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SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, Petitioner/Cross-Respondent,

v.

BRIAN BRUSH, Respondent/Cross-Petitioner.

SUPPLEMENTAL BRIEF OF PETITIONER,
STATE OF WASHINGTON

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 ORIGINAL

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I. INTRODUCTION

This supplemental brief expands upon arguments contained in the brief of respondent and the motion for supreme court discretionary review. The State's decision not to address certain issues in this supplemental brief should not be considered as a concession, but should be interpreted as the State's determination that the unaddressed issues are adequately discussed in its other briefs.

II. STATEMENT OF THE ISSUES

1. Whether a jury instruction which correctly states the law and does not assume the truth of any material fact violates Const. art. 4, sec. 16 of the Washington Constitution?

2. Whether the admission of non-testimonial hearsay in the penalty phase of a bifurcated trial requires reversal of an exceptional sentence, when the non-testimonial hearsay fell within ER 803(a)(1), ER 803(a)(2) and/or ER 803(a)(3), and the other competent evidence amply supports the aggravating circumstance?

III. STATEMENT OF FACTS RELEVANT TO AGGRAVATING CIRCUMSTANCE OF ONGOING PATTERN OF PSYCHOLOGICAL ABUSE OF THE VICTIM¹

¹This factual statement is drawn from both the culpability and the exceptional sentence eligibility phases of the trial. This is consistent with Jury Instruction 27, CP 230, which instructed the jury that during their deliberations in the exceptional sentence eligibility phase, they "should consider the evidence presented to [them] throughout both phases of the trial."

The defendant, Brian K. Brush, served as a police officer in Oregon until he injured his back and was medically retired. 6RP 201-02; 7RP 18-19; 8 RP B 28.² Following the unplanned termination of his law enforcement career, Brush started a successful, small boat company. 8RP B 45.³ His life, however, began to unravel in 2007, when a previously unacknowledged child appeared, his wife began divorce proceedings, and his mother succumbed to a stroke. 6RP 221; 8RP B 47.

Although Brush became depressed by the reversal of fortunes, Brush turned to e-Harmony in an effort to find a new partner. 6RP 209; 8RP B 49. The victim, Lisa G. Bonney,⁴ was the third person Brush dated after his divorce. *Id.* Brush became highly infatuated with Lisa and she moved into Brush's Oregon home in April of 2008. 6RP 209-10, 212. At times, Lisa's daughter, Elizabeth Bonney, also resided with Brush and her mother. 7RP 126, 128-29.

²The verbatim report of proceedings (VRP) is contained in eleven volumes, each of which begins with page "1." To assist the reader, the trial VRP will be cited as follows:

5RP – Nov. 28, 2011, Part 1
6RP – Nov. 28, 2011 Part 2
7RP – Nov. 29, 2011
8RP A – Nov. 30, 3011
8RP B – Dec. 5, 2011 Part 1

9RP – Dec. 5, 2011 Part 2
10RP A – Dec. 5, 2011 Part 3
10RP B – Dec. 6, 2011 Part 1
11RP A – Dec. 6, 2011 Part 2
11RP B – Feb. 9, 2012

³Many of these facts were testified to by the mental health experts pursuant to ER 703 and/or ER 705. Because no written or oral limiting instruction accompanied the testimony, the jury was free to consider the evidence for any purpose.

⁴Two key players share the last name of "Bonney." To avoid confusion, the victim will be referred to as "Lisa" and her daughter will be referred to as "Elizabeth." No disrespect is intended.

Brush and Lisa when the two became engaged to be married on March 3, 2009. 6RP 209. The engagement, however, was relatively short-lived, and the pair separated on July 25, 2009. 6RP 209, 212. When their plans to wed came to naught, Lisa moved out of the home that she and Brush owned together. 6RP 212.

