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No. 96777-6

NO. 75924-8-I

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

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STATE OF WASHINGTON,

Respondent,

v.

JOHN ALAN WHITAKER,

Appellant.

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BRIEF OF RESPONDENT

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## **I. COUNTER ASSIGNMENT OF ERROR**

The trial court erred in ruling that the defendant had not waived the grounds asserted in his motion for new trial.

## **II. ISSUES**

1. Did the defendant produce substantial evidence to support a defense of duress with regard to the robbery and kidnapping aggravators?

2. If the evidence was sufficient, is duress a defense to aggravation of penalty factors?

3. Did the defendant waive two claims of error in the prosecutor's closing argument when he did not make a timely objection and instruction could have cured any resulting prejudice?

4. Were the prosecutor's argument that duress was not a defense to murder and his rhetorical questions asking jurors to think about what the murder victim was thinking and feeling proper in the context of the entire arguments and evidence in the case?

5. A juror summonsed a law clerk/bailiff during deliberations and wanted to be removed from the jury.

a. Did this brief communication violate CrR 6.15?

b. Was the defendant's right to an open public trial violated?

c. Did the court properly remove the juror because he had a medical emergency and could not deliberate?

6. Has the defendant demonstrated that he was prejudiced by a juror's isolated comment following the testimony of the medical examiner, when there was no evidence any other juror agreed with that comment and no evidence the jury's decision was based on anything other than the evidence presented?

7. Did the trial court abuse its discretion when it admitted autopsy photos previously admitted in the defendant's first trial, which this Court found were not so gruesome as to violate the defendant's due process right to a fair trial?

8. Was the inadvertent admission of the defendant's post arrest silence harmless beyond a reasonable doubt?

9. When the defendant has demonstrated no prejudicial error occurred, is he entitled to a new trial under the cumulative error doctrine?

### **III. ISSUE ON CROSS APPEAL**

Did the defendant waive claims of error on appeal when he moved for a mistrial, but then asked the court to reserve ruling until after the jury rendered a verdict?

#### **IV. STATEMENT OF THE CASE**

##### **A. THE EVENTS LEADING TO THE MURDER OF RACHEL BURKHEIMER.**

On September 23, 2002, the defendant, John Whitaker, along with John Anderson, Matt Durham, and Maurice Rivas, drove Rachel Burkheimer to a remote area of Snohomish County where she was shot and killed. 6 RP 1252-64; 10 RP 1957-60, 1968, 1977; 13 RP 2519-24. The defendant was charged with one count of aggravated first degree murder and one count of conspiracy to commit first degree murder for his part in these acts. Supp. CP \_\_\_ (sub 72 Amended Information).

Whitaker was part of a group that included Anderson, Kevin Jihad, and Jeff Barth, who worked together to make money by committing crimes. Jihad was the leader of the group. Anderson was second in command, with Whitaker positioned closely to Anderson. Rivas and Durham were also part of the group, but were not in charge. Jihad told the other members of the group if anyone told about their activities they would be dealt with. 7 RP 1483-85; 8 RP 1532-34; 9 RP 1654, 1659-65.

Anderson dated Rachel Burkheimer on and off in 2002. Rachel and Anderson broke up by the spring of 2002, but Anderson was still jealous when he heard Rachel was socializing and dating

other men. Anderson learned that Rachel was dating his former roommate, J.J. Brazwell, which made Anderson very angry. Anderson told Brazwell that he wanted to beat Rachel up and that he could not trust her. He also learned that Rachel was socializing with Abe McDicken. He warned an associate of the group, Jennifer Vink, that Rachel could no longer be trusted and to stay away from her. 4 RP 741-43; 5 RP 833-34, 840, 880-81, 998-99, 1009.

In September 2002, Whitaker, Anderson, Jihad, Barth, and Vink went to Brazwell's apartment to rob Brazwell. Vink stayed in the car while the others went to the door. They abandoned their plan when Barth hit the door and an alarm went off. Brazwell was not home at the time, but when he returned he noticed his door had been damaged. 5 RP 845-59, 869-70, 1013-15; 9 RP 1683-88.

A day or so before Rachel was killed, she was at a party at the Days Inn in Everett with Nicholas Pulley. Rachel invited Whitaker and Jihad to the party. When they arrived, she talked to them in the parking lot. When Pulley looked out the door to see who Rachel was talking to, the two men looked up at him and then left. When Rachel got back to the party, she was upset. 4 RP 796; 5 RP 1032-41; 9 RP 1673.

When Whitaker and Jihad returned to Jihad's home, they talked about the party. Whitaker told Jihad that since Pulley was friends with Brazwell, he believed that Brazwell and his group of friends were likely there and that Rachel had set them up by inviting them to the party. Eventually Anderson joined this conversation. Jihad was not certain at first, but eventually agreed Rachel had tried to set them up. When Anderson heard what happened, he "blew up" and was adamant that Rachel had set them up. The next day Anderson, Jihad, and Whitaker talked about the set up. Anderson talked about a plan to scare Rachel. 9 RP 1671-83.

On September 23, Rivas and Durham went to Nathan Lovelace's home after school. Rivas and Durham spent a lot of time on the phone and both appeared stressed out. Lovelace got concerned so he made up an excuse for why Rivas and Durham had to leave. Shortly after that, Rachel showed up at Lovelace's. She stayed for about 5 minutes, and then left with Durham in his Jeep. Rachel left her car at Lovelace's house. Rivas left too. 6 RP 1058-67.

While Durham and Rivas were at Lovelace's, Anderson called Rivas and Durham. Anderson was angry and accused Rachel of trying to set up his friends. Initially Anderson told them to

stay there and they would be over to “surprise” Rachel by grabbing her and taking her with them. The plan included Whitaker, as well as Anderson, Jihad, and Barth. Later Anderson told them to bring Rachel to Jihad’s house, by force if necessary. Whitaker was present in the room when Anderson made these demands. 6 RP 1196-97; 9 RP 1689-90; 10 RP 1887-94.

Durham and Rachel went to Jihad’s house while Rivas went to do a drug deal. When Durham and Rachel arrived, Jihad, Barth, Tony Williams, and Whitaker were present. Rachel joked and laughed with Whitaker. Anderson suddenly came in and was angry. He struck Barth and Whitaker. Barth stood up and threatened to shoot Anderson. Anderson got a gun and they had about a 30-second stand-off. 6 RP 1206-11; 8 RP 1538-43; 9 RP 1688-96; 10 RP 1897.

At this point Rachel got up and tried to leave. Anderson responded by grabbing her. He hit her in the face and threw her to the ground. No one tried to help Rachel. Barth left. Without prompting, Whitaker went over and kicked Rachel. Anderson then ordered Williams to turn up the music and get duct tape. When Williams brought the duct tape, Anderson and Whitaker tied Rachel up. 6 RP 1211-17; 8 RP 1544-49.

About the time this happened, Jihad's girlfriend, Trissa Conner, returned home. Barth alerted them to her presence. Jihad went out and told Conner that he did not want her in the house right then. Jihad then sent Conner on an errand for him. While she was away, Whitaker and Anderson carried Rachel into the garage. 6 RP 1101-04; 8 RP 1550; 8 RP 1699.

Eventually Rivas showed up while Rachel was tied up in the garage. Jihad brought him to the garage and showed him what was going on. Jihad told Rivas that he was "in this now" and "loose ends get cut off." Jihad explained the events leading up to then, including that Whitaker had kicked Rachel when Anderson knocked her down. 10 RP 1901-04, 1911-15.

Rachel remained tied up on the garage for some time. Anderson and Whitaker discussed the possibility of getting ransom for her. When Anderson talked about getting one million dollars from Rachel's dad, Rachel nodded her assent. Barth eventually came back to the garage and made a sexual comment about Rachel. He positioned his gun like it was his penis and touched Rachel's bottom with it. Rachel squirmed and was uncomfortable. At one point Jihad came in the garage and cocked his gun. Jihad

told Anderson that Anderson has started it but he was going to finish it. 6 RP 1221; 8 RP 1560; 10 RP 1925-28.

Conner had left the apartment while Rachel was in the garage. When she came back home she heard music coming from the garage. She went to investigate. Because the lock on the door had been reversed she had to get someone to let her in. Williams eventually let her in. When Conner saw Rachel, she became very upset. Conner talked to Rachel, assuring her that she would release her. Conner ran to get a knife. As she was cutting Rachel's bindings, Anderson grabbed Conner and threw her out. Conner then demanded everyone leave and threatened to call the police. 6 RP 1112-30; 8 RP 1553.

Whitaker grabbed a black duffel bag and brought it into the garage. There Whitaker and Anderson put Rachel into the bag and carried her out to Durham's Jeep. Whitaker, Durham, and Rivas then drove off in the Jeep with Rachel in the back cargo area in the bag. Whitaker discussed various plans, but eventually called Anderson because Whitaker was angry that Anderson was leaving him to clean up the mess. They dropped Rivas and Rachel off at a wooded area and got Anderson. Anderson borrowed some shovels and a pick ax from Jihad's neighbor. They then went back, picked

up Rivas and Rachel and drove to the Reiter Pit. 6 RP 1246-54; 10 RP 1939-60; 11 RP 2185.

On the way to Reiter Pit Anderson talked about how Rachel had tried to set them up. Anderson told Durham that he was going to use Durham's gun, but that he would replace it with Barth's gun. 6 RP 1255; 10 RP 1961.

While Rivas and Rachel waited for Whitaker, Durham, and Anderson to return, Rivas opened the bag and talked to Rachel. Rachel told Rivas she thought she was going to die and begged to be set free. Rivas told her he did not think it would come to that. Rachel asked that if she was going to die, she be shot rather than drowned. When Whitaker came back for them Rivas told Whitaker what Rachel said. 11 RP 2072-75.

Once they arrived at the Reiter Pit, Anderson pulled out the bag containing Rachel and struck it with a shovel. Anderson and Whitaker then start poking holes in the ground with the shovel and the pick. Anderson, Whitaker, and Rivas dug a small grave. They removed Rachel from the bag. Anderson ordered her to take off all her clothes and jewelry. Whitaker collected those items as she removed them. Rachel asked to keep one ring, but Anderson refused. Whitaker took off the duct tape because he was concerned

about DNA and fingerprints. Anderson ordered Rachel to get in the grave. Rachel looked up praying. Anderson told her "don't worry, you're going to be there soon." 10 RP 1963-64, 1968-76.

