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No. 75924-8-I

No. 96777-6

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

STATE OF WASHINGTON,

Respondent,

v.

JOHN ALLEN WHITAKER,

Appellant.

REPLY BRIEF OF APPELLANT

On Appeal From Snohomish County Superior Court
The Hon. Linda Krese, Presiding

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A. ARGUMENT IN REPLY

1. *Mr. Whitaker's Right to Present a Defense Was Harmed By the Trial Court's Failure to Give a Duress Instruction*

a. Looking at the Evidence in the Light Most Favorable to Mr. Whitaker, There Was Sufficient Evidence to Support the Giving of a Duress Instruction

The State argues that there was insufficient evidence to support the giving of duress instructions in this case.[1] The State argues that Mr. Whitaker recklessly associated himself with Mr. Anderson in criminal activities, that Mr. Anderson's antipathy towards Ms. Burkheimer was well-known, and there was no evidence of any threats by Anderson that Mr. Whitaker would reasonably think that if he did not participate in the kidnapping, he would be killed or seriously injured. BOR at 16-23. The State's argument lacks merit.

As argued in the opening brief, the standard for obtaining a duress instruction is quite low. AOB at 16. A person accused of a crime is entitled to have their theory of the case submitted to the jury when there is substantial evidence that supports that theory. *See State v. Harvill*, 169 Wn.2d 254, 259, 234 P.3d 1166 (2010). "When determining if the evidence at trial was

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[1] A copy of the proposed instructions can be found at CP 573-74 and are attached in App. A.

sufficient to support the giving of an instruction, the appellate court is to view the supporting evidence *in the light most favorable to the party that requested the instruction*." *State v. Fernandez-Medina*, 141 Wn.2d 448, 455-56, 6 P.3d 1150 (2000) (emphasis added). "In evaluating whether the evidence is sufficient to support a jury instruction on an affirmative defense, the court must interpret it most strongly in favor of the defendant and must not weigh the proof or judge the witnesses' credibility, which are exclusive functions of the jury." *State v. George*, 146 Wn. App. 906, 915, 193 P.3d 693 (2008) (quoting *State v. May*, 100 Wn. App. 478, 482, 997 P.2d 956 (2000)).[2]

The State's analysis is faulty because it fails to view the evidence in the light most favorable to Mr. Whitaker. Indeed, the State's appellate argument reads like a prosecutor's closing argument in a case where a duress instruction had actually been given. However, the proper analysis at this stage is not whether there was sufficient evidence to sustain a conviction, but

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[2] *See also State v. Havrill*, 169 Wn.2d at 257 n. 1 ("For purposes of this case, we accept Harvill's account as true: the question is whether Harvill introduced evidence that, *if believed by the jury*, would support a duress defense.") (emphasis in original).

whether there was sufficient evidence in the record, from any source,[3] to allow the jury even to consider the duress defense.

The State appears to concede, as it must, that even an implicit threat of harm is sufficient to support a duress instruction. BOR at 17-18 (citing *Harvill*, 169 Wn.2d at 264). In *Harvill*, the Supreme Court reversed a conviction for selling cocaine to an informant where the trial court denied a duress instruction. The defendant requested such an instruction based upon the size difference with the informant[4] and based upon his knowledge that the informant had allegedly caused others physical harm at various points in the past, even though there was no evidence that the informant explicitly threatened the defendant with harm if he did not sell him drugs. *Harvill*, 169 Wn.2d at 256-58.

The trial court denied a duress instruction because the informant never communicated any intent to do Harvill harm, and Harvill's fear was just based on his general knowledge of the informant's past behavior. *Id.* at 259.

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[3] Evidence supporting an affirmative defense can come solely from the State's case at trial. *See State v. George*, 145 Wn.App. at 915-16 (error not to give unwitting possession instruction where evidence of defense came out through testimony of trooper).

[4] The Court noted: "Nolte was 5 feet 10 inches tall and weighed 200 pounds. . . . Harvill was 5 feet 5 inches tall and weighed about 140 pounds." *Harvill*, 169 Wn.2d at 257.

The Supreme Court reversed, cataloging the common law history of duress and concluding:

> But there is no legal authority that requires a "threat" to be an *explicit* threat. The text, history, policy, and judicial interpretations of the duress statute indicate that an implicit threat arising indirectly from the circumstances can suffice to establish a threat.

Id. at 263 (emphasis in original).

While citing *Harvill*, the State does not apply its principles. *See* BOR at 20 ("There was no evidence of any threats that Anderson made to the defendant that would reasonably cause him to believe that if he did not participate in the kidnapping that Anderson was likely to kill or seriously injure him."). Unlike the main case relied on by the State, *State v. McKinney*, 19 Wn. App. 23, 573 P .2d 820 (1978),[5] where the defendant simply stated that he feared his co-defendant might shoot him, *id.* at 24, in this case there was uncontested evidence that Mr. Anderson was inexplicably violent, punching Mr. Whitaker (who was at the time quite young, just 22 years old), brandishing a gun, barking orders, and threatening to kill others. There was also testimony from many witnesses about how afraid they were of Mr. Anderson. *See* BOA at 7-8, 17-18. Given Mr. Whitaker's confession to law

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[5] *See* BOR at 19.

enforcement about his fear of Anderson,[6] seen in the light most favorable to Mr. Whitaker, there was sufficient evidence for a duress instruction to be given to the jury.

The State also argues that such an instruction could be denied on legal grounds alone because Mr. Whitaker supposedly recklessly put himself in a position where he was compelled to participate in the kidnapping and robbery of Ms. Burkheimer. However, although Mr. Whitaker had been aware of Anderson's violent nature, this was the first time that Anderson was violent to Whitaker, when Anderson suddenly started punching Whitaker. At that point, Mr. Whitaker would have reasonably believed that his supposed friend was now was now quite willing to deal with him just as harshly as he had dealt with others.

In its legal analysis regarding "recklessly" placing oneself in a position where one is compelled to commit crimes, the State cites *State v. Healy*, 157 Wn. App. 502, 237 P.3d 360 (2010). BOR at 22. While this Court in *Healy* did recognize out-of-state cases[7] suggesting that "issue of

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[6] Tracking *Harvill*, there was a size difference here as well. *See* Ex. 232 ("Whitaker stated that he was intimidated by Diggy [Anderson] because he was physically much bigger than him.").

[7] And *State v. McKinney*, *supra* (which has already been distinguished on its facts, above).

recklessness can be decided as a matter of law in some cases so that the defendant is not entitled to a duress instruction at all," *id.* at 515, the Court actually followed the Supreme Court's lead in *Harvill* to conclude that the issue of duress was one for the jury, and that ultimately the issue of recklessness should be decided by the jury pursuant to a jury instruction. *Healy*, 157 Wn. App. 515-16. Here too, given the evidence of Mr. Anderson's unexpected violent behavior, the issue of duress was one that properly should have been decided by the jury.

b. There is No Bar to Duress as a Defense to an Aggravating Factor

The State argues that because aggravating factors are "not crimes," and because of the policy against applying duress to murder, the Legislature did not intend that duress be a defense to the aggravating factors that are themselves independent crimes. BOR at 23-27. This argument should be rejected.

On a policy level, the State simply has no response to the argument raised in the opening brief that "[i]f 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." BOA at 14. Mr. Whitaker's moral culpability is certainly much different if he committed kidnapping under duress than the

person who was not so constrained to act.[8] Clearly, it is consistent with the general policy of the criminal code to differentiate between those who commit murder and kidnapping without duress and those who are accomplices to murder but only are involved in kidnappings because of a threat of harm. *See* RCW 9A.04.020(1)(d) (purpose of criminal code is "[t]o differentiate on reasonable grounds between serious and minor offenses, and to prescribe proportionate penalties for each.").

As for the State's argument that aggravating factors are not "crimes," the State ignores key salient features of the statutory scheme in RCW 10.95.020. While some of the aggravating factors are not "crimes," RCW 10.95.020(1) - (10) & (12) - (14), others are clearly defined by means of crimes defined in other portions of the RCW, including RCW 10.95.020(11):

> (11) The murder was committed in the course of, in furtherance of, or in immediate flight from one of the following *crimes*:
>
> (a) Robbery in the first or second degree;
>
> (b) Rape in the first or second degree;

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[8] *See Enmund v. Florida*, 458 U.S. 782, 800,102 S. Ct. 3368, 73 L. Ed. 2d 1140 (1982) ("American criminal law has long considered a defendant's intention -- and therefore his moral guilt -- to be critical to the degree of [his] criminal culpability") (internal quotations omitted).

(c) Burglary in the first or second degree or residential burglary;

(d) Kidnapping in the first degree; or

(e) Arson in the first degree . . .

Emphasis added. The use of the word "crimes" in this statute rebuts the State's arguments.

Secondly, whether RCW 10.95 sets out aggravating factors which simply enhance a sentence for murder or are "crimes" is irrelevant. Under the Sixth Amendment's jury trial right and the Fourteenth Amendment's Due Process Clause, the label the State of Washington has assigned to these elements of aggravated murder is not dispositive. "[T]he relevant inquiry is one not of form, but of effect." *Apprendi v. New Jersey*, 530 U.S. 466, 494, 120 S. Ct. 2348, 147 L. Ed. 2d 435 (2000).[9] *"Premeditated murder in the first degree remains a separate crime from premeditated murder in the first degree with aggravating circumstances.* The aggravating circumstances are the functional equivalent of elements that must be submitted to the jury and

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[9] *See Ring v. Arizona*, 536 U.S. 584, 610, 122 S. Ct. 2428, 153 L. Ed. 2d 556 (2002) (Scalia, J., concurring) ("all facts essential to imposition of the level of punishment that the defendant receives -- whether the statute calls them elements of the offense, sentencing factors, or Mary Jane -- must be found by the jury beyond a reasonable doubt.").

must be proved by the State beyond a reasonable doubt." *State v. Allen*, 1 Wn. App. 2d 774, 781, ___ P.3d ___ (2017) (emphasis added).[10]

In light of this scheme, in the absence of a legislative mandate that duress is *not* available as a defense for the crimes set out in RCW 10.95.020(11), it is apparent that a defendant charged with premeditated murder in the first degree with aggravating circumstances, with the allegation that the murder was committed in the course of the crimes of kidnapping or robbery, has the right to a duress instruction under RCW 9A.16.060.

c. The Remedy is Reversal

An accused person "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." *Harvill*, 169 Wn.2d at 259 (quoting *State v. Williams*, 132 Wn.2d 248, 259-60, 937 P.2d 1052 (1997) (citations omitted)). This right is protected by the Sixth and Fourteenth Amendments. *See State v. Lynch*, 178 Wn.2d 487, 491-92, 309 P.3d 482 (2013) (citing *Faretta v. California*, 422 U.S. 806, 819, 95 S. Ct. 2525, 45 L. Ed. 2d 562 (1975)).[11]

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[10] *See also State v. Green*, 94 Wn.2d 216, 224-30, 616 P.2d 628 (1980) (reversing aggravated murder conviction where there was insufficient evidence to support kidnapping charge that was charged as aggravating circumstance).

