alcohol test results are admissible as a business record, and that Evidence Rule 702 and 703 allow a state toxicologist to rely on those results to formulate his opinion regarding the driver's impairment due to intoxication.¹⁰ *Id.* at 852-53.

⁸ The business records exception to the hearsay rule is established by the Uniform Business Records Act, which is codified at RCW 5.45.010 to .920. RCW 5.45.020 requires testimony from a records custodian "or other qualified witness."

⁹ Dr. Kloepper testified that he considered the results reliable, and that the results influence the course of treatment he takes with his patients. RP 2971, 2993.

¹⁰ ER 702 – Testimony by Experts, provides: If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise.

ER 703 – Bases of Opinion Testimony by Experts: The facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by or made known to the expert at or before the hearing. If of a type

That is exactly what occurred in Russell's case. Russell's claim that the State needed to meet the three additional factors he cites on appeal are meritless.

For the first time on appeal, Russell lists three requirements he claims are necessary to admit a medical blood test result into evidence. He first claims there was uncertainty as to what was used to swab his arm. He further complains that the blood test was performed in an out-of-state hospital laboratory and that the person performing the test did not have a valid permit issued by the Washington State Toxicologist. Russell provides no authority whatsoever that any of these factors are necessary to admit a medical blood-alcohol test result.

Russell misrepresents the record when he claims there was uncertainty as to what was used to swab his arm. Dr. Kloepfer testified that he ordered a blood-alcohol test, and that when a doctor at Gritman Memorial Hospital orders such a test the skin is prepared with betadine by staff trained in the procedure. He further explained that betadine is the same thing as iodine. RP 2969-2970, 2994. Russell's medical blood draw was administered by a registered nurse at the Gritman Memorial Hospital. RP 2982. Moreover, Russell cites no evidence in the record to support his contention that cleaning the skin with alcohol can cause contamination,

reasonably relied upon by experts in the particular filed in forming opinions or inferences upon the subject, the facts or data need not be admissible in evidence.

nor did he make any such claim at trial. If he had, the State could have remedied any alleged uncertainty, and even an alleged failure to do so would go only to the weight of that evidence not its admissibility.

Similarly, Russell did not object at trial that the blood analysis was performed in an out-of-state hospital, or that the person performing the test did not have a valid permit issued by the Washington State Toxicologist. He offers no legal authority that these factors are necessary for admitting a medical blood test result. In fact, the opposite is true.

Under the first prong of vehicular homicide a person may commit the crime by operating a motor vehicle “while under the influence of intoxicating liquor or any drug, as defined by RCW 46.61.502.” The first prong of the driving under the influence statute (DUI) is commonly referred to as the “per se prong,” while the remaining two prongs are commonly referred to as the “non per se” or “other evidence” prongs. *City of Seattle v. Clark-Munoz*, 152 Wn.2d 39, 44, 93 P.3d 141 (2004). The per se prong requires that “the person has, within two hours after driving, an alcohol concentration of .08 or higher as shown by analysis of the person’s breath or blood made under RCW 46.61.506,” while the non per se prong simply requires that the person be “affected by an intoxicating liquor and/or any drug.” *Compare*, RCW 46.61.502(1)(a) with RCW 46.61.502(1)(b) and RCW 46.61.502(1)(c).

In *State v. Donohue*, the court held that blood-alcohol test results obtained in an out-of-state hospital were admissible in a vehicular homicide prosecution as “other competent evidence” of intoxication under the non per se prong even though the test was performed by an analyst who did not have a permit issued by the Washington State Toxicologist and whose testing methods did not comply with those approved by the Washington State Toxicologist. *State v. Donahue*, 105 Wn.App. 67, 18 P.3d 608 (2001). *See also, State v. Charley*, 136 Wn.App. 58, 147 P.3d 624 (2006) (blood sample drawn and tested by a hospital for medical purposes was admissible as “other evidence” of intoxication under the non per se DUI prong notwithstanding that the test did not comply with the foundational requirements necessary to admit a forensic blood test). Thus, *State v. Donohue and State v. Charley* directly rebut Russell’s challenge to the admissibility of the blood-alcohol test results.¹¹

Lastly, Russell cites to *State v. Smith* for his contention that a lawful arrest is required in order to seize and admit the results of a hospital blood test. 84 Wn.App. 813, 929 P.2d 1191 (1997). As set forth previously, Russell was lawfully arrested. Moreover, this is not what *Smith* held. *Smith* held that the state could not use the implied consent

¹¹ The court properly gave a limiting instruction instructing the jury that the results of the medical blood test could only be considered for the non per se intoxication prong. CP 1232, RP 4118.

statute to obtain medical blood test results, but instead had to rely on general search and seizure law to obtain the results. *Id.* at 819-820. Russell's medical blood was obtained using a search warrant, and thus the legal status of his arrest is immaterial to admissibility.

In summary, medical blood-alcohol test results are admissible as "other evidence" of a defendant's intoxication. Russell's medical blood test results were properly seized under the search warrant, and were properly admitted by the court. Russell has failed to show the trial court abused its discretion in admitting the evidence, and thus his challenge to this evidence fails.

D. THE FORENSIC BLOOD TEST RESULTS WERE PROPERLY ADMITTED.

1. The Trial Court Did Not Abuse Its Discretion When It Denied Russell's Motion To Suppress The Forensic Blood Test Results.

Russell argues the trial court erred when it ruled that the state toxicology lab's failure to indefinitely preserve the forensic blood sample did not preclude admission of the blood test results. He argues the trial court should have suppressed the results because (1) Washington does not recognize a good faith exception to government misconduct, (2) the converse of Evidence Rule 407 applies to the lab's negligence, and (3) CrR 8.3 should require suppression as a minimum remedy. In his

statement of additional grounds Russell contends he was denied a fair trial because the destruction of the blood sample allegedly denied him the ability to retest the blood, and because the results of the whole blood test and the serum blood test allegedly conflict one another.

A trial court's ruling on the admission of a blood alcohol test result is reviewed for abuse of discretion. *State v. Hultenschmidt*, 125 Wn.App. 259, 264, 102 P.3d 192 (2004). When reviewing the denial of a suppression motion, the reviewing court examines whether substantial evidence supports the challenged findings and whether those findings support the conclusions of law. *State v. Ross*, 106 Wn.App. 876, 880, 26 P.3d 298 (2001). Russell has not challenged the trial court's findings of fact, and thus they are verities on appeal. *State v. Gaines*, 154 Wn.2d 711, 716, 116 P.3d 993 (2005). His challenge to the court's legal conclusions are reviewed de novo. *State v. Carneh*, 153 Wn.2d 274, 281, 103 P.3d 743 (2004).

2. Russell Failed To Meet His Burden Of Showing The Government Acted In Bad Faith When It Failed To Preserve The Forensic Blood Sample.

Two U.S. Supreme Court cases, *California v. Trombetta* and *Arizona v. Youngblood* established the analysis trial courts must use to determine whether the state's failure to preserve evidence violates a defendant's due process rights. 467 U.S. 479, 104 S.Ct. 2528, 2534,

81 L.Ed.2d 413 (1984); 488 U.S. 51, 109 S.Ct. 333, 337, 102 L.Ed.2d 281 (1988). When evidence is lost or destroyed while in the State's custody, a court must first determine whether the evidence is materially exculpatory, potentially useful, or neither. If the state fails to preserve "materially exculpatory" evidence, the defendant has been deprived of due process of law, and the criminal charges against him or her must be dismissed, regardless of the good or bad faith of the state actors. *California v. Trombetta, supra*. If the state destroys or fails to preserve "potentially useful" evidence, a due process violation is not implicated unless the defendant shows bad faith on the part of the state. *Arizona v. Youngblood, supra*.

Russell conceded at trial that the forensic blood sample qualified only as "potentially useful" evidence, not as "materially exculpatory" evidence. Therefore, in order to prevail he had to show bad faith on the part of government in destroying or failing to preserve such evidence. *Arizona v. Youngblood*, 488 U.S. 51, 109 S.Ct. 333, 337, 102 L.Ed.2d 281 (1988).

In addressing the test to be applied in cases where "potentially useful" evidence is destroyed, both the Washington State Supreme Court and the U.S. Supreme Court have placed a burden on the defense to establish bad faith on the part of the state. *Arizona v. Youngblood, supra*;

State v. Wittenbarger, 124 Wn.2d 467, 880 P.2d 517 (1994). The reasons for requiring the defendant to establish bad faith when the evidence is only “potentially useful” has been explained by the courts as follows:

Part of the reason for the difference in treatment is found in the observation made by the Court in *Trombetta*, that “[w]henver potentially exculpatory evidence is permanently lost, courts face the treacherous task of divining the import of materials whose contents are unknown and, very often, disputed.” Part of it stems from our unwillingness to read the “fundamental fairness” requirement of the Due Process Clause, as imposing on the police an undifferentiated and absolute duty to retain and to preserve all material that might be of conceivable evidentiary significance in a particular prosecution. We think that requiring a defendant to show bad faith on the part of the police both limits the extent of the police’s obligation to preserve evidence to reasonable bounds and confines it to that class of cases where the interests of justice most clearly require it.

State v. Wittenbarger, 124 Wn.2d at 481 (internal citations omitted).

In determining governmental bad faith in the context of the loss or destruction of “potentially useful” evidence, courts have focused on whether the police or other state actors had knowledge of the exculpatory value of the evidence at the time it was lost or destroyed. Accordingly, the United States Supreme Court has limited findings of bad faith to only “those cases in which the police themselves by their conduct indicate that the evidence could form a basis for exonerating the defendant.” *Arizona v. Youngblood*, 488 U.S. 51, 109 S.Ct. 333, 337, 102 L.Ed.2d 281 (1988). Russell did not meet this standard. CP 1069.

The trial judge found that no evidence was presented to demonstrate that “the toxicology lab destroyed defendant’s blood sample purposely or intentionally, or that the destruction was motivated by any improper motive.” CP 1066. When Russell’s blood was tested in June 2001 the result showed a blood alcohol content of .12. As explained by the trial judge, the toxicology lab staff was confident of these results and therefore had no reason to believe the blood sample contained exculpatory value. CP 1066. Accordingly, the court concluded that “[t]his belief is strong evidence that these individuals acted in good faith at the time the evidence was destroyed, and not with any intent to deprive the defendant of evidence that could be used in his favor.” CP 1066.

The court found further evidence of good faith in the fact that the Lab retained the sample beyond its own retention policies, and that over three years elapsed between the time the sample was obtained and the time it was destroyed. CP 1068-1069. The court noted that “while the defendant may not have any burden or obligation to timely seek to obtain this evidence, his failure to specifically request the evidence for a period of five years certainly relates to the issue of bad faith on the part of the government.” CP 1067–1068. Similarly, the court found that the lab was operating with deficient resources when the blood was destroyed, which was further evidence that the destruction was inadvertent rather than

committed in bad faith. CP 1967. Further, the individual who inadvertently destroyed the sample was not acquainted with the defendant or familiar with his case at the time the sample was destroyed. CP 1066. The trial judge found that her testimony that “she did not intend to destroy defendant’s blood sample” was credible. CP 1066. *See Fisher Props., Inc. v. Arden-Mayfair, Inc.*, 115 Wn.2d 364, 369-70, 798 P.2d 799 (1990) (trial court in better position to make credibility determinations than appellate court).

Accordingly, substantial evidence supports the trial court’s conclusion that Russell failed to meet his burden of establishing that his blood sample was destroyed in bad faith. Russell fails to cite to any fact which leads to the opposite conclusion. Instead, he argues that the well-established case law regarding the loss or destruction of “potentially useful” evidence should be disregarded because “Washington Courts do not recognize the ‘good faith’ exception to state agent misconduct.” Brief of App. at 39. This argument, however, ignores the fact that Washington courts have been applying the *California v. Trombetta* and *Arizona v. Youngblood* test for years.¹²

¹² *See, e.g., State v. Donohue*, 105 Wn.App. 67, 18 P.3d 608, *review denied*, 144 Wn.2d 1010 (2001) (results of hospital blood test were admissible in vehicular homicide prosecution because State did not act in bad faith in allowing the blood sample to be destroyed prior to the defense having an opportunity to independently testing the blood); *State v. Ortiz*, 119 Wn.2d 294, 831 P.2d 1060 (1992) (semen samples putrefied

Similarly, Russell’s argument ignores the fact that the Washington State Supreme Court has held that the Due Process Clause of the Washington State Constitution does not place more stringent requirements on the state than the Fourteenth Amendment to the U. S. Constitution in this area of preservation of evidence for the defense. *State v. Wittenbarger*, 124 Wn.2d 467, 880 P.2d 517 (1994). To the contrary, the Washington Due Process Clause has been held to afford the same protections regarding a defendant’s right to discover exculpatory evidence as does its federal counterpart. *Id.* at 474.

Russell cites two cases, *State v. Crawly* and *State v. Morse*, which have nothing to do with the loss or destruction of evidence. 61 Wn.App. 29, 808 P.2d 773 (1991); 156 Wn.2d 1, 123 P.3d 832 (2005). Instead of addressing the destruction of potentially useful evidence these cases merely state that Washington State has not adopted the federal “good faith” exception to the exclusionary rule.¹³ *See State v. Crawley*,

from bacterial growth because they were not properly preserved through either freezing or drying; unless a criminal defendant can show bad faith on the part of police, failure to preserve potentially useful evidence does not constitute a denial of due process of law); *State v. Hanna*, 123 Wn.2d 704, 714, 871 P.2d 135 (1994), *cert. denied* 513 U.S. 919, 115 S.Ct. 299, 130 L.Ed.2d 212 (1994) (in vehicular homicide prosecution state patrol failed to preserve photographs of skid marks and vehicle for defense expert; defendant showed neither bad faith nor reasonable possibility the missing evidence affected defendant's ability to present a defense, so dismissal not warranted).

¹³ The “good faith” exception to the exclusionary rule was established in *United States v. Leon*, and states that the exclusionary rule does not automatically bar the admission of evidence obtained by law enforcement officers acting in good faith. 468 U.S. 897, 104 S.Ct. 3405, 82 L.Ed.2d 677 (1984).

61 Wn.App. at 33-35; *State v. Morse*, 156 Wn.2d at 9-13. These cases are inapplicable to the issues before this court.¹⁴

3. No precedent supports Russell’s argument that under ER 407 his burden to show bad faith was met.

Russell next notes that Evidence Rule 407 precludes introduction of remedial measures to prove negligence or culpable conduct in connection with an event, and then asserts “that the converse of ER 407 applies to the lab’s negligence.” Brief of App. at 39. He provides no explanation beyond the aforementioned quote, and thus it is not clear how Russell believes ER 407 applies to this issue. Russell cites to page 1157 of the report of proceedings and states that “[t]he trial court ruled that the Lab’s change in procedures showed ‘good faith.’” Brief of App. at 39. Russell’s apparent claim that the court issued such a ruling is incorrect as that section of the transcript does not pertain to the court’s ruling, but rather covers the State’s arguments to the court. In any event, there is no basis for concluding that “the converse of ER 407 applies to the lab’s negligence” to meet his burden under *California v. Trombetta* and *Arizona v. Youngblood*.

¹⁴ *But see, State v. Riley*, COA no. 62418-1-I, which applied the good faith exception to the exclusionary rule by holding that evidence collected from defendant’s car incident to arrest under circumstances later declared unconstitutional in *Arizona v. Gant* did not reverse the conviction because the officer was acting in good faith reliance of existing Fourth Amendment law. Suppressing evidence would not deter police misconduct, and the same result is warranted under Article I, section 7 of the WA Constitution. ___ Wn.App. ___, 225 P.3d 462 (2010).

4. The Trial Court Did Not Abuse Its Discretion In Finding That The Facts Of Russell's Case Did Not Warrant A Remedy CrR 8.3(b).

Russell also asserts that suppression should be required as a minimum remedy under CrR 8.3(b) due to the combination of two factors; (1) the court's denial of his motion to call Ms. Gordon as a witness for the express purpose of impeaching her credibility,¹⁵ and (2) the problems with mismanagement in the lab regarding the destruction of his blood sample.

Criminal Rule of Superior Court 8.3(b) provides as follows:

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

Russell provides no authority as to why suppression should apply here. A motion to dismiss under CrR 8.3(b) is committed to the sound discretion of the trial court. *State v. Proctor*, 16 Wn.App. 865, 867-68, 559 P.2d 1363, *review denied*, 89 Wn.2d 1007 (1997). A defendant seeking dismissal under CrR 8.3(b) must first show arbitrary action or governmental misconduct, which may consist of mismanagement of its case. *State v. Michielli*, 132 Wn.2d 229, 239, 937 P.2d 587 (1997). In the context of CrR 8.3(b), "mismanagement" refers to truly egregious cases of mismanagement or misconduct by the prosecutor, including unfair

¹⁵ Relying on ER 608 the trial court denied Russell's motion to call Ms. Gordon as a witness for the express purpose of simply attacking her credibility. RP 4281 – 4296.

gamesmanship or intentional acts that prevent the court from administering justice. *State v. Koerber*, 85 Wn.App. 1, 3-5, 931 P.2d 904 (1996). Moreover, there can be no remedy under CrR 8.3 without proof that such mismanagement actually caused identifiable prejudice. See *State v. Michielli*, 132 Wn.2d 229 (1997). Prejudice will not be presumed, and must be specifically proven by the defendant. *State v. Head*, 136 Wn.2d 619, 625, 964 P.2d 1187 (1998).

Russell cites to *State v. Woods* for the proposition that actions conducted by lab employees constitute state action. 143 Wn.2d 561, 583, 22 P.3d 1046 (2001). But the fact that it is state action does not show bad faith or prejudice. Moreover, in upholding the trial court's denial of a motion to dismiss, *Woods* pointedly noted that "this [discovery] delay cannot be attributed to counsel for the State." *Id.* Here, the trial judge properly found that because the mismanagement was committed by a third party dismissal is beyond the scope of CrR 8.3(b). CP 1070. See, *State v. Koerber*, 85 Wn.App. 1, 4-5, 931 P.2d 904 (1996) and *State v. Duggins*, 68 Wn.App. 396, 401-02, 844 P.2d 441 (1993), both of which hold that the concept of "mismanagement" has not been extended to acts of third parties, including state officers, over whom the prosecution exerts no direct control.

The court further found that even if the rule did provide a potential remedy, a remedy was not warranted because the unintentional destruction of this “potentially useful” evidence did not materially affect the Russell’s right to a fair trial. CP 1070. Russell thus provides no evidence of actual prejudice, and he cites no authority to support his contention that a lesser remedy of suppression is available or warranted under the facts of this case.

5. The trial court properly concluded that the inadvertent failure to preserve the forensic blood draw did not deprive Russell of a fair trial.

In a statement of additional grounds, Russell contends he was denied a fair trial because the destruction of the blood sample deprived him of the ability to retest the blood, and because the results of the whole and serum blood tests allegedly conflict one another.

The trial court properly rejected Russell’s argument that the destruction of the blood sample denied him the ability to retest the blood, explaining as follows:

This argument overlooks the fact, however, that defendant’s blood sample was taken on June 5, 2001, that he was initially charged with these offenses on June 7, 2001, that he was represented by counsel from the time of his first appearance in court on June 5, 2001 through October 5, 2001, the date this case was originally set for trial. It also overlooks the fact that at no time during this five-month period did defendant or his attorney make a specific request to obtain his blood sample from the State

Toxicologist or to otherwise make any meaningful effort to conduct independent testing. Furthermore, defendant's argument in this regard ignores the fact that over three years elapsed between the date the sample was obtained and the time the sample was likely destroyed. There is no merit, therefore, to defendant's position that he was never given the opportunity to independently test and scrutinize this evidence. While the defendant may not have any burden or obligation to timely seek to obtain this evidence, his failure to specifically request the evidence for a period of five years certainly relates to the issue of bad faith on the part of the government. CP 1068 – 1067.

The court also properly concluded that the inadvertent destruction of Russell's blood sample did not deprive him of a fair trial. The court explained as follows:

[T]he court finds that the unintentional destruction of this "potentially useful" evidence has not materially affected defendant's right to a fair trial. Again, it is difficult for the court to now give credibility to defendant's claim of the importance and materiality of this evidence or of the claimed prejudice caused by its destruction, when the defendant made no effort to obtain the evidence six years ago when it remained in existence from the time of his arrest through the date of his previously scheduled trial.

CP 1070-71.

Finally, there is no merit to Russell's contention that he was denied a fair trial because the results of the whole and serum blood tests do not perfectly match. Russell argues that this lack of perfect congruity discredits the reliability of the whole blood test result. This alleged flaw in the State's case does not demonstrate actual prejudice. To the

contrary. Any alleged deficiency in the State's evidence presented an opportunity for the defense to attack the State's case. Russell was free to argue at trial that the evidence was unreliable, and he cites to no authority that an alleged deficiency in evidence constitutes the denial of a fair trial.

E. RUSSELL RECEIVED A PUBLIC TRIAL.

1. Factual Background.

Prior to the jury being brought to the courtroom on the first day of jury selection the trial judge met with Russell and the attorneys in the jury room to review the juror questionnaires for hardship requests. RP 1304. After the venire panel arrived the trial judge informed them that he and the parties had reviewed the juror questionnaires, and that he was excusing thirteen of them due to "severe hardship issues." RP 1308, 1310-1311. He further informed the panel that other jurors who listed possible hardships would be questioned before he made a decision regarding their excusal requests. RP 1308. After questioning the remaining jurors, the judge advised the jury pool that he, Russell and the attorneys were going to step into the hallway to discuss the hardship requests. RP 1328-1373. Following a brief discussion, the parties returned to the courtroom and the judge excused two more jurors for hardship. RP 1384.

Additional prospective jurors were summoned in the next morning. The trial judge again met with all parties in the jury room to "sort out the

hardship requests” for the new venire members. RP 1571. After the jurors arrived in the courtroom that discussion was placed on the record, and the judge excused several of the new jurors for hardship. RP 1571-1574. He then turned the questioning of jurors on other matters over to the attorneys.¹⁶ RP 1593.

2. Russell’s Trial Was Never Closed Nor Was Any Proceeding Ever Shielded From Public View.

Whether a defendant’s right to a public trial has been violated is a question of law that is reviewed de novo. *State v. Momah*, 167 Wn.2d 140, 217 P.3d 321 (2009), citing *State v. Bone-Club*, 128 Wn.2d 254, 256, 906 P.2d 325 (1995). The Sixth Amendment to the United States Constitution and article I, section 22 of the Washington Constitution each guarantee a criminal defendant the right to a “public trial by an impartial jury.” *Id.* at 147. Additionally, article I, section § 10 of the Washington Constitution states that “[j]ustice in all cases shall be administered openly, and without unnecessary delay.” *State v. Russell*, 141 Wn.App. 733, 738-39, 172 P.3d 361 (2007).

In *State v. Bone Club*, the trial court cleared and closed the

¹⁶ Consistent with his duties to review hardship requests the judge conducted all the questioning pertaining to hardship requests. A court is not required to allow parties the opportunity to voir dire every prospective juror. *State v. Roberts*, 142 Wn.2d 471, 519, 14 P.3d 713 (2000). Here, Judge Frazier’s questioning of the jurors regarding hardships was a logical extension of his statutory duty to determine hardship requests and further demonstrates the administrative and non-adversarial nature of this function.

courtroom during a pretrial suppression hearing. 128 Wn.2d 254, 256-57, 906 P.2d 325 (1995). On appeal, the Court held that the trial court erred when it failed to weigh five factors and make a record before closing the courtroom. *Id.* at 258-59.¹⁷

Russell contends the trial court closed the courtroom, and therefore erred when it failed to consider the *Bone-Club* factors being doing so. Russell's complaint fails because the courtroom in his case was never closed nor was anyone excluded from any proceedings. The excusal of potential jurors based on hardship is a purely administrative matter which in no way implicates the right to a public trial. Therefore, the *Bone Club* factors are not applicable.

3. Identifying Which Jurors To Remove For Hardship Is A Ministerial Matter Which Does Not Trigger Public Trial Rights.

All cases cited by Russell discuss the right to an open and public trial during juror questioning. Here, that right was scrupulously honored. No court has ever held that the right to a public trial extends to reviewing questionnaires in chambers. Indeed, attorneys and judges normally review

¹⁷ 1. The five *Bone-Club* factors are as follows. The proponent of closure or sealing must make some showing of a compelling interest, and where that need is based on a right other than an accused's right to a fair trial, the proponent must show a "serious and imminent threat" to that right; 2. Anyone present when the closure motion is made must be given an opportunity to object to the closure; 3. The proposed method for curtailing open access must be the least restrictive means available for protecting the threatened interests; 4. The court must weigh the competing interests of the proponent of closure and the public; 5. The order must be no broader in its application or duration than necessary to serve its purpose. (citations omitted).

questionnaires in their offices, homes or hotel rooms, not in courtrooms. Nor has any court ever questioned the common and necessary procedure of conducting a brief sidebar, which here was conducted to further the house keeping function of excusing jurors whose hardships prevented them from serving on a lengthy jury trial. Extending public trial rights to these acts would be inconsistent with principles underlying public trial analysis, and would establish an unworkable rule where entire venire panels would have to be excused every time a sidebar was needed.

A defendant does not have a right to a public hearing on purely ministerial matters as these do not require the resolution of disputed facts. *State v. Rivera*, 108 Wn.App. 645, 653, 32 P.3d 292, *review denied*, 146 Wn.2d 1006, 45 P.3d 551 (2001) (defendant was not deprived of right to public trial when courtroom was closed for hearing on one juror's complaint about personal hygiene of another juror because issue involved “a ministerial matter, not an adversarial proceeding” which “was akin to a chambers hearing or bench conference”). Instead, the right to a public trial applies to “the evidentiary phases of a trial and to other adversary proceedings,” and to the questioning of jurors. *Id.*, *quoting and citing Ayala v. Speckard*, 131 F.3d 62, 69 (2nd Cir. 1997), *Press Press-Enterprise Co. v. Superior Court of California*, 464 U.S. 501, 104 S.Ct. 819,

78 L.Ed.2d 629 (1984); *see also*, *In re Pers. Restraint of Orange*, 152 Wn.2d 795, 100 P.3d 291 (2004).

Excusing a prospective juror for hardship is a discretionary function of the court. RCW 2.36.100.¹⁸ The court may delegate this function to court staff. GR 28(1)¹⁹; *See also*, *State v. Rice*, 120 Wn.2d 549, 844 P.2d 416 (1993) (holding that RCW 2.36.100 which authorizes the court to excuse prospective jurors from jury service for hardship is not violated by delegation of the task to the court clerk). A matter which may be delegated to court staff is clearly administrative in nature and does not involve matters of fact finding or dispute resolution. Given that court staff performs this function outside the courtroom it cannot be said that a judge's performance of the same duty must occur in an open courtroom. Accordingly, determining which jurors to excuse for hardship does not implicate the right to public trial.

Russell suggests that anytime the parties step outside the courtroom without first conducting a *Bone-Club* analysis a closure has occurred and the right to a public trial has been violated. Russell fails to

¹⁸ RCW 2.36.100 provides that "no person may be excused from jury service by the court except upon a showing of undue hardship, extreme inconvenience, public necessity, or any reason deemed sufficient by the court for a period of time the court deems necessary."

¹⁹ GR 28 addresses the procedures for excusing jury service under RCW 2.36.100. Subsection (b)(1) provides that "judges of a court may delegate to court staff and county clerks their authority to disqualify, postpone, or excuse a potential juror from jury service."

distinguish between the legitimate use of chambers conferences and the types of proceedings which implicate the right to public trial. The use of chambers conferences to address ministerial, housekeeping, or purely legal matters has been repeatedly approved of and does not even require the presence of the defendant yet alone the public. *See, for e.g., In re Personal Restraint of Pirtle*, 136 Wn.2d 467, 965 P.2d 593 (1998) (defendant need not be present for discussion about wording of jury instructions, ministerial matters, and whether jury should be sequestered); *In re Personal Restraint of Lord*, 123 Wn.2d 296, 306, 868 P.2d 835 (1994) (defendant had no right to be present at in-chamber conference discussions regarding issuance of funds for defendant's haircut and clothing, wording of jury questionnaires and pretrial instructions, time limit on testing of evidence, rulings on evidentiary matters which had been previously argued, ruling on juror note taking, and order directing State to provide the defense with witness summaries); *State v. Bremer*, 98 Wn.App. 832, 991 P.2d 118 (2000) (defendant had no right to be present at chambers conference where proposed jury discussion were discussed because the inquiry was legal and did not involve resolution of questions of fact).

The brief chamber and sidebar conferences at issue here are similar to the cases discussed above. They dealt only with the purely ministerial

matter of identifying jurors whose hardship disqualified them from serving on a four week trial. No evidence was taken, no disputed facts were addresses, no adversarial proceeding occurred, and the brief discussions were subsequently placed on the record.

4. Russell Failed To Preserve Any Alleged Error For Appeal Because Even If A Closure Occurred It Was A Discretionary Closure Which Was Not Objected To.

At trial, Russell never objected to the two conferences he now seeks to challenge. When a defendant fails to object to a discretionary courtroom closure, the issue need not be reviewed on appeal. *State v. Collins*, 50 Wn.2d 740, 314 P.2d 660 (1957). In *State v. Collins*, the trial court locked the courtroom door to prevent spectators from filing in and out of the courtroom during closing arguments and disrupting the jury. *Id.* at 746. People in the courtroom were permitted to remain but those outside could not enter. *Id.* *Collins* did not object at trial but on appeal claimed a violation of article 1, section 10 of the state constitution.

The Washington Supreme Court distinguished between rulings that clearly violate the right to an open trial versus those rulings that involve the exercise of discretion. *Collins*, 50 Wn.2d at 747-48. The Court held that a discretionary ruling on courtroom closure must be objected to, whereas an order that clearly violates the right to a public trial can be reviewed absent an objection. *Collins* is binding precedent. Here, even if

the proceedings were closed the closure would have been discretionary and, thus, an objection was needed to preserve a claim of error. Thus, under *Collins*, the failure to object court bars the claim on appeal.

Other decisions of the Washington Supreme Court are easily reconciled with *Collins*. In all other open courtroom decisions by the Court, the courtroom closure reviewed on appeal clearly violated the right to public trial. In *State v. Marsh*, 126 Wn. 142, 145, 217 P. 705 (1923), the superior court tried an adult as if he were a juvenile, closing the entire proceeding and failing to provide counsel. In *State v. Bone-Club*, 128 Wn.2d at 256-57, the trial court summarily granted the State's request to clear the courtroom for the pretrial testimony of an undercover detective. In *In re Pers. Restraint of Orange*, 152 Wn.2d 795, 100 P.3d 291 (2004), the trial court summarily ordered the defendant's family and friends excluded from *all* voir dire proceedings. Likewise, in *State v. Brightman*, 155 Wn.2d 506, 511, 122 P.3d 150 (2005) the trial court ordered, sua sponte, that the courtroom be closed for the entire 2 ½ days of voir dire, excluding the defendant's family and friends. In *State v. Easterling*, 157 Wn.2d 167, 172-73, 137 P.3d 825 (2006), the trial court ordered the defendant and his attorney excluded from pretrial motions regarding the co-defendant. In *State v. Strode*, 167 Wn.2d 222, 217 P.3d 310 (2009) and in *State v. Momah*, 167 Wn.2d 140, 217 P.3d 321 (2009), the trial court

ordered private individual in-chambers questioning of multiple prospective jurors. In each of these cases, a complete closure occurred and the constitutional violation was clear. The errors in these cases were "manifest" and would have been reviewable under *Collins*, even absent an objection in the trial court.

5. Even If Closure Error Occurred The Error Was Not Structural Error Requiring Reversal Because A Trial Court Does Not Render A Trial Fundamentally Unfair By Exercising Its Right To Excuse Jurors Who Are Unable To Serve On A Lengthy Trial.

Even if there was error and even if it could be raised on appeal without an objection below, "being able to raise an issue on appeal does not automatically mean reversal is required." *State v. Momah*, 167 Wn.2d at 155. An error is structural when it "necessarily render[s] a criminal trial fundamentally unfair or an unreliable vehicle for determining guilty or innocence." *Id.* at 149. (citations omitted).

In *Momah*, the Court departed from its prior rulings which held that a public trial violation constitutes structural error requiring reversal. The Court emphasized that under federal law not all courtroom closures are considered structural error, because some closure errors do not render a trial fundamentally unfair. *Momah*, 167 Wn.App. at 150. Applying this principle, the Court found that the closure for private questioning that occurred in *Momah's* case was distinguishable from previous closure

cases because the defendant agreed to the closure, argued for its expansion, failed to object, actively participated in the closure proceedings and benefited from them. *Id.* at 151. Finding that the circumstances and impact of the closure differed significantly from prior cases, the Court found that the closure that occurred in Momah's case was not a structural error and therefore did not require a new trial. *Id.* at 156.

Likewise, Russell did not object to the in-chambers and sidebar conferences and was present for and participated in them. Even if these conferences constituted a closure error they in no way rendered the trial fundamentally unfair. Therefore, even if error did occur it was not structural and a new trial should not be ordered.

