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## **I. ISSUES**

1. Whether the evidence was insufficient to support the finding of premeditation required for first degree murder?
2. Whether the court violated Article IV, § 16 of the Washington Constitution in giving the limiting instruction regarding the opinions of an expert witness?
3. Whether Defendant has made a sufficient showing—that counsel’s reasonable strategic and tactical decision in proposing language for the limiting instruction was deficient—to support a claim of ineffective assistance of counsel?
4. Whether the denial of Defendant’s motion for a mistrial was an abuse of discretion?

## **II. STATEMENT OF THE CASE**

### **A. UNCONTESTED FACTS.**

Eric Christensen murdered Sherry Harlan on the morning of January 2, 2010. RP 499, 529, 868, 876, 891, 918. After killing Ms. Harlan, Christensen disarticulated her body into nine separate pieces; her arms at the shoulders, her lower legs at the knees, her thighs at the hips, her torso from her pelvis, and her head from her torso. RP 490-494, 507-530, 541-542, 545-547, 549-551, 553-555, 559-560, 572-580, 584-586, 593, 623-669. Christensen spent the

next four days trying to cover up the murder; removing items from Ms. Harlan's apartment, cleaning the apartment with bleach, scattering Ms. Harlan's body parts in the forests of east Snohomish County, and burning Ms. Harlan's car with her skull posed on the driver's seat next to a knife. RP 198-199, 864-906, 1033-1043, 1058-1060. Christensen did not contest these facts at trial; the only issue he contested was whether Ms. Harlan's murder was premeditated. Appellant's Brief at 3. RP 1220, 1225, 1235-1242, 1246-1247.

#### **B. SUBSTANTIVE FACTS.**

Eric Christensen and Sherry Harlan met through an on-line website in April 2009, and soon after began living together. In August of 2009, they moved into an out-building, about the size of a studio apartment, located on the property of John and Sharon Banks in Gold Bar. EX 238 at 2-4; RP 737-739, 754-756, 784-786.

On November 14, 2009, Christensen began serving 27 days in the Snohomish County jail on a misdemeanor warrant. CP 69; RP 107, 740, 760-761, 768, 786-787.

Prior to Christensen going to jail, Ms. Harlan began looking for another place to live and contacting Dan Young. Young was someone Ms. Harlan had previously met on-line; they did not meet

face-to-face until early November 2009. Both Christensen and Ms. Harlan referred to Young as "sugar daddy." Young gave Ms. Harlan several gifts including home furnishings, a laptop computer, a flat screen TV, a kitchen knife set, and money. Young co-signed on the lease for Ms. Harlan's new apartment, paying the first and last month's rent. On November 21, 2009, Young helped Ms. Harlan move into her new apartment at the Cedar Creek Apartment Complex in Everett. EX 238 at 9, 11-12; RP 71, 670-680, 687-705, 741-742, 759-760, 762-763, 768-771, 786-787.

After Christensen was released from jail on December 11, 2009, he became increasingly upset about Ms. Harlan's relationship with Young. Christensen called a friend saying he was depressed and going to commit suicide. During the phone conversation Christensen began "trash-talking" the women he previously had relationships with, specifically including Ms. Harlan. Christensen stated, "I'm going to get these bitches, every one of them. They fucked with me and I'm going to get these bitches for it." Ms. Harlan's neighbor's overheard Christensen calling Ms. Harlan a "bitch" and a "slut." When Christensen received a message from Ms. Harlan about their break up, he smashed his computer and a cell phone. Christensen also damaged Ms.

Harlan's car so it would not start. On Christmas Eve 2009, Christensen sent Ms. Harlan the text message: "I fucking hate you, you fucking bitch." EX 238 at 9-13, 28; RP 55, 68, 706-707, 709, 750-754, 768-774, 787-789, 800-801, 1001.

Around December 28, 2009, Christensen had Ms. Harlan make a blood oath that she would not contact or communicate with Young. Christensen acknowledged that his understanding of the consequences of breaking a blood oath would be viewed very harshly, "in ancient times you could get stoned, beaten, bludgeoned, cast out and, in some cases, from what I understand, death." EX 238 at 13-20, 23-24, 26-27; RP 857-862, 913-915.

On January 1, 2010, Christensen met Ms. Harlan at her place of employment and the two of them drove to Ms. Harlan's apartment. On the morning of January 2, 2010, at approximately 8:00 a.m., Ms. Harlan's neighbor heard Christensen and Ms. Harlan arguing and heard Christensen yell, "You weren't supposed to see him after I got out." and "Shut the fuck up, you bitch." That morning Christensen had discovered that Ms. Harlan and Young had been texting each other, including a text from Young saying: "See what two men does for you? Too much stress. LOL." EX 238 at 35-41; RP 76-78, 721-722, 941-942.

Christensen admitted confronting and getting physical with Ms. Harlan on January 2<sup>nd</sup> about her breaking her oath by texting Young. Christensen stated that by communicating with Young Ms. Harlan's "blood is garbage ... sewer water," she became a "oath-breaker, traitor, enemy." Ms. Harlan's last text message to Young was sent at 7:45 a.m., January 2, 2010. Ms. Harlan did not respond to text messages or phone calls after that. Ms. Harlan did not show up for work that day, nor any time after that day. EX 238 at 34-41; RP 29-32, 722-723.