[11] The Supreme Court in *Lynch* approved this quote from *Faretta*:

(continued...)

Accordingly, the trial court interfered with Mr. Whitaker's right to control his own defense by failing to instruct on duress. The error was particularly harmful in this case given how the State stressed in its closing argument the issue of how duress was *not* a defense. *See* RP 2764-66. *See also infra* § A(2) (regarding misconduct). The fact that the State chose to concentrate on this issue demonstrates the prejudice caused by the denial of a duress instruction. This Court should reverse the convictions.

2. *The Prosecutor's Misconduct During Closing Requires Reversal*

a. The State Ignores the Power of Its Argument Regarding Duress

The State's position regarding its closing argument that "duress is not a defense" is confusing. It is not clear whether the State's position is that the argument was not misconduct at all, or whether it was improper, but just not sufficiently flagrant and ill-intentioned such that reversal is required without a contemporaneous objection. BOR at 29-36. Ultimately, the State minimizes its misconduct by claiming that the remark was "fleeting," BOR

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[11](...continued)
Although not stated in the [Sixth] Amendment in so many words, the right … to make one's own defense personally[ ] is thus necessarily implied by the structure of the Amendment.

Lynch, 178 Wn.2d at 491-92.

at 36, and also by claiming that the remark was a fair response to the defense argument. BOR 34-36. The State is mistaken.

At the outset, the prosecutor's argument – coming at the very beginning of its rebuttal[12] – was hardly "fleeting" and was certainly not an inadvertent comment that slipped out by accident during a long muddled argument. The prosecutor's remarks (not just one "remark") were flagrant in that they were obviously intentionally thought out and calculated for maximum effect (again, at the beginning of rebuttal).

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[12] The rebuttal began as follows:

> Thank you. Ladies and gentlemen of the jury, you have heard remarks from Counsel and argument on the fact that John Whitaker and all these individuals were just afraid that night. They were just afraid. They did all they did just because they were afraid. They were scared that John Anderson would have done something to them.
>
> 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. . . .
>
> . . .
>
> So there's no fear, because even if there was, it's not a defense to the crime of murder in the state of Washington.

RP 2764-66.

Moreover, the fact that the prosecutor invoked the authority of the judge -- "If it was, Judge Krese, wearing the black robe, she's been doing this for years, she would have given you that instruction." RP 2765 -- gave the argument the aura of legitimacy. *See State v. Davenport*, 100 Wn.2d 757, 764, 675 P.2d 1213 (1984) (overruling of objection "lent an aura of legitimacy to what was otherwise improper argument.").[13] The significance of the argument is evident from the jury question as to whether the prosecutor's argument was "indeed the 'law' in WASH." CP 512. *See State v. Allen*, 182 Wn.2d 364, 378, 341 P.3d 268 (2015) (relying on jury question to show how jury was influenced by improper argument).

Here, it was the State that objected to a duress instruction. RP 2612. Once the trial court decided not to give the instruction, for the State to then to bring up the subject of duress in its closing argument reveals how ill-intentioned its argument was. *See State v. Gregory,* 158 Wn.2d 759, 866, 147

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[13] The reference to Judge Krese borders on misconduct in and of itself. *See also* RP 2695 ("You don't have to find that there is a formal agreement written, because the law tells you, and the judge tells you, and Judge Krese has been doing this for a long time, she gives you the law."). Not only is it wrong to insinuate that a judge who has been on the bench for years would never make a mistake, but the argument is similar to arguments that diminish the jury's responsibility by providing false assurances that there is some additional layer of protection other than the jury's verdict. *See Caldwell v. Mississippi*, 472 U.S. 320, 328-29, 105 S.Ct. 2633, 86 L.Ed.2d 231 (1985). Normally, prosecutors themselves have their own aura of legitimacy. *See State v. Allen*, 182 Wn.2d 364, 380, 341 P.3d 268 (2015). Here, the prosecutor bolstered his own credibility by citing to the judge's black robe.

P.3d 1201 (2006) ("The fact that the State made the motion in limine and then blatantly violated the resulting order strongly suggests that the argument was flagrant and ill intentioned."), *overruled on other grounds in State v. W.R.*, 181 Wn.2d 757, 336 P.3d 1134 (2014).

Nor was the argument about duress in response to any argument of the defense. The word "duress" never appeared in the defense closing argument and defense counsel never invited the jury to acquit his client based upon "duress" nor did he argue that "fear" was an excuse. Counsel did argue that the jury could look at Mr. Anderson's violent behavior to show that Mr. Whitaker was not in any conspiracy, that there was no agreement, there was no shared intent to kill, that Whitaker was not a major participant in the crime, and that Anderson's actions were spontaneous.[14] The defense argument was perfectly proper and in accordance with the instructions.

The State's rebuttal that "duress was not a defense" did not respond to this argument that Mr. Whitaker had no preexisting agreement, did not have any intent to kill Ms. Burkheimer, and was not a major participant.

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[14] *See, e.g.*, RP 2740-41 ("Now, up at Reiter Pit, Mr. Rivas and Mr. Whitaker assisted in digging the hole that would ultimately become a grave. But they didn't do that because they had agreed with anyone to commit First Degree Murder. They didn't do that because they intended that that conduct be performed. The only reason they dug was because Anderson was ordering them to do it.").

Rather, the State's argument improperly introduced into the mix a theory of law for which there was no instruction. This was misconduct which violated Mr. Whitaker's right to due process of law under the Fourteenth Amendment and article I, section 3. Reversal is the remedy.

b. The Prosecutor's Argument Was An Improper Appeal to Passion and Prejudice

The State argues that the deputy prosecutor's persistent references to what Ms. Burkheimer was thinking and feeling during the hours before Mr. Anderson killed her was not improper. Further, the State argues that had only counsel objected, the prosecutor would have known that his argument was improper and could have stopped committing misconduct. BOR at 36-43.

The State recites all of the evidence that supports the inference that Ms. Burkheimer was betrayed by her friends, that she "got scared" when Mr. Jihad cocked a gun in her presence, and that she told Mr. Rivas she feared she would die. BOR at 37-39. Yet, the State does not cite to any evidence in the record to support these repeated arguments: "Imagine what Rachel [Burkheimer] is going through all that time, in the garage at that residence. . . . At this point she must have believed her family would do anything for her . . . What is she thinking? . . . . what is she thinking? What is she feeling? . . . . At that point Rachel must have had a glimmer of hope . . . .What is

Rachel going through? . . . . She is resigned to her fate." RP 2678-79, 2686, 2689.

While it is an element of kidnapping that one abducts another "with intent to inflict bodily injury on the person or to inflict extreme mental distress on that person," BOR at 41 (citing CP 498), that element focuses, not on what is actually felt by the person kidnapped, but rather on the defendant's intent. That the person kidnapped actually suffered extreme mental distress is not an element of the offense under RCW 9A.40.020(1)(d).[15]

Moreover, there was simply no evidence of extreme mental distress actually suffered by Ms. Burkheimer in this case, and certainly no evidence of this distress was relayed to Mr. Whitaker. One would simply have to imagine what it was that Ms. Burkheimer may have been thinking, but it is this imagination that causes the problem. Some people are extremely fatalistic, while still others have consumed substances that interfere with their ability to feel "normal" emotions. The record does not contain any evidence about what Ms. Burkheimer's world view was or whether she was able to feel

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[15] *See State v. Garcia*, 179 Wn.2d 828, 843, 318 P.3d 266 (2014) ("When measuring the level of mental distress intended, the focus must be on the mental state of the defendant rather than the actual resulting distress. This is because kidnapping in the first degree focuses on the intent of the defendant rather than the result on the victim. That the person kidnapped actually suffered extreme mental distress is not an element of the offense.").

"normal" emotions. It is only through a false narrative constructed by the prosecutor by which the jurors were invited to speculate what Ms. Burkheimer was feeling, and this is a type of argument that has been banned. *See* Supplemental Brief of Appellant at 5-8.

The State argues that, had there been an objection, the prosecutor could have ceased his prejudicial arguments. However, this shifting of blame to the defense is meritless. A prosecutor is "a quasi-judicial officer." *State v. Monday*, 171 Wn.2d 667, 676, 257 P.3d 551 (2011). "Defendants are among the people the prosecutor represents. The prosecutor owes a duty to defendants to see that their rights to a constitutionally fair trial are not violated." *Id.* This means that even if there is not an objection (i.e. even if the prosecutor tries to get away with it), the prosecutor still has a duty not to make improper arguments.[16]

Here, it is well-known that it is improper to ask the jury to view the case with an imaginary narrative of what the decedent "must have been

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[16] *See State v. Walker*, 182 Wn.2d 463, 477, 341 P.3d 976 (2015) (reversal based upon prosecutorial misconduct even though defense counsel had not objected in the trial court, because "the failure to object will not prevent a reviewing court from protecting a defendant's constitutional right to a fair trial.").

thinking." *See State v. Pierce*, 169 Wn. App. 533, 280 P.3d 1158 (2012).[17] The prejudicial impact of such a false narrative cannot be underestimated, given the actual evidence of the extreme emotions suffered by the jurors that existed in this case. While the State now downplays the "toxic" atmosphere that existed before the one juror was removed "for health reasons," BOR at 43, the extraordinary saga of what took place with the jury in this case – a case where the prosecutors were concerned that the jurors would shoot each other with the guns in the jury room[18] – cannot be divorced from the prosecutor's improper argument. The appeal to the jurors to view the case from Ms. Burkheimer's perspective is one factor that led the jurors to have such emotions in the first instance.