Anderson then shot Rachel six times. She died from her gunshot wounds. 6 RP 1263; 10 RP 1977; 13 RP 2569-70.

They buried Rachel and then returned to Jihad's house. From there Whitaker, Durham, and Rivas got rid of the gun and other items. Before leaving Jihad's with Rachel, Whitaker, Anderson, and Jihad discussed setting up Brazwell by leaving Rachel's car at his apartment complex. Whitaker, Durham, and Rivas got Rachel's car from Lovelace's and drove it there where it was found a few days later. 5 RP 1016; 6 RP 1264-70; 10 RP 1938-39, 1981-85.

Rachel's family reported her missing on September 26. Police investigated by talking to Whitaker and others. Later when the Whitaker and others learned that Rachel's body had been found, Whitaker arranged for transportation to Portland. From there, he, Jihad, and Barth took a bus to Los Angeles County, California. 4 RP 730, 783-98; 9 RP 1719-22.

Whitaker was arrested by the FBI fugitive task force on October 9, 2002. Whitaker agreed to talk to agents after he was

read his Miranda warnings. He spoke with them for about five hours. During that time, he gave a written and oral statement admitting his presence and participation in some of the events leading up to Rachel's kidnap and murder. 7 RP 1337-43, 1347, 1383-92; Ex. 220, 232.

#### **B. TRIAL EVENTS AND JURY DELIBERATION.**

During the first day of deliberations the bailiff responded to a call from the jury room. Juror 2 was at the door and told the bailiff, "I need to be excused." The bailiff led Juror 2 from the jury room and asked him what his concern was. The juror said that he was concerned the defendant was not getting a fair trial. He believed that the other jurors were very chummy with each other and were ganging up on him. Juror 2 stated "I can't do this anymore." When the juror tried to get into the specifics of deliberation, the bailiff stopped him and alerted the judge. 15 RP 2824-26.

The parties were informed that the juror was refusing to deliberate. 15 RP 2820. The defense moved for a mistrial on the basis that the defendant's right to a unanimous jury had been violated. He also argued a violation of CrR 6.15, requiring all juror communication be in writing. It later argued that the communication with the bailiff constituted an open courtroom violation. 15 RP 2827,

2853. Alternatively the defense suggested that the court bring jurors out and inquire whether the jury was deadlocked. 15 RP 2829.

The State opposed the mistrial motion. It further argued that the deadlock inquiry was inappropriate because there was no indication that the jury was hung. Rather this was a situation where the juror committed misconduct by refusing to comply with the court's instruction to deliberate. The remedy in that case was to remove the juror and replace him with an alternate. 15 RP 2830-31.

The court recognized that the situation was highly irregular. It decided that none of the courses of action advocated by either party was warranted at that time. Instead it determined it would send the jurors home for the evening to allow the court and the parties additional time to research a proper course of action. Although the court planned to have jurors conducted into court to release them, Juror 2 refused to sit with other jurors. The jurors were then released. 15 RP 2837-38, 2843-46.

The next morning, all jurors, including Juror 2, reported back to court and began deliberations. 15 RP 2882-83. Shortly thereafter the jury sent out a note stating:

I don't know what you were told... but a lot of unbelievable things happened in here yesterday. Are we allowed to address them for our safety? Stomachs are churning in here!

2 CP 511.

The defense argued the only option was to make an inquiry into whether the jury was deadlocked. The court rejected that argument and instead called the presiding juror out to inquire about the safety concerns. The presiding juror explained that one juror was having hard time following the court's instructions. That caused stress among the other jurors. Accusations were made that snowballed into threats. She indicated that there was one juror that was not healthy and should not have to deal with any more of the stress. 15 RP 2883-88.

At the defense request the court inquired of the jurors if there was a reasonable probability of reaching a verdict. The presiding juror was unable to answer that question. The court then asked if there was a reasonable probability of reaching a verdict as to any count. The presiding juror answered "yes." The jury was then instructed to continue deliberations. 15 RP 2893-2898.

The State then withdrew its objection to the defendant's motion for mistrial. The prosecutor explained that the State was

concerned for the safety of the jurors. He noted that the jurors had a gun and bullets in the jury room admitted as exhibits. After a recess to consider the State's position, the defense asked the court to defer ruling on its motion for mistrial until after a verdict had been reached. The court deferred ruling on the motion for mistrial. It refused to inquire into the nature of the threats as the State requested. It did grant the State's request to remove the bullets from the jury room. 15 RP 2895, 2898-04.

About two hours later the parties were called back into court and informed that Juror 2 had been removed from the jury room due to a medical emergency. The court excused the remaining jurors for the day. 15 RP 2904-12. The next day the court reported that it had received information that Juror 2 was still in the hospital. It was not known when he would be released.<sup>1</sup> The court called in an alternate juror and instructed the panel to disregard all previous deliberations and commence deliberations anew. 15 RP 2912-19. Later that same day the newly reconstituted jury reached a verdict. It found the defendant guilty of first degree murder while armed with a firearm. It found the kidnapping aggravating factor had been

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<sup>1</sup> About one week after trial concluded the court learned that Juror 2 had been admitted to the hospital and while there had a heart procedure done. 16 RP 2952.

proved. It also found the defendant guilty of conspiracy to commit first degree murder. 15 RP 2920-21.

### **C. POST-TRIAL MOTIONS.**

The defendant filed a motion for new trial alleging in part that the sequence of events on June 28-30 involving Juror 2 were trial irregularities that necessitated a new trial. He renewed his claim that the bailiff's contact with the juror violated CrR 6.7 and 6.15. He also argued that Juror 2 was the holdout juror, and it was error to excuse him for that reason. 1 CP 390-394. The State responded that each of the bases cited for a new trial were waived when the defendant chose to proceed to verdict rather than pursue his motion for mistrial when the State withdrew its objection. It further argued the facts asserted by Juror 2 in his declaration were disputed, and a hearing was necessary. It argued no violation of CrR 6.7 and 6.15 occurred. 1 CP 166-70; 361-63.

The court held that the defendant had not waived the error when he did not pursue its mistrial motion. 16 RP 3080. The court held an evidentiary hearing in which the jurors were examined. 16 RP 2978-3053. At the conclusion of the hearing the court denied the motion. It entered findings and conclusions that the sequence of

events involving Juror 2 did not deprive the defendant of his right to a fair trial. 5 CP 1727-40.

## **V. ARGUMENT**

### **A. THE DEFENDANT WAS NOT ENTITLED TO A DURESS INSTRUCTION RELATED TO THE ROBBERY AND KINDAPPING AGGRAVATORS.**

#### **1. The Defendant Failed To Produce Sufficient Evidence To Support A Duress Defense.**

The defendant proposed instructions that duress was a defense to the robbery and kidnapping aggravating circumstances. 2 CP 573-74. He argued that given the statutory language for the duress defense and aggravating factors, and the purposes of the Sentencing Reform Act (SRA), duress was a defense to those factors. 2 CP 575-77. He also argued that the facts of the case supported the instructions. 6/24 (PM) RP 61.

The trial ruled that there was insufficient evidence to support the defense. 6/24 (PM) RP 61-62. It did not reach the question whether the duress was a permissible defense to the aggravating factors.

The defendant challenges the trial court's decision to deny his proposed duress instructions. Since the evidence was insufficient to establish the defendant acted under duress, the instruction was properly denied.

A party is entitled to a jury instruction on his theory of the case if there is evidence to support that theory. Whether there was sufficient evidence to support the defendant's requested instruction is reviewed for an abuse of discretion. State v. Harvill, 169 Wn.2d 254, 259, 234 P.3d 1166 (2010).

It is a defense to a criminal charge 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.

RCW 9A.16.060(1).

The defense is available when it is shown that the threat of one person created in the mind of another person a reasonable apprehension of instant death or grievous bodily harm. State v. Harris, 57 Wn.2d 383, 385, 357 P.2d 719 (1960). The defense does not depend on whether the threat could be carried out immediately. Instead the question is what the defendant's belief was, and whether that belief was reasonable. State v. Williams, 132 Wn.2d 248, 259, 937 P.2d 1052 (1997). The threat may be explicit or

implicit. An implicit threat may be shown through the defendant's prior relationship with the person making the threat. Harvill, 169 Wn.2d at 264. However, "[m]ere fear or threat by another is not sufficient to constitute the defense." Harris, 57 Wn.2d at 385. The defense is not available to the charge of murder or "if the actor intentionally or reckless places himself or herself in a situation in which it is probable that he or she will be subject to duress." RCW 9A.16.060(2), (3).

The defendant is not entitled to an instruction on the defense unless there is substantial evidence to support it. State v. Healy, 157 Wn. App. 502, 505, 237 P.3d 360 (2010). The defendant presented sufficient evidence to be entitled to an instruction in State v. Taylor, 42 Wn. App. 242, 711 P.2d 353 (1985). There the defendant's husband was a prison inmate. The wife of another inmate threatened the defendant, her husband, and their child if the defendant did not introduce contraband into the prison. The woman told the defendant that her husband had already been assaulted during a basketball game. Threatening notes were sent to the defendant and her roommate, warning the roommate to stay away from the defendant if the roommate did not want to get hurt. Id. at 243-44.

In contrast the evidence was insufficient to support the defense in State v. McKinney, 19 Wn. App. 23, 573 P.2d 820 (1978). There, the defendant and a companion were drinking beer and playing pool at a tavern for several hours when the companion suggested that they rob the tavern. The defendant procured a bag and the companion pointed a gun at the bartender. At trial, the defendant testified that he was scared that the companion would shoot the defendant or the victim. This Court reasoned that the defendant was not entitled to assert duress because there was no evidence that the defendant acted under personal constraint or was threatened by his companion. It rejected the claim that fear for the victim compelled the defendant to commit the crime. Id. at 24-25.

Whitaker asserts that Anderson's conduct supported his duress defense. BOA at 17-18. The evidence presented however, shows that this case is much more like McKinney than Taylor. Anderson and the defendant both belonged to a group organized for the purpose of making money by planning and committing crimes. 7 RP 1483-85; 9 RP 1659-65. The defendant participated with Anderson in planning and committing those crimes, including an attempted burglary at J.J. Brazwell's apartment. 5 RP 845-59; 9 RP 1683-88.