On January 3, 2010, Christensen called Ryan Gesme and asked Gesme to find a "jimmy" to help him because he locked the keys in a car at the Monroe park-n-ride. When Gesme arrived at the park-n-ride he learned Christensen locked the keys in Ms. Harlan's Nissan. Christensen told Gesme that he did something bad; he had killed Ms. Harlan; he killed Ms. Harlan because she broke the blood oath. RP 864-868, 891.

Christensen spent the next two days having Gesme drive him around in Ms. Harlan's Nissan, disposing of Ms. Harlan's body parts in the forests of east Snohomish County. After driving Christensen around for two days, Gesme told Christensen that he was done, "Just leave me out of the rest of it." Christensen called

Gesme on January 5, 2010, around 10:00 p.m. and told him that he torched Ms. Harlan's car with her head inside the car. RP 873-889, 893-904.

On January 5, 2010, Teresa Rentko went to Ms. Harlan's apartment to try and contact her. Ms. Harlan's car was not in the parking lot and no one answered the door. Rentko called Christensen to see if he knew where Ms. Harlan was. Christensen told Teresa Rentko that he had not seen Ms. Harlan since their fight on Saturday morning and that "I don't fucking care if I ever see that fucking bitch again because she broke my trust." Rentko notified the police that Ms. Harlan was missing. RP 32-35.

When Ms. Harlan's apartment was entered an overwhelming odor of bleach was present. Sections of linoleum flooring and carpeting had been cut away. The apartment appeared to be a crime scene. RP 48, 84-91, 1033-1034, 1036-38, 1042-1043.

Dr. Joanne Marzowski, of the Washington State Patrol Crime Scene Response Team, examined Ms. Harlan's apartment. The evidence was consistent with Ms. Harlan having been killed in the bedroom. The vast majority of blood stains and body tissue were found in the bedroom; there was extensive blood splatter on every wall of the bedroom. Dr. Marzowski concluded that many events

happened in the center of the bedroom, including a violent event involving a sharp weapon. RP 1024-1025, 1063-1065, 1078-1082, 1092-1102, 1109-1111, 1115.

While there were blood stains found in other locations throughout the apartment, there was no evidence of violence outside the bedroom, only evidence of attempts to clean and remove evidence. RP 1043-1093, 1109-1110.

Christensen was contacted by the police and interviewed on January 6, 2010. He denied any knowledge of Ms. Harlan's whereabouts. Christensen was arrested on January 7, 2010, the same day the burned-out ruin of Ms. Harlan's Nissan was located several miles off Highway 2 in east Snohomish County. Ms. Harlan's skull was posed on the driver's seat next to a knife. EX 238; RP 111-142, 177-186, 198-199, 985.

Several knives were located in Ms. Harlan's car: a large kitchen knife was found on the driver's seat next to Ms. Harlan's skull; a group of knives and a sharpener were found next to the passenger seat; three knives were found in the trunk. One of the knives found in the trunk had a broken tip. The tip of that knife was found embedded in Ms. Harlan's skull. The knives found in Ms. Harlan's vehicle appeared to be the same type as the two knives

found in the kitchen of Ms. Harlan's apartment. A large mass of laminate-type material with heavy fire damage was located on the rear seat of Ms. Harlan's vehicle. RP 183, 198-200, 209, 221-225, 227-230, 233-235, 313, 321, 499-500, 602-604, 622-624, 1050-1051, 1102-1108.

On April 11, 2010, Ryan Gesme told the police that he had helped Christensen dispose of Ms. Harlan's body parts. Gesme recalled that a block of knives was next to the passenger's seat and linoleum, carpet and a futon cover were rolled up in the back seat. Gesme showed the police where Christensen had disposed of Ms. Harlan's body parts, enabling the recovery of significant portions of Ms. Harlan's remains. RP 263-278, 384-421, 873, 906.

Dr. Stanly Adams, Medical Examiner, performed an autopsy on the disarticulated remains of Ms. Harlan. Ms. Harlan had been stabbed in the back three times; two of those wounds penetrated the chest cavity and were each independently capable of causing Ms. Harlan's death. Because Ms. Harlan's torso was waterlogged when it was recovered, Dr. Adams was unable to determine when the wounds were inflicted. Dr. Adams listed the manner of Ms. Harlan's death as "homicide" with the cause of Ms. Harlan's death

as “homicidal violence of unknown mechanism.” RP 490, 505-522, 526-530, 584-586.

Dr. Katherine Taylor, forensic anthropologist, also examined Ms. Harlan’s remains. Ms. Harlan had been disarticulated into nine separate parts; head, torso, pelvis, arms, thighs and lower legs. The disarticulation of Ms. Harlan was done skillfully and would have taken several hours, requiring precision and patience. The same skills used by a hunter to disarticulate a large animal could be used to disarticulate a human body. The knife tip embedded in Ms. Harlan’s head penetrated all three layers of her skull; this would require considerable force to achieve. RP 596-599, 603-604, 637, 647, 651, 658-659, 664-665.

