

No. 96777-6

No. 75924-8-I  
Snohomish County Superior Court No. 02-1-02368-6

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

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STATE OF WASHINGTON,  
Plaintiff-Respondent,

v.

JOHN ALLEN WHITAKER,  
Defendant-Appellant.

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ON APPEAL FROM THE SUPERIOR COURT OF THE STATE OF  
WASHINGTON FOR SNOHOMISH COUNTY

The Honorable Linda C. Krese, Judge

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APPELLANT'S OPENING BRIEF

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**I.**  
**ASSIGNMENTS OF ERROR**

Some of the assignments of error relate to the trial court's rulings on the defendant's motion for a new trial.

1. The trial court erred in failing to instruct the jury that duress is a defense to the aggravating factors in a first degree homicide. This is a question of first impression.
2. The prosecution committed misconduct when it told the jurors that duress was not a defense to murder although the trial court had not instructed the jury on duress. Whitaker also assigns error on this issue to Findings of Fact 16, 17, and 18. Supp. CP<sup>1</sup> \_\_\_\_.
3. The irregular manner in which the trial court dealt with a juror, who at one point refused to deliberate, violated CrR 6.15; the defendant's right to be present and to a public trial under the Sixth Amendment and Const., art. I, § 22; to due process under the Fourteenth Amendment and Const., art. I, § 3; and to a unanimous and impartial jury under the Sixth Amendment and Const., art. I, §§ 21, 22. Whitaker also assigns error to Findings of Fact 29-34, 38, and 43 on this issue. Supp. CP \_\_\_\_.

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<sup>1</sup> A supplemental designation of clerk's papers was filed with the Snohomish County Superior Court on July 18, 2017.

4. The trial court erred in declining to grant a new trial when it learned that a juror stated, “I hope they fry the fucking bastard.” This violated Whitaker’s right to due process under the Fourteenth Amendment and Const., art. I, § 3, and his right to a unanimous and impartial jury under the Sixth Amendment and Const., art. I, §§ 21, 22. Whitaker also assigns error to Findings of Fact 53, 56 and 57 on this issue. Supp. CP \_\_\_\_.
5. The trial court erred in permitting the State to introduce gruesome autopsy photos. This violated Whitaker’s right to due process under the Fourteenth Amendment and Const., art. I, § 3.
6. The prosecutor violated the defendant’s Fifth and Sixth Amendment rights to remain silent when he elicited testimony that the defendant refused to waive his *Miranda*<sup>2</sup> rights shortly after he was charged. Whitaker also assigns error to Findings of Fact 12 and 14. Supp. CP \_\_\_\_.

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

1. Where the State alleges that the homicide was committed in the course or furtherance of a kidnaping, and the defense presents evidence that the defendant committed the kidnaping under duress, was it error to decline

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<sup>2</sup> *Miranda v. Arizona*, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966).

to instruct the jury that it could consider duress as a defense to the kidnapping for the purpose of an aggravating factor?

2. Where the jury was not instructed on the law of duress, did the prosecutor commit misconduct when he told the jury that duress is not a defense to murder?

3. Where a juror told the law clerk that he wished to be excused from further deliberations should the clerk have told the juror to put the request in writing as required by CrR 6.15?

4. Did the law clerk's conversation with the deliberating juror in a closed conference room violate the federal and state constitutional guarantee of an open and public trial?

5. Did the law clerk's conversation with a deliberating juror in a closed conference room outside the defendant's presence violate the federal and state constitutional right to be present at a critical stage of the proceedings?

6. Where a deliberating juror asked to be excused from jury service, was sequestered from the other 11 jurors for a significant period and clearly disagreed with the other 11 jurors on the merits of the State's case, and these events caused the juror a heart attack that resulted in his dismissal from the deliberations, were the proceedings so irregular as to violate the

defendant's state and federal constitutional rights to a unanimous jury verdict and the state and federal rights to due process?

7. May the court consider the misconduct of a juror, although it cannot ask the jurors what affect the comment had on the jurors' thought process?

8. Was it reversible error for the juror to make the statement regarding the defendant, "I hope they fry the fucking bastard" prior to deliberations where, unlike in other cases, the comment was made to the other jurors rather than to a third party not involved in the case?

9. Where the jury heard detailed testimony from the forensic pathologist and the defense stipulated that it would not challenge that testimony in any way, was it an abuse of discretion under ER 403 to admit exceedingly gruesome and prejudicial photographs of the victim's decaying body?

10. Did the prosecutor violate the defendant's Fifth and Sixth Amendment rights to remain silent when the prosecutor elicited testimony that after the defendant was charged and arrested, the defendant refused to waive his *Miranda* rights?

11. Do the various errors in this case merit reversal when the prejudice is considered cumulatively?

### III. STATEMENT OF THE CASE

This case comes to the Court once again after a second trial. On July 3, 2003, John Whitaker was charged with aggravated first degree murder and conspiracy to commit first degree murder, along with a firearm enhancement. Whitaker was convicted on all charges on June 21, 2004. Whitaker was sentenced to life without the possibility of parole on July 23, 2004. The convictions were overturned due to a violation of the right to a public trial. *In re Whitaker*, 175 Wn. App. 1020 (2013), *review denied*, 343 P.3d 760 (2015). The mandate issued on April 23, 2015, and Whitaker was charged with the same offenses under the original amended information. After a jury trial Whitaker was convicted once again on June 30, 2016. The jury found the aggravating factor of kidnapping, but was silent as to aggravating factor of robbery. Whitaker was sentenced on September 23, 2016, to life without parole.

The testimony in the new trial differs significantly from that in the first one, and most of the issues raised here are different from the ones this Court reviewed at the first trial.

In 2002, John Whitaker part of a group of loosely-knit friends, all of whom used drugs and sometimes engaged in selling them. These people included John “Diggy” Anderson, Nathan Lovelace, Maurice Rivas,

Matthew Durham, Yusef “Kevin” Jihad, Tony Williams and Jeffrey Barth. Some people referred to this group as the “Northwest Mafia,” but nobody took that name seriously. See, e.g., 8 RP 1619; 10 RP 2023.

Rachel Burkheimer was dating John Anderson off and on. According to Jennifer Vink, John Anderson became aware that J.J. Brazwell had begun dating Ms. Burkheimer. 5 RP 840. At that point, Anderson and Brazwell stopped being friends. According to Mr. Brazwell, he was a good friend of John Anderson’s at one point. 5 RP 991. Brazwell was also a good friend of John Whitaker’s. 5 RP 994. Brazwell, Whitaker and Anderson sometimes stayed together at the same apartment. 5 RP 995.

Brazwell began dating Rachel Burkheimer at some point. 5 RP 998. She would hang out at the apartment the three men shared. Burkheimer’s relationship with Anderson was unstable. There was much arguing and jealousy. Anderson was also very controlling. 5 RP 999. Anderson expressed that he felt that Rachel was his property. 5 RP 1004. When Brazwell was living with Rachel, she was using cocaine, methamphetamine, and marijuana. 5 RP 1023. Rachel came back to Anderson at one point. Brazwell suspected that it was because she wanted drugs from him. 5 RP 1024. Rachel showed Brazwell bruises that she got after Anderson assaulted her for hanging out with other people. 5 RP 1025.

Although Whitaker had no quarrel with Brazwell, Whitaker stopped hanging out with him because of Anderson. 5 RP 1012. Brazwell became aware that Anderson knew he was staying with Rachel because of a phone call between the two of them. 5 RP 1008-09. This made Anderson upset and jealous. Anderson said that he would really like to beat her up and that he could not trust her. 5 RP 1010. Later, Brazwell learned that Anderson was thinking of beating up or killing Brazwell. 5 RP 1011.

On September 23, 2002, Matthew Durham got a phone call from Anderson. 6 RP 1194. Anderson asked Durham to bring Ms. Burkheimer over to Jihad's house. Durham asked "What if she doesn't want to come?" Anderson replied, "Bring her or I will put you in a coffin, show up at Nate's house." 6 RP 1195. While they were at Lovelace's house, Durham received another call from Anderson. 6 RP 1196. Anderson said, "Bring her, or grab her" to Jihad's house. 6 RP 1197-98. Durham told Ms. Burkheimer that Anderson wanted to talk to her and she said she needed to talk to Anderson and Jihad anyway. 6 RP 1198.