Lisa and Brush's final breakup was presaged by the turbulent nature of their 15-month long relationship. 9RP 111. At one point in June of 2008, Brush changed the locks on the house, locking both Lisa and Elizabeth out of their home. 11RP 192.

The fight on July 25, 2009, was particularly nasty, resulting in a call to the police. 8RP B 52. Although Brush took a hammer to Lisa's car, 9RP 118, 134-35, he convinced police that Lisa was the first aggressor, resulting in her arrest. 8RP B 52. Brush later admitted that Lisa had done nothing wrong on July 25th. 9RP 138 .

Lisa and Brush did not totally give up on their relationship following Lisa's arrest. Brush, who had voluntarily been hospitalized in an Oregon mental health facility for his depression and intermittent explosive disorder,⁵ called Lisa a lot upon his release. 8RP B 54-55. He also followed her, going so far as to look through the windows of her home and bang on her doors.

⁵Brush had trouble his whole adult life in controlling his temper. 9RP 117. One of the reasons that Brush admitted himself to the psychiatric hospital in Corvallis was he felt his anger was out of control and that when he got really mad "he would just spout off all sorts of hateful things and he didn't feel like he was ever in control of himself when he did that." *Id.*

9RP 139.

Lisa's daughter Elizabeth personally observed Brush's stalking behavior. On the day of the August 2009, oyster festival, Brush sent Elizabeth text messages in which he stated that Lisa was cheating on him. 11RP A 185-86. Brush followed the text messages with a phone call in which he offered to drive Elizabeth to the house where Lisa was in order to prove that Lisa was seeing another man. *Id.*

When Lisa arrived home, she was crying and unable to speak coherently. 11RP A 183, 187. Eventually, Lisa explained to Elizabeth that she was "really, really scared" because Brush drove by her friend's house when she was there. *Id.* Lisa also indicated that she had no where to turn. 11RP A 183.

Eventually, the women decided to get some fresh air, as they left the residence, Lisa told Elizabeth to "Look left and right and make sure Brian's not there." 11RP A 187. Presumably thinking the coast was "clear," Lisa and Elizabeth went for a walk together. 11RP A 176-78. As they approached the beach, the two women heard a diesel truck and saw Brush behind the wheel of his white truck. 11RP A 178-79. The two women abandoned their initial strategy of ignoring Brush's presence when Brush revved his engine and drove in their direction. 11RP A 179-80. The two women ran, hiding behind a car at an inn and then proceeded to the beach, until Brush left the

area. 11RP A 179-80, 188-89. Upon reaching their temporary sanctuary, Lisa was crying, shaking and vomiting. 11RP A 190. Lisa told Elizabeth that she was scared. *Id.*

When the women returned home, they were greeted with a number of threatening voice message from Brush. 11RP A 191. Elizabeth, who listened to the threatening voice mails, recalls one in particular, in which Brush said, "If you do not call me back, I'm going – I'm sure that your office would like to have naked pictures posted down on the front door." 11RP 191. Lisa's concern about Brush's conduct led to her obtaining a temporary restraining order. 11RP A 194, Ex. 42.

Lisa and Brush attended couples counseling, but this proved unsuccessful when Brush threatened Lisa with financial ruin. 8RP 55; 9RP 140-41. At one counseling session, Brush went so far as to begin yelling, slams the door while leaving the room, only to return and repeat the cycle again. 9RP 142.

Unfortunately, financial entanglements required continued communications between the pair. Specifically, Brush's finances, which had become desperate when the federal government seized his business' assets, was desperate to offload the home that he and Lisa owned together. 8RP B 50. Lisa, however, refused to accede to Brush's demand to return the home to the builder. 8RP B 59; 9RP 62.

On September 11, 2009, Lisa went to her real estate office despite having no scheduled appointments. 7RP 31. While in the office, Lisa received numerous cell phone calls and text messages from Brush. 7RP 35, 103-04. The text messages began benignly, but devolved rapidly to recriminations, including statements such as “Are you afraid to say it’s over because you think I will get mad?”, “Are you trying to make me blow up and say mean and nasty things?” 7RP 103-04.