### **C. PROCEDURAL FACTS.**

Prior to trial, the court denied the State’s motion to admit Christensen’s 1994 felony convictions. However, on direct examination Martha Pickens volunteered that Christensen told her he was a felon. Defense objected; the comment was stricken and the jury was instructed to disregard it. The witness was instructed to just answer the questions. The next day Christensen moved for a mistrial; the motion was denied. CP 238-239; 5/14/10 RP 155-161; RP 53-54, 98-102.

In a separate pre-trial hearing the court ruled that Christensen's incarceration on an unrelated misdemeanor was admissible as a reference point to when other events occurred. The court instructed the jury that it could only use evidence that Christensen went to jail from November 14, 2009, to December 11, 2009, on a misdemeanor matter for the purpose of proving a timeline of events; and that evidence that Christensen went to jail is not evidence of his guilt on the crime charged. Instruction 6; CP 69; 5/21/10 RP 171-172; RP 107.

During trial Christensen requested that the court exclude Dr. Taylor's opinion that the disarticulation of Ms. Harlan was very skillful, very precise and impressive. Christensen argued that Dr. Taylor's opinion would be an "improper imprint about how or where Mr. Christensen learned disarticulation skills" causing the jury to speculate. The court allowed Dr. Taylor's opinion, stating that the defense was "entitled to a limiting instruction." Christensen proposed the standard limiting instruction, WPIC 4.64.01. However, Christensen was concerned that instructing the jury that they could only consider Dr. Taylor's opinion for the purpose of determining whether there was premeditation, was giving weight to the evidence and requested additional language "saying that the

jury is to consider this evidence with all the other evidence in determining whether there is premeditation so that there is not some undue weight.” Christensen then requested language similar to the instruction for circumstantial evidence regarding weight to be given by that the jury. In response, the prosecutor suggested: “The jury shall give the opinion of Dr. Taylor no more or less weight on the issue of premeditation than any other evidence bearing on that issue.” Christensen did not object. Prior to Dr. Taylor stating her opinions the court read the limiting instruction to the jury. RP 611-622.

Christensen was charged with one count of First Degree Murder. CP 236-237. The jury was instructed on both First and Second Degree Murder. WPIC 26.02, 27.01, 27.02, 4.11; Instructions 10-13; CP 73-76. The jury found Christensen guilty of First Degree Murder. CP 60.

### **III. ARGUMENT**

#### **A. SUFFICIENCY OF EVIDENCE.**

Christensen argues that the evidence was insufficient to support the premeditation required for first degree murder. RCW 9A.32.030(1)(a). This argument should be rejected.

## 1. Standard Of Review.

The test for determining evidence sufficiency is whether, after viewing the evidence in the light most favorable to the State, any rational trier of fact could have found guilt beyond a reasonable doubt. State v. Allen, 159 Wn.2d 1, 7-8, 147 P.3d 581 (2006). An appellant who asserts that insufficient evidence supports his convictions “admits the truth of the State's evidence and all inferences that can reasonably be drawn from that evidence.” State v. Gregory, 158 Wn.2d 759, 817, 147 P.3d 1201 (2006). “In determining the sufficiency of the evidence, circumstantial evidence is not to be considered any less reliable than direct evidence.” State v. Delmarter, 94 Wn.2d 634, 638, 618 P.2d 99 (1980). The reviewing court defers to the trier of fact on any issue that involves “conflicting testimony, credibility of witnesses, and the persuasiveness of the evidence.” State v. Thomas, 150 Wn.2d 821, 874-75, 83 P.3d 970 (2004).

First degree murder requires a showing that the defendant “[w]ith a premeditated intent to cause the death of another person, ... causes the death of such person or of a third person;” RCW 9A.32.030(1)(a). Premeditation must involve “more than a moment in point of time.” RCW 9A.32.020(1). Mere opportunity to

deliberate is not sufficient to support a finding of premeditation. State v. Bingham, 105 Wn.2d 820, 827, 719 P.2d 109 (1986). Premeditation is “the deliberate formation of and reflection upon the intent to take a human life and involves thinking beforehand, deliberation, reflection, weighing or reasoning for a period of time, however short.” Allen, 159 Wn.2d at 7-8 (*quoting State v. Finch*, 137 Wn.2d 792, 831, 975 P.2d 967 (1999)).

Premeditation may be shown by circumstantial evidence if the jury's inferences are reasonable and substantial evidence supports the jury's verdict. State v. Pirtle, 127 Wn.2d 628, 643, 904 P.2d 245 (1995), cert. denied, 518 U.S. 1026, 116 S.Ct. 2568, 135 L.Ed.2d 1084 (1996). Washington courts have looked for evidence relating to motive, the planned procurement of a weapon, stealth, and the method of killing to infer premeditation. Jones v. Wood, 207 F.3d 557, 564 (9<sup>th</sup> Cir. 2000). However, a wide range of proven facts will support an inference of premeditation. State v. Gentry, 125 Wn.2d 570, 598, 888 P.2d 1105, cert. denied, 516 U.S. 843, 116 S.Ct. 131, 133 L.Ed.2d 79 (1995). Examples of circumstances supporting a finding of premeditation include motive, prior threats, multiple wounds inflicted or multiple shots, striking the victim from behind, assault with multiple means or a weapon not

readily available, and the planned presence of a weapon at the scene. See Allen, 159 Wn.2d at 8; State v. Clark, 143 Wn.2d 731, 769, 24 P.3d 1006 (2001); State v. Hoffman, 116 Wn.2d 51, 83, 804 P.2d 577 (1991). In State v. Gentry, the Court listed the following examples of evidence the Court of Appeals has found sufficient to support premeditation:

