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64033-0

NO. 64033-0-1

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

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STATE OF WASHINGTON,

Respondent,

v.

ANDRÉ FRANKLIN,

Appellant.

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APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE JAMES ROGERS

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**BRIEF OF RESPONDENT**

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**A. ISSUES PRESENTED**

1. Whether the trial court properly exercised its discretion in striking the testimony of the defendant's brother, whom the defense had inexcusably failed to disclose as an alibi witness at any point prior to his testimony, because no other remedy would have been effective.

2. Whether the trial court acted within its discretion in ruling that the defense had failed to establish a sufficient foundation for "other suspect" evidence where the connection between the "other suspect" and the crimes at issue was speculative.

3. Whether the trial court acted within its discretion in ruling that the defendant's girlfriend could not be called as a witness due to a privilege against self-incrimination where the record demonstrates that she would have had to claim the privilege in front of the jury whether or not her *in camera* testimony was truthful, and that a full direct and cross-examination would not have been possible.

4. Whether the trial court correctly ruled, in accordance with Washington law, that an *in camera* hearing was the correct method for determining whether the defendant's girlfriend had a basis to

claim a privilege against self-incrimination after a proper consideration of the Bone-Club factors.

5. Whether the trial court properly excluded the defendant from the courtroom during the *in camera* hearing because it was necessary to safeguard the witness's constitutional rights, because it was not a "critical stage" of the proceedings at which the defendant's presence was required, because the defendant invited any alleged error by agreeing to be excluded from the courtroom, and because any possible error is harmless and not "manifest" under RAP 2.5.

**B. STATEMENT OF THE CASE**

The State charged the defendant, André Franklin, with perjury in the first degree (count I), stalking - domestic violence (count II), and cyberstalking - domestic violence (count III) for a course of conduct that occurred in November and December 2008 involving victim Nanette Fuerte. CP 1-5. The charges arose from allegations that Franklin had posted sexually explicit ads on Craigslist to the effect that Fuerte wanted to perform oral sex on strangers, that he sent her harassing emails and showed up at a restaurant where she was dining with family, and that he testified

untruthfully at the hearing regarding Fuerte's petition for a protection order. CP 1-5.

A jury trial on these charges was held in June and July 2009 before the Honorable James Rogers. During pretrial motions, Franklin informed the court that he wanted to present evidence and argument that his live-in girlfriend, Rasheena Hibbler, was responsible for posting the sexually explicit ads on Craigslist and sending the harassing emails. Hibbler, who had her own attorney and had claimed a Fifth Amendment privilege in response to certain questions during her pretrial interview, had admittedly sent some angry emails to Fuerte in 2005 and 2006 when she found out that Franklin was cheating on her with Fuerte. CP 56-126; RP (6/18/09) 12-15; RP (6/22/09) 4-8. In addition to claiming that Hibbler was the "other suspect," Franklin also claimed he had "alibi" evidence that would show that he was at work when the email account from which the postings were put on Craigslist was created.<sup>1</sup> RP (6/18/09) 8-9, 16. Franklin did not mention any alibi evidence for any other of the relevant events in this case, most notably for

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<sup>1</sup> The email account in question was "[time4gamez@yahoo.com](mailto:time4gamez@yahoo.com)." RP (6/18/09) 16.

November 10, 2009 when Fuerte maintained that she went to Franklin's residence to pay him \$3,000 that she owed him.

Based on the information Franklin provided, the trial court ruled that Franklin had not established a sufficient foundation to present the specific defense that Hibbler was an "other suspect." The court further ruled, however, that the defense could argue that the State had not proved its case because Franklin was not the only person who had access to the computer and IP address in question. RP (6/22/09) 10-13.

Hibbler appeared pretrial with her attorney to address the issue of whether she would claim a Fifth Amendment privilege. RP (6/22/09) 15-28. During questioning by the prosecutor, Hibbler refused to answer any questions as to whether she had participated in the creation of the suspect email account, whether she had participated in creating or posting the Craigslist ads, or whether she had sent any emails to Fuerte using the suspect account. RP (6/22/09) 17. When questioned by defense counsel, Hibbler denied that she had conspired with Franklin to post the ads. RP (6/22/09) 26.

Based on Hibbler's pretrial testimony and the answers she had given in her interview, the State argued that Hibbler did not

have a privilege against self-incrimination, and that she was falsely claiming a privilege solely to benefit Franklin; however, the State suggested that the court hold an *in camera* hearing to inquire further if necessary. RP (6/22/09) 29-30. Defense counsel argued that Hibbler *did* have a privilege. RP (6/22/09) 30-33. The trial court asked defense counsel what Franklin's position was regarding the prosecutor's suggestion to hold an *in camera* hearing. Defense counsel stated,

If your Honor wants to do that, I will defer to the Court. I think it's clear that she has a Fifth Amendment privilege.

RP (6/22/09) 33. Defense counsel further argued that Franklin should be allowed to call Hibbler as a witness, privilege against self-incrimination notwithstanding. RP (6/22/09) 34-36.

After hearing from both parties, the trial court weighed the five factors from State v. Bone-Club,<sup>2</sup> and determined that an *in camera* hearing was the appropriate way to determine whether Hibbler had a basis to claim a Fifth Amendment privilege.

RP (6/22/09) 37-38. After hearing from both parties as to what questions the court should ask during the *in camera* hearing, the

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<sup>2</sup> State v. Bone-Club, 128 Wn.2d 254, 906 P.2d 325 (1995).

trial court closed the courtroom to everyone except Hibbler and her attorney in order to make the necessary inquiry. RP (6/22/09) 38-43.

During the *in camera* hearing, Hibbler claimed that she had participated in creating the "time4gamez" email account, that she had posted ads on Craigslist, and that she had sent emails to Fuerte. RP (6/22/09, sealed transcript). After holding the *in camera* hearing (which could not have lasted more than a few minutes based on the brevity of the transcript), the trial court reopened the courtroom and ruled that Hibbler had a Fifth Amendment right not to testify, and thus, she could not be called as a witness by either party. RP (6/22/09) 43-44.

The evidence produced at trial established the following:

Fuerte and Franklin both worked for the City of Seattle Department of Parks and Recreation. They met in early 2005, and Fuerte helped Franklin write a grant for an afterschool program he was running. RP (6/29/09 a.m.) 17-19. Fuerte and Franklin began having an intimate relationship in 2005, and it was "off and on" from that point forward. RP (6/22/09 a.m.) 20-21. Franklin was admittedly living with Rasheena Hibbler while having a relationship with Fuerte. RP (6/30/09) 182-83. During their relationship, Fuerte

noted that Franklin had a laptop computer, and he indicated that he had a desktop computer as well. RP (6/29/09 a.m.) 23-24. For a time, Fuerte also paid for a cell phone for Franklin, but she later changed the number and gave that phone to her son. RP (6/29/09 a.m.) 22-23.

