

65809-3

65809-3

No. 65809-3-I

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION ONE

STATE OF WASHINGTON,

Respondent,

v.

DZEVAD KULOGLIJA,

Appellant.

FILED
COURT OF APPEALS DIV I
STATE OF WASHINGTON
2012 APR -9 PM 3:15

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR KING COUNTY

The Honorable Jim Rogers

APPELLANT'S AMENDED OPENING BRIEF

BLAIR RUSS, KEVIN TROMBOLD and TED VOSK
Attorneys for Appellant

Pacific Building
720 Third Avenue, Suite 2015
Seattle, WA 98104
(206) 467-3152

TABLE OF CONTENTS

A. INTRODUCTION1

B. ASSIGNMENTS OF ERROR.....1

C. STATEMENT OF THE CASE.....2

D. ARGUMENT.....7

- The trial court erred in denying the defendant’s motion to suppress Mr. Kuloglija’s statements made at the scene.....7
- The trial court erred in denying the defendant’s motion to suppress Mr. Kuloglija’s statements made to Detective Seese at Harborview Medical Center.....18
- The trial court erred in allowing the term “domestic violence” to be used at trial.....27
- The trial court erred in allowing Detective Glover and Detective Heckelsmiller to provide non-expert opinion testimony as to blood splatter.....28
- The trial court erred in allowing Dr. Foy to provide non-expert opinion testimony as to “defensive wounds”.....32
- The trial court erred in permitting Detective Sampson to testify to a previous police contact that she had with the defendant and by attempting to remedy her testimony by instructing Detective Sampson to lie to the jury that she contacted Mr. Kuloglija as a witness in a case.....34
- The trial court erred in not allowing Sauda Curavac to testify to Alija Kuloglija’s statements at the scene.....36
- The trial court erred in denying defendant’s motion to arrest judgment.....39
- Mr. Kuloglija’s conviction should be reversed under the cumulative error doctrine.....41

E. CONCLUSION.....42

TABLE OF AUTHORITIES

United States Constitution

Fifth Amendment.....	22
Sixth Amendment	23
Fourteenth Amendment	27, 46

Washington State Constitution

Article 1, section 22	27
-----------------------------	----

United States Supreme Court Decisions

<u>Akey v. Oklahoma</u> , 470 U.S. 68 (1985).....	42
<u>Arizona v. Fulminante</u> , 499 U.S. 279 (1991).....	25
<u>Berkemer v. McCarty</u> , 468 U.S. 420 (1984).....	11
<u>Bruton v. United States</u> , 391 U.S. 123 (1968).....	25
<u>Chapman v. California</u> , 386 U.S. 18 (1967).....	27
<u>Chambers v. Mississippi</u> , 410 U.S. 284 (1973).....	42
<u>Davis v. Alaska</u> , 415 U.S. 308 (1974).....	42
<u>Missouri v. Seibert</u> , 542 U.S. 600 (2004).....	18
<u>Moran v. Burbine</u> , 475 U.S. 412 (1986).....	25
<u>Pennsylvania v. Muniz</u> , 496 U.S. 582 (1990).....	16, 17
<u>Rhode Island v. Innis</u> , 446 U.S. 291 (1980).....	15, 16
<u>Rock v. Arkansas</u> , 483 U.S. 44(1987).....	42
<u>Stansbury v. California</u> , 511 U.S. 318 (1995).....	10
<u>Thompson v. Keohane</u> , 516 U.S. 99 (1995)	10

Federal Court Decisions

<u>United States v. Masse</u> , 816 F.2d 805 (1 st Cir.1987).....	11
<u>United States v. Mitchell</u> , 502 F.3d 931 (2007).....	35
<u>United States v. Streifel</u> , 781 F.2d 953 (1 st Cir.1986).....	11

Washington Supreme Court Decisions

<u>In re Pers. Restraint of Lord</u> , 123 Wash.2d 296 (1994).....	30
<u>In re Pers. Restraint of Pirtle</u> , 136 Wash.2d 467 (1998).....	30
<u>In re Stenson</u> , 150 Wash.2d 207 (2003).....	35
<u>State v. Anderson</u> , 96 Wn.2d 739 (1982).....	44

<u>State v. Aten</u> , 130 Wash.2d 640 (1996).....	19
<u>State v. Badda</u> , 63 Wn.2d 176 (1963).....	46
<u>State v. Baeza</u> , 100 Wn.2d 487 (1983).....	43
<u>State v. Broadway</u> , 133 Wash.2d 118 (1997).....	19
<u>State v. Coe</u> , 101 Wn.2d 722 (1984).....	46
<u>State v. Green</u> , 94 Wn.2d 216 (1980).....	44
<u>State v. Irby</u> , 170 Wash.2d 874 (2011).....	27, 28, 30
<u>State v. Lavaris</u> , 99 Wash.2d (1983).....	17, 18, 21, 25, 26
<u>State v. Roberts</u> , 142 Wash.2d 471 (2000).....	35
<u>State v. Russell</u> , 125 Wn.2d 24 (1994).....	45, 46
<u>State v. Slack</u> , 113 Wn.2d 850 (1989).....	43
<u>State v. Terrovona</u> , 105 Wash.2d 632 (1986).....	25
<u>State v. Weber</u> , 159 Wn.2d 252 (2006).....	46

Washington State Court of Appeals Decisions

<u>City of Seattle v. Heatley</u> , 70 Wash.App. 573 (1993).....	34
<u>State v. Alexander</u> , 64 Wash.App. 147 (1992).....	45, 46
<u>State v. Corn</u> , 95 Wash.App. 41 (1999).....	25
<u>State v. Hagler</u> , 150 Wash.App. 196 (Div. 1, 2009).....	31, 32
<u>State v. Johnson</u> , 48 Wash.App. 681 (1987).....	16
<u>State v. Lopez</u> , 74 Wash.App. 264 (1994).....	25
<u>State v. Lozano</u> , 76 Wash.App. 116 (Div. 3, 1994).....	16
<u>State v. Smissaert</u> , 41 Wash.App. 813 (Div. 1, 1985).....	34
<u>State v. Walker</u> , 75 Wash.App. 101 (Div. 1, 1994).....	41

Washington State Court Rules & Evidence Rules

CrR 3.5.....	
RAP 2.5(a)(3).....	46
E.R. 701.....	33
E.R. 803(a)(1)	
E.R. 803(a)(2)	
E.R. 804(b)(2)	

A. INTRODUCTION

Mr. Kuloglija was convicted of Attempted Murder in the Second Degree and First Degree Assault, both with deadly weapon enhancements and a finding that the victim, Mr. Kuloglija's mother, was particularly vulnerable. Appellants ask this court to reverse Mr. Kuloglija's convictions for the reasons stated below.

B. ASSIGNMENTS OF ERROR

1. The trial court erred in denying the defendant's motion to suppress Mr. Kuloglija's pre-Miranda statements made at the scene.
2. The trial court erred in denying the defendant's motion to suppress Mr. Kuloglija's post-Miranda statements made at the scene.
3. The trial court erred in denying the defendant's motion to suppress Mr. Kuloglija's statements made to Detective Seese at Harborview Medical Center.
4. The trial court erred in denying the defendant's motion to suppress Mr. Kuloglija's statements made to Detectives Heckelsmiller and Koutouvidis at Harborview Medical Center.
5. The trial court erred in allowing the term "domestic violence" to be used at trial.
6. The trial court erred in allowing Detective Glover and Detective Heckelsmiller to provide non-expert opinion testimony as to blood splatter.

7. The trial court erred in allowing Dr. Foy to provide non-expert opinion testimony as to “defensive wounds.”

8. The trial court erred in permitting Detective Sampson to testify to a previous police contact she had with the defendant and by instructing Detective Sampson to lie to the jury that she had contacted Mr. Kuloglija as a witness in a case.