When Lisa finally stopped answering her cell phone, Brush phoned the real estate office’s phone line. 7RP 36. Lisa’s co-worker, who had known Lisa for approximately 15 years, noticed that Lisa was visibly scared when told that a male caller wanted to speak with Lisa. 7RP 37. Following the call, Lisa sat down at her desk, put her arms on the desk, and placed her head down in her arms. 7RP 40. Lisa’s co-worker was concerned enough, that she urged Lisa to call the police or to go to the co-worker’s home. 7RP 40-42. Lisa declined the suggestions, and left the office on foot in the direction of the Bolstad Beach Approach, where Brush was waiting. 7RP 42-43, 104.

Shortly after Lisa arrived at the bench, Brush shot Lisa four times with a shotgun. *E.g.*, 5RP 79-84, 122-24, 137; 8RP A 18; 9RP 62. Lisa died as a result of Brush’s actions. CP 200. Brush, who was apprehended moments after the murder, told the arresting officers Lisa had battered and

victimized him for many months. 6RP 208, 210-11, 248. This claim, however, was retracted by Brush's mental health expert. See 9RP 112 ("he wasn't a battered spouse"), 131.

IV. ARGUMENT

A. A Correct Statement of the Law Does Not Violate Washington Constitution Article 4, Section 16

Const. art. 4, § 16, prohibits judges from charging juries with respect to matters of fact. "The object of this constitutional provision is to prevent the jury from being influenced by knowledge conveyed to it by the court as to the court's opinion of the evidence submitted." *Hettfeld v. Benevolent & Protective Order of Keglers*, 36 Wn.2d 685, 699, 220 P.2d 655, 18 A.L.R.2d 983 (1950). Accord *State v. Lane*, 125 Wn.2d 825, 838, 889 P.2d 929 (1995). An instruction which assumes a fact for the jury's determination constitutes a prohibited comment upon the evidence. *Martin v. Kidiviler*, 71 Wn.2d 47, 51, 426 P.2d 489 (1967); see also, *State v. Galbreath*, 69 Wn.2d 664, 671, 419 P.2d 800 (1966).

For instance, an instruction that used the phrase "evidence has been offered of the escape of the defendant, or attempted escape" was held a comment on the evidence in violation of Const. art. 4, § 16 when the evidence as to the defendant's attempt to avoid trial was conflicting. *State v. McDonald*, 70 Wn.2d 328, 422 P.2d 838 (1967); see also *State v. Becker*, 132 Wn.2d 54, 64-65, 935 P.2d 1321 (1997) (special verdict form which stated,

in part, “within 1000 feet of the perimeter of school grounds, to-wit: Youth Employment Education Program School” violated Const. art. 4, § 16); *State v. Christiansen*, 161 Wash. 530, 534-35, 297 Pac. 151 (1931) (instruction which stated, in part, that the defendant “. . . is guilty of assault in the second degree, in that he testified under oath that he did” violated Const. art. 4, § 16); *Gobel v. Finkelberg*, 118 Wash. 301, 203 Pac. 65 (1922) (in an action for negligence, in which one of the principal issues was whether there had been a collision between the automobiles of plaintiff and defendant, a clause in an instruction which assumed that there was a collusion violated Const. art. 4, § 16).