Fuerte borrowed \$3,000 from Franklin in October 2008 to pay some unexpected expenses incurred by her mother. Fuerte typed up an agreement in which she promised to pay Franklin back by November 26, 2008. RP (6/29/09 a.m.) 25-27.

On November 4, 2008, Franklin came over to Fuerte's house to watch the election returns on television. RP (6/29/09 a.m.) 28. Two days later, on November 6, 2008, Fuerte was watching a movie at her home in the company of a male friend, and Franklin came over unannounced. RP (6/29/09 a.m.) 29-30. Franklin was angry; he wanted to come inside and tell Fuerte's friend to leave, but Fuerte refused to allow that. RP (6/29/09 a.m.) 30-31. Franklin would not leave despite Fuerte's repeated requests that he do so. Fuerte sat outside with him for several hours before he finally left. RP (6/29/09 a.m.) 32. Fuerte was "a little freaked out" that Franklin was acting this way. RP (6/29/09 a.m.) 33.

The following evening, Fuerte began receiving emails and phone calls from accounts and numbers she did not recognize. She finally answered one of the phone calls, and the caller told her that he was responding to a posting on Craigslist.<sup>3</sup> Fuerte discovered that the calls and emails were asking her to perform sexual acts. RP (6/29/09 a.m.) 33-34. Fuerte stayed in a hotel that night because she was afraid. She estimated that she received 75 to 100 calls and emails responding to the Craigslist ad. RP (6/29/09 a.m.) 34. Fuerte changed her phone number the next day. RP (6/29/09 a.m.) 34.

The following evening, on November 8, 2008, Fuerte went to a restaurant called RockSport with friends and family after planning a funeral reception. RP (6/29/09 a.m.) 35. Franklin showed up and approached Fuerte's table. He was angry because Fuerte had changed her phone number, and he told her he was "going to let the superintendent and [her] manager know exactly what type of person" she was. RP (6/29/09 a.m.) 36-37. He also demanded that Fuerte pay him the money she owed. Fuerte told Franklin she

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<sup>3</sup> The first ad was posted on November 7, 2008, and was entitled "Do you need some head?" RP (6/24/09) 28. There were a total of 13 postings in this case, and all were of the same general character, highlighting Ms. Fuerte's purported interest in performing fellatio on strangers. RP (6/24/09) 27-34.

would pay him on Monday. She did not stay at her home that night because she was afraid. RP (6/29/09 a.m.) 37-38.

On Monday, November 10, 2008, Fuerte began receiving emails from Franklin. He wanted to meet her so that she could pay him back. RP (6/29/09 a.m.) 40. Fuerte had not planned on paying the money back until November 26, 2008, so she had to borrow the money from a friend. RP (6/29/09 a.m.) 42-43. Fuerte sent an email to Franklin that she was meeting her friend at 1:00 p.m. to get the money, and Franklin responded, "u friday then u said monday @ noon. u asked me 2 b patient I no longer have any patients for u and Ur games. . . . u have till 1 pm then u know what will happen[.]" Ex. 40. Fuerte understood this to mean that there would be more postings on Craigslist. RP (6/29/09 a.m.) 44-45.

Fuerte's suspicions were confirmed when Franklin sent her a copy of the next Craigslist posting using the email account "time4gamez@yahoo.com." RP (6/29/09 a.m.) 45. The subject line was "I love 2 suck dick for free," the ad included her work phone as a contact number, and it invited callers to "leave a long message telling me what u would like to do to me and what u want me to do to u." Ex. 43; RP (6/29/09 a.m.) 46. There were two very intimate pictures attached to the posting, which had been taken

during Fuerte and Franklin's relationship. Fuerte was scared.

RP (6/29/09 a.m.) 46-47.

Fuerte asked via email whether Franklin wanted a cashier's check or cash; Franklin responded "cash." RP (6/29/09 a.m.) 48.

Fuerte went to her friend's bank and cashed a cashier's check in order to comply with Franklin's demands. RP (6/29/09 a.m.) 49;

Ex. 45. Fuerte then drove to Franklin's residence in order to pay him. Franklin laughed at her when she gave him the money and said "do you think this is the end of it? This is just the beginning."

RP (6/29/09 a.m.) 50-51.

Later that week, Franklin called Fuerte on her son's phone and told her that she should have gotten a receipt. RP (6/29/09 a.m.) 52. Fuerte called the police the next day, because she was very concerned that Franklin was calling her 7-year-old son's phone. RP (6/29/09 a.m.) 53.

The day after Fuerte paid Franklin, he sent her another posting he would be putting on Craigslist. RP (6/29/09 a.m.) 56-57.

It was similar to the others, and was entitled "I love 2 suck dick for free!" Ex. 46. He also sent veiled threats via email, including "what goes around comes around. (Game recognize Game) U work 4 me now[.]" Ex. 48. When Fuerte asked via email, "What do U want

from me?" Franklin responded, "u will do what ever I tell u 2 do.....when ever i want....I want u 2 fill what it fills like 2 have some 1 play games with them....." Ex. 50. On November 12, 2008, Franklin sent an email that said, in part, "u should have not played w/Ur life if u cared about it so much...now u may lose it all B-cuz u wanted 2 play games...." Ex. 54.

Franklin called Fuerte at work on November 14, 2008. Fuerte told him "this needed to end[.]" RP (6/29/09 a.m.) 70. Fuerte called Franklin back later that day and told him she "wanted to handle it at the lowest level possible," and that she just wanted it to be over; she told him she did not want to involve the police or her employer. RP (6/29/09 a.m.) 71.

Franklin called again on November 15, 2008. Fuerte told Franklin she "wanted everything to stop, and he stated that it wasn't going to stop anymore." RP (6/29/09 a.m.) 73. Franklin told her that the first postings on Craigslist were "just the tip of the iceberg," and that she "should start looking over [her] shoulder." RP (6/29/09 a.m.) 73-74. Franklin said he knew people who would "do dirt" for him. Fuerte felt physically threatened. RP (6/29/09 a.m.) 74. About 15 to 30 minutes after that phone call, Fuerte began receiving responses on her work email from yet another sexually

explicit posting on Craigslist. RP (6/29/09 a.m.) 75-76. At this point, Fuerte contacted both the police and the human resources department for the City of Seattle. RP (6/29/09 a.m.) 77. Fuerte also obtained a temporary protection order on November 18, 2008, and Franklin was placed on administrative leave as a result. RP (6/25/09) 86, 89.