Anderson's jealousy and anger toward Rachel when she began dating Brazwell was well known among the group. The defendant instigated Ms. Burkheimer's kidnapping by playing on Anderson's feelings toward her. The defendant was the one that convinced Jihad and Anderson that Rachel had set the defendant and Jihad up at the hotel party. 9 RP 1671-83. The defendant participated with Anderson and Jihad in planning the kidnapping, and later planning to cast suspicion for her disappearance on Brazwell. 9 RP 1689-91; 10 RP 1838-39, 1893. 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. On the contrary, without prompting the defendant assaulted Rachel, and then helped bind and carrying her into the garage after Anderson knocked her to the ground. 8 RP 1545.

Nor was there evidence that the defendant was acting under duress of any express or implied threat when he drove off with Rachel in the back of the Jeep. Instead, the evidence showed that the defendant was the one in control at that point. He was the one deciding where they went, contemplating a less lethal outcome to the night. 6 RP 1246-52; 10 RP 1945-50. There was no evidence

the defendant acted under any compulsion sufficient to support a duress defense when he was called back to the house to pick up Anderson.

Finally, there was no evidence that the defendant only took Rachel's things just before Anderson shot her because he reasonably feared Anderson would shoot him if he did not do so. Instead the evidence showed that from start to finish, the defendant aligned himself with Anderson and others to carry out criminal acts. Retaliation against Rachel for threatening the security of their group was part of membership in the group. 8 RP 1532-33; 10 RP 1860-61. Based on the foregoing evidence the defense of duress was not available because there was no evidence that Anderson made any express or implied threat that the defendant would be subject to death or grievous bodily injury if he did not participate in the kidnapping and robbery that ended in Rachel's death.

The defendant nonetheless argues that there was evidence supporting the defense. He points to his own statements to police that he was fearful of Anderson. But fearfulness alone is insufficient to support a duress defense. The defendant must also point to evidence that he reasonably feared death or grievous bodily harm.

To address that requirement, the defendant points to evidence that "out of the blue" Anderson punched the defendant, brandished a gun, and started "barking" orders. While Anderson did punch the defendant and Barth, and did brandish a gun when Barth challenged Anderson, none of that was unexpected. Anderson was known to carry a gun regularly. 8 RP 1590. He was also known to have a temper, and was known to be upset with Rachel. 9 RP 1671-73; Ex 232. The defendant knew that Anderson was planning to kidnap Rachel. Given what the defendant knew, and that he had previously associated himself with Anderson and Anderson's criminal enterprise, if the defendant's stated "fear" was sufficient to compel him to participate in the kidnap and robbery, then he had either intentionally or recklessly placed himself in a position where he would feel so compelled. In that circumstance the defense is not available. Since recklessness can be decided as a matter of law, the court did not err in refusing to give a duress instruction. Healy, 157 Wn App. at 515.

The defendant also asks the Court to rule as a matter of law that duress is a defense to either crime based aggravating factor. In other contexts where resolution of one issue is dispositive reviewing courts have declined to address a second issue. Thus a

court will not consider both prongs of an ineffective assistance of counsel claim where his showing on one prong is insufficient. In re Sanchez, 197 Wn. App. 686, 705, 391 P.3d 517 (2017). The court did not consider whether the defendant was prejudiced in most claims of prosecutor misconduct where the court held that all but one the challenged act was not improper. In re Gentry, 179 Wn.2d 614, 631-641, 316 P.3d 1020 (2014); see State v. Glassman, 175 Wn.2d 696, 703 n. 3, 286 P.3d 673 (2012) (declining consideration of an ineffective assistance of counsel claim where it found the defendant was entitled to a new trial on the basis of prosecutor misconduct). Since the record supports the trial court's decision to deny the duress instruction as it related to the aggravating factors, it is unnecessary to reach the issue of whether duress is an available defense to those factors.

## **2. The Legislature Did Not Intend Duress To Apply To Factors Aggravating Murder.**

If the court does reach the issue it should find that duress is not a defense to aggravating factors when the underlying crime is murder. When interpreting a statute the Court's objective is to determine the Legislature's intent. State v. Jacobs, 154 Wn.2d 596, 600, 115 P.3d 281 (2005). The surest indication of the legislature's

intent derives from the language of the statute. Where the meaning of the statute is plain on its face, the court gives effect to that meaning as an expression of legislative intent. State v. Ervin, 169 Wn.2d 815, 820, 239 P.3d 354 (2010). The plain meaning is discerned from the text of the statute, as well as the context of the statute in which the provision is found, related provisions, and the statutory scheme as a whole. State v. Larson, 184 Wn.2d 843, 848, 365 P.3d 740 (2015). The Court does not read language into the statute even where it believes the language was inadvertently omitted. State v. Slattum, 173 Wn. App. 640, 655, 295 P.3d 788 (2013).

Duress is available as a defense to most crimes. The statute applies when “the actor participated in a crime” RCW 9A.16.060(1). It does not state that it is applicable to aggravating factors, even if those factors are in and of themselves separate crimes. The aggravating factors in a first degree murder case are not elements of the crime of murder, but are “aggravation of penalty” factors that enhance the penalty for the crime. State v. Kincaid, 103 Wn.2d 304, 312, 692 P.2d 823 (1985). Thus the aggravating factors are not themselves crimes. Had the Legislature intended the duress defense to apply to sentencing factors in addition to crimes, it would

have said so. Because it omitted aggravating factors from the statute, the Court should not interpret it to apply to those factors.

The purpose of the Washington Criminal Code is

- (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.

RCW 9A.04.020(1).

The Legislature specifically denied application of the defense when the charge was murder, manslaughter, or homicide by abuse. RCW 9A.16.060(2). When considered in light of the purpose of the criminal code, that exemption reflects a policy decision that the most violent crimes may not be excused by external pressure sufficient to constitute duress. This is consistent with the rationale of other courts that have considered the policy behind exempting duress as a defense to murder.

Legal recognition of duress as a defense to crimes other than homicide necessarily assumes a working hypothesis that a harm or crime of greater magnitude is avoided when the subjected person succumbs to

the duress. This hypothesis disappears when duress is sought to be invoked as a defense in a homicide case.

Jackson v. State, 558 S.W.2d 816, 820 (Mo. App. 1977).

The only crime that is aggravated by either robbery or kidnapping is murder. A first degree murder committed in the course of, in furtherance of, or in immediate flight from either crime elevates that crime to aggravated first degree murder. RCW 10.95.020(11). Similarly, a person is guilty of first degree murder if he or an accomplice causes the death of another person while committing or attempting to commit robbery or kidnapping. RCW 9A.32.030(1)(c). Although the statute sets out defenses to first degree felony murder, a claim that the robbery or kidnapping was committed under duress is not one such defense. RCW 9A.32.030(1)(c)(i-iii).<sup>2</sup>

Since duress is not an available defense to murder, it makes little sense to find that it is nonetheless a defense to aggravating factors that are themselves independent crimes. If it did apply to

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<sup>2</sup> Similar to first degree felony murder, first degree rape may be committed in the course of a kidnapping. RCW 9A.44.040(1)(b). The duress defense applies to the rape as it is the crime charged, not the element of kidnapping.

those aggravating factors, it would undermine the Legislative policy that the protection and preservation of human life is paramount to the interests of one who is only threatened with injury or death.

The defendant cites an Ohio case to support his argument. State v. Getsy, 702 N.E.2d 866 (Ohio 1998). Unlike Washington, the Ohio legislature had not specifically exempted duress as an available defense to murder. Id. at 884. The Court construed that state's aggravated murder statute and held duress was not an available defense to that crime. Id. at 885. The Court stated that "[a]rguably, the defense of duress could have been asserted for the aggravating circumstances" of the crime, but found there was insufficient evidence to support the defense if it did apply. Id. at 886. The statement was dicta because it was not necessary to the court's decision in the case. It has no binding authority. State v Burch, 197 Wn. App. 382, 404, 389 P.3d 685 (2016). Since the suggestion in Getsy was only "arguable" and not accompanied by any reasoned analysis, it is not persuasive authority to support the defendant's position.

**B. THE DEFENDANT WAIVED A CLAIM OF PROSECUTOR ERROR IN CLOSING ARGUMENT. IN THE CONTEXT OF THE TRIAL THE PROSECUTOR'S ARGUMENTS WERE PROPER.**

The defendant argues the prosecutor committed two instances of error in closing argument that entitle him to a new trial. He claims that the argument that duress is not a defense to aggravated murder was improper because it addressed law that the jury had not been instructed on. He also claims that on several occasions the prosecutor improperly appealed to the passion and prejudice of the jury and argued facts not in evidence when he invited jurors to consider what Rachel was thinking and feeling at various times between her initial abduction and her ultimate murder.

The defendant bears the burden of proving the argument was improper as well as its prejudicial effect. An argument alleged to be improper is viewed in the context of the total argument, the issues in the case, the evidence addressed in the argument, and the instructions given. An improper remark is not grounds for reversal if it was invited or provoked by defense counsel and are in reply to his arguments, unless the remarks are not pertinent, or are so prejudicial that a curative instruction would be ineffective. State v. Russell, 125 Wn.2d 24, 85-86, 882 P.2d 747 (1994).

Failure to object constitutes waiver of error unless the remark is so flagrant and ill-intentioned that it causes an enduring and resulting prejudice that could not have been neutralized by a jury instruction. *Id.* at 86. In that case, the defendant must show “(1) no curative instruction would have obviated any prejudicial effect on the jury and (2) the misconduct resulted in prejudice that had a substantial likelihood of affecting the jury verdict” When the defendant fails to object to an allegedly improper argument the reviewing court focuses less on whether the argument was “flagrant and ill-intentioned” and more on whether the resulting prejudice could have been cured. *State v. Emery*, 174 Wn.2d 741, 760, 278 P.3d 653 (2012).

**1. The Argument That Duress Was Not A Defense Was Invited And Was A Pertinent Response To Defense Closing Argument.**

During closing argument, defense counsel developed the theme that there was no agreement to commit murder among the various participants. To support that claim, he argued in part that the participants, including the defendant, performed different acts because they were afraid of Anderson. He suggested that Williams only turned up the music and got duct tape because Anderson told him to, “not because of something Anderson had told him before...

He did it because he was scared of Anderson in that moment, because Anderson had a gun, and Anderson had just attacked three people." Noting that the defendant was one of those whom Anderson attacked, counsel argued that "he acted in exactly the same manner as Tony Williams." 14 RP 2730-31.