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[17] *See also Drayden v. White*, 232 F.3d 704, 712-13 (9th Cir. 2000):

> [T]he prosecutor engaged in misconduct when he delivered a soliloquy in the voice of the victim. By doing so, the [p]rosecutor inappropriately obscured the fact that his role is to vindicate the public's interest in punishing crime, not to exact revenge on behalf of an individual victim. Furthermore, the prosecutor seriously risked manipulating and misstating the evidence by creating a fictitious character based on the dead victim and by "testifying" in the voice of the character as if he had been a percipient witness. Finally, by testifying as [the victim], the prosecutor also risked improperly inflaming the passions of the jury through his first-person appeal to its sympathies for the victim who, in the words of the prosecutor, was a gentle man who did nothing to deserve his dismal fate.

[18] *See* RP 2895, 2900, 2903, 2916.

The argument was flagrant and ill-intentioned, and combined with the argument about duress, should lead to reversal. Mr. Whitaker's rights to due process of law under the Fourteenth Amendment and article I, section 3, were violated.

3. *Mr. Whitaker Did Not Waive Claims of Error By Asking the Court to Reserve Ruling on a Mistrial Motion*

In its cross-appeal, the State argues that Mr. Whitaker waived two issues (post-arrest silence and juror misconduct) because he asked the trial court to reserve ruling on the mistrial motion regarding issues of juror misconduct. Below, the trial court ruled that Mr. Whitaker had not waived his mistrial motions. RP 3080-81. The State assigns error to this ruling. BOR at 2, 43-47.[19] The State's arguments should be rejected.

At the outset, though the State accuses the defense of gambling on the outcome of the trial, it is clear that it was the State that was playing games.

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[19] It is not clear why the State has combined the two issues (comment on silence and juror misconduct) as their procedural histories unfolded very differently. With regard to the comment on silence, the defense objected and asked for a mistrial. It was the *trial judge* who stated she would reserve judgment on that motion. RP 2479-82.

As the trial court recognized, the State was also making predictions about jury outcomes as it shifted its litigation strategy during the trial. RP 3080.[20]

In any event, the cases cited by the State about waiver are completely off-point and do not apply to this situation. *United States v. Dinitz*, 424 U.S. 600, 96 S.Ct. 1075, 47 L.Ed.2d 267 (1976), is a double jeopardy case where the holding was that, where a defendant asked for a mistrial after his attorney was barred from the courtroom, double jeopardy was not violated by a retrial. That is in keeping with the settled principle that double jeopardy is violated only if the prosecutor intentionally committed misconduct for the purpose of causing a mistrial. *See State v. Cochran*, 51 Wn. App. 116, 119-20, 751 P.2d 1194 (1988). Otherwise, a retrial is proper, even over the defense objection, if prompted by "manifest necessity" and "extraordinary and striking" circumstances. *State v. Juarez*, 115 Wn. App. 881, 889, 64 P.3d 83 (2003).[21]

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[20] The State may also have wanted a mistrial because of issues related to a jail informant witness, Christian White. The State had just been caught withholding impeachment evidence related to Mr. White, and, then, at the last minute, decided not to call him at the trial. *See* RP 2275-2302, 2334-38, 2391-2437, 2504. It is possible that when the State realized that there was a "hold-out" juror and that it might be the case that there would be a mistrial or a verdict on lesser offenses, the State changed its position regarding a mistrial, hoping that it could use Mr. White at a retrial in a "cleaner" fashion -- that is, rather than to lose the trial with a lesser offense conviction, it would take a mistrial and have a retrial with less "baggage" surrounding Mr. White's testimony.

[21] *See also Arizona v. Washington*, 434 U.S. 497, 503-17, 98 S. Ct. 824, 54 L. Ed. 2d 717 (1978) (upholding retrial based on State's motion based upon improper defense opening).

As for *State v. Williams*, 96 Wn.2d 215, 226, 634 P.2d 868 (1981) and *State v. Lord*, 161 Wn.2d 276, 291, 165 P.3d 1251 (2007), both cases involved situations where the defendant failed to make a motion for a mistrial -- not a situation, as here, where the defense made a motion for mistrial, but then asked the court to reserve ruling.

The State's reliance on *State v. Sullivan*, 69 Wn. App. 167, 847 P.2d 953 (1993), is also unavailing. That was a case where the court held that a contemporaneous objection is required to preserve error when the State violates a motion in limine and elicits evidence previously held to be inadmissible. *Id.* at 169-73. Here, Mr. Whitaker was never silent about his desire for a mistrial and never withdrew the motion – at one point when it looked like the jury might reach a verdict, he simply asked that the court defer ruling, a decision that makes sense.

The procedure that Mr. Whitaker suggested following conserves scarce resources. If the jury had returned "not guilty" verdicts, not only would the trial court not have had to rule on the mistrial motion, but there would have been no need for a new trial for a decades-old case that had already been tried twice. In a case not discussed by the State, this is exactly the procedure that was followed in *State v. Corn*, 95 Wn. App. 41, 51, 975

P.2d 520 (1999), and a procedure that is fairly standard. As the Florida Supreme Court once held:

> We hold that a motion for a mistrial coupled with a request that the court reserve ruling on the motion does not constitute a waiver and therefore prohibit appellate review of the motion . . . [I]t is quite reasonable for a trial judge to reserve ruling until after the jury deliberates in the hope that the jurors can rise above the alleged prejudice and cure the error. If the verdict cures the error, the court will save the expenditure of additional time, money and delay associated with a new trial. On the other hand, if the judge, after the verdict, incorrectly grants the motion for mistrial and orders a new trial, that order is reviewable on appeal. The appellate court could then reverse the order granting the new trial and order the trial court to enter a judgment on the jury verdict.

Ed Ricke and Sons, Inc. v. Green, By and Through Swan, 468 So. 2d 908, 910 (Fla. 1985).[22]

The trial judge correctly ruled that there was no waiver in this case.

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[22] *See also Commonwealth v. Brangan*, 475 Mass. 143, 148, 56 N.E.3d 153, 157-58 (2016) ("[A] judge's decision to defer ruling on the motion until after the jury return their verdict enhances judicial efficiency and preserves valuable judicial resources by obviating the need for a retrial should the verdict result in an acquittal.") (internal quotes omitted); *Robinson v. Commonwealth*, 13 Va. App. 574, 577, 413 S.E.2d 885, 886-87 (1992) ("Defense counsel had every right to expect that the trial judge would rule on the motion when the judge deemed appropriate. It is not uncommon for trial judges to defer ruling on mistrial motions until after the jury has reached a verdict, thereby possibly obviating the need for a retrial should the verdict result in an acquittal.").

4. *The Sequence of Events Regarding Juror No. 2 Requires Reversal*

Although the sequence of events regarding Juror No. 2 resulted in a series of errors each of which require reversal, it is important not to minimize the seriousness of the entire situation by parsing out each individual error separately. In the end, what took place in this case is quite extraordinary. While certainly sitting jurors are expected to disagree with each other, what occurred here was way beyond normal.

Again, the level of hostility that existed during deliberations was so high that *the prosecutor asked that the court insure that the jurors did not have access to the guns and ammunition that were admitted as exhibits.* RP 2895, 2900, 2903, 2916. Counsel can find no reported decision where such similar dangers existed during deliberations in other cases.[23] This alone sets this case apart even from *State v. Elmore*, 155 Wn.2d 758, 123 P.3d 73 (2005), the leading Washington case about removal of jurors based upon the

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[23] There are anecdotal stories about such things, but no published decisions. *See* J. Marzulli, "Jurors come to blows during trial of reputed Brooklyn drug dealers charged with torturing and murdering victims," *New York Daily News* (11/1/14) (http://www.nydailynews.com/new-york/nyc-crime/ exclusive-jurors-blows-alleged-drug-dealers-trial-article-1.2028368 (accessed on 3/7/18). On the other hand, research shows that jury intimidation is generally quite low. *See* J. Fordham, "Juror Intimidation? An investigation into the prevalence and nature of juror intimidation in Western Australia." *Report submitted to the Attorney General of Western Australia* (4/1/10)(http://www.web.uwa.edu.au/__data/assets/pdf_file/0005/836906/jury_intimidation_report.pdf) (accessed on 3/7/18).

perception of other jurors of unreasonableness. In light of these extraordinary circumstances, the Court should then consider the combined impact of the specific irregularities.

The State disputes Juror No. 2's factual assertion in his affidavit that he had 3-4 conversations with the judge's law clerk (CP 373), arguing that there is substantial evidence supporting the judge's supposed contrary conclusions. BOR at 48-49 & n.5. However, the State does not dispute that the juror swore under penalty of perjury that he did in fact have these extensive private meetings with the law clerk, and the trial court essentially accepted his declaration. *See* RP 2985.

In this regard, even the trial court's factual findings are not in conflict with the juror's declaration. While the trial court's findings appear to exculpate the law clerk for not engaging in conversation with Juror No. 2, CP 1731 (FF 30-33),[24] the court specifically found: "Juror No. 2 persisted in trying to reveal details of the jury's deliberations to the law clerk despite the court's instructions to the jury not to discuss the case with anyone other than their fellow jurors." CP 1731 (FF 32). From Juror No. 2's perspective, this

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[24] A copy of the findings and conclusions is attached in App. B.

certainly would qualify as repeated conversations (even though the law clerk's view was that the conversations were not mutual).