Christopher Williams, Deputy Superintendent for Parks and Recreation, spoke with Franklin after he was placed on leave. RP (6/23/09) 19. Williams wanted to offer his support to Franklin; they went to breakfast together at a restaurant on lower Queen Anne. RP (6/23/09) 20-22. Williams noted that Franklin was "stressed," and he exhibited "a mix of frustration, anxiety, [and] remorse." RP (6/23/09) 24. Franklin said, "I don't know how I let myself get in this situation." RP (6/23/09) 24. Williams asked, "André, did you do it? Did you post those pictures on the internet?" Franklin looked at Williams and said "yes, I did. I don't have a problem telling you the truth about that." RP (6/23/09) 24, 26. Franklin also later spoke with Parks and Recreation Superintendent Timothy Gallagher by phone, and he admitted to Gallagher that he had posted the ads on Craigslist. RP (6/25/09) 33-34. Gallagher

told Franklin that it was good that he was being honest.

RP (6/24/09) 34-35.

Franklin also met with Mickey Fern, who was the manager of community outreach for Parks and Recreation. RP (6/25/09) 50-54.

Franklin initially told Fern that he had given money to another employee, that he had contacted her in various ways to get his money back, and that "she defined that as harassment."

RP 6/25/09) 54-55. Franklin later called Fern and told him that he had left something out, but Fern did not want Franklin to tell him what it was because Fern did not want the responsibility of having that information. RP (6/25/09) 57.

Seattle Police Detective Rande Christiansen conducted the criminal investigation in this case. The investigation revealed that the Craigslist postings had come from an IP address associated with Franklin's residence. RP (6/25/09) 171-72. When Christiansen served a search warrant at Franklin's home, there were no computers present. There were, however, three empty laptop bags and two wireless routers. RP (6/24/09) 77-88.

The hearing regarding Fuerte's petition for a permanent protection order was held on December 2, 2008 before the Honorable Kenneth Comstock. During the hearing, Franklin

testified under oath and denied posting the Craigslist ads or having any embarrassing pictures of Fuerte. Ex. 38.

Franklin presented his own witnesses at trial, including Nichele Foster, who purported to provide Franklin with an alibi for the evening of November 7, 2008, when the first ad was posted on Craigslist. RP (6/30/09) 52. As will be discussed further below in the first argument section, Franklin also called his younger brother Ramon as a witness to provide Franklin with an alibi for November 10, 2008 -- the date that Nanette Fuerte had paid Franklin the \$3,000 she owed him and he had sent her a series of harassing emails. According to Ramon, he and Franklin had worked on a car and watched football at Ramon's house that day, and Ramon claimed that Franklin had spent the night. RP (6/30/09) 117-21.

Franklin had given no notice of this testimony to the State, so the State moved to strike Ramon's testimony. RP (6/30/09) 127-33. During argument on the State's motion, the following exchange occurred:

THE COURT: Let me be really specific. As I understand it, you've known for months that Ms. Fuerte said on November 10th, Monday, that she went to pay your client. And this witness is testifying that he, in fact, was with his brother the entire evening. Correct? Are both those facts correct?

[DEFENSE COUNSEL]: That is correct.

THE COURT: So how is it that you did not know about Ramon Franklin or did not know that there was an alibi witness until during this trial if you've known for months that your client was allegedly in a meeting with Nanette Fuerte? That's the issue being raised here.

RP (6/30/09) 129-30. The trial court granted the motion to strike, and instructed the jury to disregard Ramon's testimony.

RP (6/30/09) 133.

Franklin also testified at trial. He denied creating the "time4gamez" email account and posting the Craigslist ads, and he denied that he was upset that Fuerte was seeing another man.

RP (6/30/09) 200, 240-42. He also said that Christopher Williams had taken his remarks "out of context." RP (6/30/09) 244.

Additional facts will be discussed further below as necessary for argument.

**C. ARGUMENT**

**1. THE TRIAL COURT EXERCISED SOUND DISCRETION WHEN STRIKING THE TESTIMONY OF FRANKLIN'S BROTHER AS A SURPRISE ALIBI WITNESS.**

Franklin first claims that the trial court abused its discretion by striking the testimony of his younger brother Ramon on grounds

that the defense had failed to disclose him as an alibi witness. Appellant's Opening Brief, at 16-27. This claim should be rejected. Relevant authorities support the trial court's ruling that alibi testimony may be excluded in the trial court's discretion if the defense improperly fails to disclose its alibi witnesses in accordance with the discovery rules. Accordingly, this Court should affirm.

As a general rule, evidentiary rulings are matters addressed to the sound discretion of the trial court. State v. Atsbeha, 142 Wn.2d 904, 913-14, 16 P.3d 626 (2001). A trial court abuses its discretion only when its decision is manifestly unreasonable or is based on untenable grounds. State v. Enstone, 137 Wn.2d 675, 679-80, 974 P.2d 828 (1999). A reviewing court will find an abuse of discretion only if it finds that no reasonable person would have ruled as the trial judge did. Atsbeha, 142 Wn.2d at 914.

Under CrR 4.7, a criminal defendant is obligated to disclose the names, the addresses, and the substance of any statements of persons who will be called as witnesses no later than the omnibus hearing. CrR 4.7(b)(1). In addition, the defendant may be specifically ordered to "state whether or not the defendant will rely on an alibi and, if so, furnish a list of alibi witnesses and their

addresses[.]" CrR 4.7(b)(2)(xii). This specific disclosure requirement is common to most jurisdictions, and it exists to prevent unfair gamesmanship given the nature of the alibi defense:

[T]he notice-of-alibi rule is itself carefully hedged with reciprocal duties requiring state disclosure to the defendant. Given the ease with which an alibi can be fabricated, the State's interest in protecting itself against an eleventh-hour defense is both obvious and legitimate. Reflecting on this interest, notice-of-alibi provisions, dating at least from 1927, are now in existence in a substantial number of States. The adversary system of trial is hardly an end in itself; it is not yet a poker game in which players enjoy an absolute right always to conceal their cards until played. We find ample room in that system, at least as far as "due process" is concerned, for the instant [state] rule, which is designed to enhance the search for truth in the criminal trial by insuring both the defendant and the State ample opportunity to investigate certain facts crucial to the determination of guilt or innocence.

Williams v. Florida, 399 U.S. 78, 81-82, 90 S. Ct. 1893, 26 L. Ed. 2d 466 (1970) (footnotes omitted).

In accordance with these principles, exclusion of a defendant's alibi evidence is available as a sanction in the discretion of the trial court if the defendant's failure to timely disclose the evidence is the product of "totally inexcusable neglect[.]" State v. Grant, 10 Wn. App. 468, 474, 510 P.2d 261 (1974). In the absence of such inexcusable neglect, the

defendant's right "to compel the attendance of witnesses" and to present a defense outweighs the strict enforcement of the notice requirement. Grant, 10 Wn. App. at 475. In other words, "slight delays in the otherwise orderly presentation of evidence must be tolerated within the judicial system unless they are occasioned by insufferable dereliction of duty by those whose function it is to assist the court." Id. Although this standard for the exclusion of an alibi witness is a high one, it is met in this case.