9. The trial court erred in not allowing Sauda Curavac to testify to Alija Kuloglija statements at the scene.

10. The trial court erred in denying defendant’s motion to arrest judgment.

C. STATEMENT OF THE CASE

On October 15, 2009, Alija Kuloglija called her daughter, Suada Curavac, on the telephone, and told her that she was hurt. 4RP 122.¹ Ms. Curavac arrived at her mother’s house, discovered the door slightly ajar, and found her mother lying in the entryway covered in blood. 4RP 123-24,

¹ The verbatim Report of Proceedings (RP) from pretrial and sentencing proceedings will be referred to by the date of the proceedings. Trial testimony is contained in eight consecutively paginated volumes and is referred to herein by the volume number as follows:

- 1RP refers to June 1 & 2, 2010;
- 1(a)RP refers to June 1, 2010;
- 2RP refers to June 3, 7, 8 & 9, 2010;
- 2(a)RP refers to June 7 & 8, 2010;
- 2(b)RP refers to June 9, 2010 (TaraLynn A. Bates, court reporter)
- 3RP refers to June 14, 2010;
- 4RP refers to June 15 & 16, 2010;
- 5RP refers to June 17 & 21, 2010.

133. Ms. Curavac called out for her brother, Dzevad Kuloglija, and called 911. 4RP 123-24. While waiting for help, Ms. Kuloglija told her daughter that she thought she might not make it and that she wanted everyone to know that Dzevad was defending her from an unknown assailant and that he also was attacked by this assailant. 4RP 132, 150.

Two emergency responders from the Tukwila Fire Department were the first to arrive on scene and they began treating Ms. Kuloglija for her injuries. 4RP 9-12. Tukwila Police Officers Bisson and LeCompte arrived next, in separate vehicles but at approximately the same time, and began a sweep of the apartment. 2RP 57-58. The officers had their weapons out as they conducted the sweep. 2RP 64. On the way to the bedroom, the officers passed Suada Curavac in the hallway but did not question, frisk, or detain her. 2RP 78, 83.

Officer LeCompte located Dzevad Kuloglija lying face down on the floor of a bedroom; he was covered in blood. 2RP 64; 5RP 14. At trial, Mr. Kuloglija was described by Officer LeCompte as looking “ashen” and “in agony.” 2RP 90, 93. Officer LeCompte yelled out that he had “got one” and Officer Bisson joined him in the bedroom, holding Mr. Kuloglija at gunpoint. 5RP 15. Officer Devlin then entered the room, jumped on the bed, and from a crouched position also held Mr. Kuloglija at gunpoint. 2RP 106-07. Officer LeCompte commanded Mr. Kuloglija to

let go of the knife that he appeared to be holding or which may have been stuck underneath his armpit. 2RP 65, 106; 5RP 15. Mr. Kuloglija complied and the knife fell to the floor. 2RP 65, 87. Officer LeCompte asked Mr. Kuloglija, “What happened?” and Mr. Kuloglija responded, “I stabbed my mom.” Ofc. LeCompte asked Mr. Kuloglija the same question again and received the same response. 2RP 66.

Officer Devlin jumped off the bed, placed Mr. Kuloglija in handcuffs, and read him his Miranda rights. 2RP 67, 106. It is unclear how Mr. Kuloglija acknowledged these rights. 2RP 67. Officer Devlin asked Mr. Kuloglija, “What happened here?” and Mr. Kuloglija replied, “I stabbed my mother. Thank you for helping me. I want to die.” 2RP 111.

Medics then entered the bedroom, asked the officers to remove Mr. Kuloglija’s handcuffs, and began treating him for his injuries. 2RP 112. Mr. Kuloglija had three wounds in and around his abdomen, as well as a wound to his neck, his left upper chest, and his right jaw. 4RP 195. Mr. Kuloglija was given intravenous fluids and intubated on the scene before being transported to Harborview Medical Center. 4RP 101, 103. Mr. Kuloglija was considered to be in critical condition. 4RP 105. Mr. Kuloglija remained at Harborview for six days before being transported to the King County Jail. 4RP 108.

Ms. Kuloglija had several wounds to her chest and abdomen, as well

as wounds to her arms and hands. 3RP 100, 109. Ms. Kuloglija was intubated and given intravenous fluids on the scene before being transported to Harborview Medical Center for treatment. 4RP 194. At Harborview, Ms. Kuloglija was taken into surgery, where doctors stitched several muscles around her heart, along her abdomen, and repaired the tendons in her hands. 3RP 104-06, 109, 114-15. Ms. Kuloglija also had a collapsed lung. 3RP 118. Ms. Kuloglija remained in the Intensive Care Unit at Harborview for seven days and was discharged from the hospital after fifteen days. 3RP 116.

The day after the incident, from approximately 6am until 12pm, Detective Seese, dressed in plain clothes but with his badge hanging on a chain necklace and two pairs of handcuffs and his firearm visible, sat in Mr. Kuloglija's room at Harborview Medical Center providing guard. 2RP 116-17. Mr. Kuloglija was restrained in his hospital bed. 1RP 53, 63, 106. During the course of Detective Seese's shift, Mr. Kuloglija received treatment from Harborview medical staff. 1RP 57. According to Detective Seese, Mr. Kuloglija appeared to be in pain and distress. 2RP 131-33. Several times, Mr. Kuloglija initiated conversation with Detective Seese about his surroundings and Detective Seese's presence. 2RP 117-18. Detective Seese testified at trial that Mr. Kuloglija also stated: "I am stupid. I stab mother and stab self. How is my mother?" and "I should

have used gun. Shoot everyone and myself.” 2RP 121-23. Detective Seese also testified that Mr. Kuloglija stated, “I want to die please,” and asked, “How long I go to jail?” 2RP 127-28.

During Detective Seese’s guard shift on October 16, 2009, Detectives Heckelsmiller and Koutouvidis attempted to interview Dzevad Kouloglija at Harborview. Detective Koutouvidis read Mr. Kuloglija his Miranda rights and Mr. Kuloglija interrupted the detective to invoke his right to an attorney. 1RP 77. Detective Koutouvidis finished reading Miranda and Mr. Kuloglija again invoked his right to an attorney. Before the detectives left, Mr. Kuloglija stated that he just wanted to talk as friends and have some fun, but that it was too late. 1RP 78.

The Washington State Patrol Crime Lab analyzed several samples of blood collected from knives and clothing at the scene and matched all but one of the samples to either Alija or Dzevad Kuloglija. 4RP 41. There was a trace amount of DNA discovered on the handle of one of the bloody knives did not meet the lab’s threshold for a positive match to anyone. 4RP 53.

Mr. Kuloglija testified at his jury trial, as did Alija Kuloglija, Suada Curavac, and the firefighters, police officers, detectives, sergeants, doctors, and emergency responders involved in this incident. Mr. Kuloglija was convicted of Attempted Murder in the 2nd Degree and

Assault in the 1st Degree, both with dangerous weapon enhancements and with the jury making a specific finding for each count that the victim was particularly vulnerable. On the State's motion, the court dismissed the conviction for Assault in the 1st Degree. 07/23/10 at 6-7. Mr. Kuloglija was sentenced to 116.25 months in jail. 07/23/10 at 15.

D. ARGUMENT

THE TRIAL COURT ERRED IN DENYING THE DEFENDANT'S MOTION TO SUPPRESS MR. KULOGLIJA'S STATEMENTS MADE AT THE SCENE.