6. Even If Closure Error Occurred The Closure Was Too Trivial To Violate Public Trial Rights.

Similarly, even if this Court finds that these brief discussions regarding juror hardships constituted an improper closure de minimis closures may be "too trivial to implicate one's constitutional rights." *United States v. Ivester*, 316 F.3d 955 (9th Cir. 2003); *Peterson v. Williams*, 85 F.3d 39 (2nd Cir. 1996). Trivial closures are those that are "brief and inadvertent" and which "had no real affect on the conduct of the proceedings." *State v. Brightman*, 155 Wn.2d 506, 517, 122 P.3d 150

(2005). The concept of “trivial closures” derives from federal cases²⁰ and was recently applied by Washington in *State v. Lormor* where the court found that even though closure occurred the right to a public trial was not violated by the court’s decision to exclude the defendant’s young daughter from the courtroom. ___ Wn.App. ___, 224 P.3d 857 (Feb. 2, 2010). The *Lormor* court noted that the right to a public trial serves to ensure a fair trial, to remind officers of the court of the importance of their functions, to encourage witnesses to come forward and to discourage perjury, and reasoned that none of those principles were implicated by the trivial closure. *Id.* at 860, *citing Waller v. Georgia*, 467 U.S. 39, 46, 104 S.Ct. 2210, 81 L.Ed.2d 31 (1984). As in *Lormor*, none of these considerations were offended by the administrative procedure used in Russell’s case, and thus any violation was de minimus and not subject to remedy.

F. THE STATE’S PEREMPTORY CHALLENGE TO JUROR 39 DID NOT VIOLATE BATSON.

1. Factual Background.

The State used its last remaining peremptory challenge to strike juror 39. Juror 39 was the only African American on the venire panel.

²⁰ See, for e.g. *Peterson v. Williams*, 85 F.2d 39, 41042 (2nd Cir. 1996) (the trial court, on motion, closed the courtroom so that an undercover officer could testify but inadvertently left the courtroom closed for 15-20 minutes of the defendant's testimony; *United States v. Al-Smadi*, 15 F.3d 153, 154 (10th Cir. 1994)(court security officers closed federal courthouse doors at the usual time of 4:30 P.M., 20 minutes before the close of a trial's proceedings at 4:50 P.M.); *Snyder v. Coiner*, 510 F.2d 224, 230 (4th Cir. 1975) (during counsels' arguments to the jury, a bailiff refused to allow persons to enter or leave the courtroom).

RP 2705, 2708. Russell, who is Caucasian, raised a *Batson* challenge. RP 2701. Judge Frazier responded to the challenge by stating “well I hadn’t seen that ... so what I’m going to do is note the challenge and your argument at a later time.” RP 2701. The judge instructed the parties to select alternate jurors, and then readdressed the *Batson* challenge thereafter.

When the issue was subsequently addressed, the State provided a race-neutral explanation for striking juror 39, explaining it had struck her because “she had made it very clear throughout the process she didn’t want to be here.” RP 2705. Russell then claimed that juror 25 was also possibly a minority stating “I don’t know if she’s African-American; but she looks Hispanic or some other ... woman of color.” RP 2709. Russell made no record to establish whether this was actually the case, and the record suggests there may have been disagreement on this matter.²¹ In any event, Russell’s counsel conceded that juror 25 was struck for obvious and legitimate reasons,²² and clarified that he was simply suggesting there

²¹ An inaudible portion of the transcript in which the State is speaking reads as follows. “[Inaudible on tape – whispered] doesn’t appear to be Hispanic. RP 2718. However, it is not clear from the surrounding context if the State is referring to juror number 25 or juror number 31.

²² Juror 25’s demeanor was unreceptive throughout the jury selection process, at times becoming abrasive and provocative. For example, when the State asked the venire panel who would rather not serve on the jury juror 25 began waving at the attorneys. RP 1671. When asked why, she explained that “she was not a very patient person and I don’t like delays[.]” RP 1862. She later added “I have many virtues but patience isn’t one of them.” She further explained that patience was not a virtue she wanted to work at

may be a pattern of striking minorities rather than suggesting there was any improper intent by the State in striking this specific juror. RP 2709.

The trial judge denied the *Batson* challenge, stating “I’m not convinced at all that the peremptory was exercised here against Ms. Ruby West (juror 39) was racially motivated.” RP 2710.

After the judge ruled on the *Batson* motion and after the jury was empanelled and sent home, Russell then advised the court that the State had struck juror 31, Ms. Ramirez, and asserted that she too was “a minority.”²³ RP 2716. The State disagreed, noting that “Ramirez” was the juror’s married name²⁴ and that it was unclear what her ethnicity was. RP 2718. Russell offered no response; he did not dispute the State’s assertion, provide any information to establish that Ms. Ramirez was a minority or ask for a fact-finding to resolve the dispute.²⁵ The court did

and that her patience had already been tested by the jury selection process thus far. RP 1863-1864. The questioning of juror 25 on this subject matter ended when she asked defense counsel “are you done,” and then advised him she did not “want to share anything else.” RP 1864. In a separate and unrelated exchange juror number 25 replied to a question by stating “I refuse to talk about it.” Counsel said he would come back to her, to which she replied “you can try.” Counsel never returned to finish that discussion. RP 1762. During another part of questioning juror 25 stated “I just want to get through this process” (RP 2159), and later complained that “it’s taking so long.” (RP 2160). On another occasion she asked one of the attorneys if he had “really thick skin,” warning him that she had to criticize him because “I can’t help myself.” She then complained that “you seem to ask the same question from fifty different directions, and explained “[o]nce I’ve heard something I’m done with it ... I don’t know what you want[.]” RP 2167-2168.

²³ Russell did not specify which minority, but presumably meant to infer she was Latina. RP 2709.

²⁴ See, for e.g., 1930, 1971.

²⁵ An inaudible portion of the transcript in which the State is speaking reads as follows. “[Inaudible on tape – whispered] doesn’t appear to be Hispanic. RP 2718.

not address the issue further.²⁶

After hardship exclusions the venire panel consisted of 39 prospective jurors; 16 men and 23 women. RP 2008–2544. The State used its peremptory challenges to strike five women and one man. CP 1135-1136; RP 2032, 2157, 2174, 2199, 2269, 2283. It used its peremptory challenges afforded for the alternate jurors to strike one man and one woman. CP 1135-1136; RP 2384, 2473. Russell used his peremptory challenges to strike three men and three women. CP 1135-1136; RP 2010, 2016, 2114, 2149, 2199, 2301. He used his peremptory challenges afforded for the alternate jurors to strike two women. CP 1135-1136; RP 2362-2363, 2376. The jury was comprised of six men and six women. RP 2711.²⁷

2. Legal Background.

The equal protection clause prohibits a prosecutor from using

However, it is not clear from the surrounding contest if the State is referring to juror 25 or juror 31.

²⁶ On the first day of jury selection the defense asked the court to grant juror 31's request to be excused for hardship. The State remained silent on the issue, and in the absence of an agreement between the parties the court denied the excusal request. RP 1378 1381. During subsequent voir dire juror number 31 repeatedly expressed confusion. RP 1760, 1762, 2002, 2203, 2204. At one point she stated she felt "embarrassed" because "I don't know all the answers." RP 2204. When the topic of media exposure came up she summed up her feelings towards Mr. Russell by stating "[h]e's not a monster, he's just a kid." RP 2205. The State's refusal to accept the defense invitation to excuse juror 31 at the outset dismantles the defense's later suggestion that the State used a peremptory challenge to strike her based on her race or ethnicity. The State only struck juror 31 after observing her and listening to her answers during five days of voir dire.

²⁷ All the juror's genders are apparent from their first names except for "Terry Boyko." At RP 2139 Boyko is identified as "Terry Ann Boyko" and referred to as "ma'am," thereby identifying her as female.

peremptory challenges to exclude otherwise qualified and unbiased persons from the jury solely because of their race. *Batson v. Kentucky*, 476 U.S. 79, 106 S.Ct. 1712, 80 L.Ed.2d 69 (1986). The same analysis which bans discriminatory use of peremptory challenges based on race also bans the use of peremptory strikes based on gender, and the same procedures are used in making this determination. *State v. Burch*, 65 Wn.App. 828, 839, 830 P.2d 357 (1992).

In *Batson v. Kentucky*, the Court outlined a three-part procedure for challenging the State's use of peremptory strikes based on race. First, the defendant has the burden of establishing that a prima facie case of purposeful discrimination occurred. *Batson* 476 U.S. at 96. To establish a prima facie case the defendant must show two things; (1) that "he is a member of a cognizable racial group," and (2) that "these facts and other relevant circumstances raise an inference" that the prosecutor used the peremptory challenge to excuse a potential juror on account of his or her race. *Id.* at 96.

If the defendant establishes a prima facie case of purposeful discrimination then the burden shifts to the State to provide a race-neutral explanation for challenging the juror. *Batson*, 476 U.S. at 97. "[U]nless a discriminatory intent is inherent in the prosecutor's explanation, the reason

offered will be deemed race neutral.” *Hernandez v. New York*, 500 U.S. 352, 360, 111 S.Ct. 1859, 114 L.Ed.2d 395 (1991).

Lastly, the trial court must determine whether purposeful discrimination occurred. *Batson*, 476 U.S. at 98. A trial judge’s ruling regarding discriminatory intent is a finding of fact entitled to great deference on appeal, and is reviewed for clear error. *Hernandez* 500 U.S. at 362-364; *State v. Hicks*, 163 Wn.2d 477, 493, 181 P.3d 831 (2008). As explained by the U.S. Supreme Court, such deference is necessary because the determination at issue amounts to assessing the credibility of the attorney whose peremptory challenge is being questioned and the trial judge is in the best position to makes that assessment.

Deference to trial court findings on the issue of discriminatory intent makes particular sense in this context because, as we noted in *Batson*, the finding “largely will turn on evaluation of credibility.” 476 U.S. at 98, n.21. In the typical peremptory challenge inquiry, the decisive question will be whether counsel's race-neutral explanation for a peremptory challenge should be believed. There will seldom be much evidence bearing on that issue, and the best evidence often will be the demeanor of the attorney who exercises the challenge. As with the state of mind of a juror, evaluation of the prosecutor's state of mind based on demeanor and credibility lies “peculiarly within a trial judge's province.” *Wainwright v. Witt*, 469 U.S. 412, 428, 105 S.Ct. 844, 854, 83 L.Ed.2d 841 (1985), *citing Patton v. Yount*, 467 U.S. 1025, 1038, 104 S.Ct. 2885, 2892, 81 L.Ed.2d 847 (1984).

Hernandez, 500 U.S. at 365.

The State is required to provide a race neutral explanation for its peremptory strike only if the trial judge finds that the defendant has made a prima facie showing of purposeful discrimination. *State v. Burch*, 65 Wn.App. 828, 840, 830 P.2d 357 (1992); *State v. Wright*, 78 Wn.App. 93, 100-01, 896 P.2d 713 (1995). A trial court has the discretion to find that a prima facie case of discrimination has been made when the State removes the only remaining member of a constitutionally cognizable group. *State v. Hicks*, 163 Wn.2d 477, 490, 181 P.3d 831 (2008). Here, the trial court declined to do so. However, if the State offers a race neutral explanation for the peremptory challenge and the trial court rules on the ultimate issue of whether intentional discrimination occurred then the appellate court reviews the trial court's ultimate decision for clear error. *Hernandez*, 500 U.S. at 352, citing *U.S. Postal Service Bd. Of Governors v. Aikens*, 460 U.S. 711, 715, 103 S.Ct. 1478, 1482, 75 L.Ed.2d 403 (1983); *Hicks*, 163 Wn.2d at 492. If the trial court declines to find that a prima facie case of discrimination was made and the State does not volunteer a race neutral reason then the court's preliminary ruling is reviewed for clear error. *Hicks*, 163 Wn.2d at 486.

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3. The Record Is Insufficient To Review Russell’s Belated Objections To The State’s Peremptory Challenges Of Jurors 25 And 31.

While a *Batson* challenge may be made at any time the Ninth Circuit has emphasized that “[t]he case law is clear that a *Batson* objection must be made as soon as possible, and preferably before the jury is sworn.” *United States v. Contreras-Contreras*, 83 F.3d 1103, 1104 (9th Cir. 1996), *citing* *Dias v. Sky Chefs, Inc.*, 948 F.2d 532, 534, (9th Cir. 1991), *cert.denied*, 503 U.S. 920, 112 S.Ct. 1294, 117 L.Ed.2d 517 (1992). The reason for this is that a “contemporaneous objection is especially pertinent as to *Batson* claims, where innocent oversight can so readily be remedied and an accurate record of the racial composition of the jury is crucial on appeal.” *United States v. Pulgarin*, 955 F.2d 1, 2 (1st Cir. 1992). The *Pulgarin* court’s commentary is fitting as applied to Russell’s delayed challenges where the record is insufficient to review his claim that the State struck three minority women. While the State agrees that juror 39 was the only African American on the venire panel, the alleged minority status of jurors 25 and 31 is not established on this record, and therefore cannot be reviewed.

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4. The Trial Court Did Not Commit Clear Error When It Found That A Prima Facie Case Of Discrimination Had Not Been Shown In Regards To Jurors 25 And 31.

Belatedly, Russell alleged that jurors 25 and 31 may be women of color. Their alleged minority status was never established, the court did not find that a prima facie case of discrimination had been made and the State did not volunteer any reasons for striking them. The court's refusal to find that a prima facie case had been made was not clearly erroneous.

It is not clear from the record if Russell even raised a *Batson* challenge regarding the State's use of peremptory challenges to strike jurors 25 and 31. Instead, it appears that Russell was simply noting their possible racial makeup to support his *Batson* challenge regarding juror number 39. What is clear is that Russell raised no evidence of any circumstances other than race that would support an inference that jurors 25 and 31 were struck on account of their race.

The Washington State Supreme Court recently held that if a challenged juror is the last remaining member of a racially cognizable group of which the defendant is also a member, a trial court does not err in finding that a prima facie case of discrimination has not been established simply because the State struck that juror. *State v. Rhone*, No. 800037-5, 2010 WL 1240983 at *8-10 (Wash. April 1, 2010). *Rhone* does not apply to Russell's case because he is not a member of a racially cognizable class,

and even if he were jurors 25 and 31 were not the last remaining members of a racially cognizable class. Nevertheless, it is notable that even under the facts of *Rhone* where the defendant and the struck juror were part of the same racially cognizable group the Court held that “something more” in addition to shared race is necessary to make a prima facie showing. *Id.* at *12. Here, Russell offered no evidence to support an inference that jurors 25 and 31 were struck for a discriminatory purpose or that either of them was even a member of a racially cognizable group. Under these facts, the trial court did not clearly err.

5. The Trial Court’s Denial Of The *Batson* Challenge Of Juror 39 Was Not Clearly Erroneous.

The State offered a race-neutral explanation regarding its peremptory challenge of juror 39 even though the trial court did not find that Russell had made a prima facie showing. The State explained it had struck juror 39 because “she had made it very clear throughout the process she didn’t want to be here.” RP 2705. Russell countered that juror 18 also stated he would rather not serve on the jury, and then argued that because “all things were equal” between the two potential jurors the State’s decision to strike juror 39 must have been based on race. RP 2706-2707. Russell adds on appeal that the State also failed to strike juror 53, who also indicated he would rather not serve on the jury. Given that it would

have been impossible for the State to strike all sixteen jurors who expressed reluctance to serving on the jury²⁸ the failure to strike two of the sixteen does nothing to support Russell's *Batson* claim.

Furthermore, Russell's claim that "all things were equal" between jurors 18 and 39 is without merit. First, he tried unsuccessfully to strike juror 18 for cause. RP 1873-1874. Second, juror 39 repeatedly, and without explanation, stated she did not wish to be on the jury. RP 2708. In contrast, jurors 18 and 53 expressed valid reasons for being reluctant to serve, namely that they were busy with work. RP 2708-2709. The differences in explanation provided by jurors 18, 39 and 53 regarding their reluctance to serve are striking.

- Juror number 18 explained that he would rather be at work. RP 1860-1862.
- Juror number 39 explained she had "no particular reason" for not wanting to serve on the jury. When pressed to provide more details, she repeated again that she had "no particular reason" before eventually saying she did not want to participate because "I'm selfish." RP 1890-1891.
- Juror number 53 had served on five prior juries. RP 1637. When asked how he would feel being on a jury for the sixth time, he replied "I think that it's the citizen's responsibility to serve and so if I'm being called to serve, I think all of us around here would be not necessarily happy to serve but certainly would." RP 1640. He later elaborated on this area in the same manner as juror number

²⁸ See, RP 1671-1672.

18, explaining that his work demands made serving on a jury difficult. RP 1892-1893.

A trial court's finding of non-discriminatory motive based on even minor differences between a challenged and non-challenged juror is entitled to great deference on appeal. *State v. Rhone*, No. 800037-5, 2010 WL 1240983 at *15-16 (Wash. April 1, 2010). For instance, in *State v. Rhone* an African American defendant claimed on appeal that the State's striking of the sole African-American on the venire panel was based on race because his "background and answers to voir dire questions were similar to those of a non-African-American venire member." *Id.* at *12. The Washington State Supreme Court noted that the non-African American venire member had experience as a prior juror whereas the African-American member did not. *Id.* at *15. In finding this difference enough to uphold the trial court's denial of the *Batson* challenge, the Court emphasized that "where reasonable minds may differ in finding an inference of discrimination, an appeal court may not conclude that a trial court's determination regarding that inference is clearly erroneous." *Id.* at *16. (citations omitted).

The thoughtful and reasonable explanations of jurors 18 and 53 are in stark contrast to the mindset exhibited by juror 39. When an attorney is down to her last peremptory strike, as was the case here, she is literally

faced with a choice between two specific people. The State's decision to strike a juror who unabashedly proclaimed she was simply too "selfish" to serve on a jury in favor of one who did not express this sentiment is not suspect.²⁹

The trial court's denial of the *Batson* challenge to juror 39 was not clearly erroneous. Nothing in the record indicates the judge had cause to suspect that counsel's explanation for striking the juror was a pretext for discrimination. The trial judge unequivocally rejected the claim, declining to find that Russell had made even a prima facie showing of discrimination.

As the Supreme Court has noted, a reviewing court may find evidence of the prosecutor's sincerity in the fact that he "defended his use of the preemptory challenges without being asked to do so by the judge," that "only three of the challenged jurors can with confidence be identified as Latinos, and the prosecutor had a verifiable and legitimate explanation for two of those challenges." *Hernandez*, 500 U.S. at 369-370. Here, the minority status of only juror 39 was established, and the State volunteered a detailed explanation as to why it had struck her even while noting its

²⁹ When faced with its last preemptory strike the State was able to choose between jurors 39 and 43. Juror 43 is Nicholas Stumbo. He was one of 29 jurors who raised their hands when the venire panel was asked who would like to serve on the jury. RP 1670. He was the presiding juror of the jury that convicted Russell. RP 1242-1244; 1251-1253.

understanding that it was not required to do so in the absence of a prima facie showing of discrimination. RP 2706. The assessment of a prosecutor's credibility on such matters lies firmly within a trial judge's realm, and here was made after observing five full days of jury selection. The trial court did not clearly err in accepting the State's race neutral explanation.

G. RUSSELL WAS CONVICTED BY A FAIR AND IMPARTIAL JURY.

Russell seeks to overturn his conviction by arguing that the trial court improperly denied his motion to strike jurors 8 and 16 for cause. Russell's challenge fails because he waived his ability to challenge the court's ruling on juror 16 when he used a peremptory challenge to remove him, and the court did not abuse its discretion by refusing to remove juror 8.

1. Russell Waived His Right To Challenge The Court's Ruling Denying His Motion To Strike Juror 16 When He Subsequently Used A Peremptory Challenge To Remove Him From The Jury Panel.

After the trial court denied his motion to remove jurors 8 and 16 for cause, Russell used a peremptory challenge to strike juror 16 but allowed juror 8 to remain. CP 1135. Russell used all his peremptory challenges. RP 2717. Russell contends he should be able to challenge the denial of his motion to strike juror 16 for cause because being "forced" to

strike him unfairly reduced his peremptory challenges to five. This argument has been explicitly rejected by the Federal and Washington State Supreme Court.

In *United States v. Martinez-Salazar*, a defendant used all his peremptory challenges, one of which included striking a juror after the court denied his for-cause challenge. 528 U.S. 304, 120 S.Ct. 774, 145 L.Ed.2d 792 (2000). The Ninth Circuit held that the District Court abused its discretion when it denied Defendant's motion to strike the juror for cause. *Id.* The court concluded that while this error did not violate the defendant's Sixth Amendment Right to an impartial jury, his Fifth Amendment due process rights were violated when the number of his peremptory challenges was reduced due to his being forced to use one of them curatively. *Id.*

The Supreme Court reversed, and held that a defendant faced with the denial of a for-cause challenge has two options: to leave the juror on the panel and then challenge the juror's fitness on appeal, or to strike the juror and thereby waive his ability to appeal the denial of the for-cause challenge. *Martinez-Salazar*, 528 U.S. at 306. The Court explained that peremptory challenges provide an important mechanism for assuring impartial juries, and reasoned that even if a trial court errs by denying a motion to strike a juror for cause any such error is "cured" when a

defendant elects to remove the juror with a peremptory strike. *Id.* at 306-07. Contrary to Russell’s assertion, this rule does not constitute an impermissible “Hobson’s choice.” As the Court explained, “[a] hard choice is not the same as no choice,” and the court’s ruling “does not deprive a defendant of any rule-based or constitutional right.” *Id.* at 307.

In *State v. Fire*, the Washington State Supreme Court applied the analysis from *Martinez-Salazar*, to support its holding that, “if a defendant through the use of a peremptory challenge elects to cure a trial court’s error in not excusing a juror for cause, exhausts his peremptory challenges before the completion of jury selection, and is subsequently convicted by a jury on which no biased juror sat, he has not demonstrated prejudice, and reversal of his conviction is not warranted.” *State v. Fire*, 145 Wn.2d 152, 165, 34 P.3d 1218 (2001), *abrogating State v. Parnell*, 77 Wn.2d 503, 463 P.2d 134 (1969) (which held that a court’s error in refusing to excuse a juror for cause, thus forcing the defendant to exercise a peremptory challenge to remove the juror, constitutes prejudice where the defendant subsequently exhausted her peremptory challenges).

As explained by the Federal and State Supreme Courts, “the forced use of a peremptory challenge is merely an exercise of the challenge and not the deprivation or loss of a challenge.” *Fire*, 145 Wn.2d at 162-63,

citing Martinez-Salazar, 528 U.S. at 314-15. Thus, Russell’s “forced” use of a peremptory is not a basis for relief.

2. The Trial Court Did Not Abuse Its Discretion When It Denied Russell’s Motion To Strike Juror 8 For Cause.

Russell contends that juror number 8 should have been struck for cause, claiming he had a “fixed opinion that “one drink would impair anyone’s ability to drive.” Brief of App. at 47. Russell misconstrues the record.³⁰

Juror 8 explained from the outset that alcohol affects people differently, and despite leading and insistent questioning by Russell’s counsel never claimed a person could not or should not drive after consuming alcohol. On the contrary, the first exchange between defense counsel and juror 8 proceeded as follows:

Mr. Vargas: And you believe that one drink is – would impair anybody would that be fair to say?

Juror 8: Right. Now the – severity of the impairment is open for discussion but –

Mr. Vargas: Okay – buy one drink would be sufficient to impair somebody?

Juror 8: Yeah.

Mr. Vargas: And so you think if you heard that somebody had a drink and drove and you had to decide if they were

³⁰ The inquiry into this matter is contained on pages 2595 to 2647 of the Report of Proceedings.

impaired – that you would be more biased to say they were impaired because of your belief?

Juror 8: Uh ... no. I would – I would, again, have to know all the facts – to know if the person - the individual was like and –

...

Mr. Vargas: Okay. Um ... but it seems to me like you'd have a pretty strong anti-drink or anti-consuming alcohol position. Would that be fair to say?

Juror 8: Uh ... well –

Mr. Vargas: Because of that?

Juror 8: Uh ... personally – but the driving thing, maybe not – not so much. I – you know, honestly my dad could consume – many alcoholic beverages and do just fine so – I mean, everybody is different.

RP 2598-2599.

The court correctly noted that juror 8 and other jurors discussing the effects of alcohol were not discussing the legal standard for being under the influence, but rather were using generalized terms to explain concepts which were far removed from the legal standard for intoxication. RP 2626-2627. Defense counsel acknowledged this during his questioning regarding the effects of alcohol on a person, stating just prior to turning to juror 8 that “[t]he law will be different I’m assuming but you have a personal opinion.” RP 2597. Juror 8 aptly noted that “impairment wasn’t really described in that questionnaire.” RP 2602. During lengthy

questioning which sometimes deteriorated into semantic wrangling juror 8 described “being impaired” as everything from being “on a sugar high,” to his belief that consuming “one or two drinks might [cause you to] let down your guard” or “ make you a little more loose or comfortable.” RP 2601.

Russell’s suggestion that juror 8’s generalized discussion about “impairment” demonstrated that he harbored a bias against drinking and driving that made him unsuitable to serve on the jury is contrary to the record. On that specific topic, juror 8 reiterated that people are affected differently by alcohol and that he would follow the law regardless of any personal beliefs he may have.

Ms. Weinmann: Mr. Hart, when we were questioning you earlier about your beliefs about having one beer did you mean that applies to any person, anybody who has one beer should not be able to drive?

Juror 8: Uh ... no. I did not say that any person that has one beer should not be able to drive. Nor do I mean that.

Ms. Weinmann: Okay. Then explain to me what you meant?

Juror 8: ... It impairs everybody differently – and I don’t know the severity of it, you know, it depends on the individual. Like I said, honestly my father could drink and drive and he was fine. He did it for many years.

...

Ms. Weinmann: Do you believe then that anybody who has one drink is necessarily impaired to a degree that they cannot drive well?

Juror 8: I don't think that it's right and I don't think that one beer would impair a person to drive well. Again it depends on the –

...

Ms. Weinmann: And the judge instructs on what the law is in a criminal case - and if the law is different than your beliefs or your belief system, how will that affect you?

Juror 8: Uh ... it – it won't. You know, you have to – you have to see – you have to see through that and do what the law says, what you're instructed to do.

RP 2638 – 2640.

Juror 8 repeatedly explained he did not harbor any ill feelings towards people who consume alcohol, that he could be fair and impartial, and assured the court and all parties that he would put aside any personal beliefs and follow the law. RP 2608-2609, RP 2612-2613.

Russell contends juror 8 should have been struck for “actual bias.” “Actual bias” is “the existence of a state of mind on the part of a juror in reference to the action, or to either party, which satisfies the court that the challenged person cannot try the issue impartially and without prejudice to the substantial rights of the party challenging[.]” RCW 4.44.170(2). While implied bias is presumed from facts shown, actual bias of a juror must be established by proof. *State v. Noltie*, 116 Wn.2d 831, 838, 809

P.2d 190 (1991). The proof must demonstrate the probability of bias, not the possibility of it. *Id.* at 838-39; *Ottis v. Stevenson-Carson School Dist. No. 303*, 61 Wn.App. 747, 812 P.2d 133 (1991).

The fact that a person may provide equivocal answers does not require a juror to be removed for cause. Rather, the standard is whether a juror with preconceived ideas can set them aside. *Noltie*, 116 Wn.2d at 839, *citations omitted*. “Case law, the juror bias statute, our Superior Court Criminal Rules and scholarly comment all emphasize that the trial court is in the best position to determine a juror’s ability to be fair and impartial,” because it has the unique benefit of being able to observe the juror’s demeanor and evaluate and interpret his or her responses. *Id.* at 839, *citing State v. Gosser*, 33 Wn.App. 428, 434, 656 P.2d 514 (1982); *State v. Rupe*, 108 Wn.2d 734, 749, 743 P.2d 210 (1987); RCW 4.44.170(2), .190; CrR 6.4(c)(1).

An appellate court reviews a trial court’s denial of a challenge for cause for manifest abuse of discretion. *Noltie*, 116 Wn.2d at 838. A party challenging a juror on the ground of actual bias has the burden of proving by a preponderance of the evidence that the prospective juror cannot try the case fairly and impartially. *Ottis v. Stevenson-Carson School Dist. No. 303*, 61 Wn.App. 747, 812 P.2d 133 (1991). In applying this standard, the appellate court must review the evidence in the light most favorable to the

prevailing party below, and accept the trial court's decisions regarding credibility and its decisions to choose among reasonable but competing inferences. *Id.*

In the present case, the testimony of juror 8 did not establish that there was a probability of bias. Juror 8 simply stated that one drink causes some level of impairment. Russell latches on to the word "impairment," a word which he initiated through use of the term in the juror questionnaire. He seeks to exaggerate and misconstrue the impact of that terminology by suggesting that use of the word is proof that juror 8 was biased against people who drive after consuming alcohol.

A full review of the record supports the trial court's decision to deny Russell's motion to strike juror 8 for actual bias. This record demonstrates that juror 8 understood that impairment levels vary among individuals, that he was not biased against people who consume alcohol, that he rejected the notion that a person could not or should not drive after consuming alcohol, and that he could and would set aside any personal beliefs regarding alcohol and follow the law.

The trial judge observed several lengthy exchanges between juror 8 and counsel for both sides. He had ample opportunity to observe the juror's demeanor, to assess the relationship or lack thereof between his statements and the facts and law of this case, and to assess his ability to set

aside any preconceived ideas which might impact his ability to serve as a juror on this case. There was no manifest abuse of discretion in finding a lack of prejudice.

H. THE STATE DID NOT COMMIT PROSECUTORIAL MISCONDUCT WHEN IT OBJECTED TO DEFENSE COUNSEL’S ALLEGATION TO THE JURY THAT IT HAD IMPROPERLY WITHHELD EVIDENCE.

During motions in limine, Russell sought to suppress the medical blood test results by arguing that the State had violated the discovery rules by withholding materials. RP 1818–1819. The State countered that it had complied with CrR 4.7 by providing the defense with a copy of everything it had regarding the blood results, and that no requests had been made to seek information beyond that. RP 1834–1835. The court ruled that the State had fully met its discovery obligations. RP 2742-2743.

Despite this ruling, Russell’s trial counsel referred to this discovery dispute during opening statement and repeatedly tried to advise the jury that the State improperly withheld information. “[T]here were two blood samples taken from [Mr. Russell] for testing ... we wanted access to them you will found out. We wanted to see them.” RP 2822. “[T]hey’re going to talk to you about a medical blood test ... And yet they haven’t disclosed ... what machines they used for testing, what procedures they followed.” RP 2824. The State objected, calling the characterization “inappropriate”

and a “misrepresentation” about a “legal judgment” that the “Court has already made in the State’s favor.” RP 2824. Russell’s counsel responded by “telling this jury right now that’s a misrepresentation when in fact we know what the truth is.” RP 2824. The trial court responded by instructing the jury to “disregard [State counsel’s] statement” and by telling Russell’s counsel to “move on to a different line of statement.” RP 2824.

Despite being instructed to switch topics, Russell’s counsel reiterated that “no information has been provided about the method used at that hospital, the procedures that they were supposed to follow.” RP 2825. The State renewed its objection that counsel was commenting on a discovery ruling, and added that counsel was using argument in his opening statement. RP 2825. The court overruled this last objection. RP 2826.

Russell argues that the State’s objections constitute prosecutorial misconduct. To address this point, there are two questions: (1) whether State’s counsel’s comments were improper, and (2) whether there was a substantial likelihood that the comments affected the verdict (i.e. prejudice). *State v. Dhaliwal*, 150 Wn.2d 559, 578, 79 P.3d 432 (2003). A defendant alleging prosecutorial misconduct bears the burden of establishing both elements. *Id.* Allegedly improper statements should be

viewed “within the context of the prosecutor’s entire argument, the issues in the case, the evidence discussed in the argument, and the jury instructions.” *Id.*

Russell’s brief quotes a lengthy portion of the opening statement, yet points to no specific improper statement made by State’s counsel. Thus, it is difficult to ascertain whether Russell asserts the impropriety of a specific statement or the objection as a whole. Russell argues that the exchange meant that (1) the jury was told that the trial court “determined that the serum blood test results were reliable,” and (2) that this undercut “any evidence pertaining to the actual testing procedures and their reliability.” Brief of App. at 52.

This is an illogical and unwarranted interpretation of the exchange. The State did not comment on the weight of the evidence or on the reliability of the blood draw. The State objected to Russell’s improper attempt to discredit the integrity of State’s counsel by accusing the State of improperly withholding evidence. Russell’s statements were not only false, but they also violated the rule that opening statement is restricted to what the evidence will show. Accordingly, the State’s brief objections were not an improper comment by the prosecution.³¹

³¹ It is difficult to imagine how evidence of discovery proceedings could be presented to a jury. Furthermore, the scope of the party’s legal obligations involves questions of law which are matters for judges to consider, not juries.

Assuming for argument the State made an improper comment, Russell offers no colorable evidence or showing of prejudice. Instead, he simply asserts that the State “violated the spirit of the law” and that “[t]he harm to Mr. Russell’s case is self-evident.” Brief of App. at 52. The opposite is true. For a number of reasons, there is no substantial likelihood that the State’s comments affected the verdict.

First, jurors are presumed to follow the court’s instructions. *State v. Kirkman*, 159 Wn.2d 918, 936-37, 155 P.3d 125 (2007). Here, immediately prior to opening statements, the trial judge instructed the jury to “keep in mind that the lawyers statements are not evidence and they do not constitute the law,” that “[t]he law is contained in the Court’s instructions and you must disregard anything that the lawyers say that is – at odds with the evidence or the law that I give you in my instructions,” that “a trial judge such as myself is not permitted to make a comment on the evidence,” and “the fact that objections are made should not influence you – and you must not make any assumptions and you must not make any – draw any inferences or conclusions based merely upon a lawyer’s objection.” RP 2786–2788.