Counsel then discussed the defendant's reaction when he left with Rachel, Rivas, and Durham in the Jeep. The defendant initially looked for a place to drop Rachel off. The defendant concurred with Rivas that he did not think Rachel would die that night. Things changed "[a]fter Mr. Anderson gets in the Jeep, everyone is simply acting at the direction and fear of John Anderson, not because of some kind of an agreement or some kind of intent or some kind of conspiracy." He talked about other people's fear of Anderson. He concluded by stating that Whitaker and Rivas participated in the murder only because Anderson ordered them to do so. 14 RP 2738-41.

In rebuttal closing the prosecutor argued:

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.

14 RP 2764-2765.

The defendant did not object to this argument. The defendant did later move for a new trial in part on the basis that the argument constituted prosecutor error. 1 CP 387-389. The court denied the motion, finding the issue had been waived since there was no objection at the time, and that an instruction could have cured any resulting prejudice. The court reasoned that the prosecutor did not misstate the law, and a variation of the argument made by the prosecutor would have been proper. The court rejected the argument that the jury question was evidence that the jury had been influenced by the argument because it was not repeated after the jury had been reconstituted with an alternate juror.<sup>3</sup> 1 CP 92-94.

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<sup>3</sup> Before Juror 2 was excused the jury sent an inquiry asking for clarification of the prosecutor's argument that "being afraid or being under duress" was not a defense. 2 CP 512.

The defendant argues he is entitled to a new trial on the basis of prosecutor error because the prosecutor argued law that jurors had not been instructed on, relying on State v. Davenport, 100 Wn.2d 757, 675 P.2d 1213 (1984). In that case a defendant was charged with burglary. The court did not instruct jurors on accomplice liability. In closing the defense argued that the charge had not been proved if a co-defendant were in the building and handed items to the defendant standing outside. The prosecutor responded that the defendant could still be guilty as an accomplice. An objection to the argument was overruled. Id. at 759. The court ruled the argument was error because it referenced matters outside the scope of the instructions provided by the trial court. It acknowledged that a prosecutor may respond to matters brought up in defense closing, but found the argument exceeded the scope of the defense argument. Id. at 760. The court found prejudice since overruling the objection lent an aura of legitimacy to an otherwise improper argument. A jury question further demonstrated jurors were confused by the prosecutor's argument. Id. at 764.

Since the defendant in Davenport objected, prejudice was evaluated on the basis of whether it had a substantial likelihood of affecting the jury's verdict. Emery, 174 Wn.2d at 760. Here, the

defendant did not object. He therefore bears the burden of proving prejudice under the heightened standard. Id. at 761. The Court of Appeals found this standard had not been met when a prosecutor misstated the law in closing in State v. Classen, 143 Wn. App. 45, 176 P.3d. 582 (2008). There the defendant was charged with murder and the jury was instructed on manslaughter as a lesser included offense. The prosecutor erred by mischaracterizing manslaughter as an "accident," stating that recklessness and negligence are concepts related to accident. Since the defendant did not object, the improper argument was not a basis for new trial. Id. at 53, 64-65.

Unlike Davenport, the prosecutor's argument did not suggest to jurors that they could decide the case based on law that they had not been instructed on. On the contrary, the thrust of the argument was that jurors were confined to the instructions given to them by the court. That argument was consistent with the instructions that it was the juror's duty "to accept the law from my instructions" and "[y]ou must disregard any remark, statement, or argument that is not supported by the evidence or the law in my instructions." 1 CP 481-482. As the trial court stated, a variation of the argument that did not reference the law of duress would have been proper.

Although the prosecutor's reference to duress related to a matter jurors had not been instructed on, the remark was provoked by defense counsel's closing argument. Both defense counsel and the prosecutor are required to confine argument to the law as set forth by the court's instructions. State v. Estill, 80 Wn.2d 196, 199, 492 P.2d 1037 (1972). The defense had fought hard for a duress instruction before closing but was not able to convince the court there was sufficient evidence to give it. The reference to the defendant's "fear" of Anderson was an obvious attempt to argue that his participation in the kidnap, robbery, and murder was the result of duress and therefore excusable, despite the lack of a duress instruction. By arguing that the defendant only acted out of fear of Anderson, defense counsel went beyond the instructions given by the court, giving the jury the impression that if the defendant was afraid of Anderson, his conduct was excused, and he was therefore not guilty. Naming the argument for what it was, i.e. a claim of duress, was a fair response.

The defendant argues the prosecutor's conduct was "flagrant and ill-intentioned" and therefore no jury instruction could have obviated the prejudice. Whether the prosecutor's conduct met that standard and whether the prejudice were incurable are two different

things. The reviewing court is more concerned with whether the prejudice could be cured, than whether the conduct was “flagrant and ill-intentioned.” Emery, 174 Wn.2d at 760.

The defendant cites Glassman. There the Court found the prosecutor’s closing argument was “flagrant and ill-intentioned” because it violated several well settled rules concerning the scope of argument. The argument submitted evidence that had not been admitted to the jury. The argument also incorporated the prosecutor’s personal opinions regarding the defendant’s guilt. Because the arguments and inflammatory language in an accompanying Power Point presentation pervaded the entire closing argument the Court found no instruction could cure the resulting prejudice. Glassman, 175 Wn.2d at 704-06

Relying on defense counsel’s flattery of the prosecutors in this case during the motion for new trial, the defendant argues that the prosecutor knew that he could only argue the law as contained in the instructions, and therefore his conduct was “flagrant and ill-intentioned.” Likewise, the prosecutor’s experience no doubt meant he understood he could make a fair response to defense counsel’s argument. The prosecutor confined his argument to a fair response. The argument was neither flagrant nor ill-intentioned.

Moreover the remark was fleeting. Unlike Glassman the prosecutor's entire rebuttal closing was not devoted to talking about duress. For that reason if it was error, an instruction to disregard the statement could have cured any resulting prejudice.

**2. The Prosecutor Argued From The Evidence And Reasonable Inferences From The Evidence. The Defendant Has Not Shown That If The Arguments Were Error It Could Not Have Been Cured By An Instruction.**

A prosecutor is permitted to argue the facts in evidence and reasonable inferences from those facts in closing argument. State v. Dhaliwal, 150 Wn.2d 559, 577, 79 P.3d 432 (2003). A prosecutor may not refer to evidence that has not been admitted at trial. Glassman, 175 Wn.2d at 705. It is also improper to make arguments calculated to inflame the passion and prejudice of the jury. State v. Thierry, 190 Wn. App. 680, 690, 360 P.3d 940 (2015), review denied, 185 Wn.2d 1015 (2016).

Here the defendant argues that the prosecutor's rhetorical questions to imagine what Rachel was thinking and feeling were an improper "Golden Rule" argument. That argument urges jurors to put themselves in the place of one of the parties to the litigation, or to grant a party the recovery they would wish themselves if they were in the same position. It is improper because it urges jurors to

consider the case on the basis of personal interest or bias rather than on the evidence. Adkins v. Aluminum Company, 110 Wn.2d 128, 139, 750 P.2d 1257 (1988). The Court has not adopted a prohibition on that kind of argument in criminal cases. State v. Borboa, 157 Wn.2d 108, 124 n. 5, 135 P.3d 469 (2006). Instead arguments inviting jurors to imagine themselves in the victim's place are considered in terms of whether it was an appeal to the jury's sympathy or passion. State v. Pierce, 169 Wn. App. 533, 555 n. 9, 280 P.3d 1158 (2012).

The prosecutor developed a theme that Rachel was betrayed by friends and others who could help her. The challenged arguments properly referred to the evidence and the reasonable inferences to be drawn from it. The first challenged argument to "[i]magine what Rachel went through in the hours that she was in the garage" and "at that point she had a glimmer of hope" related to Connor's abandoned opportunity to free her. 14 RP 2673, 2678. Connor testified that when she saw Rachel bound in the garage, she spoke to Rachel and assured her that Conner would help her. Conner got a knife and started to cut Rachel's bindings. Connor abandoned her efforts when Anderson grabbed Conner and threw her out of the garage. 6 RP 1124-29.

The argument that Rachel must have believed that her family would do anything for her related to testimony regarding talk of ransom in her presence. Williams testified Anderson and the defendant talked about money when Rachel was in the garage with them. 8 RP 1555. Rivas said Anderson told him that they had a plan to ransom Rachel. Rachel was conscious when that statement was made. 10 RP 1923. Durham testified that Rachel nodded affirmatively when Anderson asked if her dad had money to pay for her. 6 RP 1221.

The discussion about Jihad chambering a round and talking about ending it right there is supported by Rivas's testimony. He said that Rachel "got scared" when Jihad cocked a gun in her presence and said Anderson started it but he was going to finish it. 10 RP 1925-1926. Similarly the discussion about Barth using a gun to make sexual gestures toward Rachel is supported by Rivas's testimony that Barth took his gun and put it between his legs, poking Rachel in the bottom and stating he wanted to stick her. Rachel was uncomfortable, squirming and mumbling. 10 RP 1927-1930.

The reference to Rachel hearing them talk about what gun was going to be used was supported by evidence she was in the

back of the Jeep on the way up to the Reiter Pit. During that time, Anderson said that he was going to use Durham's gun, but he assured Durham that he would replace it with Barth's gun. 6 RP 1254; 10 RP 1961-62; 14 RP 2686. It was also supported by evidence Rachel that told Rivas she thought she was going to die. 11 RP 2072-75. The argument "she knows she's going to die" was a reasonable inference from evidence she was being driven to a remote location where Anderson was going to use the gun.

There was likewise evidence supporting the argument about what Rachel knew when she was kneeling in her grave. 14 RP 2689. Rivas testified that as she knelt in her grave and the defendant was pulling the duct tape off of her she looked around scared. Rachel then looked to the sky praying when Anderson told her "don't worry, you're going to be there soon." 10 RP 1976. The inference from that evidence is that Rachel at that point knew she was going to die.

The defendant argues the prosecutor's rhetorical questions throughout these arguments asking what was Rachel thinking and feeling was improper. He compares the arguments to those found to be inflammatory and not supported by the evidence in Pierce. Pierce involved a double homicide where in closing the prosecutor

speculated what the defendant and victims were thinking and feeling. He also speculated about a series of events that occurred during the murder that was completely unsupported by any evidence. Pierce, 169 Wn. App. at 553-555.

Unlike Pierce there was evidence in the record that supported the reasonable inference that Rachel was aware she was being kidnapped and would ultimately die at the defendant and other's hands. The questions "[w]hat is she thinking? What is she feeling? What is Rachel going through?" were not speculation about her mental and emotional state. Nor did they ask jurors to put themselves in Rachel's shoes at that time. Rather, the arguments were an invitation for jurors to draw their own reasonable inferences from the evidence. That reasonable inference was that it was obvious to everyone that the plan was to kidnap and murder Rachel.