A law clerk (or bailiff) has been described as the "alter ego" of the judge, and thus should not communicate orally with jurors about the case in back rooms, without the presence of the defendant. *See State v. Bourgeois*, 133 Wn.2d 389, 407, 945 P.2d 1120 (1997). In *O'Brien v. City of Seattle*, 52 Wn.2d 543, 327 P.2d 433 (1958), the Supreme Court affirmed the granting of a new trial in a negligence case where the judge's bailiff had contacts with the jurors during deliberations. Two jurors swore that the bailiff had conversations with them about the instructions, while the bailiff denied referring the jurors to the instructions. *Id.* at 546. Despite this difference of opinion as to what transpired, and the specific finding by the trial judge that he believed his bailiff, he granted a new trial and the Supreme Court affirmed, adopting the trial judge's reasoning:

> In the present case, we have the bailiff (in a sense, the "alter ego" of the judge) communicating with the jurors in response to a question about one of the jury instructions. This is in direct violation of RCW 4.44.300 and [former] RCW 4.44.320. The trial judge stated that he believed his bailiff; i.e., that the bailiff had made no reference to instruction 9; but he still felt that he should grant a new trial, *because it is not what the bailiff said that is the determining factor, but rather, what the jurors heard.*

Id. at 548 (emphasis added).

In fact, RCW 4.44.300 currently provides:

> During deliberations, the jury may be allowed to separate unless good cause is shown, on the record, for sequestration of the jury. Unless the members of a deliberating jury are allowed to separate, *they must be kept together* in a room provided for them, or some other convenient place under the charge of one or more officers, until they agree upon their verdict, or are discharged by the court. The officer shall, to the best of his or her ability, keep the jury separate from other persons. *The officer shall not allow any communication to be made to them, nor make any himself or herself, unless by order of the court, except to ask them if they have agreed upon their verdict, and the officer shall not, before the verdict is rendered, communicate to any person the state of their deliberations or the verdict agreed on.*

Emphasis added.[25]

As with the jurors in *O'Brien*, from Juror No. 2's perspective he had repeated conversations with the law clerk. While the law clerk may have tried to shut down those conversations, they obviously took place – and took place orally, in a back room, without the presence of the defendant. This procedure violated CrR 6.15(e) & (f), RCW 4.44.300, the guarantee of an open and public trial (under the First, Sixth and Fourteenth Amendments and

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[25] Former RCW 4.44.320 ("Additional Instructions") was repealed by Laws of 1984, ch. 76, § 14.

article I, sections 3, 10 and 22),[26] and the right of Mr. Whitaker to be present (protected by the Sixth and Fourteenth Amendments and article I, sections 3 and 22).[27]

What took place with Juror No. 2 was not a "side bar" conference, and did not involve mundane and minor clerical matters. *See* BOR at 51-57 (citing, *inter alia*, *In re Pirtle*, 136 Wn.2d 467, 484, 965 P.2d 593 (1998), *habeas relief affirmed sub nom. Pirtle v. Morgan*, 313 F.3d 1160 (9th Cir. 2002), and *State v. Smith*, 181 Wn.2d 508, 516-19, 334 P.3d 1049 (2014)). In contrast, the Supreme Court recently reversed a conviction on public trial grounds in *State v. Whitlock*, 188 Wn.2d 511, 396 P.3d 310 (2017), where there was a "chambers" meeting of the judge and counsel (without the defendants or a court reporter) to discuss an issue involving cross-examination of a witness, which was then placed on the record later. The meeting took only ten minutes -- an extraordinarily short amount of time. *Id.* at 516-17.

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[26] *See Weaver v. Massachusetts*, ___ U.S. ___, 137 S. Ct. 1899, 1905, 198 L. Ed. 2d 420 (2017) (in direct review context, improper courtroom closure is a "structural error . . . entitling the defendant to automatic reversal without any inquiry into prejudice.").

[27] *See State v. Irby*, 170 Wn.2d 874, 880-85, 246 P.3d 796 (2011) (email exchange about jury selection violated right to be present).

The Court held that this brief chambers meeting was not a "sidebar" conference:

> First, it occurred in chambers. Chambers are, by definition, closed to the public. . . . So the location of the proceeding in this case cannot be considered the location of a sidebar. . . .
>
> . . .
>
> Second, the in-chambers proceeding was not recorded or promptly memorialized. . . .
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> . . .
>
> Finally, the State argues that the in-chambers proceeding resolved only legal issues, as opposed to factual ones, and was therefore permissible. . . . [T[the objection argued in chambers in this case was not purely technical or legalistic.

Id. at 522-23. The Court found the chambers conference to be structural error and reversed the conviction. *Id.* at 524.[28]

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[28] In *Pirtle*, the Supreme Court noted that most of the in-chambers meetings from which the defendant was excluded involved "legal" or "ministerial" matters, but that there was one chambers conference involving juror misconduct at which Mr. Pirtle should have been present. The Court went on to note that "[a]fter the conference, however, Pirtle was apprised of this matter and the issue was heard on the record in Pirtle's presence soon after the issue of alleged misconduct became known. Accordingly, Pirtle has not established his constitutional rights were violated by his absence from various in-chambers conferences between court and counsel." *Pirtle*, 136 Wn.2d at 484. It is not clear that this holding survives *Irby* or *Whitlock*. Moreover, in *Pirtle*, counsel was at least present and there was no objection to the exclusion of Mr. Pirtle, whereas here counsel was not present and not informed contemporaneously with the contacts with the juror even to be able to make an objection.

Similarly, here, what took place in the backroom – conversations between a juror and the law clerk about his concerns about being physically threatened by other jurors – cannot be written off as discussions about legal issues or ministerial in nature. The conversations should have occurred in open court, in the presence of the defendant, and with a court reporter. Reversal should be the result.

5. *Mr. Whitaker's Rights to Due Process and a Jury Trial Were Violated When Juror No. 2 Was Forced From The Jury*

Juror No. 2 was skeptical that the State had proven the premeditation necessary for first degree murder or the intent necessary for conspiracy. When he verbalized his beliefs, other jurors threatened him with physical violence, including making comments which Juror No. 2 believed constituted a threat to break his legs. After he reported these threats to the law clerk, he did attempt to resume deliberations, but then he continued to be verbally abused by the others. As a result of the pressure and harassment he suffered as a holdout juror, Juror No. 2 suffered a heart attack and was taken to the hospital. CP 372-74.[29]

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[29] The trial court never made any determination that Juror No. 2's recitation of the threats the other jurors made against him was anything but credible.

To be sure, as the State argues, Juror No. 2 was ultimately replaced because his medical condition made him unfit to continue serving as a juror. BOR at 57-59. But the same argument would apply if Juror No. 2 had to be replaced because the other jurors killed him when he would not change his vote. Here, the jurors did not kill Juror No. 2 with the gun in the jury room that the prosecutors feared would be used for violent purposes, but the effect was the same – they harassed and threatened Juror No. 2 so much that they caused him almost to die, and he was replaced on that basis.

Just as jurors cannot be fined or imprisoned until they return a guilty verdict, *see Bushel's Case*, Vaughan 135, 124 Eng. Rep. 1006 [CP 1670], so too jurors should not be physically threatened because they disagree with the other jurors. While the State attempts to write off the threats and intimidation as "inhering" in the verdict, BOR at 60-61, the cases cited by the State involve jurors who served until the end of the case, who later stated that their votes to convict were caused by their illness.[30] Such situations are very different from what took place in this case where Juror No. 2 did not finish

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[30] *See State v. Hoff*, 31 Wn. App. 809, 813, 644 P.2d 763 (1982); *State v. Forsyth*, 13 Wn. App. 133, 137-41, 533 P.2d 847 (1975). *See also State v. Reynoldson*, 168 Wn. App. 543, 547-52, 277 P.3d 700 (2012) (juror who felt pressured to vote to convict).

serving and thus his recitation of the threats and intimidation from the other jurors did not "inhere" in the verdict.

Mr. Whitaker had the right to have the jury initially constituted decide his case. Indeed, earlier in its brief, the State specifically made this argument. *See* BOR at 43 ("A criminal defendant has a valued right to have his trial completed by a particular tribunal.") (citing *United States v. Dinitz*, 424 U.S. at 606). Mr. Whitaker's right to the jury selected in his trial cannot be eliminated due to the intimidation and harassment of a juror who was not going to vote the same way as the others. Thus, the focus should not be on whether *Juror No. 2* became unfit to continue serving, under RCW 2.36.110.[31] Rather, the focus should be on whether *the other jurors* who badgered and threatened Juror No. 2 so much that he had a heart attack *were themselves fit to serve* since they exhibited "conduct or practices incompatible with proper and efficient jury service." RCW 2.36.110. Clearly, the other jurors were not fit to serve when they were able to remove

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[31] RCW 2.36.110 provides:

> It shall be the duty of a judge to excuse from further jury service any juror, who in the opinion of the judge, has manifested unfitness as a juror by reason of bias, prejudice, indifference, inattention or any physical or mental defect or by reason of conduct or practices incompatible with proper and efficient jury service.

a holdout juror by threatening him with violence which caused him to become ill.

Again, Juror No. 2 did not want to convict Mr. Whitaker of aggravated murder or conspiracy. The only reason he did not serve out his jury service was that the other jurors intimidated and harassed him such that he had a heart attack. This is intolerable and violated Mr. Whitaker's rights to due process of law and right to a jury, protected by the Sixth and Fourteenth Amendments and article I, sections 3, 21 and 22. The trial court erred by not granting a mistrial and by not granting a new trial. This Court should reverse.

6. *The Jurors' Misconduct Before Deliberations Should Result in a New Trial*

The State does not dispute that before deliberations, after the medical examiner testified, one juror stated, "I hope they fry the fucking bastard," and a majority of jurors agreed, with one juror expressing his wish that Mr. Whitaker should have been "in the hole" instead of Ms. Burkheimer, which Juror No. 2 took as a racist statement. CP 371; RP 2990. Rather, the State argues that such comments "inhered" in the verdict and thus cannot be the basis for a new trial. BOR at 61-64. The State's complaint should be rejected.

At the outset, it is now apparent that there no longer is a clear prohibition on consideration of juror comments that supposedly "inhere" in the verdict. The U.S. Supreme Court has recently allowed for inquiries into some issues that "inhere" in the verdict where a juror's racism is in issue, important in this case given Juror No. 2's concerns about the racism of other jurors. *See, e.g., Tharpe v. Sellers*, ___ U.S. ___,138 S. Ct. 545, 199 L. Ed. 2d 424 (2018) (juror later gave declaration that revealed his extreme racist views); *Peña-Rodriguez v. Colorado*, 580 U.S. ___, 137 S. Ct. 855, 197 L. Ed. 2d 107 (2017) (racist comments during deliberations).