State v. Rehak, 67 Wn. App. 157, 834 P.2d 651 (1992) held that evidence showing the victim was shot three times in the head, two times after he had fallen on the floor, was sufficient to establish premeditation. State v. Massey, 60 Wn. App. 131, 803 P.2d 340 (1990), cert. denied, 499 U.S. 960, 111 S.Ct. 1584, 113 L.Ed.2d 648 (1991) held evidence that defendant brought a gun to the murder site supported finding of premeditation. State v. Woldegiorgis, 53 Wn. App. 92, 765 P.2d 920 (1988), review denied, 112 Wn.2d 1012 (1989) held that evidence supported a finding of premeditation where the victim had gone to bed prior to the attack, was stabbed multiple times, had defensive wounds and there was longstanding animosity between the victim and Defendant. State v. Longworth, 52 Wn. App. 453, 761 P.2d 67 (1988), review denied, 112 Wn.2d 1006 (1989) held evidence that a weapon had been procured, and that the victim was stabbed in the back while being held by another and was killed to keep her from reporting a burglary was sufficient to support a finding of premeditation. State v. Gibson, 47 Wn. App. 309, 734 P.2d 32 (1987) held evidence that there was a sufficient lapse of time between beating and strangling the victim was sufficient to support finding of premeditation. State v. Bushey, 46 Wn. App. 579, 731 P.2d 553 (1987) held that evidence that the victim had been strangled, that she had received blunt injuries to her face, and that her hands had been tied was sufficient to support

finding of premeditation. State v. Giffing, 45 Wn. App. 369, 725 P.2d 445 (1986) held that evidence the victim was transported some distance to an isolated spot and killed, when the attacker approached her from behind and slit her throat after stabilizing her, supported a finding of premeditation. State v. Sargent, 40 Wn. App. 340, 698 P.2d 598 (1985) held evidence that victim was struck by two blows to the head, with some interval passing between the blows, while she was lying face down, supported a finding of premeditation.

State v. Gentry, 125 Wn.2d at 598-599.

The Court has found sufficient evidence to infer premeditation where multiple wounds were inflicted; a weapon was used; the victim was struck from behind; and there was evidence of a possible motive. State v. Ollens, 107 Wn.2d 848, 853, 733 P.2d 984 (1987). The Court has also found sufficient evidence to infer premeditation where multiple wounds were inflicted by a knife procured at the site of the killing; the killing took place in a room away from the kitchen, where the knife was found; where the victim was struck in the face and where the evidence indicated that the victim had engaged in a prolonged struggle. State v. Ortiz, 119 Wn.2d 294, 312-13, 831 P.2d 1060 (1992). A defendant's conduct following a murder can also be relevant to whether the murder was premeditated. Pirtle, 127 Wn.2d at 645. A cold, calculated

disarticulation flows from a cold, calculated killing, which is, in fact, a premeditated murder.

## **2. Ample Evidence In The Record Shows Premeditation.**

The showing of premeditation here was ample. Christensen concedes that there was sufficient evidence showing that Ms. Harlan's relationship with Young was motive for Christensen to murder Ms. Harlan. Appellant's Brief at 16. Christensen admitted killing Ms. Harlan because she broke her blood oath. RP 891.

Christensen had made prior threats directed at Ms. Harlan. While trash-talking the women he previously had relations with, specifically including Ms. Harlan, Christensen stated, "I'm going to get these bitches, everyone of them. They fucked with me and I'm going to get these bitches for it." RP 773. The neighbor's overheard Christensen yelling at Ms. Harlan calling her a "bitch" and a "slut." RP 55, 68. On Christmas Eve 2009, Christensen sent Ms. Harlan the text message: "I fucking hate you. You fucking bitch." EX 238 at 28; RP 1001. Christensen smashed his computer and a cell phone after he received a message from Ms. Harlan about breaking up. RP 753-754, 788-789. On December 28, 2009, Christensen had Ms. Harlan make the "blood oath" that

she would not contact or communicate with Young. EX 238 at 13-20, 23-24, 26-27; RP 857-862, 913-915.

Christensen picked Ms. Harlan up from work around 6:20 p.m., January 1, 2010. RP 941-942. The evidence showed that Christensen killed Ms. Harlan the next morning. On January 2, 2010, at approximately 8:00 a.m., Ms. Harlan's neighbor heard Ms. Harlan and Christensen arguing, they heard Christensen yelling, "You weren't supposed to see him after I got out." and "Shut the fuck up, you bitch." RP 76-78. Just before he murdered Ms. Harlan Christensen found that Ms. Harlan and Young had been communicating with each other that morning, including the text from Young saying: "See what two men does for you? Too much stress. LOL." EX 238 at 35-41; RP 721-722.