Nor were the arguments an appeal to the jury's passion and prejudice. The arguments suggested nothing more gruesome than the evidence revealed. "A prosecutor is not muted because the acts committed arouse natural indignation." State v. Fleetwood, 75 Wn.2d 80, 84, 448 P.2d 502 (1968). The arguments complained of did not embellish on the evidence presented as those found

improper in Pierce, 169 Wn. App. at 554-555. Nor did they contain the inflammatory comparisons that were found improper in State v. Belgarde, 110 Wn.2d 504, 506-508, 755 P.2d 174 (1988) (holding it was improper to characterize the group a defendant admitted affiliation with as unstable and "a deadly group of madmen.")

The defendant further argues that the prosecutor's argument was improper because what Rachel was thinking and feeling was irrelevant to the issues at trial. The issues at trial included whether Rachel had been kidnapped, whether her murder was intentional and premeditated, and whether the defendant was an accomplice or an unwilling participant in the crimes. 1 CP 491-492, 496. Kidnapping was defined as "intentionally abducting another person with intent to inflict bodily injury on the person or to inflict extreme mental distress on that person or a third person." 1 CP 498.

What was apparent to Rachel at the time she was kidnapped and during the events that led up to her murder would have also been apparent to anyone involved in those acts, including the defendant. That in turn bore on whether the defendant intentionally abducted her, and whether he or a person to whom he was an accomplice intentionally inflicted extreme mental distress on her. It also bore on whether he or an accomplice with premeditation

murdered her. It also bore on whether the defendant was a major participant in the crime and whether he conspired with others to commit the kidnap and murder. 1 CP 496, 500. The prosecutor explained that he went through the entire preceding narrative because it bore on those issues. 14 RP 2694.

Since none of these arguments were improper, they do not constitute prosecutor error justifying a new trial. If the arguments were improper, then the defendant waived the error when he did not object to them. Had he objected and stated the basis for the objection, the court could have sustained it and struck the argument from the juror's consideration. In turn, that would have alerted the prosecutor to the issue, and would have prevented repeated rhetorical questions about what Rachel was thinking and feeling.

The defendant argues that the prejudice from those arguments was incurable. He suggests that the argument should be considered in light of the argument that duress was not a defense to murder, and in the context of photos he describes as "needlessly gruesome and inflammatory" as well as the "toxic atmosphere" apparent in the jury room. He does not explain how asking jurors to consider what Rachel was thinking and feeling as she was going through the events of the last few hours of her life caused jurors to

decide the case on an emotional basis rather than the evidence presented. As discussed in section IV C, The "toxic" atmosphere in the jury room occurred before one juror was ultimately removed for health reasons. After that juror was removed, no other questions or concerns were voiced by the reconstituted jury.

Finally, the defendant once again refers to defense counsel's flattery, calling the prosecutor part of the "A team," to suggest that the argument was "flagrant and ill-intentioned." As noted however, Washington has not yet prohibited "golden rule" arguments in criminal cases. The arguments made were nothing like those found to be improper appeals to the jury's passion and prejudice in other cases. Without an objection, the prosecutor had no way of knowing that the defense considered the arguments improper. They were neither flagrant nor ill-intentioned. If they were improper, the resulting prejudice could have been cured with an instruction.

**C. THE DEFENDANT WAIVED A CLAIM OF ERROR RESULTING FROM EVIDENCE OF HIS POST ARREST SILENCE AND JUROR CONDUCT DURING DELIBERATIONS.**

A criminal defendant has a valued right to have his trial completed by a particular tribunal. United States v. Dinitz, 424 U.S. 600, 606, 96 S.Ct. 1075, 47 L.Ed.2d 267 (1976). When a trial irregularity occurs, the defendant has a choice: he may either seek

a mistrial or he may “nonetheless desire “to go to the first jury and, perhaps, end the dispute then and there with an acquittal.” Id. at 607-608. Under the Double Jeopardy Clause, the defendant should “retain primary control over the course to be followed in the event of such error.” Id. at 609. Absent a showing of “manifest necessity,” a mistrial cannot be properly declared without the defendant’s request or consent. Id. at 606-607.

Here the defendant initially moved for mistrial on several bases. He first moved for a mistrial on the basis that the State presented evidence of his post arrest silence. 13 RP 2481; 14 RP 2589-2609. He then moved for mistrial on several bases stemming from the events involving Juror 2 after deliberations began. 15 RP 2827-2844, 2852-2864, 2880. When the State withdrew its objection to the motion, the defendant had the option of aborting the trial or continuing to verdict. He chose the latter. 15 RP 2898-2902. In doing so, the trial court could not properly grant a mistrial based on these incidents.

By asking the court to reserve ruling the defendant made his strategy clear. He wanted to potentially obtain a favorable verdict, while at the same time preserving his option to challenge an unfavorable verdict. This is not a permissible strategy. State v.

Lord, 161 Wn.2d 276, 291 165 P.3d 1251 (2007). (failure to make a motion for mistrial or for curative jury instruction constituted waiver.)

A defendant cannot withhold a mistrial motion, gamble on the verdict, and then rely on the same grounds for a new trial.

Petitioner had many opportunities to request a mistrial and never did so. Had he felt the procedures used were inadequate for a fair trial, it was incumbent upon him to move for a mistrial at that time. He did not do so. Even after all the testimony was concluded and the jury was in the process of deliberating, petitioner declined to move for a mistrial when a sick juror was excused. It is obvious the defense did not feel greatly prejudiced by the late revelation of the incident until after the adverse verdict. The defense made a tactical decision to proceed, "gambled on the verdict", lost, and thereafter asserted the previously available ground as reason for a new trial. This is impermissible

State v. Williams, 96 Wn.2d 215, 226, 634 P.2d 868 (1981).

The defendant cannot now claim that eliciting evidence of his post arrest silence and the events surrounding Juror 2 are a basis for new trial. Those issues were the basis for his motions for mistrial, which he abandoned when he elected to allow the jury to go to verdict. That constitutes waiver.

The defendant based his motion for new trial in part on these two grounds. 1 CP 382-387, 390-406. The State argued that the defendant had waived these issues when he chose to proceed to verdict rather than accept a mistrial. 1 CP 361-363; 16 RP 3067-69,

3079. The court held that the defendant had not waived those bases for a new trial because the court had reserved ruling on mistrial motion and had asked the defense for its position on further reserving ruling before going forward. The court also perceived that the State had withdrawn its objection to the mistrial at a strategic point in deliberations<sup>4</sup>. 16 RP 3080-3081.

There is no authority for the proposition that the conduct of the trial judge or the opposing party determines whether a party has waived grounds for a motion for mistrial. In similar circumstances, the court has made clear that the duty to pursue relief lies solely with the aggrieved party. Where the defendant got a favorable ruling from the trial court in a motion in limine but did not object to testimony that arguably violated that ruling, he waived review of that claimed error as a basis for new trial. State v. Sullivan, 69 Wn. App. 167, 847 P.2d 953 (1993). The Court recognized without that rule, there was a potential for serious abuse. "A party so situated could simply lie back, not allowing the trial court to avoid the potential prejudice, gamble on the verdict and then seek a new trial

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<sup>4</sup> The State withdrew its motion for mistrial when it became apparent that deliberations had become so emotional that there was a concern for juror safety. 15 RP 2884-2898. Contrary to the trial judge's accusation, the State did not withdraw its objection because it perceived some advantage to a new trial.

on appeal." Id. at 172. These authorities demonstrate that whether a party pursues or abandons a basis for relief is solely within the control of that party. The trial court erred when it held that the defendant had not waived a claim he was entitled to a new trial on these bases.

**D. THE EVENTS CONCERNING JUROR CONDUCT DURING DELIBERATIONS DO NOT JUSTIFY A NEW TRIAL.**

**1. The Bailiff's Actions Did Not Violate CrR 6.15.**

The defendant first claims that the manner in which the bailiff dealt with Juror 2 violated CrR 6.15. That rule requires that jurors be instructed that "any questions it wishes to ask the court about the instructions or evidence should be signed, dated, and submitted in writing to the bailiff." CrR 6.15(f).

The defendant assigns error to the court's finding of fact 30-33. Challenged findings of fact are verities on appeal if they are supported by substantial evidence. Substantial evidence is evidence sufficient to persuade a fair minded person of the truth of the premise. Cowiche Canyon Conservancy v. Bosley, 118 Wn.2d 801, 819, 828 P.2d 549 (1992).

The court entered the following challenged findings of fact<sup>5</sup>:

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

5 CP 1731.

The law clerk reported that the juror was at the door when the law clerk answered the call from the jury room. Juror 2 stated he wanted out, that he was having difficulty with other jurors, and that he could not continue deliberations. When Juror 2 tried to get into the content of deliberations the law clerk interrupted him, telling him not to talk about that and "let me talk to the judge." The law clerk then went and brought the matter to the court's attention. The

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<sup>5</sup> The defendant also asserts that the law clerk had 3-4 conversations with Juror 2. BOA at 32. Juror 2 made this claim in his affidavit appended to the motion for new trial. 1 CP 373. The court did not find that the law clerk had 3-4 contacts with the juror. In the absence of a factual finding on an issue, the Court presumes that the party with the burden of proof failed to sustain his burden on the issue. State v. Armenta, 134 Wn.2d 1, 14, 948 P.2d 1280 (1997).

law clerk did not say that he gave Juror 2 any information.<sup>15</sup> RP 2825-2826.

This record supports the court's findings of fact 30-33. They are therefore verities on appeal.

In addition to the foregoing facts, the trial court found that it complied with its duty to instruct jurors on communication with the court. 5 CP 1736.<sup>6</sup> The court concluded that the bailiff's communication had not violated CrR 6.15. This conclusion is supported by the trial court's factual findings. The communication did not have anything to do with the instructions or the evidence. CrR 6.15(f) does not require administrative questions concerning jurors be in writing. Juror 2 summonsed the bailiff for the purpose of extricating himself from the rest of the jurors and terminating his role in deliberations. That request presented other issues involving neither the instructions nor the evidence. Rather, it had to do with the juror's interpersonal relations with other jurors.

