

641.34-4

64134-4



No. 64134-4-I

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

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**STATE OF WASHINGTON, Respondent,**

**v.**

**BRUCE HUMMEL, Appellant.**

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**BRIEF OF RESPONDENT**

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**A. ASSIGNMENTS OF ERROR**

None.

**B. ISSUES PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR**

1. Whether the State Offered Sufficient Independent Evidence that *Prima Facie* established the *Corpus Delicti* of the Crime for purposes of admission of Hummel's statements.
2. Whether Hummel's right to confront witnesses pursuant to the Sixth Amendment of the United States Constitution and article 1, section 22 of the Washington State Constitution was implicated when witnesses testified and were subject to cross examination regarding how, when and where they unsuccessfully searched for Alice Hummel after her disappearance.
3. Whether the trial court abused its discretion by declining to give a proposed jury instruction specifically directing how jurors should assess the credibility of Donald Cargill's testimony when the jury instructions, as a whole, properly conveyed the law and allowed Hummel to argue his case; including his contention that Cargill was not a credible witness.
4. Whether Hummel invited public trial error by expressly asking and encouraging the court to close portions of voir dire by submitting a jury questionnaire that repeatedly and specifically asked potential jurors to disclose if they preferred private questioning on any sensitive questions or issues and by later requesting the court expand this process to include one additional potential juror.
5. Whether the trial court violated the public's right to an "open proceeding" under article 1, section 10 of the Washington State Constitution when the trial court asked if there were any objections to the proposed limited in chamber proceedings and made Bone-Club findings.

6. Whether Hummel waived his right to claim for the first time on appeal that his federal convictions should not be used to calculate his offender score when he acknowledged the inclusion of his federal offense below and only asserted that his prior convictions should be scored as one, not twelve based on Hummel's assertion that his prior convictions constituted the same criminal conduct.

### C. FACTS

In October of 1990, Shanalyn Hummel, then twelve years old and youngest of three children, confided to her mom, Alice Kristina Hummel, that Bruce Hummel had been sexually molesting her for years. RP 41.

Hummel would force Shanalyn to help him masturbate. RP 36.

Sometimes Hummel would force her while they were driving in remote areas of Whatcom County, other times Hummel would just pull into local community parks. RP 36-37. Hummel also tried to climb in the bathtub with Shanalyn and have her perform oral sex. *Id.* Alice Hummel was upset, though compassionate and concerned when Shanalyn finally revealed the ongoing sexual abuse. RP 41. Shanalyn felt reassured though, that her mom would take action in response to her disclosure. *Id.* Two days later, on Thursday October 18<sup>th</sup>, 1990 Shanalyn came home from school and found her mom was gone. RP 42.

Sean Hummel, Shanalyn's older brother who was then a senior, confirmed their mom was gone when they came home from school that

day and that when Bruce Hummel returned home later that evening he told Shanalyn and Sean that their mom had gone to a job interview in California. RP 235. Shanalyn, who was close to her mom at the time and spoke to her daily, found it unusual for her mom not to be home after school or that she would just suddenly leave home. RP 39, 42. Especially since Shanalyn and her mom, Alice had made special plans to go to see the ballet “Coppellia” at Western Washington University on Shanalyn’s 13<sup>th</sup> birthday just days later, on October 21<sup>st</sup>, 1990. Both Shanalyn and her mom were very excited and had been looking forward to seeing this ballet together. RP 38. And after disclosing sexual abuse, Shanalyn didn’t expect her mom would leave. RP 51. After her mom disappeared Bruce Hummel continued molesting Shanalyn. Id.

Alice Hummel who suffered from Lupus and was on disability from the state of Alaska, where she previously was a teacher, rarely left Hummel family home without someone, and when she did Bruce Hummel usually drove her. RP 90-91, 95-96. At the time of her disappearance Alice had at least fifteen prescriptions for various medications. RP 77. Alice received a monthly disability payment from the state of Alaska teacher’s retirement system and ran a home computer business from a

basement office of the Hummel home at 2426 Vista Drive, Bellingham.

RP 30.

Alice and Bruce Hummel's relationship was contentious, tense and argumentative. RP 35, 36. Prior to Alice's disappearance Bruce and Alice lived in the same home but in separate bedrooms. RP 36. There was also a lot of financial stress on the family and Alice's disability payments were often the only source of income. RP 35, 36, 94. After moving full time to Bellingham, Bruce Hummel stopped teaching and worked odd jobs. He occasionally worked by collecting natural materials like foliage, cedar and flowers to sell to companies for cash. RP 100-102. Hummel would drive the family's large 1985 Econoline van to remote areas of Whatcom County, off of logging roads to collect these items, often with one or more of his family. RP 34,-5, 45, 101.

At the time of her disappearance Alice Hummel not only had birthday plans with Shanalyn but was also working on a job to recover lost data from computer disks for a client, Wayne Terry. RP 30, 289. Terry had dropped off these disks mid-October and Alice had promised to have the disks ready for him mid week the following week. RP 292. Terry never heard from Alice again. RP 293. Terry described Alice Hummel as competent and reliable and thought it was not like Alice to just vanish or

take off for another job without talking to him or returning the computer disks he was having repaired. RP 292.

When Terry asked Hummel where Alice was, Hummel initially told him on the phone she was interviewing in Houston but then later told him she was interviewing in California or Montana. RP 294. Wanting to find his computer disks, Terry, a retired law enforcement officer, used various search tools in November-December of 1990 including LEXIS NEXIS, Capital Search to try to locate or get a hit on Alice Hummel's whereabouts. Terry did not get any leads from any of his searches and was never able to locate either Alice or his computer disks. RP 299.

Neither Sean nor Shanalyn saw their mom pack or prepare to leave for a trip prior to her disappearance. RP 236, 43. But within two weeks of her sudden disappearance, Bruce Hummel directed Shanalyn to pack up her mom's personal belongings purportedly to be forwarded to her. RP 45, 46. While doing so, Shanalyn found the current purse Alice Hummel had been using at the time she disappeared. The purse still had Alice Hummel's wallet, gum and prescription drugs in it. RP 46. Shanalyn explained Alice kept her identification and credit cards in her wallet. Id. Shanalyn gave the packed boxes to Bruce Hummel to forward to her mom

but later found these same items hidden in the basement when the family was preparing for a garage sale in the spring. RP 47.

Sean Hummel also recalled seeing Bruce Hummel packing a suitcase and boxes with his mom's needlepoint and MAC computer stuff within weeks of his mom's disappearance, reportedly to also be sent to his mom. RP 240. Months later however, Sean found these boxes/suitcase hidden by the hot water tank and in the false ceiling in the basement of the Hummel home. RP 240.

None of the Hummel children ever spoke to their mother again after October 18<sup>th</sup>, 1990. Initially, Bruce Hummel told them their mother had gone for a job interview in California and did not have telephone access. RP 237. Hummel, who would get agitated when Sean or Shanalyn would ask about their mother, also told them Alice would call him every Thursday afternoon but when they pretended to be sick to stay home on Thursday, even for weeks at a time, nobody ever called. RP 237-38.

Bruce Hummel also became very guarded about incoming mail after Alice Kristina's disappearance; having full temper tantrums if anyone tried to pick up the mail. RP 52. Shanalyn nonetheless would sneak out to examine the mail but never found anything from her mom. RP 52. At Christmas, Sean Hummel received a Christmas card from his mom but the

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\$50.00 check inside of it was signed by his dad. RP 239. In the spring Hummel told his three children Alice would be coming to Sean's graduation. RP 105. Just days before, however, Hummel told them their mom had to work and could not make the trip. RP 105. Hummel told Sharinda and Shanalyn separately over time that Alice first went for a job interview, then got a job, then fell in love and wanted nothing more to do with her children. RP 107.

Prior to her sudden disappearance, Alice Hummel had happily helped move her father, Ernie Wehr to a Bellingham retirement facility and would visit him approximately twice a month. RP 306, 308. After she disappeared Ernie's step son in law, Don West, received a typed letter purportedly from Alice stating she had left Bruce, moved to California, got a job, fell in love and based on her childhood had decided to disassociate herself from her dad. RP 306-310. After Alice's father died in 1993, West as executor of Ernie's estate, tried to notify Alice by publishing notices in Texas and California newspapers. RP 313. West never heard from Alice. Id.

After Alice Hummel disappeared and Sean graduated, Bruce and Shanalyn Hummel moved away from Bellingham to Okanogan and then Enumclaw. RP 28, 29. Shanalyn reported receiving typed letters

purportedly from her mom stating she found someone else who didn't want kids around and that she would always take care of the family financially. RP 50. Shanalyn stated these letters didn't sound like her mom. Id. Lisa Collins, a forensic scientist from the Washington State Patrol, who examined Alice's signature on various pieces of correspondence allegedly sent by Alice after she disappeared, testified there were indications the signatures were made by Bruce Hummel, not Alice. RP 603-607.