Const. art. 4, § 16 is not violated by an instruction that accurately states the law. *State v. Woods*, 143 Wn.2d 561, 590, 23 P.3d 1046, *cert. denied*, 534 U.S. 964 (2001); *Christensen v. Munsen*, 123 Wn.2d 234, 249, 867 P.2d 626 (1994). Thus, instructing a penalty phase only jury that the defendant has been convicted of aggravated first degree murder is not an impermissible comment on the evidence when the defendant has, in fact, been convicted of that crime. *State v. Thomas*, 166 Wn.2d 380, 390-92, 208 P.3d 1107 (2009). Adding the phrase “including a finger” to the definition of object in WPIC 45.01 did not violate Const. art. 4, § 6, as the instruction informed the jury of “the appropriate rule of law to the facts of this case” without indicating how the court felt about the victim’s testimony. *State v.*

Tili, 139 Wn.2d 107, 127, 985 P.2d 365 (1999). A jury instruction that defined the word “threat” in accordance with former RCW 9A.04.110(25) does not violate Const. art. 4, § 16 as the instruction is an accurate statement of the law and does not convey an attitude towards the merits of the case. *State v. Ciskie*, 110 Wn.2d 263, 282-83, 751 P.2d 1165 (1988).

The challenged language in jury instruction 26 that “The term ‘prolonged period of time’ means more than a few weeks” was an accurate statement of the law. Compare *State v. Atkinson*, 113 Wn. App. 661, 671–72, 54 P.3d 702 (2002), *review denied*, 149 Wn.2d 1013 (2003) (domestic violence abuse occurring over period of 7 to 10 months, during which time at least three incidents of abuse required the victim to seek medical attention, was sufficient to establish an ongoing pattern of abuse); *State v. Bell*, 116 Wn. App. 678, 684, 67 P.3d 527, *review denied*, 150 Wn.2d 1023 (2003) (with respect to an offense occurring in July of 2001, the court stated that “whether the abuse began in September 2000, Christmas 2000, or spring 2001, the abuse was prolonged”); and *State v. Daniels*, 56 Wn. App. 646, 784 P.2d 579, *review denied*, 114 Wn.2d 1015 (1990) (multiple beatings within the five-month charging period was sufficient to support a pattern of abuse over a prolonged period); with *State v. Barnett*, 104 Wn. App. 191, 16 P.3d 74 (2001) (two weeks is not sufficient to prove a pattern of sexual abuse over a prolonged period of time for purposes of the domestic violence

aggravating circumstance at former RCW 9.94A.390(2)(h)); and *State v. Quigg*, 72 Wn. App. 828, 841, 866 P.2d 655 (1994) (sexual abuse over a period of three days is insufficient to demonstrate an ongoing pattern).

The definition of “prolonged period of time” did not convey the judge’s opinion as to whether the psychological abuse of Lisa had been proven. The definition of “prolonged period of time” did not convey the judge’s opinion on whether any psychological abuse lasted more than a few weeks. In other words, Jury Instruction 26 is similar to the instructions at issue in *Thomas*, *Tili*, and *Ciskie* and it does not violate Const. art. 4, § 16. The Court of Appeal’s vacation of the aggravating circumstance of “aggravated domestic violence offense” must be reversed.

B. Lisa’s Statements to Elizabeth Were All Properly Admitted During the Penalty Phase of the Trial

Brush contends that the admission of Lisa’s out-of-court statements to Elizabeth was error. Brush’s argument on this point is perfunctory, at best, with only one statement clearly identified. *See generally* Answer to Petition for Review and Cross-Petition at 31-33; Appellant’s Reply Brief at 17-18; Appellant’s Opening Brief at 3, 16, and 39-40. Brush concedes, however, that the admission of the challenged non-testimonial hearsay does not present a constitutional claim. *See* Appellant’s Opening Brief at 38 (“When no constitutional rights are infringed, evidentiary rulings are reviewed for abuse

of discretion.”).⁶

During the exceptional sentence eligibility phase of the trial, Elizabeth testified to the following out-of-court statements:

1. “So then mom says, ‘Just keep walking. He’s going to drive by.’” 11RP A 178, 179.
2. “and mom says, ‘He’s not stopping. Run.’” 11RP A 179.
3. “and she says, ‘Where do we go?’” 11RP A 179.
4. “When Brian’s truck drove by, she said, ‘I need to get out of here.’” 11RP A 185.
5. “She called me and said, ‘I’m on my way home. Get me when I get home.’” 11RP A 187.
6. “She said that ‘I was really, really scared and I saw Brian drive by at the oyster festival.’” 11RP A 187.
7. “She said, ‘Look left and right and make sure Brian’s not there.’” 11RP A 187.