Second, the trial court in this case issued a curative instruction telling the jury to disregard the State’s statement. RP 2824. *State v. Warren* illustrates how the substantial likelihood standard requires a

showing of substantial or flagrant misconduct to overcome the mitigating effects of a curative instruction. 165 Wn.2d 17, 28, 195 P.3d 940 (2008), *cert.denied*, 129 S.Ct. 2007, 173 L.Ed.2d 1102 (2009). The prosecutor in *Warren* “sought to undermine the State’s burden of proof” three times during closing argument. *Id.* at 27. The Washington Supreme Court found this behavior to be “clearly improper,” *id.* at 24, “particularly grievous,” *id.* at 27, “certainly flagrant,” *id.*, and a “remarkable misstatement of the law. *Id.* at 28. Notwithstanding these strong admonishments, the Supreme Court ruled that “reviewing the argument in context, because Judge Hayden interrupted the prosecutor’s argument to give a correct and thorough curative instruction, we find that any error was cured. *Id.*

Therefore, even if State’s counsel made an improper statement by objecting to Russell’s opening statement, the statement was clearly harmless, especially in light of the curative instruction given by Judge Frazier. As *State v. Warren* shows, curative instructions are presumed to correct a wide range of abuses. If this net encompasses repeated improper comments about the burden of proof, as in *Warren*, it surely applies to the instant case.

I. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION BY ADMITTING THE RESULTS OF THE FORENSIC BLOOD DRAW.

1. The State Presented Sufficient Prima Facie Evidence To Meet The Foundational Requirements Necessary To Admit The Forensic Blood Test Results.

A trial court's ruling on the admission of a blood alcohol test result is reviewed for abuse of discretion. *State v. Hultenschmidt*, 125 Wn.App. 259, 264, 102 P.3d 192 (2004); *City of Seattle v. Clark-Munoz*, 152 Wn.2d 39, 44, 93 P.3d 141 (2004). The party moving to suppress the results bears the burden of showing abuse of discretion. *State v. Sponburgh*, 84 Wn.2d 203, 210, 525 P.2d 238 (1974); *State v. Saunders*, 120 Wn.App. 800, 811, 86 P.3d 232 (2004). The trial court abuses its discretion when it admits evidence of a blood test result in the face of insufficient prima facie evidence. *State v. Bosio*, 107 Wn.App. 462, 468, 27 P.3d 636 (2001). “Prima facie evidence” is “evidence of sufficient circumstances that would support a logical and reasonable inference of the facts sought to be proved.” *State v. Brown*, 145 Wn.App. 62, 69, 184 P.3d 1284 (2008), citing RCW 46.61.506(4)(b).

“To be admissible for the purpose of showing intoxication, a blood sample analysis must comply with the Washington Administrative Code requirements.” *Hultenschmidt*, 125 Wn.App. at 265. Russell contends that the State did not make a prima facie showing for admissibility of the

blood test results because it did not satisfy the requirements of WAC 448-14-020(3)(b), which provides:

Blood samples for alcohol analysis shall be preserved with an anticoagulant and an enzyme poison sufficient in amount to prevent clotting and stabilize the alcohol concentration. Suitable preservatives and anticoagulants include the combination of sodium fluoride and potassium oxalate.

He argues first that toxicologist Eugene Schwilke's testimony that the manufacturer's certificate verified the necessary contents of the vials should have been excluded as hearsay, second that he should not have been permitted to testify that the vials contain sodium fluoride and potassium oxalate, and third that without this testimony the requirements of WAC 448-14-020(3)(b) were not met. Russell's argument fails on several grounds: (1) testimony regarding the contents of the vials had already been admitted without objection through Dr. Judy Clark; (2) Russell's objection to Mr. Schwilke's testimony regarding the manufacturer's certification was not preserved for appeal because it was never objected to; (3) the testimony of Mr. Schwilke was properly admitted; and (4) with or without testimony from Mr. Schwilke regarding the manufacturer's certificate, the State presented sufficient prima facie evidence to meet the foundational requirements of WAC 448-14-020(3)(b).

First, Russell's objection to Mr. Schwilke's testimony that the standardized gray-topped vials used by the state toxicology lab to obtain forensic blood samples contain sodium fluoride and potassium oxalate is moot. Dr. Judy Clark had already testified at length to the same facts a week prior to Mr. Schwilke without objection. RP 3161-3172. Mr. Schwilke's testimony in this regard was merely cumulative.

Second, the Court should decline to review Russell's claim that Mr. Schwilke's testimony regarding the manufacturer's certificate of compliance was hearsay because it was not preserved for appeal. Russell never objected to this testimony. In fact, Russell is the one who solicited this information from Mr. Schwilke. RP 4109. An issue is not preserved for appeal unless a timely objection or motion to strike is made which states the specific ground of the objection. *State v. Black*, 109 Wn.2d 336, 340, 745 P.2d 12 (1987); ER 103. Russell cannot on appeal move to exclude the very information he solicited and never objected to. Any alleged error was both waived and invited.³²

Russell next objects that Mr. Schwilke was permitted to testify that

³² Furthermore, resolution of the argument has no meaningful effect because *State v. Brown*, the case upon which Russell relies, held that the manufacturer's certificate was not necessary for admission of the blood test results. The *Brown* court deemed it sufficient that the toxicologist testified that the vials are provided by the manufacturer with powdery chemicals he knew to be potassium oxalate and sodium fluoride, that this was consistent with the labels on the vials, and that if those chemicals had not been presents the blood would have clotted and no alcohol would have been detected. *State v. Brown*, 145 Wn.App. 62, 71, 184 P.3d 1284 (2008).

the gray-topped vials used by the state toxicology lab for forensic blood draws contain sodium fluoride and potassium oxalate. At trial, Russell objected that Mr. Schwilke lacked personal knowledge regarding the contents of the vials. RP 4108. Judge Frazier correctly overruled Russell's objection, and properly held that the basis and extent of Mr. Schwilke's knowledge goes to the weight of the evidence not to its admissibility. RP 4111. In *State v. Brown*, the court discussed the threshold of evidence necessary to satisfy the requirements of WAC 448-14-020(b)(3), and specifically held that firsthand knowledge is not necessary to make a prima facie showing. 145 Wn.App. 62, 184 P.3d 1284 (2008). The court explained the following:

Nobody with firsthand knowledge testified as to what was contained in the vials used for Mr. Brown's blood sample prior to the blood draw. But that is not what the regulation requires. The regulation requires only that the blood samples "be preserved with an anticoagulant and an enzyme poison sufficient in amount to prevent clotting and stabilize the alcohol concentration." WAC 448-14-020(b)(3). Further, there is a relaxed standard for foundational facts under the blood alcohol statute in that the court assumes the truth of the State's evidence and all reasonable inferences from it in a light most favorable to the State. RCW 46.61.506(4)(b).

Id. at 71.

Mr. Schwilke's testimony that the manufacturer's certificate of compliance established the vials contained sodium fluoride and potassium

oxalate was admitted without objection. It was properly considered by the court not only because it was never objected to, but also because a trial court may rely on the certification for foundational purposes in determining the admissibility of the blood sample. *Brown*, 145 Wn.App. at 75, citing ER 104(a) and ER 1101(c)(1).

Consistent with *Brown*, numerous courts have affirmed that the toxicologist's knowledge regarding the expected contents of the standardized vials used by the state lab is admissible, and that along with other factors constitutes sufficient prima facie evidence to admit forensic blood test result. *See, State v. Steinbrunn*, 54 Wn.App. 506, 512-13, 774 P.2d 55, *review denied*, 114 Wn.2d 1015, 779 P.2d 731 (1989) (Prima facie case established where nurse testified that vial was supplied by hospital, and toxicologist testified that vial manufacturer always put anticoagulants in such vials); *State v. Barefield*, 47 Wn.App. 444, 458, 735 P.2d 1339 (1987), *aff'd*, 110 Wn.2d 728, 756 P.2d 731 (1988) (toxicologist testified sample was not adulterated and the vial manufacturer always put an anticoagulant in vials on that type); *State v. Wilbur-Bobb*, 134 Wn.App. 627, 631-32, 141 P.3d 665 (2006) (trooper testified blood was tested with blood vial packet supplied by the state toxicology lab and the vials contained white powder, labels on the vials

showed they contained sodium fluoride which toxicologist explained was an enzyme poison).

Here, Trooper Murphy testified he provided the blood vials to Doctor Clark, that these vials were provided to him by the state toxicology lab, that each vial contained a white powdery substance and that he made sure nothing was added to them other than Russell's blood. RP 3074-3078. Doctor Clark testified that she is familiar with the gray-topped vials used for forensic blood draws, that they come in standardized kits which the manufacturer provides to law enforcement agencies and to hospitals, and that she has training and experience in using them. She explained that she observed white powder in the vials, and that the gray top on the vials designate that the powder is a combination of potassium oxalate and sodium fluoride. RP 3165-3171.

Mr. Schwilke testified that the vials he analyzed were the standardized vials provided by Becton Dickinson, the manufacturer designated to supply these vials for the specific purpose of collecting blood samples for this type of forensic analysis. RP 4106-4107. He further explained that the gray top is a color coding used to designate that the vials contain sodium fluoride and potassium oxalate. RP 4106. Mr. Schwilke explained that sodium fluoride is an enzyme poison and preservative which maintains the integrity of the sample by stabilizing the

alcohol concentration. RP 4111-4112. He explained that potassium oxalate is an anticoagulant, that its purpose is to prevent the sample from coagulating or clotting after it's collected and that he did not observe any clotting. RP 4111-4112. He testified that the range of sodium fluoride in the vials was 22.5 to 28.8 milligrams and that the range of potassium oxalate was 17.5 to 23 milligrams, and that these ranges were sufficient in amount to prevent clotting and stabilize the alcohol concentration in Russell's blood. RP 4211-4212, 4215-4216.

The evidence presented in Russell's case conforms to numerous cases in which courts have concluded that the toxicologist's knowledge regarding the contents of the vials is admissible. These cases also establish that the State presented sufficient prima facie evidence to admit the forensic blood test result. Once a prima facie showing is made, it is for the jury to determine the weight to be attached to the evidence. *Brown*, 145 Wn.App. at 70, *citing* RCW 46.61.506(4)(c); *Hoffman v. Tracy*, 67 Wn.2d 31, 35, 406 P.2d 323 (1965). Judge Frazier correctly admitted Mr. Schwilke's testimony and properly admitted the blood test results.

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2. Russell Did Not Preserve A Challenge To Chain Of Custody For Appeal And Even If He Had The State Established A Sufficient Chain Of Custody To Admit The Forensic Blood Test Results.

For the first time on appeal, Russell objects that “the State failed to establish a complete and unbroken chain of custody concerning the [forensic] blood samples.” Brief of App. at 56. His argument fails because (1) he did not preserve the alleged error for appeal, (2) an unbroken chain is not required to admit evidence, and (3) the evidence was properly admitted.

At trial, Russell never objected to chain of custody. The only objection made to the admissibility of the forensic blood test results was Mr. Schwilke’s alleged lack of personal knowledge regarding the contents of the vials. Since he never objected to chain of custody at trial he has not preserved that issue for review. *State v. Black*, 109 Wn.2d 336, 340, 745 P.2d 12 (1987); ER 103 (issue is not preserved for appeal unless a timely objection or motion to strike is made which states the specific ground of the objection); *City of Seattle v. Carnell*, 79 Wn.App. 400, 403, 902 P.2d 186 (1995) (a lack of foundation objection is a general objection that will not preserve a chain of custody objection for appeal).

Should this Court choose to review chain of custody notwithstanding the lack of objection Russell’s argument is without merit,

because a sufficient foundation does not require proof of an unbroken chain of custody. *State v. Picard*, 90 Wn. App. 890, 897, 954 P.2d 336 (1998). Russell cites to no legal authority supporting his argument except one isolated quote from *State v. Potts* which states that an exhibit must be sufficiently identified before being admitted. 1 Wn.App. 614, 616, 464 P.2d 742 (1969). But Russell's reliance on *Potts* is inapt because *Potts* affirmed the long-standing rule that an unbroken chain of evidence is not necessary, and then admitted a marijuana plant notwithstanding a break in the chain. *Id.*

The record establishes that the State exceeded what is legally required to establish a sufficient chain of custody. Trooper Murphy testified that the state toxicology lab provides him with blood vials which he keeps in the locked trunk of his patrol car. On the night in question he retrieved the vials from his patrol car and gave them to Dr. Clark. He watched her draw Russell's blood and made sure nothing but the blood was added to the vials. He then took the vials back from her, labeled them with Russell's name, date of birth, date of the blood draw, the time, his own initials and badge number and the case number. Trooper Murphy then gave the vials to Detective Fenn. RP 3073-3079.

Dr. Clark testified that nothing was added to the vials except Russell's blood, that the stopper was never removed, and that she secured

the top of the stopper with a label so that it could not be opened by anyone but the toxicologist. RP 3173. Trooper Fenn testified that after he received the two vials from Trooper Murphy he transported them back to the Patrol's district office, filled out identifying paperwork and secured the vials and the paperwork in the locked evidence box. RP 4006-4008. He explained that from there the evidence custodian mailed the items to the state toxicology lab. RP 4007. Mr. Schwilke testified Russell's vials were received at the lab by certified mail on June 8, 2001 and that the vials did not appear to have been tampered with in any way prior to him receiving and testing them. RP 4104-4105.

A trial court's decision regarding the sufficiency of chain of custody is reviewed for an abuse of discretion. *State v. Campbell*, 103 Wn.2d 1, 21, 691 P.2d 929 (1984), *citing Kiessling v. Northwest Greyhound Lines, Inc.*, 38 Wn.2d 289, 295, 229 P.2d 335 (1951). Russell takes issue with Mr. Schwilke's testimony that he believed the vials came to the lab by certified mail. He complains that no documentation was introduced to reflect the transmittal of the blood sample from the Patrol to the Lab, but fails to cite to any legal authority purporting this to be necessary or even relevant. Russell's complaints fail due to the lack of any legal authority supporting them, and because minor uncertainty on the part of a witness testifying about the chain of evidence affects only the

weight of the evidence, not its admissibility. *State v. Campbell*, 103 Wn.2d 1, 21, 691 P.2d 929 (1984) (citations omitted). Furthermore, the party introducing evidence need not identify the evidence with absolute certainty and need not eliminate every possibility of alteration or substitution. *Id.*

Because the State presented sufficient prima facie evidence that the requirements of WAC 448-14-020(3)(b) were met and established a sufficient chain of custody, Russell has failed to meet his burden of showing the trial court abused its discretion by admitting the forensic blood test results.

J. THE JURY INSTRUCTIONS PROPERLY SET FORTH THE LAW AND ALLOWED BOTH PARTIES TO ARGUE THEIR THEORY OF THE CASE.

Russell appeals the court's decision to give instructions 14 and 20³³ and its refusal to give his proposed instruction number 7. Russell's challenges fail, because the jury instructions as a whole correctly set forth the law and allowed both parties to argue their theory of the case.

A party objecting to a jury instruction must "state the reasons for the objection, specifying the number, paragraph, and particular part of the instruction to be given or refused." CrR 6.15(c). Where trial counsel's exception to instructions and his discussion do not clearly apprise the trial

³³ Instructions 14 and 20 are identical except that 14 refers to vehicular homicide and 20 refers to vehicular assault.

court of the points of law involved, the instructions cannot be challenged for the first time on appeal. CrR 6.15(c); *VanHout v. Celotex Corp.*, 121 Wn.2d 697, 702, 853 P.2d 908 (1993). *State v. Barriault*, 20 Wn.App. 419, 581 P.2d 1365 (1978).

The court reworked WPIC 90.08 by slightly modifying paragraphs one and two to create instructions 14 and 20. CP 1224, 1230. Paragraph three remained unchanged. *Compare*, Appendix's A, B, C. Examination of the record reveals that at trial Russell objected to paragraph three of instructions 14 and 20, claiming it should be removed because it was redundant to paragraph two. RP 4798-4799.³⁴ On appeal, Russell abandons this complaint and now challenges these instructions by claiming that paragraph one "reduced the State's burden of proof on proximate cause." Brief of App. at 62.

Russell's objection that paragraph three was redundant did not preserve for appeal his new claim that paragraph one misstated the law. Therefore, instructions 14 and 20 cannot be challenged for the first time on appeal unless the new complaint raises a claim of constitutional magnitude. RAP 2.5(a). Russell makes no argument that it does, and his

³⁴ Referring to instructions 14 and 20, Russell specified that "we have no exception to the first two paragraphs [o]ur exception is to the inclusion of the third paragraph" ... because it's "redundant of the information contained in paragraph two" and therefore "doesn't aid the jury in making its determination." RP 4798-4799.

claim would only meet the criteria for review if the State's burden of proof was lessened. It was not.

A court's specific wording of its jury instructions is reviewed for abuse of discretion. *State v. Harris*, 97 Wn.App. 865, 870, 989 P.2d 553 (1999). Alleged legal errors in jury instructions are reviewed de novo. *State v. Becklin*, 163 Wn.2d 519, 525, 182 P.3d 944 (2008). Jury instructions, taken in their entirety, must inform the jury "that the State bears the burden of proving every essential element of a criminal offense beyond a reasonable doubt." *State v. Bennett*, 161 Wn.2d 303, 307, 165 P.3d 1241 (2007). It is reversible error if the instructions relieve the State of this burden. *State v. Pirtle*, 127 Wn.2d 628, 656 P.2d 245 (1995).

Russell asserts that WPIC 90.08, and by extension instructions 14 and 20, "provides the definition of proximate cause for purposes of informing a jury of the necessary burden of proof." Brief of App. at 60. App. A, B, C. Russell is incorrect. The aforementioned instructions define superseding, intervening event, not proximate cause. Paragraph one, the partial modification to which Russell objects, is simply an introductory paragraph to the definition of superseding, intervening event. The failure to verbatim copy this introductory paragraph into instructions 14 and 20 in no way reduces the State's burden to prove each element of the crime beyond a reasonable doubt.

Proximate cause was properly defined in instructions 13 and 19.³⁵ CP 1223, 1229; Appendix D, E. Proximate cause was also properly included as part of the elements in all six “to convict” instructions. CP 1217-1222; CP 1226-1228; App. F, G, H, I, J, K. Jury instruction 5 properly instructed the jury that the “State is the plaintiff and has the burden of proving each element of the crime beyond a reasonable doubt.” CP 1212; App. L. When read in their entirety, the jury instructions correctly informed the jury that the State had the burden of proving every element of the charged offenses beyond a reasonable doubt.

Russell also objects to the court’s refusal to give his proposed instruction number 7 which provides as follows: “An intoxicated defendant may avoid responsibility for the death or substantial bodily harm to another, which results from his driving if the death or the substantial bodily harm is caused by a superseding, intervening event. CP 1187; App. M.

The trial court did not err in refusing this instruction as it is duplicative of other instructions. Jury instructions 13 and 19 define proximate cause and when combined with instructions 14 and 20 properly informed the jury that the proximate cause element is not met if a new

³⁵ Instructions 13 and 19 are identical except that 13 refers to vehicular homicide and 19 refers to vehicular assault.

independent cause breaks the direct sequence between the act and the death or serious bodily injury. *State v. Morgan*, 123 Wn.App. 810, 817-18, 99 P.3d 411 (2004). App. B, C, D, E.

Lastly, in his statement of additional grounds Russell objects to jury instructions 22 and 25. CP 1232, 1235; App. N, O. Neither of these was objected to at trial so these issues are not preserved for appeal. CrR 6.15(c); RAP 2.5(a). Should the Court review them anyway, Russell's arguments fail.

Russell contends that instruction 22 "narrowed the field for the elements to convict." SAG at 40. Instruction 22 was a limiting instruction which properly instructed the jury that the results of the hospital blood test could only be considered for the affected by prong, not for the per se prong of intoxication. CP 1232; App. N. *State v. Donahue*, 105 Wn.App. 67, 18 P.3d 608 (2001).

Russell contends that "[u]nder the influence should have been defined by the use of WPIC 90.06, and not the wrong and ambiguous jury instruction number 25." SAG at 40. Specifically, he complains that instruction 25 incorrectly advised the jury that "the mere consumption of an intoxicating liquor must be shown to establish that a person is under the influence." SAG at 40. Russell misreads the record. Instruction 25, actually states that "[m]ore than mere consumption of intoxicating liquor

must be shown to establish that a person is under the influence.” App. O. Regarding his complaint that the trial court failed to give WPIC 90.06, Russell again misreads the record. WPIC 90.06 was proposed by the State and given by the court. CP 1154, 1231.

The instructions as a whole correctly instructed the jury as to the elements of and defenses to the offenses charged, and allowed both parties to argue their theory of the case. Therefore, the trial court did not abuse its discretion and did not commit an error of law when it gave instructions 14 and 20, and declined to give Russell’s proposed instruction 7.

K. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION WHEN IT ALLOWED THE STATE TO CALL RUSSELL’S FORMER EXPERT WITNESS TO TESTIFY.

1. The Work Product Doctrine Did Not Preclude Disclosure Of Mr. Genter’s Report.

In 2001 Geoffrey Genter was working as a consultant in the field of accident reconstruction. RP 4945. Mr. Genter was hired by Russell’s first attorney, and his report was provided to the State by that attorney. RP 4915. After he was extradited back to the United States, Russell hired new counsel. New Counsel hired a second accident reconstructionist named Richard Chapman who testified for Russell at trial. RP 4631-4794, 5030-5044.

Russell argues that the trial court erred in allowing the State to call Geoffrey Genter to testify as a rebuttal witness,³⁶ because “Mr. Genter was a consulting witness” who was “hired by Mr. Russell’s former attorney.” Brief of App. at 63; RP 4910. No evidence supports this claim. Indeed, given that Russell’s prior counsel provided Mr. Genter’s report to the State prior to trial in 2001 the more reasonable conclusion is that he did so because he was considering calling him as an expert witness. RP 4915; *See* CrR 4.7(b)(1) which requires defendants to disclose “the names and addresses of persons whom the defendant intends to call as witnesses at the hearing or trial, together with any written or recorded statements and the substance of any oral statements of such witness,” and CrR 4.7(g) which permits the disclosure of reports of experts which the defendant intends to use at a hearing or trial.

Moreover, Russell offers no criminal law authority to support his assertion that the trial court should have barred Mr. Genter’s testimony. Russell’s reliance on civil case law is inapt as “the civil rules by their very terms apply only to civil cases.” *State v. Gonzalez*, 110 Wn.2d 738, 744, 757 P.2d 925 (1988). The work product doctrine in the criminal context “is more narrow in its definition of work product” than that which is encompassed in the civil context. *Linstrom v. Ladenburg*, 136 Wn.2d 595,

³⁶ The jury was not told who hired Mr. Genter as a consultant. He simply testified as to his findings regarding the accident reconstruction. RP 4945-5023.

606, 963 P.2d 869 (1998). *See also State v. Christensen*, 40 Wn.2d 329, 330, 242 P.2d 755 (1952) (“Rule 26(a)...is applicable only in civil procedure and has no application in criminal procedure.”). Indeed, the Washington Supreme Court has stated “that CrR 4.7 plainly contemplates that [certain reports and testimony of experts] is not protected by the work product doctrine.” *State v. Pawlyk*, 115 Wn.2d 457, 478, 800 P.2d 338 (1990).

2. Even If The Work Product Doctrine Applied Russell Waived These Protections By Voluntarily Providing Mr. Genther’s Report To The State.

Even if Russell showed that Mr. Genther’s report fell within the protections of the work product doctrine, Russell’s first trial attorney disclosed the report in the initial discovery phase of the first trial. RP 4915. The operative criminal rule on this issue states that “[d]isclosure shall not be required” of documents subject to the work product doctrine. CrR 4.7(f)(1). The rule does not forbid voluntary disclosures of information or reports. Additionally, “[i]f a party discloses documents to other persons with the intention that an adversary can see the documents, waiver generally results.” *Linstrom v. Ladenburg*, 110 Wn.App. 133, 145, 39 P.3d 351 (2002). Thus, Russell cannot assert the protections of the work product doctrine to bar Mr. Genther’s testimony.

3. Attorney-Client Privilege Was Not Implicated When Russell's Prior Counsel Voluntarily Provided Mr. Genther's Report To The State In The Discovery Phase.

Russell claims that the voluntary disclosure of Mr. Genther's report was a violation of attorney-client privilege and states that "[t]he trial court ruled that there was a waiver of attorney/client privilege." Brief of App. at 63. Russell misconstrues the record and misstates the issue at hand. The trial court noted that attorney-client privilege, unlike work product protections, can only be waived by the client. However, the court also found that attorney client privilege was not implicated by the disclosure of Mr. Genther's report.³⁷ The court then correctly concluded that (1) the work product doctrine did not protect disclosure of Mr. Genther's report, and (2) even if it did any work product protection which existed was waived when prior counsel disclosed the report in 2001. RP 4931-4932, 4933-4934.

The attorney-client privilege "protects confidential attorney-client communications from discovery so clients will not hesitate to fully inform their attorneys of all relevant facts." *Barry v. USAA*, 98 Wn.App. 199, 204, 989 P.2d 1172 (1999). Attorney- client privilege does not "protect materials compiled by an attorney from outside sources on a client's

³⁷ "The Court has [sic] to distinguish between attorney/client privilege and the work product privilege...and what we're dealing with...does not relate to a communication that occurred between Mr. Russell and Mr. Moorer, between attorney and client." RP 4929.

behalf.” 5A *Washington Practice: Evidence Law and Practice* §501.9 (2007). The work product rule operates independently of the privilege, and vice versa.” 5A *Washington Practice: Evidence Law and Practice* §501.10 (2007).

The trial court correctly found that the attorney-client privilege did not pertain to the relationship and disclosure in question, and Russell confuses the issue by referring multiple times to the law pertaining to attorney-client privilege. As explained *supra*, Russell waived the protections of the work product doctrine by voluntarily providing Mr. Genther’s report to the State, and once he did so the State was free to call him as a witness.

4. Russell Has Failed To Meet His Burden Of Demonstrating That He Was Prejudiced By The Court’s Decision To Allow Mr. Genther To Testify.

A trial court's decision to admit or exclude evidence is reviewed for an abuse of discretion. *Davis v. Globe Mach. Mfg. Co.*, 102 Wn.2d 68, 76, 684 P.2d 692 (1984). It is not an abuse of discretion for a trial court to admit testimony when the party seeking exclusion fails to demonstrate prejudice as a result of admission. *Goodman v. Boeing Co.*, 75 Wn.App. 60, 84, 877 P.2d 703 (1994), *aff'd*, 127 Wn.2d 401, 899 P.2d 1265 (1995). Since Russell presented no facts or argument whatsoever as to how the trial court’s decision to allow Mr. Genther’s testimony

prejudiced him he has not met his burden of demonstrating that the decision constitutes an abuse of discretion.

L. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN ALLOWING THE STATE TO ASK DETECTIVE SPANGLER ABOUT INVESTIGATIVE BIAS IN RESPONSE TO RUSSELL’S SUGGESTION THAT SUCH BIAS TAINTED THE INVESTIGATION.

1. Russell Did Not Preserve Any Alleged Error For Appeal.

Russell objects to State’s counsel asking Detective Spangler if he believed investigative bias played a role in Detective Fenn’s investigation of the crash, claiming for the first time on appeal that this question asked the detective to comment on the credibility of another witness. Russell did not preserve this objection for appeal.

The question Russell complains of was asked during redirect examination only after Russell first raised the issue of investigative bias during cross examination. RP 4888. Russell objected that the State’s question called for speculation, and the trial court overruled the objection. RP 4890. After the objection was overruled, Detective Spangler responded that “Detective Fenn and Detective Snowden exercised efforts to avoid investigative bias because they chose to exercise integrity and not make calculations based on assumptions.” RP 4891. Given that the answer allegedly invoked a new and different concern a second specific

objection and motion to strike the answer was necessary to preserve an objection to the answer for appeal. Russell did not object to this response, did not move to strike the answer, and did not request a curative instruction. Therefore, he did not preserve an objection to this answer for appeal.

Russell only preserved for appeal his objection as to the initial question, and that objection was that the question called for speculation not that it asked the witness to comment on the credibility of another witness. A party cannot assert an entirely different reason for exclusion of testimony on appeal than that which was argued at trial. *State v. Guloy*, 104 Wn.2d 412, 422, 705 P.2d 1182 (1985). Therefore, the only objection Russell preserved for appeal is that the State's question called for speculation.

2. The Trial Court Did Not Abuse Its Discretion When It Overruled Russell's Objection That The State's Question Called For Speculation.

The trial court's decision to overrule Russell's objection to the question is reviewed for abuse of discretion. *State v. Ortiz*, 119 Wn.2d 294, 308, 831 P.2d 1060 (1992). The State asked Detective Spangler, "based upon your review of [the case] materials [put together by Detective Fenn] do you believe investigative bias placed (sic) a role in that investigation?" RP 4890. An experienced detective can rely on his

training and experience to assess the professional merits of an investigation and answer the aforementioned question. As such, the trial court did not abuse its discretion when it overruled Russell's objection that the question called for speculation.

3. Detective Spangler's Answer Did Not Constitute A Comment On The Credibility Of Another Witness.

If the Court reviews Detective Spangler's answer notwithstanding Russell's failure to object to it, the answer did not constitute an improper comment on credibility. Russell bases his entire argument on a partial quote from *State v. Chavez*, 76 Wn. App. 293, 884 P.2d 624 (1994). When the quote is considered in its entirety, reliance on *Chavez* is inapt. Russell quotes the following passage from *Chavez*:

The State cannot indirectly vouch for a witness by eliciting testimony from an expert or a police officer concerning the credibility of a crucial witness. It is misconduct for the prosecutor to ask a witness whether he or she believes another witness *is lying*.

Id. at 299 (emphasis added).

Russell omitted the last two words of this quote, words which are crucial to a proper understanding of *Chavez*. *Chavez* does not bar comments regarding investigative techniques, but instead bars comments on another witness's truthfulness. In the instant case, the State asked Detective Spangler to comment on the investigative techniques of the

Washington State Patrol in response to Russell's allegation that it was tainted by investigative bias. The State never asked Detective Spangler to comment on the truthfulness or credibility of another detective or his testimony.

4. The State's Question Posed On Redirect Was Proper Because It Was Asked Only After Russell Opened The Door To The Issue Of Investigative Bias.

Even assuming *arguendo* that Detective Spangler made an improper comment on the credibility of a witness, Russell opened the door by first raising the issue of investigative bias during his questioning of Detective Spangler. Russell asked Detective Spangler on cross-examination whether "it would be improper to allow investigative bias to play a role in an investigation." RP 4888. Only after Russell raised this issue was it responded to by the State on redirect examination when State's counsel asked Detective Spangler whether investigative bias played a role in the investigation. RP 4890.

"Fairness dictates that the rules of evidence will allow the opponent to question a witness about a subject matter that the proponent first introduced through the witness." *State v. Gallagher*, 112 Wn. App. 601, 610, 51 P.3d 100 (2002). A trial judge is given considerable discretion to determine whether the door has been opened to a line of inquiry. *Burchfiel v. Boeing Corp.*, 149 Wn. App. 468, 490, 205 P.3d 145

(2009) (citations omitted). Here, in light of the open door rule, the trial judge correctly allowed the State to respond to Russell's suggestion during cross examination that investigative bias tainted the investigation.

Lastly, while Russell's brief alleges an improper comment, he does not meet his burden of showing that the complained-of comment substantially affected the verdict. "It is not an abuse of discretion for a trial court to admit testimony when the party seeking exclusion fails to demonstrate prejudice as a result of admission." *Goodman v. Boeing Co.*, 75 Wn.App. 60, 84, 877 P.2d 703 (1994), *aff'd*, 127 Wn.2d 401, 899 P.2d 1265 (1995). The six lines dedicated to this issue in Russell's brief do not allege any prejudice from the detective's answer. Therefore, Russell's challenge fails.

M. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION BY FAILING TO GIVE RUSSELL CREDIT ON HIS SENTENCE FOR THE TIME HE SPENT CONFINED IN IRELAND FIGHTING A FEDERAL EXTRADITION WARRANT.

After Russell failed to appear for court the Whitman County Superior Court issued three nationwide arrest warrants for three sets of charges; vehicular homicide and vehicular assault, bail jumping, and forgery and theft. CP 1363-1370. The violation dates for each set of charges is different and each set of cases has a separate cause number. Later, the United States District Court for the Eastern District of

Washington issued an arrest warrant for the federal charge of unlawful flight to avoid prosecution. CP 1375. On October 23, 2005, Russell was located in Ireland and arrested. Because the state charge of bail jumping and federal charge of unlawful flight to avoid prosecution are not extraditable offenses under the extradition treaty between the United States and Ireland, the Irish High Court would not extradite Russell unless those charges were dismissed. CP 1382, 1387.

On February 15, 2006 Whitman County agreed not to prosecute the defendant for bail jumping. FOF 12, CP 1383, CP 1379. On October 25, 2006, the Irish High Court issued an order returning Russell to the United States. FOF 13, CP 1383, CP 1384. On November 9, 2006, after Russell arrived on American soil, a federal court granted the United State's motion to dismiss the unlawful flight to avoid prosecution charge. FOF 14, CP 1384, CP 1386-1391.