As the trial court observed, the defense had known since very early on in the case that Nanette Fuerte maintained that she went to Franklin's residence in the afternoon on November 10, 2008 to give Franklin the \$3,000 she owed him. RP (6/30/09) 129-30. Through discovery, the defense had copies of emails and a cashier's check showing that Fuerte had obtained the money and paid Franklin on that date. Ex. 40, 41, 45. Fuerte had also testified at the protection order hearing on December 2, 2008 that she had paid Franklin at his residence on the day before Veteran's Day, which was November 11, 2008. Ex. 38, p. 10-11. In sum, the significance of the events of November 10, 2008 was obvious well in advance of trial.

Furthermore, as the trial court also observed, the alibi witness who was not disclosed is Franklin's *brother*, whom Franklin spoke with on a daily basis and saw in person three times a week. RP (6/30/2009) 131. Accordingly, as the trial court found, there was absolutely no reason (other than willful non-compliance) for the defense's failure to comply with the applicable notice requirements to disclose this witness prior to trial. RP (6/30/09) 132.

There is also no question that the defense's failure to comply with the applicable notice requirements resulted in unfair surprise to the State. Indeed, the trial prosecutor did not realize that Ramon was providing Franklin with an alibi for November 10, 2008 until the middle of her cross-examination. RP (6/30/09) 126, 132.

Furthermore, the other remedies potentially available to the trial court would not have been effective. For instance, the trial court initially considered declaring a mistrial. RP (6/30/09) 130. However, any double jeopardy concerns notwithstanding, this would have been a punishment for the State and its witnesses, not for the defense. A mistrial would have wasted public resources and caused the considerable expense and inconvenience of starting the trial all over again at some future date because of the defense's misconduct. And calling a recess for the State to investigate

Ramon's alibi testimony was not a feasible option, either. Several of the jurors had scheduling problems toward the end of the trial, and Franklin was unwilling to be tried by fewer than 12 jurors; thus, a mistrial was likely to occur if the trial were further delayed by an unanticipated recess. See RP (6/30/09) 14, 16, 151.

In sum, the trial court acted within its discretion in striking Ramon's testimony due to "totally inexcusable neglect" and "insufferable dereliction of duty" on the part of the defense in failing to disclose Ramon Franklin as an alibi witness prior to trial. Grant, 10 Wn. App. at 474-75. The defense was well aware of the significance of the date in question, the witness is the defendant's brother, there was no valid excuse for failing to comply with the notice requirements, and alternative remedies would not have been effective. This Court should reject Franklin's claim, and affirm.

Nonetheless, Franklin claims the trial court erred, primarily on grounds that his defense was *not* alibi, and thus, the trial court applied the wrong standard. Franklin makes this argument based on the notion that Ramon's testimony "would not have rendered it 'physically impossible' for Andre Franklin to have committed the crimes of stalking or cyberstalking." Appellant's Opening Brief, at 21. This claim is without merit.

First, as previously discussed, November 10, 2008 was a significant date in this case, and proffering a witness who would testify that the defendant was elsewhere on that significant date is by definition an alibi, not merely impeachment. Moreover, the policy reasons behind the notice rule -- specifically, preventing "trial by ambush" tactics -- applies to the circumstances presented here, just as it would in a case where all relevant events took place on only one day. Finally, Franklin's claim that he was not stalking or cyberstalking on November 10, 2008 is contrary to the record. Franklin sent Fuerte emails that day threatening to post another ad on Craigslist if Fuerte did not come up with the money. Ex. 40, 43. And, as Nanette Fuerte testified at both the protection order hearing and the trial, Franklin taunted her after she gave him the money and told her that his campaign of harassment and intimidation was just beginning. Ex. 38, p. 11; RP (6/29/09 a.m.) 51. Franklin's argument that he was not engaged in the ongoing crimes of stalking and cyberstalking on November 10, 2008 should be rejected.

Also, Franklin cites Taylor v. Illinois, 484 U.S. 400, 108 S. Ct. 646, 98 L. Ed. 2d 798 (1988), for these three propositions: 1) that a defendant's constitutional rights may be violated if a defense

witness is improperly excluded as a discovery sanction, 2) that "alternative sanctions are adequate and appropriate in most cases," and 3) that exclusion is appropriate only if the defense engages in willful misconduct. Appellant's Opening Brief, at 17-18 (quoting Taylor, at 413, 414-17). But these principles, as set forth above, fully support the trial court's ruling in this case, and Franklin's arguments to the contrary are without merit.

In sum, the trial court exercised its discretion appropriately by striking Ramon Franklin's testimony due to the defense's inexcusable disregard of the notice requirements regarding alibi witnesses. Accordingly, this Court should affirm.

Lastly, even assuming that the trial court erred, any possible error is harmless. When a defendant is precluded from presenting a defense, the standard is whether any error is harmless beyond a reasonable doubt. State v. Jones, 168 Wn.2d 713, 724-25, 230 P.3d 576 (2010). That standard is met in this case because Franklin also testified that he was with his brother on November 10, 2008, Ramon's testimony in this regard would not have made a difference because of his obvious bias, and independent documentary evidence showed that Fuerte had paid Franklin

\$3,000 that day. Thus, any possible error is harmless, and the Court should affirm for this reason as well.

**2. THE TRIAL COURT EXERCISED SOUND DISCRETION IN RULING THAT FRANKLIN HAD NOT LAID A SUFFICIENT FOUNDATION TO ESTABLISH THAT HIBBLER WAS AN "OTHER SUSPECT."**

Franklin next claims that the trial court abused its discretion in ruling that he had not laid a sufficient foundation to establish that Rasheena Hibbler was an "other suspect" who could have posted the ads on Craigslist and sent incriminating emails to Nanette Fuerte. Appellant's Opening Brief, at 27-32. The trial court did not err because the evidence did not establish a sufficient connection between Hibbler and the crimes charged to warrant admissibility, and any connection that could have been argued was tenuous. The defendant's convictions should be affirmed.

Although a defendant has a constitutional right to present evidence in his or her defense, the trial court is vested with considerable discretion in determining admissibility of that evidence. State v. Rehak, 67 Wn. App. 157, 162, 834 P.2d 651 (1992), rev. denied, 120 Wn.2d 1022 (1993). A trial court does not abuse its discretion unless "no reasonable person would take the

position adopted by the trial court." Id. The trial court exercised sound discretion in this case when ruling that Franklin's "other suspect" evidence was not admissible.

Evidence tending to implicate suspects other than the defendant is not admissible without a proper foundation. Rehak, 67 Wn. App. at 162. The defendant offering the evidence must show a direct connection between the other person and the crime. As Division Two of this Court explained,

Not only must there be a showing that the third party had the ability to place him- or herself at the scene of the crime, there also must be some step taken by the third party that indicates an intention to act on that ability.