However, this new view of the U.S. Supreme Court aside, the comments that took place in the jury room before deliberations did not "inhere" in the verdict. They were evidence of juror misconduct that occurred before deliberations began – the expression of personal opinions and bias against the defendant in front of other jurors. In this regard, while the State relies on *Tate v. Rommel*, 3 Wn. App. 933, 478 P.2d 242 (1970) and *State v. Hatley*, 41 Wn. App. 798, 706 P.2d 1083 (1985), Mr. Whitaker discussed and distinguished these cases already in the opening brief as involving evidence of juror comments to third persons and not involving the same level of bias and hostility. BOA at 42-43.

Moreover, this misconduct cannot be divorced from the threats and intimidation to Juror No. 2. It was comments like this that caused Juror No. 2 to become upset by the cavalier disregard for the judge's instructions; this juror misconduct was clearly a contributing factor to Juror No. 2's later heart attack; and such comments need to be combined with the other evidence that the other jurors were not fit to serve because their pre-determined view that Mr. Whitaker was guilty led them to misbehave by threatening Juror No. 2 such that he was harassed to the point of physical illness. In light of this history, the undisputed evidence of juror misconduct before deliberations should lead to reversal based upon the violation of due process and the right to a jury trial. U.S. Const. amend. VI & XIV; Const. art. I, §§ 3, 21 & 22.

7. *The Gruesome Photographs Should Not Have Been Admitted*

The State disputes that the juror outburst after being exposed to the disturbing photographs does not demonstrate the trial court abused its discretion when admitting them: "Certainly the juror's outburst could not have been predicted." BOR at 68. This is not correct. That jurors would react violently to disturbing visual evidence is something that certainly can be predicted given undisputed research that gruesome photographs are a leading cause of juror stress. *See* National Center for State Courts ("NCSC"),

Through the Eyes of the Juror: A Manual for Addressing Juror Stress (1998) at 30-32.[32] Scientific research reveals that subjects in studies (including brain scans) who are exposed to gruesome evidence are more likely to convict, and not only "dole out significantly more punishment, they also showed a decrease in activity in the regions of the brain that are usually active during logical reasoning and moral judgment." J. Epstein & S. Mannes, "'Gruesome' Evidence, Science, and Rule 403," National Judicial College (March 17, 2016).[33] Indeed, in 2012, there was a study, specific to Snohomish County, detailing a survey of former jurors about the stress they felt serving in Snohomish County Superior Court. Marilyn J. Finsen, *Jurors as Unintended Victims, "A Quality Assurance Study of Jury Services and Stress,"* May 2012.[34] One source of stressors for Snohomish County jurors was the stress from serving on murder trial panels. *Id.* at 4, 10-11, 34, 38.

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[32] Http://www.ncsc-jurystudies.org/What-We-Do/~/media/Microsites/Files/CJS/What%20We%20Do/THROUGH%20THE%20EYES%20OF%20THE%20JUROR.ashx (accessed 3/1/18).

[33] Http://www.judges.org/gruesome-evidence-science-and-rule-403/ (accessed on 3/1/18).

[34] Http://www.ncsc.org/~/media/Files/PDF/Education%20and%20Careers/CEDP%20Papers/2012/Quality%20Assurance%20Study%20of%20Jury%20Services%20and%20Stress.ashx (accessed 3/1/18).

In light of this research, the State well knows how jurors will react to gruesome evidence. While perhaps the later threats to harm Juror No. 2 could not be anticipated, it is common sense to assume that normal people who have disturbing imagery thrust upon them will react strongly, in a hostile fashion, against the defendant. In light of the defense willingness to stipulate to the cause of death, there was no reason for the State to traumatize the jurors with the gruesome photographs other than to cause the very situation that took place. The convictions should be reversed based upon the violation of due process of law and the right to a jury trial. U.S. Const. amend. VI & XIV; Const. art. I, §§ 3, 21 & 22.

8. *The Admission of Evidence of Silence Was Not Harmless*

The State concedes that its solicitation from Detective Pince that Mr. Whitaker remained silent was constitutional error, but argues that it was harmless. BOR at 69-77. However, as evidence of the supposed harmless of the error, the State relies in part on the fact that Mr. Whitaker did not remain completely silent, but gave a statement to the FBI. The State then points to defense counsel's closing argument that stressed how cooperative Mr. Whitaker was. BOR at 71-72.

The State relies on *State v. Pottorff*, 138 Wn. App. 343, 156 P.3d 955 (2007), but that decision is not on point. There, the defendant gave a statement to the police, admitting slapping the complainant, but during the conversation itself, when asked about using his cane to hit the other person, the defendant asserted the right to remain silent. There was no objection to the testimony about the assertion of silence at trial. Under these circumstances, the Court of Appeals did not even necessarily conclude there was error because once someone begins talking to the police, they cannot "toy" with the police by telling only part of the story. *Id.* at 348. As for harmlessness, the Court of Appeals centered on the fact that the defendant had raised self-defense, thereby admitting the assault. Additionally, another officer actually heard the defendant admit to hitting the other person in the head. *Id.*

This case is very different. This was not a case where Mr. Whitaker began talking to the authorities but then refused to answer key questions. Rather, this is a case where Mr. Whitaker in fact gave an extensive statement to the FBI in California, but then later the State elicited that he refused to talk to the local police assigned to investigate the case in Snohomish County. Thus, the defense theory that Mr. Whitaker was cooperative is the very reason

why evidence of his assertion of his right to remain silent with Det. Pince cannot be harmless. The evidence of silence actually undercut the defense argument that Whitaker cooperated with the police by revealing that he was not "cooperative" with Det. Pince.

The State's discussion of harmlessness is also deficient by its failure completely to discuss the proper test. Although citing to the "untainted" evidence test set out in *State v. Guloy*, 104 Wn.2d 412, 426, 705 P.2d 1182 (1985), the State fails to note that a constitutional error[35] is "presumed to be prejudicial." Only then must the State must show that the error was harmless beyond a reasonable doubt. *State v. Miller*, 131 Wn.2d 78, 90, 929 P.2d 372 (1997).

Here, the State does not assume prejudice, and merely argues that there was sufficient evidence to sustain a conviction. BOR at 73-77. But presenting the evidence essentially the same way a reviewing court would apply *Jackson v. Virginia*, 443 U.S. 307, 99 S. Ct. 2781, 61 L.Ed.2d 560 (1979) -- i.e. in the light most favorable to the State – does accurately apply the presumption of prejudice. Rather than recounting the evidence that

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[35] Here, a violation of the right to remain silent protected by the Fifth and Fourteenth Amendments and article I, section 9, and the due process violation under the Fourteenth Amendment and article I, section 3, by the State's use of post-arrest silence against Mr. Whitaker. *See Doyle v. Ohio*, 426 U.S. 610, 611, 96 S.Ct. 2240, 49 L.Ed.2d 91 (1976); *State v. Easter*, 130 Wn.2d 228, 238-43, 922 P.2d 1285 (1996).

supports conviction, the State should have been concentrating on examining the evidence favorable to the defendant – i.e., that Mr. Anderson's violence towards Mr. Whitaker was unusual and unexpected, that Mr. Whitaker was afraid of Mr. Anderson, that Mr. Whitaker had no personal grudge against Ms. Burkheimer, and that there was no pre-existing plan to murder Ms. Burkheimer.

As the U.S. Supreme Court once explained:

> The inquiry, in other words, is not whether, in a trial that occurred without the error, a guilty verdict would surely have been rendered, but whether the guilty verdict actually rendered in this trial was surely unattributable to the error. That must be so, because to hypothesize a guilty verdict that was never in fact rendered -- no matter how inescapable the findings to support that verdict might be -- would violate the jury-trial guarantee.

Sullivan v. Louisiana, 508 U.S. 275, 279, 113 S. Ct. 2078, 124 L. Ed. 2d 182 (1993).

Given this perspective – that there is an assumption of prejudice by the constitutional violation and the issue is whether the State can show the jury was not effected by the error – and given the evidence that Mr. Whitaker was not guilty, the State cannot meet its burden of overcoming the presumption of prejudice. A main issue in this case was "cooperation." The State brought out the supposed cooperation of Mr. Durham and Mr. Rivas

just minutes before bringing out Mr. Whitaker's silence. *See* BOA 53-54. It cannot therefore be said that the error of bringing out Mr. Whitaker's silence to Det. Pince was harmless beyond a reasonable doubt.

9. *Cumulative Error Should Lead to Reversal*

The State argues against "cumulative error," citing that the only error involved the admission of Mr. Whitaker's exercise of his right to remain silent and that this error was harmless. BOR 77-78. This is incorrect.

At the outset, this Court should look at the combined effect of the following errors: (1) the failure to give an instruction on duress, (2) the prosecutor's misconduct by arguing that "duress is not a defense," (3) the prosecutor's misconduct by asking the jurors repeatedly to think about what Ms. Burkheimer was thinking, (4) the entire sequence of events with Juror No.2 and the multiple violations of Mr. Whitaker's rights regarding the back room conversations he had with the law clerk, (5) the misconduct of the other jurors by discussing the case before deliberation and by threatening and intimidating Juror No. 2, (6) the admission of the gruesome photographs, and (7) the comment on silence. All of these combined errors justify reversal.

A defendant has a fundamental right to a fair trial, protected both by the right to a jury and due process of law under the Sixth and Fourteenth Amendments and article I, sections 3, 21 and 22. "[T]he fundamental right

to a fair trial demands minimum standards of due process." *State v. Gonzalez*, 129 Wn. App. 895, 905, 120 P.3d 645 (2005). Cumulative error can interfere with this right to a fair trial. *See State v. Cloud*, 195 Wn. App. 1054, 2016 Wash. App. LEXIS 2108, Slip Op. at 5 (46912-0-II, 8/30/16) (unpub.)(citing as non-binding authority).