The trial court conducted a 3.5 hearing regarding the admissibility of several statements made at Mr. Kuloglija's home and in the presence of Tukwila Police Department Officers LeCompte, Bisson, and Devlin. At the 3.5 hearing, each officer testified differently regarding Mr. Kuloglija's statements and the circumstances under which he made them. All officers agreed on the following, however: Officer LeCompte was the first to discover Mr. Kuloglija in the southeast bedroom of his apartment; Mr. Kuloglija was lying face down on the ground in a pool of blood, between his bed and the wall farthest from the bedroom door. 1(a)RP 42; 1RP 176. Mr. Kuloglija appeared to have several wounds in his abdomen, chest, neck, and jaw. 1(a)RP 50-51. Officer LeCompte called out that he had "got one" and Officer Bisson quickly entered the room and provided backup. 1(a)RP 64; 1RP 175-76. Officer Devlin entered the room next

and provided backup from a crouched position atop the bed. 1RP 8. All three officers had their guns pointed at Mr. Kuloglija. 1RP 183.

Officer LeCompte testified at the 3.5 hearing that he ordered Mr. Kuloglija to drop the knife in his right hand. 1(a)RP 44. Officer LeCompte described his tone as commanding. 1(a)RP 68. Officer LeCompte testified that he moved the knife away from Mr. Kuloglija's body, rolled him over, and asked, "What happened?" 1(a)RP 45.

Officer Bisson stated at the 3.5 hearing that he does not recall who read Miranda, but that at some point during Officer LeCompte's and Officer Devlin's search of Mr. Kuloglija, but before Mr. Kuloglija was handcuffed, he was able to make out two words Mr. Kuloglija said: "killed" and "mother." 1RP 177. Officer Bisson explained further that Mr. Kuloglija spoke in a "kind of whisper" and that his voice was "very, very quiet." 1RP 177; 186. He also noted that Mr. Kuloglija had a "pretty strong accent." Officer Bisson testified that Officer Devlin then turned to him and said, "He just said, 'Let me die, I killed my mother.'" 1RP 177.

Officer Devlin testified that when he entered the bedroom he saw Officer LeCompte standing at the base of the bed pointing his gun at Mr. Kuloglija and that Officer Bisson was standing right next to Officer LeCompte. 1RP 26. Officer Devlin jumped on top of the bed and also pointed his gun at Mr. Kuloglija. 1RP 26. Officer LeCompte ordered Mr.

Kuloglija to drop the knife and Officer LeCompte moved the knife to a windowsill. 1RP 26. Officer Devlin then holstered his weapon, jumped down from the bed, and began handcuffing Mr. Kuloglija. 1RP 27. While being cuffed, Officer Devlin testified that Mr. Kuloglija volunteered, “I stabbed my mother.” 1RP 27.

Officer LeCompte testified at the 3.5 hearing that he asked Mr. Kuloglija “What happened?” *prior* to Miranda being read. 1(a)RP 71. Officer LeCompte subsequently revised his account of this interaction, stating later in the 3.5 hearing that pre-Miranda he and Officer Devlin jointly asked Mr. Kuloglija, “What happened?” 1RP 16-17. Mr. Kuloglija said, “I stabbed my mom,” and Officer LeCompte immediately said: “Say it again.” 1RP 16-17. Mr. Kuloglija complied. *Id.* Officer Devlin then read Mr. Kuloglija his Miranda rights, dropping his Miranda card in a pool of blood when attempting to put the card away. 1RP 16-17, 28.

Officer Devlin testified that Mr. Kuloglija acknowledged his Miranda warnings by saying out loud, “I understand.” 1RP 28. Officer LeCompte testified that he did not recall how Mr. Kuloglija acknowledged his Miranda rights, but that he recalled some acknowledgment. 1(a)RP 74. Later in the 3.5 hearing, however, Officer LeCompte revised his testimony and stated that Mr. Kuloglija acknowledged his Miranda rights by shaking his head and that he also may have said, “Yes” or “Yes, I understand.”

1RP 48. Officer Bisson testified that he did not recall Miranda being read and that he did not indicate Miranda was read in his report for the incident. 1RP 184-5. Officer Devlin testified that Mr. Kuloglija did not respond to his asking, "Do you wish to speak with us?" 1RP 130. Officer Devlin also testified that after he read Miranda he asked Mr. Kuloglija, "What happened?" and that he responded, "I stabbed my mother." 1RP 28. Officer LeCompte testified that he and Officer Devlin jointly asked this question post-Miranda. 1RP 12. Officer Devlin also testified that Mr. Kuloglija thanked him and said that he wanted to die. 1RP 28.

Miranda is required whenever a person is in custody and being interrogated. The key inquiry regarding 'custody' is whether there was "a formal arrest or restraint on freedom of movement of the degree associated with a formal arrest." Thompson v. Keohane, 516 U.S. 99, 100 (1995) (citations omitted); Stansbury v. California, 511 U.S. 318, 322 (1995) (*per curiam*). Determining whether there was "restraint on movement" is an objective test and must include all of the circumstances surrounding the interrogation. The key question is "how a reasonable man in the suspect's shoes would have understood his situation." Stansbury, 511 U.S. at 323-24 (quoting Berkemer v. McCarty, 468 U.S. 420, 442 (1984)). Factors include the location of questioning, the number of officers at the scene, the duration and character of the questioning, and whether the suspect was

physically restrained. United States v. Masse, 816 F.2d 805, 809 (1st Cir.1987) (quoting United States v. Streifel, 781 F.2d 953, 961 n. 13 (1st Cir.1986)).

In the present case, Mr. Kuloglija was in his own home, lying in a pool of blood, holding a knife and suffering from multiple stab wounds. The officers discovered Mr. Kuloglija while conducting a sweep of the house – what Officer Devlin described at trial as being in “scan mode looking for bad guys, more victims.” 2RP 104. Prior to locating Mr. Kuloglija, Officers LeCompte and Bisson came across Mr. Kuloglija’s sister, Suada Curavac, walking down the hall with blankets or towels in her arms.

1(a)RP 61. The officers did not stop Ms. Curavac, check her for injuries or weapons, question her, frisk her, or call for someone else to assist her; rather, they asked only if there was anyone else in the residence. 1(a)RP 62. Only seconds later, Mr. Kuloglija was treated significantly differently.

As soon as Officer LeCompte spotted a severely injured Mr. Kuloglija lying on the floor, he approached him with his gun aimed, calling out, “I’ve got one.” He then ordered Mr. Kuloglija not to move. 1(a)RP 65. Officers Bisson and Devlin entered the room also pointing their guns at Mr. Kuloglija. 1RP 24; 37-38. Officer LeCompte issued a stern command for Mr. Kuloglija to drop the knife in his right hand and Officer LeCompte moved the knife away from Mr. Kuloglija’s grasp. 1(a)RP 68,

70-1. Officer Bisson was the second officer to enter the room and testified at trial that first Officer LeCompte ordered Mr. Kuloglija to show his hands. 5RP 14. Officer Bisson explained that it is important to observe an individual's hands as this is traditionally where a weapon, such as a gun or knife, is held. 5RP 14. Although at the 3.5 hearing Officer Devlin stated that when he first entered the bedroom he was unsure whether Mr. Kuloglija was a suspect or victim, Officer Devlin testified differently in the case in chief: "[Mr. Kuloglija] is covered in blood. He is holding a knife. He is laying down behind this big bed. So, I'm assuming that he is the suspect." 1RP 37; 2RP 107. It is unclear why Officer Devlin changed his testimony from a characterization cutting against a custody determination during the court's 3.5 hearing to one cutting for a custody determination during the case in chief.² Officer Devlin then jumped from the bed and frisked Mr. Kuloglija for weapons. 1RP 42.