Rehak, 67 Wn. App. at 163. And, as explained by a seminal case on this issue,

Before such testimony can be received, there must be such proof of connection with the crime, such a train of facts or circumstances as tend clearly to point out someone besides the accused as the guilty party.

State v. Downs, 168 Wn. 664, 667, 13 P.2d 1 (1932). In addition, "[r]emote acts, disconnected and outside of the crime itself, cannot be separately proved for such a purpose." Id. (quoting Greenfield v. People, 85 N.Y. 75, 39 Am. Rep. 636 (1881)).

The facts of Downs are instructive. In Downs, the defendants were caught by the police as they were sitting in their car, counting and sorting booty from a burglary that had just taken place in the area. Downs, 168 Wn. at 664-65. At trial, the defendants tried to introduce evidence that “a man known as ‘Madison Jimmy,’ whose occupation was that of a safe burglar,” had committed the crime. Downs, 168 Wn. at 666. The infamous “Madison Jimmy” was apparently known to be in town when the burglary took place, and it was therefore at least theoretically possible that he could have committed the crime. Id. at 666-67. Nonetheless, the “other suspect” evidence was excluded because there was an insufficient showing of a connection between “Madison Jimmy” and the crime at issue. Id. at 667-68. The same is true in this case.

In this case, Franklin wanted to argue that his live-in girlfriend and the mother of his child, Rasheena Hibbler, was the person who had actually posted the Craigslist ads and sent the harassing emails to Nanette Fuerte via the “time4gamez” account. In support of this theory, Franklin argued that Hibbler had access to a computer that could have been used to post the ads and send the emails, that Hibbler’s name was on their residential wireless

internet account, that Hibbler had been jealous and upset in the past when she had discovered that Franklin and Fuerte were romantically involved, and that Hibbler had accessed Franklin's email accounts in the past. RP (6/22/09) 3-14, 20-28; RP (6/25/09) 195-98.

However, as the trial court observed, any email contact between Hibbler and Fuerte occurred mainly in 2005 and 2006 (with Hibbler using her own identity, not Franklin's), but there was no evidence that anything had occurred during the relevant time frame. RP (6/29/09 a.m.) 4. In addition, Hibbler stated that her relationship with Franklin was "good" in November 2008, and that she was unaware at the time that Franklin and Fuerte were seeing each other. RP (6/29/09 a.m.) 7. Therefore, as the trial prosecutor noted, all that the defense had established was that Hibbler had been understandably upset in the past when she had discovered that Franklin was cheating on her, but there was no nexus between Hibbler and the commission of the crimes at issue in November 2008. RP (6/29/09 a.m.) 7-8.

In addition, as the trial court found, although more than evidence of motive is required for the admission of "other suspect" evidence, even the evidence of motive in this case was weak.

RP (6/29/09 a.m.) 14. In contrast, the case against Franklin was strong, as Franklin had confessed directly to two witnesses and implied to a third that he had posted the ads on Craigslist.

RP (6/29/09 a.m.) 14. Finally, although the trial court ruled that Franklin could not expressly argue that Hibbler had committed the crimes with which Franklin was charged, he could argue more generally that the State had not proved its case because the State could not establish that Franklin was the only person with access to the offending computer. RP (6/22/09) 10-11, 49; RP (6/23/09) 9-10; RP (6/29/09 a.m.) 14. In sum, the trial court exercised its considerable discretion appropriately, and Franklin's arguments to the contrary should be rejected.

Nonetheless, Franklin argues that the trial court erred, and points to Hibbler's testimony during the *in camera* hearing as a basis to find a direct connection between Hibbler and the crimes in question. Appellant's Opening Brief, at 30-31. But as the trial court ruled, Hibbler's testimony during the closed hearing was inadmissible, and was adduced solely for the purpose of establishing whether Hibbler had a constitutional right not to be compelled to testify at trial. RP (6/22/09) 48. A witness's testimony in a preliminary proceeding does not constitute a waiver of the

Fifth Amendment privilege for purposes of the trial. United States v. Johnson, 488 F.2d 1206, 1210 (1st Cir. 1973) (quoting 8 J. Wigmore, Evidence § 2276, at 470-72 (McNaughton rev. 1961; Supp. 1972)). The trial court did not err.

Lastly, even if this Court were to find that the trial court erred, there is still no basis to reverse because any error was harmless. When a defendant is precluded from presenting a defense, the standard is whether any error is harmless beyond a reasonable doubt. Jones, 168 Wn.2d at 724-25. Any possible error is harmless in this case for the same reasons that the "other suspect" evidence was ruled inadmissible: any connection between Hibbler and the crimes at issue was speculative, and the evidence against Franklin, which included his confessions to multiple people, was very strong. In addition, as noted above, Franklin was able to argue that he was not the only person with access to the computer that had created the "time4gamez" account and posted the ads. Thus, even if the attenuated "other suspect" evidence had been admitted, it would not have made a difference to the outcome of the trial.

**3. THE TRIAL COURT PROPERLY RULED THAT HIBBLER COULD NOT BE CALLED AS A WITNESS DUE TO A PRIVILEGE AGAINST SELF-INCRIMINATION.**

Franklin also argues that the trial court erred in ruling that Hibbler could not be called as a witness due to a Fifth Amendment privilege against self-incrimination. More specifically, he argues that the trial court erred in ruling that Hibbler had a "blanket" privilege and disallowing her testimony entirely. Appellant's Opening Brief, at 32-34. This claim should be rejected. The trial court exercised its discretion appropriately by ruling that the scope of Hibbler's privilege was such that she could not be called as a witness.

The Fifth Amendment privilege against self-incrimination is a fundamental constitutional right that is broadly applied and zealously guarded by the courts:

The privilege reflects a complex of our fundamental values and aspirations, and marks an important advance in the development of our liberty. It can be asserted in any proceeding, civil or criminal, administrative or judicial, investigatory or adjudicatory; and it protects against any disclosures which the witness reasonably believes could be used in a criminal prosecution or could lead to other evidence that might be so used. This Court has been zealous to safeguard the values which underlie the privilege.

Kastigar v. United States, 406 U.S. 441, 444-45, 92 S. Ct. 1653, 32 L. Ed. 2d 212 (1972) (footnotes omitted). The privilege against self-incrimination "must be accorded liberal construction in favor of the right it was intended to secure." Hoffman v. United States, 341 U.S. 479, 486, 71 S. Ct. 814, 95 L. Ed. 2d 1118 (1951). This privilege is so fundamental that "[a]n accused's right to compulsory process to secure the attendance of a witness does not include the right to compel the witness to waive his [or her] fifth amendment privilege." United States v. Moore, 682 F.2d 853, 856 (9th Cir. 1982). In other words, a witness's privilege against self-incrimination trumps the defendant's right to call witnesses in his defense.