When Durham got to Jihad's house, everyone was hanging out and having fun. 6 RP 1206. Ms. Burkheimer was tickling Whitaker and they were laughing and joking. Then, suddenly, Anderson came into the room and began yelling. 6 RP 1208. He immediately began swinging punches at Whitaker and Barth. 6 RP 1209. Whitaker was punched hard, twice, with a

closed fist. 6 RP 1301. Durham testified that Anderson seemed to simply snap and no one saw it coming. 7 RP 1304. See also, testimony of Williams at 8 RP 1580. After Barth stood up, he grabbed his waistband and threatened to shoot Anderson. 6 RP 1210. Anderson then grabbed a gun and there was a brief stand-off between the two of them. Ms. Burkheimer tried to move out the door but Anderson grabbed her and also hit her in the face. 6 RP 1211-12. Whitaker then went over to where Ms. Burkheimer and Anderson were. 6 RP 1215. Whitaker then kicked Ms. Burkheimer. 8 RP 1545. Anderson was yelling at somebody to get duct tape and to turn up the music. Williams complied with that order. 6 RP 1216. Durham tried to leave but Jihad said that no one was leaving. 6 RP 1218. Anderson told Ms. Burkheimer that he wanted her father to give him ransom money. 6 RP 1221.

Ms. Burkheimer was tied up and put in the garage. When Barth went into the garage, he made sexual gestures towards Ms. Burkheimer. Whitaker told the others that they should not leave Barth and Ms. Burkheimer together. 6 RP 1227. After a while, Jihad's girlfriend, Trissa Conner, came into the house and began yelling and threatening to call the police when she realized what was going on. 6 RP 1229. Barth then came out carrying a bag and put it in the back of Durham's car. 6 RP 1232. Anderson said he couldn't strangle Ms. Burkheimer because he used to

love her. 6 RP 1233. Durham was told to drive because he had a valid license. Also in the car were Rivas and Whitaker. Ms. Burkheimer was tied up in a large duffel bag, which was placed in the back of the car. 6 RP 1235. Durham drove to a remote area called Reiter Pit. 6 RP 1248. Durham was throwing up because he was so nervous. *Id.*

While they were waiting for the others, Whitaker suggested some ways they could get Ms. Burkheimer to a safe place and release her. 10 RP 2013. Whitaker suggested they get a hotel room, and also suggested his girlfriend's grandparent's house, where Ms. Burkheimer could heal up and then they would let her go. 10 RP 1946-47. They went to Whitaker's girlfriend's grandparent's house because he thought they were away, but it turned out they were home. RP 1948.

Eventually, they left Rivas holding the bag and the others went back to Jihad's house to pick up Anderson. 6 RP 1251. Before they left to Reiter Pit again, Anderson placed some shovels in the back of the car. 6 RP 1253.

They then drove back to where they had taken Rivas. 6 RP 1254. Then they put the bag holding Ms. Burkheimer in the back of the car and headed off farther into the hills. 6 RP 1255. In the car, Anderson was talking about how he used to love Ms. Burkheimer. He also said that he thought that Ms. Burkheimer had tried to get Jihad killed. 6 RP 1255.

After they stopped, Anderson brought out the shovels and told them to start digging. 6 RP 1257. Durham testified that he did not drive off because he was worried about Anderson coming back for his family. 6 RP 1258. According to Rivas, he and Whitaker dug for about 30 minutes. 10 RP 1968-69. After that Durham heard Anderson yell, "Clothes off, face in the dirt." 6 RP 1263. Shortly after that, he heard several shots that could only have been fired by Anderson. 6 RP 1264. Anderson then ordered them to cover over the grave. *Id.* When they got in the car, Anderson was talking about how he could not stand snitches. 6 RP 1264. Anderson said "snitches get killed." 7 RP 1308. Tony Williams confirmed that all of the participants were well aware of the danger of snitching. 8 RP 1633. Anderson also said that if he could not "get" to the snitch, somebody else would be able to. 7 RP 1309. Anderson also said that he used to love her and that he watched her head explode. 6 RP 1265. Then they went back to Lovelace's house and picked up Rachel's car. 6 RP 1267. The group then made several unsuccessful attempts to hide evidence in various ways.

Whitaker fled to California where he was arrested by FBI agents on October 9, 2002. 7 RP 1337-38. After being read his rights, Whitaker gave lengthy oral and written statements to the agents. 7 RP 1341; Ex. 220, Supp. CP \_\_\_\_; Ex. 232, Supp. CP \_\_\_\_.

participating in some of the events of September 23, 2002, but explained that he did this out of fear of Anderson.

Anderson was found hiding in Lovelace's house. He refused to surrender and ultimately was arrested by a SWAT Team. 13 RP 2468.

#### **IV. STANDARD OF REVIEW**

The trial court's findings of fact will be upheld if they are supported by substantial evidence. *State v. Garcia-Hernandez*, 67 Wn. App. 492, 496, 837 P.2d 624, 627 (1992). The trial court's rulings on matters of law are reviewed *de novo*. *Nevers v. Fireside, Inc.*, 133 Wn.2d 804, 809, 947 P.2d 721, 723 (1997).

In this case, most of the issues were reviewed by the trial court in the context of the defense motion for a new trial. Under some circumstances, a motion for a new trial is reviewed for abuse of discretion. However, the court's discretion is much more limited when, as here, the motion for a new trial was denied by the trial court. *State v. Brent*, 30 Wn.2d 286, 290, 191 P.2d 682 (1948).

Further, when the issue involved in the motion for new trial concerns a matter of law, review is *de novo*. *Schneider v. City of Seattle*, 24 Wn. App. 251, 255-56, 600 P.2d 666 (1979). See also, *Detrick v. Garretson Packing Co.*, 73 Wn.2d 804, 812, 440 P.2d 834 (1968); *Lyster*

*v. Metzger*, 68 Wn.2d 216, 226, 412 P.2d 340 (1966). Thus, the reason for the judge’s decision determines the standard of review. “If the reason given is predicated upon an issue of law, the appellate court reviews for error only, not for abuse of discretion.” *Braden v. Rees*, 5 Wn. App. 106, 110, 485 P.2d 995, 998 (1971).

## V. ARGUMENT

### A. THE COURT ERRED IN REJECTING A JURY INSTRUCTION THAT DURESS IS A DEFENSE TO AGGRAVATING FACTORS. THIS IS A QUESTION OF FIRST IMPRESSION.

Whitaker acknowledges that he cannot claim duress as to first-degree murder. *See* RCW 9A.16.060. But he should have been allowed to prove the affirmative defense of duress as to the aggravating factors of robbery and kidnapping.

The Washington Supreme Court has emphasized that there is no crime of “aggravated murder.” While that phrase is sometimes used as a shortcut, the actual crime is premeditated murder in the first degree. The aggravating factors merely raise the penalty for that crime. *See State v. Irizarry*, 111 Wn.2d 591, 594-595, 763 P.2d 432, 435 (1988); *State v. Ortiz*, 119 Wn.2d 294, 314, 831 P.2d 1060, 1071 (1992), *disapproved of on other grounds by State v. Condon*, 182 Wn.2d 307, 343 P.3d 357 (2015). Therefore, the duress defense was not offered as a defense to the

charge of murder (which would be prohibited), but rather to the aggravating factors which increase the penalty upon conviction for murder.

The duress statute does not explicitly prohibit the duress defense for aggravating factors. See RCW 9A.16.060. Likewise, RCW 10.95.020, the statute for aggravating factors in a premeditated murder case contains no prohibition against a duress defense.

Where, as here, there is no clear statement from the legislature, the Court must ascertain legislative intent. *State v. Keller*, 98 Wn.2d 725, 728-29, 657 P.2d 1384 (1983). In so doing, this Court should construe a statute to avoid strained or absurd consequences. *Id.* If two statutes pertain to the same subject matter, they must be harmonized whenever possible. *Snohomish Cnty. P.U.D. No. 1 v. Broadview Television Co.*, 91 Wn.2d 3, 586 P.2d 851 (1978).

“Two explicit purposes of the SRA are to ensure that punishment is (1) proportionate to the seriousness of the offense, and (2) commensurate with the punishment imposed on persons committing similar offenses.” *State v. Kron*, 63 Wn. App. 688, 694, 821 P.2d 1248, 1252 (1992).

Therefore, the aggravated murder statute, RCW 10.95, functions consistently with the SRA by prescribing a more severe penalty than that provided in the SRA for “ordinary”

first degree murder. Likewise, to satisfy the SRA's purpose of like sentences for like crimes, it is important that "ordinary" first degree murderers and aggravated murderers not receive the same degree of punishment.

*Id.* at 695.

These legislative purposes favor the availability of a duress defense for aggravating factors. If Whitaker was innocent of the kidnapping due to duress, it makes little sense to treat him as if he had no excuse for such conduct. The legislature could not have envisioned such an absurd result. Because a charged robbery or kidnapping can be completely excused by duress, surely the same conduct should be excused for purposes of aggravation.

Although this is an issue of first impression in Washington, the Ohio Supreme Court has suggested *in dicta* that duress would be available as a defense to the aggravating factors on a murder charge, if the evidence supported it. See *State v. Getsy*, 84 Ohio St.3d 180, 199-200, 702 N.E.2d 866 (1998).