Although Officer Kerin entered the bedroom just after Mr. Kuloglija was handcuffed, his testimony at trial regarding an officer's mindset when clearing a scene is instructive: "[I was told there was a stabbing] so I obviously had my gun out. I didn't know if there was a suspect on scene or a bad guy on scene. That kind of thing. Basically what officers do is

² Note that the trial court is free to re-address its pre-trial motions at any time. Given the officers' evolving testimony during the 3.5 hearing and at trial, the court should have revisited the 3.5 issues in this case.

we go in and we clear all the rooms to make sure that, you know, there is no danger left in the apartment or in the building.” 3RP 57. Officer Kerin’s description suggests that identifying a suspect, or ‘bad guy’ is the primary task for officers clearing a scene.

Taking into account all of the surrounding circumstances, Mr. Kuloglija was in custody from the moment he was discovered by Officer LeCompte as there was a restraint on his freedom of movement to the degree associated with formal arrest. Mr. Kuloglija was ordered not to move by three armed police officers, all of whom were pointing their firearms at him. Officer Devlin testified at the trial in chief that when he entered the room, he interpreted the circumstances to suggest that Mr. Kuloglija was the suspect. 2RP 107. Officer Bisson testified that Officer LeCompte asked to see Mr. Kuloglija’s hands because that is where a person typically holds a weapon. From the moment these officers encountered Mr. Kuloglija he was treated as a suspect and his liberty was restrained in a manner commensurate with custody.

Due to the inconsistencies among the officers’ testimony, it is impossible to pinpoint exactly when Mr. Kuloglija was questioned during his frisk and arrest. What is clear, though, is that from the moment Mr. Kuloglija was spotted by Officer LeCompte, every action taken by these officers was to effectuate his arrest. Unlike Alija Kuloglija or Suada

Curavac, Mr. Kuloglija was the sole focus of the officers' investigative energies. There was not a moment, from discovery to arrest, where a gun was not trained on Mr. Kuloglija or where his freedom to move was not restricted at a level commensurate with formal arrest. Any reasonable person would have understood his situation as being in custody; at the sole mercy of the officers' weapons, restraints, and commands.

Unlike Alija Kuloglija or Suada Curavac, Mr. Kuloglija was the only person in the house ordered not to move. Unlike Alija Kuloglija or Suada Curavac, Mr. Kuloglija was the only person immediately ordered to show his hands upon discovery, identified with a weapon, frisked for weapons, and questioned. Every detail of Mr. Kuloglija's treatment suggests that for the purposes of Miranda he was in custody as soon as he was discovered by officers. The trial court found that Mr. Kuloglija was not free to leave in this situation but did not specifically pinpoint when that restraint commenced. 2RP 39. Every fact suggests it began from the moment he was discovered Officer LeCompte.

The second part of Miranda analysis is whether there was interrogation, which refers both to express questioning as well as its functional equivalent ("any words or actions on the part of the police (other than those normally attendant to arrest and custody) that the police should know are reasonably likely to elicit an incriminating response from

the suspect.”). Rhode Island v. Innis, 446 U.S. 291, 301 (1980) (footnotes omitted). As with custody, this also is an objective test: How would the officer's statements and conduct be perceived by a reasonable person in the same circumstances? Innis, 446 U.S. at 301.

Here, Officer LeCompte is quite clear that he asked Mr. Kuloglija, pre-Miranda, “What happened?” 1(a)RP 45-46. The trial court, acknowledging it had not found a similar factual case, ruled this was not interrogation, explaining that it was reasonable to ask this question to determine the situation at hand and that the question was not reasonably likely to elicit an incriminating response. 2RP 39. This was error. ‘Determining the situation at hand’ is the very essence of interrogation, especially when that question is designed to uncover past events. Rather than asking about the present – *Are you hurt? Did you see a suspect? Is there anyone else in the house?* – the officers’ first and only question was investigative. Given the circumstances under which Mr. Kuloglija was discovered bleeding at the scene holding a knife – the officers should have known that their question was reasonably likely to elicit an incriminating response.

The U.S. Supreme Court has defined interrogation as express questioning or its functional equivalent (words or actions that the police should know are reasonably likely to elicit an incriminating response).

State v. Johnson, 48 Wash.App. 681, 685 (1987) (citing Rhode Island v. Innis, 446 U.S. 291, 100 S.Ct. 1682, 64 L.Ed.2d 297 (1980)). Unlike standard booking questions or those attendant to arrest, the question “What happened?” goes to the heart of the investigation by seeking to elicit testimonial statements. See e.g., Pennsylvania v. Muniz, 496 U.S. 582, 601 (1990). Pre-Miranda, even non-verbal *acts* in response to custodial questioning may be testimonial and require suppression. See State v. Lozano, 76 Wash. App 116, 120, 882 P.2d 1191, 1193 (Div. 3 1994). Here, Mr. Kuloglija articulated response to the officers’ questions and demands.

Even if this court finds that asking “What happened” is not express custodial questioning, it rises to its functional equivalent. The U.S. Supreme Court has stated that the definition of *functional equivalent* focuses on the perceptions of the suspect, not the intent of the officers, and that it should include the officers’ knowledge of any special susceptibilities of the suspect. Pennsylvania v. Muniz, 496 U.S. 582, 601 (1990). In the present case, the officers observed that Mr. Kuloglija was severely injured (James Selig, Paramedic for King County Medic One, testified at the 3.5 hearing that Mr. Kuloglija was considered a critical patient in need of “advanced life support attention immediately.”). IRP 193-94. Three police officers pointed their firearms at Mr. Kuloglija,

ordered him to comply with certain instructions and then questioned him. From Mr. Kuloglija's point of view, it is impossible to imagine the pre-Miranda question, "What happened?" as being anything other than the functional equivalent of custodial interrogation and direct questioning. The police should have known that asking, "What happened?" of the only person with a weapon at the scene was reasonably likely to elicit an incriminating response.

Once Mr. Kuloglija made these inculpatory statements, Officer Devlin's Miranda advisement was of little significance. The cat was out of the bag, and absent a warning as to the potential inadmissibility of his pre-Miranda statements, there was no reason for Mr. Kuloglija to attach much meaning to the warnings now given to him.

The State bears the burden of overcoming the presumption of inadmissibility for post-Miranda statements where a pre-Miranda confession has already been obtained. See State v. Lavaris 99 Wash. 2d 851, 860 (1983) (en banc). Miranda warnings in this context do not erase the taint inherent in a pre-Miranda confession. Lavaris at 857. Here, as soon as Mr. Kuloglija stated that he stabbed his mother, Officer LeCompte demanded that he say it again. 1RP 67. Only after Mr. Kuloglija repeated this statement, on command, did Officer Devlin begin reading Mr. Kuloglija his Miranda rights. 2RP 67, 106. After Mr. Kuloglija had been

read his Miranda warnings, Officers LeCompte and Devlin jointly asked Mr. Kuloglija, again, “What happened?” 1RP 12. One can only imagine how hollow the warnings must have rung for him in that moment. The post-Miranda question asked of Mr. Kuloglija was identical to the pre-Miranda questioning he faced; the location the same and the officers the same. There was nothing to separate or distinguish his pre-Miranda questioning from the post-Miranda questioning except for the formal punctuation of warnings between the two. See Missouri v. Seibert, 542 U.S. 600, 601-602 (2004) (plurality opinion). The trial court erred when it permitted these statements to be used at trial.

THE TRIAL COURT ERRED IN DENYING THE DEFENDANT’S MOTION TO SUPPRESS MR. KULOGLIJA’S STATEMENTS MADE TO DETECTIVE SEESE AT HARBORVIEW MEDICAL CENTER.

At the 3.5 hearing, the State conceded and the trial court found that Mr. Kuloglija was in custody for Miranda purposes when he was restrained in a hospital bed at Harborview Medical Center, under 24 hour guard. See 2RP 41. The trial court nevertheless admitted Mr. Kuloglija’s statements to Detective Seese at Harboview finding that although Miranda was not read, the statements were admissible because Detective Seese “asked no question to elicit the statements.” 2RP 41.