The evidence supports an inference that Christensen killed Ms. Harlan in the bedroom of her apartment; the blood spatter and the majority of the staining were in the bedroom; a violent event involving a sharp weapon occurred in the bedroom. RP 1052-1088, 1092-1102, 1109-1111, 1115. The State did not determine which knife Christensen used to kill Ms. Harlan, but a reasonable inference was that Christensen obtained the knife from the kitchen and carried it to the bedroom where he stabbed Ms. Harlan. RP

493, 513, 1050-1051, 1102-1108. “Although the knife was procured on the premises, the jury could have found that the act of obtaining the knife involved deliberation. Moreover, the murder occurred in a bedroom, and not in the kitchen where the knife was found.” Ortiz, 119 Wn.2d at 313. Christensen had an opportunity to withdraw from his course of action. See State v. Hughes, 106 Wn.2d 176, 199, 721 P.2d 902 (1986).

The evidence also supports an inference that Christensen stabbed Ms. Harlan in the back three times and smashed a knife into her skull. RP 499-502, 507-530, 587, 602-604, 622-624. The medical examiner stated that two of the knife wounds to Ms. Harlan’s back were each independently capable of causing Ms. Harlan’s death. RP 529-530.

After he murdered Ms. Harlan, Christensen disarticulated her body into nine separate pieces. RP 876-889, 893-904. Christensen’s disarticulation of Ms. Harlan was skillfully done and would have taken several hours. RP 629, 637-638, 646-647, 650-651, 656, 658-659. Additionally, Christensen made an effort to clean up the apartment using bleach and removing sections of the carpet, linoleum and mattress cover. RP 1033-1034, 1036-1038, 1042-1043, 1058-1060.

The evidence was more than sufficient to support the finding of premeditation.

**B. THE TRIAL COURT DID NOT COMMENT ON THE EVIDENCE.**

Christensen argues that giving the limiting instruction regarding the opinions of an expert witness violated Article IV, § 16 of the Washington Constitution in. Appellant's Brief at 20-28.

**1. Standard Of Review.**

"The determination of whether a comment on the evidence is improper depends on the facts and circumstances in each case." State v. Eaker, 113 Wn. App. 111, 117-18, 53 P.3d 37 (2002), review denied, 149 Wn.2d 1003 (2003). A statement constitutes a comment on the evidence "if the court's attitude toward the merits of the case or the court's evaluation relative to the disputed issue is inferable from the statement." State v. Deal, 128 Wn.2d 693, 703, 911 P.2d 996 (1996); State v. Lane, 125 Wn.2d 825, 838, 889 P.2d 929 (1995). The purpose of prohibiting such comments is to prevent the judge's opinion from influencing the jury's verdict. Lane, 125 Wn.2d at 838. "The touchstone of error in a trial court's comment on the evidence is whether the feeling of the trial court as to the truth value of the testimony of a witness has been communicated to the jury." Lane, 125 Wn.2d at 838 (*citing State v.*

Trickel, 16 Wn. App. 18, 25, 553 P.2d 139 (1976), review denied, 88 Wn.2d 1004 (1977)).

## **2. The Limiting Instruction Was Not A Comment On The Evidence.**

In the present case, Christensen requested the court exclude Dr. Taylor's opinion that the disarticulation of Ms. Harlan was very skillful, very precise and impressive. Christensen argued that Dr. Taylor's opinion would be an "improper imprint about how or where Mr. Christensen learned disarticulation skills ... ." RP 611-612. The trial judge ruled that it would allow Dr. Taylor's opinion, stating that the defense was "entitled to a limiting instruction." Christensen proposed the standard limiting instruction, WPIC 4.64.01. RP 615. However, Christensen expressed concern that instructing the jury that they could only consider Dr. Taylor's opinion for the purpose of determining whether there was premeditation, was giving weight to the evidence. RP 616-617. Christensen requested additional language "saying that the jury is to consider this evidence with all the other evidence in determining whether there is premeditation so that there is not some undue weight." RP 618. Christensen then requested language similar to the instruction for circumstantial evidence regarding weight to be

given by that the jury. RP 619. In response, the prosecutor suggested, "The jury shall give the opinion of Dr. Taylor no more or less weight on the issue of premeditation than any other evidence bearing on that issue." Christensen did not object. RP 620-621.

A trial court must give a limiting instruction where evidence is admitted for one purpose but not for another and the party against whom the evidence is admitted asks for a limiting instruction. ER 105; State v. Gallagher, 112 Wn. App. 601, 611, 51 P.3d 100 (2003). An instruction proposed by defense cannot be later cited as error. State v. Boyer, 91 Wn.2d 342, 345, 588 P.2d 1151 (1979); State v. Fitzgerald, 39 Wn. App. 652, 662, 694 P.2d 1117 (1985). The trial court is not obliged to give the instruction in the exact language proposed by the defendant. The court has broad discretion to fashion its own limitation on the use of the evidence. Gallagher, 112 Wn. App. at 611. The court read the following instruction to the jury:

The State is asking Dr. Taylor to give some opinions. Before this evidence is allowed, the Court advises you that you may consider the opinions of Dr. Taylor only for the purpose of determining whether premeditation was present. You must not consider the opinions of Dr. Taylor for any other purpose. The jury shall give the opinions of Dr. Taylor no more or less weight than other evidence bearing on that issue.