"Where, however, there are multiple trial errors, a balkanized [sic], issue-by-issue . . . review is far less effective than analyzing the overall effect of the errors in the context of the evidence introduced at trial against the defendant." *United States v. Preston*, 873 F.3d 829, 835 (9th Cir. 2017) (internal quotes and cites omitted). The test to determine if cumulative error requires reversal of a defendant's conviction is whether the totality of circumstances substantially prejudiced the defendant and denied him or her a fair jury trial, in violation of the Sixth and Fourteenth Amendments and article I, sections 3, 21 and 22. *See In re Cross*, 180 Wn.2d 664, 690, 327 P.3d 660 (2014). "[T]he cumulative effect of multiple trial errors can violate due process even where no single error . . . would independently warrant reversal. . . . In deciding whether the combined effect of multiple errors prejudiced a defendant we ask whether the errors stand in unique symmetry . . . , such that [they] amplify each other in relation to a key contested issue

in the case." *United States v. Preston*, 873 F.3d at 835 (internal quotes and citations omitted).[36]

This standard is met here. Where, for instance, the introduction of gruesome photographs and the State's "Golden Rule" argument set off a train of events that led the intimidation and harassment of a "hold-out" juror, it is necessary to examine the entire picture. The Court must ask itself whether, in light of all of the various errors, Mr. Whitaker had a jury trial that comported with the First, Fifth, Sixth and Fourteenth Amendments and article I, sections 3, 9, 10, 21 and 22. It is apparent that Mr. Whitaker's rights were repeatedly violated and the cumulative impact of all of these errors should lead to reversal.

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[36] *See also State v. Cloud*, *supra*, Slip Op. at 6 ("We may reverse a defendant's convictions when the combined effect of errors during trial effectively denied the defendant his right to a fair trial, even if each error standing alone would be harmless.") (unpub., cited as non-binding authority).

B. CONCLUSION

For the foregoing reasons and those set out in the opening and supplemental briefs, the Court should reverse the convictions for aggravated murder and conspiracy and remand for a new trial.

DATED this 9th day of March 2018.

Respectfully submitted,

s/ Neil M. Fox
WSBA NO. 15277
Attorney for Appellant

APPENDIX A

DEFENDANT'S PROPOSED INSTRUCTION NO. D4

Duress is a defense to the aggravating circumstance of robbery in the first or second degree if:

(a) The defendant's conduct giving rise to the aggravating circumstance of robbery in the first or second degree resulted from compulsion by another who by threat or use of force created an apprehension in the mind of the defendant that in case of refusal the defendant would be liable to immediate death or immediate grievous bodily injury; and

(b) Such apprehension was reasonable upon the part of the defendant; and

(c) The defendant would not have participated in the conduct giving rise to the aggravating circumstance of robbery in the first or second degree except for the duress involved.

The defendant has the burden of proving this defense by a preponderance of the evidence. Preponderance of the evidence means that you must be persuaded, considering all the evidence in the case, that it is more probably true than not true. If you find that the defendant has established this defense, it will be your duty to answer "no" on the special verdict form for the aggravating circumstance of robbery in first or second degree.

WPIC 18.01. *See also* Defendant's Memorandum In Support of Duress Instruction on Aggravating Circumstances.

DEFENDANT'S PROPOSED INSTRUCTION NO. D5

Duress is a defense to the aggravating circumstance of kidnapping in the first degree if:

(a) The defendant's conduct giving rise to the aggravating circumstance of kidnapping in the first degree resulted from compulsion by another who by threat or use of force created an apprehension in the mind of the defendant that in case of refusal the defendant would be liable to immediate death or immediate grievous bodily injury; and

(b) Such apprehension was reasonable upon the part of the defendant; and

(c) The defendant would not have participated in the conduct giving rise to the aggravating circumstance of kidnapping in the first degree except for the duress involved.

The defendant has the burden of proving this defense by a preponderance of the evidence. Preponderance of the evidence means that you must be persuaded, considering all the evidence in the case, that it is more probably true than not true. If you find that the defendant has established this defense, it will be your duty to answer "no" on the special verdict form for the aggravating circumstance of kidnapping in the first degree.

WPIC 18.01. *See also* Defendant's Memorandum In Support of Duress Instruction on Aggravating Circumstances.

APPENDIX B

SUPERIOR COURT OF WASHINGTON
FOR SNOHOMISH COUNTY

THE STATE OF WASHINGTON, Plaintiff, v. WHITAKER, JOHN ALAN Defendant.	No. 02-1-02368-6 FINDINGS OF FACT AND CONCLUSIONS OF LAW AND ORDER DENYING DEFENSE MOTIONS FOR ARREST OF JUDGMENT AND FOR NEW TRIAL

I. HEARING

1.1 Date: September 14, 2016

1.2 Judge: The Honorable Linda C. Krese

1.3 Appearances: The plaintiff appeared by Mark K. Roe, Prosecuting Attorney for Snohomish County, by and through his deputies, SETH A. FINE, JULIE A. MOHR, and EDIRIN O. OKOLOKO. The defendant appeared in person and by counsel, PETER OFFENBECHER and COOPER OFFENBECHER.

1.4 Purpose: Evidentiary hearing with testimony of jurors in the above case and argument regarding defense motion for new trial and motion for arrest of judgment as to aggravating circumstance.

1.5 Evidence: The court considered the following evidence:

a. The testimony of 15 jurors.

b. Declarations submitted from Juror No. 2 and Juror No. 7

c. Statements made on the record by the court's bailiff/law clerk.

d. The record of trial proceedings.

e. The briefing and argument of counsel.

II. FINDINGS OF FACT

The court having considered the evidence and the argument of counsel makes the following Findings of Fact:

1. Rachel Burkheimer was abducted on September 23, 2002.
2. Defendant, John Whitaker, was one of the persons who abducted her.
3. The kidnapping ended only with her death after being shot by John Anderson in the early morning hours of September 24, 2002.
4. The kidnapping was not merely incidental restraint with no independent purpose – the kidnapping continued for hours while the participants discussed what to do and acted on their plans.
5. The evidence supports the jury's finding that her murder occurred "in the course of, in furtherance of, or in immediate flight from" first degree kidnapping, an aggravating circumstance pursuant to RCW 10.95.020(11)(d).
6. The murder did occur in the course of the kidnapping of Rachel Burkheimer.
7. During trial, the prosecutor elicited testimony from Detective Pince to the effect that he had advised the defendant of his rights pursuant to Miranda v. Arizona, 384 U.S. 436 (1966), after which the defendant declined to waive those rights.

8. Later, in response to questions from the prosecutor, Detective Pince testified as to volunteered statements the defendant made to him (these statements had previously been deemed admissible pursuant to a CrR 3.5 hearing).
9. The prosecutor did not purposefully elicit the testimony regarding the defendant exercising his right to remain silent.
10. The prosecutor had forgotten that Mr. Whitaker had exercised his right to remain silent when first advised of his rights in his effort to introduce volunteered statements that had been deemed admissible at a CrR 3.5 hearing.
11. The prosecutor did not mention the defendant's exercise of his rights in closing argument.
12. The prosecutor did not rely on Detective Pince's testimony regarding the defendant exercising his rights in any way as substantive evidence of guilt.
13. The defendant did waive his rights prior to the above exchange with Detective Pince and gave a lengthy oral and written statement to FBI agents in California.
14. There is overwhelming evidence of Mr. Whitaker's involvement in the crimes charged.
15. In rebuttal closing argument, the prosecutor told the jury that duress was not a defense to first degree murder and that if it was the court would have included it in its instructions.
16. No objection was made by defense to the prosecutor's argument despite the fact that it was repeated several times by the prosecutor.
17. The prosecutor did not misstate the law.
18. The argument with regard to duress was not so prejudicial that an appropriate instruction could not have cured it.
19. If defense had made an objection, the court could have stricken the comments, given curative instructions, and directed the jury to disregard the comments when the argument was first made.

20. At some point during deliberations, the jury sent out a question about the duress defense; defense proposed an answer to the question that did not serve to clarify the law with regard to duress but instead asked the court to repeat portions of Instruction No. 1 to the jury.
21. In response to the inquiry regarding duress from the jury, the court did refer the jury to Instruction No. 1 but did not repeat certain portions of Instruction No. 1 in the response.
22. The question regarding duress was asked by the jury before Juror No. 2 was excused. The jury was thereafter reconstituted with Juror No. 3 and was directed to begin their deliberations anew.
23. Defense did not request a mistrial at the conclusion of closing arguments.
24. No request was made for sequestration of the jury and there is no record supporting sequestration.
25. The jury was allowed to separate during deliberations which extended over four days.
26. On June 28, 2016, the jury buzzed the law clerk for help.
27. The bailiff/law clerk responded to the jury buzzer to ask what they needed. There is no evidence that the bailiff/law clerk asked any questions other than to ascertain why the juror had buzzed and what his difficulty was.
28. Juror No. 2 said he needed to be excused and began leaving the jury room, so the law clerk had him go to a separate conference room.
29. Contrary to the assertion by the defendant that the bailiff separated Juror No. 2, the record supports the conclusion that Juror No. 2 essentially separated himself and refused to rejoin the jury.

30. The law clerk made no further effort to inquire about the circumstances of the need to leave the jury room. He directed Juror No. 2 not to tell him anything about the deliberations.
31. The law clerk provided no information about the case and no advice to Juror No. 2.
32. Juror No. 2 persisted in trying to reveal details of the jury's deliberations to the law clerk despite the court's instructions to the jury not to discuss the case with anyone other than their fellow jurors.
33. As soon as the bailiff ascertained the nature of Juror No. 2's complaint, he immediately notified the court and counsel.
34. Juror No. 2 refused to rejoin the jury even after being asked to do so by the court.
35. During the time that Juror No. 2 was separated from the jury, the jury did not deliberate, which was consistent with the court's instructions.
36. The court excused the jury for the day and had them return later than their usual time the next morning to allow the attorneys time to research and present argument on how the court should proceed given Juror No. 2's demand to be excused.
37. On June 29, 2016, all of the jurors including Juror No. 2 returned to the jury room and resumed deliberations.
38. Contrary to the defense's argument, the chain of events cannot be interpreted to suggest that the court was signaling to the jury that "something was wrong with Juror No. 2" and therefore signaling what the jury's verdict should be. Juror No. 2's return to the jury room and deliberations the next day, if anything, suggested that the court was not going to remove Juror No. 2 and that he would continue to be a part of the jury deliberations – which he was.