⁶Brush’s concession is supported by the great weight of evidence, with most courts categorically holding that statements between private parties are not testimonial. *United States v. Boyd*, 640 F.3d 657, 665 (6th Cir.), *cert. denied*, 1325 S. Ct. 271 (2011) (statements made to police in the course of official investigation are testimonial; statements made to friends and acquaintances are nontestimonial); *State v. Miller*, 95 Conn. App. 362, 896 A.2d 844, 859 (Conn. App. Ct. 2006) (“[t]he courts of this land, both federal and state, are in agreement that statements made to friends in unofficial settings do not constitute testimonial hearsay”); *State v. Brocca*, 979 So. 2d 430, 434 (Fla. Dist. Ct. App. 2008) (statements sexual assault victim made to his mother were nontestimonial because they “were not made to a government agent or under police interrogation”); *Laine v. State*, 786 N.W.2d 635, 639 (Minn. 2010) (trial court properly admitted victim’s out-of-court statements to show the defendant’s prior acts of domestic abuse in murder trial; statements were nontestimonial because they were made to friends and coworkers, not law enforcement officers); *State v. Sorenson*, 770 N.W.2d 701, 707 (N.D. 2009) (“out-of-court statements by an individual to a friend, family member or cellmate are non-testimonial statements”); *Garcia v. State*, 246 S.W.3d 121, 133 (Tex. Ct. App. 2007) (victim’s statements to third parties that she was afraid of the defendant did not constitute testimonial hearsay because they were not “given in response to police interrogations,” but instead were made to the victim’s coworkers, friends, and her divorce attorney).

8. "She yelled it. She said, 'He's not stopping. Run.'" 11RP A 188.
9. She yelled it in very – she meant every word she said. It was, 'You better run now. He's not stopping. You better go fast.'" 11RP A 189.
10. "and she said, 'Well, where do we go? What do we do?' And then she said, 'Let's go to the beach. He can't do anything to you at the beach. Let's go to the beach.'" 11RP A 189.
11. "She said – when she was throwing up, she just said we're scared." 11RP A 190.

Brush concedes that many of the proceeding statements were made while Lisa was under stress and excitement. Appellant's Opening Brief, at 39. Brush contends, however, that the statements "were not excited utterances because they did not relate to the 'startling event or condition' causing the stress and excitement." *Id.* at 39, citing ER 803(a)(2). Brush overlooks the fact that many of the above items fall within other exceptions to the hearsay rule or are not hearsay at all.

Those portions of items 2, 8, and 9 regarding Brush's failure to brake as he drove toward Lisa and Elizabeth constitute present sense impressions, as the statements were made contemporaneously with Brush's actions. *See* ER 803(a)(1) ("A statement describing or explaining an event or condition made while the declarant was perceiving the event or condition, or immediately thereafter.").

Item 3 is a question and questions traditionally have not been considered to be hearsay. *See, e.g., State v. Flett*, 40 Wn. App. 277, 287-88, 699 P.2d 774 (1985) (in prosecution for rape, evidence of victim's out-of-court question to her son, "Did you take the bastard home?", was admissible because the question was not offered to prove the truth of the matter asserted). Portion of item 10 is also a question, and thus not hearsay.

Item 7 and portions of items 1, 2, 8, and 9 were requests to Elizabeth to take certain actions. Such requests are not hearsay. *State v. Fish*, 99 Wn. App. 86, 96, 992 P.2d 505 (1999), *review denied*, 140 Wn.2d 1019 (2000) (declarant's requests for driver to "pull over" and drop passengers off were commands, not assertions of fact).