Russell spent 384 days confined in Ireland while fighting his extradition. On January 2, 2008, he was sentenced for the vehicular homicide and vehicular assault convictions which are the subject of this appeal. The theft and forgery charges were dismissed that same day. FOF 17, CP 1384. The trial court gave him credit for 363 days served in the Whitman County jail awaiting trial, and declined to give him credit for the 384 days spent in Ireland fighting extradition. FOF 16, CP 1384.

1. The Plain Meaning Of RCW 9.94A.505(6) Is Unambiguous And Requires A Judge To Give An Offender Credit For Presentencing Confinement Only If That Confinement Was “Solely In Regard To The Offense For Which The Offender Is Being Sentenced.”

Relying on the plain language of RCW 9.94A.505(6) the trial court declined to give Russell credit for the 384 days he spent confined in Ireland, reasoning it had the discretion to do so because he had not been held solely on the vehicular homicide and vehicular assault charges while in Ireland. The court concluded that during the time Russell was confined in Ireland he was not being confined solely in regards to the vehicular homicide and vehicular assault charges, because he was also being held on the forgery and theft charges, but not on the unlawful flight or bail jumping charges. COL 4 & 5, CP 1384-1385.³⁸ COL 1-6, CP 1384-85.

Revised Code of Washington 9.94A.505(6) states:

The sentencing court shall give the offender credit for all confinement time served before the sentencing if that confinement was *solely* in regard to the offense for which the offender is being sentenced. (emphasis added).

Questions of statutory interpretation are reviewed de novo. *State v. Jacobs*, 154 Wn.2d 596, 600, 115 P.3d 281 (2005). A court’s primary objective when interpreting a statute is to ascertain and carry out the intent and purpose of the Legislature. The first step in the analysis requires

³⁸ The State maintains that Russell was being held on the unlawful flight from prosecution and bail jumping charges as well. A reviewing court may affirm on any ground supported by the record. *State v. Costich*, 152 Wn.2d 463, 477, 98 P.3d 795 (2004).

looking at the plain meaning of the words of the statute. *Fraternal Order of Eagles, Tenino Aerie No. 564 v. Grand Aerie of Fraternal Order of Eagles*, 148 Wn.2d 224, 239, 59 P.3d 655 (2002). If the language of the statute is unambiguous, the court must rely solely on the plain language of the statute. *Id.* Statutory language is ambiguous when it can be reasonably interpreted in two or more ways, but it is not ambiguous merely because multiple interpretations are conceivable. *Id.* at 239-40.

Under the plain meaning of the statute an offender must receive credit for presentencing confinement time only if the confinement was “solely in regard to the offense for which the offender is being sentenced.” RCW 9.94A.505(6). Russell’s analysis ignores the word “solely.” Statutes are to be construed so as to give effect to every word and no word may be ignored simply because its presence is inconvenient. *State v. Roggenkamp*, 153 Wn.2d 614, 624, 106 P.3d 196 (2005).

Russell was not confined in Ireland “solely” because of the vehicular homicide and vehicular assault charges. He was also confined there because of the federal unlawful flight charge and state bail jumping charge, and because of the state forgery and theft charges for which he was also extradited. The federal flight and state forgery and theft charges were not dismissed until after he left Ireland. Accordingly, the trial court was not obligated to give him credit for the time he spent confined in Ireland.

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2. None Of The Cases Relied On By Russell Overcome The Plain Meaning Of The Controlling Statute On Credit For Time Served.

Russell contends that principles of fundamental fairness relied on in *Reanier v. Smith*, *In re Phelan (Phelan I)* and *State v. Phelan (Phelan II)* required the trial court to give him credit for the time he spent confined in Ireland. 83 Wn.2d 342, 517 P.2d 949 (1974); 97 Wn.2d 590, 647 P.2d 1026 (1982); 100 Wn.2d 508, 671 P.2d 1212 (1983). He argues that because that did not occur the 384 days he spent in Ireland on multiple cases under multiple cause numbers, both state and federal, illegally remain “in limbo.” Brief of App. at 69. Russell essentially argues that once a person has spent time in confinement that time is somehow “banked” and must be credited towards any future sentence, regardless of whether the offender was or was not being held solely on the charges for which he is being sentenced.

The Court should reject the argument that *Reanier v. Smith*, *Phelan I* and *Phelan II* require an interpretation contrary to the clear provisions of RCW 9.94A.505(6). These cases further underscore the statutory rule that an offender is only entitled to credit for time served if that time was served solely for the offense for which he is ultimately sentenced.

Reanier v. Smith involved four defendants, all held and sentenced on one case. 83 Wn.2d 342, 517 P.2d 949 (1974). The Court simply held that if a person is held in custody on a singular case then he or she is entitled to receive credit for that time.

The issue in *Phelan I* was whether credit against a maximum prison sentence must be given for different time periods during which the defendant was confined. 97 Wn.2d 590, 647 P.2d 1026 (1982). The case involved four confinement periods: (1) between the arrest and guilty plea; (2) between the guilty plea and sentencing; (3) the time served as a condition of probation after sentencing; and (4) the time served in lieu of revocation of his probation. *Id.* at 594. The Court held that the defendant was entitled to credit for the time he was confined during the first three categories, but not for the fourth because a defendant is only entitled “to credit for all time served *exclusively* on the principal underlying charge.” *Id.* at 591. The Court explained:

Under the reasoning of *Reanier* and *Hultman*, it would seem petitioner is entitled to no credit for the time he served in jail while awaiting his revocation hearing. None of the considerations of due process, equal protection, or multiple punishments arising in *Reanier* and *Hultman* appear as to this category of jail time since petitioner was serving time on the Clark County charges-not on the principal underlying charge. Therefore, petitioner is not entitled to credit against his maximum sentence for the time he served while awaiting his probation revocation hearing.

Phelan I at 597.

In *Phelan II*, the Court simply held that jail time must be credited against the discretionary minimum terms set by the Board of Prison Terms and Paroles. 100 Wn.2d 508, 671 P.2d 1212 (1983). That holding adds nothing to Russell's argument regarding how the trial court may allocate credit for time served towards an offender being held on multiple charges.

Russell also cites to the Washington Practice series in support of his claim that "if an offender is confined on two charges simultaneously any time not credited towards one must be credited towards the other." Brief of App. at 69. Russell's reliance on this out-of-context statement is misplaced because Washington Practice attributes this statement to *In re Schaupp*, 66 Wn.App. 45, 831 P.2d 156 (1992). While this statement describes the fact-specific result in *Schaupp*, the reasoning simply reiterates the statutory rule that a court must only award credit for time served if that time was served solely in regard to the offense for which the offender is being sentenced.

In *Schaupp*, the defendant was in the Franklin County when he plead guilty to delivery of a controlled substance and was sentenced to 36 months before being transferred to the Spokane County jail on September 20, 1990 pursuant to a warrant. 66 Wn.App. 45, 46, 831 P.2d 156 (1992). On December 10, 1990, while at the Spokane jail, he plead guilty to

possession of a legend drug. He was sentenced to 30 days jail and given credit for 30 days already served. The sentencing order stated “Defendant has served 30 days in jail solely on this/these charge(s). The defendant is to be released to D.O.C.” *Id.* at 47. As of December 10, defendant had been confined in the Spokane jail for 81 days. *Id.* He remained there until January 17, 1991, at which time he was transported to the Department of Corrections (DOC). *Id.* at 47.

On appeal, Defendant was serving his 36 month Franklin County sentence at the DOC and argued he should have been credited with all pre-sentence and post-sentence time spent in both jails pursuant to RCW 9.94A.120(13) [since recodified as RCW 9.94A.505(6)]. *Schaupp*, 66 Wn.App. at 47. Relying on the plain language of RCW 9.94A.120(13) the court of appeals rejected that argument and held he was only entitled to credit for the time he served solely on the Franklin County charge regardless of where the confinement occurred. *Id.* at 50.

In reaching this conclusion the court reviewed four time periods. Category three involved the time Defendant spent in the Spokane jail from September 20 to December 10. Category four involved the time Defendant spent in the Spokane jail from December 10, 1990 until his transfer to DOC on January 17, 1991. *Schaupp*, 66 Wn.App. at 47.

In regards to category three the court explained that although Defendant was in the Spokane jail beginning on September 20 his confinement there was for his Franklin County conviction not his Spokane conviction. *Schaupp*, 66 Wn.App. at 50. However, when the Spokane County trial court sentenced him to 30 days for a Spokane charge and gave him credit for 30 days served he was no longer entitled to have those 30 days credited towards his Franklin County conviction, because he was not being held solely on the Franklin County conviction anymore during that time. Accordingly, he was entitled only to credit for the 51 days during which he was being held solely on the Franklin County conviction. *Id.* at 51.

In regards to category four, the court reasoned that since the sentencing order specifically provided that the defendant be released to DOC he was only being held on the Franklin County matter from December 10 to January 17. Because he was being held solely on that matter during that time period the court held the statute mandates that he be given credit for that time served. *Schaupp*, 66 Wn.App. at 51-52.

Contrary to Russell's assertion, *Schaupp* does not stand for the proposition that you are universally entitled to receive credit for any unused confinement time. Instead, the *Schaupp* court's findings simply interpret RCW 9.94A.120(13) [since recodified as RCW 9.94A.505(6)] in

the same manner as the trial court in Russell's case did which is that you are only entitled to receive credit for confinement time if that confinement was solely for the offense for which you are being sentenced. The court's ultimate conclusions were based strictly on identifying the time periods during which the defendant was being confined on only one charge, not on some overarching principle that you are entitled to bank your confinement time and use it as needed.

Lastly, Russell's contention that *State v. Brown* stands for the proposition that an offender is entitled to receive credit for any time spent in "pretrial detention in connection with extradition proceedings" is incorrect. Brief of App. at 67, citing *State v. Brown*, 55 Wn.App. 738, 757, 780 P.2d 880 (1989). *Brown* simply reiterates the rule that an offender is only entitled to receive credit for time served solely on the offense for which he is being sentenced. In *Brown*, the defendant was located in California after the Information was filed. He spent 83 days there before being returned to Washington. *Id.* at 741. In holding that he was entitled to credit for those 83 days pursuant to RCW 9.94A.120(12) [since recodified as RCW 9.94A.505(6)] the court explained that "the time Brown served in California was attributable only to the offenses for which he was convicted and sentenced; *they were the sole reason* for his confinement." *Id.* at 757 (emphasis added). Brown was not subject to

separate and distinct charges as was Russell who was charged with the federal crime of unlawful flight to avoid prosecution after fleeing Washington, as well as state bail jumping, theft and forgery charges.

The trial court properly applied RCW 9.94A.505(6). Russell was detained in Ireland on multiple charges, both state and federal, and therefore he was not held “solely” for the vehicular crimes he was ultimately sentenced for.

Nor is this result unfair. Russell benefitted tremendously by fleeing to Ireland, a country which rarely extradites people to the United States and which refused to do so in this case absent dismissal of the state bail jumping and federal flight from prosecution charges. In light of the substantial benefits Russell achieved by selecting Ireland as his flight destination and fighting extradition once located, the trial court did not abuse its discretion when it declined to further reward him by giving him credit for the time he spent there.

N. WASHINGTON’S IMPLIED CONSENT STATUTE AUTHORIZED THE FORENSIC BLOOD DRAW, TESTIMONY BY DETECTIVE SNOWDEN REGARDING DAMAGE TO THE CADILLAC WAS RELEVANT AND NOT UNDULY PREJUDICIAL, AND THE TRIAL COURT PROPERLY ADMITTED THE NON-CUSTODIAL STATEMENTS RUSSELL MADE TO TROOPER MURPHY.

Russell raises three additional arguments in his statement of additional grounds; (1) that Washington’s implied consent statute did not

authorize the forensic blood draw; (2) that testimony by detective Snowden was irrelevant and unfairly prejudicial; and (3) that the court erred by admitting statements he made to Trooper Murphy.

Washington's implied consent statute, RCW 46.20.308(1), provides that "[a]ny person who operates a motor vehicle within this state is deemed to have given consent ... to a test or tests of his or her breath or blood for the purposes of determining the alcohol concentration or presence of any drug ..." provided "the arresting officer has reasonable grounds to believe the person had been driving or was in actual physical control of a motor vehicle while under the influence of intoxicating liquor or any drug[.]" Russell offers no legal authority to support his contention that "Washington's Implied Consent law cannot reach outside the territorial boundaries of the State of Washington." SAG at 14. In the absence of any authority, the clear mandate of the statute controls.

Russell next asserts the court erred in allowing Detective Snowden to testify that the Cadillac incurred more contact and intrusion damage than almost any of the hundreds of collisions he's encountered, and that it looked like the jaws of life had been used on the vehicle. Russell asserts this testimony was irrelevant and unfairly prejudicial. A trial court's rulings on relevance and its balancing of probative evidence against its prejudicial effect is reviewed under the manifest abuse of discretion

standard. *State v. Luvene*, 127 Wn.2d 690, 706-07, 903 P.2d 960 (1995). The severity of the damage to the victims' vehicle was highly relevant because one of the factual disputes relating to Russell's culpability was the speed at which he had been driving. Both the aforementioned statements were descriptive of the amount of damage the Cadillac sustained, and thereby corroborated testimony by Robert Hart that Russell was driving at least 90 miles per hour when he smashed into the Cadillac. RP 3594. Because the mere description of vehicle damage is not overly prejudicial when balanced against the necessity of such testimony, the trial judge did not abuse his discretion in admitting it.

Russell also contends the court erred by admitting statements he made to Trooper Murphy, arguing that those statements were made during a custodial interrogation. Russell has not challenged the trial court's findings of fact, and thus they are verities on appeal. *State v. Gaines*, 154 Wn.2d 711, 716, 116 P.3d 993 (2005). His challenge to the court's legal conclusions are reviewed de novo. *State v. Carneh*, 153 Wn.2d 274, 281, 103 P.3d 743 (2004).

Whether a person is in custody for *Miranda* purposes is a mixed question of fact and law. *State v. Rehn*, 117 Wn. App. 142,152, 69 P.3d 379 (2003) (citations omitted). In resolving the legal inquiry the court applies an objective test to determine whether there was a formal arrest or

a restraint of the defendant to a degree consistent with formal arrest. *Id.* at 153 (citations omitted). The issue is not whether a reasonable person would believe he or she was not free to leave, but rather “whether such a person would believe he was in police custody of the degree associated with formal arrest.” *State v. Ferguson*, 76 Wn. App. 560, 566, 886 P.2d 1164 (1995) (citing 1 W. LaFave & J. Israel, *Criminal Procedure* § 6.6, at 105 (Supp. 1991)).

For *Miranda* purposes, the fact that a suspect is not free to leave during the course of an investigative stop does not make the encounter comparable to a formal arrest. *State v. Ferguson* is illustrative. 76 Wn.App. 560, 886 P.2d 1164 (1995). In *Ferguson*, the defendant was not free to leave the scene of a traffic accident until two officers questioned him. Prior to being Mirandized, the suspect was asked whether he was the driver of one of the vehicles, whether he had been drinking alcohol and how much he had consumed. *Id.* at 563. One of the officers directed the aid crew to delay transporting him to the hospital. *Id.* The other testified he was not free to leave and had he tried the officer would have restrained him. *Id.* at 564. After questioning was completed the suspect was arrested for vehicular homicide and advised of his *Miranda* rights. *Id.* at 564. The court held that the detention and questioning constituted a permissible temporary detention not a custodial arrest for

purposes of *Miranda*. *Id.* at 568. In so holding, the court explained that such detentions are analogous to a *Terry* Stop, and that an officer “may ask a person apparently involved in the accident a moderate number of questions to determine whether he should be issued a traffic citation, whether there is probable cause to arrest him, or whether he should be free to leave after the necessary documentation has been exchanged. *Id.* at 568, citing *Cordoba v. Hanrahan*, 910 F.2d 691, 694 (10th Cir.), *cert.denied*, 498 U.S. 1014, 111 S.Ct. 585, 112 L.Ed.2d 590 (1990).

The facts regarding Russell do not show “a formal arrest or restraint of the defendant to a degree consistent with a formal arrest.” *State v. Solomon*, 114 Wn. App. 781, 787, 60 P.3d 1215 (2002). Upon arriving at the hospital, Trooper Murphy talked with witnesses Tony Catt and David Uberuaga before contacting Russell. FOF 8; CP1402. A nurse and Russell’s father and friend were present in the room while Trooper Murphy briefly asked him how the collision had occurred and whether he had consumed alcohol. FOF 9, 11, 14; CP1402-1403. Trooper Murphy asked these questions as a means of continuing his investigation as to the cause of the collision. FOF 11; CP 1403. Trooper Murphy did not advise Russell that he was under arrest, that he was being detained or that he was not free to leave. FOF 12; CP 1403. No one took any action to block the door to the room or to prevent the defendant or anyone else from entering

or exiting the room. FOF 12; CP 1403. Following this brief interview, Trooper Murphy left the room and talked to his sergeant and another witness on the phone. FOF 19, 20; CP 1403-1404. Only thereafter, did Trooper Murphy return to the room and arrest and Mirandize Russell. FOF 21; CP 1404.

Under these facts, the court did not err when it concluded that Russell was not in custody when he was questioned by Trooper Murphy, because his freedom of movement was not restricted to a degree associated with formal arrest. COL 2; CP 1404. At most, he was only temporarily detained by Trooper Murphy, who left the room after questioning him to continue his investigation. Because Russell was not in custody, the trial court properly admitted his pre-arrest statements.

Even if the court finds error in the trial court's conclusion the error was harmless. "An error of constitutional magnitude in a criminal prosecution is harmless if the reviewing court is convinced beyond a reasonable doubt that the evidence not tainted by the error is, by itself, so overwhelming that it necessarily leads to a finding of guilt." *State v. Guloy*, 104 Wn.2d 412, 425, 705 P.2d 1182 (1985).

Russell told Trooper Murphy that he had consumed alcohol at My Office Tavern, and that the collision occurred when he swerved to avoid a vehicle that had come into his lane and which may have struck him.

FOF 13, 14. Because the statements to Trooper Murphy were made to other witnesses as well their admission through Trooper Murphy was cumulative, and therefore harmless. Moreover, even without these statements Russell's alcohol consumption and poor driving were never in doubt.

Bartender Levi Neufeld confirmed that Russell consumed at least two pints of Guinness at My Office Tavern. RP 3291. Prior to leaving for the bar, Russell and six others consumed a half gallon of vodka. RP 3551–3555. Tony Catt and Kayce Ramirez testified that Russell smelled heavily of alcohol at the collision scene. RP 3408-3409, 3881. Without specifying an amount Russell told Brian Parrish he had consumed alcohol prior to the collision. Russell then gave numerous conflicting accounts to others regarding the amount of alcohol, telling Cristin Capwell it was one drink (RP 3492), Tony Catt it was two beers (RP 3883) and finally Dr. Kloepfer it was two and a quarter beers (RP 2963).

Russell also gave Brian Parrish the same account of his driving as he had given Trooper Murphy, telling him the collision occurred when he swerved to avoid a vehicle that had come into his lane and which may have struck him. RP 3752. Yet numerous witnesses disputed this account, and described how Russell caused the accident by speeding into oncoming traffic. Robert Hart testified that Russell was driving erratically

prior to the collision. RP 3589-3590. When Russell approached him from behind at a very high rate of speed and blinked his lights Hart pulled to the shoulder and stopped his vehicle. RP 3591-3593. Russell sped past him going at least 90 miles per hour and swerved into the oncoming lane. RP 3594. Hart observed several cars cresting the hill in the opposite direction, and when Russell was unable to get back in his own lane he sideswiped the first of the oncoming vehicles and then plowed into the second one. RP 3593-3596.

Jill Baird was driving in front of the Cadillac and behind a Geo when she saw Russell hit the Geo, and then saw the Geo spin around while the cars behind her caught fire. RP 3832-3833. Eric Haynes and Matt Wagner, passengers in the Cadillac, described Russell coming at their car and colliding with it. RP 3231-3232. Vihn Tran, the driver behind the Cadillac saw Russell's vehicle come out of a dust cloud and into his lane before their vehicles collided. RP 3462-3463.

Russell's forensic blood alcohol level was .12 two and a half hours after he sped into oncoming traffic and collided with several vehicles. RP 4115. Schwilke testified that this result meant Russell had the equivalent of six one point five ounce shots of alcohol in his system at the time his blood was drawn, and that his blood alcohol concentration within two hours of driving would have been .13 to .14 per one hundred

milliliters of whole blood. RP 4130, 4212-4215. He further explained that at a blood alcohol concentration of .08 per one hundred milliliters everyone is affected to such a degree that they should not drive a motor vehicle. RP 4117-4118. Mr. Schwilke concluded that the results of both the forensic and medical blood test indicated a blood alcohol level at which Russell's driving would be adversely affected. RP 4121-4122.

Because Russell was not in custody, the trial court properly admitted his pre-arrest statements. Additionally, since overwhelming evidence existed to convict Russell without his statements any error affecting the admissibility of his statements was harmless.

IV. CONCLUSION

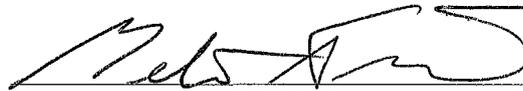
The cumulative error doctrine applies when the combination of several errors at the trial court level combine to deny a defendant a fair trial. *State v. Hodges*, 118 Wash.App. 668, 673-74, 77 P.3d 375 (2003). Russell bears the burden of showing he was prejudiced by the accumulation of errors. *State v. Price*, 126 Wash.App. 617, 655, 109 P.3d 27 (2003). Here, Russell's cumulative error argument fails because he has not demonstrated any error.

Russell was lawfully arrested and convicted by a fair and impartial jury. He received a fair and public trial in which all evidence that came before the jury was properly admitted. The court did not abuse its

discretion when it denied him credit for the time he spent in Ireland fighting his extradition back to the United States. The judgment and sentence must be affirmed.

RESPECTFULLY SUBMITTED this 5th day of April, 2010.

ROBERT M. MCKENNA
Attorney General

A handwritten signature in black ink, appearing to read 'Melanie Tratnik', written over a horizontal line.

MELANIE TRATNIK, WSBA #25576
Assistant Attorney General

Appendix A

WPIC 90.08 Vehicular Homicide and Assault—Conduct of Another

If you are satisfied beyond a reasonable doubt that the *[act] [or] [omission] [driving]* of the defendant was a proximate cause of *[the death] [substantial bodily harm to another]*, it is not a defense that the *[conduct] [driving]* of *[the deceased] [or] [another]* may also have been a proximate cause of the *[death] [substantial bodily harm]*.

[However, if a proximate cause of *[the death] [substantial bodily harm]* was a new independent intervening act of *[the deceased] [the injured person] [or] [another]* which the defendant, in the exercise of ordinary care, should not reasonably have anticipated as likely to happen, the defendant's act is superseded by the intervening cause and is not a proximate cause of the *[death] [substantial bodily harm]*. An intervening cause is an action that actively operates to produce harm to another after the defendant's *[act] [or] [omission]* has been committed *[or begun]*.]

[However, if in the exercise of ordinary care, the defendant should reasonably have anticipated the intervening cause, that cause does not supersede the defendant's original act and the defendant's act is a proximate cause. It is not necessary that the sequence of events or the particular injury be foreseeable. It is only necessary that the *[death] [substantial bodily harm]* fall within the general field of danger which the defendant should have reasonably anticipated.]

Appendix B

Instruction No. 14

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3 With respect to a charge of Vehicular Homicide, conduct of a defendant is not a
4 "proximate cause" of death if death is caused by a superseding, intervening event.

5 A superseding, intervening event is a new, independent intervening act of another
6 person, which the defendant, in the exercise of ordinary care, should not reasonably have
7 anticipated as likely to happen. An intervening cause is an action that actively operates to
8 produce harm to another after the defendant's act has been committed or began.

9 However, if in the exercise of ordinary care, the defendant should reasonably have
10 anticipated the intervening cause, that cause does not supersede the defendant's original
11 act, and the defendant's act is a proximate cause. It is not necessary that the sequence of
12 events or the particular injury be foreseeable. It is only necessary that death fall within the
13 general field of danger which the defendant should have reasonably anticipated.

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Appendix C

Instruction No. 20

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2
3 With respect to a charge of Vehicular Assault, the conduct of a defendant is not a
4 "proximate cause" of serious bodily injury if serious bodily injury is caused by a
5 superseding, intervening event.

6 A superseding, intervening event is a new, independent intervening act of another
7 person, which the defendant, in the exercise of ordinary care, should not reasonably have
8 anticipated as likely to happen. An intervening cause is an action that actively operates to
9 produce harm to another after the defendant's act has been committed or began.

10 However, if in the exercise of ordinary care, the defendant should reasonably have
11 anticipated the intervening cause, that cause does not supersede the defendant's original
12 act, and the defendant's act is a proximate cause. It is not necessary that the sequence of
13 events or the particular injury be foreseeable. It is only necessary that serious bodily
14 injury fall within the general field of danger which the defendant should have reasonably
15 anticipated.
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Appendix D

Instruction No. 13

To constitute vehicular homicide, there must be a causal connection between the death of a human being and the driving of a defendant so that the act done or omitted was a proximate cause of the resulting death.

The term "proximate cause" means a cause which, in a direct sequence, unbroken by any new independent cause, produces the death, and without which the death would not have happened.

There may be more than one proximate cause of a death.

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Appendix E

Instruction No. 19

To constitute vehicular assault, there must be a causal connection between the serious bodily injury of a human being and the driving of a defendant so that the act done or omitted was a proximate cause of the resulting serious bodily injury.

The term "proximate cause" means a cause which, in a direct sequence, unbroken by any new independent cause, produces the ~~death~~ *serious bodily injury* and without which the serious bodily injury would not have happened.

There may be more than one proximate cause of a serious bodily injury.

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Appendix F

Instruction No. 10

To convict the defendant of the crime of Vehicular Homicide, as charged in Count I of the Information, each of the following five elements of the crime must be proved beyond a reasonable doubt:

1. That on or about the 4th day of June, 2001, the defendant drove or operated a motor vehicle.

2. That the defendant's driving of the motor vehicle proximately caused injury to Brandon S. Clements.

3. That at the time of causing the injury, the defendant was driving or operating the motor vehicle:

- a. while under the influence of intoxicating liquor; or
- b. in a reckless manner; or
- c. with disregard for the safety of others;

4. That Brandon S. Clements died as a proximate result of the injuries; and

5. That the defendant's acts occurred in the State of Washington.

If you find from the evidence that elements 1, 2, 4, and 5, and any of the alternative elements 3(a), 3(b), or 3(c), have been proved beyond a reasonable doubt, then it will be your duty to return a verdict of guilty. To return a verdict of guilty, the jury need not be unanimous as to which of alternatives 3(a), 3(b), or 3(c), has been proved beyond a reasonable doubt, as long as each juror finds that at least one alternative has been proved beyond a reasonable doubt.

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1 On the other hand, if, after weighing all the evidence, you have a reasonable doubt
2 as to any one of the elements 1, 2, 3, 4, or 5, then it will be your duty to return a verdict of
3 not guilty.
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WHITMAN COUNTY SUPERIOR COURT
N. 404 MAIN STREET + P.O. BOX 679
COLFAX, WA 99111
(509) 397-6244

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Appendix G

Instruction No. 11

To convict the defendant of the crime of Vehicular Homicide, as charged in Count II of the Information, each of the following five elements of the crime must be proved beyond a reasonable doubt:

1. That on or about the 4th day of June, 2001, the defendant drove or operated a motor vehicle.

2. That the defendant's driving of the motor vehicle proximately caused injury to Stacey G. Morrow.

3. That at the time of causing the injury, the defendant was driving or operating the motor vehicle:

a. while under the influence of intoxicating liquor; or

b. in a reckless manner; or

c. with disregard for the safety of others;

4. That Stacey G. Morrow died as a proximate result of the injuries; and

5. That the defendant's acts occurred in the State of Washington.

If you find from the evidence that elements 1, 2, 4, and 5, and any of the alternative elements 3(a), 3(b), or 3(c), have been proved beyond a reasonable doubt, then it will be your duty to return a verdict of guilty. To return a verdict of guilty, the jury need not be unanimous as to which of alternatives 3(a), 3(b), or 3(c), has been proved beyond a reasonable doubt, as long as each juror finds that at least one alternative has been proved beyond a reasonable doubt.

1 On the other hand, if, after weighing all the evidence, you have a reasonable doubt
2 as to any one of the elements 1, 2, 3, 4, or 5, then it will be your duty to return a verdict of
3 not guilty.
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WHITMAN COUNTY SUPERIOR COURT
N. 404 MAIN STREET + P.O. BOX 679
COLFAX, WA 99111
(509) 397-6244

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Appendix H

Instruction No. 12

To convict the defendant of the crime of Vehicular Homicide, as charged in Count III of the Information, each of the following five elements of the crime must be proved beyond a reasonable doubt:

1. That on or about the 4th day of June, 2001, the defendant drove or operated a motor vehicle.

2. That the defendant's driving of the motor vehicle proximately caused injury to Ryan G. Sorenson.

3. That at the time of causing the injury, the defendant was driving or operating the motor vehicle:

a. while under the influence of intoxicating liquor; or

b. in a reckless manner; or

c. with disregard for the safety of others;

4. That Ryan G. Sorenson died as a proximate result of the injuries; and

5. That the defendant's acts occurred in the State of Washington.

If you find from the evidence that elements 1, 2, 4, and 5, and any of the alternative elements 3(a), 3(b), or 3(c), have been proved beyond a reasonable doubt, then it will be your duty to return a verdict of guilty. To return a verdict of guilty, the jury need not be unanimous as to which of alternatives 3(a), 3(b), or 3(c), has been proved beyond a reasonable doubt, as long as each juror finds that at least one alternative has been proved beyond a reasonable doubt.

1 On the other hand, if, after weighing all the evidence, you have a reasonable doubt
2 as to any one of the elements 1, 2, 3, 4, or 5, then it will be your duty to return a verdict of
3 not guilty.
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WHITMAN COUNTY SUPERIOR COURT
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(509) 397-6244

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Appendix I

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Instruction No. 16

To convict the defendant of the crime of Vehicular Assault, as charged in Count IV of the Information, each of the following elements of the crime must be proved beyond a reasonable doubt:

1. That on or about the 4th day of June, 2001, the defendant drove or operated a motor vehicle.

2. That at the time, the defendant:

a. Operated or drove the motor vehicle in a reckless manner and this conduct was a proximate cause of serious bodily injury to Sameer Ranade;

or

b. Was under the influence of intoxicating liquor and this conduct was a proximate cause of serious bodily injury to Sameer Ranade; and

3. That the defendant's acts occurred in the State of Washington.

If you find from the evidence that elements 1, 3, and either 2(a) or 2(b) have been proved beyond a reasonable doubt, then it will be your duty to return a verdict of guilty. To return a verdict of guilty, the jury need not be unanimous as to which of alternatives 2(a) or 2(b) has been proved beyond a reasonable doubt, as long as each juror finds that at least one alternative has been proved beyond a reasonable doubt.

On the other hand, if, after weighing all the evidence, you have a reasonable doubt as to any one of the elements, then it will be your duty to return a verdict of not guilty.

Appendix J

Instruction No. 17

To convict the defendant of the crime of Vehicular Assault, as charged in Count V of the Information, each of the following elements of the crime must be proved beyond a reasonable doubt:

1. That on or about the 4th day of June, 2001, the defendant drove or operated a motor vehicle.

2. That at the time, the defendant:

a. Operated or drove the motor vehicle in a reckless manner and this conduct was a proximate cause of serious bodily injury to Kara Eichelsdoerfer; or

b. Was under the influence of intoxicating liquor and this conduct was a proximate cause of serious bodily injury to Kara Eichelsdoerfer; and

3. That the defendant's acts occurred in the State of Washington.

If you find from the evidence that elements 1, 3, and either 2(a) or 2(b) have been proved beyond a reasonable doubt, then it will be your duty to return a verdict of guilty.

To return a verdict of guilty, the jury need not be unanimous as to which of alternatives 2(a) or 2(b) has been proved beyond a reasonable doubt, as long as each juror finds that at least one alternative has been proved beyond a reasonable doubt.

On the other hand, if, after weighing all the evidence, you have a reasonable doubt as to any one of the elements, then it will be your duty to return a verdict of not guilty.

Appendix K

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Instruction No. 18

To convict the defendant of the crime of Vehicular Assault, as charged in Count VI of the Information, each of the following elements of the crime must be proved beyond a reasonable doubt:

1. That on or about the 4th day of June, 2001, the defendant drove or operated a motor vehicle.

2. That at the time, the defendant:

a. Operated or drove the motor vehicle in a reckless manner and this conduct was a proximate cause of serious bodily injury to John M. Wagner;

or

b. Was under the influence of intoxicating liquor and this conduct was a proximate cause of serious bodily injury to John M. Wagner; and

3. That the defendant's acts occurred in the State of Washington.

If you find from the evidence that elements 1, 3, and either 2(a) or 2(b) have been proved beyond a reasonable doubt, then it will be your duty to return a verdict of guilty.

To return a verdict of guilty, the jury need not be unanimous as to which of alternatives 2(a) or 2(b) has been proved beyond a reasonable doubt, as long as each juror finds that at least one alternative has been proved beyond a reasonable doubt.