"Arguably, the defense of duress could have been asserted for the aggravating circumstance of murder for hire." *Id.* However,

Getsy did not satisfy his burden of presenting evidence of a nature and quality sufficient to raise the defense of duress and merit an instruction. Therefore, the trial court did not err in failing to instruct on the affirmative defense of duress.

*Getsy*, 84 Ohio St.3d at 199-200. See also, *State v. Bockorny*, 124 Or. App. 585, 587-89, 863 P.2d 1296, 1297-98 (1993) (Court assumes without deciding that duress could excuse an aggravating factor in a capital case, but finds an insufficient factual basis).

The defense presented a proposed instruction on this issue. CP 574. It also presented a memorandum of law concerning duress. See CP 575. The defense also maintained that instruction was warranted under the facts of the case. *Id.* See also 6/24/16 (PM) RP 61.<sup>3</sup> The trial court ruled as follows:

I'm going to tell you I'm not giving it because I don't think there is sufficient evidence to give a duress defense. It may well make sense that they should apply to the aggravating factors, but I don't think I really have to reach that because it would be a defense to those crimes, but I'm not really resolving that issue. I don't think there is sufficient evidence to give the duress defense.

6/24/16 (PM) RP 61-62. The defense formally took exception to the trial court's refusal to give the instruction. 6/24/16 (PM) RP 62.

The trial court was mistaken because there was a sufficient basis for the instruction. Duress is an affirmative defense that must be established by a preponderance of the evidence. *State v. Frost*, 160 Wn.2d 765, 773, 161 P.3d 361 (2007). The defendant must prove that

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<sup>3</sup> This transcript was separately paginated.

(a) he participated in the crime under compulsion by another who by threat or use of force created an apprehension in his mind that in case of refusal he or another would be liable to immediate death or immediate grievous bodily injury; and (b) such apprehension was reasonable upon his part; and (c) he would not have participated in the crime except for the duress involved.

*State v. Harvill*, 169 Wn.2d 254, 258-59, 234 P.3d 1166, 1168 (2010).

In *Harvill*, the main issue was whether the threat must be explicit. The Court found it sufficient that the defendant reasonably perceived a threat based on the totality of the circumstances. *Harvill*, 169 Wn.2d at 259-60.

The standard for obtaining a jury instruction is quite low.

A defendant “is entitled to have the jury instructed on [his] theory of the case if there is evidence to support that theory. Failure to so instruct is reversible error.” *State v. Williams*, 132 Wn.2d 248, 259-60, 937 P.2d 1052 (1997) (citations omitted).

*Harvill*, 169 Wn.2d at 259. In evaluating whether the evidence will support a jury instruction, the trial court must interpret the evidence most strongly for the defendant. The jury, not the judge, must weigh the proof and evaluate the witnesses’ credibility. *State v. May*, 100 Wn. App. 478, 482, 997 P.2d 956 (2000) (citing *State v. Williams*, 93 Wn. App. 340, 348, 968 P.2d 26 (1998)). If there are justifiable inferences from the evidence upon which reasonable minds might reach conclusions that would sustain a verdict, then the question is for the jury, not for the court. *Moyer v. Clark*, 75 Wn.2d 800, 803, 454 P.2d 374, 376 (1969).

There was a sufficient basis in this case. In his statement to the FBI, Whitaker explained that everything was fine at Trissa's house until Anderson became violent. Out of the blue, Anderson punched Whitaker twice. Ex. 220 at 2. This was corroborated by several witnesses. 6 RP 1209 (Testimony of Durham); 8 RP 1542 (Testimony of Williams); 9 RP 1694-95 (Testimony of Barth). Anderson then brandished a gun and began barking orders. Whitaker was shaking. Ex. 220 at 3; 6 RP 1210; 9 RP 1696. When Anderson joined Whitaker in the mountains, Whitaker said they should let Rachel go. But Anderson said it was too late. Ex. 232 at 2. Whitaker said he had to leave but Anderson said Whitaker had to stay with him.

In his oral statement to the agents, Whitaker explained that he was intimidated by Anderson because Anderson was much bigger and stronger than Whitaker. Ex. 232 at 2. When Anderson ordered them to dig a hole Whitaker tried to get out of the car but Anderson called him a "bitch" and told him he wasn't going anywhere. Ex. 232 at 3.

Other witnesses reinforced the danger of defying Anderson's orders. Rivas testified that Anderson frequently used the phrase "loose ends get clipped" meaning that "if you were the weak link in the chain, or you weren't up to par with everybody else, that meant you didn't fit in the

circle” and you “got cut off.” 10 RP 1860-61. Anderson also often carried a firearm. 10 RP 1861-62.

While holding a gun, Anderson threatened to come after Lovelace and his family and “do whatever it takes” if Lovelace told the police where he was or if he ended up going to jail. 6 RP 1084.

Trissa Conner was so terrified of Anderson that even though she was concerned for Ms. Burkheimer’s safety after she saw her tied up in the garage, she never called the police. 6 RP 1146-47. She was afraid that Anderson would “come back and do something to me.” 6 RP 1148. In fact, in the days after September 23, 2002, whenever Conner was alone in her house, she put pieces of furniture up against the locked front door “to make sure nobody could come into my home.” 6 RP 1148-49.

See also the Statement of the Case for some additional evidence of Anderson’s dangerousness. Clearly, there was sufficient evidence for the jury to find that Whitaker acted under duress. Therefore, the conviction for aggravated murder must be overturned.

**B. IN HIS REBUTTAL CLOSING ARGUMENT, THE PROSECUTOR TOLD THE JURORS THAT DURESS WAS NOT A DEFENSE TO MURDER, ALTHOUGH THE COURT HAD NOT INSTRUCTED THE JURY ON THAT ISSUE**

The prosecutor began his rebuttal argument as follows:

Being afraid is not a defense to the crime of murder in the state of Washington. You can check that packet of

instructions you have from top to bottom. You won't see it there. Because in the state of Washington duress is not a defense to murder. If it was, Judge Krese, wearing the black robe, she's been doing this for years, she would have given you that instruction. It is not a defense. And rightfully so. Because why should one person place the value of a life more value than the life of another person? It's not a defense.

6/2/16 RP 2765.

This argument violated due process because the court never instructed the jury regarding duress. The Washington Supreme Court case of *State v. Davenport*, 100 Wn.2d 757, 675 P.2d 1213 (1984), is directly on point.

Davenport was charged with burglary of a residence. The evidence showed that two other people were involved. The prosecutor did not request an instruction on accomplice liability and none was given. *Id.* at 758. In closing argument defense counsel noted that if one of the other participants went into the home and handed out stolen property to Davenport, the defendant would not be guilty of the crime charged. In rebuttal the prosecutor told the jury that it did not matter who entered the house because the defendant would still be guilty as an accomplice. *Id.* at 758-59.

Although the prosecutor's discussion of accomplice liability was accurate, it was improper. "Statements by the prosecution or defense to the

jury upon the law, must be confined to the law as set forth in the instructions given by the court.” *Id.* at 760 (citation omitted). The Court reversed because the prosecutorial misconduct violated the defendant’s due process right to a fair trial.

The same analysis applies here. The Court did not instruct the jury on the legal issue of duress. In fact, it rejected such an instruction as it related to the aggravating factors. Yet the prosecutor took it upon himself to explain that doctrine in detail. The violation here was potentially worse than that in *Davenport* because this discussion may not have been completely accurate. As discussed in section A, duress should be a defense to the aggravating factors.

In post-trial motions, the State maintained that the defense invited error in closing argument. The State relied on the defense’s references to Whitaker and other participants being afraid. Again *Davenport* is instructive. In *Davenport*, the State maintained that its comment was not improper because it was invited by the defendant. The Court disagreed. “While the petitioner’s comments in closing argument invited a response, as all closing arguments should, the prosecutor’s response in rebuttal was ‘it doesn’t make any difference actually who went into the house ... they are accomplices.’” The Court noted that an invitation cannot go beyond a pertinent reply and bring before the jury extraneous matters not in the

record. *Id.* at 761, citing *State v. La Porte*, 58 Wn.2d 816, 822, 365 P.2d 24 (1961).

Here, there was nothing improper in the defense argument. Counsel discussed fear of Anderson in the context of the standard for the conspiracy charge. Counsel argued that, for several reasons, there was no agreement between the participants to kill Ms. Burkheimer. One of those reasons was that the participants were not following any plan together, but were merely reacting to the threats and orders Anderson was suddenly throwing at them. See 14 RP 2719-2741. All of that argument was based squarely on the jury instructions regarding conspiracy to commit murder.