The defendant claims error because the bailiff's contact with the juror was undocumented and left the parties without any ability to object or offer suggestions to the trial court on the best course of

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<sup>6</sup> This finding was labeled as a conclusion of law. It is treated as a finding of fact on appeal. Karanjah v. Department of Social and Health Services, 199 Wn. App. 903, 916, 401 P.3d 381 (2017).

action. BOA at 32. The record contradicts this claim. As the trial court found, the bailiff immediately contacted the parties and the court. 5 CP 1731, finding 33. He stated on the record what had transpired between himself and Juror 2. The parties and the court engaged in a long colloquy about what should happen next. The defendant offered two alternative remedies; either order a mistrial or inquire whether the jury was deadlocked. 15 RP 2820-46.

The contact between the law clerk and Juror 2 did not violate CrR 6.15. The defendant has not shown that he was prejudiced in the manner in which the juror's contact with the law clerk was handled. Thus, a claimed violation of CrR 6.15 is not a basis to grant a new trial.

**2. The Defendant's Right To A Public Trial Was Not Implicated By A Brief Contact Between The Law Clerk And Juror 2.**

The defendant next contends that his right to an open public trial was violated when the Juror 2 spoke to the law clerk. Washington Constitution Article 1, §22 guarantees criminal defendants "to have a speedy public trial." The right serves to ensure a fair trial, to remind officers of the court of the importance of their functions, to encourage witnesses to come forward, and to

discourage perjury. State v. Brightman, 155 Wn.2d 506, 514, 122 P.3d 150 (2005).

Not all courtroom matters implicate that provision. To determine whether it is implicated, the Supreme Court has adopted the experience and logic test. State v. Sublett, 176 Wn.2d 58, 292 P.3d 715 (2012). The experience prong asks “whether the place and process have historically been open to press and general public.” Id. at 73. The logic prong asks “whether public access plays a significant positive role in the function of the particular process in question.” Id. Using that test, the court held that a chambers conference to discuss a jury question did not implicate that provision. The Court reasoned that jury questions are much like discussions about jury instructions, which historically have not necessarily been conducted in open court. Since the opportunity to object to the proposed answer occurs on the record, none of the values served by the public trial right were violated. Id. at 75-78.

Using the same test the Court similarly held sidebars do not violate that provision. State v. Smith, 181 Wn.2d 508, 334 P.3d 1049 (2014). Historically side bar conferences were not held within public view since they deal with “mundane issues implicating little public interest”. Id. at 516-517. Under the logic prong the court

reasoned that the public would have little to add to a discussion about legal principles. The public was informed about what happened when the sidebar was memorialized on the record. Id. at 518-519.

Applying the experience and logic test to the facts of this case shows that the brief interaction between the law clerk and Juror 2 did not implicate the defendant's right to a public trial. Jurors are kept separate from the public during the course of deliberations. The officer charged with their care is restricted from communicating with them except to ask if the jurors have reached a verdict. CrR 6.7(b). Historically the law clerk or bailiff is placed in charge of the jury, and the jury is given some means of summoning the bailiff when his attention is required. When summonsed, it is typically for the purpose of notifying the court that the jury had reached a verdict. A juror may also contact the law clerk for other matters such as to seek assistance in arranging personal matters to accommodate deliberations beyond the normal court day. Or juror may have a medical emergency. In that context jurors may summon the law clerk to arrange for a paramedic. These contacts are done at or nearby the threshold of the jury

room. Until the law clerk responds however, he has no idea why he is being summonsed.

Like side bars and juror question conferences, a requirement that jurors not communicate anything to the law clerk before being escorted into court would not further the values served by the public trial right. The purpose of the brief contact with the law clerk is to ascertain the needs of the jurors; either to render their verdict or to assist in personal matters that come up in the course of deliberations. Public scrutiny of these housekeeping type of communications would not enhance the fairness of the trial. Since the law clerk's duty is to immediately report to the court what has been communicated to him, the reasons for the contact are made public when the court notifies the parties what has transpired.

While the defendant repeats his claim that the law clerk had several contacts with the juror, the court made no such finding. The record shows that the law clerk had one brief contact with Juror 2, and determined as quickly as possible why he summonsed the law clerk to the jury room. The law clerk conveyed no information to the juror and preempted the juror's attempts to discuss what happened in jury deliberations. The juror's statements concerning his personal relationships with other jurors explained why he

wanted out of the jury deliberations. It had nothing to do with the jury's thought process concerning its verdict. Under the experience and logic prong this was a normal response to a juror summoning the law clerk. The substance of the contact was unusual, but that was due to the juror, not the law clerk. The substance of the conversation was placed on the record. The public's presence during that brief contact would not have promoted the public trial right values.

The defendant asserts that any communication between the court and a juror violates his public trial right, relying on State v. Lam, 161 Wn. App. 299, 254 P.3d 891 (2011). There the court conducted an entire colloquy in chambers with a juror who expressed concerns about his personal safety due to the nature of the crime. The court sealed that portion of the trial. While the lawyers were present during this examination, the defendant was not. Id. at 302. This Court found that the questioning was similar to voir dire. Since that portion of trial occurred in public, the questioning violated the defendant's public trial right. Id. at 303-305.

Unlike Lam the interaction between the law clerk and the juror was nothing like voir dire. The law clerk did not question the juror. He interrupted the juror and kept the juror from talking about

deliberations. He reported immediately to the court and the parties in open court what had transpired. Lam did not deal with initial communications to determine the juror's needs that are at issue here. It does not support the assertion that every single communication between the court and the jury must occur in an open courtroom.

### **3. The Defendant's Right To Be Present Was Not Violated.**

Washington Constitution Art. 1, §22 guarantees the defendant the right to be present at trial. The provision is triggered any time the defendant's substantial rights may be affected. State v. Englund, 186 Wn. App. 444, 460, 345 P.3d 859 (2015). Those rights may be affected in circumstances where he may actively contribute to his own defense. State v. Bennett, 168 Wn. App. 197, 203, 275 P.3d 1224 (2012). "The core of the constitutional right to be present is the right to be present when evidence is being presented." In re Lord, 123 Wn.2d 296, 306, 868 P.2d 835 (1994). Re-playing evidence before a jury implicates that right. State v. Rice, 110 Wn.2d 577, 613, 757 P.2d 889 (1988). Jury selection is also encompassed in that right. State v. Irby, 170 Wn.2d 874, 882, 246 P.3d 796 (2011).

The right does not attach to proceedings involving purely legal matters or ministerial matters. In re Pirtle, 136 Wn.2d 467, 484, 965 P.2d 593 (1998). Thus a defendant did not have a right to be at an in chambers bench conference on the admissibility of evidence where no testimony was required. Lord, 123 Wn.2d at 306. Nor did the defendant have a right to be present when the court discussed the wording of jury instructions or jury sequestration. Pirtle, 136 Wn.2d at 484. The right did not attach when the court provided jurors a tape measure and masking tape at the jury's request. State v. McCarthy, 178 Wn. App. 90, 97-100, 312 P.3d 1027 (2013).

The brief contact between the law clerk and Juror 2 was ministerial. It concerned questions regarding the juror's needs and his request to be removed from the jury. There was nothing that the defendant could have contributed to that exchange that could have affected his defense. Thus the defendant did not have a right to be present during that initial exchange.

Several of the trial court's findings regarding the juror's actions could be characterized as misconduct. The juror's attempt to reveal details of the jury's deliberations to the law clerk directly violated the court's instruction to not discuss the case with anyone

other than fellow jurors. His refusal to return to the jury room violated the duty to deliberate. In Pirtle, the Court stated that it may have been appropriate for the defendant to be present during a conference to discuss juror misconduct. Pirtle, 136 Wn.2d at 484. However, since the defendant was apprised of the matter, and a hearing on the issue was heard on the record immediately after the alleged misconduct became known, the defendant's rights were not violated by an in-chambers conference on the issue.

Here the misconduct occurred under circumstances in which it would not have been possible to go into court on the record any earlier. The court held no in-chambers conference, but discussed the issue on the record in the defendant's presence as soon as it became known. As in Pirtle the defendant has not shown the procedure used here violated his right to be present.

**4. Juror 2 Was Dismissed For Medical Reasons, Not Because Of His Views On The Evidence. The Defendant's Right to Due Process and a Unanimous and Impartial Jury Was Not Violated.**

The trial judge has a statutory duty to excuse a juror from jury service when in the judge's opinion the juror has manifested unfitness as a juror by reason of "any physical or mental defect." RCW 2.36.110. The decision to excuse a juror for this reason is

reviewed for an abuse of discretion. State v. Jorden, 103 Wn. App. 221, 226, 11 P.3d 866 (2000), State v. Hughes, 106 Wn.2d 176, 204, 721 P.2d 902 (1986). A trial court abuses its discretion when it is based on untenable grounds or for untenable reasons. A decision is based on untenable grounds when the factual findings are unsupported by the record. It is made for untenable reasons if it is based on an incorrect standard or the facts do not meet the requirements for the correct standard. State v. Dye, 178 Wn.2d 541, 553-54, 309 P.3d 1192 (2013).

Juror 2 had a medical emergency which required that he be removed from deliberations by EMTs and brought to the hospital. 15 RP 2904. The court did not excuse him at that point, but waited until the next day to see if his condition would improve to the point that he could return. 15 RP 2910-12. The information conveyed to the court by the juror's representative was that he had been admitted to the hospital, and that it was unknown when he would return. 15 RP 2912.

The court applied the correct standard for determining the jurors' fitness for service when it based the decision to dismiss him on a physical defect that kept him from deliberations. The record supports the court's decision to excuse the juror because his health

condition was unknown and it was not clear that he would be able to return within a reasonable amount of time. The trial court did not abuse its discretion when it excused Juror 2 because his health condition kept him from being able to participate in deliberations.

The defendant argues that the court did not excuse the juror because he had been hospitalized but because he was a “holdout” juror. When a juror’s view of the evidence differs from that of other jurors, dismissal of that juror implicates a defendant’s right to a unanimous verdict and an impartial jury. State v. Elmore, 155 Wn.2d 758, 771-772, 123 P.3d 73 (2005). Where there is a reasonable possibility that a complaint about a juror refusing to deliberate or attempting nullification is based on the juror’s view of the evidence, the court it must send the jury back with instruction that it must try to reach a verdict. Otherwise the defendant is entitled to a mistrial. Id. at 772, 778.