On the other hand, if, after weighing all the evidence, you have a reasonable doubt as to any one of the elements, then it will be your duty to return a verdict of not guilty.

Appendix L

Instruction No. 5

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2 The defendant has entered a plea of not guilty. That plea puts in issue every
3 element of the crime charged. The State is the plaintiff and has the burden of proving
4 each element of the crime beyond a reasonable doubt. The defendant has no burden of
5 proving that a reasonable doubt exists.

6 A defendant is presumed innocent. This presumption continues throughout the
7 entire trial unless during your deliberations you find it has been overcome by the
8 evidence beyond a reasonable doubt.

9 A reasonable doubt is one for which a reason exists and may arise from the
10 evidence or lack of evidence. It is such a doubt as would exist in the mind of a
11 reasonable person after fully, fairly, and carefully considering all of the evidence or lack
12 of evidence.

Appendix M

No. 9

An intoxicated defendant may avoid responsibility for the death or substantial bodily harm to another, which results from his driving if the death or the substantial bodily harm is caused by a superseding, intervening event.

WPIC 90.08 (Comment)
RCW 46.61.520

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Appendix N

Instruction No. 22

Evidence was presented regarding the results of a blood alcohol test conducted at Gritman Memorial Hospital. You are only permitted to consider this evidence in determining whether the defendant was under the influence of or affected by intoxicating liquor while driving a vehicle. You are not permitted to consider this evidence in determining whether the defendant had, within two hours after driving, an alcohol concentration of 0.08 or higher as shown by analysis of his blood.

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Appendix **O**

Instruction No. 25

A person's ability to drive is lessened to an appreciable degree when, as a result of consuming intoxicating liquor, the person's physical or mental abilities are impaired to such a degree that the person no longer has the ability to drive a motor vehicle with the caution characteristic of a sober person of ordinary prudence under the same or similar circumstances.

It is not unlawful for a person to consume intoxicating liquor and drive a motor vehicle. More than mere consumption of intoxicating liquor must be shown to establish that a person is under the influence.

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FILED

JUN 01 2010

COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By 

NO. 26789-0

COURT OF APPEALS, DIVISION III
OF THE STATE OF WASHINGTON

THE STATE OF WASHINGTON,

Respondent,

v.

FREDERICK DAVID RUSSELL,

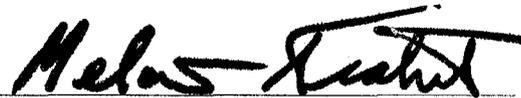
Appellant.

STATEMENT OF
ADDITIONAL
AUTHORITIES

The State of Washington submits the following additional authorities with regard to the issue of whether the right to a public trial is violated when a trial judge meets with counsel and the defendant in chambers and at a sidebar to discuss which jurors to excuse for hardship. *State of Washington v. Michael Sublett & Christopher Olsen*, slip opinion 38034-0-II. A copy of the opinion is attached as Appendix A.

RESPECTFULLY SUBMITTED this 27th day of May, 2010.

ROBERT M. MCKENNA
Attorney General



MELANIE TRATNIK, WSBA #25576
Assistant Attorney General

Appendix A



Opinion in PDF Format

Court of Appeals Division II
State of Washington

Opinion Information Sheet

Docket Number: 38034-0

Title of Case: State Of Washington, Respondent V. Michael L. Sublett & Christopher L. Olsen,
Appellants

File Date: 05/18/2010

SOURCE OF APPEAL

Appeal from Thurston Superior Court

Docket No: 07-1-00312-0

Judgment or order under review

Date filed: 07/23/2008

Judge signing: Honorable Christine a Pomeroy

JUDGES

Authored by Christine Quinn-Brintnall

Concurring: Elaine Houghton

J. Robin Hunt

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View the Opinion in PDF Format

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON,

No. 38034-0-II

Respondent,

v.

MICHAEL LYNN SUBLETT,

Appellant.

Consolidated with No. 38104-4-II

STATE OF WASHINGTON,

Respondent,

v.

CHRISTOPHER LEE OLSEN,

PUBLISHED OPINION

Appellant.

Quinn-Brintnall, J. -- A jury entered verdicts finding co-defendants Michael Sublett and Christopher Olsen guilty of first degree murder. Sublett and Olsen appeal, asserting that the trial court violated their public trial rights and their right to be present by holding an in-chambers conference to address a question submitted by the jury during its deliberations and that the trial court violated their due process rights by refusing to answer the jury's question.

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Additionally, Sublett contends that the trial court erred by refusing to sever the co-defendants' trial and in calculating his offender score. Sublett also contends that the prosecutor committed misconduct in closing argument by misstating the probative value of the deoxyribonucleic acid (DNA) evidence and by showing a photograph of the defendants with the word "guilty" superimposed over their faces. Last, Sublett asserts in his statement of additional grounds (SAG)¹ that the State committed a Brady² violation by suppressing exculpatory evidence and he raises a number of issues we cannot address in his direct appeal on the record provided.

Olsen also contends that (1) the trial court's felony murder instruction violated his due process rights, (2) his counsel was ineffective for proposing a nonstandard lesser included second degree manslaughter instruction, (3) his counsel was ineffective for not proposing the standard first and second degree manslaughter instructions, (4) the trial court erred by denying his motion for a new trial, (5) the trial court erred by admitting evidence of prior bad acts under ER 404(b), and (6) the trial court violated his due process right to present a defense by excluding relevant admissible evidence. Finding no merit in any of the appellants' contentions, we affirm.

FACTS

Background Facts

In 2005, April Frazier met Jerry Totten at an Alcoholics Anonymous meeting. Totten befriended Frazier and allowed her to stay in a trailer on his property in Tumwater, Washington. He gave Frazier the only key to the trailer; Totten also gave Frazier a key to his house. Totten allowed Frazier's boyfriend, Sublett, to visit freely with Frazier in the trailer and in his house.
1 RAP 10.10.

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

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In November 2006, Frazier stole coins from Totten and had a friend pawn them for \$200. On January 10, 2007, Sublett pawned more of Totten's coins for \$115. On January 16, 2007, Sublett pawned Totten's generator for \$150. On January 27, 2007, Sublett pawned a second generator belonging to Totten for \$234.

Frazier and Sublett traveled together to Reno, Nevada. In late January of 2007, while the couple were in Reno, Frazier's friend, Olsen, called her from the Thurston County Jail. Frazier told Olsen that she would bail him out of jail. Frazier called Totten from Reno and convinced him to wire her \$500 for nonexistent car repairs. When Frazier and Sublett returned to Washington at the end of January 2007, they visited Totten and stole his wallet, cell phone, and checkbook. On January 29, 2007, Frazier and Sublett bailed Olsen out of jail using \$1,000 they had stolen from Totten. Olsen's mother signed the bond.

After Frazier and Sublett bailed Olsen out of jail, the group went to the Little Creek Casino Hotel in Shelton, Washington, and used methamphetamine. Later that same day or the next day, all three went to Totten's home.

On January 30, 2007, Matthew Gantenbein saw a pickup truck over an embankment of Old Olympic Highway in Thurston County. Gantenbein approached the truck and saw that the driver's side door was open, the truck was in neutral, and the engine was running. He did not see anybody in or near the truck. When Gantenbein looked in the canopy of the truck, he saw "a bunch of boxes" and "stuffed animals." 2 Report of Proceedings (RP) at 72. The Washington State Patrol arrived and impounded the truck.

On February 4, 2007, Tumwater Police Detective Charles Liska responded to a domestic violence incident at a Tumwater hotel room where Frazier and Sublett were staying; Frazier was

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alone in the room when Liska arrived. Frazier told Liska that Sublett had physically assaulted her over the last few days. Frazier allowed Liska to photograph her injuries but she was otherwise uncooperative and declined medical attention. Liska observed methamphetamine and a butane

torch in the motel room but he did not make an arrest.

That same day, Sublett called his friend, Elsie Pray. Sublett told Pray that he and Frazier had gotten into a fight and that he wanted Pray to speak with her. Later that evening, Frazier told Pray that she and two other people had killed Totten on January 29, 2007. According to Pray, Frazier said that she knocked on Totten's door and, when he answered the door, the two others pushed him into a recliner, beat him with a baseball bat, and shot him with her gun. Frazier told Pray that she was in another room of the house listening to music while the two others killed Totten. Frazier told Pray that the group had wrapped up Totten's body, placed it in one of his trucks, and then rolled the truck down an embankment near Mud Bay in Thurston County. Frazier showed Totten's checkbook and driver's license to Pray. On February 10, 2007, Pray contacted the police and reported this conversation.

On February 5, 2007, Frazier and Sublett asked Peter Landstad to loan them his vehicle so they could move into a new residence. Landstad agreed to loan them his vehicle and the couple left Sublett's car with Landstad. Frazier and Sublett did not return Landstad's car on the agreed date and instead called him and offered to buy the vehicle for \$2,500. Landstad spoke with Sublett three times about Sublett wiring the money owed to him, but Sublett did not send him any money.

On February 8, 2007, Totten's sister, Shirley Inman, contacted the Tumwater Police Department to request that they perform a welfare check on Totten. Inman was concerned

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because she had not been able to contact her brother since January 15, 2007, when he had left after visiting Oregon for their mother's 90th birthday. Tumwater Police Officer Tim Eikum went to Totten's house and entered through an open door; Eikum noticed that the house was in disarray, but he did not see any obvious signs that a crime had been committed.

On February 10, 2007, Inman and her mother went to Totten's house to check on him. When they could not find Totten, they called the Tumwater Police Department. Officer Eikum went to Totten's house and saw that nothing had changed since his February 8, 2007 welfare check. Eikum checked to see if Totten had any vehicles registered in his name. Later that evening, Eikum discovered that the Sheriff's Department had impounded Totten's 1989 Ford pickup truck. After receiving a search warrant, Thurston County Sheriff's Deputy Michael Stewart searched the back of the pickup truck and, after removing a number of blankets, saw Totten's body "gagged across the mouth and across the top of the head . . . laying [sic] on a picnic table." 2 RP at 63.

On February 14, 2007, police arrested Frazier and Sublett in Las Vegas, Nevada. In the couple's Suburban, police found Totten's disabled parking placard, a loaded gun, and various items belonging to Totten, including his wallet, checkbook, and social security card. On February 22, 2007, Olympia police officers arrested Olsen. When officers confronted Olsen, he gave them

a false name but later he admitted his identity.

Olsen gave law enforcement two statements that were later admitted into evidence at trial. In his statements, Olsen admitted that he had been inside Totten's house and that he had planned to help Frazier and Sublett steal from him, but he denied participating in Totten's murder. Olsen stated that Totten was already dead or fatally injured when he arrived at the house. Olsen also

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admitted to stealing items from Totten's home and to helping move Totten's body.

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Procedural Facts

The State charged Sublett and Olsen with premeditated first degree murder and, in the alternative, first degree felony murder. In exchange for her testimony against Sublett and Olsen, the State allowed Frazier to plead guilty to second degree manslaughter, first degree burglary, and rendering criminal assistance, and it agreed to recommend a 54-month prison sentence.

On January 7, 2008, the State filed a CrR 4.3(b) motion to join the defendants for trial. Sublett opposed the State's motion to join, asserting that the defendants had antagonistic defenses. On May 8, 2008, the trial court consolidated the cases for trial.

A jury trial began on June 2, 2008. At trial, forensic scientist Karen Green testified that she had obtained a partial DNA profile from the handle of a wooden bat found at the crime scene. Green further testified that, based on the partial DNA sample, she could not rule out Sublett and Totten as possible contributors and that one in every 130 individuals in the United States population could be a possible contributor. She also testified that a DNA sample taken from a latex glove found at the scene matched Olsen's profile and that "the estimated probability of selecting an unrelated individual at random from the U.S. population with a matching profile to that glove is one in six quadrillion." 4 RP at 338. The State also presented evidence that, in the days following Totten's death, Frazier and Sublett made several purchases using Totten's credit cards.

At trial, Frazier testified that she and Sublett had bailed Olsen out of jail so that he could help them rob Totten. Frazier stated that after the group had ingested methamphetamine at a hotel, Sublett drove the three of them to Totten's home. She stated that after Totten let her into his house, she let Sublett and Olsen in through a back door. She further stated that she saw Olsen

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grab an aluminum bat from the utility room on his way into the house. Frazier claimed that she stayed in the laundry room while the two men beat Totten and that, after she heard Totten moan loudly, she turned up the music on her cell phone so she could not hear anything else. She

testified that Sublett then came into the utility room and took an extension cord.

Frazier further testified that Sublett had told her to get blankets and that she had seen Totten's dead body as she walked through the living room. Frazier stated that Olsen was upset after the killing and that Sublett took Olsen for a drive to calm him down, leaving her alone at the house for an hour. Frazier testified that while she was alone, she collected valuables and stored them in a spare bedroom. Frazier also testified that she and Sublett took bags of stolen items from the house, including credit cards, a laptop computer, and documents from Totten's desk. She stated that the three of them returned the next day to dispose of Totten's body. She testified that after they loaded Totten's body into the back of one of his trucks, she stayed at the house while Olsen drove the truck away with Sublett following him in another car. Frazier stated that after the men returned from moving Totten's body, Olsen remarked that he had enjoyed what he had done and would do it again.

On cross examination, Frazier admitted that during her interviews with the police, she had not mentioned Olsen's remarks regarding enjoying what he had done to Totten. She also testified that sometime after Olsen made this statement, he sat under a kitchen table with his knees drawn up and was crying. She further testified on cross examination that Sublett had pointed his gun at Olsen in Totten's house and later in the motel room. Frazier also admitted on cross examination that she had told several lies in the days surrounding Totten's death, including that Totten was a child molester with a jar of his victims' teeth, that she needed to borrow her friend's Suburban

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because she and Sublett were moving to a new residence, that she needed money to repair a broken car, and that she knew Sublett had not killed Totten.

The State sought to introduce tape recordings of two phone calls Olsen made to Frazier while Olsen was in jail on an unrelated charge. Olsen objected to the evidence, asserting that it was cumulative because Frazier had already testified as to the nature of her phone conversations with him; Olsen also objected because he claimed that portions of the calls contained offensive terms and evidence of prior bad acts in violation of ER 404(b). The trial court allowed the State to play the entire audio recordings of the phone calls over Olsen's objections.

Olsen's defense counsel sought to elicit testimony from Totten's neighbor, an attorney named Todd Rayan. Rayan's proffered testimony was that Totten had asked him about obtaining a restraining order against Frazier and that Totten had stated to him that Frazier had overstayed her welcome and that he had asked her to leave. The State objected to Rayan's proffered testimony, asserting that it was inadmissible hearsay. The trial court sustained the State's objection in part; it allowed Rayan to testify that Totten sought his advice on obtaining a restraining order but it did not allow him to testify as to whom Totten sought the restraining order against or that Totten suspected Frazier had been stealing from him. The trial court also allowed Rayan to testify that he had heard Totten and Sublett arguing in Totten's carport approximately

two weeks before police came to the property to investigate Totten's disappearance.

Olsen testified in his defense. He stated that when he spoke to Frazier while he was in jail, he was willing to say anything to have her bail him out, but he denied making an agreement to rob or hurt anyone. Olsen admitted that he went to Totten's house but stated that he was unsure whether Totten was already dead when he arrived. Olsen also admitted that he helped to move

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Totten's body. Olsen further testified that he did not receive any money or property for his participation in the incident. Olsen also testified that after the group moved Totten's body, Sublett forced him to cooperate by threatening him with a gun and by threatening to hurt his family.

At closing, the prosecutor made the following argument:

That bat was wiped for DNA. Mr. Sublett was not excluded as a DNA contributor, and the probability that he was the contributor to that DNA found on that bat was one in 130. Now, you know, you take that number, one in 130, and consider it in a vacuum, that's a low number, especially when you consider what was the -- Mr. Olsen's DNA was one in six I don't know how many gazillions; a lot. So in light of that, one out of 130, that's a low number, but when you consider that evidence, ladies and gentlemen, one in 130, when you consider that evidence in light of all of the evidence in the case, that was Mr. Sublett's DNA because Mr. Sublett was at that house. Mr. Sublett was at that house on January 29th. He was the guy that stole the credit cards. He was the guy that had the credit cards stolen from Jerry Totten. His fingerprints were in the utility room. April Frazier put him there and Christopher Olsen. So ladies and gentlemen, I submit the totality of the evidence, Sublett had that bat.

9 RP at 997. Later, in closing, the prosecutor remarked, "Turns out that Mr. Sublett's DNA is on a wooden bat." 9 RP at 1074.

Defense counsel objected to the prosecutor's use of an image during its closing argument that apparently depicted the defendants with the word "guilty" superimposed over their photos. The trial court sustained the objection and had the State remove the image.

Olsen's defense counsel proposed the following lesser included second degree manslaughter instruction:

To convict the defendant of the crime of manslaughter in the second degree, each of the following elements of the crime must be proved beyond a reasonable doubt:

- (1) That on or about the 19th day of January, 2007, the defendant failed to summon aid after illegally entering Jerry Totten's residence;
- (2) That the defendant's conduct was criminal negligence;

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- (3) That Jerry Totten died as a result of the defendant's acts; and
 - (4) That the acts occurred in the State of Washington.
- If you find from the evidence that each of these elements has been proved beyond a reasonable doubt, then it will be your duty to return a verdict of guilty. On the other hand, if, after weighing all of the evidence, you have a reasonable doubt as to any one of these elements, then it will be your duty to return a verdict of not guilty.

Clerk's Papers (CP) (Olsen) at 40.

The trial court refused to give this proposed instruction but the record does not include

the reasons for the trial court's refusal. Defense counsel did not propose any other lesser included jury instructions and the trial court did not provide any to the jury.

The trial court gave the following accomplice liability jury instruction (instruction no. 21):

A person is guilty of a crime if it is committed by the conduct of another person for which he or she is legally accountable. A person is legally accountable for the conduct of another person when he or she is an accomplice of such other person in the commission of the crime.

A person is an accomplice in the commission of a crime if, with knowledge that it will promote or facilitate the commission of the crime, he or she either:

(1) solicits, commands, encourages, or requests another person to commit the crime; or

(2) aids or agrees to aid another person in planning or committing the crime.

The word "aid" means all assistance whether given by words, acts, encouragement, support, or presence. A person who is present at the scene and ready to assist by his or her presence is aiding in the commission of the crime. However, more than mere presence and knowledge of the criminal activity of another must be shown to establish that a person present is an accomplice.

A person who is an accomplice in the commission of a crime is guilty of that crime whether present at the scene or not.

CP (Sublett) at 156; CP (Olsen) at 71.

During its deliberations, the jury submitted the following question to the court:

Clarification of Instruction 21. The structuring of the 2nd sentence in the 1st paragraph is unclear. Which of the following is correct for intent? A person (X) is legally accountable for the conduct of another person (Y) when he or she (X) is an accomplice of such other person (Y) in the commission of the crime. - OR - A

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person (X) is legally accountable for the conduct of another person (Y) when he or she (Y) is an accomplice of such other person (X) in the commission of the crime.

CP (Sublett) at 129.

Counsel met with the trial court in chambers to address the jury's question. Counsel agreed to the trial court's answer to the jury question, which stated, "I cannot answer your question please re-read your instructions." CP (Sublett) at 129. The jury found Sublett guilty of first degree murder by premeditation and in the course of a felony and it found Olsen guilty of first degree murder in the course of a felony but not by premeditation.

Olsen moved for a new trial, asserting that he had discovered new evidence of a witness that he could have used to impeach Frazier's testimony. The State opposed the motion for a new trial, arguing that the newly discovered evidence was merely cumulative or impeaching. The trial court denied Olsen's motion for a new trial.

At sentencing, the State sought a life sentence for Sublett under the Persistent Offenders Accountability Act (POAA), RCW 9.94A.555, based on his prior California robbery convictions. The trial court found that Sublett's prior out-of-state convictions were comparable to Washington strike offenses under the POAA and sentenced him to life in prison without the possibility of parole. The trial court sentenced Olsen to a standard range sentence, 500 months of incarceration, based on his offender score of nine. Sublett and Olsen timely appeal.

ANALYSIS

Sublett

A. Denial of Motion to Sever Trials

Sublett first contends that the trial court erred by denying his motion to sever his trial from

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Olsen's trial, asserting that Olsen's antagonistic defense unfairly prejudiced his right to a fair trial. The State asserts that the trial court properly denied the motion to sever because Sublett and Olsen did not have mutually inconsistent defenses. We agree with the State.

Separate trials are not favored in Washington. *State v. Dent*, 123 Wn.2d 467, 484, 869 P.2d 392 (1994) (citing *State v. Grisby*, 97 Wn.2d 493, 506, 647 P.2d 6 (1982), cert denied, 459 U.S. 1211 (1983)). We review a trial court's denial of a motion to sever for manifest abuse of discretion. *Dent*, 123 Wn.2d at 484. Defendants seeking severance have the burden of demonstrating that a joint trial "'would be so manifestly prejudicial as to outweigh the concern for judicial economy.'" *State v. Medina*, 112 Wn. App. 40, 52, 48 P.3d 1005 (quoting *State v. Bythrow*, 114 Wn.2d 713, 718, 790 P.2d 154 (1990)), review denied, 147 Wn.2d 1025 (2002).

A defendant may demonstrate prejudice by showing "'antagonistic defenses conflicting to the point of being irreconcilable and mutually exclusive.'" *State v. Canedo-Astorga*, 79 Wn. App. 518, 528, 903 P.2d 500 (1995) (quoting *United States v. Oglesby*, 764 F.2d 1273, 1276 (7th Cir. 1985)), review denied, 128 Wn.2d 1025 (1996). "But mutually antagonistic defenses are not per se prejudicial as a matter of law." *State v. Johnson*, 147 Wn. App. 276, 284, 194 P.3d 1009 (2008) (citing *Grisby*, 97 Wn.2d at 507), review denied, 165 Wn.2d 1050 (2009). And "[t]he mere existence of antagonism between defenses 'or the desire of one defendant to exculpate himself by inculcating a codefendant . . . is insufficient to [compel separate trials].'" *In re Pers. Restraint of Davis*, 152 Wn.2d 647, 712, 101 P.3d 1 (2004) (alterations in original) (quoting *United States v. Throckmorton*, 87 F.3d 1069, 1072 (9th Cir. 1996), cert. denied, 519 U.S. 1132 (1997)). Instead, a defendant must "'demonstrate[] that the conflict is so prejudicial that . . . the jury will unjustifiably infer that this conflict alone demonstrates that both are guilty.'" *Grisby*, 97

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Wn.2d at 508 (quoting *United States v. Davis*, 623 F.2d 188, 194-95 (1st Cir. 1980)).

Here, Olsen's defense was that Totten's murder had occurred before he participated in the robbery of the home and in the disposal of his body, whereas Sublett's defense was a general denial of any involvement in the crime. Although Olsen's defense attempted to shift the blame to Sublett and Frazier, this conflict alone did not rise to the level that a jury would unjustifiably infer that both Olsen and Sublett were guilty. *Grisby*, 97 Wn.2d at 508. Further, the defenses were not irreconcilable because the jury was free to disbelieve both versions of the events. "For defenses to be irreconcilable, they must be 'mutually exclusive to the extent that one [defense] must be believed if the other [defense] is disbelieved.'" *Johnson*, 147 Wn. App. at 285

(alterations in original) (quoting *State v. McKinzy*, 72 Wn. App. 85, 90, 863 P.2d 594 (1993)).

Accordingly, the trial court did not err by denying Sublett's motion to sever his trial from Olsen's.

B. Right to a Public Trial/Right to be Present

Sublett next contends that the trial court erred when it held an in-chambers conference in response to a question the jury submitted during its deliberations.³ Specifically, Sublett contends that the trial court's in-chambers conference violated his right to an open and public trial and violated his right to be present. We disagree.

The Sixth Amendment to the United States Constitution and article I, section 22 of the Washington Constitution guarantee criminal defendants the right to a public trial. *State v. Wise*, 148 Wn. App. 425, 433, 200 P.3d 266 (2009). We review de novo whether a trial court has violated a defendant's public trial right. *State v. Brightman*, 155 Wn.2d 506, 514, 122 P.3d 150 (2005).

³ Olsen joins Sublett's arguments on this issue.

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Whether a defendant's public trial right applies in the context of an in-chambers conference to answer a question the jury submitted during its deliberations appears to be an issue of first impression in Washington. In *State v. Sadler*, 147 Wn. App. 97, 114, 193 P.3d 1108 (2008), this court recognized that the public trial right applies to evidentiary phases of the trial as well as other "adversary proceedings," including suppression hearings, during voir dire, and during the jury selection process. But this court also determined that "[a] defendant does not . . . have a right to a public hearing on purely ministerial or legal issues that do not require the resolution of disputed facts." *Sadler*, 147 Wn. App. at 114.

Here, the trial court's in-chambers conference addressed a jury question regarding one of the trial court's instructions, a purely legal issue that arose during deliberations and that did not require the resolution of disputed facts. Thus, under this court's decision in *Sadler*, the defendants' right to a public trial did not apply in this context. Further, CrR 6.15(f) provides in part that "[the trial] court shall respond to all questions from a deliberating jury in open court or in writing." (Emphasis added.) More important, questions from the jury to the trial court regarding the trial court's instructions are part of jury deliberations and, as such, are not historically a public part of the trial. See, e.g., *Clark v. United States*, 289 U.S. 1, 12-13, 53 S. Ct. 465, 77 L. Ed. 993 (1933) (citing *Woodward v. Leavitt*, 107 Mass. 453, 460, 9 Am. Rep. 49 (1871)); *In re Matter of Cochran*, 237 N.Y. 336, 340, 143 N.E. 212 (1924); *In re Matter of Nunns*, 188 A.D. 424, 430, 176 N.Y.S. 858 (N.Y. App. Div. 1919)); *Times Mirror Co. v. United States*, 873 F.2d 1210, 1213 (9th Cir. 1989); *Crowe v. County of San Diego*, 210 F. Supp.2d 1189, 1196 (S.D. Cal. 2002). Because the public trial right does not apply to a trial court's conference with counsel on how to resolve a purely legal question which the jury submitted

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during its deliberations, we hold that the trial court did not violate the appellants' public trial right by responding to the jury's question in writing as CrR 6.15(f) provided.

Similarly, because the in-chambers conference held in response to a jury question was not a critical stage of the proceedings, we hold that the trial court did not violate the appellants' right to be present. A criminal defendant has a constitutional right to be present at every critical stage of the criminal proceedings against him. *State v. Pruitt*, 145 Wn. App. 784, 798, 187 P.3d 326 (2008). A critical stage is one where the defendant's presence has a reasonably substantial relationship to the fullness of his opportunity to defend against the charge. *In re Pers. Restraint of Benn*, 134 Wn.2d 868, 920, 952 P.2d 116 (1998) (quoting *United States v. Gagnon*, 470 U.S. 522, 526, 105 S. Ct. 1482, 84 L. Ed. 2d 486 (1985)). But in general, in-chambers conferences between the court and counsel on legal matters are not critical stages of the proceedings except when the issues involve disputed facts. *In re Pers. Restraint of Lord*, 123 Wn.2d 296, 306, 868 P.2d 835, 870 P.2d 964, cert. denied, 513 U.S. 849 (1994). The in-chambers conference here was not a critical stage of the proceedings because it involved only the purely legal issue of how to respond to the jury's request for a clarification in one of the trial court's instructions. Accordingly, the appellants' right to be present did not apply in this context.

C. Trial Court's Refusal to Clarify a Jury Instruction

Next, Sublett asserts that the trial court abused its discretion by refusing to answer the jury's question during deliberations because the instruction at issue was ambiguous and misstated the applicable law.⁴ The State responds that the jury instruction accurately stated the law. We agree with the State.

⁴ Olsen joins Sublett's arguments on this issue.

A trial court has discretion whether to give further instructions to a jury after it has begun deliberations. *State v. Ng*, 110 Wn.2d 32, 42, 750 P.2d 632 (1988). But we review claimed errors of law in a jury instruction de novo, evaluating the instruction "'in the context of the instructions as a whole.'" *In re Pers. Restraint of Hegney*, 138 Wn. App. 511, 521, 158 P.3d 1193 (2007) (quoting *State v. Benn*, 120 Wn.2d 631, 654-55, 845 P.2d 289, cert. denied, 510 U.S. 944 (1993)). Jury instructions as a whole must provide an accurate statement of the law and must allow each party to argue its theory of the case to the extent the evidence supports. *Benn*, 120 Wn.2d at 654. Jury instructions are sufficient if they are readily understood and are not misleading to the ordinary mind. *State v. Dana*, 73 Wn.2d 533, 537, 439 P.2d 403 (1968).

Here, the jury's question to the trial court indicated that it could interpret the sentence, "A person is legally accountable for the conduct of another person when he or she is an accomplice of such other person in the commission of the crime," in two ways. CP (Sublett) at 156; CP (Olsen) at 71. The jury indicated that it could interpret "he or she" as referring to the person who

may be legally accountable for another person's conduct or it could interpret "he or she" as referring to the person for whom a person may be legally accountable.

Sublett asserts that only the first interpretation is a correct statement of the law, whereas the State asserts that either interpretation is correct. Even assuming without deciding that only the first interpretation is a correct statement of the law, the trial court properly responded to the jury's question by telling them to reread the instruction at issue because a careful reading of the instruction supports only the jury's first interpretation. Here, the second part of the instruction at issue reads, "[W]hen he or she is an accomplice of such other person." CP (Sublett) at 156; CP (Olsen) at 71 (emphasis added). The instruction's use of the phrase "such other person"

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following "he or she" clearly indicates that "he or she" refers to the "person [who may be] legally accountable for the conduct of another person." Because the instruction at issue is not ambiguous and supports only the interpretation that Sublett concedes on appeal is a correct statement of law, the trial court did not abuse its discretion by refusing to further clarify the instruction for the jury.

D. Prosecutorial Misconduct/Cumulative Error

Next, Sublett contends that the State committed prosecutorial misconduct during closing argument by misstating the probative value of the DNA evidence and by using a visual aid that misstated the evidence and misled the jury. Sublett asserts that the cumulative effect of these alleged instances of prosecutorial misconduct merits a new trial. We disagree.

A defendant claiming prosecutorial misconduct bears the burden of establishing the impropriety of the prosecuting attorney's comments and their prejudicial effect. *State v. Brown*, 132 Wn.2d 529, 561, 940 P.2d 546 (1997), cert. denied, 523 U.S. 1007 (1998). We review a prosecutor's allegedly improper comments in the context of the total argument, the issues in the case, the evidence addressed in the argument, and the instructions given. *State v. Russell*, 125 Wn.2d 24, 85-86, 882 P.2d 747 (1994), cert. denied, 514 U.S. 1129 (1995).

In determining whether prosecutorial misconduct occurred, we first evaluate whether the prosecuting attorney's comments were improper. *State v. Reed*, 102 Wn.2d 140, 145, 684 P.2d 699 (1984). If the prosecuting attorney's statements were improper and the defendant made a proper objection to the statements, then we consider whether there was a substantial likelihood that the statements affected the jury's verdict. *Reed*, 102 Wn.2d at 145. Absent a proper objection and a request for a curative instruction, the defense waives a prosecutorial misconduct

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claim unless the comment was so flagrant or ill-intentioned that an instruction could not have cured the prejudice. *State v. Charlton*, 90 Wn.2d 657, 661, 585 P.2d 142 (1978). In reviewing a

prosecutorial misconduct claim, we generally afford the State great latitude in making arguments to the jury. *State v. Gregory*, 158 Wn.2d 759, 860, 147 P.3d 1201 (2006).

Sublett first contends that the prosecutor committed misconduct by misstating the probative value of the DNA evidence at closing. Specifically, Sublett contends that the prosecutor's remark that there was a one in 130 chance that Sublett contributed the DNA sample found on the bat misstated the evidence because the expert witness testified that one in every 130 individuals in the United States population could be a possible contributor. Because Sublett did not object to this remark and did not ask for a curative instruction, he waives any prosecutorial misconduct claim unless the comment was so flagrant or ill-intentioned that an instruction could not have cured the prejudice. *Charlton*, 90 Wn.2d at 661. Even assuming that the prosecutor's remark at closing was improper, Sublett does not argue that a curative instruction would have been insufficient to cure any resulting prejudice. He thus fails to meet his burden of establishing prosecutorial misconduct. *State v. Hoffman*, 116 Wn.2d 51, 93, 804 P.2d 577 (1991).

Sublett next contends that the prosecutor committed misconduct by using a visual aid that "apparently altered a photograph [of the defendants], inserting the word guilty." Br. of Appellant (Sublett) at 24. Defense counsel objected. The trial court sustained the objection and excluded the image. Sublett has not provided this court with the visual aid and the record is insufficient to allow further review.⁵ RAP 9.2(b); see also *State v. Rienks*, 46 Wn. App. 537, 544-45, 731 P.2d

⁵ The record of proceedings contains no indication as to the nature of the allegedly improper visual aid apart from Sublett's statement at sentencing that he was going to appeal his conviction based in part on the "[prosecutor's] use of visual graphics that displayed my image with a red circle around that image with arrows pointing to me with the word guilty in bold red letters across

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1116 (1987) (Appellant has the burden of perfecting the record so that the reviewing court has before it all of the evidence relevant to the issue and matters not in the record will not be considered on appeal.). Moreover, Sublett provides no legal argument or citations to authority to support this claim that the excluded photos irreparably precluded a fair trial.⁶ Without argument or authority to support it, an assignment of error is waived. *State v. Thomas*, 150 Wn.2d 821, 874, 83 P.3d 970 (2004) (citing *Smith v. King*, 106 Wn.2d 443, 451-52, 722 P.2d 796 (1986)). Because Sublett has failed to establish prosecutorial misconduct, we do not address his cumulative error claim.