In determining voluntariness, a trial court looks at the totality of the circumstances to decide whether the statement was coerced. State v.

Broadaway, 133 Wash.2d 118, 132, 942 P.2d 363 (1997). The defendant's mental abilities, physical condition, drug use, and the conduct of the police are all factors to consider. State v. Aten 130 Wash.2d 640, 664 (1996) (en banc). In State v. Aten, the Washington Supreme Court upheld the trial court's admission of a defendant's incriminating statements as there was no evidence that the defendant was affected by a calming, anti-anxiety medication taken approximately six hours prior to questioning. Id.

In the present case, Detective Seese testified that Mr. Kuloglija was in such physical pain and distress that, unprompted, he sought medical assistance on his behalf. 1RP 57. Detective Seese witnessed Harborview medical staff attend to Mr. Kuloglija on multiple occasions and give him injections in response to his pain complaints. 1RP 57. Although Detective Seese maintained at the 3.5 hearing that he was not interested in speaking with Mr. Kuloglija, he repeatedly responded to his inquiries, approached and re-approached his bedside, and otherwise engaged him in discussion.

The trial court committed reversible error in admitting Mr. Kuloglija's statements to Detective Seese. Mr. Kuloglija was under immense physical and emotional distress due to his life-threatening injuries and the pharmacological treatment of them. Detective Seese's presence, at a seat right beside Mr. Kuloglija's bed, with his badge, gun, and handcuffs

prominently displayed, combined with Mr. Kuloglija's weakened physical state, created a coercive, interrogation-like presence that required Miranda warnings. It appears that Detective Seese was acutely aware of these circumstances, stating during the 3.5 hearing that he figured, "If I just left his bedside we'd be done with this conversation." 1RP 62. Detective Seese did not leave Mr. Kuloglija's bedside and, in fact, returned to it over and over again.

Under these circumstances, Detective Seese's proximity, appearance, repeated presence at Mr. Kuloglija's bedside, and knowledge of Mr. Kuloglija's compromised health, created a coercive environment functionally equivalent to interrogation. There is no indication that Mr. Kuloglija was given Miranda warnings by Detective Seese or whether Mr. Kuloglija recalled the warnings given to him at the scene. No steps were taken to affirm the true value of those previously-issued warnings despite Mr. Kuloglija's pre-Miranda confession. The cat was *still* out of the bag, so to speak, and without any advisement regarding the potential inadmissibility of those pre-Miranda statements he had no reason to believe that an invocation of his rights would be of any benefit. "Any form of custodial interrogation is inherently coercive. Therefore, any confession obtained in the absence of proper Miranda warnings is by definition 'coerced' – regardless of how 'friendly' the actual

interrogation.” State v. Lavaris 99 Wash.2d 851, 857 (1983) (en banc) (citing Miranda at 457). See also Sonesheim, Miranda and the Burger Court: Trends and Countertrends, 13 Loy.U.Chi.L.J. 405, 423 (1982)). Here, Detective Seese did not read Mr. Kuloglija Miranda warnings and the previously given warnings had lost their meaning entirely as a result of Mr. Kuloglija’s response to the earlier officers’ pre-Miranda questioning at the scene.

Tellingly, the very same morning that Mr. Kuloglija spoke with Detective Seese he invoked his right to counsel when advised of his Miranda rights by Detectives Heckelsmiller and Koutouvidis. 1RP 77. The only difference between Detective Seese’s presence and Detectives Heckelsmiller and Koutouvidis was Miranda. It is not surprising, then, that Mr. Kuloglija spoke freely with Detective Seese (no warnings) and moments later invoked his right to counsel with Detectives Heckelsmiller and Koutouvidis (warnings given). There is more than a mere suggestion of coercion when Miranda and a few minutes time is the only difference between confession and silence. Mr. Kuloglija’s statements should have been suppressed as they were made in custody, absent warnings, and were the product of coercion.

The trial court also admitted several statements Mr. Kuloglija made to Detective Seese that were not relevant and highly prejudicial. The court

permitted Detective Seese to testify that Mr. Kuloglija made comments regarding the female staff at Harborview and what was on TV, questioned Detective Seese about his gun, and expressed a desire to die. 2RP 6-7. While Mr. Kuloglija's incriminating statements ("I'm stupid. I stabbed mother and self," and "I should have used gun, shoot everyone and myself.") are relevant, his other statements have no bearing on a determination of guilt and served only to alienate and prejudice Mr. Kuloglija in the minds of the jurors.

The court also permitted Detectives Heckelsmiller and Koutouvidis to testify that Mr. Kuloglija said he just wanted to talk as friends and get along but that it was too late for that. 1RP 78; 109. These statements were not probative to the matter at hand and quite prejudicial. Worse, these statements tie into Mr. Kuloglija's invocation of his right to counsel, which protects his Fifth Amendment privilege against self-incrimination. U.S. Const. Amend. V. The trial court properly excluded Mr. Kuloglija's assertion of that right, which occurred prior in time to these statements. 2RP 42; 1RP 78. Permitting the jury to hear Mr. Kuloglija's remarks on the context in which he would speak to the officers, however, is directly related to his assertion of counsel and should have been excluded.

Mr. Kuloglija is saying that it is too late to talk as friends *because* he has asserted his right to counsel. By admitting the more cryptic portion of

Mr. Kuloglija's assertion ("it's too late to talk as friends"), the jury was left to fill-in the context on their own. The malleability of the decontextualized statement is part of what makes it so prejudicial – in addition to being tied to an assertion of a constitutional right, when placed out of context it takes on an inculpatory sheen (*i.e.*, that it is too late to talk as friends because Mr. Kuloglija has attempted murder). Defense counsel was faced with an impossible choice: allow the statement to hang there, un-rebutted, suggesting guilt, or place the statement back in its proper context by eliciting Mr. Kuloglija's invocation of his right to counsel. The invocation of Mr. Kuloglija's right to counsel, however, is constitutionally protected and cannot be used against him. The court's ruling placed prejudicial information before the jury, put defense counsel in an untenable position, and denied Mr. Kuloglija his Sixth Amendment right to assistance of counsel.

Coursing through the entire analysis of Mr. Kuloglija's statements is the fact that English is not his native language. Detective Seese described understanding Mr. Kuloglija "most of the time," but acknowledged that his speech was occasionally "a little broken." 1RP 56. Detective Heckelsmiller stated that Mr. Kuloglija "appeared to" understand what I was saying. 2RP 183. Detective Koutouvidis described his accent as "fairly substantial" and noted that he could tell English was not his native

language. 1RP 114. The officers who responded to the scene said that Mr. Kuloglija spoke with an accent but that they believed he understood them (Officer LeCompte); that his accent was “pretty strong” (Officer Bisson); that his accent appeared to be European (Officer LeCompte); that Mr. Kuloglija did not respond to Miranda-related questions (Officer Devlin); that Mr. Kuloglija kept repeating only his name and age over and over again to the medics (Officer Devlin); and that the medics did not ever appear to establish communication with Mr. Kuloglija (Officer Devlin). 1(a)RP 46; 1RP 186; 1(a)RP 72; 1RP 30; Id. at 44-45; Id.

Mr. Kuloglija’s language skills are critical to the admissibility analysis not only because of the incredible weight a confession carries, but also because of the constitutional protections regarding statements to police. As the U.S. Supreme Court has explained, "A confession is like no other evidence. Indeed, 'the defendant's own confession is probably the most probative and damaging evidence that can be admitted against him.'" Arizona v. Fulminante, 499 U.S. 279, 296 (1991) (quoting Bruton v. United States, 391 U.S. 123, 139-40 (1968) (White, J., dissenting)). The erroneous admission of a confession has great risk of prejudice, because the jury may be tempted "to rely upon that evidence alone in reaching its decision." Id.