39. The deliberations continued until the presiding juror sent out a written question indicating that there were concerns for safety in the jury room and referenced threats.

40. The presiding juror was brought into the courtroom for further inquiry.

41. The presiding juror indicated that some jurors were frustrated and some threats had been made.

42. The juror returned to the jury room and after more discussions between the court and counsel in the courtroom it was decided that the court should bring in all of the jurors and inquire pursuant to WPIC 4.70 regarding the probability of the jury reaching a verdict.

43. At approximately 11:00 a.m., the jury was brought into the courtroom and the presiding juror told the court there was a reasonable probability the jury could reach a verdict as to any count within a reasonable time.

44. The jury was then directed to return to the jury room to continue deliberations.

45. Deliberations continued until approximately 2:00 p.m. when Juror No. 2 suffered a medical emergency and medical aid was called.

46. Juror No. 2 apparently had suffered a heart attack and was taken to Providence Medical Center where he remained for at least two days and underwent a medical procedure related to his heart problems.

47. The jury was excused after Juror No. 2 was taken to the hospital and returned the next morning.

48. By the next morning (June 30, 2016) the court received information from Juror No. 2's spouse that he was still in the hospital.

49. After confirming Juror No. 2 would not be back on June 30, 2016, the court reconstituted the jury with the first alternate, Juror No. 3.

50. The jury was directed to begin deliberations anew with Juror No. 3 and to disregard all previous deliberations.

51. The jury deliberated for approximately six hours before returning a verdict.

52. Jurors testified at the post-trial hearing that one juror made a comment prior to deliberations (immediately after the testimony of Medical Examiner Dr. Norman Thiersch that included autopsy photos) to the effect of, "I hope they fry the fucking bastard."

53. Juror testimony does not support any factual finding that other jurors agreed with that sentiment.

54. Juror testimony does show that some jurors attempted to comfort the juror who made the "I hope they fry the fucking bastard" comment as that juror was crying/upset.

55. The above statement was made near the end of the case.

56. Juror No. 2 testified, and the court finds that the opinions of the jury were swayed back and forth during the case alternately by listening to the State and the defense.

57. There was no evidence that any juror was biased or had formed a fixed opinion as to the proper outcome of the case before deliberations began.

58. The State at one point listed Christian White as a witness in the case against John Whitaker.

59. Before Christian White was scheduled to testify, the State informed the defense of some probation hearings Mr. White had in District Courts in Snohomish County; Mr. White had outstanding warrants for probation violations in those matters and appeared to have the warrants quashed. The probation matters were heard and resolved..

60. The defense was given an opportunity to investigate this information before Mr. White was scheduled to testify.

61. The evidence regarding Mr. White's warrants and probation hearings was useful to the defendant only to the extent it could be used for impeachment of Mr. White.

62. The State chose not to present the testimony of Christian White to the jury.

III. CONCLUSIONS OF LAW

On the basis of the foregoing Findings of Fact and the record herein, the court makes the following Conclusions of Law:

A. MOTION FOR ARREST OF JUDGEMENT:

1. The evidence is sufficient to establish the aggravating circumstance of Kidnapping.
2. Pursuant to State v. Brown, 132 Wn.2d 529 (1997), and State v. Brett, 126 Wn.2d 136 (1995), it is immaterial whether the intent to murder preceded the kidnapping or followed the kidnapping. In either case there is a "causal" or "intimate" connection between the two.
3. There is no inconsistency between the jury's verdict on the kidnapping aggravating circumstance, the jury's failure to reach a verdict on the robbery aggravating circumstance, and the jury's guilty verdict on the charge of conspiracy to commit murder and First Degree Murder. The failure to reach a verdict on the robbery aggravating circumstance is just that – a failure to reach a verdict. It is not possible to determine why the jury did not reach a verdict on that aggravating circumstance, therefore it cannot be said to be inconsistent.
4. Regarding the guilty verdict on conspiracy and First Degree Murder: even if the defendant and the other participants intended to commit murder from the outset, it does

not mean the murder was not committed in the course of the kidnapping; therefore the verdict is not inconsistent.

5. The motion for arrest of judgment is not supported by the record or the law and should be denied. Additionally, to the extent that any issue regarding the aggravating circumstance of kidnapping has been asserted in the motion for new trial, resolution of this motion also resolves that issue.

B. NEW TRIAL MOTION (1) ALLEGING PROSECUTOR VIOLATED DEFENDANT'S RIGHT TO REMAIN SILENT, RIGHT TO COUNSEL AND CrR 3.1.

1. Pursuant to State v. Romero, 113 Wn. App. 772, 790 (2002), it is constitutional error for a police witness to testify that a defendant refused to speak to him or her. It is also constitutional error for the State to purposefully elicit such testimony or inject it into closing argument or rely on such testimony as substantive evidence of guilt.
2. Any error in Detective Pince testifying regarding the defendant exercising his right to remain silent is harmless beyond a reasonable doubt. State v. Pottorff, 138 Wn. App. 343, 347 (2007).

C. NEW TRIAL MOTION (2) ALLEGING PROSECUTOR DISCUSSION OF DURESS IN CLOSING ARGUMENT WAS MISCONDUCT REQUIRING NEW TRIAL:

1. Defense failure to make an objection waives any error unless the remark is so prejudicial that no instruction could have cured the prejudice. State v. Russell, 125 Wn.2d 24, 85 (1994).
2. The argument regarding duress was not so prejudicial that an appropriate instruction could not have cured it. If the objection had been made, the court could have stricken

the comments and directed the jury to disregard them when the argument was first made – preventing any additional references to the issue. The court could have given the jury curative instructions to clarify the application of the defense to the case if requested.

D. NEW TRIAL MOTION (3) ALLEGING THE DEFENDANT'S RIGHT TO A FAIR TRIAL WAS VIOLATED BY THE SEQUENCE OF EVENTS INVOLVING JUROR NO. 2 ON JUNE 28TH AND JUNE 29TH:

1. Much of the evidence related to the sequence of events during deliberations on June 28 and 29, 2016, inheres in the verdict and should not be considered by the court in deciding whether to grant a new trial.
2. CrR 6.7(a) provides that a jury may be allowed to separate during deliberations "unless good cause is shown, on the record, for sequestration of the jury." CrR 6.7(b) states that "[u]nless the jury is allowed to separate, the jurors shall be kept together . . . until they agree upon their verdict or are discharged by the court." CrR 6.7(b) goes on to state that the officer charged with their care "shall not, before the verdict is rendered, communicate to any person the state of the jurors' deliberations or their verdict." Neither CrR 6.7(a) or 6.7(b) were violated in this case by the bailiff's actions in allowing Juror No. 2 to be separated from the other jurors.
3. CrR 6.15 (f)(1) requires that "[t]he 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." This rule was complied with by the court. The jury was so instructed and the jury submitted its questions regarding instructions and evidence in this fashion. Juror No. 2's demand to be excused from the jury was not a jury question

regarding instructions or evidence and his communication with the bailiff did not violate this rule.

4. It is apparent that if Juror No. 2's communications were improper it was misconduct by the juror who was attempting to tell the bailiff information he had been instructed not to discuss with anyone.
5. Court rules and the law do not contemplate that any and all communications with the bailiff will be in writing. To the contrary, it is clearly contemplated that there will be contact for housekeeping type purposes which is what happened in this case. As soon as the bailiff ascertained the nature of Juror No. 2's complaint, he immediately notified the court and counsel.
6. Any issues regarding Juror No. 2 were rendered moot by the events of June 29th when Juror No. 2 left the courthouse due to a medical emergency.
7. The course of events involving Juror No. 2 did not violate the defendant's right to an open and public trial. Juror No. 2's summoning of the bailiff and demand to be excused were unanticipated by any participant in the case. There is no reasonable way to have handled the matter in open court initially. Even if the bailiff had pushed the juror back into the jury room and demanded he put his request in writing, he would already have been told what the issue was. The issue was immediately communicated to the court and all further substantive discussion occurred in court. No questioning of Juror No. 2 of the sort set forth in State v. Lam, 161 Wn. App. 299 (2011) occurred in this case either in or out of the courtroom.
8. The events regarding Juror No. 2 did not violate the defendant's constitutional rights or any rights pursuant to the criminal rules. None of these events constitute grounds for a new trial.

E. NEW TRIAL MOTION (4) ALLEGING A SUBSTANTIAL PORTION OF THE JURY VIOLATED THE COURT'S INSTRUCTIONS NOT TO DISCUSS THE CASE OR DELIBERATE ON A DECISION PRIOR TO HAVING THE CASE SUBMITTED TO THEM FOR DELIBERATIONS:

1. The statement made by a juror prior to deliberations to the effect of "I hope they fry the fucking bastard" is not a basis for a new trial. Testimony of this sort should not be considered by the court in deciding whether to grant a new trial as "[e]vidence concerning the mental processes of the jurors, including their expressed opinions and when they made up their minds inheres in the verdict." State v. Hatley, 41 Wn. App. 789, 793, 706 P.2d 1083 (1985) (internal citations omitted).
2. Whether any member of the jury expressed an opinion about the defendant's guilt prior to beginning deliberations does not establish prejudice and is not a ground for the grant of a new trial.

F. NEW TRIAL MOTION (5) ALLEGING THE STATE VIOLATED DUTIES UNDER BRADY V. MARYLAND REGARDING INFORMATION ABOUT CHRISTIAN WHITE:

1. The defendant has not demonstrated prejudice with regard to any failure on the part of the State to disclose material required pursuant to Brady v. Maryland, 373 U.S. 83 (1963). Three elements are required to establish a Brady violation: 1) the evidence was favorable to the defendant because it was exculpatory or impeaching; 2) the State failed to disclose it either willfully or inadvertently; and 3) the defendant was prejudiced as a result. The evidence in question was helpful to the defendant only to the extent it could be used for impeachment of Christian White. Because the evidence was disclosed to defense in time to investigate it before Mr. White was scheduled to testify and because

Mr. White did not testify, nondisclosure of the evidence was not prejudicial to the defendant.

G. NEW TRIAL MOTION (6) ALLEGING SUBSTANTIAL JUSTICE WAS NOT DONE WITH RESPECT TO THE JURY'S FINDING OF THE KIDNAPPING AGGRAVATING CIRCUMSTANCE:

See Conclusions of Law 1 – 5 under "A. Motion for Arrest of Judgment."