E. Offender Score Calculation

Last, Sublett contends that the trial court erred at sentencing when calculating his offender score. Specifically, Sublett argues that the trial court erred when it found that his prior out-of-state convictions were comparable to strike offenses for purposes of the POAA. RCW 9.94A.570; former RCW 9.94A.030(29) (2006). Because the elements of Sublett's out-of-state convictions are substantially similar to the elements of a Washington strike offense under the POAA, we disagree and affirm Sublett's sentence.

A sentencing court may not count an offender's out-of-state conviction as a strike offense unless the State proves by a preponderance of the evidence that the conviction would be a strike

my face." 11 RP at 1151-52.

6 The entirety of Sublett's argument on this issue reads:

In addition, the prosecutor used inadmissible visual aids -- misstating the evidence and misleading the jury. For example, the prosecutor apparently altered a photograph, inserting the word guilty. Taken as a whole, these improper tactics rendered Sublett's trial unfair.

Br. of Appellant (Sublett) at 24.

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offense under the POAA. *State v. Ford*, 137 Wn.2d 472, 479-80, 973 P.2d 452 (1999); *State v. Ruldolph*, 141 Wn. App. 59, 71-72, 168 P.3d 430 (2007) (defendant does not have a right to have a jury determine fact of prior conviction for POAA sentence), review denied, 163 Wn.2d 1045 (2008). Washington courts employ a two-part test to determine whether foreign convictions are comparable to Washington strike offenses. In *re Pers. Restraint of Lavery*, 154 Wn.2d 249, 255, 111 P.3d 837 (2005). First, the trial court must compare the elements of the foreign crime to determine if they are substantially similar to the elements of a Washington criminal statute in effect when the foreign crime was committed. In *re Lavery*, 154 Wn.2d at 255 (citing *State v. Morley*, 134 Wn.2d 588, 605-06, 952 P.2d 167 (1998)). If the elements of the foreign conviction are comparable to the elements of a Washington strike offense on their face, the foreign conviction counts toward the defendant's offender score. In *re Lavery*, 154 Wn.2d at 255. If the elements of the Washington crime and the foreign crime are not substantially similar, the trial court may "look at the defendant's conduct, as evidenced by the indictment or information, to determine if the conduct itself would have violated a comparable Washington statute." In *re Lavery*, 154 Wn.2d at 255.

Here, the trial court based Sublett's offender score calculation on his prior California second degree robbery convictions; Sublett was convicted of three counts of second degree robbery on January 28, 1994, and he was convicted of two counts of second degree robbery on March 17, 1997. The trial court found Sublett's prior California second degree robbery convictions comparable to the elements of second degree robbery in Washington, which is a strike offense under the POAA. RCW 9.94A.570; former RCW 9.94A.030(29)(o).

California Penal Code section 211 provides:

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Robbery is the felonious taking of personal property in the possession of another, from his person or immediate presence, and against his will, accomplished by means of force or fear.

California Penal Code section 212.5 defines second degree robbery as any robbery other than those listed in sections 212.5(a) and (b). Washington courts have interpreted "feloniously" to mean "'with intent to commit a crime.'" *State v. Nieblas-Duarte*, 55 Wn. App. 376, 381, 777 P.2d 583 (quoting *State v. Smith*, 31 Wash. 245, 248, 71 P. 767 (1903)), review denied, 113 Wn.2d 1030 (1989).

At the time of Sublett's California convictions for second degree robbery, the Washington statute defining robbery required (1) the unlawful taking (2) of personal property (3) from the person of another or in his presence (4) against his will (5) by the use of immediate force, violence, or fear of injury to that person or his property or the person or property of anyone. RCW 9A.56.190. RCW 9A.56.210 provides that a person commits second degree robbery if he commits robbery as defined in RCW 9A.56.190. Additionally, in order to convict a defendant of second degree robbery in Washington, the State must prove the nonstatutory element of a specific intent to steal. See *In re Lavery*, 154 Wn.2d at 255-56 ("our settled case law is clear that "intent to steal" is an essential element of the crime of robbery" (quoting *State v. Kjorsvik*, 117 Wn.2d 93, 98, 812 P.2d 86 (1991))).

A legal comparison of the elements of second degree robbery in California and Washington illustrates that the two appear essentially identical. Both require (1) a taking (2) of personal property (3) from another person or his immediate presence (4) against his will (5) by use of force or fear. Both also require a specific intent to steal. It thus appears that the elements of California and Washington second degree robbery are substantially equivalent for purposes of

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the POAA.

Olsen

A. "To-Convict" Felony Murder Jury Instruction (Instruction No. 15)

Olsen first contends that the trial court's "to-convict" felony murder jury instruction violated his due process rights by misstating the elements of the offense, thus relieving the State of its burden of proving every element of the offense beyond a reasonable doubt. Specifically, Olsen contends that the challenged jury instruction allowed the jury to find him guilty of felony murder even if it believed that Frazier and Sublett killed or fatally wounded Totten during the course of felonies no longer in progress when they recruited him to help. We disagree.

Due process requires the State to prove every element of an offense beyond a reasonable doubt. U.S. Const. amend. XIV; *In re Matter of Winship*, 397 U.S. 358, 364, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970). Jury instructions that relieve the State of its burden to prove every element of an offense violate due process. *Thomas*, 150 Wn.2d at 844. Because jury instructions that omit elements of the crime charged constitute a "manifest error affecting a constitutional right," we may consider the issue for the first time on appeal. RAP 2.5(a)(3); *State v. Chino*, 117 Wn. App. 531, 538, 72 P.3d 256 (2003). Jury instructions that misstate an element of the charged offense may be harmless if the element is supported by uncontroverted evidence. *State v. Brown*, 147 Wn.2d 330, 341, 58 P.3d 889 (2002) (citing *Neder v. United States*, 527 U.S. 1, 18, 119 S. Ct. 1827, 144 L. Ed. 2d 35 (1999)).

The trial court gave the following jury instruction regarding the elements required to

convict Olsen of first degree felony murder:

(ALTERNATIVE [sic] B)

(1) That on or about January 29, 2007, Jerry Totten was killed;

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(2) That the defendant or an accomplice was committing or attempting to commit the crime of burglary in the first degree or robbery in the first or second degree.

(3) That the defendant, or another participant, caused the death of Jerry Totten in the course of or in furtherance of such crime or in immediate flight from such crime;

(4) That Jerry Totten was not a participant in the crime; and

(5) That the acts occurred in the State of Washington.

CP (Olsen) at 64.

Olsen contends for the first time on appeal that the trial court should have explained to the jury that it could find him guilty of felony murder only if he was an accomplice to the specific burglary or robbery in progress when Totten was killed or fatally wounded. Olsen further contends that the trial court should have instructed the jury on when a burglary or robbery terminates. But Olsen's contentions fail for three reasons. First, Olsen did not object to the giving of this instruction as CrR 6.15(c) requires.⁷ *State v. Ermert*, 94 Wn.2d 839, 621 P.2d 121 (1980). Second, there was no evidence at trial that Totten was killed during the course of a burglary or robbery that had terminated before Olsen's participation in a separate burglary or robbery. And third, a trial court errs by giving a jury instruction not supported by the evidence. *State v. Hunter*, 152 Wn. App. 30, 44, 216 P.3d 421 (2009) (quoting *State v. Warden*, 133 Wn.2d 559, 563, 947 P.2d 708 (1997)), review denied, 168 Wn.2d 1008 (2010).

⁷ CrR 6.15(c) states:

Before instructing the jury, the court shall supply counsel with copies of the proposed numbered instructions, verdict and special finding forms. The court shall afford to counsel an opportunity in the absence of the jury to object to the giving of any instructions and the refusal to give a requested instruction or submission of a verdict or special finding form. The party objecting shall state the reasons for the objection, specifying the number, paragraph, and particular part of the instruction to be given or refused. The court shall provide counsel for each party with a copy of the instructions in their final form.

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There was no evidence that Totten was killed during or in immediate flight from a completed robbery or burglary before Olsen's participation. Thus, the trial court's "to-convict" instruction accurately stated the elements required for the jury to convict Olsen of felony murder. Accordingly, the trial court's jury instructions did not violate Olsen's due process rights by misstating an element of the offense charged.

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B. Trial Court's Failure to Instruct on Lesser Included Offense of Second Degree Manslaughter/Ineffective Assistance of Counsel

Next Olsen contends that the trial court's refusal to instruct the jury on the lesser included offense of second degree manslaughter violated Olsen's due process rights under the State and

Federal constitution. We disagree.

A criminal defendant is entitled to a jury instruction on a lesser included offense if (1) each element of the lesser offense is a necessary element of the charged offense, and (2) the evidence supports an inference that only the lesser crime was committed. *State v. Nguyen*, 165 Wn.2d 428, 434, 197 P.3d 673 (2008). In determining whether it is appropriate to give an instruction on a lesser included offense, the trial court views the evidence in a light most favorable to the defendant. *State v. Pittman*, 134 Wn. App. 376, 385, 166 P.3d 720 (2006) (citing *State v. Fernandez-Medina*, 141 Wn.2d 448, 455-56, 6 P.3d 1150 (2000)). Manslaughter is a lesser included offense of premeditated murder. *State v. Schaffer*, 135 Wn.2d 355, 357-58, 957 P.2d 214 (1998). A person commits second degree manslaughter when, with criminal negligence, he causes the death of another person. RCW 9A.32.070.

Olsen asserts that he was entitled to a jury instruction on second degree manslaughter because his testimony at trial established that he was unsure whether Totten was already dead or still alive when he joined in the robbery. Olsen contends that, based on this testimony, a jury could find him guilty of second degree manslaughter based on his failure to summon aid under RCW 9.69.100.8. But even viewing the evidence in a light most favorable to Olsen, he did not
8 RCW 9.69.100 imposes a legal duty on people who witness a violent offense and provides in part that any person "who witnesses the actual commission of [a] violent offense as defined in RCW 9.94A.030 . . . shall as soon as reasonably possible notify the prosecuting attorney, law enforcement, medical assistance, or other public officials."

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demonstrate that he was entitled to the lesser included instruction. Olsen did not provide any evidence that Totten was alive when he first saw him tied to a chair with only his foot protruding through a blanket. Instead, Olsen testified that he did not participate in any assault against Totten and that he did not know whether Totten was dead or alive when he joined in the robbery. Because Olsen did not testify that Totten was alive when he participated in the robbery and did not present any other evidence establishing that Totten was alive before his participation in the crime, his testimony was essentially a denial that he participated in Totten's murder. Accordingly he was not entitled to a jury instruction on the lesser included offense of second degree manslaughter.⁹

Moreover, even if Olsen presented some evidence that Totten had been assaulted by others but was still alive when he began to participate in the first degree robbery or first degree burglary, he would still not be entitled to a second degree manslaughter instruction. By Olsen's account, Totten died as a result of Olsen's accomplices' conduct while he participated in an on-going first degree robbery or burglary occurring at some time between when he first saw Totten tied to a chair under a blanket and when he helped to dispose of Totten's body. But manslaughter is not a lesser included offense of felony murder. *State v. Berlin*, 133 Wn.2d 541, 550, 947 P.2d 700 (1997). The record reveals no basis for the trial court giving a second degree manslaughter instruction.

9 Because Olsen was not entitled to a second degree manslaughter jury instruction, we need not address his argument that his defense counsel was ineffective for proposing a nonstandard second degree manslaughter instruction or his argument that the trial court violated his due process rights by failing to give the instruction.

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C. Newly Discovered Evidence

Next, Olsen asserts that the trial court erred by denying his CrR 7.5 motion for a new trial based on newly discovered evidence. We disagree.

CrR 7.5(a) provides in part:

Grounds for New Trial. The court on motion of a defendant may grant a new trial for any one of the following causes when it affirmatively appears that a substantial right of the defendant was materially affected:

. . . .
(3) Newly discovered evidence material for the defendant, which the defendant could not have discovered with reasonable diligence and produced at the trial;

. . . .
When the motion is based on matters outside the record, the facts shall be shown by affidavit.

We review a trial court's denial of a motion for a new trial for an abuse of discretion. *State v. Burke*, 163 Wn.2d 204, 210, 181 P.3d 1 (2008). To obtain a new trial based on newly discovered evidence, a defendant must demonstrate that the evidence (1) will probably change the result of the trial, (2) was discovered after the trial, (3) could not have been discovered before trial by the exercise of due diligence, (4) is material, and (5) is not merely cumulative or impeaching. *State v. Roche*, 114 Wn. App. 424, 435, 59 P.3d 682 (2002) (citing *State v. Swan*, 114 Wn.2d 613, 641-42, 790 P.2d 610 (1990), cert. denied, 498 U.S. 1046 (1991)). The absence of any of these five factors is grounds to deny a new trial. *Roche*, 114 Wn. App. at 435 (citing *State v. Williams*, 96 Wn.2d 215, 223, 634 P.2d 868 (1981)).

To support his motion for a new trial, Olsen presented the affidavit of Katrina Berchtold (also known as Alexis Cox). In her affidavit, Berchtold asserts that Frazier had told her about her and Sublett's plans to kill Totten because Totten was involved with child pornography. Berchtold

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also denied that Olsen and Sublett came to her apartment on January 29, 2008,10 and smoked methamphetamine.

Here, Berchtold's affidavit does not support a motion for a new trial because the purported evidence does nothing more than impeach Frazier's testimony. Further, because defense counsel thoroughly impeached Frazier during its cross examination, it is unlikely that any additional attack on Frazier's credibility would have changed the result of the trial. Here, defense counsel's cross examination of Frazier revealed that she told several lies in the days surrounding Totten's murder, including accusing Totten of being a child molester. Because Olsen fails to demonstrate how this newly discovered evidence would change the result of his trial and fails to

show how the evidence is not merely cumulative or impeaching, the trial court did not err in denying his motion for a new trial.

D. ER 404(b) Evidence

Next, Olsen contends that the trial court violated ER 404(b) by admitting unedited recordings of telephone calls between him and Frazier. The State concedes that the trial court erred by failing to conduct an analysis on the record when it found the evidence admissible under ER 404(b) but asserts that the error was harmless. We agree with the State.

We will not disturb a trial court's ruling under ER 404(b) absent a manifest abuse of discretion such that no reasonable judge would have ruled as the trial court did. *State v. Mason*, 160 Wn.2d 910, 933-34, 162 P.3d 396 (2007), cert. denied, 128 S. Ct. 2430 (2008). A trial court abuses its discretion when its decision is manifestly unreasonable or based on untenable grounds or reasons. *State v. Powell*, 126 Wn.2d 244, 258, 893 P.2d 615 (1995).

10 Olsen's defense attorney at trial asserted that this date was a typographical error.

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Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity with it. ER 404(b). It may be admissible for other purposes, such as proof of motive, plan, preparation, intent, or identity, but before a trial court may admit such evidence, it must (1) find by a preponderance of the evidence that the misconduct occurred, (2) identify the purpose for which the evidence is sought to be introduced, (3) determine whether the evidence is relevant to prove an element of the crime charged, and (4) weigh the probative value against the prejudicial effect. *State v. Thang*, 145 Wn.2d 630, 642, 41 P.3d 1159 (2002). The trial court must conduct this analysis on the record. *State v. Lillard*, 122 Wn. App. 422, 431, 93 P.3d 969 (2004) (citing *State v. Jackson*, 102 Wn.2d 689, 694, 689 P.2d 76 (1984)), review denied, 154 Wn.2d 1002 (2005).

Although Olsen does not specifically identify which bad acts were contained in the phone conversations that he objected to, a review of the phone transcript shows that the following was discussed:

[Olsen]: Oh, I didn't believe he was getting her, but I thought for real, that I mean, the way he was acting was a little bit on the questionable side.
[Frazier]: Do something (inaudible)
[Olsen]: If I'd a done something to that boy that night, I'd a blown that mother fucker's brains out all over that motel room.
[Frazier]: I had the fucking bullets. Hello?
[Olsen]: Check this out. I try, I tried to stab that son-of-a-bitch in the Super 8 Motel room the night before I got arrested.

Ex. 178A at 9.

The transcript of the telephone calls also showed Olsen and Frazier discussing past drug use and plans to use drugs in conjunction with the "job" Frazier was offering Olsen. Here, the trial court erred by failing to conduct the ER 404(b) balancing analysis on the record. But where

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the trial court fails to conduct an ER 404(b) analysis on the record, the error is harmless unless the failure to do the balancing, within reasonable probability, materially affected the outcome of the trial. *State v. Halstien*, 122 Wn.2d 109, 127, 857 P.2d 270 (1993) (citing *State v. Tharp*, 96 Wn.2d 591, 599, 637 P.2d 961 (1981)).

Here, the trial court's failure to conduct a balancing analysis on the record was harmless because the evidence was admissible under the ER 404(b) res gestae exception. Under the res gestae exception to ER 404(b), "evidence of other crimes or bad acts is admissible to complete the story of a crime or to provide the immediate context for events close in both time and place to the charged crime." *Lillard*, 122 Wn. App. at 432. Unlike most ER 404(b) evidence, res gestae evidence is not evidence of unrelated prior criminal activity but is itself a part of the crime charged. Here, Olsen's telephone conversation with Frazier was evidence of the preparation, intent, and Olsen's motive (to get bail money).

At issue were Olsen's statements in the phone conversation in which the State alleged Frazier recruited Olsen. The conversation took place one day before Olsen was bailed out and Totten murdered; it appears that Olsen was boasting about his past criminal activity to induce Frazier to bail him out and let him work on a "job" for her and Sublett. Under the State's theory of the case, the "job" being discussed involved the robbery or burglary of Totten. The conversation thus constituted planning evidence relevant to establish an essential element of the State's case. "ER 404(b) is not designed 'to deprive the State of relevant evidence necessary to establish an essential element of its case,' but rather to prevent the State from suggesting that a defendant is guilty because he or she is a criminal-type person who would be likely to commit the crime charged." *State v. Foxhoven*, 161 Wn.2d 168, 175, 163 P.3d 786 (2007) (quoting *State v.*

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Lough, 125 Wn.2d 847, 859, 889 P.2d 487 (1995)).

Under the State's theory of the case, Olsen agreed to participate in a "job" to rob or burglarize Totten in order to get Frazier to bail him out of jail; Olsen's specific statement that he tried to stab someone the night before he was arrested was admissible to rebut his defense that he believed Frazier was offering him a legitimate construction job. See, e.g., *United States v. Keeper*, 977 F.2d 1238, 1241 (8th Cir. 1992) (evidence of two earlier searches that revealed cocaine relevant to rebut Keeper's defenses he did not possess or intend to distribute cocaine found in bedroom of his residence and that police had targeted wrong person); *State v. Wilson*, 60 Wn. App. 887, 891, 808 P.2d 754 (evidence of defendant's alleged prior assaults on victim admissible not only to explain victim's delay in reporting sexual abuse but also to rebut implication that molestation did not occur), review denied, 117 Wn.2d 1010 (1991).

Additionally, any reference to Olsen's drug use did not, within a reasonable probability, materially affect the outcome of the trial because Olsen admitted to his extensive drug use in his

interviews to police as well as in his testimony at trial. Accordingly, we hold that the trial court's failure to conduct an ER 404(b) analysis on the record was harmless error.

E. Due Process Right to Present a Defense

Last, Olsen asserts that the trial court violated his due process right to present a defense by excluding portions of the proffered testimony of Totten's former neighbor, Rayan. The State responds that the trial court properly excluded portions of Rayan's testimony because they were not relevant and were inadmissible hearsay. We agree with the State.

A criminal defendant has a constitutional right to present relevant, admissible evidence in his defense. *State v. Rehak*, 67 Wn. App. 157, 162, 834 P.2d 651 (1992), review denied, 120

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Wn.2d 1022, cert. denied, 508 U.S. 953 (1993). The United States Supreme Court has stated, "Just as an accused has the right to confront the prosecution's witnesses for the purpose of challenging their testimony, he has the right to present his own witnesses to establish a defense. This right is a fundamental element of due process of law." *Washington v. Texas*, 388 U.S. 14, 19, 87 S. Ct. 1920, 18 L. Ed. 2d 1019 (1967). But the right of a criminal defendant to present evidence is not unfettered and the refusal to admit evidence lies largely within the sound discretion of the trial court. *Rehak*, 67 Wn. App. at 162. We review a trial court's decision to admit or refuse evidence under an abuse of discretion standard. *Powell*, 126 Wn.2d at 258. A trial court abuses its discretion when its decision is manifestly unreasonable or based on untenable grounds or reasons. *Powell*, 126 Wn.2d at 258.

Here, the trial court allowed Rayan to testify regarding Totten asking him for advice on obtaining a restraining order but did not allow him to testify that Totten sought the restraining order against Frazier because he suspected she had been stealing from him. Olsen asserts that this evidence was admissible under the state of mind hearsay exception to show the plan to evict Frazier from his property and, thus, was relevant to show Frazier's plan to murder Totten. ER 803(a)(3).

Relevant evidence means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable than it would be without the evidence. ER 401. ER 402 provides, "All relevant evidence is admissible, except as limited by constitutional requirements or as otherwise provided by statute, by these rules, or by other rules or regulations applicable in the courts of this state. Evidence which is not relevant is not admissible." Here, Totten's plan to evict Frazier was not relevant to any fact of consequence

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because, absent evidence that he had communicated his intention to Frazier, it does not provide any motive for Frazier to murder him and, thus, does not support the defense's theory that Frazier and Sublett had murdered Totten before Olsen participated in the robbery. Moreover, even if

Totten's state of mind were relevant, statements discussing the conduct of another person that may have created the declarant's state of mind are inadmissible under ER 803(a)(3). *State v. Parr*, 93 Wn.2d 95, 104, 606 P.2d 263 (1980). Thus, under the state of mind hearsay exception, Totten's statements regarding his suspicions that Frazier had been stealing from him were not admissible. Accordingly, the trial court did not err by excluding portions of Rayan's testimony that were not relevant and it did not violate Olsen's due process right to present a defense.

Sublett's SAG

In his SAG, Sublett presents a number of arguments that we cannot address in his direct appeal because they require examination of matters outside the record. For instance, Sublett asserts that the trial court erred by refusing to admit a January 25, 2007 and January 27, 2007 phone conversation between Olsen and Frazier while Olsen was incarcerated on an unrelated charge. But the content of these conversations was not made part of the trial record. For this same reason, we cannot address Sublett's claims that (1) his attorney did not allow him to testify, (2) that his attorney was ineffective for failing to admit a signed statement by Olsen's cellmate that implicated Olsen in Totten's murder, and (3) that the prosecutor committed misconduct at closing by showing the jury the defendants' photos with the word "guilty" superimposed over their faces.

Sublett also contends that we should reverse his conviction because the State failed to inform his defense counsel about Berchtold, which Sublett claims was a "potential critical

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witness." SAG at 1. To the extent that Sublett is arguing that the State committed a Brady violation by suppressing exculpatory evidence, his claim lacks merit.

In *Brady v. Maryland*, 373 U.S. 83, 86, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963), the United States Supreme Court held that a prosecutor's suppression of an accomplice's confession to murder violated the defendant's due process rights under the Fourteenth Amendment. In holding that the prosecution deprived the defendant of due process, the Supreme Court announced the rule that "suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." *Brady*, 373 U.S. at 87.

There are three components to a Brady violation: (1) the evidence at issue must be favorable to the accused, either because it is exculpatory or impeaching; (2) the evidence must have been suppressed by the State, either willfully or inadvertently; and (3) the evidence must be material, meaning that the evidence must have resulted in prejudice to the accused. *Strickler v. Greene*, 527 U.S. 263, 281-82, 119 S. Ct. 1936, 144 L. Ed. 2d 286 (1999). Prejudice occurs "if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." *Strickler*, 527 U.S. at 280 (quoting *United States v.*

Bagley, 473 U.S. 667, 682, 105 S. Ct. 3375, 87 L. Ed. 2d 481 (1985)). Prejudice is determined by analyzing the evidence withheld in light of the entire record. In re Pers. Restraint of Sherwood, 118 Wn. App. 267, 270, 76 P.3d 269 (2003) (citing Benn v. Lambert, 283 F.3d 1040, 1053 (9th Cir.), cert denied, 537 U.S. 942 (2002)). "'A Brady violation does not arise if the defendant, using reasonable diligence, could have obtained the information' at issue." In re Benn, 134 Wn.2d at 916 (quoting Williams v. Scott, 35 F.3d 159, 163 (5th Cir. 1994)).

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As we noted above, Berchtold's affidavit indicates that had the defense called her as a witness, she would have testified that Frazier had told her that she and Sublett were planning to kill Totten. Because this purported evidence implicates Sublett in the premeditated murder of

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Totten, it is not favorable to his defense. Thus, even assuming that he can demonstrate the remaining Brady violation components, his claim fails.

Affirmed.

QUINN-BRINTNALL, J.

We concur:

HOUGHTON, J.P.T.

HUNT, P.J.

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FILED

JUN 01 2010

COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON

NO. 26789-0

**COURT OF APPEALS, DIVISION III
OF THE STATE OF WASHINGTON**

STATE OF WASHINGTON,

Plaintiff/Respondent,

v.

FREDERICK DAVID RUSSELL,

Defendant/Appellant.

DECLARATION OF
SERVICE

VICTORIA L. ROBBEN declares as follows:

On Thursday, May 27, 2010, I deposited into the United States

Mail, first-class postage prepaid and addressed as follows:

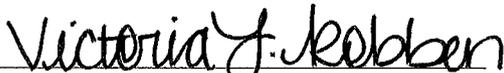
DENNIS W. MORGAN
120 WEST MAIN
RITZVILLE, WA 99169

Copies of the following documents:

- 1) STATEMENT OF ADDITIONAL AUTHORITIES
- 2) DECLARATION OF SERVICE

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

RESPECTFULLY SUBMITTED this 27th day of May, 2010.


VICTORIA L. ROBBEN

Appendix A

H

Court of Appeals of Washington,
 Division 3.
 STATE of Washington, Respondent,
 v.
 Anthony David KOSS, Appellant.

No. 28185-0-III.
 Aug. 19, 2010.
 Publication Ordered Oct. 12, 2010.

Background: Defendant was convicted by a jury in the Superior Court, Spokane County, Annette S. Plese, J., of first degree burglary. Defendant appealed.

Holdings: The Court of Appeals, Sweeney, J., held that:

- (1) defendant was not entitled to a unanimity jury instruction;
- (2) evidence was sufficient to establish defendant entered the building intending to commit an assault;
- (3) defendant's right to a public trial was not violated when the court conducted a jury instruction conference in chambers; and
- (4) the prosecutor's closing argument comments, which encouraged the jury to focus of the victim's fundamental rights to be secure in her home and free from bodily injury, did not constitute prosecutorial misconduct.

Affirmed.

West Headnotes

[1] Criminal Law 110 ↪ 798(.7)

110 Criminal Law
 110XX Trial
 110XX(G) Instructions: Necessity, Requisites, and Sufficiency
 110k798 Manner of Arriving at Verdict
 110k798(.7) k. Unanimity as to facts, conduct, methods, or theories. Most Cited Cases

Defendant was not entitled to a unanimity jury instruction, in prosecution for first-degree burglary; the burglary charge was based on defendant's single assault of the victim. West's RCWA 9A.52.020(1) (1995).

[2] Burglary 67 ↪ 41(3)

67 Burglary
 67II Prosecution
 67k40 Weight and Sufficiency of Evidence
 67k41 In General
 67k41(3) k. Intent. Most Cited Cases

Evidence was sufficient to establish defendant entered the building intending to commit an assault, in support of conviction for first-degree burglary; the victim was standing inside the doorway to her house when defendant punched her in the mouth, and the victim did not invite defendant into her house. West's RCWA 9A.52.010(2); 9A.52.020(1) (1995).

[3] Criminal Law 110 ↪ 1144.13(3)

110 Criminal Law
 110XXIV Review
 110XXIV(M) Presumptions
 110k1144 Facts or Proceedings Not Shown by Record
 110k1144.13 Sufficiency of Evidence
 110k1144.13(2) Construction of Evidence
 110k1144.13(3) k. Construction in favor of government, state, or prosecution. Most Cited Cases

Criminal Law 110 ↪ 1144.13(5)

110 Criminal Law
 110XXIV Review
 110XXIV(M) Presumptions
 110k1144 Facts or Proceedings Not Shown by Record
 110k1144.13 Sufficiency of Evidence
 110k1144.13(5) k. Inferences or de-

ductions from evidence. Most Cited Cases

Criminal Law 110 ↪ **1159.2(7)**

110 Criminal Law
110XXIV Review
110XXIV(P) Verdicts
110k1159 Conclusiveness of Verdict
110k1159.2 Weight of Evidence in
General

110k1159.2(7) k. Reasonable
doubt. Most Cited Cases

The Court of Appeals views the evidence and all reasonable inferences in a light most favorable to the State to determine whether any rational trier of fact could have found the essential elements of the charged crime beyond a reasonable doubt.

[4] Criminal Law 110 ↪ **1159.6**

110 Criminal Law
110XXIV Review
110XXIV(P) Verdicts
110k1159 Conclusiveness of Verdict
110k1159.6 k. Circumstantial evi-
dence. Most Cited Cases

On a challenge to the sufficiency of the evidence the Court of Appeals considers circumstantial evidence as reliable as direct evidence.

[5] Criminal Law 110 ↪ **1159.3(2)**

110 Criminal Law
110XXIV Review
110XXIV(P) Verdicts
110k1159 Conclusiveness of Verdict
110k1159.3 Conflicting Evidence
110k1159.3(2) k. Province of jury
or trial court. Most Cited Cases

On a challenge to the sufficiency of the evidence the Court of Appeals defers to the trier of fact on the persuasiveness of the evidence.

[6] Criminal Law 110 ↪ **635.7(1)**

110 Criminal Law
110XX Trial

110XX(B) Course and Conduct of Trial in
General

110k635 Public Trial
110k635.7 Nature of Proceeding Af-
fecting Propriety of Closure
110k635.7(1) k. In general. Most
Cited Cases

Criminal Law 110 ↪ **635.7(4)**

110 Criminal Law
110XX Trial
110XX(B) Course and Conduct of Trial in
General

110k635 Public Trial
110k635.7 Nature of Proceeding Af-
fecting Propriety of Closure
110k635.7(4) k. Jury selection.
Most Cited Cases

Criminal Law 110 ↪ **635.7(5)**

110 Criminal Law
110XX Trial
110XX(B) Course and Conduct of Trial in
General

110k635 Public Trial
110k635.7 Nature of Proceeding Af-
fecting Propriety of Closure
110k635.7(5) k. Proceedings to de-
termine admissibility of evidence. Most Cited Cases
A defendant's right to a public trial requires that the court be open during adversary proceedings including evidentiary phases of the trial, suppression hearings, voir dire, and jury selection.

[7] Criminal Law 110 ↪ **635.7(1)**

110 Criminal Law
110XX Trial
110XX(B) Course and Conduct of Trial in
General

110k635 Public Trial
110k635.7 Nature of Proceeding Af-
fecting Propriety of Closure

110k635.7(1) k. In general. Most Cited Cases

A defendant does not have a right to a public hearing on purely ministerial or legal issues that do not require the resolution of disputed facts.

[8] Criminal Law 110 ⚡635.7(8)

110 Criminal Law

110XX Trial

110XX(B) Course and Conduct of Trial in General

110k635 Public Trial

110k635.7 Nature of Proceeding Affecting Propriety of Closure

110k635.7(8) k. In camera proceedings. Most Cited Cases

Defendant's right to a public trial was not violated when the court conducted a jury instruction conference in chambers, where the in chamber conference was a ministerial legal matter, and it did not involve disputed facts.

[9] Criminal Law 110 ⚡635.7(8)

110 Criminal Law

110XX Trial

110XX(B) Course and Conduct of Trial in General

110k635 Public Trial

110k635.7 Nature of Proceeding Affecting Propriety of Closure

110k635.7(8) k. In camera proceedings. Most Cited Cases

Defendant's right to a public trial was not violated when the trial court responded to two written questions from the jury without making a record to show the questions were discussed in open court or that defendant was present; the jury's first written inquiry was part of deliberations, it did not require the resolution of any factual questions, and the court gave a neutral response, and the second inquiry was also neutral as it involved giving the jury access to an audio player during deliberations. CrR 6.15(f)(1).

[10] Criminal Law 110 ⚡673(5)

110 Criminal Law

110XX Trial

110XX(C) Reception of Evidence

110k673 Effect of Admission

110k673(5) k. Limiting effect of evidence of other offenses. Most Cited Cases

The trial court was not required to instruct the jury to disregard a witness's reference to defendant being on "DOC" status, in prosecution for first-degree burglary; defendant's witness raised the issue of direct examination.

[11] Criminal Law 110 ⚡1982

110 Criminal Law

110XXXI Counsel

110XXXI(D) Duties and Obligations of Prosecuting Attorneys

110XXXI(D)1 In General

110k1982 k. Prejudice resulting from improper conduct; unfairness or miscarriage of justice. Most Cited Cases

Criminal Law 110 ⚡2060

110 Criminal Law

110XXXI Counsel

110XXXI(F) Arguments and Statements by Counsel

110k2060 k. In general. Most Cited Cases

To establish prosecutorial misconduct a defendant had to show both that the comment was improper and that it was prejudicial.