Language difficulties are a factor to be considered in evaluating the admissibility of evidence. State v. Lopez, 74 Wash.App. 264, 270, 872 P.2d 1131 (1994). A waiver of Miranda rights is voluntary if “it was the product of a free and deliberate choice rather than intimidation, coercion, or deception.” State v. Corn, 95 Wash.App. 41, 57-58, 975 P.2d 520 (1999) (quoting Moran v. Burbine, 475 U.S. 412, 421 (1986)). It must also be made with “full awareness of both the nature of the right being abandoned and the consequences of the decision to abandon it.” Id. at 58 (quoting Moran, 475 U.S. at 421). Courts must examine the totality of the circumstances in order to properly assess the nature of the choice and level of comprehension of the right being relinquished. Id.; see also State v. Terrovona, 105 Wash.2d 632, 646 (1986) (en banc).

“Any form of custodial interrogation is inherently coercive. Therefore, any confession obtained in the absence of proper Miranda warnings is by definition ‘coerced’ – regardless of how ‘friendly’ the actual interrogation.” State v. Lavaris 99 Wash.2d 851, 857 (1983) (en banc) (citing Miranda at 457). See also Sonesheim, Miranda and the Burger Court: Trends and Countertrends, 13 Loy.U.Chi.L.J. 405, 423 (1982)).

The present case is analytically similar to State v. Lavaris, in which the Washington State Supreme Court suppressed the statements of a non-native English speaking defendant, in part because he was never properly

informed that his pre-Miranda confession could not be used against him. 99 Wash.2d at 860. As the Lavaris court explained, the psychological damage was done; even subsequent Miranda advisements could not undue the damage. Id. The defendant's post-Miranda confession was not voluntary because of the tainted pre-Miranda confession. Id.

In Lavaris, the defendant's status as a non-native English speaker only heightened the importance of providing him with a clear instruction on the inadmissibility of his pre-Miranda confession: "The most critical factor is a showing that the defendant knew earlier statements made prior to the Miranda warnings could not be used against him. Petitioner was never informed of this important factor, therefore, his post-Miranda confession must be suppressed as the direct product of the first invalid confession." Id. at 858.

In the present case, given the circumstances of Mr. Kuloglija's incriminating statements (both a pre- and post-Miranda confession; the defendant's critical, life threatening injuries; his medicated state at Harborview; and his English language proficiency), the trial court committed reversible error by not suppressing these statements. The State cannot demonstrate beyond a reasonable doubt that the erroneous admission of the statements did not contribute to the verdict. See Chapman v. California, 386 U.S. 18, 24 (1967). Reversal is required.

THE TRIAL COURT ERRED IN ALLOWING THE TERM
“DOMESTIC VIOLENCE” TO BE USED AT TRIAL.

During pre-trial motions, defense moved to exclude mention of the term “domestic violence” during voir dire and at trial. 1RP 13. The court granted defense counsel’s motion. 1RP 13. The State noted that it did not intend to submit jury instructions that included a “domestic violence” tag as State v. Hagler discouraged such instructions and the prosecutor did not feel such a tag was appropriate. 1RP 13-14. The State noted, however, that it could not guarantee that the term would not come up during voir dire. 1RP 13-14. The court granted defense’s motion, specifically excluding it from inclusion in the jury instructions but allowing the term to be used during voir dire.

In Hagler, this Court stated, “It is neither necessary nor advisable to inform the jury that charges have been designated as domestic violence crimes under chapter 10.99 RCW.” 150 Wash.App. 196, 198 (Div. 1, 2009). This court explained further that a DV designation may, in fact, prejudice the defendant. Id. at 202.

In the present case, Detective Philip Glover repeatedly used the term “domestic violence” to describe his training and experience (“My specific area currently is the area of felony domestic violence.”). 3RP 66. The prosecutor’s next question asked whether the detective had special training

related to *domestic violence* crimes. 3RP 66. The detective's answer again included the term "domestic violence." 3RP 66. This question and answer session violated the court's pre-trial rulings, was prosecutorial misconduct, and prejudiced the defendant in the eyes of the jury. In his testimony, Detective Glover referenced the special "dynamics" of domestic violence cases, suggesting a particular complexity, separation, and animus for these crimes. See 3RP 66.

THE TRIAL COURT ERRED IN ALLOWING DETECTIVE GLOVER AND DETECTIVE HECKELSMILLER TO PROVIDE NON-EXPERT OPINION TESTIMONY AS TO BLOOD SPLATTER.

Defense sought to limit testimony offered by the State regarding blood splatter during pre-trial motions. See 1RP 27. During argument on this motion, the prosecutor stated, "I do not have an expert on this case." 1RP 27. The court stated that it sounded like there only would be testimony as to the location of blood splatter but that no one would be qualified to interpret the blood in a way that might indicate how the altercation occurred. 1RP 27-9. During trial, however, the State sought to admit significantly more than this. The State placed great weight on the issue of blood splatter, arguing that the pattern of blood on the inside of the apartment suggested that the attack was from within the apartment with the door closed, and therefore inconsistent with the defense theory of an outside attacker. See e.g., 2RP 76. The issue on appeal is whether the trial

court properly allowed Detectives Glover and Heckelsmiller to offer opinions as to the *meaning* of blood splatter (extrapolating from blood evidence the location of things and nature of events).

At trial, Detective Heckelsmiller testified that blood splatter tells the story of where things are. 2RP 153. Here, Detective Heckelsmiller crossed the line from fact-based testimony into impermissible opinion testimony by a lay witness. See E.R. 701. Although the court sustained defense counsel's objection to the State's questioning of Detective Heckelsmiller in this regard, it was only for lack of foundation. 2RP 153-4. The State did not attempt to qualify Detective Heckelsmiller as an expert on blood splatter, but did lay further foundation for his testimony on this point (Detective Heckelsmiller testified that he attended "a two hour course where how blood occurs [in] an environment, happens."). 2RP 154. Detective Heckelsmiller testified that it would not been possible for the door to have been open during the attack. 2RP 163. The State did not propose, nor did the court give, any instructions regarding experts. The State did not properly qualify Detective Heckelsmiller as an expert, did not lay sufficient foundation for his testimony, and did not provide proper notice of his "expert" testimony. Questioned outside the presence of the jury, Detective Heckelsmiller indicated that he was able to draw conclusions as to *how* the blood got there. 2RP 156. The court

acknowledged that there are blood splatter experts, but that what Detective Heckelsmiller was testifying to was “within the realm of common human experience.” 2RP 158.

Similarly, the court permitted Detective Philip Glover to speculate regarding the door’s position: “Blood would not have been able to land there because the door would have blocked it. So the door was most likely closed when the blood was splattered.” 3RP 74. The court erred in allowing Detectives Heckelsmiller and Glover to provide non-expert opinion testimony.

Unlike the effects of alcohol, which this court has described as “commonly known,” blood splatter is a unique science. See City of Seattle v. Heatley, 70 Wash.App.573, 582 (1993) (holding that where testimony is supported by proper foundation a police officer may provide non-expert, opinion testimony as to the degree of intoxication in a driving under the influence case); State v. Smissaert, 41 Wash.App.813, 815 (Div. 1, 1985) (“If the issue involves a matter of common knowledge about which inexperienced persons are capable of forming a correct judgment, there is no need for expert opinion.”). While intoxication is a matter of common knowledge about which lay persons can form an accurate opinion, blood splatter is a forensic science. See e.g., State v. Roberts, 142 Wash.2d 471, 520-21 (2000) (en banc) (finding that blood splatter analysis is an

accepted scientific technique not requiring a Frye analysis); U.S. v. Mitchell, 502 F.3d 931, 968-69 (2007) (finding no plain error in two FBI agents testifying that they saw blood splatter or what they believed to be blood); In re Stenson, 150 Wash.2d 207, 219-20 (2003) (finding a forensic scientist of 20 years who had testified in over 800 trials to be an expert on blood splatter analysis).