But the prosecutor's argument may have led the jury to believe that they could not consider fear at all when deciding whether there was a conspiracy. The jury clearly focused on this issue because they sent out a question asking whether the prosecutor was correct. The court responded that the jurors should review the instructions already given, particularly Instruction 1. CP 512.

During the hearing regarding the jury question, the court repeatedly chastised the prosecutor for improperly discussing the law of duress when there was no instruction on that subject. 15 RP 2803-18.

The defense first raised this matter as a reversible issue in its motion for new trial at CP 387. The trial court denied relief because the defense did not timely object. CP 92-94.<sup>4</sup>

This Court should review the error, however, because the prosecutor's conduct was so flagrant and ill-intentioned that no instruction could have cured the prejudice. See *In Re Glassman*, 175 Wn.2d 696, 704, 286 P.3d 673 (2012).

Here, the misconduct was clearly intentional rather than inadvertent. As the defense pointed out, "the Snohomish County Prosecutor's office obviously brought their A team to this case." 16 RP 3090. One of the prosecutors had handled prior trials involving the Burkheimer murder before this one. And "the prosecutor who did the argument is undoubtedly one of the finest prosecutors on the Snohomish County Prosecutor's Office staff." 16 RP 3090. Thus, the prosecutor must have been aware of the elementary rule that an attorney can argue only the law that has been set out in the judge's instructions.

The right to a fair trial is a fundamental liberty secured by the Sixth and Fourteenth Amendments to the United States Constitution and article I, section 22 of the Washington

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<sup>4</sup> The court's Finding of Fact 16 flatly states that the defense did not object. The court likely meant to say that no *contemporaneous* objection was made. There is no dispute that the defense did raise this issue in its motion for a new trial.

State Constitution. Prosecutorial misconduct may deprive a defendant of his constitutional right to a fair trial.

*In Re Glassman*, 175 Wn.2d at 703-04 (internal citations omitted).

In order to prevail on a claim of prosecutorial misconduct, a defendant is required to show that in the context of the record and all of the circumstances of the trial, the prosecutor's conduct was both improper and prejudicial. *Id.* at 704. Prejudice is not analyzed by weighing the evidence, but rather by considering the likely effect on the jury. The *Glassman* Court described the closing moments of a trial as "critical."

The same is true here. The prosecutor's comments effectively told the jury that their argument against the conspiracy charge was invalid. This likely affected the verdict on that count.

Thus, the court's Finding of Fact 18 that the error was not sufficiently prejudicial was erroneous. In any event, the analysis of prejudice is actually a conclusion of law, and is therefore reviewed *de novo*.

Whitaker also disagrees with Finding of Fact 17 that the prosecutor did not misstate the law. As discussed in section B, the court should have instructed the jury that duress a defense to aggravating factors.

C. THE SEQUENCE OF EVENTS INVOLVING JUROR NO. 2 RESULTED IN SEVERAL VIOLATIONS AND IRREGULARITIES

1. Relevant Facts

After deliberations began, Juror No. 2 refused to deliberate any longer. 15 RP 2820. According to the court's law clerk, the juror buzzed for the clerk and then immediately said he needed to be excused. The clerk said: "Come with me" and then took the juror into a conference room with a closed door so they could have a discussion away from the other jurors. 15 RP 2825.

Whitaker disputes the court's Finding of Fact 29, which states that Juror No. 2 essentially separated himself and refused to rejoin the jury. But it clearly was the law clerk who decided that the juror should be moved to a separate room. Further, it is undisputed that Juror No. 2 did join the other jurors in the jury room by the next day. 15 RP 2882-83.

Without consulting the judge or the parties, the clerk decided to talk to the juror separately in the conference room away from the rest of the jury. According to the clerk,

[Juror No. 2] basically said that he didn't think the defendant was getting a fair trial, and he wanted to be excused. And he did start to get into specifics of the deliberations, and I told him not to tell me about the specifics of the deliberations. And so I told him to wait in the conference room and I would talk to the judge to figure out what to do about it, and then I brought it to the court's attention.

15 RP 2821. The clerk did not tell the juror to write a note that could be relayed to the judge. 15 RP 2820.

Juror No. 2 also said that he felt everyone was ganging up on him and that the rest of the jury was very friendly and having lunches and exchanging phone numbers, etc., and that made this juror very frustrated. The juror said “I can’t do this anymore.” 15 RP 2824-25. The clerk said that he told the juror not to give specifics, but the juror insisted on doing so anyway.

The judge instructed the law clerk to summon the lawyers back to court. The clerk notified both parties but informed only the prosecutor that a juror was refusing to deliberate. He then realized that “might be unfair because I did not mention it to anyone else.” 15 RP 2822. Because the judge was busy with another trial, the law clerk was apparently on his own when the juror approached him. *Id.*

The parties returned to court where the law clerk first explained what happened. *Id.* The judge said she had never experienced this problem before. The law clerk said the juror gave some specifics. 15 RP 2827. Before the law clerk was allowed to go further, the court took a recess to review the law.

When the hearing resumed, the defense immediately asked for a mistrial. 15 RP 2827. The prosecutor objected. 15 RP 2828. In the

alternative, the defense asked the court to bring the jurors into the courtroom to see whether there was a reasonable likelihood of a verdict. 15 RP 2829. The court denied both motions. 15 RP 2838. Over a defense objection, the court decided to dismiss the jurors for the day. The court had some difficulty in doing that because Juror No. 2 refused to sit with the other jurors. 15 RP 2844.

Contrary to Finding of Fact 34, Whitaker cannot find any portion of the transcript showing that Juror No. 2 was told by the court to return to deliberations and refused to do so.

The next day, the presiding juror sent the following note to the court: “I don’t know what you were told... But a lot of unbelievable things happened in here yesterday. Are we allowed to address them for our safety? Stomachs are turning in here!” See CP 511. The Court then brought the presiding juror into the courtroom. 15 RP 2886. The juror said there were some accusations among the jurors yesterday, which she characterized as threats. She believed that one juror was having a hard time following the instructions and that caused stress among the other jurors.

The court then brought all the jurors into the courtroom. 15 RP 2897. When the court asked the presiding juror whether there was a reasonable probability of the jury reaching a verdict within a reasonable

time, the juror did not answer. 15 RP 2898. When asked whether there was a reasonable probability of the jury reaching a verdict within a reasonable time with regard to *any* count, the juror said yes. The court then told the jurors to continue their deliberations. (The wording of Finding of Fact 43 is a bit confusing as written, but there does not appear to be any dispute that the above paragraph is accurate.)

At this point, the State said it would not object to the defense motion for a mistrial. 15 RP 2899. The defense asked the court to reserve ruling on the mistrial motion. *Id.*

The next day, Juror No. 2 rejoined the other jurors for deliberations. 15 RP 2882-83. This continued until Juror No. 2 was taken away by ambulance due to a heart attack. 15 RP 2904. The State then withdrew its agreement to a mistrial and asked for an alternate juror to be brought in. 15 RP 2905-06. The next day, Juror No. 2 still appeared to be incapacitated; the court then replaced him with an alternate juror. 15 RP 2912-19.

After the verdict, Juror 2 provided a declaration. CP 371-74. It reads, in part, as follows:

3. On Thursday, June 23, 2016, after the presentation of the Dr. Thiersch's testimony and the viewing of the autopsy photos of Ms. Burkeimer, the jury convened in the jury room. One of the jurors was crying and stated to the whole group: "I hope they fry the fucking bastard." The

majority of the jurors verbally agreed with this sentiment. Based on this comment and the reaction of the other jurors to it, it was clear to me that some of the jurors had decided to find Mr. Whitaker guilty before the jury was instructed was instructed by the judge and before the jury heard closing arguments.

4. Once the jury began deliberating, it became clear that I was one of only a few jurors who did not favor finding Mr. Whitaker guilty of all of the charges.

5. In particular, I was skeptical that the prosecution had proved the element of premeditation for first-degree murder or that the prosecution had proved the intent required for the conspiracy charge.

6. Throughout the proceedings, I believe that I faithfully followed the judge's instructions, but my assessment of the strength of the state's evidence was different than the other jurors.

7. I told the jury on Tuesday, June 28 that I would not change my honestly held views of the strength of the evidence just to reach an agreement.

8. I told the jurors that I thought we had a hung jury and that the only way that agreement would be reached is to remove me from the jury.

9. I was threatened by other members of the jury.

10. At one point, during a discussion of duress, one of the jurors mentioned what would happen if my legs were broken. I took this to be a threat against me.

11. I believe that these threats were because of my views of the evidence that were different than the majority of jurors and because my firmly holding on to my views was preventing the other jurors from returning unanimous guilty verdicts on all charges and the aggravating circumstances.