Sean Hummel and his mom had a history of leaving notes for each other in the false ceiling of their basement. RP 246-248. After his mom disappeared, Sean looked but did not find any letters or notes from his mom in the false ceiling. Id. After his graduation, however, Sean returned to temporarily live at the Hummel home after traveling and found an apparent suicide note from his mom hidden in the false ceiling. Id. Sean said the note appeared to be written by his dad and was not there after Alice initially disappeared. Id.

In the early 90's Sean tried to find his mom after purchasing search software called 1-800 Search for the Northwest, California and Texas regions. RP 241-2. Sean found a few 'hits' within the databases for A. Hummel and A. Wehr but follow up phone calls confirmed they were not

his mom and her social security number only listed her in Bellingham. Id. Shanalyn also was unable to find any trace of her mom. She used a USA search database and typed in her mom's social security number but found nothing. RP 64. Sharinda, the oldest of the Hummel children, who was not living at 2426 Vista Drive when her mom disappeared, eventually looked for Alice after Alice's dad, Ernie Wehr died in 1993. RP 108. Sharinda called utility companies, old friends but could not find any trace of her mom. Id. Eventually, after sharing details and discussing their mom's disappearance and learning about Hummel's molestation of Shanalyn, Sharinda filed a missing persons report in 2003 with the Bellingham Police Department. RP 117.

In 2004 Bellingham Police Detectives Gitts, Huchings and Mozelewski along with the FBI Agent Bray contacted Hummel at his home in Billings Montana. RP 156. Hummel maintained he last saw Alice when he drove her to SeaTac in October 1990 so she could fly to California for a job interview. RP 156. He confirmed he had boxed up her belongings but maintained he sent them along to her. RP 160,163. He also denied taking her disability payments. Id.

When confronted with evidence that Hummel had falsely represented himself as Alice to the Alaska Teacher's Retirement Fund and

arranged for these payments to be deposited into bank accounts so he could collect these funds, Hummel changed his story and admitted taking the money for the good of his children. RP 165. He also admitted molesting Shanalyn from when she was three to twelve years old and confirmed that if Alice had known about the abuse, she would have confronted him. RP 169. When Detective Mozelewski informed Hummel during their discussion that they wouldn't ask him any questions unless they knew the answer, Hummel immediately responded by stating, "Well, where is Alice?" RP 172. Detectives then said "you tell us." To which Hummel responded that he wasn't going to change his story. RP 174.

In 2007 Hummel pled guilty to twelve counts of federal wire fraud for unlawfully stealing Alice Hummel's disability payments from the Alaska Retirement System from November 1990 until February 24<sup>th</sup>, 2004. Supp. CP \_\_\_ (Pl. Ex 6). In his guilty plea statement Hummel admitted Alice died on October 18<sup>th</sup>, 1990 and that after she was dead he falsely represented himself to be his wife, and forged Alice's name to documents in an effort to maintain the fiction that she was alive and still collecting her disability. Id.

Detectives searched the grounds of the Hummel's home at 2426 Vista Drive Bellingham in 2004 with ground penetrating radar, cadaver

and rescue dogs. RP 318, 393. They found two areas, a raised flower bed and ground of a metal shed area that had disturbances in the ground but nothing else. RP 138. The Hummel children later confirmed that Hummel had done some remodeling in the basement sometime after Alice disappeared, including removing some cement and completing some piping work to the downstairs bathroom, RP 137. 167. Extensive searches in the Hummel home however, revealed nothing of forensic value. RP 152-3.

After meeting with detectives in Montana, Hummel sent Detective Gitts a letter apologizing for the smoke screen he threw at them, stating “but what else would you expect when it’s the same story I have been telling you for thirteen years...” RP 175, 334.

Hummel then went on to confirm that Alice Kristina Hummel was dead but then contended she died “of her own hand” on October 18 1990. Id. Hummel then described in excruciating detail that he came home on the morning of October 18<sup>th</sup>, 1990 to find Alice dead lying in a large pool of blood in the downstairs bathroom with a large gash across her left wrist with a note asking him not to tell the children. RP 175-183.

I apologize for the smoke screen I threw at the three of you, but what else could you expect when it is the same story I’ve been telling for 13 years? You must admit, it sounded rehearsed. Parts of it are true, mostly false.

What I'm about to write in the best detail is the absolutely truth and accurate to the best of my ability considering the amount of time that has passed.

First fact, Alice Kristina Werh Hummel is dead.

Second fact, she died of her own hand.

Third fact, I covered up her suicide for two reasons: A, on a note I found half laying in the bathroom sink was a request, "Don't let the kids know." B, I didn't want TRS to be aware of her death for fear of losing her disability payments.

Let me set the scene. The day was Thursday, October 18<sup>th</sup>, 1990. Place, our home at 2426 Vista Drive, Bellingham, Washington, 98226. Time, during the week Sean and I would leave home at 6:45 in order to get him to a 7:00 fire class. Shanalyn would leave by 7:45 for school at Whatcom Middle School. Kristy usually slept until 9:30 to 10:30.

I was doing maintenance work for a property management company and had my own business of bringing house up to code so banks would loan purchase money.

On Wednesday night, the four of us had attended a concert at Sehome, and the day's mail wasn't picked up until after I returned from Sehome. I dropped Shanalyn off at school on the way to a job I was working on.

Needing additional tools, I came home at about noon to a nightmarish scene that so shocked me that it has stayed with me to this day, and initially made sleep hard to come by.

Stopping in the kitchen to get a drink, I saw that some of the mail had been opened. Our bedroom door at the end of the hall was wide open, so I figured Kristy must be downstairs in our office.

Not getting a response, I started up the hall toward our bedroom, but stopped dead in my tracks as I passed the open bedroom door. I found Kristy laying on her left side with her back to the bathtub. There was a lot of blood in and around the toilet, and in front of her there were splatters of blood on the base of the vanity and pools of it, one a small one in front of her face, and a large one in front of her waist. She had also urinated.

I first turned her head to check for a pulse, but her rolled-up eyes told me she was dead.

As I turned her slightly, I could see that her left wrist had a terrible gash across it. I had to get out of there.

I grabbed a towel to step on so as to not track blood through the hall. It is then that I noticed the note playing mostly down in the sink. Right at the bottom were the words, "Don't tell the kids." There was more, but it was written in a smaller hand and read only later.

I thought what do you mean don't tell the kids? What in the hell am I supposed to do? Sean would be home in three hours.

I had some plastic sheeting left over from one of my jobs. I decided to roll Kristy up in it, and then more towels to clean the plastic so I could pull it through the house.

How I managed, I don't know. I was both angry and numb. Kristy weighed a good 200 pounds, but somehow I managed to lift her in the back of our van and covered her with a blanket.

While cleaning up the blood, I found a ribbed back razor between the toilet and the outside wall. The rubber was beyond saving, so I trashed it. I cleaned the walls, floor, and toilet, and laundered the towels.

Exhausted, I took the time to read the rest of the note. One of the letters that Kristy opened was from that fellow in California. She was banking on a positive response, but instead, it was a rejection letter. The note included the statement like what are we going to do now?

She blamed me for our IRS problems which resulted in the IRS taking all of the money out of our Anchorage account.

I went to the mall to get a replacement rug and got it down before Sean got home.

Almost once a month, Kristy would check herself into the Pony Soldier for a one night R and R. This was my excuse to the kids for why Kristy wasn't home. I took Shanalyn to the grocery store so she could get what she needed to make something special for dinner. I spent the night at the Pony. It was a night without sleep. It was during the night that I came up with the idea of Kristy going to California.

I come home early Friday morning to take Sean to school and had Shanalyn help me pack a couple suitcases for her mother's trip to San Luis Obispo.

What to do with the body? I had some two-by-fours, and two very large truck inner tubes still inflated from summer use. I used my afternoon to cut pieces for the raft shown below [and there is a depiction of the raft]. Size, almost eight feet by four feet w. All the joints were lashed as were the inner tubes lashed to the two-by-fours ...

Friday night after the kids were asleep, almost midnight for Sean, I loaded the tubes, rope and boards in the van along with my five-man inflatable raft. I drove to Fairhaven and assembled the tube raft, and used my electric pump to inflate my five man. I took a rock from our rick wall and after loading Kristy onto the tube raft, I untied the bottom of the plastic sheeting, and placed the rock between Kristy's feet and retied the bottom, and tied Kristy to the two-by-four frame.

I decided on this harebrained way of ridding the body, because I didn't think anyone else would think it possible. They would almost be right.

We had both aluminum handled oars, or there would not have been a chance. This is the one and only time I had been on Bellingham Bay, but I figured if I took Kristy out close to the middle, it would be deep enough so as not to be snagged by anchors or fishing nets.

Rowing was very difficult, and I almost conceded to the bay. The tube raft capsized leaving Kristy suspended by the ropes. Holding her to the frame while the frame was hanging by ropes tied to the inner tubes, I rowed and bailed for an hour and a half at least, but the wind got worse, and I had to let her body go.