[12] Criminal Law 110 ⚡2146

110 Criminal Law

110XXXI Counsel

110XXXI(F) Arguments and Statements by Counsel

110k2145 Appeals to Sympathy or Prejudice

110k2146 k. In general. Most Cited Cases

The prosecutor's closing argument comments,

which encouraged the jury to focus on the victim's fundamental rights to be secure in her home and free from bodily injury, did not constitute prosecutorial misconduct, in prosecution for first-degree burglary; after making the statement the prosecutor discussed the elements of first degree burglary and the State's burden of proving each element beyond a reasonable doubt.

[13] Criminal Law 110  2101

110 Criminal Law
110XXXI Counsel
110XXXI(F) Arguments and Statements by Counsel

110k2099 Comments Shifting or Misstating Burden of Proof

110k2101 k. In particular prosecutions. Most Cited Cases

The prosecutor's closing argument comments regarding the burden of proof, which provided that it was alright for the jury to have "some questions that are unanswered so long as the information you have before you leads you to believe that the defendant committed the crime," did not impermissible lessen the State burden of proof or constitute prosecutorial misconduct, in prosecution for first-degree burglary; the prosecutor's statement explain that reasonable doubt was not all possible doubt.

[14] Criminal Law 110  2098(5)

110 Criminal Law
110XXXI Counsel
110XXXI(F) Arguments and Statements by Counsel

110k2093 Comments on Evidence or Witnesses

110k2098 Credibility and Character of Witnesses; Bolstering

110k2098(5) k. Credibility of other witnesses. Most Cited Cases

The prosecutor's closing argument comments, which referred to the fact that several defense witnesses could not determine the ethnicity of the victim, did not constitute prosecutorial misconduct, in

prosecution for first-degree burglary; the prosecutor argued the reasonable inference that the defense witnesses were not credible based on their inability to correctly identify the victim's ethnicity.

****416** Douglas Dwight Phelps, Phelps & Associates, P.S., **Anthony David Koss** (Appearing Pro Se), Spokane, WA, for Appellant.

Mark Erik Lindsey, Spokane County Prosecuting Attorneys, Andrew J. Metts III, Spokane County Pros. Offc., Spokane, WA, for Respondent.

SWEENEY, J.

*12 ¶ 1 This is a prosecution for first degree burglary. The defendant stood at an open door and punched *13 the victim, who was in her house. We conclude that this supports the necessary elements for first degree burglary. We also conclude that the defendant's right to a public trial was not violated by an instruction conference held in chambers. Nor were the court's instructions to the jury flawed. The defendant also assigns error to a number of the court's discretionary rulings and urges that the prosecutor committed misconduct during the course of the trial; conduct that we should characterize as flagrant and review in the first instance here on appeal. We conclude the court's decisions were well within its discretionary authority and we conclude that the prosecutor's comments did not amount to misconduct. We therefore affirm the conviction.

FACTS

¶ 2 Anthony D. Koss punched Katy Jones in the mouth after she opened the door to her home. She was in her house; Mr. Koss was on the porch. She did not know him before the assault. She called police and described Mr. Koss and his companion. Police investigated and found the men in a home across the street from Ms. Jones. Ms. Jones identified both Mr. Koss and his companion.

¶ 3 The State charged Mr. Koss with first degree burglary.

¶ 4 The court instructed the jury that to convict

Mr. Koss for first degree burglary it had to find that he (1) entered or remained unlawfully in a building; (2) that the entering **417 or remaining was with intent to commit a crime against a person or property therein; (3) that in so entering or while in the building or in immediate flight from the building he assaulted a person; and (4) that any of these acts occurred in the state of Washington. Clerk's Papers (CP) at 49 (Instruction 5).

¶ 5 The jury found Mr. Koss guilty of first degree burglary.

*14 DISCUSSION

UNANIMITY INSTRUCTION-FIRST DEGREE BURGLARY

[1] ¶ 6 Mr. Koss contends that he was entitled to an instruction that required the jury to be unanimous on whether he assaulted Ms. Jones while she was inside her house or outside as he fled from the building. *State v. Gilbert*, 68 Wash.App. 379, 842 P.2d 1029 (1993).

¶ 7 The jury, of course, had to unanimously conclude that the criminal act charged in the information had been committed. *State v. Petrich*, 101 Wash.2d 566, 569, 683 P.2d 173 (1984), *modified on other grounds by State v. Kitchen*, 110 Wash.2d 403, 405-06, 756 P.2d 105 (1988); *State v. Williams*, 136 Wash.App. 486, 496, 150 P.3d 111 (2007). And here it did so.

¶ 8 To convict Mr. Koss of first degree burglary, the State had to show, and the jury had to be convinced, that he entered Ms. Jones's house unlawfully and assaulted her. RCW 9A.52.020(1). That statute provides two alternative means by which the crime can be committed-either by being armed with a deadly weapon or by assaulting any person. See *Williams*, 136 Wash.App. at 498, 150 P.3d 111.

¶ 9 A unanimity instruction would be required if the State charged a single first degree burglary based upon two distinct criminal acts that are not alternative means of committing that crime, for ex-

ample if there were two assaults. *Id.* But here, the burglary charge was based on a single assault. The question for the jury was whether the assault occurred inside Ms. Jones's house or outside. The jury concluded that it occurred inside and that finding is easily supported by Ms. Jones's testimony. Mr. Koss says he punched her outside of her home. The jury did not believe him. That was its prerogative. *State v. Walton*, 64 Wash.App. 410, 415-16, 824 P.2d 533 (1992). The court properly instructed the jury on the elements of first degree burglary. CP at 48, 49. There was no need for a separate unanimity instruction.

¶ 10 Mr. Koss relies on *Gilbert* for the proposition that the finding that he committed first degree burglary required*15 a unanimity instruction because he testified that the assault occurred outside. *Gilbert*, 68 Wash.App. at 381, 842 P.2d 1029. His reliance is misplaced. There, Mr. Gilbert, the defendant, burglarized a home and was confronted outside by a man; Mr. Gilbert assaulted that man. He was convicted of first degree burglary. *Id.* At that time, the first degree burglary statute provided:

(1) A person is guilty of burglary in the first degree if, with intent to commit a crime against a person or property *therein*, he enters or remains unlawfully in a dwelling and if, in entering or while in the dwelling or in immediate flight therefrom, the actor or another participant in the crime (a) is armed with a deadly weapon, or (b) assaults any person *therein*.

Former RCW 9A.52.020 (1975) (emphasis added). The court of appeals read the statute to require an assault "therein," and concluded that the assault outside did not elevate a residential burglary to first degree and reversed. *Gilbert*, 68 Wash.App. at 383-84, 842 P.2d 1029. The State failed to prove the element, "assaults any person therein," and so the evidence did not support a first degree burglary conviction. *Id.* at 384, 842 P.2d 1029.

¶ 11 The State's theory and proof here was that Mr. Koss assaulted Ms. Jones in her home. And so

his conviction turned on whether the State successfully showed that. The jury said the State proved the necessary elements. Moreover, RCW 9A.52.020(1) was amended in 1996 to remove the word "therein" from subsection (b). LAWS OF 1996, ch. 15, § 1. So the strict statutory construction necessary in *Gilbert* is of no moment in Mr. **418 Koss's case. We then reject this assignment of error.

SUFFICIENT EVIDENCE

[2] ¶ 12 Mr. Koss next contends that the State failed to prove that he entered the building intending to commit an assault. He argues that the assault either occurred outside the house without any intent to enter, or alternatively, as the men left the front porch without any intent to enter the *16 house. Under either scenario, he urges that there was only a fourth degree assault and no burglary.

[3][4][5] ¶ 13 We view the evidence and all reasonable inferences in a light most favorable to the State to determine whether any rational trier of fact could have found the essential elements of the charged crime beyond a reasonable doubt. *State v. Green*, 94 Wash.2d 216, 221, 616 P.2d 628 (1980). We consider circumstantial evidence as reliable as direct evidence. *State v. Delmarter*, 94 Wash.2d 634, 638, 618 P.2d 99 (1980). We defer to the trier of fact on the persuasiveness of the evidence. *Walton*, 64 Wash.App. at 415-16, 824 P.2d 533.

¶ 14 Ms. Jones never left her house. She stood a couple of feet inside the door when Mr. Koss punched her. She did not invite Mr. Koss into the home. He breached the doorway with his fist and punched her in the mouth. This is a sufficient showing that Mr. Koss entered the home with the intent to assault. The term "enter" includes the insertion of any part of the person's body. See RCW 9A.52.010(2). Ultimately, a rational trier of fact could find each element of first degree burglary beyond a reasonable doubt based upon Ms. Jones's testimony. *Green*, 94 Wash.2d at 221, 616 P.2d 628; RCW 9A.52.020(1).

RIGHT TO PUBLIC TRIAL

¶ 15 Mr. Koss next contends that he was denied his right to a public trial during critical stages of the proceedings because (1) the court conducted a jury instruction conference in chambers without "receiving assent from the defendant" or "allowing observation by the public," and (2) the court responded to two written questions from the jury without making a record to show that the questions were discussed in open court or that the defendant was present. Br. of Appellant at 22.

[6][7] ¶ 16 A defendant's constitutional right to a public trial requires that the court be open during "adversary proceedings" including evidentiary phases of the trial, suppression hearings, voir dire, and jury selection. *State v. Sadler*, 147 Wash.App. 97, 114, 193 P.3d 1108 (2008); *17 *State v. Rivera*, 108 Wash.App. 645, 32 P.3d 292 (2001). But "[a] defendant does not ... have a right to a public hearing on purely ministerial or legal issues that do not require the resolution of disputed facts." *Sadler*, 147 Wash.App. at 114, 193 P.3d 1108.

[8] ¶ 17 Here, counsel and the court met off the record in chambers and everyone agreed to remove accomplice language from the first degree burglary elements instruction. Report of Proceedings (RP) at 271. The court and counsel then went on the record in open court (with Mr. Koss now present) to address any objections or exceptions to the instructions. No one objected to the instruction or to the procedure.

¶ 18 The in-chambers conference was a ministerial legal matter. It did not involve disputed facts. *Sadler*, 147 Wash.App. at 114, 193 P.3d 1108. And ultimately it did not then implicate Mr. Koss's right to a public trial. Nor was it a critical stage that required Mr. Koss's presence. *In re Pers. Restraint of Lord*, 123 Wash.2d 296, 306, 868 P.2d 835 (1994) (in-chambers conferences between court and counsel on legal matters are not critical stages except when the issues involve disputed facts).

[9] ¶ 19 The jury made two written inquiries

during deliberations. First, it asked, "Mr. Drake stated that Tony Coss [sic] was DOC [Department of Corrections] can we factor that in? And if so what is the meaning?" CP at 61. The court responded, "Please re-read your jury instructions." *Id.* It also asked for a CD player, "Need CD player to play 911 call." *Id.* at 62. The court noted as its response "(given one time-computer play back)." *Id.* The record contains no further information about the jury **419 inquiries, including whether the court consulted with counsel before communicating its answers.

¶ 20 Recently, in *State v. Sublett*,^{FN1} the court rejected arguments that an in-chambers conference to address a jury question on one of the trial court's instructions implicated the defendants' right to a public trial. Citing *Sadler*, *18 the court reasoned that the jury inquiry involved a purely legal issue that arose during deliberations and did not require the resolution of disputed facts. *Sublett*, 156 Wash.App. at 181, 231 P.3d 231. And "questions from the jury to the trial court regarding the trial court's instructions are part of jury deliberations and, as such, are not historically a public part of the trial." *Id.* at 182, 231 P.3d 231. The court held that because "the public trial right does not apply to the trial court's conference with counsel on how to resolve a purely legal question which the jury submitted during its deliberations, ... the trial court did not violate the appellants' public trial right by responding to the jury's question in writing as CrR 6.15(f) provided." *Id.* We agree.

FN1. *State v. Sublett*, 156 Wash.App. 160, 181, 231 P.3d 231 (2010).

¶ 21 The same rationale applies here to Mr. Koss's claim that his right to a public trial was violated. However, nothing here suggests that the court held an in-chambers conference or even contacted counsel.

¶ 22 The jury's first written inquiry was part of deliberations and it did not require the resolution of any factual questions. The court gave an appropri-

ate neutral response, simply telling the jury to re-read the instructions. See *State v. Allen*, 50 Wash.App. 412, 420, 749 P.2d 702 (1988). The second inquiry and response by the court was also neutral; it simply involved giving the jury access to an audio player during deliberations. The trial court followed CrR 6.15(f)(1); it provided written responses. Mr. Koss's right to a public trial was not violated by the court's response.

¶ 23 Mr. Koss specifically claims only that his right to a public trial was violated. But he is correct that the discussion of a jury inquiry is a critical stage of the trial at which the defendant has a right to meaningful representation by counsel. *Rogers v. United States*, 422 U.S. 35, 39, 95 S.Ct. 2091, 45 L.Ed.2d 1 (1975); see CrR 6.15(f)(1) (court shall respond to jury inquiries in the presence of or after notice to the parties or their counsel). Communications between the judge and jury without the defendant's presence are error, and the State must prove the communications harmless beyond a reasonable doubt. *19 *State v. Caliguri*, 99 Wash.2d 501, 509, 664 P.2d 466 (1983); *State v. Russell*, 25 Wash.App. 933, 948, 611 P.2d 1320 (1980).

¶ 24 Mr. Koss has not, however, supplied an adequate record to permit further review of his claim that he was denied his right to be present. See *State v. Rienks*, 46 Wash.App. 537, 544, 731 P.2d 1116 (1987). Even assuming the court's responses were ex parte communications with the jury, they were clearly neutral and, for us, harmless beyond a reasonable doubt. *Allen*, 50 Wash.App. at 420, 749 P.2d 702 (harmless error when neutral instruction conveyed no affirmative information).

INSTRUCTION-DOC STATUS

[10] ¶ 25 Mr. Koss next argues that the reference to him being on DOC status was evidence of prior misconduct and prejudicial, and the court therefore erred by failing to instruct the jury to disregard it.

¶ 26 Defense witness Mr. Drake testified on direct examination that he was the one who hit Ms.

Jones. He said he then ran down the street and into Delanzo Pleasant's house. Defense counsel asked if he saw where Mr. Koss went. Mr. Drake responded, "Yeah, he ran with me. He wasn't, you know, we were both freaking out. He was on DOC at the time, and we didn't want to be anything [sic] involved in that, so." RP at 240. On cross-examination, Mr. Drake responded to the prosecutor's questions about why he ran. The prosecutor asked if Mr. Koss ran, and Mr. Drake responded, "Yes." *Id.* at 252. The prosecutor then asked, "And was it your testimony because something about DOC?" *Id.* at 253. Mr. Drake responded, "Yeah." *Id.* Defense counsel objected.**420 The court then refused to allow any further inquiry about DOC status. The jury asked about it during deliberations.

¶ 27 First of all, the State had a right to ask about the DOC status during cross-examination because Mr. Koss's witness raised the subject on direct. *State v. Gefeller*, 76 Wash.2d 449, 455, 458 P.2d 17 (1969). Second, the court had ample discretionary authority to handle the jury *20 inquiry the way it did-by instructing the jury to reread the instructions. *State v. Studebaker*, 67 Wash.2d 980, 987, 410 P.2d 913 (1966).

PROSECUTORIAL MISCONDUCT

¶ 28 Mr. Koss next argues that the prosecutor committed prejudicial misconduct when he (1) appealed to the jurors' passions by extolling them to focus on protecting Ms. Jones's fundamental right to be secure in her home instead of requiring that the State prove the elements of the crime it charged, (2) suggested the State's burden of persuasion was less than beyond a reasonable doubt, and (3) argued that defense witnesses were not credible because they could not identify the victim's ethnicity.

[11] ¶ 29 Mr. Koss had to show both that the comment was improper and that it was prejudicial. *State v. Brown*, 132 Wash.2d 529, 561, 940 P.2d 546 (1997). Mr. Koss did not object to any of the prosecutor's closing comments at trial. So he has the added burden to show that the conduct was so flagrant and ill intentioned that it caused an endur-

ing and resulting prejudice that could not have been remedied by a curative instruction. *State v. McKenzie*, 157 Wash.2d 44, 52, 134 P.3d 221 (2006). And the absence of an objection "strongly suggests ... that the argument or event in question did not appear critically prejudicial to [him] in the context of the trial." *Id.* at 53 n. 2, 134 P.3d 221 (emphasis omitted) (quoting *State v. Swan*, 114 Wash.2d 613, 661, 790 P.2d 610 (1990)).

[12] ¶ 30 Mr. Koss's claims are based in part on this statement in the State's closing argument:

At the start of this process, the State asked if a person has a *fundamental right to be secure in their home* and to be free from bodily injury, and it was unanimous that when a person is in their home, they should be secure in their own safety. They should be secure that their way of life ... is not disturbed by some other person who is not invited to be in there or consents to any type of harmful conduct, and you folks have, basically, been brought here *to determine whether or not the defendant* *21 *violated Katy Jones' right to be secure in her home and free from bodily injury.*

RP at 317 (emphasis added). He contends the italicized portions shifted the State's burden of proof from proving the elements of the crime beyond a reasonable doubt to protecting the rights of the victim. But after making these statements, the prosecutor discussed the elements of first degree burglary and the State's burden of proving each element beyond a reasonable doubt. The comments were not improper.

[13] ¶ 31 Mr. Koss also claims misconduct based on this statement:

As the State has indicated, the critical issue for you folks to decide is whether the defendant committed the crime of First Degree Burglary, and it's the State's responsibility to prove each and every element of the charge beyond a reasonable doubt.

Now, when you think of that concept beyond a reasonable doubt, it's not beyond all possible doubt. It's okay if *there are some questions that are unanswered so long as the information you have before you leads you to believe that the defendant committed this crime.*

Id. at 319 (emphasis added).

¶ 32 He now argues that the italicized portion lessens the State's burden of persuasion. We disagree. The prosecutor's statement can be fairly read as explaining that reasonable doubt is not all possible doubt—a concept consistent with the court's instruction that beyond a reasonable doubt means an “abiding belief in the truth of the charge.” CP at 47 (Instruction 3). Moreover, the prosecutor's statement is consistent with the court's general instruction to decide the case **421 based upon the evidence presented during trial. *Id.* at 43 (Instruction 1). We presume the jury followed the court's instructions. *State v. Kirkman*, 159 Wash.2d 918, 937, 155 P.3d 125 (2007). In any event, we conclude that the prosecutor's comments hardly meet the required showing of flagrant or ill-intentioned.

[14] *22 ¶ 33 Finally, Mr. Koss contends this comment by the prosecutor amounted to misconduct:

Well, Delanzo Pleasant can't even figure out the ethnicity of the female nor can Andrew Drake nor can Jon Boltz, and, of course, the defendant knows what ethnicity she is because he saw her testify.

RP at 323-24.

¶ 34 He contends the comments were an inflammatory attack on the defense witness's credibility. They were not. And a prosecutor is afforded wide latitude in closing argument to draw and express reasonable inferences, including arguing the credibility of witnesses based on the evidence. *State v. Millante*, 80 Wash.App. 237, 250, 908 P.2d 374 (1995). That is what occurred here. The prosecutor

argued reasonable inferences, that the defense witnesses were not credible, as further evidenced by their inability to correctly identify the victim's ethnicity.

¶ 35 This is not a case of improper burden shifting like *State v. Fleming*.^{FN2} There, the prosecutor told the jury it could acquit only if it found the complaining witness had lied or was confused. That was misconduct. Further, the prosecutor argued there was no reasonable doubt because there was no evidence the witness was lying or confused, and if there had been such evidence, the defendants would have presented it. *Fleming*, 83 Wash.App. at 214-16, 921 P.2d 1076.

FN2. *State v. Fleming*, 83 Wash.App. 209, 921 P.2d 1076 (1996).

¶ 36 We affirm the conviction.

WE CONCUR: KULIK, C.J., and SIDDOWAY, J.

Wash.App. Div. 3, 2010.
State v. Koss
158 Wash.App. 8, 241 P.3d 415

END OF DOCUMENT



FILED
 MAR 17 2011
 COURT OF APPEALS
 DIVISION III
 STATE OF WASHINGTON
 By: *[Signature]*

NO. 26789-0

**COURT OF APPEALS, DIVISION III
 OF THE STATE OF WASHINGTON**

THE STATE OF WASHINGTON,
 Respondent,

v.

FREDERICK DAVID RUSSELL,
 Appellant.

RESPONDENT'S
 THIRD STATEMENT
 OF ADDITIONAL
 AUTHORITIES

The State of Washington submits the following additional authorities with regard to the issue of whether the right to a public trial is violated when a trial judge meets with counsel and the defendant in chambers and at a sidebar to discuss which jurors to excuse for hardship. *In the Matter of the Detention of Calvin Ticeson*, Slip Opinion No. 63122-5-I, 246 P.3d 550 (2011). A copy of the opinion is attached as Appendix A.

RESPECTFULLY SUBMITTED this 15th day of March, 2011.

ROBERT M. MCKENNA
 Attorney General

[Signature]
 MELANIE TRATNIK, WSBA #25576
 Assistant Attorney General

Appendix A

246 P.3d 550
(Cite as: 246 P.3d 550)

C

Court of Appeals of Washington,
Division 1.
In the Matter of the DETENTION OF Calvin
TICESON, Appellant.

No. 63122-5-I.
Jan. 18, 2011.

Background: Detainee was committed as a sexually violent predator after a jury trial in the King County Superior Court, Catherine Shaffer, J., and he appealed.

Holdings: The Court of Appeals of Washington, Division 1, Ellington, J., held that:

- (1) detainee was not required to establish third party standing in order to assert the public right to open proceedings;
- (2) trial court did not violate the public's right to open proceedings by conducting chambers conferences;
- (3) trial court was not required to give unanimity instruction to jury.

Affirmed.

West Headnotes

[1] Appeal and Error 30 ↪ 893(1)

30 Appeal and Error
30XVI Review
30XVI(F) Trial De Novo
30k892 Trial De Novo
30k893 Cases Triable in Appellate
Court
Cases 30k893(1) k. In general. Most Cited

Criminal Law 110 ↪ 1139

110 Criminal Law
110XXIV Review

110XXIV(L) Scope of Review in General
110XXIV(L)13 Review De Novo
110k1139 k. In general. Most Cited
Cases

Trial 388 ↪ 20

388 Trial
388III Course and Conduct of Trial in General
388k20 k. Publicity of proceedings. Most
Cited Cases

Whether the right to a public trial under the Washington Constitution has been violated is a question of law reviewed de novo by the Court of Appeals; this standard applies to civil as well as criminal appeals. West's RCWA Const. Art. 1, § 10.

[2] Criminal Law 110 ↪ 230

110 Criminal Law
110XII Pretrial Proceedings
110k229 Conduct of Preliminary Examination
110k230 k. In general. Most Cited Cases

Mental Health 257A ↪ 462

257A Mental Health
257AIV Disabilities and Privileges of Mentally
Disordered Persons
257AIV(E) Crimes
257Ak452 Sex Offenders
257Ak462 k. Hearing. Most Cited

The right of criminal defendants to a public trial under the Washington Constitution did not apply to the civil proceeding in which the detainee was found to be a sexually violent predator (SVP) and was committed. West's RCWA Const. Art. 1, § 22 as amended by Amend. 10; West's RCWA 71.09.060.

[3] Constitutional Law 92 ↪ 725

92 Constitutional Law

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92VI Enforcement of Constitutional Provisions
92VI(A) Persons Entitled to Raise Constitutional Questions; Standing
92VI(A)4 Particular Constitutional Provisions in General

92k725 k. In general. Most Cited Cases

In proceedings to commit detainee as a sexually violent predator (SVP), detainee was not required to establish third party standing in order to assert the public right to open proceedings under the Washington Constitution, since he was a member of the public. West's RCWA Const. Art. 1, § 10.

[4] Appeal and Error 30 ↪ 170(2)

30 Appeal and Error

30V Presentation and Reservation in Lower Court of Grounds of Review

30V(A) Issues and Questions in Lower Court

30k170 Nature or Subject-Matter of Issues or Questions

30k170(2) k. Constitutional questions. Most Cited Cases

Appeal and Error 30 ↪ 201(1)

30 Appeal and Error

30V Presentation and Reservation in Lower Court of Grounds of Review

30V(B) Objections and Motions, and Rulings Thereon

30k201 Mode and Conduct of Trial or Hearing

30k201(1) k. In general. Most Cited Cases

The constitutional public trial right in civil cases may be raised for the first time in a civil appeal, under the rule of appellate procedure allowing a party to raise a manifest constitutional error for the first time on appeal. West's RCWA Const. Art. 1, § 10; RAP 2.5(a)(3).

[5] Mental Health 257A ↪ 467

257A Mental Health

257AIV Disabilities and Privileges of Mentally Disordered Persons

257AIV(E) Crimes

257Ak452 Sex Offenders

257Ak467 k. Appeal. Most Cited Cases

In his civil appeal of his commitment as a sexually violent predator (SVP), detainee who asserted for the first time on appeal the public right to open proceedings under the Washington Constitution could not rely on the presumption of prejudice applicable to criminal defendants who were denied their constitutional right to a public trial in order to satisfy requirement in rule of appellate procedure that a party raising a manifest constitutional error for the first time on appeal demonstrate that the constitutional error had identifiable and practical consequences in his trial. West's RCWA Const. Art. 1, § 10; RAP 2.5.

[6] Constitutional Law 92 ↪ 2325

92 Constitutional Law

92XIX Rights to Open Courts, Remedies, and Justice

92k2325 k. Prisoners and pretrial detainees. Most Cited Cases

Mental Health 257A ↪ 462

257A Mental Health

257AIV Disabilities and Privileges of Mentally Disordered Persons

257AIV(E) Crimes

257Ak452 Sex Offenders

257Ak462 k. Hearing. Most Cited

In civil proceedings at which detainee was found to be a sexually violent predator (SVP) and was committed, trial court did not violate the public's right to open proceedings under the Washington Constitution by conducting two chambers conferences outside usual trial hours, to discuss evidentiary objections and make rulings, and then making a record describing the conferences. West's RCWA Const. Art. 1, § 10.

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[7] **Criminal Law 110** ↪230

110 Criminal Law
110XII Pretrial Proceedings
110k229 Conduct of Preliminary Examination
110k230 k. In general. Most Cited Cases

Trial 388 ↪20

388 Trial
388III Course and Conduct of Trial in General
388k20 k. Publicity of proceedings. Most Cited Cases
Public trial rights under the Washington Constitution apply to adversary proceedings, including presentation of evidence, suppression hearings, and jury selection; the resolution of purely ministerial or legal issues that do not require the resolution of disputed facts is not an adversary proceeding. West's RCWA Const. Art. 1, § 10.

[8] **Trial 388** ↪20

388 Trial
388III Course and Conduct of Trial in General
388k20 k. Publicity of proceedings. Most Cited Cases
So long as the trial itself is open, in-chambers discussion of legal or trial management issues does not amount to a closure of proceedings in violation of the public right to open proceedings under the Washington Constitution. West's RCWA Const. Art. 1, § 10.

[9] **Mental Health 257A** ↪467

257A Mental Health
257AIV Disabilities and Privileges of Mentally Disordered Persons
257AIV(E) Crimes
257Ak452 Sex Offenders
257Ak467 k. Appeal. Most Cited Cases
Detainee's argument that in the civil proceedings at which he was found to be a sexually violent predator (SVP) and was committed, the trial court

erred in failing to provide a unanimity instruction implicated the due process right to jury unanimity in SVP cases, and thus, it raised an issue of constitutional magnitude subject to review for the first time on appeal under the rule of appellate procedure allowing a party to raise a manifest constitutional error for the first time on appeal. U.S.C.A. Const.Amend. 14; RAP 2.5(a)(3).

[10] **Mental Health 257A** ↪462

257A Mental Health
257AIV Disabilities and Privileges of Mentally Disordered Persons
257AIV(E) Crimes
257Ak452 Sex Offenders
257Ak462 k. Hearing. Most Cited
In civil commitment proceedings in which detainee was found to be a sexually violent predator (SVP), there was substantial evidence to support both a finding that detainee had a mental abnormality that made him likely to engage in predatory acts of sexual violence if not confined, and a finding that he had a personality disorder that made him likely to engage in predatory acts of sexual violence if not confined, and thus, trial court was not required to give unanimity instruction to jury; detainee conceded evidence proved he had mental abnormality and personality disorder, and that the abnormality made him likely to engage in sexual violence if not confined, and expert testified detainee's personality disorder caused him serious difficulty controlling his sexually violent behavior. West's RCWA 71.09.060.

*551 Andrew Peter Zinner, Nielsen Broman Koch, Seattle, WA, for Appellant.

David J.W. Hackett, Alison M. Bogar, King County Prosecutor's Office, Seattle, WA, for Respondent.

ELLINGTON, J.

¶ 1 Calvin Ticsen was committed as a sexually violent predator. In this appeal, he contends the

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court erred by failing to require jury unanimity as to whether he suffered from a mental abnormality and/or personality disorder which made him likely to engage in predatory acts of sexual violence if not confined to a secure facility. **Ticeson** also assigns error to the court's in-chambers conferences, arguing this violated his rights to an open, public trial. We hold the court did not err in failing to provide a unanimity instruction, **Ticeson** is not a criminal defendant and has no rights under article I, section 22 of the Washington Constitution, and the public *552 right to an open proceeding under article I, section 10 was not violated by in-chambers conferences that dealt with purely legal matters. We affirm.

BACKGROUND

¶ 2 On February 13, 2009, a jury found Calvin **Ticeson** to be a sexually violent predator (SVP) under chapter 71.09 RCW (SVP statute), and the court entered an order of commitment for his indefinite confinement.

¶ 3 The SVP statute required the State to prove beyond a reasonable doubt that (1) **Ticeson** has been convicted of a crime of sexual violence; (2) **Ticeson** suffers from a mental abnormality and/or personality disorder which causes serious difficulty in controlling his sexually violent behavior; and (3) **Ticeson's** mental abnormality and/or personality disorder makes him likely to engage in predatory acts of sexual violence if not confined to a secure facility.^{FN1}

FN1. RCW 71.09.020(18), .060(1).

¶ 4 **Ticeson's** convictions for crimes of sexual violence are undisputed. As to the second and third statutory elements, the jury heard testimony from the State's expert, Dr. Brian Judd, and from **Ticeson's** expert, Dr. Theodore Donaldson.

¶ 5 Briefly summarized, Judd testified **Ticeson** suffers from a mental abnormality called paraphilia not otherwise specified, nonconsent (paraphilia NOS-NC), which predisposes **Ticeson** to commit-

ting violent sexual acts. Judd testified that, if released, **Ticeson** would be a menace to the health and safety of others.

¶ 6 Judd also diagnosed **Ticeson** with a personality disorder called personality disorder not otherwise specified, with antisocial traits (personality disorder NOS), which in his opinion causes **Ticeson** to have difficulty controlling his behavior. He noted that **Ticeson** continued committing assaults despite repetitive incarcerations, concurrent supervision, or within short periods of time after release from custody. Judd agreed that this disorder does not usually cause a person to engage in predatory acts of sexual violence.

¶ 7 Donaldson disagreed with Judd's diagnosis of paraphilia NOS-NC. He did not dispute Judd's diagnosis of personality disorder NOS, but did not agree that **Ticeson** *currently* suffers from the disorder, and noted that even if he did, it would not cause difficulty controlling sexually violent behavior.

¶ 8 The court instructed the jury it must determine whether **Ticeson** suffers from "a mental abnormality and/or personality disorder"^{FN2} that makes him likely to reoffend, and that "to return a verdict all jurors must agree."^{FN3}

FN2. Clerk's Papers (CP) at 338.

FN3. CP at 356.

¶ 9 On the first day of proceedings, the court held an in-chambers conference during the lunch break to discuss the admissibility of certain deposition testimony. After the break, the court recapped on the record what had occurred in chambers.

¶ 10 At the start of proceedings on the second day of trial, the court explained it had held another in-chambers conference: "We held a conference in chambers.... We talked about the deposition of Tedra Howard and the Court made rulings on the noted defense objections. And the State also agreed to strike a number of items that the defense had ob-

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jected to.”^{FN4} The court did not further specify what had occurred.

FN4. Report of Proceedings (Feb. 4, 2009) at 2.

DISCUSSION
In-Chambers Conferences

[1] ¶ 11 **Ticeson** contends the in-chambers conferences violated his right to a public trial under the Washington Constitution, article I, section 22 and his public right to open proceedings under the Washington Constitution, article I, section 10. Whether the right to a public trial has been violated is a question of law reviewed de novo.^{FNS} “This standard*553 applies to civil as well as criminal appeals.”^{FN6}

FN5. *State v. Brightman*, 155 Wash.2d 506, 514, 122 P.3d 150 (2005).

FN6. *In re Det. of D.F.F.*, 144 Wash.App. 214, 218, 183 P.3d 302 (2008).