In Roberts, the State called a Washington State Crime Lab forensic scientist to testify regarding blood splatter. 142 Wash.2d at 520. The court noted that the forensic scientist's methods for analyzing blood splatter were generally accepted within the *scientific* community and that she could form an opinion based on pictures, without actually visiting the crime scene. Id. at 522. Similarly, in Mitchell, the Ninth Circuit held that the testimony of two FBI agents did not require expert qualification as one agent did not offer opinion as to the significance of blood splatter in a picture and the other did not testify that there was blood on a rock, merely that he believed the substance on the rock to be blood. 502 F.3d 968-69.

Blood splatter is a highly specialized field with accepted scientific techniques to (1) determine if a substance is blood and (2) hypothesize as to the relative position of people or objects based on that blood's shape, size, or appearance. Detective Heckelsmiller is not a scientist; a single two hour class does not qualify him to offer expert-level opinion testimony on

blood. Detective Heckelsmiller's testimony exceeded the scope of his personal experience and observations. The trial court abused its discretion by permitting Detective Heckelsmiller and Detective Glover to offer opinion on blood splatter.

Mr. Kuloglija, as a result, was deprived of his Sixth Amendment right to assistance of counsel as the State introduced expert-like opinion without having to meet the pre-trial requirements for noting an expert. Notice requirements for experts ensure opposing counsel has an adequate opportunity to prepare for complicated or specialized testimony. Both Detective Heckelsmiller and Detective Glover ventured into expert territory by extrapolating the position of the front door *during* the incident based on his observations of blood *after* the incident. 2RP 163; 3RP 74. The State assured the court during pre-trial motions that it did not have an expert on this case and indicated it would not seek to elicit testimony regarding blood to extrapolate details of the incident. The State violated this promise to the court thereby depriving Mr. Kuloglija of meaningful representation by counsel on this issue.

THE TRIAL COURT ERRED IN ALLOWING DR. FOY TO
PROVIDE NON-EXPERT OPINION TESTIMONY AS TO
"DEFENSIVE WOUNDS."

Similarly, the court permitted Dr. Foy to provide non-expert opinion testimony as to "defensive wounds." Although Dr. Foy may be an expert

in the field of surgical medicine³ the State failed to lay any foundation as to identifying defensive wounds. Defense counsel failed to object to Dr. Foy testifying regarding defensive wounds, but this issue is nevertheless ripe for review because this was manifest error that affects Mr. Kuloglija's constitutional rights to due process and assistance of counsel. U.S. Const. Am. VI, XIV. Defense was not provided notice that Dr. Foy would testify regarding defensive wounds and therefore were deprived of an opportunity to prepare cross-examination on this point or potentially seek a defense expert for rebuttal.

The State did not lay any foundation before eliciting testimony on defensive wounds from Dr. Foy. 3RP 112. Dr. Foy's explanation of 'defensive wounds' illustrates the criminal – not medical – nature of this term: "Defensive wounds are usually wounds that when someone blocks someone who may be attacking them with their hands. In particular, grabs a knife." 3RP 112. Dr. Foy continued, noting that defensive wounds can be typical of stabbing victims. 3RP 112. Dr. Foy is an attending physician at Harborview Medical Center; he does not investigate stabbing incidents, identify victims versus suspects, participate in charging decisions, or work in a forensic capacity. Dr. Foy exceed the scope of his

³ Note, however, that the State did not seek to qualify Dr. Foy as an expert, stated during pre-trial motions that they did not have an expert on this case, and did not offer a jury instruction regarding expert testimony.

expertise (surgical medicine) and ventured into crime reconstruction that suggested Alija Kuloglija had wounds typical of a victim, whereas Dzevad Kuloglija did not. Again, defense counsel was not provided notice of Dr. Foy's "expert" testimony on this point and Mr. Kuloglija was denied his Sixth Amendment right to assistance of counsel.

THE TRIAL COURT ERRED IN PERMITTING DETECTIVE SAMPSON TO TESTIFY TO A PREVIOUS POLICE CONTACT THAT SHE HAD WITH THE DEFENDANT AND BY ATTEMPTING TO REMEDY HER TESTIMONY BY INSTRUCTING DETECTIVE SAMPSON TO LIE TO THE JURY THAT SHE CONTACTED MR. KULOGLIJA AS A WITNESS IN A CASE.

Detective Sampson's testimony was more prejudicial than probative and should not have been permitted. At trial, Detective Sampson testified to a previous contact that she had with Mr. Kuloglija. 5RP 48. The State sought Detective Sampson's testimony to bolster their argument that Mr. Kuloglija spoke and understood English well enough to knowingly and intelligently comprehend Miranda warnings and understand questioning by police officers and detectives. 5RP 48-51. Detective Sampson's only previous contact with Mr. Kuloglija occurred a little over three years prior to the date of her testimony. 5RP 48. Detective Sampson contacted Mr. Kuloglija as the primary suspect in a domestic violence harassment case. 1RP 151. Detective Sampson questioned Mr. Kuloglija, read him his Miranda warnings, and arrested and booked Mr. Kuloglija for the crime.

1RP 159; 164-65. The charges were subsequently dismissed.

The mere fact that one of the State's witnesses was a police officer not involved in the present case hints at prior bad acts. While the prosecutor did not specifically seek to admit 404(b) evidence – and the trial court did not conduct a pre-trial hearing on this issue – both the State and the court seemed to recognize the potential 404(b) nature of Detective Sampson's testimony. 5RP 42-43. As a solution, the trial court excused the jury, instructed the prosecutor to ask Detective Sampson in what context she contacted Mr. Kuloglija, and then instructed Detective Sampson to say that he was a witness (rather than a suspect) in the prior case. 5RP 51-52. In other words, the trial court specifically instructed Detective Sampson to perjure herself. Defense counsel was then left with the impossible decision of remaining complicit with this ruse in order to keep out prejudicial information (prior police contact) or else impeach the witness on this lie – essentially trading prejudicial information for the opportunity to attack the witness's credibility. The trial court's invention of this falsity restricted defense counsel in an untenable way, required Detective Sampson to perjure herself, and denied Mr. Kuloglija his Sixth Amendment right to assistance of counsel.

THE TRIAL COURT ERRED IN NOT ALLOWING SAUDA CURAVAC TO TESTIFY TO ALIJA KULOGLIJA'S STATEMENTS AT THE SCENE.

The court erred in not allowing Sauda Curavac to testify to the “dying declaration” of Alija Kuloglija. Defense counsel sought to elicit from Ms. Curavac that her mother, Alija Kuloglija, stated that her son, Dzevad Kuloglija, did not commit this crime, but instead attempted to protect her from an unknown assailant. 4RP 130-31; 150. The State objected to Ms. Curavac testifying on this point as Ms. Kuloglija was not “unavailable” under 804(b)(2). *Id.* Ms. Kuloglija was in the courtroom hallway during Ms. Curavac’s testimony and testified immediately after Ms. Curavac. 4RP 141; 154-179.

Appellant’s acknowledge that Ms. Kuloglija was not “unavailable” under 804(b)(2). Ms. Curavac, however, should have been permitted to testify to Ms. Kuloglija’s statements as either a “present sense impression” or an “excited utterance.” See ER 803(a)(1) and (2). Defense counsel’s attempts to admit these statements under 804(b)(2) and 803(a)(2) preserves the issue for appellate review. Although the State made a hearsay objection, defense counsel attempted to locate exceptions that could have permitted Ms. Curavac’s testimony on this point.