H. NEW TRIAL MOTION (7) ALLEGING THE CUMULATIVE IMPACTS OF THE SPECIFIED PROSECUTORIAL MISCONDUCT COMBINED TO DENY THE DEFENDANT A FAIR TRIAL:

1. The court in State v. Perrett, 86 Wn. App. 312, 322 (1997), held that "an accumulation of nonreversible errors may deny a defendant a fair trial." The court has ruled that the two claimed instances of misconduct do not require a new trial. The defendant has not demonstrated that the combined effect of those incidents requires reversal given the court's determination that the comment on the defendant's right to remain silent was harmless beyond a reasonable doubt and that defense waived any error with regard to the State's argument about duress.
2. Deterring prosecutors and jurors from engaging in conduct that occurred in this trial is not the standard for granting a new trial. Even if this was the standard, the defense has not established any deliberate behavior on the part of the State or jurors that could or would be deterred.

IV. ORDER

IT IS ORDERED that the defendant's motion for a new trial and motion for arrest of judgment as to the aggravating circumstance are denied.

DONE IN OPEN COURT this 22th day of February, 2017.

JUDGE LINDA C. KRESE

Presented by:

SETH A. FINE, #
JULIE A. MOHR, #25528
EDIRIN O. OKOLOKO, #
Attorneys for State/Plaintiff

Approved as to form:

PETER OFFENBECHER, #
COOPER OFFENBECHER, #
Attorneys for Defendant

STATUTORY APPENDIX

CrR 6.15 provides in part:

> (e) Deliberation. After argument, the jury shall retire to consider the verdict. The jury shall take with it the instructions given, all exhibits received in evidence and a verdict form or forms.
>
> (f) Questions from Jury During Deliberations.
>
> (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.
>
> (2) After jury deliberations have begun, the court shall not instruct the jury in such a way as to suggest the need for agreement, the consequences of no agreement, or the length of time a jury will be required to deliberate.

RCW 2.36.110 provides:

> It shall be the duty of a judge to excuse from further jury service any juror, who in the opinion of the judge, has manifested unfitness as a juror by reason of bias, prejudice, indifference, inattention or any physical or mental defect or

by reason of conduct or practices incompatible with proper and efficient jury service.

RCW 4.44.300 provides:

> During deliberations, the jury may be allowed to separate unless good cause is shown, on the record, for sequestration of the jury. Unless the members of a deliberating jury are allowed to separate, they must be kept together in a room provided for them, or some other convenient place under the charge of one or more officers, until they agree upon their verdict, or are discharged by the court. The officer shall, to the best of his or her ability, keep the jury separate from other persons. The officer shall not allow any communication to be made to them, nor make any himself or herself, unless by order of the court, except to ask them if they have agreed upon their verdict, and the officer shall not, before the verdict is rendered, communicate to any person the state of their deliberations or the verdict agreed on.

RCW 9A.04.020 provides:

> (1) The general purposes of the provisions governing the definition of offenses are:
>
> (a) To forbid and prevent conduct that inflicts or threatens substantial harm to individual or public interests;
>
> (b) To safeguard conduct that is without culpability from condemnation as criminal;
>
> (c) To give fair warning of the nature of the conduct declared to constitute an offense;
>
> (d) To differentiate on reasonable grounds between serious and minor offenses, and to prescribe proportionate penalties for each.

(2) The provisions of this title shall be construed according to the fair import of their terms but when the language is susceptible of differing constructions it shall be interpreted to further the general purposes stated in this title.

RCW 9A.16.060 provides:

(1) In any prosecution for a crime, it is a defense that:

(a) The actor participated in the crime under compulsion by another who by threat or use of force created an apprehension in the mind of the actor that in case of refusal he or she or another would be liable to immediate death or immediate grievous bodily injury; and

(b) That such apprehension was reasonable upon the part of the actor; and

(c) That the actor would not have participated in the crime except for the duress involved.

(2) The defense of duress is not available if the crime charged is murder, manslaughter, or homicide by abuse.

(3) The defense of duress is not available if the actor intentionally or recklessly places himself or herself in a situation in which it is probable that he or she will be subject to duress.

(4) The defense of duress is not established solely by a showing that a married person acted on the command of his or her spouse.

RCW 9A.40.020 provides:

(1) A person is guilty of kidnapping in the first degree if he or she intentionally abducts another person with intent:

(a) To hold him or her for ransom or reward, or as a shield or hostage; or

(b) To facilitate commission of any felony or flight thereafter; or

(c) To inflict bodily injury on him or her; or

(d) To inflict extreme mental distress on him, her, or a third person; or

(e) To interfere with the performance of any governmental function.

(2) Kidnapping in the first degree is a class A felony.

RCW 10.95.020 provides:

A person is guilty of aggravated first degree murder, a class A felony, if he or she commits first degree murder as defined by RCW 9A.32.030(1)(a), as now or hereafter amended, and one or more of the following aggravating circumstances exist:

(1) The victim was a law enforcement officer, corrections officer, or firefighter who was performing his or her official duties at the time of the act resulting in death and the victim was known or reasonably should have been known by the person to be such at the time of the killing;

(2) At the time of the act resulting in the death, the person was serving a term of imprisonment, had escaped, or was on authorized or unauthorized leave in or from a state

facility or program for the incarceration or treatment of persons adjudicated guilty of crimes;

(3) At the time of the act resulting in death, the person was in custody in a county or county-city jail as a consequence of having been adjudicated guilty of a felony;

(4) The person committed the murder pursuant to an agreement that he or she would receive money or any other thing of value for committing the murder;

(5) The person solicited another person to commit the murder and had paid or had agreed to pay money or any other thing of value for committing the murder;

(6) The person committed the murder to obtain or maintain his or her membership or to advance his or her position in the hierarchy of an organization, association, or identifiable group;

(7) The murder was committed during the course of or as a result of a shooting where the discharge of the firearm, as defined in RCW 9.41.010, is either from a motor vehicle or from the immediate area of a motor vehicle that was used to transport the shooter or the firearm, or both, to the scene of the discharge;

(8) The victim was:

(a) A judge; juror or former juror; prospective, current, or former witness in an adjudicative proceeding; prosecuting attorney; deputy prosecuting attorney; defense attorney; a member of the indeterminate sentence review board; or a probation or parole officer; and

(b) The murder was related to the exercise of official duties performed or to be performed by the victim;

(9) The person committed the murder to conceal the commission of a crime or to protect or conceal the identity of any person committing a crime, including, but specifically not limited to, any attempt to avoid prosecution as a persistent offender as defined in RCW 9.94A.030;

(10) There was more than one victim and the murders were part of a common scheme or plan or the result of a single act of the person;

(11) The murder was committed in the course of, in furtherance of, or in immediate flight from one of the following crimes:

(a) Robbery in the first or second degree;

(b) Rape in the first or second degree;

(c) Burglary in the first or second degree or residential burglary;

(d) Kidnapping in the first degree; or

(e) Arson in the first degree;

(12) The victim was regularly employed or self-employed as a newsreporter and the murder was committed to obstruct or hinder the investigative, research, or reporting activities of the victim;

(13) At the time the person committed the murder, there existed a court order, issued in this or any other state, which prohibited the person from either contacting the victim, molesting the victim, or disturbing the peace of the victim, and the person had knowledge of the existence of that order;

(14) At the time the person committed the murder, the person and the victim were "family or household members" as that term is defined in RCW 10.99.020(1), and the person had previously engaged in a pattern or practice of three or more of the following crimes committed upon the victim within a five-year period, regardless of whether a conviction resulted:

(a) Harassment as defined in RCW 9A.46.020; or

(b) Any criminal assault.

U.S. Const. amend I provides:

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances.

U.S. Const. amend. V provides:

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

U.S. Const. amend. VI provides:

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been

> committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

U.S. Const. amend. XIV, § 1 provides in part:

> No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Wash. Const. art. I, § 3 provides:

> No person shall be deprived of life, liberty, or property, without due process of law.

Wash. Const. art. I, § 9 provides:

> No person shall be compelled in any criminal case to give evidence against himself, or be twice put in jeopardy for the same offense.

Wash. Const. art. I, § 10 provides:

> Justice in all cases shall be administered openly, and without unnecessary delay.

Wash. Const. art. I, § 21 provides:

> The right of trial by jury shall remain inviolate, but the legislature may provide for a jury of any number less than twelve in courts not of record, and for a verdict by nine or more jurors in civil cases in any court of record, and for

waiving of the jury in civil cases where the consent of the parties interested is given thereto.

Wash. Const. art. I, § 22 (Amendment 10) provides:

> In criminal prosecutions the accused shall have the right to appear and defend in person, or by counsel, to demand the nature and cause of the accusation against him, to have a copy thereof, to testify in his own behalf, to meet the witnesses against him face to face, to have compulsory process to compel the attendance of witnesses in his own behalf, to have a speedy public trial by an impartial jury of the county in which the offense is charged to have been committed and the right to appeal in all cases: *Provided,* The route traversed by any railway coach, train or public conveyance, and the water traversed by any boat shall be criminal districts; and the jurisdiction of all public offenses committed on any such railway car, coach, train, boat or other public conveyance, or at any station or depot upon such route, shall be in any county through which the said car, coach, train, boat or other public conveyance may pass during the trip or voyage, or in which the trip or voyage may begin or terminate. In no instance shall any accused person before final judgment be compelled to advance money or fees to secure the rights herein guaranteed.

CERTIFICATE OF SERVICE

I, Alex Fast, certify and declare as follows:

On March 9, 2018, I served a copy of this REPLY BRIEF OF APPELLANT on counsel for the Respondent by filing a copy through the Portal and thus a copy will be delivered electronically.

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

Dated this 9th day of March 2018, at Seattle, Washington.

s/ Alex Fast
Legal Assistant

CERTIFICATE OF SERVICE

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Dated this 9th day of March 2018, at Seattle, Washington.

s/ Alex Fast
Legal Assistant

LAW OFFICE OF NEIL FOX PLLC

March 09, 2018 - 12:38 PM

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