I cut the ropes and up come the two-by-four frame as her weight was gone. I was too tired to cry, but I remember saying a silent prayer.

Rowing back was aided by the wind, but finding my way to the marina took a long time. I cut the tube raft loose after making holes in the tubes.

It was about six before I got home. I still could not sleep.

On Sunday, October 21<sup>st</sup>, it was Shanalyn's birthday. We went to a concert at Western and had her favorite dish for dinner at home.

You asked me what I would think if the situation were reversed. There were two elements in your assumption: One, you never knew Kristy or about the attempted suicides, and two, you don't know me, and the fact that I can't kill anything, let alone anybody.

You say why didn't I level with you after you shot down my smoke screen story. Part of it was saving face, but more so, it was the effect the FBI information about the money that I had taken and used. At that point, I figured it would put me in a worse position if you knew I was taking the money even though I knew Kristy was dead. '91-'94, I figured using the money was safe, because I was helping both Shanalyn and Sean, paying private school costs for Shanalyn.

I had to resign from teaching in Okanogan in November of '91 because of heart problems, restricted blood supply, and did not work other than occasional subbing including Auburn and Buckley, Washington. I took a part-time maintenance job to supplement what I was getting from Kristy's disability.

In '94, I met Sharon, and we were married December 23<sup>rd</sup>, 1995 in Auburn. I had been teaching in Alaska from August of '95, so after the wedding, Sharon and I went back to Alaska. After the wedding Sharon went back to Alaska with me, and we both taught at [I believe it's Tuntutuliak] and a year later at Kotzebue.

During April of '97, I got critically ill with liver failure, a condition never fully diagnosed by 40 plus doctors, two hospitals, and the U.W. Medical School

My income ended with the end of summer. I tried real estate, but it was a cash-out sort of situation. This was the first time I mentioned the annuity to Sharon.

We were living in Kent, and even with Sharon teaching part-time, we would not have survived without my dipping. I tried to get disability for me in 1998, but since no one could say what I had or how long it would last, it didn't stand a chance. This even though I could hardly work.

I did do a couple of short long-term subs in Saint Maries, but with the failing economy, dipping continued. I

rationalized that if I couldn't get a disability from Alaska, why not use hers?

Since Kristy had somehow withdrawn the entire balance from my retirement account, which would have amounted to more than \$90,000 and with interest by 1997, I had to somehow put in enough money to be able to get some retirement.

We borrowed from Sharon's brother, Richard, and sister, Bernice, \$36,000, and added \$7,000 that Sharon had in her non-vested retirement account. These amounts plus what I had accumulated in two years, '95 to '96, '96 to '97, was what was needed to give me a very basic retirement of \$1200 to \$1300. This amount is about \$1600 a month less than what I would have retired at had not my retirement fund been totally depleted. This difference is about what I was withdrawing each month from Kristy's account.

Two more facts: One, this is the first time, this in its entirety has been shared with anyone; two, Sharon Mulsted Hummel, my wife, had no knowledge of the nature of my annuity since she began to know of it. The post office boxes were set up only to keep it that way.

Through the years, I had only limited contact with the Credit One credit union or the TRS people. I may have looked at the total of six statements in all the years this has been going on.

RP 175-184.

Detectives Mozelewski and Gitts of the Bellingham Police

Department went back to 2426 Vista after receiving Hummel's letter and attempted to confirm Hummel's story by searching and testing the home for the presence of blood applying hemaglow and luminol to various areas of the former Hummel home. RP 232, 330, 391. Nothing, not even trace amounts of blood, were detected. Id.

Working with Dr. Goldfogel, the Whatcom County Medical examiner, detectives also reconstructed a bathroom to scale to the downstairs bathroom in the Hummel home demonstrating the extensive amounts of blood that Alice Hummel would have bled out if she died in the manner described by Hummel. RP 393, 588. Dr. Goldfogel explained Alice would likely have bled at least two quarts of blood and that it was unlikely she could have bled out by slashing across her wrist as described by Hummel. RP 593. Usually, he explained, successful suicide patients have to slash their wrists vertically. RP 593. Dr. Toby Hayes, a professor of biomechanical engineering also explained that it would be next to impossible for a man Hummel's size to move a dead woman of Alice Hummel's size from the floor of the bathroom into his van, then on to a raft without suffering a significant injury. RP 375. When detectives later told Hummel they didn't find any blood, Hummel changed his story and responded that she bled into the toilet. RP 198.

Detectives also determined that Hummel would have had to pass by a manned guard shack in 1990 to take Alice's body out to Bellingham Bay as he described in his letter. RP 346. Additionally, contrary to Hummel's letter, Bellingham Bay was not stormy, but incredibly calm with no wind throughout the night of October 19 and 20<sup>th</sup>, 1990. Dr.

Goldfogel also explained that when someone drowns in Bellingham Bay, they usually always find the body because it is a relatively contained bay and gases build up in the body as it decomposes. RP 585. He explained it is much more difficult to find bodies in the forest because decomposition of the body necessarily occurs faster. RP 586.

Detectives searched, unsuccessfully, LEXIS NEXIS Accurint database using Alice Hummel's married and maiden name and social security number looking for possible leads to Alice Hummel's whereabouts. RP 483. Detectives also had the stamps and envelopes of letters purportedly sent by Alice Hummel analyzed for fingerprints and DNA evidence but found nothing; even on stamps where DNA would be expected to be found in abundance. RP 397, 341, 624-7.

While Bruce Hummel was incarcerated at the Whatcom County Jail, his cellmate was Donald Cargill. RP 512. Cargill testified Hummel talked a lot and eventually talked to him about how he helped his wife Alice "get to a better place." RP 516. Cargill stated Hummel would often close his eyes when he was talking but then would open them and look at him when he was making a point. RP 523. Shanalyn confirmed that Hummel often spoke in this manner, particularly when he was teaching. RP 53. Hummel told Cargill, who had extensive criminal history, a drug

problem and was facing a battery of new charges, that Alice was in poor health, not taking care of her kids and not doing well before she died. RP 516. He explained that he took a handful of barbiturate type pills and mixed 2-25 of them up in some apple cider and gave it to Alice to drink. RP 523. Hummel said he worried she wouldn't drink it because the pills looked cloudy, but she did. Id. Hummel explained Alice Hummel then died on her bed. RP 527. Dr. Goldfogel explained that barbiturates are respiratory and central nervous systems depressants and that ingesting too many will lead to death. RP 595-6. Hummel told Cargill he killed Alice because she caught him molesting their daughter and she was going to turn him in to authorities. RP 525. Hummel also told Cargill about digging a 10x4 trench when he completed some pipe work on his Montana home and that Hummel had asserted "that would be an interesting place to find artifacts." RP 526. Cargill acknowledged throughout his testimony that he was a convicted felon, drug addict and that he did receive a reduced plea package in exchange for his testimony.

After receiving Cargill's information, Detectives revisited searching 2426 Vista Drive home to examine areas of the basement where they were aware Hummel had completed some pipe work. RP 33, 199, 200. Hummel had removed cement and dug up the floor to put in new

bathroom pipes. Detective's found the area near the water tank, dug up the cement, then dug through pea gravel and tested approximately four feet into the ground but found nothing. RP 33, 199, 200. Detectives were also never able to trace or find the 1985 Econoline Van Hummel was using when Alice disappeared. RP 306, 317.

When Hummel was finally arrested by the FBI for wire fraud in Westport Washington May 16<sup>th</sup>, 2007, detectives from Bellingham, after advising Hummel of his Miranda warnings, again asked about Alice Hummel. RP 197. Hummel stated he was not going to change his story from Idaho. Id. Detectives told Hummel that they were not able to find any blood to confirm his story. Hummel changed his story and claimed for the first time that all of Alice's blood went into the toilet. Id. When detectives gave Hummel the opportunity to make things right and provide closure to his family, Hummel responded by stating, "I don't care. They don't care about me. I don't care about them." RP 197.

#### **D. ARGUMENT**

- 1. The State offered independent evidence that Prima Facie established the Corpus Delicti of the crime to support admission of Hummel's statements.**

Prior to trial, Hummel unsuccessfully moved to suppress various statements he made that implicated himself in the murder of his wife,

claiming the state could not independently prove the *corpus delicti* of the crime charged to support the admission of his statements. RP 66 (7/21/09), CP 322-429, 458-471, CP 95-96, 103-104. On appeal, Hummel raises the same claim, challenging the State's independent proof of the *corpus delicti*. Br. of Appellant, 7-18.