RP 621-622. The first three sentences of the instruction simply rearticulate WPIC 4.64.01. The last sentence is a paraphrase of the last sentence of WPIC 5.01, the instruction regarding direct and circumstantial evidence.

This instruction is not a comment on the evidence; in no manner does it indicate to the jury the personal belief of the trial court. State v. Cogswell, 54 Wn.2d 240, 246, 339 P.2d 465 (1959); State v. Rio, 38 Wn.2d 446, 452-53, 230 P.2d 308 (1951). “A judge may refer to the evidence so long as he does not explain or criticize the evidence, or assert that a fact is proven thereby, and so long as the jury is made aware that the fact is for it to determine.” Moore v. Mayfair Tavern, Inc., 75 Wn.2d 401, 409, 451 P.2d 669 (1969).

### **3. The Jury Was Instructed To Determine Witness Credibility And The Weight Or Value Of The Evidence.**

At the conclusion of the trial the jury was given the following instructions:

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.

WPIC 1.02; Instruction 1, paragraph 7, first sentence; CP 63.

Our state constitution prohibits a trial judge from making a comment on the evidence. It would be improper for me to express, by words or conduct, my

personal opinion about the value of testimony or other evidence. I have not intentionally done this. If it appeared to you that I have indicated my personal opinion in any way, either during trial or in giving these instructions, you must disregard this entirely.

WPIC 1.02; Instruction 1, paragraph 10; CP 64.

A witness who has special training, education, or experience may be allowed to express an opinion in addition to giving testimony as to facts.

You are not, however, required to accept his or her opinion. To determine the credibility and weight to be given to this type of evidence, you may consider, among other things, the education, training, experience, knowledge, and ability of the witness. You may also consider the reasons given for the opinion and the sources of his or her information, as well as considering the factors already given to you for evaluating the testimony of any other witness.

WPIC 6.51; Instruction 14; CP 77.

Considering the instructions as a whole, the jury was clearly instructed that they were not required to accept Dr. Taylor's opinion and that they were the sole judges of the credibility and the value or weight to be given to her testimony. Jury instructions are considered in the context of the instructions as a whole. State v. Pirtle, 127 Wn.2d at 656; State v. Peterson, 94 Wn. App. 1, 4, 966 P.2d 391 (1998). Furthermore, the court specifically instructed the jury that if it appeared that the judge had indicated his personal opinion in any way, they were to disregard it entirely. The jury is presumed to follow the court's instruction. State v. Mak, 105 Wn.2d

692, 702, 718 P.2d 407 (1986). The challenged instruction does not communicate the court's opinion of the truth value of the evidence; it does not express the court's attitude towards the merits of, or a disputed issue in, the case. Under the facts and circumstance of this case the challenged instruction was not improper; it is a correct statement of the law.

### **C. INEFFECTIVE ASSISTANCE OF COUNSEL.**

Christensen additionally argues that defense counsel's participation in proposing language for the limiting instruction amounted to ineffective assistance of counsel. Appellant's Brief at 26-27.

#### **1. Standard Of Review.**

Effective assistance of counsel is guaranteed by both the federal and the state constitutions. In re Woods, 154 Wn.2d 400, 420, 114 P.3d 607 (2005); see U.S. Constitution, amendment VI; Washington Constitution, Article I, § 22. To demonstrate ineffective assistance of counsel, a defendant must make two showings: (1) defense counsel's representation was deficient, i.e., it fell below an objective standard of reasonableness based on consideration of all the circumstances; and (2) defense counsel's deficient representation prejudiced the defendant, i.e., there is a reasonable

probability that, except for counsel's unprofessional errors, the result of the proceeding would have been different. State v. McFarland, 127 Wn.2d 322, 335, 899 P.2d 1251 (1995); State v. Thomas, 109 Wn.2d 222, 225-26, 743 P.2d 816 (1987) (applying the 2-prong test in Strickland v. Washington, 466 U.S. 668, 687, 104 S.Ct. 2052, 2064, 80 L.Ed.2d 674 (1984)). If one of the two prongs of the test is absent, the court need not inquire further. Strickland, 466 U.S. at 697; State v. Foster, 140 Wn. App. 266, 273, 166 P.3d 726, review denied, 162 Wn.2d 1007, 175 P.3d 1094 (2007).

Courts engage in a strong presumption that counsel's representation was effective. McFarland, 127 Wn.2d at 335. Competency of counsel is determined upon the entire record below. McFarland, 127 Wn.2d at 335. Where the claim is brought on direct appeal, the reviewing court will not consider matters outside the trial record. McFarland, 127 Wn.2d at 335; State v. Crane, 116 Wn.2d 315, 335, 804 P.2d 10, cert. denied, 501 U.S. 1237, 111 S.Ct. 2867, 115 L.Ed.2d 1033 (1991); State v. Blight, 89 Wn.2d 38, 45-46, 569 P.2d 1129 (1977). "The burden is on the defendant to show from the record a sufficient basis to rebut the 'strong presumption' that counsel's representation was effective."