The privilege is not limited to testimony directly implicating the witness in a crime. Rather, it also "embraces those [answers to questions] which would furnish a link in the chain of evidence needed to prosecute the claimant" for a crime. Hoffman, 341 U.S. at 486. Again, the privilege is to be liberally construed. Id. In addition, "[t]o sustain the privilege, it need only be evident from the implications of the question, in the setting in which it was asked, that a responsive answer to the question or an explanation of why it

cannot be answered might be dangerous because injurious disclosure could result." Id. at 486-87.

The trial court has a duty to protect the Fifth Amendment rights of witnesses. United States v. Lyons, 703 F.2d 815, 818 (5th Cir. 1983). In this capacity, the trial court "necessarily is accorded broad discretion in determining the merits of a claimed privilege and the measures to be taken as a result of a valid fifth amendment claim." Id. If the trial court finds that a witness has a valid basis to claim the privilege, "the defendant has no right to call the witness to the stand merely to force invocation of that right before the jury." Id. Also, the trial court must be mindful not only of the witness's anticipated testimony on direct examination, but of the potential for even broader cross-examination. Johnson, 488 F.2d at 1210. This is the case because, "when a witness voluntarily testifies to certain facts, he may not invoke the privilege as to details." Id.

In sum, the trial court maintains the discretion to refuse to allow either party to call the witness because "[n]either side has the right to benefit from any inferences the jury may draw simply from the witness' assertion of the privilege either alone or in conjunction with questions that have been put to him" or her. Id. at 2011. The trial court exercised that discretion appropriately in this case.

In this case, Hibbler was questioned pretrial by both the prosecutor and defense counsel, and she asserted a Fifth Amendment privilege in response to many of the questions she was asked. Indeed, Hibbler refused to answer any of the substantive questions that were asked of her by the prosecutor. RP (6/22/09) 16-28. During the *in camera* hearing, Hibbler answered the trial court's questions and claimed that she had created the "time4gamez" account, posted the Craigslist ads, and sent emails to Fuerte. RP (6/22/09, sealed transcript). As a result of this testimony, the trial court ruled that Hibbler had a Fifth Amendment privilege and would not allow her to be called as a witness by either party. RP (6/22/09) 43-44. The trial court reasoned further that it would be "unfair to the parties" if she were called as a witness and questioned in a limited way "because you can ask her some of the things about this issue, but not all of the things about this issue, and she can't provide additional evidence on that." RP (6/22/09) 47.

This ruling was proper. First, it is difficult to imagine how a full direct examination and a fair cross-examination could have been conducted that would not have either a) forced Hibbler to

invoke the privilege in front of the jury,<sup>4</sup> b) left the jury with an incomplete and wholly misleading version of events, or c) both. In addition, the fact that Hibbler's testimony was completely at odds with the other trial evidence does not change this result. To the contrary, the fact that the State maintained (and the evidence showed) that Hibbler was lying in order to manufacture a privilege for Franklin's benefit<sup>5</sup> gave rise to the potential for a perjury charge. In sum, the trial court exercised sound discretion in ruling that Hibbler had a valid basis for claiming a privilege and in not allowing her to be called as a witness by either party.

Nonetheless, Franklin contends that the trial court erred by allowing Hibbler to claim a "blanket" privilege. Appellant's Opening Brief, at 32-33. This argument takes language from the relevant cases out of context.

Franklin correctly notes that cases hold that a witness cannot assert a "blanket" Fifth Amendment privilege and refuse to answer any questions at all. See Appellant's Opening Brief, at

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<sup>4</sup> As an aside, the record indicates that this may have been what Franklin's counsel intended, as he repeatedly urged the trial court to allow him to call Hibbler as a witness in spite of the fact that it would force her to claim her privilege in front of the jury, particularly during the State's cross-examination. See RP (6/22/09) 34-36.

<sup>5</sup> See RP (6/22/09) 30.

32-33. But this does not mean, as Franklin suggests, that the witness is required to assert the privilege in response to questioning *in the presence of the jury*. Rather, this means that the witness must be questioned *outside the presence of the jury* so that the trial court can determine the existence and scope of the privilege. See Moore, 682 F.2d at 856 (the privilege must be "raised in response to specific questions propounded by the *investigating body*" so the court can "determine whether a responsive answer might lead to injurious disclosures") (emphasis supplied); Johnson, 488 F.2d at 1211 ("*before excluding the witness*, the court must first establish reliably that the witness will claim the privilege and the extent and validity of the claim") (emphasis supplied); State v. Levy, 156 Wn.2d 709, 732, 132 P.3d 1076 (2006) (the trial court "must determine whether the privilege is applicable, and a witness cannot establish the privilege merely by making a 'blanket declaration'" that she cannot testify). Once this determination has been made, however, the trial court has the discretion to not allow either party to call the witness if necessary to protect the witness's rights and to prevent incomplete, misleading testimony. Accordingly, the trial court did not err, and Franklin's arguments to the contrary should be rejected.

Finally, even if this Court were to find that the trial court erred, any possible error is harmless beyond a reasonable doubt. Franklin cross-examined Nanette Fuerte regarding the fact that Hibbler had intercepted Franklin's messages, that Hibbler had accessed Franklin's personal email account, and that Hibbler had used Franklin's email to contact Fuerte in the past. RP (6/29/09 p.m.) 86-94. Also, Franklin admitted during his testimony that he cheated on Hibbler with Fuerte, and he testified that Hibbler discovered his infidelity by logging into his email accounts. RP (6/30/09) 183-85. Franklin also testified that the laptop computer that he and Hibbler used at home was a computer that had been issued to Hibbler by her employer. RP (7/1/09) 16-17. In sum, the evidence that Franklin had wanted to elicit from Hibbler was largely admitted through other witnesses, and thus, Franklin's inability to call Hibbler as a witness made no difference to the outcome of the trial. This Court should affirm for this reason as well.

**4. THE TRIAL COURT CONDUCTED A BONE-CLUB ANALYSIS AND RULED CORRECTLY THAT A BRIEF CLOSED HEARING WAS NECESSARY TO DETERMINE IF HIBBLER HAD A BASIS FOR HER CLAIM OF A FIFTH AMENDMENT PRIVILEGE.**

Franklin next argues that the trial court conducted an inadequate inquiry under State v. Bone-Club and its progeny and that the courtroom closure was improper, thus necessitating reversal due to so-called "structural error." Appellant's Opening Brief, at 35-41. This claim should be rejected. The trial court weighed the Bone-Club factors and properly found that a brief closed hearing was necessary in order to protect Rasheena Hibbler's constitutional rights. This Court should reject Franklin's claim, and affirm.