The defendant first alleges that initially separating Juror 2 from the rest of the panel signaled to the jury that there was something wrong with his evaluation of the evidence. As the court found, Juror 2 was the one who buzzed the law clerk and asked to be removed from the jury room. Only after that request did the law clerk put the juror in a separate room. 5 CP 1730. The next day,

Juror 2 returned to the jury room and participated in deliberations. 5 CP 1731. A reasonable inference from that sequence of events is that jurors assumed whatever the problem was the day before had been resolved from the court's perspective. It did not suggest that the court had any opinion one way or the other about the juror's evaluation of the evidence.

Juror 2 himself refused to deliberate. The presiding juror did not identify who was having a hard time following jury instruction or whose physical condition was affected by the emotional stress in the jury room. Following the dictate in Elmore the trial court directed the jury to return to the jury room to continue deliberations when the presiding juror said there was a reasonable probability of the jury reaching a verdict as to some counts. 15 RP 2898.

The defendant also argues that Juror 2 was wrongly dismissed because his health condition directly stemmed from the stress and threats he received as a holdout juror. He cites Juror 2's declaration to support that argument. The effect of illness and claimed pressure by other jurors is a matter that inheres in the verdict and may not be considered as a basis to grant a new trial. State v. Forsyth, 13 Wn. App. 133, 138, 533 P.2d 847 (1975); State v. Hoff, 31 Wn. App. 809, 813, 644 P.2d 763 (1982). Moreover,

regardless of the reason for the juror's illness, the fact remained he was incapacitated for an indefinite period of time. The court only excused him and reconstituted the jury with an alternate after it learned the juror would not be available for the foreseeable future. The juror's illness, and not his evaluation of the evidence, was the reason he was excused. The defendant's right to jury unanimity and impartiality was not violated in that circumstance.

**E. THE DEFENDANT HAS NOT SHOWN HE WAS PREJUDICED BY ONE JUROR'S COMMENT FOLLOWING THE MEDICAL EXAMINER'S TESTIMONY.**

The defendant filed an affidavit from Juror 2 in connection with his motion for new trial. In it, Juror 2 alleged juror misconduct when one juror stated to the jury "I hope they fry the fucking bastard" upon returning to the jury room after the medical examiner's testimony. He claimed the majority of other jurors agreed with this sentiment. 1 CP 371. During the evidentiary hearing seven of the fourteen jurors and alternates testified that they did not hear that statement made. 16 RP 2996, 3001, 3009, 3025, 3031, 3041, 3044. Three jurors heard some kind of comment but not the exact wording. 16 RP 3010-3011, 3017, 3028-3029. Four jurors heard the comment, or a variation on that comment. 16 RP 3003, 3036, 3048-3049, 3054. None of the jurors testified that

the comment had an effect on them. When the juror made the comment, other jurors admonished the juror to not let emotions get in the way of their decision. 16 RP 3037.

Juror 2 initially testified that he did not recall whether jurors responded to the comment. When asked about his declaration, the juror admitted his memory was "not as good," and agreed that some jurors verbally agreed with that sentiment. 16 RP 2981, 2990.

The court found the statement had been made. It also determined that most or all of the jurors did not agree with that sentiment. The court concluded the statement inhaled in the verdict. Even if the court could consider it, based on the testimony showing no juror had a fixed opinion as to the outcome of the case before deliberations began, prejudice was not shown. 1 CP 98-99.

The defendant argues that the juror's emotional outburst demonstrated that she had formed an abiding belief that the defendant was guilty. Even if the juror had made up her mind before deliberations began, that does not mean the defendant had established prejudice. A juror may form opinions about the case as he or she hears each piece of evidence. State v. Hatley, 41 Wn. App. 798, 795, 706 P.2d 1083 (1985). Where there is no evidence

the juror was biased before trial, and the juror bases his or her decision on the evidence presented at trial, the defendant had not shown prejudice. Id.; Tate v. Rommel, 3 Wn. App. 933, 937, 478 P.2d 242 (1970).

Moreover the statements that a juror made inhered in the verdict. A juror's statement regarding another juror's misconduct may not be considered if it relates to the juror's motive, intent, or belief, or describes their effect on him. The court may consider the testimony if it can be rebutted by other testimony without probing the juror's mental process. Hatley, 41 Wn. App. at 793. Juror 2's testimony that other jurors agreed with the statement at issue relates to those jurors mental processes, so it cannot be considered when determining whether the defendant was so prejudiced by the statement that he did not receive a fair trial.

The defendant assigns error to the trial court's finding of fact 56 that jurors' opinions were swayed back and forth during the case alternately after listing to the prosecutor and defense. That is exactly what Juror 2 testified to. 16 RP 2991-93. The finding is therefore supported by substantial evidence.

The defendant takes issue with the trial court's reliance on Hatley and Tate. Although there were some factual differences

between those cases and this one, the rules announced in each case apply equally. The defendant has not demonstrated that any juror was biased when seated, or that any juror decided the case on anything but the evidence received. He therefore fails to establish prejudice which would justify granting him a new trial.

Finally the defendant argues that fact 57 is really a conclusion of law that this Court should review de novo. That finding stated

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.

5 CP 1733.

A determination that the evidence showed something occurred or existed is properly labeled a finding of fact. A conclusion of law is a determination made by the process of legal reasoning from the facts in evidence. State v. Niedergang, 43 Wn. App. 656, 568, 719 P.2d 576 (1986). The lack of evidence is a finding of fact which is supported by the record.

#### **F. ADMISSION OF AUTOPSY PHOTOS WAS A PROPER EXERCISE OF DISCRETION.**

The State sought to admit the same photos used to illustrate the medical examiner's testimony in Whitaker's first trial. 1 RP 82; 3 CP 1431. The defense objected, arguing that it had agreed to

stipulate to the time, place, and manner of Ms. Burkheimer's death. The defense argued that under ER 403 its stipulation reduced the probative value of those photos to the point that it was outweighed by the danger of unfair prejudice. 1 RP 86-86; 3 CP 1215-1216. After taking the matter under advisement, the court admitted the photos. The court noted that it had the benefit of seeing the photos and testimony in the first trial. It found that even with the offer to stipulate, the photos were not unfairly prejudicial. 3 RP 430-431. Whitaker's motion for reconsideration was denied. The trial court noted that four of the photos were not gruesome. The remaining were relevant and not unfairly prejudicial. The court reiterated that they were the same photos that the Court of Appeals had earlier found to be properly admitted. 13 RP 1460-1464.

At trial the medical examiner, Dr. Thiersch, testified that of some 100 photos taken to document the scene and autopsy he selected some to illustrate his testimony. He identified Ex. 47-61 as photos of Ms. Burkheimer taken at the time she was excavated and during the autopsy. The court admitted those photos. 13 RP 2528-2536.

The defendant argues that since he had offered a stipulation, the photos were unfairly prejudicial and should have been excluded

from evidence. The State is entitled to prove its case in any manner it sees fit. It is not required to accept a stipulation from the defense that would preclude the presentation of evidence. Rice, 110 Wn.2d at 598-599. The rule is based on "sound policy, in that the State should be allowed to present the complete picture to the jury." Id. at 599.

A syllogism is not a story, and a naked proposition in a courtroom may be no match for the robust evidence that would be used to prove it. People who hear a story interrupted by gaps of abstraction may be puzzled at the missing chapters, and jurors asked to rest a momentous decision on the story's truth can feel put upon at being asked to take responsibility knowing that more could be said than they have heard. A convincing tale can be told with economy, but when economy becomes a break in the natural sequence of narrative evidence, an assurance that the missing link is really there is never more than second best.

Old Chief v. United States, 519 U.S. 172, 189, 117 S.Ct. 644, 654, 136 L.Ed.2d 574 (1997).<sup>7</sup>

If the State does not accept a stipulation then the admissibility of the evidence depends on the whether the probative value is substantially outweighed by unfair prejudice to the

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<sup>7</sup> Old Chief held there was an exception to the general rule that the State need not accept a stipulation when the offer related to the defendant's legal status. The holding was limited to cases involving proof of the accused's felon status. Old Chief, 519 U.S. at 172 n. 7.

defendant. State v. Finch, 137 Wn.2d 792, 811, 975 P.2d 967 (1999).

Admissibility of photographs is within the discretion of the trial court, and is only subject to review for an abuse of discretion. State v. Crenshaw, 98 Wn.2d 789, 806, 659 P.2d 488 (1983). The trial court abuses its discretion when no reasonable person would take the position adopted by the trial court. State v. Hoisington, 123 Wn. App. 138, 145, 94 P.3d 318 (2004).

Where photos illustrate different aspects of injuries to a body and are not repetitious, the trial court does not abuse its discretion in admitting those photos, even if some are inflammatory. State v. Pirtle, 127 Wn.2d 628, 654-55, 904 P.2d 245 (1995). Autopsy photos are properly admitted when they are used to explain or illustrate the testimony of the pathologist performing the autopsy. State v. Lord, 117 Wn.2d 829, 870, 822 P.2d 177 (1991).

The photos were used in the same manner in this trial as they were used in Whitaker's first trial. They illustrated Dr. Thiersch's testimony. He described what each photo showed. 13 RP 2528-36. Then, using the photos, the doctor showed the jury the injuries that he described. The photos also demonstrated why

some of the doctor's interpretation of the evidence was hampered. 13 RP 2537-68. The testimony was factual and dispassionate.

This court considered whether the same photos offered in this case were so gruesome that they were unfairly prejudicial in Whitaker's first trial. State v. Whitaker, 133 Wn. App. 199, 227, 135 P.3d 923 (2006). It held that although a reasonable person could find the photos disturbing, the trial court did not abuse its discretion when it admitted these photos. Id. at 229. The same is true in the current case.

The defendant argues that the prosecution sought to introduce the photos for their shock value. The manner in which the prosecutor presented the evidence refutes this claim. The defendant argues that the juror's outburst after Dr. Thiersch's testimony is proof that the photos were inflammatory. Even gruesome photos are admissible if they are accurate and their probative value outweighs their prejudicial effect. Crenshaw, 98 Wn.2d at 806. Certainly the juror's outburst could not have been predicted. Contrary to the defendant's claim, the other jurors did not agree with the sentiment expressed in her outburst. Half of the jurors did not hear the outburst. The remaining jurors did not respond to the outburst, except to admonish the juror not to let her

emotions get in the way of her decision. 16 RP 3004, 3037, 3049, 3054. This one outburst is not evidence the court abused its discretion when it admitted the photos.