12. At one point, I felt so threatened by the other jurors that I buzzed for the law clerk, Michael Nelson.

13. Mr. Nelson answered the door and took me to a different room where I stayed alone for the rest of the day.

14. While I was there, I met alone with Mr. Nelson approximately three to four times.

15. During these meetings, I told Mr. Nelson that I was being ganged up on by the other jurors and that I did not think Mr. Whitaker was getting a fair trial. During the trial and deliberations, I did not receive any outside information about the case. My belief that Mr. Whitaker was not getting a fair trial stemmed from my disagreement with the other jurors about the sufficiency of the state's evidence on certain points.

16. During these meetings, I expressed to Mr. Nelson my concern that I was being threatened by the other jurors because of my views of the evidence and that I feared for my safety.

17. At one point, I asked Mr. Nelson whether I needed to hire a lawyer to represent me and protect me regarding these threats.

18. At one point, I asked Mr. Nelson if I should call the police or 911 to protect myself.

19. I told Mr. Nelson that I wanted to talk to the judge.

20. Mr. Nelson told me that he could not give me legal advice.

21. During these meetings with Mr. Nelson, I related my concerns about the threats to me and the threats of having my legs broken.

22. I also expressed to Mr. Nelson about other concerns about the jurors being too familiar with one another, such as selling one another their products.

23. When we came back on Wednesday, June 29, we discussed the evidence and the various counts again.

24. I expressed my view that I believed that the jury was hung and that we would not reach an agreement.

25. One of the jurors told me I was a “selfish fucking bastard” and ran into the bathroom crying.

26. On Wednesday, the pressure on me became too great. I began having chest pains, pain in my left arm, and my face became numb. It was then I requested medical attention.

27. I firmly believe that this episode occurred because of the distress caused by my status as a holdout juror.

In post-trial motions, the State requested an opportunity for factual development. 16 RP 2939. The court ultimately agreed to interview the jurors in open court. 16 RP 2954. The State’s position was that it was proper to question the jurors about whether threats were made, but that the jurors could not reveal how those threats affected the verdict. 16 RP 2965-66.

The court granted the prosecutor’s request for a post-verdict hearing. Juror No. 2 testified consistently with his declaration. 16 RP 2978-92. After hearing from the juror, the court noted that it was inclined to accept the truth of his declaration. 16 RP 2985.

The court heard from the rest of the jurors. Among other things, the hearing revealed that one of the jurors said to the others, “I hope they fry the fucking bastard.” Seven of the jurors confirmed that they heard that

comment or something similar. Several of them agreed that this was directed at the defendant. 16 RP 2980, 3011, 3017-18.

This sequence of events led to several reversible errors. All of these issues were raised by the defense in their motion for a new trial. See CP 390-407.

2. Violation of Criminal Rule 6.15

First, the law clerk's interactions with Juror No. 2 violated CrR 6.15, which requires that all questions submitted by the jurors during deliberations shall be in writing.<sup>5</sup> The reason for this rule is clearly to ensure that an accurate record is made of the jurors' questions and comments. The parties and the trial court can then determine the appropriate response.

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<sup>5</sup> CrR 6.15 states in pertinent part:

(1) The jury shall be instructed that any question it wishes to ask the court about the instructions or evidence should be signed, dated and submitted in writing to the bailiff. The court shall notify the parties of the contents of the questions and provide them an opportunity to comment upon an appropriate response. Written questions from the jury, the court's response and any objections thereto shall be made a part of the record. The court shall respond to all questions from a deliberating jury in open court or in writing. In its discretion, the court may grant a jury's request to rehear or replay evidence, but should do so in a way that is least likely to be seen as a comment on the evidence, in a way that is not unfairly prejudicial and in a way that minimizes the possibility that jurors will give undue weight to such evidence. Any additional instruction upon any point of law shall be given in writing.

Here, the law clerk's contact with Juror No. 2 and the remaining jurors was undocumented, uncontrolled, and undertaken without the opportunity for the parties to offer any objections and suggestions to the trial court on the best course of action.

Considerable time went by before the matter was taken to the judge. After Juror No. 2 buzzed for the law clerk, the clerk took the juror to a different room where he remained for the rest of the day. During that time, Juror No. 2 met with the law clerk three or four times. Juror No. 2 discussed the deliberations although the law clerk apparently tried to stop him. To Juror No. 2's credit, he asked to speak to the judge. That would have been a proper procedure as long as the discussion was on the record and in an open courtroom with the defendant and the parties present.

In view of these problems, Whitaker assigns error to Findings of Fact 30-33 which purport to set out the actions of the law clerk. Because the proper procedures were not followed, it is impossible to know what went on.

3. Violation of the Federal and State Constitutional Rights to an Open and Public Trial

The state and federal constitutions protect a defendant's right to an open and public trial under the Sixth Amendment and Const., art. I, § 22.

The public trial right extends beyond the taking of a witness's testimony at trial. See, e.g., *Press-Enterprise Co. v. Superior Court*, 478 U.S. 1, 13, 106 S.Ct. 2735, 92 L.Ed.2d 1 (1986) (preliminary hearing); *Presley v. Georgia*, 558 U.S. 209, 130 S.Ct. 721, 175 L.Ed.2d 675 (2010) (voir dire); *Seattle Times Co. v. Ishikawa*, 97 Wn.2d 30, 37-39, 640 P.2d 716 (1982) (hearing on pretrial motion to dismiss).

To balance the public trial right and other competing rights and interests, the Washington Supreme Court has set out a five-part test:

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

*State v. Bone-Club*, 128 Wn.2d 254, 258-59, 906 P.2d 325 (1995). The federal standard is similar. See *Waller v. Georgia*, 467 U.S. 39, 46, 49, 104 S.Ct. 2210, 81 L.Ed.2d 31 (1984).

Failure to conduct a *Bone-Club* analysis before ordering a courtroom closure is structural error which requires automatic reversal. *State v. Wise*, 176 Wn.2d 1, 17-19, 288 P.3d 1113 (2012). The public trial right is violated when the Court discusses a juror's concerns regarding safety in a closed setting. *State v. Lam*, 161 Wn. App. 299, 254 P.3d 891 (2011).

In this case, several critical and substantive interactions between the law clerk and one of the jurors occurred in a closed, private room not open to the public. The law clerk met privately with Juror No. 2 in a separate conference room three to four times. CP 373 (Declaration of Juror No. 2 at ¶ 14). The juror provided substantive information to the court staff regarding the nature of the deliberations, including that he was being ganged up on by the other jurors, and that the juror did not think Whitaker was getting a fair trial. *Id.* (¶ 15). The juror informed the court staff that he was being threatened by the other jurors, and inquired as to whether he needed a lawyer to protect him, or whether he should call 911 to protect himself. *Id.* (¶¶ 16-21).

These interactions cut to the very heart of the deliberations of the jury, and safety concerns raised by the defense holdout juror. There was no *Bone-Club* analysis and no waiver by the defendant. Indeed, the defendant and defense counsel were not aware that these interactions were

even occurring. These interactions violated the defendant's state and federal constitutional rights to open and public court proceedings.

4. Violation of Defendant's Constitutional Right to Be Present

A criminal defendant has a right to be present at all critical stages of a trial, under the Sixth Amendment and Const., art. I, § 22. *Rushen v. Spain*, 464 U.S. 114, 117, 104 S.Ct. 453, 78 L.Ed.2d 267 (1983); *State v. Rice*, 110 Wn.2d 577, 757 P.2d 889 (1988). This right extends to a juror's questions to the court, as noted in the Comment to WPIC 151.0:

Question from deliberating jury—Presence of counsel and defendant. A defendant has a constitutional right to be present at every stage of a trial. This includes the right to be present for communications between the court and jurors after deliberations have begun. *See State v. Rice*, 110 Wn.2d 577, 757 P.2d 889 (1988).

Here, the communication with Juror No. 2 and the law clerk took place in a private conference room, in the absence of counsel and a court reporter. The interactions between the court staff and the defense holdout juror were not logistical or *de minimis*. Rather, the two had substantial discussions regarding threats Juror No. 2 was receiving from the other jurors, Juror No. 2's status as a holdout defense juror, and Juror No. 2's inquiries regarding obtaining a lawyer or law enforcement assistance. Thus, Whitaker's right to presence was violated.

5. The Sequence of Events on June 28, June 29, And June 30 Was So Irregular that It Violated Whitaker's Rights to Due Process, and to A Unanimous and Impartial Jury

Separating the defense holdout juror from the remaining 11 jurors conveyed to the remaining 11 jurors that there was something wrong with Juror No. 2's position. See *State v. Elmore*, 155 Wn.2d 758, 772, 123 P.3d 72 (2005) ("the reconstituted jury may be left with the impression that the trial judge prefers a guilty verdict"). The court's finding that Juror No. 2's separation could not have led the other jurors to believe that something was wrong with Juror 2's views on the evidence is clearly a legal conclusion. Finding of Fact 38. Supp. CP\_\_.