McFarland, 127 Wn.2d at 337; Thomas, 109 Wn.2d at 226.

## **2. Defendant Has Not Shown That Counsel's Performance Was Deficient.**

To prevail on his claim of ineffective assistance of counsel, Christensen must show that counsel's performance fell below an objective standard of reasonableness. Strickland v. Washington, 466 U.S. at 687; McFarland, 127 Wn.2d at 334-35. The reasonableness inquiry presumes effective representation and requires the defendant to show the absence of legitimate strategic or tactical reasons for the challenged conduct. McFarland, 127 Wn.2d at 336. The court gives exceptional deference when evaluating trial counsel's strategic decisions. In re Davis, 152 Wn.2d 647, 714, 101 P.3d 1 (2004). Christensen has not carried his burden to demonstrate that there was no legitimate strategic or tactical reason for counsel's decision regarding the language of the limiting instruction.

In the present case, that reasoning is seen in trial counsel's approach to the cross-examination of Dr. Taylor. The extent of cross-examination, even made quickly in the heat of conflict, is a matter of judgment and strategy. State v. Stockman, 70 Wn.2d 941, 945, 425 P.2d 898 (1967). Defense was concerned that the

jury might speculate about where Christensen acquired the skills used to disarticulate Ms. Harlan's body. RP 612. Defense counsel's entire cross-examination of Dr. Taylor consisted of questions regarding the similarity of the anatomy of the human body with the anatomy of other mammals, and that skills learned as a hunter and used to disarticulate an animal would translate to disarticulating a human body. RP 660-669. The strategic and tactical decision is also seen in how Christensen argued the disarticulation evidence in the present case. Defense argued that while Dr. Taylor's testimony demonstrated premeditation of Christensen's attempt to clean-up afterwards, it did not prove premeditation of the actual killing. RP 619, 1225, 1235-1239.

### **3. Counsel Made A Reasonable Strategic And Tactical Decision.**

Defense counsel made a reasonable strategic decision. Even if in retrospect some other tactical approach might have been more successful, Counsel's representation did not fall below an objective standard of reasonableness. Christensen has not carried his burden of showing deficient performance. Additionally, as shown above in § B, the limiting instruction was proper and,

therefore, not prejudicial. The ineffective assistance of counsel claim fails.

**D. THE DENIAL OF DEFENDANT'S MOTION FOR MISTRIAL WAS NOT AN ABUSE OF DISCRETION.**

Christensen argues that the court erred in denying of his motion for a mistrial. Appellant's Brief at 28-32.

**1. Standard Of Review.**

A trial court's denial of motion for a mistrial is reviewed for abuse of discretion. State v. Lewis, 130 Wn.2d 700, 707, 927 P.2d 235 (1996). Mistrial is appropriate only when the defendant has been so prejudiced that nothing short of a new trial can ensure that the defendant will be tried fairly. Lewis, 130 Wn.2d at 707; State v. Johnson, 124 Wn.2d 57, 76, 873 P.2d 514 (1994). In considering whether a trial irregularity warrants a mistrial, the appropriate inquiry is whether the testimony, when viewed against the backdrop of all the evidence, so tainted the trial that the defendant did not receive a fair trial. State v. Weber, 99 Wn.2d 158, 164, 659 P.2d 1102 (1983). Trial courts are accorded discretion in denying a motion for mistrial; such denials will be overturned only when there is a "substantial likelihood" the prejudice affected the jury's verdict. State v. Russell, 125 Wn.2d 24, 85, 882 P.2d 747 (1994) (*citing*

State v. Crane, 116 Wn.2d 315, 332-33, 804 P.2d 10, cert. denied, 501 U.S. 1237, 111 S.Ct. 2867, 115 L.Ed.2d 1033 (1991)). The trial court is best situated to assess the prejudice caused by a given statement. Lewis, 130 Wn.2d at 707; Weber, 99 Wn.2d at 166; State v. Thompson, 90 Wn. App. 41, 45, 950 P.2d 977 (1998).

## **2. The Comment Of Martha Pickens Did Not Warrant A Mistrial.**

At trial, the following occurred during direct examination of Martha Pickens:

Q. Now once Eric got out of jail in that early part or mid-portion of December, approximately how many times do you think you and he actually had a conversation between the two of you?

A. More than twice. I would say; about three or four times. I learned that he had a little toddler girl. I learned he was a felon.

MS. KYLE: Your Honor, I'm going to object and move to strike.

THE COURT: I will sustain the objection, strike that comment, and the jurors will disregard it.

A. (continued) That's what he told me.

MS. KYLE: Again, Your Honor, I renew my objection.

THE COURT: Just answer the questions. The jurors will disregard that statement.

RP 53-54. The next morning Christensen moved for a mistrial; the motion was denied. RP 98-102.

Prior to trial, the court denied the State's motion to admit Christensen's 1994 felony convictions for First Degree Assault with a Deadly Weapon. See State's Brief in Support of Admission of ER 404(b) Evidence, Sub# 43, CP \_\_\_; CP 238-239; 5/14/10 RP 155-161. In a separate pre-trial hearing the court ruled that Christensen's incarceration in the Snohomish County Jail on an unrelated misdemeanor was admissible as a reference point to when other events occurred. 5/21/10 RP 171-172. The court instructed the jury that it could only use evidence that Christensen went to jail from November 14, 2009, to December 11, 2009, on a misdemeanor matter for the purpose of proving a timeline of events; and that evidence that Christensen went to jail is not evidence of his guilt on the crime charged. Instruction 6; CP 69; RP 107.