A criminal defendant has the right to a public trial under both the federal and state constitutions. U.S. Const. amend. VI; Const. art. I, § 22. The state constitutional right in particular has been strictly applied:

Although the public trial right may not be absolute, protection of this basic constitutional right clearly calls for a trial court to resist a closure motion except under the most unusual circumstances.

State v. Bone-Club, 128 Wn.2d 254, 259, 906 P.2d 325 (1995).

The public trial right serves important interests, including ensuring

that the defendant receives a fair trial. State v. Brightman, 155 Wn.2d 506, 514, 122 P.3d 150 (2005).

Accordingly, the Washington Supreme Court has held that trial courts generally must consider five factors on the record before ordering a closure of the courtroom during trial. These factors are as follows: 1) there must be a compelling interest justifying the closure, and, if the interest is a reason other than the defendant's right to a fair trial, there must be a serious and imminent threat to the interest in question; 2) anyone present when the closure motion is made should be given an opportunity to object; 3) the method of closure must be the least restrictive means available for protecting the threatened interest; 4) the court must weigh the competing interests of the proponent of closure and the public; and 5) the closure order must be no broader in application or duration than is necessary. Bone-Club, 128 Wn.2d at 258-29. If the reviewing court finds that the public trial right has been violated, the presumptive remedy is a new trial. State v. Easterling, 157 Wn.2d 167, 174, 137 P.3d 825 (2006). The question of whether a violation of the right to a public trial has occurred is a question of law subject to *de novo* review on direct appeal. Id.

Washington case law holds that an *in camera* hearing is the appropriate method for determining whether a witness has a factual basis to assert her privilege against self-incrimination. See Eastham v. Arndt, 28 Wn. App. 524, 533-34, 624 P.2d 1159 (1981); Seventh Elect Church v. Rogers, 34 Wn. App. 105, 114-15, 660 P.2d 280, rev. denied, 99 Wn.2d 1019 (1983); State v. Berkley, 72 Wn. App. 12, 20, 863 P.2d 133 (1993), rev. denied, 124 Wn.2d 1011 (1994); see also State v. Hobble, 126 Wn.2d 283, 892 P.2d 85 (1995). The privilege against self-incrimination is clearly a fundamental right. See Kastigar, 406 U.S. at 444-45.

Accordingly, application of the Bone-Club factors in any case where a witness claims to have a Fifth Amendment privilege for which the trial court must evaluate the factual basis leads to the conclusion that a courtroom closure is proper. As this Court has observed in a case presenting similar issues, "[a]pplying the five factors before an *in camera* review would serve little purpose, because proper *in camera* proceedings would always satisfy them." State v. White, 152 Wn. App. 173, 182, 215 P.3d 251 (2009), rev. denied, 168 Wn.2d 1015 (2010). Such is the case here.

Under the first Bone-Club factor, the privilege against self-incrimination is clearly a compelling interest, and a witness's

potentially incriminating testimony in open court would pose a serious and imminent threat to that interest. Indeed, if a witness were compelled to provide a factual basis for her claim of privilege in open court, the privilege itself would be vitiated and rendered meaningless. Therefore, in order to evaluate the factual basis for Hibbler's claim of privilege while protecting this compelling interest, it was necessary for the trial court to close the courtroom.

Under the second factor, Franklin was given the opportunity to object to closing the courtroom, but he did not. Rather, he tacitly agreed to the procedure by deferring to the trial court as to whether an *in camera* proceeding was necessary. RP (6/22/09) 33, 37.

The third Bone-Club factor dictates that the method of closure must be the least restrictive means available to protect the interest in question. An *in camera* hearing, while certainly restrictive, is necessary to protect the witness claiming a privilege. Indeed, there is no other way to determine whether there is a basis for the witness to claim the privilege without vitiating the privilege if it exists. Therefore, closing the courtroom under these circumstances was the least restrictive means in order to protect the compelling interest at issue, i.e., the witness's constitutional rights.

The fourth factor dictates that the interests of the proponent of the closure should be weighed against the public's interest. A witness's risk of self-incrimination is of sufficient importance to outweigh the public's interest in open proceedings, at least for the limited purpose of determining whether a basis for the privilege exists. Again, closing the courtroom in these circumstances was proper.

Finally, the trial court's closure order must be no broader than necessary in scope and duration to serve its purpose. In this case, the *in camera* hearing was very brief, and the Court kept the closure order in effect just long enough to question Hibbler in the presence of her attorney to determine if Hibbler's claim of privilege was justified. RP (6/22/09, sealed transcript).

In sum, application of the Bone-Club factors to the situation presented here confirms what Washington courts have already acknowledged -- that an *in camera* hearing is appropriate when the trial court is called upon to determine whether a witness has a basis to invoke her privilege against self-incrimination. Although the constitutional right to a public trial is undeniably important, a witness's privilege against self-incrimination should trump the public trial right to the extent necessary for the trial court to ascertain

whether a factual basis for the privilege exists. An application of the Bone-Club factors confirms this result, and thus, the trial court's ruling was proper.

Nonetheless, Franklin argues that the courtroom closure was improper because the trial court "paid lip service to the Bone-Club factors," but did not perform an adequate analysis. Appellant's Opening Brief, at 40-41. This argument should be rejected.

The trial court first recited the Bone-Club factors, and observed that neither the State nor the defense was objecting to the closure.<sup>6</sup> RP (6/22/09) 37. The court noted that the Fifth Amendment privilege is an important right that all persons enjoy, and that a brief closed proceeding was necessary to protect that right. RP (6/22/09) 38. The court stated that it would not close the courtroom for any longer than was necessary to ask Hibbler the few questions identified by the parties to determine whether her claim of privilege had an adequate basis. RP (6/22/09) 38. Thus, the record is sufficient to establish that the trial court weighed the

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<sup>6</sup> This record, contrary to what Franklin now suggests on appeal, does not establish that the public was not given the right to object. Rather, this record shows that the prosecutor, defense counsel, and Franklin were the only persons present in the courtroom (other than Hibbler and her attorney) when the trial court was weighing the factors.

Bone-Club factors and determined, in accordance with Washington law, that an *in camera* hearing was necessary. Franklin's arguments to the contrary are without merit, and this Court should affirm.

**5. FRANKLIN WAS PROPERLY EXCLUDED FROM THE COURTROOM DURING THE TRIAL COURT'S QUESTIONING OF HIBBLER TO DETERMINE WHETHER SHE HAD A BASIS TO CLAIM A FIFTH AMENDMENT PRIVILEGE.**

In a related claim, Franklin argues that his right to be present for a "critical stage" of the trial was violated when he was excluded from the courtroom for the trial court's questioning of Hibbler to determine if she had a basis to claim a Fifth Amendment privilege. Appellant's Opening Brief, at 41-43. This claim should be rejected for the same reasons as the prior claim: relevant authorities hold that an *in camera* hearing is the proper way to determine if a witness has a basis to claim the privilege against self-incrimination, and application of the Bone-Club factors confirms this result.