The *corpus delicti* rule is an evidentiary rule that establishes the foundational requirements for admitting a defendant's statements or confession. State v. Aten, 130 Wn.2d 640, 656, 927 P.2d 210 (1996). To satisfy the corpus delicti rule in Washington, the state must have evidence, independent of the defendant's statements, to support the crime charged before a jury may consider extrajudicial statements of the defendant. State v. Brockob, 159 Wn.2d 311, 329, 150 P.3d 59 (2006).<sup>1</sup>

In a homicide case, corpus delicti requires the state independently prove the fact of death and a causal connection between the death and a criminal agency. State v. Lung, 70 Wn.2d 365, 423 P.2d 72 (1967), *citing* State v. Meyer, 37 Wn.2d 759, 226 P.2d 204 (1951). Proof of a causal relationship between death and the accused for example, while a fact to be proven at trial, is not considered an element of corpus delicti in a homicide

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<sup>1</sup> Where there is insufficient independent evidence to support the admission of defendant's statements, those statements may still be admissible pursuant to RCW 10.58.035; *see* State v. Dow, 168 Wn.2d 243, 227 P.3d 1278 (2010) (new rule, to extent

prosecution. *Id.* The independent evidence must support the inference that a crime was committed; if it supports both a criminal and innocent hypothesis of guilt, it is not sufficient. State v. Brockob, 159 Wn.2d at 330.

The corroborating evidence “need not be of such a character as would establish the *corpus delicti* beyond a reasonable doubt, or even by a preponderance of the proof. The independent evidence need not be sufficient to support a conviction or even to send the case to the jury. City of Bremerton v. Corbett, 106 Wn.2d 569, 576-77, 723 P.2d 1135 (1986). It is sufficient if it *prima facie* established the *corpus delicti*.” *Id.* (quoting State v. Meyer, 37 Wn.2d at 763-64). *Prima facie* means “evidence of sufficient circumstances which would support a logical and reasonable inference’ of the facts sought to be proved.” *Id.* (citing State v. Vangerpen, 125 Wn.2d 782, 796, 888 P.2d 1177 (1995)).

The *corpus delicti* of a crime “can be established by either direct or circumstantial evidence.” State v. Smith, 115 Wn.2d 775, 782 n.1, 801 P.2d 975 (1990) (quoting State v. Lung, 70 Wn.2d at 371). When analyzing this issue, the appellate court “assumes the truth of the State’s

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departs from traditional rule of Corpus Delicti pertains only to admissibility, not sufficiency of the evidence required to support a conviction.)

evidence and all reasonable inferences from it in a light most favorable to the State.” State v. Aten, 130 Wn.2d 640, 663, 927 P.2d 210 (1996).

Assuming the truth of the State’s evidence and viewing all reasonable inferences from the evidence in the light most favorable to the state, ample independent circumstantial evidence in this case supports a reasonable and logical inference that Alice Hummel was intentionally murdered in October of 1990. Alice Hummel disappeared suddenly from her home on October 18<sup>th</sup>, 1990 within days of her youngest daughter, Shanalyn confiding to her that Bruce Hummel had been sexually molesting her for years. Bruce and Alice Hummel had a contentious relationship and Bruce was the only person home with Alice when she vanished. The facts demonstrate Alice would not have abandoned her children and left home on October 18<sup>th</sup> 1990 because she was concerned Bruce was molesting Shanalyn, she had special birthday plans with Shanalyn just days later on October 21<sup>st</sup>, 1990 and was working on a computer job for Wayne Terry.

Nor do the facts reasonably suggest Alice would have suddenly left home without talking to her children or packing. Instead, the facts reveal Alice left all of her personal effects including her medications, her purse and her wallet-where she carried her identification and credit cards. These facts infer Alice was murdered, not that she voluntarily took a job out of

state and abandoned her children. Particularly when this evidence is viewed in conjunction with testimony from Alice's client Terry, who ran an investigative business, who testified he attempted but could not locate Alice Hummel in Washington, California and Texas right after she disappeared.

This evidence, coupled with additional facts that Bruce Hummel continued molesting Shanalyn and immediately began stealing Alice's disability payments as soon as Alice disappeared, support the inference Alice Hummel was intentionally murdered on October 18<sup>th</sup>, 1990. The fact that Alice Hummel's body was never recovered evidences she was killed in a manner to conceal her death so Hummel could pretend Alice simply abandoned her family. This enabled Hummel to continue molesting Shanalyn without consequence and maintain some financial stability.

Relying on State v. Aten, 130 Wn.2d at 663, Hummel asserts nonetheless that even if the state can prove the fact of Alice Hummel's death for corpus delicti purposes, there is insufficient evidence that Alice Hummel's death was caused by criminal means. Br. of App. at 10.

In Aten the issue was whether there was independent evidence, not withstanding Aten's confession, to support the conclusion that a baby in

Aten's care died as a result of a crime as opposed to a non criminal cause. In Aten, the court held that the defendant's confession to suffocating the baby in her care was inadmissible because there was no independent proof a crime had been committed because the medical examiner could not say whether the death of the baby was the result of homicide or the result of natural causes. The court in Aten confirmed that the circumstantial evidence proving the corpus delicti "must be consistent with guilt and inconsistent with the hypothesis of innocence". Id at 655, *citing State v. Lung*, 70 Wn.2d at 423.

Unlike Aten, the facts and circumstances leading up to Alice Hummel's sudden disappearance combined with Hummel's continued sexual molestation of Shanalyn and taking of Alice Hummel's monthly disability payments beginning November 1990 circumstantially support only one logical and reasonable inference, that Hummel intentionally murdered Alice Hummel so he could avoid being turned into authorities, continue to molest Shanalyn without consequence and have continued financial support.

In contrast to Aten, the independent evidence in this case does not reasonably suggest Alice Hummel voluntarily moved away leaving her children, a job, her purse with her wallet and medications, her personal

belongings and monthly disability income, never to be seen or heard from again. The facts simply do not infer, as they did in Aten, that Alice Hummel's death was innocent. Hummel had motive and opportunity to murder Alice and acted in a manner after her disappearance that demonstrated he knew Alice was dead, he knew he could continue to molest Shanalyn without consequence and could begin stealing her disability checks. These facts combined with the Hummel's contentious relationship and the fact that Alice's body was never found infer Bruce carried out an elaborate plan to murder Alice in October 1990 and carry out an elaborate web of lies to convince his children she had simply abandoned them and wanted nothing more to do with each of them.

In State v. Lung, 70 Wn.2d at 423, our State Supreme court held a body need not be produced to establish corpus delicti. Lung was convicted of murder in the second degree for killing his wife even though her body was never recovered during the investigation. Lung asserted he had accidentally killed his wife, panicked and then disposed of her body in a river. Investigators were not able to locate or recover her body from the river. At trial, Lung complained there was insufficient corpus delicti evidence because his wife's body was never found. The court rejected Lung's assertion stating:

Is the body or some part thereof required to establish the 'fact of death' element in the corpus delicti? We think not. To require direct proof of the killing or the production of the body of the alleged victim in all cases of homicide would be manifestly unreasonable and would lead to absurdity and injustice.

All that is required to prove death is circumstantial evidence sufficient to convince the minds of reasonable men the existence of that fact. The law employs the judgment of reasonable minds as the only means of arriving at the truth by inference from the facts and circumstances in evidence. If this were not true, an infinite number of crimes involving the elements of specific intent would go unpunished. The strict rule contended by the defendant would operate as a complete shield against punishment for his crime and afford him absolute immunity if he were cunning enough to destroy the body or otherwise conceal his identity.

70 Wn.2d at 371.

The court also explained,

In establishing the corpus delicti, the confession of the person charged with the commission of the crime is not sufficient, 'but if there is independent proof thereof such confession may then be considered in connection therewith and the Corpus delicti established by a combination of the independent proof and the confession.'

Id at 371-72.

The court found the independent evidence of corpus delicti in Lung, notwithstanding his confession, was overwhelming. There was testimony the victim routinely drove to her regular place of employment and parked her car. In her car, investigators found her coat, shoes and handbag with its contents and they determined Lung's wife had been

wearing these items the night before she disappeared. Blood stains were found in the cracks of the floor. And his wife had not been seen since the night she disappeared.

In State v. Quillin, 49 Wn.App. 155, 741 P.2d 589 (1987), the defendant was convicted of first degree felony murder and second degree possession of stolen property. As in this case, the victim disappeared and neither his body nor the means of the murder were recovered. The victim, Duffy, had stolen a blue Pontiac Firebird, owned by his mother, just before he disappeared. Quillin was later seen driving the Pontiac for several days after Duffy vanished. The Pontiac was subsequently found burned and abandoned. Investigators discovered personal items belonging to Duffy and his mother inside the burned out vehicle. Finally, a witness testified Duffy had told him he was going to meet Quillin just prior to his disappearance. The court held that even though the means of murder and Duffy's body was never recovered, there was sufficient evidence of Corpus Delicti to support admission of Quillin's statements.