Additionally, it is clear that Juror No. 2's health issues stemmed directly from his status as the defense holdout juror and the stress and threats he received from the other jurors: "I firmly believe that this episode occurred because of the distress caused by my status as a holdout juror." CP 374 (Declaration of Juror No. 2 at ¶ 27).

All of this stemmed from Juror No. 2's fundamental disagreement with the remaining jurors over the sufficiency of the State's evidence on certain points.

"[W]here the record shows any reasonable possibility that the impetus for a juror's dismissal stems from his views on the merits of the case, the dismissal is error." *Elmore*, 155 Wn.2d at 773 (quoting *State v.*

*Elmore*, 121 Wn. App. 747, 756, 90 P.3d 1110 (2004)). See also *State v. Berniard*, 182 Wn. App. 106, 123, 327 P.3d 1290 (2014). Here, it is clear that Juror No. 2's dismissal was related to his views on the merits of the case and his status as a holdout juror. Accordingly, his excusal was error.

All of these issues could have been avoided. According to the law clerk's own testimony, when he came to the door of the jury room Juror No. 2 simply said, "I need to be excused." At that point, the law clerk should have told the juror to put his request in writing so the judge could take up the matter with the parties.

That the error in this case was due to the actions of the law clerk makes no difference. Washington law is clear that all actions of a bailiff<sup>6</sup> are imputed to the trial judge:

The bailiff works under the control and supervision of the judge. When a judge delegates part of the judge's official duties to a bailiff, the bailiff becomes in effect the alter ego of the judge; the actions of the bailiff are the actions of the judge and the shortcomings of the bailiff are the shortcomings of the judge.

*Adkins v. Clark Cty.*, 105 Wn.2d 675, 678, 717 P.2d 275 (1986) (internal citations omitted). Indeed, "[t]he duty imposed upon the bailiff, as a judicial officer, is a judicial duty..." *Id.* at 678-79. Accordingly, here, the actions of the law clerk should be viewed as if the judge herself had gone

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<sup>6</sup> Here, the court's law clerk also served as the "bailiff" or custodian of the jury.

to the door of the jury room, asked Juror No. 2 to “come with me,” escorted Juror No. 2 to a separate conference room, and sat with Juror No. 2 during a private meeting during which Juror No. 2 provided substantive information regarding the deliberations. Obviously, that would not be proper.

The entire sequence of events with Juror No. 2 is so irregular that it violates Whitaker’s right to a fair trial, a unanimous and impartial jury verdict under the Sixth Amendment and Const., art., I §§ 21, 22, and his right to due process under the Fourteenth Amendment and Const., art., I § 3.

Accordingly, this Court should reverse.

**D. A JUROR VIOLATED THE COURT’S INSTRUCTIONS NOT TO DISCUSS THE CASE OR MAKE A DECISION BEFORE THE CASE WAS SUBMITTED TO THEM. THE JUROR STATED, IN THE PRESENCE OF THE OTHER JURORS, “I HOPE THEY FRY THE FUCKING BASTARD.”**

On June 23, 2016, after the presentation of Dr. Thiersch’s testimony, the jury convened in the jury room. After viewing the autopsy photos of Ms. Burkheimer, one of the jurors was crying and stated to the whole group: “I hope they fry the fucking bastard.” According to Juror No. 2, the majority of the jurors verbally agreed with this sentiment. CP 371 (Declaration of Juror No. 2 at ¶ 3). In particular, one juror said, “instead of Ms. Burkheimer in the hole, if it would have been the

defendant in the hole, nobody would have cared.” 16 RP 2990. Whitaker therefore disputes Finding of Fact 53, which states that no other juror voiced agreement with the notion that Mr. Whitaker deserved death.

The post-verdict hearing showed that seven jurors acknowledged hearing the comment or something similar to those words. This shows that at least one juror found Mr. Whitaker’s guilt prior to hearing the court’s instructions or the parties’ closing arguments; and (2) that the juror likely prejudiced the others.

*United States v. Resko*, 3 F.3d 684, 689-90 (3d Cir. 1993), sets out clearly and concisely the reasons why premature decisions are unlawful.

There are a number of reasons for this prohibition on premature deliberations in a criminal case. *See generally* Lillian B. Hardwick & B. Lee Ware, *Juror Misconduct* § 7.04, at 7-27 (1988). First, since the prosecution presents its evidence first, any premature discussions are likely to occur before the defendant has a chance to present all of his or her evidence, and it is likely that any initial opinions formed by the jurors, which will likely influence other jurors, will be unfavorable to the defendant for this reason. *See Commonwealth v. Kerpan*, 508 Pa. 418, 498 A.2d 829 (1985). Second, once a juror expresses his or her views in the presence of other jurors, he or she is likely to continue to adhere to that opinion and to pay greater attention to evidence presented that comports with that opinion. Consequently, the mere act of openly expressing his or her views may tend to cause the juror to approach the case with less than a fully open mind and to adhere to the publicly expressed viewpoint. *See Winebrenner v. United States*, 147 F.2d 322, 328 (8th Cir.1945); *State v. Joyner*, 289 S.C. 436, 346 S.E.2d 711, 712 (1986).

Third, the jury system is meant to involve decisionmaking as a collective, deliberative process and premature discussions among individual jurors may thwart that goal. *See Winebrenner*, 147 F.2d at 329; *Kerpan*, 498 A.2d at 831. Fourth, because the court provides the jury with legal instructions only after all the evidence has been presented, jurors who engage in premature deliberations do so without the benefit of the court's instructions on the reasonable doubt standard. *See Winebrenner*, 147 F.2d at 327. Fifth, if premature deliberations occur before the defendant has had an opportunity to present all of his or her evidence (as occurred here) and jurors form premature conclusions about the case, the burden of proof will have been, in effect, shifted from the government to the defendant, who has “the burden of changing by evidence the opinion thus formed.” *Id.* at 328.

Finally, requiring the jury to refrain from prematurely discussing the case with fellow jurors in a criminal case helps protect a defendant's Sixth Amendment right to a fair trial as well as his or her due process right to place the burden on the government to prove its case beyond a reasonable doubt. *See In re Winship*, 397 U.S. 358, 364, 90 S.Ct. 1068, 1072, 25 L.Ed.2d 368 (1970).

In its preliminary oral instructions to the jury the court included the portion of WPIC 1.01, which states:

Throughout the trial, you must maintain an open mind. You must not form any firm and fixed opinion about any issue in the case until the entire case has been submitted to you for deliberation. As jurors, you are officers of this court. As such, you must not let your emotions overcome your rational thought process.

Clearly the juror violated the admonition to keep an open mind, as well as the requirement to not be overcome by emotion. The juror also

violated the court's instruction stating that jurors should not consider punishment, which was given in writing at CP 483.

The trial court found that the "fry the fucking bastard" comment was made, but held that it could not be considered because it inhered in the verdict. CP 98.

But as the prosecutor noted at the beginning of the post-verdict hearing, testimony regarding juror misconduct may be considered by the court, although the jurors cannot reveal how that affected their thought process.

The policy favoring stable and certain verdicts and the necessity of maintaining the secrecy of deliberation and frank and free discussion by all jurors must yield: (1) if the affidavit(s) of the juror(s) alleges facts showing misconduct, and (2) those facts are sufficient to justify making a determination that the misconduct, if any, affected the verdict.

Affidavits of jurors may be considered only to the extent they do not attest to matters inhering in the verdict. The individual or collective thought processes leading to a verdict "inhere in the verdict" and cannot be used to impeach a jury verdict. *State v. Ng*, 110 Wn.2d 32, 43, 750 P.2d 632 (1988).

*Richards v. Overlake Hosp. Med. Ctr.*, 59 Wn. App. 266, 271-72, 796 P.2d 737, 741-42 (1990). See also *State v. McChesney*, 114 Wash. 113, 116, 194 P. 551 (1921) ("It will be observed that the affidavits upon which appellant relies purport to state facts constituting misconduct, and do not attempt to state what effect this alleged misconduct had upon the jury, and

therefore do not come within the rule that a juror will not be heard to impeach his own verdict.”).

Although the court did not find that the other jurors agreed with the one who said “fry the fucking bastard,” it did note that some jurors attempted to comfort the juror who made the comment and that others were emotionally affected by the autopsy photographs. CP 98.

The court mistakenly believed that *State v. Hatley*, 41 Wn. App. 789, 706 P.2d 1083 (1985), and *Tate v. Rommel*, 3 Wn. App. 933, 478 P.2d 242 (1970), negated Whitaker’s claim.