**G. ERROR IN ELICITING WHITAKER'S POST ARREST SILENCE WAS HARMLESS BEYOND A REASONABLE DOUBT.**

The court conducted a CrR 3.5 hearing before Whitaker's first trial. After that hearing the court found that Whitaker's statements to two FBI agents after his arrest were made after a knowing, intelligent, and voluntary waiver of rights, and was therefore admissible. It found Detective Pince re-read Whitaker his rights a few days later at which time Whitaker invoked his right to remain silent. Pince asked Whitaker no further questions. While waiting for the flight back to Washington Whitaker volunteered some statements to Pince. The Court ruled the volunteered statements were admissible. Supp CP \_\_ (sub 103 Memorandum Decision And Order Regarding 3.5 Hearing, sub 134 Certificate Pursuant to CrR 3.5). This Court affirmed the admission of those statements on appeal. Whitaker, 133 Wn. App. at 214-218. At retrial, the court denied a defense request for a new CrR 3.5 hearing. 3 RP 431-436.

FBI agents Rattleman and Garriola testified that Whitaker was "cooperative" and that he agreed to talk to them. The defendant talked to the agents for about 5 hours. He gave a written statement that was admitted into evidence. 7 RP 1341-1343, 1346-1352, 1384-1392; Ex. 220.

Later the State re-called Detective Pince. He testified that when he picked up Whitaker to return him to Washington Pince read Whitaker his Miranda warnings. The prosecutor then asked:

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

A: No.

Q So at some point in time did you have a conversation with him that day?

A: Brief one, yes.

13 RP 2479.

The defense motion to strike and instruction to disregard the testimony was granted. 13 RP 2480. In a hearing outside the presence of the jury the prosecutor explained that he had confused when the two conversations that Pince had with the defendant on that day had occurred. 13 RP 2481.

After the verdict, the defense moved for a new trial on the basis that the defendant's right to remain silent had been violated

when that testimony was elicited. The Court denied the motion ruling that a constitutional error occurred, but that it was harmless. 1 CP 91-92; 5 RP 1729, 1735.

The State may not use the defendant's constitutionally protected silence as substantive evidence of guilt. State v. Knapp, 148 Wn. App. 414, 420, 199 P.3d 505 (2009). It is constitutional error for a police officer to testify that the defendant refused to speak to him. State v. Romero, 113 Wn. App. 779, 790, 54 P.3d 1255 (2002). Detective Pince's testimony that the defendant refused to waive his rights was therefore a constitutional error.

Constitutional error may be harmless if the court is convinced that any reasonable jury would have reached the same result in the absence of the error. State v. Guloy, 104 Wn.2d 412, 425, 705 P.2d 1182 (1985). To determine if the error was harmless the court looks at the untainted evidence to see if it is so overwhelming that it necessarily leads to a finding of guilt. Id. at 426.

That standard is met when the defendant did talk to police, even though he later exercised his right to remain silent. State v. Pottorff, 138 Wn. App. 343, 156 P.3d 955 (2007). In Pottorff a defendant charged with third degree assault admitted to police that

he had “slapped [Mr. Taylor] around a little.” When asked if he used his cane the defendant said he wanted to invoke his right to remain silent. *Id.* at 345-346. This court held the error was harmless because the State did not argue the testimony was substantive evidence of guilt. Also, the defendant had given a statement, setting the facts apart from cases where the defendant had invoked his rights completely. *Id.* at 347-348.

Here the defendant had given a lengthy statement to the FBI before he was contacted by Pince. Even though the defendant initially refused to talk to Pince, he did volunteer some statements shortly after invoking his rights. In closing argument, the prosecutor did not suggest that Whitaker’s refusal to answer Pince’s questions was evidence of guilt. Rather, he focused on how plentiful the defendant’s statements to police were and how he cooperated with police. 14 RP 2666, 2682-2684.<sup>8</sup>

As authority for his position that the error was not harmless the defendant cites Romero, State v. Curtis, 110 Wn. App. 6, 37 P.3d 1274 (2002), and Douglas v. Cupp, 578 F.2d 266 (9<sup>th</sup> Cir.

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<sup>8</sup> Whitaker challenges the trial court’s finding of fact 12 that the prosecutor did not rely on Detective Pince’s testimony regarding the defendant exercising his rights as substantive evidence of guilt. BOA at 54; 5 CP 1729. The record provides substantial evidence supporting that finding of fact.

1978). Each of these cases involves a situation where the defendant made no statements to the police, and the testimony was elicited for the purpose of raising an impermissible inference of guilt. The circumstances of this case are different because the erroneous evidence was inadvertently elicited, not used for an improper purpose, and was accompanied by evidence that the defendant did talk to police.

Error in the brief direct comment on the defendant's exercise of his right to remain silent was also harmless because the untainted evidence overwhelmingly showed that he was an accomplice to aggravated first degree murder and conspiracy to commit first degree murder. The evidence showed that the defendant was aware that Anderson had been jealous of Rachel's relationships with other men and had come to distrust her. Rachel had invited the defendant and Jihad to a party where the defendant thought he saw someone who had been a rival to their gang. He was convinced that Rachel had tried to set them up, and he convinced Anderson and Jihad that she had done so too. 9 RP 1671-73.

Witnesses testified to the defendant's involvement in discussions to get back at Rachel by "scaring" her. He was present

when Anderson called Durham and Rivas and directed them to bring Rachel to Jihad's house. Whitaker was present when Rachel arrived. He did not warn her but playfully flirted with her instead. 6 RP 1196-97; 9 RP 1689-90; 10 RP 1887-94.

When Anderson came in and knocked Rachel to the ground, the defendant jumped in voluntarily. Without any direction, he ran over and kicked Rachel and then assisted tying her up. 8 RP 1544-45. When Conner got home he helped carry Rachel into the garage where she was kept until Conner found out about her presence and ordered everyone out. During that time Whitaker freely moved in and out of the garage. 8 RP 1555; 10 RP 1920-21.

The defendant, Anderson, and Jihad planned what to do with Rachel when Conner came home. They talked about setting up Anderson's rival Brazwell by leaving Rachel's car at his apartment complex. 10 RP 1938-39.

When the defendant left with Durham, Rivas, and Rachel, it was the defendant that decided where they would go and what they would do. The defendant was the one who figured out Anderson was leaving him to deal with the situation, and so he called Anderson to remedy that. The defendant was the one that picked up Anderson, along with shovels and pick axes. 6 RP 1246-54; 10

RP 1939-60. The defendant was present when Anderson was talking about the gun he would use on the way up to the Reiter Pit. 10 RP 1961. The defendant helped Anderson look for a place to dig the grave, and then helped dig the grave. He helped by taking Rachel's jewelry and the tape that had been used to bind her. 10 RP 1963-64, 1968-76.

Although the defendant defended on the basis that he was forced to participate in the kidnapping and murder, the evidence showed neither Anderson nor Jihad compelled him to do anything. In contrast to Rivas and Durham, whom Jihad ordered to stay put when Conner got home, the defendant freely moved about the house. 6 RP 1218; 10 RP 1935-38. The defendant insisted that Anderson deal with the situation after Rachel was driven away from Jihad's house. Once the defendant understood that none of his alternative plans for Rachel would work, he got Anderson and made him come along to the Reiter Pit, where Anderson ultimately shot Rachel. He helped locate a place for a gravesite. There was no evidence Anderson forced him to do that. Before Rachel was shot, the defendant refused to strike Rachel when Anderson told him to at the grave site, and Anderson did not force the issue. 10 RP 1970-73.

The defendant's attempts to avoid responsibility for the crime also indicted a consciousness of guilt. He, Jihad, and Barth fled the state when they learned Rachel's body had been located. When Rivas was going to testify against him, the defendant attempted to influence his testimony by arranging through a third party to have contact with him. 11 RP 2126-31, 2156-57.

While the defendant downplayed his involvement in the kidnapping and murder in his written and oral statements to the FBI agents, he did admit to being present and knowing what was going on. He also admitted that he had fled after they learned that an investigation had begun. Ex. 220, 232.

Taken together this evidence overwhelmingly proves that that the defendant was an accomplice in an aggravated first degree murder.<sup>9</sup> The defendant claims that the error was not harmless because before the erroneous testimony, the detective testified that Rivas and Durham had cooperated with the investigation. He argues that when considered with that evidence, the erroneous testimony made him appear uncooperative. That in turn

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<sup>9</sup> Whitaker challenges the trial court's finding of fact 14 that there is overwhelming evidence of his involvement in the charged crimes. BOA at 54; 5 CP 1729. The foregoing demonstrates that this finding is supported by substantial evidence.

undermined his defense that he had been cooperative and forthright in his statement. BOA at 54.

The testimony could not have that effect. First, the defendant had already given a lengthy five-hour statement to other law enforcement officials. Those officer had described Whitaker as cooperative. 7 RP 1341. The inference from the defendant's decision not to talk to Pince is that at that point he had already given a statement, and did not want to repeat himself. That inference is further strengthened by the voluntary statements the defendant made to Pince after he refused to talk to Pince, wherein the defendant added information he had not previously discussed with the FBI agents. Thus, error in the brief reference to the defendant's exercise of his right to remain silent was harmless beyond a reasonable doubt.

#### **H. THE CUMULATIVE ERROR DOCTRINE DOES NOT APPLY IN THIS CASE.**

The defendant argues that cumulative error from the prosecutor's closing argument discussing duress, a juror's emotional comment after the medical examiner's testimony, admission of autopsy photos, and the error in eliciting the

defendant's post arrest silence is cumulative error which entitles him to a new trial.

The cumulative error doctrine is limited to instances where there are several trial errors that standing alone would not justify reversal, but when combined may act to deny the defendant a fair trial. Where there are few errors that had little or no effect on the trial, the doctrine does apply. State v. Grieff, 141 Wn.2d 910, 929, 10 P.3d 390 (2000).

With the exception of the admission of the defendant's post arrest silence, no error occurred. That error was harmless beyond a reasonable doubt. The cumulative error doctrine does not justify a new trial in this case.

**VI. CONCLUSION**

For the foregoing reasons the State asks the Court to affirm the defendant's convictions for aggravated first degree murder and conspiracy to commit first degree murder.

Respectfully submitted on January 18, 2018.

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

THE STATE OF WASHINGTON,

Respondent,

v.

JOHN ALAN WHITAKER,

Appellant.

No. 75924-8-1

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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 19<sup>th</sup> day of January, 2018, at the Snohomish County Office.

  
\_\_\_\_\_  
Diane K. Kremenich  
Legal Assistant/Appeals Unit  
Snohomish County Prosecutor's Office

**SNOHOMISH COUNTY PROSECUTOR'S OFFICE**

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