As in Lung, Alice Hummel was considered a reliable person and had plans both to complete a job assignment she was hired for and to attend a special ballet performance to celebrate Shanalyn's birthday on October 21<sup>st</sup>, 1990 at the time she disappeared. Alice's plans and

commitment to complete a job assignment, her health and concern over Shanalyn's disclosures of sexual abuse demonstrate Alice would not have voluntarily left her home or family on October 18<sup>th</sup>, 1990. Alice and Bruce's contentious relationship confirm she would have confronted Bruce about molesting Shanalyn as soon as she could. As in Quillin, Alice was last known to be home alone with Bruce. When Shanalyn returned from school Alice was gone but her personal effects, including her purse with her medications in it and her wallet were still at home and she left no note or explanation for her sudden departure. Additionally, Hummel almost immediately began packing up Alice's personal belongings, forging her monthly disability payments for his benefit and continued to molest Shanalyn. This evidence circumstantially reasonably infers Bruce Hummel, after being confronted with molestation allegations, intentionally murdered Alice, concealed disposal of her body and then began an elaborate plan to cover up her death by convincing their children that their mom had abandoned them and wanted nothing more to do with them. As in Lung and Quillin Alice has never been seen or heard from again. These facts circumstantially support the inference that Bruce Hummel murdered Alice. *See also, State v. Neslund*, 50 Wn.App. 531, 749 P.2d 725 (1988),

State v. Thompson, 73 Wn.App. 654, 870 P.2d 1022 (1994) and, People v. Scott, 176 Cal.App.2d 1 Cal.Rptr.600 (1959).

Hummel also contends Corpus Delicti for first degree murder requires corroborating evidence of the fact of death as well as the cause of death by premeditated intent. Br. of App. at 16, *citing Aten*, 130 Wn.2d at 6587-59. No Washington case has held that the State must provide evidence of premeditation to satisfy the *corpus delicti* rule. State v. Vangerpen, 71 Wn.App. at 100, 856 P.2d 1106 (1993), *aff'd.*, 125 Wn. 2d 782 (1995). However, even if such a showing is necessary, there is ample evidence to support the inference of premeditation and any corroboration of premeditation is sufficient. *Id.*

Premeditation “is the ‘deliberate formation of and reflection upon the intent to take a human life’ and involves ‘the mental process of thinking beforehand, deliberation, reflection, weighing or reasoning over a period of time, however short’” In re Pirtle, 127 Wn.2d at 644, 904 P.2d 245 (1995). Motive, procurement of a weapon, stealth, and method of killing are all factors relevant to establishing premeditation. *Id.* at 644. Premeditation may be shown by circumstantial evidence. *Id.* at 643.

Ample independent evidence demonstrates Hummel had motive to kill Alice in order to conceal his continued molestation of Shanalyn and

for financial gain. Prior to her death, Alice Hummel confirmed Hummel had been molesting Shanalyn and Shanalyn believed her mom would take care of the situation. Instead her mom disappeared within days, the molestation continued, and Hummel embarked on an elaborate scheme to convince the Hummel children Alice Hummel had simply left the family and abandoned her children, while he then began to forge and steal Alice Hummel's disability checks for his financial benefit. This evidence supports the prima facie inference Hummel acted with premeditation in murdering, concealing and disposing of Alice Hummel. The court therefore did not err when it found the evidence sufficient to establish the *corpus delicti* of the crime for purposes of admitting Hummel's statements.

**2. Hummel's opportunity to confront and cross examine each witness regarding their efforts to search for Alice Hummel, including their attempts to search for Alice using computer software and broad databases, satisfied Hummel's Sixth Amendment confrontation rights.**

Next, Hummel contends the state violated his Sixth Amendment confrontation rights when Sean and Shanalyn testified to their efforts to locate their mom, including their use of computer software programs. When witness Wayne Terry testified as to efforts to investigate the

whereabouts of Alice Hummel following her disappearance, and Bellingham Detective Jensen's investigation after her children reported her missing in 2003, Hummel contends his confrontation rights were violated because he was not able to confront the software or database itself for accuracy or completeness when these witness testified. Br. of App. at 18.

The Sixth Amendment provides that “[i]n all criminal prosecutions, the accused shall enjoy the right...to be confronted with witnesses against him.” U.S. CONST. amend. VI. “[T]he ‘principle evil’ at which the clause was directed was the civil-law system’s use of ex parte examinations and ex parte affidavits as substitutes for live witnesses in criminal cases.” State v. Jasper, \_\_\_ Wn.App. \_\_\_, 240 P.3d 174 (2010), *citing* State v. Lui, 153 Wn.App. 304, 314, 221 P.3d 948 (2009) *citing* Crawford v. Washington, 541 U.S. 36, 50, 124 S.Ct. 1354, 158 L.Ed.2d 177 (2004), *review granted*, 168 Wn.2d 1018 (2010).

Not every out of court statement used at trial implicates the core concerns of the confrontation clause however. The scope of the clause is limited to “ ‘witnesses’ against the accused-in other words who ‘bear testimony’ in turn, is typically ‘[a] solemn declaration or affirmation made for the purpose of establishing or proving some fact.’” Crawford v. Washington, 541 U.S. at 51. Under Crawford, a witness’ testimony

against a defendant is inadmissible unless the witness appears at trial or if the witness is unavailable, the defendant had a prior opportunity for cross examination. Crawford, 541 U.S. at 54. The confrontation clause therefore gives defendant's the right to confront those who make testimonial statements against them. *Id.* The confrontation clause "does not bar the use of testimonial statements for purposes other than asserting the truth of the matter asserted." *Id.* at 60 n.9.

The Crawford court listed three possible formulations for determining whether testimony was testimonial in nature and therefore subject to the confrontation clause:

Ex parte in-court testimony or its functional equivalent—that is, material such as affidavits, custodial examinations, prior testimony that the defendant was unable to cross-examine, or similar pretrial statements that declarants would reasonably expect to be used prosecutorially; extrajudicial statements contained in formalized testimonial materials, such as affidavits, depositions, prior testimony, or confessions; statements that were made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial.

Crawford, 541 U.S. at 51-52. (internal quotation marks and citations omitted).

In Melendez-Diaz v. Massachusetts, \_\_\_ U.S. \_\_\_, 129 S.Ct 2527, 174 L.Ed.2d 314 (2009), the Supreme Court applied its decision in Crawford v. Washington, *supra*, to scientific evidence. At issue was whether offering

sworn “certificates of analysis” showing the results of forensic testing as prima facie evidence of the composition quality and weight of narcotics analyzed, was testimonial in nature and subject to the confrontation clause. The Melendez court found that the introduction of these certificates were ‘testimonial’ in nature and therefore their introduction at trial without witness testimony violated the Confrontation clause. Id. at 2532.

In the wake of Melendez- Diaz, consistent with the state’s concession in the trial court below, the court in United States v. Martinez-Rios, 595 F.3d 581 (5<sup>th</sup> Cir.2010) held that the introduction of CNR (“Certificate of Non Record”) without the testimony of the preparer of the certificate violates the Sixth Amendment. The Court reasoned, as in Melendez-Diaz where the government sought to introduce sworn certificates of analysis, that these certificates were sworn declarations of fact made for the purpose of establishing some fact to be used at trial and therefore were testimonial in nature such that they implicated the Sixth Amendment. Melendez-Diaz at 2532, Martinez-Rios at 585.

The Martinez-Rios court recognized that Melendez Diaz analysis relied on an important distinction between records kept in the ordinary course of business and those that are specifically produced for use at trial. The latter, the court confirmed, are testimonial and such evidence

therefore implicates the Confrontation Clause. Business records however, may still be admitted at trial despite their hearsay status. Melendez-Diaz at 2538 *citing* Fed. Rule Evid.803(6), *see also* ER 803(7). The Martinez-Rios court held that because a Certificate of Non Record was not introduced through the person who conducted the records search of the computerized databases, Martinez-Rios was deprived of his Sixth Amendment Right of Confrontation.

In this case, contrary to Martinez-Rios or Melendez-Diaz, the state did not seek<sup>2</sup> to introduce a “sworn certificate” of non record and moreover, gave Hummel the opportunity to cross examine each witness who actually conducted the computer search. Hummel complains nonetheless, that several witnesses were permitted to “repeat the results they received from searching record databases” and that this testimony violated his Sixth Amendment confrontation right because these witnesses themselves were not the record keepers of each database. Br. of App. at 22. Hummel misconstrues the nature of the testimony at issue.

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<sup>2</sup> Hummel asserts the state relied on the now-overruled United States v. Cervantes-Flores, 421 F.3d 825 (9<sup>th</sup> Cir.2005), to admit the results of the computer searched. Br. of App. at 21, footnote 4. The record reveals however, the state acknowledged Cervantes-Flores was overruled prior to trial, that the state would not seek to introduce certificates of non records for Alice Hummel from various databases. RP 103 (7/21/09 pre-trial motions) Instead, the officers would testify solely to their due diligence efforts to find Alice Hummel. Id.

The Hummel children, for example, simply explained how, at different times after their mom disappeared, they searched but were unable to find any trace of her. The focus of their testimony was *their* actions, where they looked and how they looked, not the scope of the tools they used or that their searches of particular computer databases were complete or reliable. Cross examination allowed Hummel to reasonably challenge the both the reliability and scope of the computer searches Sean and Sharinda made.