¶ 12 Article I, section 10 (Section 10) of the Washington Constitution provides, “Justice ... shall be administered openly.”^{FN7} The Sixth Amendment to the United States Constitution and article I, section 22 (Section 22) of the Washington Constitution also guarantee criminal defendants the right to a public trial. To protect both Section 10 and Section 22 rights, a trial court must address the five *Bone-Club* factors before restricting public access to judicial proceedings:

FN7. See *State v. Easterling*, 157 Wash.2d 167, 174, 137 P.3d 825 (2006) (citing *Seattle Times Co. v. Ishikawa*, 97 Wash.2d 30, 36, 640 P.2d 716 (1982)).

“(1) The proponent of closure ... must make some showing [of a compelling interest], and where that need is based on a right other than an accused's right to a fair trial, the proponent must show a ‘serious and imminent threat’ to that right.

“(2) Anyone present when the closure motion is made must be given an opportunity to object to the closure.

“(3) The proposed method for curtailing open access must be the least restrictive means available for protecting the threatened interests.

“(4) The court must weigh the competing interests of the proponent of closure and the public.

“(5) The order must be no broader in its application or duration than necessary to serve its purpose.”^{FNS}

FN8. *State v. Bone-Club*, 128 Wash.2d 254, 258-59, 906 P.2d 325 (1995) (alteration in original) (quoting *Allied Daily Newspapers of Wash. v. Eikenberry*, 121 Wash.2d 205, 210-11, 848 P.2d 1258 (1993)).

The court has an independent obligation to perform a *Bone-Club* analysis where appropriate.^{FN9}

FN9. *State v. Strode*, 167 Wash.2d 222, 229-30, 217 P.3d 310 (2009).

Article I, Section 22

[2] ¶ 13 **Ticeson** contends the right of a criminal defendant to a public trial conferred by Section 22 should extend to respondents in civil SVP cases.

¶ 14 As **Ticeson** points out, SVP proceedings share some characteristics of a criminal trial, including the beyond a reasonable doubt standard and the requirement that the jury be unanimous.^{FN10} These guarantees are necessary to satisfy due process because of the serious restraint on liberty resulting from civil commitment as an SVP.^{FN11}

FN10. *In re Det. of Halgren*, 156 Wash.2d 795, 808-09, 132 P.3d 714 (2006).

FN11. RCW 71.09.060(1); *In re Det. of Thorell*, 149 Wash.2d 724, 731, 72 P.3d 708 (2003) (“[c]ommitment for any reason

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constitutes a significant deprivation of liberty triggering due process protection”); *In re Det. of Young*, 122 Wash.2d 1, 50, 857 P.2d 989 (1993). To determine what process is due, courts apply the test enunciated in *Mathews v. Eldridge*, 424 U.S. 319, 335, 96 S.Ct. 893, 47 L.Ed.2d 18 (1976), which balances (1) the private interest affected; (2) the risk of erroneous deprivation of that interest under existing procedures and the probable value of additional safeguards; and (3) the governmental interest, including costs and administrative burdens, of additional procedures. See also *Young*, 122 Wash.2d at 43-44, 857 P.2d 989.

¶ 15 An SVP case is, however, a civil proceeding,^{FN12} and the consequences of an SVP finding are not equivalent to a criminal conviction. Punishment is not the purpose of confinement under the SVP statute.^{FN13} Washington courts have recognized this, and have repeatedly refused to confer upon SVP respondents the same rights as criminal defendants.^{FN14} **Ticeson's** argument rests upon his *554 view that the public right to open proceedings and the criminal's right to a public trial are “inextricably intertwined” and upon the fact that SVP proceedings “share other characteristics of a criminal trial.”^{FN15} Both those observations are true, but neither separately nor together do they support extending Section 22 beyond its express intent. Further, as discussed below, Section 10 protects public trial rights in civil cases.

FN12. *Young*, 122 Wash.2d at 23, 857 P.2d 989.

FN13. *Id.* at 18-25, 51, 857 P.2d 989 (“the State serves its purpose of *treating* rather than punishing sexually dangerous persons by committing them to an institution expressly designed to provide psychiatric care and treatment” (quoting *Allen v. Illinois*, 478 U.S. 364, 373-74, 106 S.Ct. 2988, 92 L.Ed.2d 296 (1986))).

FN14. *In re Det. of Stout*, 159 Wash.2d 357, 369-71, 150 P.3d 86 (2007) (no Sixth Amendment right to confront witnesses in SVP proceeding); *Young*, 122 Wash.2d at 21-26, 51, 857 P.2d 989 (refusing to apply the ex post facto and double jeopardy clauses and the Fifth Amendment privilege against compulsory self-incrimination in SVP proceedings); *In re Det. of Aqui*, 84 Wash.App. 88, 101, 929 P.2d 436 (1996) (refusing to apply the rule of lenity and presumption of innocence in SVP cases), *abrogated on other grounds by In re Det. of Henrickson*, 140 Wash.2d 686, 2 P.3d 473 (2000).

FN15. Appellant's Br. at 31.

¶ 16 The SVP statute is resolutely civil. We decline to extend Section 22 to civil cases.

Article I, Section 10

¶ 17 Section 10 reads, in full: “Justice in *all* cases shall be administered openly, and without unnecessary delay.”^{FN16}

FN16. (Emphasis added.)

[3] ¶ 18 The State contends **Ticeson** cannot assert rights under this section because a right belonging to others may be raised by a litigant only when the litigant can establish third party standing.^{FN17} But **Ticeson** is a member of the public, and like everyone else is protected by Section 10. We see no reason to apply the third party standing rule to rights granted to the public at large. We thus reject the approach taken in *State v. Wise*,^{FN18} in which Division Two of this court held a criminal appellant could not raise Section 10 rights because he lacked third party standing.^{FN19}

FN17. *Powers v. Ohio*, 499 U.S. 400, 410-11, 111 S.Ct. 1364, 113 L.Ed.2d 411 (1991); *Ludwig v. Dep't of Ret. Sys.*, 131 Wash.App. 379, 385, 127 P.3d 781 (2006).

FN18. 148 Wash.App. 425, 200 P.3d 266

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(2009), *rev. granted*, 170 Wash.2d 1009, 236 P.3d 207 (2010).

FN19. Wise could properly be said to have no Section 10 standing because he waived his Section 22 rights, which serve complementary and interdependent functions. *See State v. Momah*, 167 Wash.2d 140, 156, 217 P.3d 321 (2009) (defendant waived right to assert both Section 22 and Section 10 public trial rights claims on appeal by affirmatively accepting closure, arguing for its expansion, actively participating in it, and seeking benefit from it); *Strode*, 167 Wash.2d at 229, 217 P.3d 310 (defendant cannot waive public's right to open proceedings); *Bone-Club*, 128 Wash.2d at 259, 906 P.2d 325 (Section 10 and Section 22 complementary and interdependent functions in assuring fairness in our judicial system).

¶ 19 As **Ticeson** contends, Section 22 and Section 10 are closely related, and in several Section 22 cases, our Supreme Court has, often sua sponte, also discussed Section 10.^{FN20} It seems clear that although they have somewhat different purposes, the two sections confer essentially the same rights and share a common concern of fairness.^{FN21} Further, the two sections require the same analysis before proceedings are closed to the public.^{FN22}

FN20. *See Strode*, 167 Wash.2d at 225-26, 229-31, 217 P.3d 310 (closure violated Sections 10 and 22, defendant did not waive Section 22 and cannot waive Section 10 on behalf of the public; new trial); *Momah*, 167 Wash.2d at 147, 155-56, 217 P.3d 321 (Sections 10 and 22 serve complementary and interdependent functions, and are primarily for the benefit of the accused, defendant waived Section 22 public trial rights by affirmative conduct; conviction affirmed); *State v. Easterling*, 157 Wash.2d 167, 173-74, 179, 181-82, 137 P.3d 825 (2006) (closure violated Sections

10 and 22; new trial).

FN21. *See Easterling*, 157 Wash.2d at 179, 137 P.3d 825 (citing *Press-Enter. Co. v. Superior Court*, 478 U.S. 1, 7, 106 S.Ct. 2735, 92 L.Ed.2d 1 (1986)).

FN22. *In re Pers. Restraint of Orange*, 152 Wash.2d 795, 805-06, 100 P.3d 291 (2004).

[4] ¶ 20 It is well settled that a criminal defendant may raise the Section 22 right to a public trial for the first time on appeal and will enjoy a presumption of prejudice where the right has been violated.^{FN23} Washington courts have not, however, discussed whether the Section 10 right, standing alone, may be raised for the first time in a civil appeal. We hold it may, under RAP 2.5.

FN23. *Strode*, 167 Wash.2d at 231, 217 P.3d 310.

[5] ¶ 21 RAP 2.5(a)(3) allows a party to raise a manifest constitutional error for the first time on appeal. Improper courtroom closure is a constitutional error. Thus, **Ticeson** may raise the issue for the first time in this civil appeal. As required by RAP 2.5, *555 however, he must demonstrate that the constitutional error had identifiable and practical consequences in his trial.^{FN24} He has not done so. Rather, he relies on the presumption of prejudice enjoyed by criminal defendants. This does not satisfy the rule. **Ticeson's** failure to object below therefore constitutes waiver of review.

FN24. *State v. Holzknicht*, 157 Wash.App. 754, 760, 238 P.3d 1233 (2010).

¶ 22 We reject **Ticeson's** argument that his silence did not waive his public trial rights for another reason, as well. In criminal cases, the court must ensure that any waiver of Section 22 rights is knowing, intelligent and voluntary—which means the court must be sure the defendant knew he possessed such a right and knowingly waived it.^{FN25} But if the same test applies to Section 10 rights, the court

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would be required to ensure, sua sponte, that all parties (and possibly, everyone in the courtroom), know about and waive any rights under Section 10. Otherwise, the losing party may raise the issue for the first time on appeal, and the only remedy is reversal. This is an unjust and costly proposition and the rule does not permit it. A party who perceives a possible violation of Section 10 must make its argument to the trial judge, thereby ensuring a record for review.

FN25. *Strode*, 167 Wash.2d at 229 n. 3, 217 P.3d 310.

¶ 23 Had **Ticeson** lodged an objection, however, our ruling would be the same.

[6] ¶ 24 The trial court conducted two chambers conferences outside usual trial hours, to discuss evidentiary objections and make rulings. The court then made a record describing the conferences. This did not violate the public's right to open proceedings.

[7] ¶ 25 Public trial rights “ensure a fair trial,” “foster the public's understanding and trust in our judicial system, and to give judges the check of public scrutiny.”^{FN26} None of these purposes is served by eliminating a trial judge's discretion to handle ministerial or purely legal matters informally in chambers.^{FN27} Rather, public trial rights apply to “adversary proceedings,” including presentation of evidence, suppression hearings, and jury selection.^{FN28} The resolution of “ ‘purely ministerial or legal issues that do not require the resolution of disputed facts’ ” is not an adversary proceeding.^{FN29}

FN26. *Brightman*, 155 Wash.2d at 514, 122 P.3d 150; *Dreiling v. Jain*, 151 Wash.2d 900, 903, 93 P.3d 861 (2004).

FN27. It will usually be wise for trial courts to state for the record the nature and result of sidebar discussions or chambers conferences that take place after trial be-

gins. See, e.g., *State v. Koss*, 158 Wash.App. 8, 241 P.3d 415, 418 (2010) (record showed closed proceedings involving language of jury instruction were of purely ministerial legal nature and therefore not in violation of public trial right); *State v. Sadler*, 147 Wash.App. 97, 114, 193 P.3d 1108 (2008) (record showed closed proceedings involved question of fact about discriminatory intent and were therefore in violation of public trial right where no *Bone-Club* analysis); *State v. Rivera*, 108 Wash.App. 645, 653, 32 P.3d 292 (2001) (record showed closed proceedings regarding hygiene complaints of juror were of ministerial nature and therefore not in violation of public trial right).

FN28. *Koss*, 241 P.3d at 418 (citing *Sadler*, 147 Wash.App. at 114, 193 P.3d 1108; *Rivera*, 108 Wash.App. at 645, 32 P.3d 292).

FN29. *Id.* (quoting *Sadler*, 147 Wash.App. at 114, 193 P.3d 1108).

¶ 26 A review of the history of the public trial right confirms this conclusion. The public's right to open court proceedings dates back to the days before the Norman Conquest,^{FN30} and was included in the very first draft of our state constitution.^{FN31} The founders also created the office of court commissioner: “There may be appointed in each county ... one or more court commissioners, ... who shall have authority to perform like duties as a judge of the superior court at *556 chambers.”^{FN32} The powers of a judge in chambers thus describe the powers of commissioners.

FN30. See *Press-Enter. Co. v. Superior Court*, 464 U.S. 501, 505, 104 S.Ct. 819, 78 L.Ed.2d 629 (1984).

FN31. WASH. CONST.. of 1878 (not adopted), art. V, §§ 9 (“all courts shall be open to the public”), 13 (“the accused shall

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have a right to ... a public trial”), http://www.sos.wa.gov/_assets/history/1878constitution.pdf. The voters of Washington ratified the 1878 constitution, but Congress did not approve the official state constitution until 1889. *Washington History*, WASH. SEC’Y OF STATE,, <http://www.sos.wa.gov/history/constitution.aspx> (last visited Jan. 4, 2011).

FN32. WASH. CONST. art. IV, § 23 (emphasis added).

¶ 27 The implementing statute provides that court commissioners may hear and determine all probate matters, grant defaults and judgment thereon, and issue restraining orders.^{FN33} In the early days of our state, our Supreme Court upheld a judgment entered by a commissioner, making the following observations about the powers of judges in chambers:

FN33. RCW.2.24.040.

Under our present system, when an act of a judicial nature is performed by the judge, it is, in contemplation of law, done in open court, although the act may in reality be done in the private room or office of the judge. When the framers of the constitution used the term “at chambers” in speaking of the duties performed by the judges at chambers, they had in view a certain object, and, in order to ascertain what this was, we must have recourse to the meaning of the term “at chambers” as it was understood at the time this particular provision of the constitution was framed.... Under the law as it then existed, *judges of territorial courts could at chambers entertain, try, hear, and determine all actions, causes, motions, demurrers, and other matters not requiring a trial by jury.*”^{FN34}

FN34. *Peterson v. Dillon*, 27 Wash. 78, 83-84, 67 P. 397 (1901) (emphasis added).

¶ 28 In 1909, the court considered the validity

of a divorce decree where an order denying a motion to vacate the decree was signed in chambers.^{FN35} The court held “it cannot be successfully contended that an act done by a judge sitting on the bench where no jury is required has any greater legal force than the same act done by him in an adjoining room, by courtesy styled his chambers.”^{FN36}

FN35. *Meisenheimer v. Meisenheimer*, 55 Wash. 32, 42, 104 P. 159 (1909).

FN36. *Id.* at 42-43, 104 P. 159.

¶ 29 These cases illustrate the framers’ understanding of what judges may do in chambers, outside the public presence. It is generally consistent with our understanding today, a hundred years later.^{FN37}

FN37. This is not to suggest judges can conduct bench trials in chambers. RCW 4.44.060 provides that the order of proceedings in bench trials shall be the same as in jury trials (the presentation of evidence is done in open court).

¶ 30 *Ticeson* offers no response to this history. Instead, he demands a full *Bone-Club* analysis before every in-chambers or sidebar discussion (unless, as he suggested at oral argument, the topic is limited to the time of the noon recess). *Ticeson* would have us hold that a judge cannot, in chambers, sign an agreed order; hold pretrial conferences; speak privately with counsel to caution against uncivil behavior; inquire as to the time needed for remaining witnesses; discuss jury instructions; or do any of the myriad things judges do in chambers to ensure trials are fair and to save time.^{FN38}

FN38. In the case of sidebar discussions, issues arising with the jury present would always require interrupting trial to send the jury to the jury room, often located some distance from the courtroom, thereby occasioning long delays every time the court

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wishes to caution counsel or hear more than a simple “objection, Your Honor.” This would do nothing to make the trial more fair, to foster public trust, or to serve as a check on judges by way of public scrutiny.

¶ 31 The public trial right is not served by such a reading, and the ability of judges to make legal rulings or solve case management issues during recess, when courtroom staff are unavailable, would be greatly hindered without a corresponding public benefit. Nothing in the history of our state constitution supports this interpretation of Section 10.

[8] ¶ 32 So long as the trial itself is open, in-chambers discussion of legal or trial management issues does not amount to a closure of proceedings in violation of Section 10. The in-chambers discussions that occurred here involved only legal issues. There was no violation of the public's right to open proceedings.

*557 ¶ 33 As noted before, **Ticeson** did not object below. Unlike a criminal defendant who may raise the right to a public trial for the first time on appeal and has the benefit of a presumption of prejudice, a civil litigant who fails to raise a Section 10 objection at trial may raise it for the first time on appeal only under RAP 2.5(a)(3).^{FN39}

FN39. *Holzknicht*, 157 Wash.App. at 759-60, 238 P.3d 1233.

¶ 34 **Ticeson** has failed to show either a violation of the public right to open proceedings or a practical consequence affecting the fairness of his trial. **Ticeson's** Section 10 claim fails.^{FN40}

FN40. The State contends that even if the court violated **Ticeson's** right to a public trial by holding in-chambers conferences, the violation was de minimis. Washington courts have never found a public trial right violation to be de minimis. *Strode*, 167 Wash.2d at 230, 217 P.3d 310 (quoting

Easterling, 157 Wash.2d at 180, 137 P.3d 825).

Unanimity instruction

[9] ¶ 35 **Ticeson** contends the court erred in failing to provide a unanimity instruction. The State first argues we should decline to review this argument because **Ticeson** failed to raise it below. Under RAP 2.5(a)(3), a party may raise an issue he did not object to at trial if it is a “manifest error affecting a constitutional right.”

¶ 36 The lack of a required unanimity instruction has been held to be an error of constitutional magnitude.^{FN41} The State contends the right to a unanimous jury verdict in SVP proceedings is statutory, not constitutional.^{FN42} However, *In re Detention of Halgren* makes clear that due process requires jury unanimity in SVP cases.^{FN43} Therefore, this is an issue of constitutional magnitude subject to review for the first time on appeal under RAP 2.5(a)(3).^{FN44} Our review is de novo.^{FN45}

FN41. *Halgren*, 156 Wash.2d at 807-08, 132 P.3d 714 (“a defendant in [SVP] proceedings is entitled to due process protections that include a unanimous jury verdict”) (citing *Young*, 122 Wash.2d at 48, 857 P.2d 989).

FN42. See RCW 71.09.060(1). The State also argues that the doctrine of invited error precludes this issue on appeal, regardless of any constitutional implications. See *State v. Henderson*, 114 Wash.2d 867, 868-71, 792 P.2d 514 (1990). Failure to request a required jury instruction, however, does not constitute invited error. See *City of Seattle v. Patu*, 147 Wash.2d 717, 720-21, 58 P.3d 273 (2002).

FN43. *Halgren*, 156 Wash.2d at 807-08 n. 4, 132 P.3d 714 (noting that, subsequent to *Young*, the statute was amended to explicitly require a unanimous verdict).

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FN44. For a slightly different analysis, see *In re Det. of Sease*, 149 Wash.App. 66, 74-75, 201 P.3d 1078, review denied, 166 Wash.2d 1029, 217 P.3d 337 (2009).

FN45. *In re Det. of Keeney*, 141 Wash.App. 318, 327, 169 P.3d 852 (2007).

[10] ¶ 37 Under *Halgren*, the presence of a disorder and/or abnormality are two alternative means of establishing the mental illness element of an SVP commitment determination.^{FN46} Where an element may be established by alternative means, a particularized expression of unanimity as to the means relied upon to reach the verdict is not required so long as there is substantial evidence to support a verdict on each alternative.^{FN47} If a rational juror could have found each means proved beyond a reasonable doubt, no unanimity instruction is necessary.^{FN48}

FN46. *Halgren*, 156 Wash.2d at 811, 132 P.3d 714; *In re Det. of Pouncy*, 144 Wash.App. 609, 618, 184 P.3d 651 (2008), *aff'd*, 168 Wash.2d 382, 229 P.3d 678 (2010).

FN47. *Halgren*, 156 Wash.2d at 809, 132 P.3d 714; see also *State v. Ortega-Martinez*, 124 Wash.2d 702, 707-08, 881 P.2d 231 (1994); *State v. Arndt*, 87 Wash.2d 374, 376-77, 553 P.2d 1328 (1976).

FN48. *Halgren*, 156 Wash.2d at 811-12, 132 P.3d 714.

¶ 38 **Ticeson** concedes the State presented sufficient evidence to prove he suffers from a mental abnormality, paraphilia NOS-NC, which causes him serious difficulty controlling sexually violent behavior and makes him likely to engage in predatory acts of sexual violence if not confined. He also concedes the State presented sufficient evidence to prove he suffers from a personality disorder, personality disorder NOS, with antisocial traits.

*558 ¶ 39 He contends, however, that the State

failed to present evidence sufficient to prove that this personality disorder makes him likely to reoffend. He thus argues a unanimity instruction was constitutionally required.

¶ 40 The record belies his argument. Dr. Judd testified that **Ticeson's** personality disorder causes him serious difficulty controlling his sexually violent behavior. This testimony is sufficient to allow a rational juror to find **Ticeson's** personality disorder makes him likely to reoffend.^{FN49} There is thus substantial evidence to support either alternative means. No unanimity instruction was required.

FN49. Insofar as the parties' experts disagreed with one another, this goes to the weight of the evidence rather than to its admissibility. Weighing expert testimony requires a credibility determination for the trier of fact, and is therefore not subject to this court's review. *Sease*, 149 Wash.App. at 80, 201 P.3d 1078.

¶ 41 Affirmed.

WE CONCUR: LEACH, A.C.J., and COX, J.

Wash.App. Div. 1, 2011.
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MAR 17 2011

COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON



NO. 26789-0

**COURT OF APPEALS, DIVISION III
OF THE STATE OF WASHINGTON**

THE STATE OF WASHINGTON,

Respondent,

v.

FREDERICK DAVID RUSSELL,

Appellant.

RESPONDENT'S
FOURTH STATEMENT
OF ADDITIONAL
AUTHORITIES

The State of Washington submits the following additional authorities with regard to the issue of whether the right to a public trial is violated when a trial judge meets with counsel and the defendant in chambers and at a sidebar to discuss which jurors to excuse for hardship. *State v. Castro*, Slip Opinion No. 28885-4-III, 246 P.3d 228 (2011). A copy of the opinion is attached as Appendix A.

RESPECTFULLY SUBMITTED this 15th day of March, 2011.

ROBERT M. MCKENNA
Attorney General

MELANIE TRATNIK, WSBA #25576
Assistant Attorney General

Appendix A

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(Cite as: 246 P.3d 228)

C

Court of Appeals of Washington,
Division 3.
STATE of Washington, Respondent,
v.
Samuel Joel CASTRO, Appellant.

No. 28885-4-III.
Jan. 11, 2011.

Background: Defendant was convicted in the Superior Court, Kittitas County, Michael E. Cooper, J., of possessing a controlled substance. He appealed.

Holding: The Court of Appeals, Brown, J., held that the trial court's failure to engage in five-step *Bone-Club* inquiry to determine whether closure was required before hearing defendant's motions in limine did not violate defendant's right to public trial.

Affirmed.

West Headnotes

[1] Criminal Law 110 ⚡1139

110 Criminal Law
110XXIV Review
110XXIV(L) Scope of Review in General
110XXIV(L)13 Review De Novo
110k1139 k. In general. Most Cited Cases

Whether the right to a public trial has been violated is a question of law subject to de novo review. U.S.C.A. Const.Amend. 6; West's RCWA Const. Art. 1, § 22.

[2] Criminal Law 110 ⚡635.6(1)

110 Criminal Law
110XX Trial
110XX(B) Course and Conduct of Trial in

General

110k635 Public Trial
110k635.6 Considerations Affecting Propriety of Closure
110k635.6(1) k. In general. Most Cited Cases

The public trial right is not absolute; it is strictly guarded to assure proceedings occur outside the public courtroom in the most unusual circumstances. U.S.C.A. Const.Amend. 6; West's RCWA Const. Art. 1, § 22.

[3] Criminal Law 110 ⚡635.5(3)

110 Criminal Law
110XX Trial
110XX(B) Course and Conduct of Trial in General
110k635 Public Trial
110k635.5 Limitations on Power to Close Proceedings
110k635.5(3) k. Narrow tailoring requirement. Most Cited Cases

Criminal Law 110 ⚡635.6(3)

110 Criminal Law
110XX Trial
110XX(B) Course and Conduct of Trial in General
110k635 Public Trial
110k635.6 Considerations Affecting Propriety of Closure
110k635.6(3) k. Overriding interest; necessity. Most Cited Cases

Criminal Law 110 ⚡635.12

110 Criminal Law
110XX Trial
110XX(B) Course and Conduct of Trial in General
110k635 Public Trial
110k635.12 k. Objections to closure and proceedings thereon. Most Cited Cases

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If closure of criminal hearing is contemplated or requested, trial court must consider five criteria to protect defendant's right to public trial before granting motion to close hearing: proponent of closure must make some showing of compelling interest, and where that need is based on right other than accused's right to fair trial, proponent must show serious and imminent threat to that right; anyone present when closure motion is made must be given opportunity to object to closure; proposed method for curtailing open access must be least restrictive means available for protecting threatened interests; competing interests of proponent of closure and public must be weighed; and order must be no broader in its application or duration than necessary to serve its purpose. U.S.C.A. Const.Amend. 6 ; West's RCWA Const. Art. 1, §§ 10, 22.

[4] Criminal Law 110 635.7(3)

110 Criminal Law.

110XX Trial

110XX(B) Course and Conduct of Trial in General

110k635 Public Trial

110k635.7 Nature of Proceeding Affecting Propriety of Closure

110k635.7(3) k. Pretrial proceedings. Most Cited Cases

Criminal Law 110 635.11(3)

110 Criminal Law

110XX Trial

110XX(B) Course and Conduct of Trial in General

110k635 Public Trial

110k635.11 Proceedings on Request for Closure

110k635.11(3) k. Hearing. Most Cited Cases

Trial court' failure to engage in five-step *Bone-Club* inquiry to determine whether closure was required before hearing defendant's motions in limine on whether to exclude witnesses and impeachment evidence was not improper, and thus did not violate

defendant's right to public trial; closure was not contemplated or requested, and even assuming closure, defendant's motions did not involve any fact finding required to be open to public. U.S.C.A. Const.Amend. 6; West's RCWA Const. Art. 1, §§ 10, 22.

*229 Eric J. Nielsen, David Bruce Koch, Nielsen Broman & Koch PLLC, Seattle, WA, for Appellant.

Laura Candace Hooper, Kittitas Co. Courthouse, David Kennedy Barrett, Kittitas County Prosecutor, Ellensburg, WA, for Respondent.

BROWN, J.

¶ 1 Samuel J. Castro appeals his conviction for possessing a controlled substance: cocaine. He contends his constitutional right to a public trial was violated when the court decided pretrial motions on legal matters in chambers and later put them on the record in open court with an invitation to counsel to object. Because the procedure did not implicate Mr. Castro's public trial rights, we affirm.

FACTS

¶ 2 Samuel J. Castro was charged with one count of possession of a controlled substance: cocaine. Before trial, defense counsel moved in limine to (1) exclude witnesses from the trial proceedings; (2) preclude the State from calling any witnesses not previously disclosed; (3) preclude the State from impeaching Mr. Castro under ER 609 with his prior criminal history; and (4) have all prosecution witnesses avoid hearsay and improper opinions. On the first day of trial, the judge held a meeting with counsel in his chambers. In addition to a general discussion of the case and the voir dire process, the judge decided the defense motions in limine. The court ruled in Mr. Castro's favor on all four motions. Later, the court placed its rulings on the record in open court and entertained any objections to them. Mr. Castro did not object.

¶ 3 The jury found Mr. Castro guilty. Mr. Castro appealed.

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ANALYSIS

¶ 4 The issue is whether the trial court violated Mr. Castro's public trial right when deciding his motions in limine in chambers and later placing them on the record in open court with the invitation to counsel to make objections. Mr. Castro contends hearing motions in limine without first analyzing the *Bone-Club* factors is "structural error" warranting reversal. *State v. Bone-Club*, 128 Wash.2d 254, 906 P.2d 325 (1995).

[1] ¶ 5 Whether the right to a public trial has been violated is a question of law subject to de novo review. *Id.* at 256, 906 P.2d 325.

[2] ¶ 6 The Sixth Amendment to the United States Constitution provides, "In all criminal prosecutions, the accused shall enjoy the right to a ... public trial." Similarly, article I, section 22 of the Washington Constitution guarantees, "In criminal prosecutions the accused shall have the right ... to have a ... public trial." The Washington Constitution provides in article I, section 10 that "[j]ustice in all cases shall be administered openly." The public trial right is not absolute; it is strictly guarded to assure proceedings occur outside the public courtroom in the most unusual circumstances. *State v. Momah*, 167 Wash.2d 140, 148, 217 P.3d 321 (2009); *State v. Strode*, 167 Wash.2d 222, 226, 217 P.3d 310 (2009) (citing *State v. Easterling*, 157 Wash.2d 167, 174-75, 137 P.3d 825 (2006)).

[3] ¶ 7 The *Bone-Club* factors considered before closure are:

1. The proponent of closure or sealing must make some showing [of a compelling interest], and where that need is based on a right other than an accused's right to a fair trial, the proponent must show a "serious and imminent threat" to that right.
2. Anyone present when the closure motion is made must be given an opportunity to object to the closure.

3. The proposed method for curtailing open access must be the least restrictive means available for protecting the threatened interests.

*230 4. The court must weigh the competing interests of the proponent of closure and the public.

5. The order must be no broader in its application or duration than necessary to serve its purpose.

Bone-Club, 128 Wash.2d at 258-59, 906 P.2d 325 (quoting *Allied Daily Newspapers v. Eikenberry*, 121 Wash.2d 205, 210-11, 848 P.2d 1258 (1993)). Before a court addresses the *Bone-Club* factors a closure must be contemplated or requested.

[4] ¶ 8 Here, the record does not show a closure was contemplated or requested. Even assuming a closure, a defendant does not have a constitutional right to have the public present for in-chambers or bench conferences where the court and counsel address legal matters, those not requiring the resolution of disputed facts. *State v. Rivera*, 108 Wash.App. 645, 653, 32 P.3d 292 (2001). In *State v. Sadler*, 147 Wash.App. 97, 114, 193 P.3d 1108 (2008), Division Two of this court recognized the public trial right applies to evidentiary phases of the trial as well as other "adversary proceedings," including suppression hearings during voir dire and during the jury selection process. *Rivera*, 108 Wash.App. at 653, 32 P.3d 292. But, the court reasoned "[a] defendant does not ... have a right to a public hearing on purely ministerial or legal issues that do not require the resolution of disputed facts." *Sadler*, 147 Wash.App. at 114, 193 P.3d 1108 (citing *Rivera*, 108 Wash.App. at 653, 32 P.3d 292). Relying on *Sadler*, Division Two held an in-chambers conference in response to a jury question that did not require a public hearing. *State v. Sublett*, 156 Wash.App. 160, 181, 231 P.3d 231 (2010).

¶ 9 Mr. Castro argues his motions are distinguishable from *Sublett* and *Rivera* because his motions "dealt exclusively with issues related to trial, including the State's witnesses and the admissibility

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of evidence.” Br. of Appellant at 5. But Mr. Castro fails to explain why dealing with “issues related to trial” would elevate his motions beyond “purely ministerial or legal.” *Sadler*, 147 Wash.App. at 114, 193 P.3d 1108. The outcome frequently depends on a resolution of factual matters. See *Bone-Club*, 128 Wash.2d at 257, 261-62, 906 P.2d 325; *Easterling*, 157 Wash.2d at 174, 137 P.3d 825.

¶ 10 Here, the trial court addressed legal issues during the pretrial hearing: (1) whether to exclude witnesses; and (2) whether the State could impeach Mr. Castro with his prior criminal history. Further, the court admonished the State to avoid hearsay and improper opinion. Thus, the matters addressed did not involve any fact finding required to be open to the public. Therefore, the trial court was not required to engage in a *Bone-Club* analysis. Accordingly, the trial court did not violate Mr. Castro's public trial rights in its procedure for resolving his motions in limine.

¶ 11 Affirmed.

WE CONCUR: KORSMO, A.C.J., and SIDDO-
WAY, J.

Wash.App. Div. 3, 2011.
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MAR 17 2011

COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By: *JA*

NO. 26789-0

**COURT OF APPEALS, DIVISION III
OF THE STATE OF WASHINGTON**

STATE OF WASHINGTON,

Plaintiff/Respondent,

v.

FREDERICK DAVID RUSSELL,

Defendant/Appellant.

DECLARATION OF
SERVICE

VICTORIA L. ROBBEN declares as follows:

On Tuesday, March 15, 2011, I deposited into the United States

Mail, first-class postage prepaid and addressed as follows:

DENNIS W. MORGAN
120 WEST MAIN
RITZVILLE, WA 99169

Copies of the following documents:

- 1) RESPONDENT'S SECOND STATEMENT OF ADDITIONAL AUTHORITIES
- 2) RESPONDENT'S THIRD STATEMENT OF ADDITIONAL AUTHORITIES
- 3) RESPONDENT'S FOURTH STATEMENT OF ADDITIONAL AUTHORITIES
- 4) DECLARATION OF SERVICE

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

RESPECTFULLY SUBMITTED this 15th day of March, 2011.

Victoria L. Robben
VICTORIA L. ROBBEN