As previously discussed, Washington case law holds that an *in camera* hearing is appropriate when a trial court must determine whether a witness has a basis to assert her privilege against self-incrimination. See White, 152 Wn. App. at 182; Eastham, 28

Wn. App. at 533-34; Seventh Elect Church, 34 Wn. App. at 114-15; Berkley, 72 Wn. App. at 20; see also Hobble, 126 Wn.2d 283. This is the case because the trial court "is the final judge of whether the chance of self-incrimination is genuine or contrived," Eastham, 28 Wn. App. at 531, and because the witness must establish a factual basis for asserting the privilege in the first instance. Hobble, 126 Wn.2d at 290. Further, as is also discussed at length above, an application of the Bone-Club factors demonstrates that the witness's privilege against self-incrimination is a compelling reason to hold a limited closed hearing.

This analysis holds true as applied to the defendant's right to present for the same reasons that it applies to the public trial right. The right against self-incrimination would be vitiated if persons other than the judge, the witness, and her lawyer were present, which is why Washington law holds that an *in camera* hearing is proper in these circumstances. Otherwise, the witness claiming a privilege would be forced to rely on the defendant's good will that her potentially incriminating *in camera* testimony would not be revealed.

In addition, although a criminal defendant has the right to be present for all critical stages of his trial,<sup>7</sup> this right is not absolute, and what constitutes a "critical stage" is not always easily defined. Unquestionably, the core of this right is the right to be present when evidence is being presented to the jury. United States v. Gagnon, 470 U.S. 522, 526, 105 S. Cr. 1482, 84 L. Ed. 2d 486 (1985). Beyond that, the defendant has a "right to be present at a proceeding 'whenever his presence has a relation, reasonably substantial, to the fullness of this opportunity to defend against the charge . . . .'" Gagnon, 470 U.S. at 526 (quoting Snyder v. Massachusetts, 291 U.S. 97, 54 S. Ct. 330, 78 L. Ed. 674 (1934)). But "the presence of a defendant is a condition of due process to the extent that a fair and just hearing would be thwarted by his absence, and to that extent only." Gagnon, 470 U.S. at 526 (quoting Snyder, 291 U.S. at 107-08).

The proceeding at issue here, i.e., a hearing addressing whether a witness has a Fifth Amendment privilege, has been held *not* to be a critical stage, and thus, the defendant's presence is not constitutionally required. United States v. Moore, 936 F.2d 1508,

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<sup>7</sup> See Illinois v. Allen, 397 U.S. 337, 338, 90 S. Ct. 1057, 25 L. Ed. 2d 353 (1970).

1523 (7th Cir. 1991). This is the case because a trial court's determination as to whether the privilege exists is a legal determination reserved for the judge alone. Id. This holding is in accordance with pre-existing Washington law holding that such proceedings should be held *in camera* to protect the witness's constitutional rights.

In addition, Franklin clearly acquiesced to being excluded from the courtroom during the *in camera* hearing. When asked what his position was regarding a closed hearing, defense counsel stated that Franklin would "defer to the Court." RP (6/22/09) 33. Thus, by inviting the trial court to conduct a brief hearing in his absence, Franklin has invited the alleged error he now claims on appeal. See State v. Henderson, 114 Wn.2d 867, 870-71, 792 P.2d 514 (1990) (defendant may not set up an error at trial and allege that error as a basis for reversal on appeal). In addition, in preparation for the *in camera* hearing, both Franklin and the State outlined the questions that should be asked of Hibbler during the brief closed proceeding. RP (6/22/09) 38-43. The trial court asked these questions. RP (6/22/09, sealed transcript). Therefore, any

error is also harmless,<sup>8</sup> as Franklin's presence would not have made a difference to the outcome of the proceedings, and Franklin cannot show that the alleged error that he invited is a "manifest" constitutional error within the meaning of RAP 2.5 because his input was given due consideration by the trial court.

In sum, Franklin was not denied the right to be present at a "critical stage" of the proceedings. Rather, an *in camera* hearing is the proper way to protect a witness's privilege against self-incrimination, the trial court is vested with sole responsibility for determining if the witness has a privilege and the defendant's presence is not required, Franklin invited the error he now alleges by agreeing to the *in camera* hearing, and the error he alleges is harmless and not "manifest" under RAP 2.5. This Court should reject Franklin's arguments to the contrary, and affirm.

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<sup>8</sup> See State v. Irby, 170 Wn.2d 874, 885-86, 246 P.3d 796 (2011) (holding that a violation of the defendant's right to be present for a "critical stage" of the proceedings is subject to harmless error analysis).

**6. FRANKLIN'S CUMULATIVE ERROR CLAIM SHOULD BE REJECTED.**

Lastly, Franklin claims that even if none of the errors he has alleged warrants reversal individually, he should be granted a new trial due to their cumulative effect. Appellant's Opening Brief, at 43-44. This claim should be rejected.

The cumulative error doctrine is limited to cases where there have been several trial errors that, standing alone, may not justify reversal; when combined, however, they may deny a defendant a fair trial. State v. Greiff, 141 Wn.2d 910, 929, 10 P.3d 390 (2000). As argued above, Franklin's claims on appeal are without merit. Accordingly, there is no trial error to cumulate in this case. See State v. Hodges, 118 Wn. App. 668, 674, 77 P.3d 375 (2003) (where defendant has identified no errors, cumulative error doctrine does not apply). Franklin's cumulative error claim fails.

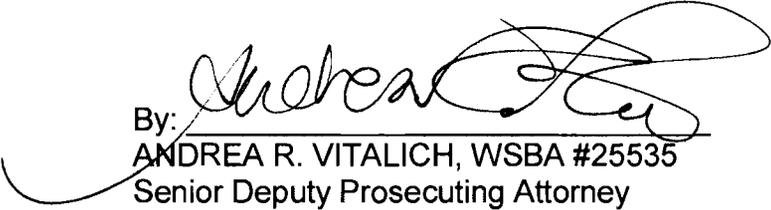
D. **CONCLUSION**

For all of the reasons stated above, this Court should reject Franklin's appellate claims and affirm his convictions for perjury, stalking, and cyberstalking.

DATED this 14<sup>th</sup> day of June, 2011.

Respectfully submitted,

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By: 

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Certificate of Service by Mail

Today I deposited in the mail of the United States of America, postage prepaid, a properly stamped and addressed envelope directed to Steven Witchley, the attorney for the appellant, at 705 Second Avenue, Suite 401, Seattle, WA 98104, containing a copy of the Brief of Respondent, in STATE V. ANDRE FRANKLIN, Cause No. 64033-0-I, in the Court of Appeals, Division I, for the State of Washington.

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

W Brame  
Name  
Done in Seattle, Washington

6/14/11  
Date

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