Witness Wayne Terry also testified to his efforts to find Alice Hummel soon after she disappeared in an effort to retrieve computer disks he had left with her to repair. Terry, a retired law enforcement investigator, testified he searched various search engines, including LEXIS NEXIS, Northwest Locators, Capital Searches in an effort to track down Alice after learning from Bruce Hummel that she had moved out of state to take another job. Terry explained these were local and national search engines that he routinely used in the ordinary course of his business and that he used these resources to try to locate where Alice moved to but couldn't find anything helpful. Similar to the Hummel children, Terry's testimony was limited to his searches of raw data in computer databases and his inability to find anything useful. Under those circumstances, the

“database” if you will, did not bear any “testimony” that would implicate Hummel’s Sixth Amendment right of confrontation.

Similarly, Detective Jensen testified that during his investigation into Alice Hummel’s whereabouts, he accessed and used the Accurint database maintained by LEXIS NEXIS to try to find leads on Alice using her married and maiden name and social security number. Using an advance person search Detective Jensen testified he looked for death, business, corporate and vehicle registrations but found nothing. RP 476-483. Steven Lappenbush of Lexis Nexis explained that Accurint was a database maintained by his company that draws data from both government and nongovernment sources. He explained that LEXIS NEXIS is constantly updating its database and does not alter the data received from third party sources. RP 454-455.

None of the complained of testimony introduced a certified record or sworn affidavit that no record existed or, improperly attested to the completeness of the particular database. As such Hummel’s right to confrontation were fully protected by his ability to cross examine each witness as to the testimony they provided. [T]he Confrontation Clause is implicated by extrajudicial statements only insofar as they are contained in formalized testimonial materials, such as affidavits, depositions, prior

testimony, or confessions.” Melendez-Diaz, \_\_\_ U.S. \_\_\_, 129 S.Ct. 2527 (2009), *citing* White v. Illinois, 502 U.S. 346, 365, 112 S.Ct. 736, 116 L.Ed.2d 848 (1992) (THOMAS, J., concurring in part and concurring in judgment). Hummel’s confrontation rights were not therefore implicated because he was given the opportunity to cross examine each of his children as to when, how and where they looked for their mom overtime and, was able to cross examine Terry and Detective Jensen as to when, where and how they looked for Alice over time.

Even if the complained of testimony could be construed as to violate Hummel’s Sixth Amendment right of confrontation, such violation was harmless. A constitutional error is harmless if it appears beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained. State v. Banks, 149 Wn.2d 38, 44, 65 P.3d 1198 (2003), Delaware v. Arsdall, 475 U.S. 673, 684, 106 S.Ct. 1321, 89 L.Ed.2d 674 (1986). Alice Hummel’s death was not contested. Hummel admitted Alice died in October 1990 both in his letter to Detective Gitts in 2004 and in his federal guilty plea to twelve counts of wire fraud in 2007.

The testimony Hummel complains of merely demonstrated the due diligence efforts by Alice’s children and law enforcement to try to find any trace of Alice Hummel after October 1990, to corroborate the fact of her

death. Moreover, because none of these witnesses certified the databases they looked in were complete, accurate or produced a particular certifiable result and, these witnesses were subject to cross examination regarding their knowledge and use of the various search engines accessed, Hummel's confrontation rights were satisfied.

**3. The trial court acted within its discretion by declining to give the jury an additional more specific instruction on the credibility of the witness-informant Donald Cargill.**

Hummel contends, relying solely on federal and out of state cases, that the trial court erred when it declined to give a specific jury instruction regarding witness Donald Cargill's credibility. Br. of App. at 31. The jury in this case was properly instructed and Hummel was given significant latitude to effectively cross examine and later argue to the jury that Cargill's testimony and Cargill himself was not a believable or credible witness. The trial court therefore did not abuse its discretion by declining to give a specific jury instruction regarding Cargill's credibility. Hummel's argument should be rejected.

Hummel proposed the following "informant credibility" jury instructions:

You have heard the testimony of Donald Ray Cargill. You have also heard he was addicted to methamphetamine during the time that he testified about, and that the state of

Washington has promised him a reduction in charges and in-patient treatment instead of a prison sentence in exchange for his testimony.

It is permissible for the state of Washington to make such a promise. But you should consider Donald Ray Cargill's testimony with more caution than the testimony of other witnesses. An addict may have a constant need for drugs, and for money to buy drugs, and may also have a greater fear of imprisonment because his supply of drugs may be cut off. Think about these things and consider whether his testimony may have been influenced by the governments promise. Don not convict the defendant based on unsupported testimony of such a witness, standing alone, unless you believe the testimony beyond a reasonable doubt.

CP 66-67. Hummel alternatively proposed another informant instruction that stated:

You have heard testimony that Donald Ray Cargill, a witness, has received benefits and favored treatment from the State of Washington in connection with this case. You should examine Donald Ray Cargill's testimony with greater caution than that of ordinary witnesses. In evaluating that testimony, you should consider the extent to which it may have been influenced by the receipt of benefits and favored treatment from the state of Washington.

Id. Hummel also orally proposed the trial court model an "informant" instruction based on the accomplice liability instruction. 6 RP 723-26 *citing* WPIC 6.5. The trial court however, declined to do so, pointing out that the fact that WPIC 6.5 only addresses accomplice testimony presupposes a distinction that accomplices present different interests than informants. See 6 RP 724-726.

Jury instructions do not implicate a fair trial if, read as a whole, they permit each party to argue his or her theory of the case, are not misleading, and properly inform the jury of applicable law. State v. Tilli, 139 Wn.2d 107, 126, 985 P.2d 365 (1999). A trial court's refusal to submit a proposed instruction is reviewed on appeal for an abuse of discretion. State v. Picard, 90 Wn.App. 890, 902 P.2d 336, *review denied*, 136 Wn.2d 1021 (1998).

The trial court did not abuse its discretion by declining to give Hummel either of his proposed instructions. As Hummel concedes, contrary to the federal and out of state cases relied on by Hummel, there is no requirement that a Washington jury be given a specific credibility of informant witness jury instruction. And in this case, the trial court sufficiently instructed the jury on the credibility of witnesses, as follows:

....You are the sole judges of the credibility of each witness. You are also the sole judges of the value or weight to be given to the testimony of each witness. In considering the witnesses testimony, you may consider these things: the opportunity of the witness to observe or know the things he or she testifies about; the ability of the witness to observe it accurately; the quality of a witnesses' memory while testifying' the manner of the witness while testifying; any personal interest that the witness may have ion the outcome or the issues; any bias or prejudice the witness may have shown; the reasonableness of the witnesses statements in the context of all of the other evidence; and any other factors that affect your evaluation or belief of a witness or your evaluation of his or her testimony...

CP 46.

The court also instructed the jury:

Evidence that a witness has been convicted of a crime may be considered by you in deciding what weight or credibility should be given to the testimony of the witness and for no other purpose.

CP 57. These instructions sufficiently instructed the jury of its role in assessing the credibility of all of the witnesses and various factors, including bias, personal interest and a witness may have. The trial court also specifically instructed the jury that they could consider Cargill's criminal history in assessing what weight or credibility should be given to the testimony of such witness. A trial court need not give a more specific instruction if a more general instruction sufficiently explains the law. State v. Brown, 132 Wn.2d 529, 605, 940 P.2d 546 (1997), *cert. denied.*, 523 U.S. 1007 (1998).

An instruction that singles out the testimony of one particular witness, as in Hummel's proposed instructions comments on the evidence and improperly invades the province of the jury by suggesting the court believes the particular testimony is suspect. *See, State v. Schneider*, 36 Wn.App. 237, 673 P.2d 200 (1983). The jury is the sole judge of the credibility of the witnesses, and the judge cannot comment upon the

evidence in any way. State v. Dietrich, 75 Wn.2d 676, 453 P.2d 654 (1969). A judge is prohibited by article IV, section 16 of the Washington Constitution from “conveying to the jury his or her personal attitudes towards the merits of the case, “or instructing the jury that “matters of fact have been established as matters of law.” State v. Becker, 132 Wn.2d 54, 935 P.2d 1321 (1997).

The jury was sufficiently instructed on the law they were the sole judges of credibility of the witnesses and, instructed on what factors they could appropriately use, including prior criminal convictions, bias and personal interest, to make their determinations. Hummel was also given wide latitude to cross examine Cargill as to the plea arrangement with the state, his drug problem, his criminal history and the circumstances surrounding Hummel’s confession to him. Under these circumstances, the trial court’s decision to not give an additional specific instruction, was not an abuse of the trial court’s considerable discretion.

**4. Hummel invited the trial court to violate his right to a public trial by requesting and encouraging the trial court to conduct limited portions of voir dire in chambers.**

Next, Hummel contends his right to a public trial was violated when the court questioned nine potential jurors in chambers after discussing proposed venire process with both parties on the record and

asking if anyone in the courtroom objected to the process because the trial court made its formal Bone-club findings after the questioning. Hummel's argument should be rejected because he expressly requested and assented to the limited in chamber questioning in order to protect his right to a fair trial and his right to an impartial jury. Having expressly invited the error, Hummel should not now be able to claim reversible error. Hummel's claim should be rejected.