Neither *Hatley* nor *Tate* ruled that misconduct of the nature here was foreclosed under all circumstances. Rather, both courts based their decision on the misconduct being insufficiently prejudicial. *Hatley* 41 Wn. App. at 794; *Tate* at 3 Wn. App. at 947-48. Those findings were based in part on the fact that in both those cases the jurors’ comments were made to third parties not involved in the litigation. *Hatley* at 792; *Tate* at 934. Here, however, the improper comment was made in the jury room and other jurors heard the comment. That raised the likelihood that the other jurors were prejudiced by the comment.

Further, the juror’s comment in this case was far more inflammatory than the ones in *Hatley* and *Tate*. *Hatley*, 41 Wn. App. at 792 (“Hamernik told him that he was sitting on a jury and that the

defendant on trial was ‘guilty as sin.’); *Tate*, 3 Wn. App. at 934 (“Cyrus made certain comments concerning the trial, consisting of statements that, ‘Tate certainly was hurt’; ‘We (you) should just see him and we (you) would believe that he was hurt’; and ‘He certainly believed that Rommel should have to pay Tate’ because of the injuries.”).

While such offhand comments might not suggest that the juror had made up his mind before closing arguments and deliberations, the same is not true here. The juror’s emotional and profane outburst showed that she had formed an abiding belief that Whitaker should face the harshest possible penalty.

The court’s Finding of Fact 56 stating that, according to Juror No. 2, the opinions of the jury were swayed back and forth during the case, is misleading. Supp. CP \_\_\_\_\_. Juror No. 2 acknowledged that earlier in the testimony the other jurors were swayed back and forth. But before deliberations began all the jurors except Juror No. 2 had a fixed opinion of guilt. This was related to the “fry the bastard” comment. 16 RP 2991-92.

The court’s Finding of Fact 57 that there was no evidence that any juror was biased or had a fixed opinion is clearly a conclusion of law. It is up to this Court to decide objectively whether the jurors were likely biased by the “fry the fucking bastard” comment. Supp. CP \_\_\_\_\_.

This Court should find that the misconduct was prejudicial in violation of Whitaker's right to due process and to a unanimous and impartial jury verdict.

E. THE TRIAL COURT ABUSED ITS DISCRETION UNDER ER 403 AND VIOLATED THE FEDERAL AND STATE DUE PROCESS CLAUSES WHEN IT PERMITTED GRUESOME AND INFLAMMATORY PHOTOGRAPHS TO BE SHOWN TO THE JURY. AND THERE WAS LITTLE PROBATIVE VALUE BECAUSE THE DEFENSE STIPULATED THAT IT WOULD NOT DISPUTE THE MANNER OR CAUSE OF DEATH IN ANY WAY.

In pretrial motions in limine, the defense moved to exclude gruesome autopsy photos. CP 1219. The State's position was essentially that it could admit whatever evidence it pleased even if there was no dispute regarding the manner and means of death. 1 RP 82-84. The defense relied on ER 403 which reads as follows:

Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

The defense stipulated that it would not question in any way the validity of the medical examiner's testimony, or the testimony of any other witness called to discuss the condition of Ms. Burkheimer after her death.

In view of that, there would be little or no probative value of the

photographs beyond what the jury learned from the State's witnesses.

And the unfair prejudice would be very high. 1 RP 84-87.

Let[']s be clear. They want to shock the jury because it prejudices the jury unfairly.

There's not going to be any issue at the end of this trial that this was a brutal murder. There is not going to be any issue at the end of this trial that these injuries were suffered by Rachel Burkheimer prior to her death. We will stipulate to every single one of those injuries and every single fact.

The state says it's robbed of its evidentiary value . . . What they really mean is that it's so repulsive to show the autopsy photographs and the decomposition photographs, that they will shock the jury and they will be more likely to convict John Whitaker. That's what they're trying to do.

1 RP 90.

The State insisted that the defendant's agreement to the State's testimony had no bearing on the State's purported right to present additional evidence, no matter how inflammatory it might be. 1 RP 88-89.

The judge admitted all the autopsy photos presented by the State. 3 RP 431. See Exhibits 47-61, Supp. CP \_\_\_\_.

Forensic pathologist Norman Thiersch testified that he took photos during the autopsy to document the body and the injuries. 13 RP 2510. He discussed each of the exhibits in detail. 13 RP 2529-72. The court did not immediately rule that they could be shown to the jury. True to its word, the defense did not cross-examine Dr. Thiersch. 13 RP 2453. "We are offering to stipulate to every fact that Dr. Thiersch testified to as to the

cause, manner, and circumstances.” 13 RP 2453. More broadly, counsel pointed out there was no suggestion that any of the injuries were inconsistent with the testimony of witnesses. The defense would not argue, for example, that any witnesses were lying when they said the victim was punched or was hit with a shovel. 13 RP 2454.

Further, the defense objected

for the simple reason that everyone in the courtroom knows that these photos have a profound emotional impact on most people who see them, except perhaps a medical examiner...it creates an emotional impact and a high danger of prejudice to the defendant who is on trial, because most people have never seen the type of photograph before.

And when they see a person's deceased body, when they see it's been dissected, when they see that there are bullet wounds in it, when they see that it has been in the ground for a period of time and has gone to decay, these are things that most people have never really seen, and they're quite emotionally disturbing...and that's why the prosecutor wants them, not because at the end of the case they're going to argue that Mr. Whitaker is more likely to be guilty because there's a particular photo here that shows that Dr. Thiersch was right about the ecchymosis or the binding or the bludgeoning of Ms. Burkheimer when she was found.

13 RP 2455-56.

In his first appeal, *State v. Whitaker (Whitaker I)*, 133 Wn. App. 199, 227, 135 P.3d 923 (2006), this Court held that the trial court was within its discretion to admit the autopsy photographs. The analysis is different in this appeal, however, because the defense stipulated that it

would not question any testimony from witnesses relating to the gruesome photographs.

As this Court recognized in *Whitaker I*, gruesome photographs are admissible only if their probative value outweighs the prejudicial effect. *Id.* at 227. That standard is based on ER 403 cited in full above. In view of this rule,

[P]rosecutors do not have “carte blanche to introduce every piece of admissible evidence” when the cumulative effect of that evidence is inflammatory and unnecessary. *Crenshaw*, 98 Wn.2d at 807, 659 P.2d 488; see *State v. Sargent*, 40 Wn. App. 340, 698 P.2d 598 (1985) (abuse of discretion to admit four autopsy photographs when only one helped to show premeditation, and testimonial evidence and diagrams could have revealed the same information in a nonprejudicial manner).

*Whitaker I*, 133 Wn. App. at 227. As this Court said, “the photographs are indeed gruesome and disturbing.” That is true in part because the victim had been in the ground a long time, causing her skin to decompose. For example, Exhibit 49 shows Ms. Burkheimer’s bloody face in close-up, with her skin clearly peeling away.

These pictures are clearly shocking and inflammatory. Yet as the defense pointed out, they had little or no probative value. There was no dispute that: the victim incurred beatings on September 23, 2002, prior to her death; that later that day she was killed when Anderson shot her multiple times in the hills off Reiter Road; that she was placed in a

shallow grave; and that her body was unearthed by law enforcement on October 4, 2002.

If the prosecutor truly believed that any corroboration was necessary on these points, the testimony of Dr. Thiersch amply sufficed. All the jurors learned from viewing the photos was that a corpse looks absolutely disgusting when it has been in the ground a long time. The photos added no probative value at all. The prosecutors clearly pushed for the photos for the purpose of shock value.

And they got it. As discussed above in the issues regarding Juror No. 2, immediately after seeing the photos one of the jurors came into the jury room crying, "I hope they fry the fucking bastard." Other jurors agreed with that sentiment. This clearly shows that the photos inflamed the jurors. That is another reason why this Court's ruling should be different this time around. The Court should reverse based on the abuse of discretion and the violation of due process.

**F. THE PROSECUTOR VIOLATED MR. WHITAKER'S FIFTH AND SIXTH AMENDMENT RIGHTS BY INFORMING THE JURY THAT WHITAKER DID NOT WAIVE HIS RIGHTS AFTER BEING GIVEN *MIRANDA* WARNINGS**

In the State's case-in-chief the lead detective testified that he and his partner brought Whitaker back to Washington from California. The prosecutor then elicited the following from the detective:

Q. When you made contact with John Whitaker in California -- do you remember when it was that you made contact with him, what date?

A. It was on October 24th.

Q. Prior to you having a conversation with him, did you advise him of his rights?

A. I did.

Q. Did you advise him of his rights from memory or from some document?

A. From a card I carry with me in my pocket.

Q. Is that a card that you carry with you when you're working?

A. It is.

Q. Do you have it with you today?

A. Yes.

Q. Can you read in the record the rights you advised John Whitaker of that day.

A. The rights that I read to him is, you have the right to remain silent. Anything you say can be used against you in a court of law. You have the right at this time to talk to a lawyer and to have him present with you while you are being questioned. If you cannot afford to hire a lawyer, one will be appointed to represent you before any questioning if you wish. You can decide at any time to exercise these rights, not answer any questions, or make any statements.