In State v. Walker, this court held that although an objection must be specific to preserve an issue for appeal, an appellate court may consider

the propriety of the ruling if the specific basis for the objection is apparent from the context. 75 Wash.App. 101, 109 (Div. 1, 1994). Walker is applicable to the present case in the inverse – here, rather than failing to make the proper objection to exclude evidence, defense counsel failed to articulate the proper exception in order to admit evidence. See Id. The “present sense impression” exception to the hearsay rule was apparent from the factual context and the court should have considered that exception, as well, even though defense counsel failed to specifically raise it. Ms. Kuloglija was suffering from the effects of the attack when she made her statements; she described the events of the attack while suffering from the attack. 4RP 132. It was error for the court not to admit these statements under either the “excited utterance” or the “present sense impression” exceptions to the hearsay rule.

Even if this court finds that it was proper under the rules of evidence to exclude Ms. Curavac’s testimony regarding her mother’s statements at the scene, Mr. Kuloglija was denied his right to present a defense as a result of this ruling. Even where relevant testimony may otherwise be inadmissible under the rules of evidence, such evidence should be permitted so as not to infringe on a criminal defendant’s right to present a defense. See Chambers v. Mississippi, 410 U.S. 284, 302 (1973) (“where constitutional rights directly affecting the ascertainment of guilt are implicated, the

hearsay rule may not be applied mechanistically to defeat the ends of justice”); Davis v. Alaska, 415 U.S. 308, 318 (1974) (holding that limiting a probationer’s right to effective cross-examination through a court order prohibiting questions regarding a key witness’s juvenile record violated the right to confrontation); Rock v. Arkansas, 483 U.S. 44, 61 (1987) (finding that a state’s *per se* rule precluding hypnotically refreshed testimony impermissibly infringed on the defendant’s right to testify on his own behalf); Akey v. Oklahoma, 470 U.S. 68, 83 (1985) (finding that due process requires states to provide access to a psychiatrist where the defendant is unable to afford one and his sanity is likely to be a significant factor at trial).

Just as in Chambers, here the hearsay rules excluded evidence paramount to Mr. Kuloglija’s defense. See 410 U.S. at 302. In Chambers, the trial court restricted defendant’s ability to show a witness’s bias, thereby depriving the defendant of a right to present a defense. Id. Ms. Curavac’s corroboration of Ms. Kuloglija’s testimony was as important to Mr. Kuloglija’s case as witness bias was to the defendant in Chambers. Ms. Kuloglija is the only non-charged individual with firsthand knowledge of what happened. Her credibility is the key to the case. For all of the officers, detectives, and medics who testified during the trial, none but Alija and Dzevad Kuloglija possess personal knowledge of what actually

occurred. Due process guarantees defense counsel the right to present a defense. In this case, that includes the opportunity to bolster Alija Kuloglija's version of events by seeking admission of prior, consistent testimony, even if a technical application of the rules of evidence may otherwise bar it.

Ms. Kuloglija's testimony exonerated Mr. Kuloglija; her credibility was perhaps the single most important factor in this case. Preventing Ms. Curavac from testifying to this point deprived Mr. Kuloglija of his best defense. It was error for the court to prohibit Ms. Curavac from testifying to Ms. Kuloglija's prior identification of an unknown assailant as the perpetrator of this crime; that exclusion denied Mr. Kuloglija his constitutionally-protected right to a defense.

THE TRIAL COURT ERRED IN DENYING DEFENDANT'S MOTION TO ARREST JUDGMENT.

It is well established that the sufficiency of the evidence upon which a conviction was based may be challenged for the first time on appeal. State v. Slack, 113 Wn.2d 850, 859, 784 P.2d 494 (1989); State v. Baeza, 100 Wn.2d 487, 488, 670 P.2d 646 (1983). The relevant test is "whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." State v. Green, 94 Wn. 2d at 221 (1980). An

accused whose conviction had been reversed due to insufficient evidence cannot be retried. State v. Anderson, 96 Wn.2d 739, 742, 638 P.2d 1205 (1982).

In the present case, the jury heard testimony from the alleged victim, Ms. Alija Kuloglija, that an unknown assailant entered her home and attacked her. 4RP 167-68. She testified that the defendant is her caretaker and her husband's caretaker and that during this incident he attempted to stop the unknown assailant, but suffered life-threatening injuries himself as a result. 4RP 169. Detective Heckelsmiller testified that the kitchen blade found in the garbage can did not match the knife set in the kitchen, suggesting that the weapon used in the attack came from outside the home. 2RP 185. Detective Heckelsmiller also noted drops of blood in the parking lot, suggesting that a bleeding intruder left the apartment through the parking lot. 2RP 186. The State's forensic scientist testified that one sample of DNA was below the threshold for reliability and therefore could not be matched to either Dzevad or Alija Kuloglija. 4RP 44. Mr. Kuloglija's confession at the scene was obtained at gun point, while he was suffering from life-threatening injuries. 2RP 64; 66-67. Mr. Kuloglija's understanding of the English language is unclear. Mr. Kuloglija's confession at Harborview Medical Center was obtained while he was receiving medications for his pain and injuries. 1RP 57. Even

viewing all of the evidence in the light most favorable to the State, no rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.

MR. KULOGLIJA'S CONVICTION SHOULD BE REVERSED UNDER THE CUMULATIVE ERROR DOCTRINE.

In the event this Court concludes that none of the errors discussed above warrants reversal alone, the cumulative effect of the errors at trial requires reversal. State v. Russell, 125 Wn.2d 24, 93-94, 882 P.2d 747 (1994). cert. denied, 514 U.S. 1129 (1995); State v. Alexander, 64 Wash. App. 147, 150-51, 822 P.2d 1250 (1992).

To determine whether cumulative error exists, the reviewing court examines the nature of the errors. Russell, 125 Wn.2d at 94. Constitutional error is more likely to contribute to cumulative error than multiple non-constitutional errors. Id. In the present case, both the court and the prosecutor did not abide by pre-trial rulings regarding use of the term "domestic violence" and the bounds of opinion testimony from lay witnesses. Significant, prejudicial information regarding Mr. Kuloglija's medications, mental health history, and prior police contacts were admitted at trial. These errors, among others, require reversal. Id. at 93-94.

"It is well accepted that reversal may be required due to the cumulative effects of trial court errors, even if each error examined on its own would otherwise be considered harmless." Russell, 125 Wn.2d at 93-94 (1994) (citing State v. Coe, 101 Wn.2d 772, 789, 684 P.2d 668 (1984)); State v. Badda, 63 Wn.2d 176, 183, 385 P.2d 859 (1963); State v. Alexander, 64 Wn.App. 154, 822 P.2d 1250 (1992); State v. Weber, 159 Wn.2d 252, 279, 149 P.3d 646 (2006). The harmless error analysis employed is determined by the nature of the error. Russell, 125 Wn.2d at 94. Here, the errors were both of constitutional and non-constitutional magnitude.

Each of the errors discussed above would, individually, warrant reversal. This Court also has discretion under RAP 2.5(a)(3) to review all errors, preserved and inadequately preserved, as part of a cumulative error analysis to ensure that Mr. Kuloglija received a fundamentally fair trial. State v. Alexander, 64 Wn. App. at 150-51; U.S. Const. Amend. 14. This Court should reverse his conviction and remand for a new trial.

E. CONCLUSION

For the reasons stated above, Mr. Kuloglija's convictions should be reversed.

Respectfully submitted this 4th day of April 2011.

A handwritten signature in cursive script, appearing to read "Blair Russ", written over a horizontal line.

Blair Russ, WSBA #40374
Attorney for the Appellant