A criminal defendant has the right to a "speedy and public trial." Art. I, sec.22 and the constitution requires that "justice be administered openly." Art.1, §10. The federal constitution recognizes similar rights. U.S. Const. amend VI; Press Enterp.Co. v. Superior Court, 464 U.S. 501, 104 S.Ct. 819, 78 L.Ed.2d 629 (1984). The Washington Supreme Court has held that these constitutional provisions are violated when a courtroom is closed for significant portions of trial and under those circumstances, a new trial may be required. State v. Bone-Club, 128 Wn.2d 254, 906 P2d 325 (1995) (trial court summarily granted State's request to clear the courtroom for the pretrial testimony of an undercover detective); State v. Brightman, 155 Wn.2d 506, 122 P.3d 150 (2005) (trial court closed courtroom from defendant's family and friends for entire two plus days of voir dire); In re Personal Restraint of Orange, 152 Wn.2d 795, 100 P.3d

291 (2004) (trial court summarily ordered defendant's family and friends removed from all of voir dire); State v. Easterling, 157 Wn.2d 167, 137 P.3d 825 (2006) (defendant and attorney excluded from pre-trial motions of co-defendant). Whether a violation of the public trial right exists is a question of law reviewed de novo. State v. Momah, 167 Wn.2d 140, 217 P.3d 321 (2009).

A defendant who invites error, even constitutional error may not later claim that the error requires a new trial. State v. Studd, 137 Wn.2d 533, 546, 973 P.2d 1049 (1999). Invited error precludes review even if counsel inadvertently encouraged the error. City of Seattle v. Patu, 147 Wn.2d 717, 720, 58 P.3d 273 (2002). The invited error doctrine recognizes that “[t]o hold otherwise would put a premium on defendant’s misleading trial courts.” State v. Henderson, 114 Wn.2d 867, 868, 792 P.2d 514 (1990).

The State Supreme Court decisions in State v. Strobe, 167 Wn.2d 222, 217 P.3d 310 (2009) and State v. Momah, 167 Wn.2d 140, 217 P.3d 321 (2009) confirmed the right to a public trial extends to voir dire but that this right is not absolute, the trial court may close a courtroom under certain circumstances and reversal is not always mandated when the right to public trial is violated. State v. Momah, 167 Wn.2d 140, 217 P.3d 321

(2009), State v. Strode, 167 Wn.2d 222, 217 (.3d 310 (2009)). In Momah the majority emphasized that the “central aim of any criminal proceeding must be to try the accused fairly,” and that a defendant’s right to public trial does not exist, and cannot be considered, in isolation from his other constitutional rights. Momah, 167 Wn.2d at 147-48.

In Momah, as in this case, the judge and the parties acted with awareness of both the defendant’s and the public’s right to a public trial during voir dire. The parties agreed to use potential jurors’ responses to a jury questionnaire to determine if any of the jurors wished to be questioned individually on sensitive issues relevant to jury selection. Momah at 146-47. Then, during jury selection, Momah encouraged and actively participated in the in private questioning even though he had not expressly asked the court to “close” the courtroom. The Washington Supreme Court determined that although Momah did “not present a classic case of invited error” because Momah did not expressly seek the closure, the error did not warrant reversal because it was not, under the circumstances of the case a per se structural error-automatic reversal was therefore not the appropriate remedy. State v. Momah, 167 Wn.2d at 154. An error is only structural though if the error ““necessarily render[s] a criminal trial fundamentally unfair or an unreliable vehicle for determining

guilt or innocence.” Id. (*quoting Washington v. Recuenco*, 548 U.S. 212, 218-19, 126 S.Ct. 2546, 165 L.Ed.2d 466 (2006)). In Momah the majority held that the determination of whether a closure error constitutes structural error necessarily depends upon the nature of the violation: “If, on appeal, the court determines that the defendant’s right to public trial has been violated, it devises a remedy appropriate to the violation.” Id. at 149. Only when the error is structural is automatic reversal warranted. Id.

The Momah court noted that in its prior cases of State v. Easterling, 157 Wn.2d 167, 137 P.3d 825 (2006) and In re Personal Restraint of Orange, 152 Wn.2d 795, 100 P.3d 291 (2004), new trials were required because the trials had been rendered fundamentally unfair by the closure. Id. at 150-51. In distinguishing those prior cases where structural error was found, the Court noted that in Momah’s case, the defendant had “affirmatively assented to the closure, argued for its expansion, had the opportunity to object but did not, actively participated in it and benefitted from it.” Id. at 151. In concluding that the closure in Momah was not structural error, that the closure occurred to protect the defendant’s rights and did not prejudice him, the court presumed that the defendant made “tactical choices to achieve what he perceived as the fairest result.” Id. at 155. In addition, the court noted that the closure only

occurred after the court consulted with the defense and prosecution and occurred to safeguard the defendant's right to an impartial jury. *Id.*

In contrast to the Momah decision, the plurality opinion Strode found that the record in Strode did not reflect that either the closing of the courtroom was necessary to safeguard the defendant's right to a fair trial or that there was a knowing and voluntary waiver of that right. Strode, 167 Wn.2d at 234. In Strode, the plurality opinion held that a court must perform a Bone-Club analysis on the record prior to closing a courtroom in unexceptional circumstances, and that failure to do so is structural error that can never be harmless. Strode, 217 P.3d at ¶1. The concurring opinion took exception to the plurality opinion's requiring an on-the-record colloquy before waiver could be found and to allowing a defendant to raise the public's, and the media's, right to open proceedings on appeal in order to overturn his conviction. *Id.* at ¶26, 28. The concurring opinion therefore concurred in the result only because it concluded that under the facts of the Strode case the defendant's public trial rights had not been waived or safeguarded per State v. Bone-Club as it asserted it was in Momah, because the court did not weigh the right to public trial against competing interests. *Id.* at 232, 235.

Similar to Momah and in contrast to Strode this case reflects Hummel made tactical decisions regarding the jury selection process in an effort to ensure he received an impartial jury and ultimately, a fair trial. The record also reflects the trial court acted with an awareness of the various constitutional rights at stake, including the public's right to an open proceeding.

First, prior to trial, the court agreed it would give whatever jury questionnaire the parties agreed upon to the venire pool prior to jury selection. RP 109. The jury questionnaire proposed by Hummel and ultimately adopted and used by the trial court specifically advised potential jurors:

Some of these questions may call for information of a personal nature that you may not want to discuss in public. If you feel you're your answer to any question might be embarrassing to you, you may indicate that you would prefer to discuss your answer in private. You will find instructions for this on the questionnaire.

CP 546-552, Supp CP \_\_ (sub nom 68). On the questionnaire itself, jurors were informed:

Please read each of these questions carefully and answer them as candidly and fully as possible. If your answer to any of the following questions is of such a "sensitive nature" that you would like to discuss it "privately", please identify those questions by number here: \_\_\_\_\_

Id. Then again on question 19, jurors were asked:

If any of the questions asked here are of such a “sensitive” nature that you would like to discuss it privately, please indicate the number of the question(s) here:

CP 546-552, Supp CP \_\_\_\_ (sub nom 68).

Pursuant to the questionnaire, proposed by Hummel, the court noted prior to voir dire commencing that approximately nine jurors indicated they wished to be heard in private but that the court would have to weigh Hummel’s interest in full disclosure from potential venire persons to the public’s right to an open proceeding at the beginning of voir dire. RP 100 (8/10/90). The trial court explained:

I’ll announce the issue. I’ll do some preliminary stuff, and then I’ll announce that to the jurors , and I will tell them there are some issues, and I’ll ask is there anyone in the courtroom that has an objection, and if there is, I’ll hear the objection, and then I’ll make the findings under Bone Club as to whether or not we can go into chambers with counsel and the defendant and do that, and we’ll just kind of have to see how that goes, and I think I know how we’re going to handle it, but you never know what’s going to come up, or who is going to raise an issue when we have a bunch of people in the courtroom, and somebody says I don’t want you going in there, and we’ll have to deal with that if it comes up.

RP 100-101 (8/10/90).

Consistent with the court’s earlier comments, the court, after making some preliminary remarks to the venire pool, acknowledged that it was aware that some people had indicated they wished to be questioned

privately on sensitive issues and that the court may, if there weren't any objections go into chambers for limited questioning on these sensitive issues. RP 24. The trial court then asked if anyone objected this proposed process and hearing no objection, the trial court explained the in chamber questioning would be limited to the relevant sensitive questions. RP 24 (voir dire 8/10/90)

The following day the trial court formally placed its Bone Club analysis for the temporary closure on the record, stating Hummel's right to a fair trial required potential jurors to speak freely on sensitive issues relevant to the case during voir dire and that the least restrictive means were employed to balance Hummel's right to a fair trial and his and the public's right to a open and public trial. RP 107-108 (8/11/09). The court then followed up and asked if either party had any comments on that and again, neither party voiced an objection or concern. RP 107-108 (8/11/09). In fact, Hummel's attorney specifically said he did not have a comment but then expressed concern that another potential juror still needed to be questioned in chambers. RP 108. After a brief discussion and consensus from Hummel and the State, the court determined, consistent with its previous *Bone-Club* findings, that limited in chambers

questioning of one last juror was appropriate and necessary. RP 110 (8/10/10).