Q. Did John Whitaker waive those rights and speak with you that day?

A. No.

13 RP 2478-79.

Defense counsel promptly objected and the Court sustained the objection and told the jury to disregard the detective's answer. 13 RP 2479-80.

At the request of the defense, the Court sent the jury out. Defense counsel maintained that striking the answer was not a sufficient remedy. 13 RP 2480. He asked for a mistrial. 13 RP 2481. The prosecutor maintained that he accidentally mixed in his mind two different requests to speak with Whitaker. In California, Whitaker briefly spoke with Detective Pince. 13 RP 2479. The Court reserved judgment. 13 RP 2482.

With the jury back, Pince explained that he briefly spoke with Whitaker in California. Whitaker said that Anderson should step up and admit his responsibility for the crime. 13 RP 2482-83.

This issue was litigated as part of the defense motion for a new trial. The trial judge agreed that there was constitutional error but found it to be harmless beyond a reasonable doubt. CP 91-92.

In *Doyle v. Ohio*, 426 U.S. 610, 611, 96 S.Ct. 2240, 49 L.Ed.2d 91 (1976), the U.S. Supreme Court concluded "that use of the defendant's post-arrest silence in this manner violates due process." More recently, in *State v. Romero*, 113 Wn. App. 779, 54 P.3d 1255 (2002), our Court of Appeals dealt with facts similar to those in this case.

In *Romero* a police officer testified that he brought Romero into the station and put him in the holding cell because he was somewhat uncooperative. The officer then said: “I read him his *Miranda* warnings, which he chose not to waive, would not talk to me.”

The Court set out the basic principles as follows:

Mr. Romero’s right to silence is derived from the Fifth Amendment, applicable to the states via the Fourteenth Amendment, and Article I section 9 of the Washington Constitution. *State v. Easter*, 130 Wn.2d 228, 238, 922 P.2d 1285 (1996). In Washington, a defendant's constitutional right to silence applies in both pre and post-arrest situations. *Easter*, 130 Wn.2d at 243, 922 P.2d 1285. In the post-arrest context, it is well-settled that it is a violation of due process for the state to comment upon or otherwise exploit a defendant’s exercise of his right to remain silent.

*Id.* at 786-87. See also *State v. Easter*, 130 Wn.2d 228, 241, 922 P.2d 1285 (1996) (stating that the defendant’s “right to silence was violated by testimony he did not answer and looked away without speaking” when questioned by an officer).

In *Romero*, the Court adopted a two-part analytical framework. When, as here, the comment is direct, constitutional error exists that requires a constitutional harmless error analysis. Only when the comment is indirect does the court have to consider further factors. *Id.* at 790.

The *Romero* Court considered the comment in that case to be a direct comment. *Id.* at 793. There is no meaningful difference between the

comment in this case and the comment in *Romero*. If anything, the detective's comment here was more substantial because he spent considerably more time discussing the *Miranda* rights before revealing that Whitaker did not waive them.

Notably, in the *Romero* case, as in this case, the prosecutor did not attempt to exploit the comment on silence. *Id.* at 794. Nevertheless, the court found that the error was not harmless beyond a reasonable doubt. *Id.* at 795.

The Court of Appeals also reversed a conviction where an officer testified that he had read the defendant his *Miranda* rights and the defendant refused to talk to him and wanted an attorney. *State v. Curtis*, 110 Wn. App. 6, 9, 13-16, 37 P.3d 1274 (2002). This Court reasoned that although the State did not "harp" on the officer's testimony, the "question and answer were injected into the trial for no discernable purpose other than to inform the jury that the defendant refused to talk to the police without a lawyer." *Id.* at 13-14.

Similarly in *Douglas v. Cupp*, 578 F.2d 266 (9th Cir. 1978), the testimony was as follows:

Q. Who arrested Mr. Douglas?

A. I did.

Q. Did he make any statements to you?

A. No.

Prosecutor: That's all the questions I have.

*Id.* at 267 (quoting Trial Tr. at 158-159).

The Ninth Circuit reasoned such testimony was forbidden under *Miranda v. Arizona*, *supra*, and *Doyle v. Ohio*, *supra*. *Douglas*, 578 F.2d at 267. The *Douglas* court also noted that the prosecutor “purposefully elicited the fact of silence in the face of arrest.” *Id.* “The introduction of such testimony acted as an impermissible penalty on the exercise of the petitioner’s right to remain silent.” *Id.* Further:

*While perhaps inadvertent*, the placement of the suspect question at the end of the arresting officer’s testimony gave it a prominence which it would not have had, had it simply been recounted as part of a description of the events culminating in the petitioner’s arrest. Thus it is plausible to suppose that a juror might have inferred from the offending testimony that the petitioner was guilty of the crime charged, and that his alibi was a later fabrication and without foundation.

*Id.* (emphasis added). Similarly, in this case, it should not matter whether the detective’s or the prosecutor’s comments were inadvertent.

The sequence of the testimony preceding the comment on silence added to the harmfulness of the error. Just minutes before revealing that Whitaker declined to waive his rights, Detective Pince described how Durham and Rivas cooperated with the investigation.

On October 5, 2002, Detective Pince met with Durham and his lawyer. Durham voluntarily agreed to show his hands so Pince could see whether he had blisters from digging. 13 RP 2468-69. Durham voluntarily led Pince to a location where the gun used in the murder had been disposed. 13 RP 2471. This ultimately enabled the police to recover that gun. *Id.*

Rivas was arrested on October 6, 2002. He likewise showed his hands to Pince even though they revealed incriminating blisters. 13 RP 2469. Several days later, Rivas voluntarily spoke to Pince with his attorney present. 13 RP 2472. Rivas took Pince to several locations where evidence regarding this investigation could be found. 13 RP 2472-77.

This testimony unfairly juxtaposed the cooperation of two of the co-defendants to show they were far more cooperative than Whitaker. This directly undermined the defense theory that Whitaker's cooperation showed that he was forthright in his statement because he had nothing to hide. Because the prosecution did rely on Detective Pince's testimony regarding Whitaker, Finding of Fact 12 is incorrect. Whitaker also disputes the court's Finding of Fact 14, which states that there is overwhelming evidence of Whitaker's involvement in the crimes charged. As the defense pointed out in closing argument, there were significant questions about the extent of his culpability. In particular, the evidence

that Whitaker joined a conspiracy to murder was quite weak. Further, there were significant questions whether Whitaker was a major participant in the homicide. Also, if the court had given a proper jury instruction, Whitaker likely would have been able to show that the aggravating factor of kidnapping did not apply because it was done under duress.

Thus, the error was not harmless and the convictions must be reversed.

#### G. CUMULATIVE ERROR

“The cumulative error doctrine applies where a combination of trial errors denies the accused a fair trial.” *In re Personal Restraint of Cross*, 180 Wn.2d 664, 690, 327 P.3d 660 (2014).

Here, there is no dispute that several constitutional and statutory violations took place. First, the prosecutor told the jury that duress was not a defense to murder although the judge gave no instruction on that. This likely led the jury to believe that the defense closing argument regarding the conspiracy charge was invalid. Second, a juror unquestionably violated the court’s instructions when she blurted out, “I hope they fry the fucking bastard.” This surely must have had an effect on the other jurors. Third, there can be no question that the gruesome photos had a strong effect on the jury with little probative value. Fourth, the prosecutor presented evidence that the defendant did not waive his *Miranda* rights. This must

have impaired the defense position, at least somewhat, that Whitaker was always cooperative and forthcoming. The harm from these four admitted errors clearly requires a new trial even if the Court finds that none of them are sufficiently prejudicial on their own.

Whether any of the issues concerning Juror No. 2 involve error is disputed. But if this Court finds that any or all of the irregularities in that sequence of events amount to error, this Court should consider the additional prejudice.<sup>7</sup>

## VI. CONCLUSION

For the foregoing reasons, this Court should reverse Mr. Whitaker's convictions and remand for a new trial.

DATED this 19th day of July, 2017.

Respectfully submitted,



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Attorney for John A. Whitaker

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<sup>7</sup> The issue regarding a jury instruction on duress for the aggravating factor does not fit with a cumulative error analysis. The Court will either agree that the instruction should have been given and reverse the aggravating factor, or it will reject the claim entirely.

**CERTIFICATE OF SERVICE**

I hereby certify that on the date listed below, I served by First Class United States Mail, postage prepaid, one copy of this brief on the following:

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