To determine the prejudicial effect of an irregular occurrence during trial, the appellate court examines the occurrence's seriousness, whether it involved cumulative evidence, and whether the trial court properly instructed the jury to disregard it. Johnson, 124 Wn.2d at 76. Here, Martha Pickens' remark was sufficiently serious because it violated a motion *in limine* to exclude it. State v. Essex, 57 Wn. App. 411, 416, 788 P.2d 589 (1990). However, the

witness did not disclose any details of the felony; there are many non-violent felony crimes which do not carry the same taint as a conviction for a violent crime. Additionally, Pickens' comment also included innocuous information that Christensen had a little toddler girl. When the court instructed the jury to disregard the comment the court did not distinguish between those two details, thereby not drawing extra attention to the offending portion of her remark. The single, isolated comment occurred in the context of a lengthy trial. See Russell, 125 Wn.2d at 85. Next, the comment was partially cumulative of other evidence; several witnesses testified that Christensen had served time in jail and the jury was instructed that evidence that Christensen went to jail was not evidence of his guilt on the crime charged. Of particular importance, however, is the fact that the trial court immediately struck the comment from the record and instructed the jury to disregard it.

Furthermore, the court offered to give an additional limiting instruction if Christensen wanted one. The prosecutor stated that he would agree to any kind of limiting instruction Christensen wanted the court to give the jury. Christensen did not request an additional limiting instruction. RP 99-102. Reversal is not required if the prejudice could have been cured by a jury instruction, which

the defendant did not request. State v. Warren, 165 Wn.2d 17, 43, 195 P.3d 940 (2008); State v. Russell, 125 Wn.2d at 85.

The comment's prejudicial effect was mitigated under the circumstances of this case. The single, isolated comment occurred in the context of a lengthy trial. The trial court immediately struck the comment from the record, and instructed the jury to disregard it. Christensen did not request an additional limiting instruction. Under these circumstances, the trial judge did not abuse its discretion in denying Christensen's request for a mistrial.

### **3. The Jury Was Properly Instructed To Not Consider The Comment.**

At the conclusion of the trial the jury was given the following instructions:

The evidence that you are to consider during your deliberations consists of the testimony that you have heard from witnesses, stipulations, and the exhibits that I have admitted, during the trial. *If evidence was not admitted or was stricken from the record, then you are not to consider it in reaching your verdict.*

WPIC 1.02; Instruction 1, paragraph 3 (emphasis added); CP 62.

One of my duties has been to rule on the admissibility of evidence. Do not be concerned during your deliberations about the reasons for my rulings on the evidence. *If I have ruled that any evidence is inadmissible, or if I have asked you to disregard any evidence, then you must not discuss that evidence*

*during your deliberations or consider it in reaching your verdict. Do not speculate whether the evidence would have favored one party or the other.*

WPIC 1.02; Instruction 1, paragraph 5 (emphasis added); CP 62.

The jury is presumed to follow the court's instruction. State v. Mak, 105 Wn.2d at 702.

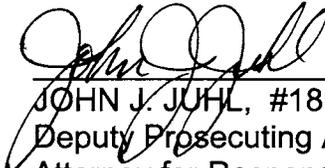
In the instant case, the ultimate consideration is whether Martha Pickens' improper comment, viewed in light of all the evidence, was so prejudicial that Christensen was denied his right to a fair trial. It was not. The trial court did not abuse its discretion in denying Christensen's motion for a mistrial.

#### **IV. CONCLUSION**

For the reasons stated above, the appeal should be denied.

Respectfully submitted on March 29, 2011.

MARK K. ROE  
Snohomish County Prosecuting Attorney

By:   
\_\_\_\_\_  
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Deputy Prosecuting Attorney  
Attorney for Respondent



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

THE STATE OF WASHINGTON,  
  
Respondent,  
  
v.  
  
ERIC J. CHRISTENSEN,  
  
Appellant.

No. 65619-8-1

AFFIDAVIT OF MAILING

AFFIDAVIT BY CERTIFICATION:

The undersigned certifies that on the 30<sup>th</sup> day of March, 2011, affiant deposited in the mail of the United States of America a properly stamped and addressed envelope directed to:

THE COURT OF APPEALS - DIVISION I  
ONE UNION SQUARE BUILDING  
600 UNIVERSITY STREET  
SEATTLE, WA 98101-4170

NIELSEN, BROMAN & KOCH  
1908 EAST MADISON STREET  
SEATTLE, WA 98122

containing an original and one copy to the Court of Appeals, and one copy to the attorney for the appellant of the following documents in the above-referenced cause:

BRIEF OF RESPONDENT

I certify under penalty of perjury under the laws of the State of Washington that this is true.

Signed at the Snohomish County Prosecutor's Office this 30<sup>th</sup> day of March, 2011.



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DIANE K. KREMENICH  
Legal Assistant/Appeals Unit