Items 4 and 11 and portions of 6 fall within ER 803(a)(3)'s exception for then existing state or mind or emotion. *See, e.g., State v. Parr*, 93 Wn.2d 95, 99, 606 P.2d 263 (1980) (testimony that the victim had told the witness that she feared the defendant was admissible under ER 803(a)(3)). Item 5 also falls within ER 803(a)(3) as showing Lisa's state of mind and her plan. *See, e.g., State v. Terrovana*, 105 Wn.2d 632, 637-43, 716 P.2d 295 (1986) (in prosecution for murder, the State was properly allowed to introduce evidence that after hanging up the telephone, the victim had said that the caller was the defendant and that he, the victim, was going to go to 116th street to meet the defendant); *State v. Bernson*, 40 Wn. App. 729, 738,

700 P.2d 758, *review denied*, 104 Wn.2d 1016 (1985) (victim's statement that she had received a job offer to sell women's apparel was admissible as circumstantial evidence of the victim's state of mind).

Only the admission of the portion of item 6, in which Lisa stated that she saw Brush drive by at the oyster festival, is at all problematic. This Court need not, however, decide whether the trial judge abused his discretion in admitting that statement because in all probabilities the statement did not materially affect the jury's verdict in the exceptional sentence eligibility phase. *See State v. Neal*, 144 Wn.2d 600, 611, 30 P.3d 1255 (2001) (an erroneous evidentiary ruling is grounds for a new trial only if the outcome would have been materially affected by the error).

The improper admission of evidence constitutes harmless error if the evidence is of minor significance in reference to the evidence as a whole. *Id.* Here, significant other evidence established that Brush's stalking of Lisa included an incident on the day of the oyster festival. Specifically, Brush's own text messages and phone calls to Elizabeth established that Brush had Lisa under surveillance:

He texted me. He called me. Text messages said, "Your mom is with another guy. She's cheating on me. I will take you to the house right now to prove to ou -- to show you the house."

11RP A 186. Brush's mental health expert, Dr. Christiane Tellefsen, also confirmed that an incident occurred during the oyster festival. 9RP 138-39.

Brush's exceptional sentence should be affirmed.

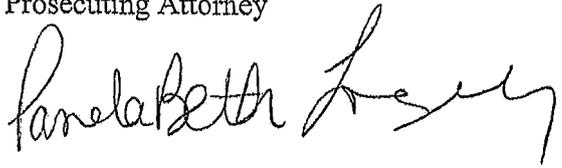
V. CONCLUSION

The State respectfully requests that this Court reinstate Brush's exceptional sentence.

Dated this 1st day of December, 2014.

Respectfully Submitted,

David Burke
Prosecuting Attorney

A handwritten signature in black ink, appearing to read "Pamela B. Loginsky". The signature is written in a cursive style with a large initial "P" and "L".

Pamela B. Loginsky, WSBA 18096
Special Deputy Prosecuting Attorney

PROOF OF SERVICE

I, Pamela B. Loginsky, declare that I have personal knowledge of the matters set forth below and that I am competent to testify to the matters stated herein.

On the 1st day of December, 2014, I deposited in the mails of the United States of America, postage prepaid, a copy of the document to which this proof of service is attached in an envelope addressed to:

Jodi R. Backlund
Backlund & Mistry
P.O. Box 6490
Olympia, WA 98507

On the 1st day of December, 2014, I also e-mailed a copy of the document to which this proof of service is attached to Jodi R. Backlund, Manek R. Mistry, and Skylar T. Brett at backlundmistry@gmail.com.

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

Signed this 1st day of December, 2014, at Olympia, Washington.



Pamela B. Loginsky, WSBA No. 18096

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Dear Clerk and Counsel:

Attached for filing is the State's Supplemental Brief. Please let me know if you should encounter any difficulty in opening the document.

Sincerely,

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