These facts confirm that Hummel, in contrast to Momah, expressly invited the alleged violation of his right to a public trial. Hummel, through his two seasoned attorneys, submitted jury questionnaires that encouraged jurors to request private questioning as needed during the jury selection process. By submitting such a questionnaire, Hummel expressly requested the courtroom be closed for portions of jury selection in order to ensure his right to obtaining a fair trial by impartial jury. Additionally, Hummel participated in the closed proceedings for his benefit and then later asked for expansion of the closure when he realized another potential juror wished to be questioned privately about a sensitive matter.

Additionally, as in Momah, the record reflects the trial court understood the voir dire proceedings were presumptively open and public and sought to make sure the public did not object to the proposed limited process. The trial court additionally placed *Bone Club* findings on the record explaining the basis and need for the temporary courtroom closure during voir dire. As such Hummel expressly requested the in chamber questioning, participated in the process, encouraged expansion and received the benefit of full disclosure of all material Hummel felt was

relevant to obtaining a fair trial by an impartial jury. Any violation of Hummel's right to a public trial was therefore invited and even if not invited, does not amount to a structural error requiring reversal.

Particularly, where the court also sought to protect the public's right to a open proceeding by asking if anyone objected to the proposed process, to limiting questioning and by making appropriate findings explaining the basis for the in chamber process.

Hummel contends nonetheless that the court erroneously failed to consider alternatives prior to the temporary closure, *citing* Presley v. Georgia, \_\_ U.S. \_\_, 130 S.Ct. 721 (2010). See Br. of App. at 45. Presley is a per curium decision predicated existing precedent where the trial court violated the defendant's right to a public trial by excluding the public from the voir dire proceedings *over Presley's objection*. Under those circumstances the Presley court summarily confirmed Presley's right to a public trial had been violated and determined reversal was appropriate because the court neither considered reasonable alternatives nor made findings to justify the closed proceeding. Thus, Presley addressed circumstances where the party opposed the closure at trial and therefore does not provide any new guidance to this case or alter the applicability of the Momah decision. Moreover, the Presley court acknowledged

consistent with Momah that while a defendant has the right to insist that voir dire be public there are exceptions where this constitutional right “may give way in certain cases to other rights or interests, such as the defendant’s right to a fair trial or the governments interests in inhibiting disclosure of sensitive information.” Presley at 130 S.Ct. at 724 (*quoting* Waller v. Georgia, 467 U.S. 39, 45, 104 S. Ct. 2210, 81 L. Ed. 2d 31 (1984)). That is precisely what happened in this case at Hummel’s express request; therefore automatic reversal is not appropriate.

Pursuant to Momah and Strode, Hummel’ claimed right to a public trial error, even if not invited, does not warrant reversal of his conviction because the trial court complied with Bone-Club and the record reveals the proceedings did not undermine the fundamental fairness of this trial.

**5. Hummel waived his right to assert his federal convictions could not be used to calculate his offender score at sentencing by failing to object to their inclusion below on the basis of comparability.**

Next, Hummel complains for the first time on appeal, that the sentencing court erred by using his federal convictions to calculate his offender score. Hummel asserts for the first time on appeal that these convictions are not comparable to a Washington felony and therefore should not have been used to calculate his offender score. Hummel

waived his right to assert this error by agreeing below that his offender score should be calculated by including his federal convictions.

The law in effect at the time an offense is committed controls the punishment for the offense. RCW 9.94A.345<sup>3</sup>, 10.01.040. In 1990, federal convictions, similar to out-of-state convictions, could be use to calculate an offender score if comparable to a Washington felony. *See*, former 9.94A.360(1) (1990)<sup>4</sup>, State v. Villegas, 72 Wn.App. 34, 37, 863 P.2d 560 (1993), current RCW 9.94A.525(3)<sup>5</sup>.

Generally, if a defendant's criminal history includes out of state/foreign convictions, such convictions must be classified according to the comparable offense definitions and sentences provided by Washington law. State v. Ford, 137 Wn.2d at 479; RCW 9.94A.360 (3). The State must prove, by a preponderance of the evidence, the existence of the prior conviction and that the conviction would be a felony under Washington law. State v. Ford, 137 Wn.2d at 480.

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<sup>3</sup> "Any sentence imposed under this chapter shall be determined in accordance with the law in effect when the current offense was committed."

<sup>4</sup> RCW 9.94A360(3) (1990) provides in part, "Out of state convictions for offenses shall be classified according to the comparable offense definitions and sentences provided by Washington law."

<sup>5</sup> RCW 9.94A.525(3) now provides in pertinent part, "Federal convictions for offenses shall be classified according to comparable offense definitions and sentences provided by Washington law. If there is no clearly comparable offense under Washington law or the offense is one that is usually considered subject to exclusive federal jurisdiction, the offense shall be scored as a class C felony equivalent if it was a felony under the relevant federal statute."

Proper classification requires the sentencing court to compare the elements of the out-of-state offense with the elements of potentially comparable Washington crimes. Ford, 137 Wn.2d at 479. Where the elements are not identical, or if the Washington statute defines the offense more narrowly than does the foreign statute, it may be necessary to look into the record of the out-of-state conviction to determine whether the defendant's conduct would have violated a comparable Washington offense. *Id.* at 474-475.

Remand for resentencing to litigate comparability is usually the appropriate remedy when the issue has not been fully litigated below. Ford at 485-86. ("Accordingly, where, as here, the defendant fails to specifically place the court on notice as to any apparent defects, remand for an evidentiary hearing to allow the state to prove the classification of the disputed convictions is appropriate.) Remand for resentencing is not necessary in this case however, because Hummel affirmatively agreed to the inclusion of his federal offenses in calculating his offender score and thereby waived the issue.

In State v. Ross, 152 Wn.2d 220, 95 P.3d 1225 (2004) our Supreme Court held that a defendant waives the right to object to the inclusion of an out-of-state conviction when the defendant affirmatively

acknowledges the conviction was properly included in their offender score below. A defendant's affirmative acknowledgement of the existence and comparability of out of state convictions renders further proof unnecessary. Ross at 233. Under those circumstances, the state is relieved of its burden of further proving the existence and comparability of the foreign conviction and such acknowledgment satisfies the requirements of the SRA and Due Process. Ross at 230. While sentencing errors that are "legal" cannot be waived, errors predicated on the agreement to facts, including the inclusion of foreign convictions, can. *Id.*; *accord*, State v. Mendoza, 165 Wn.2d 913, 927, 2005 P.3d 113 (2009).

"Acknowledgement" now includes "not objecting to criminal history presented at the time of sentencing" as well as not objecting to information contained in presentence reports. RCW 9.94A.530(2)(2008). Therefore, pursuant to Ross, Hummel waived any objection he had to the inclusion of his federal offenses below by affirmatively acknowledging the existence and inclusion of these convictions for purposes of calculating his offender score. Hummel's only objection below was predicated on his claim that his federal offenses should only be scored as one point, as opposed to twelve, based on his argument these convictions arose out of the same course of criminal conduct. See CP 33-42, 26-32, see also Supp.

CP \_\_\_ (Pl. Ex. 6. Alaska Legal Documents.), see also, RP 12  
(9/8/09)(sentencing court expressly confirmed Hummel was raising no  
other sentencing issues) Hummel's argument below presupposes the  
existence and comparability of his criminal history and rendered further  
proof beyond the certified copy of Hummel's federal plea and judgments  
by the state, unnecessary. Hummel therefore waived his right to raise and  
litigate comparability on appeal.

**E. CONCLUSION**

For the reasons set forth above, the State respectfully requests that  
this court affirm Hummel's conviction for murder in the first degree.

Respectfully submitted this 7 day of January 2011.

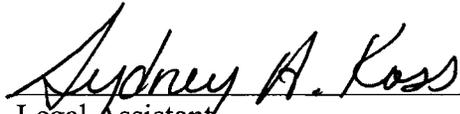


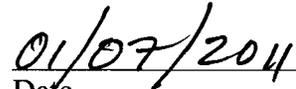
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CERTIFICATE

I certify that on this date I placed in the U.S. mail with proper postage thereon, or otherwise caused to be delivered, a true and correct copy of the foregoing document to this Court, and appellant's counsel of record, addressed as follows:

NANCY P. COLLINS  
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\_\_\_\_\_  
Legal Assistant

  
\_\_\_\_\_  
Date