No. 43240-4

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION TWO

STATE OF WASHINGTON,

Respondent,

v.

BARBARA ANN CLAYTON,

Appellant.

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

APPELLANT'S REPLY BRIEF

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A. ARGUMENT IN REPLY

1. **The trial court's refusal to vacate one of the murder convictions violated Ms. Clayton's right to be free from double jeopardy**

The State relies on State v. Johnson, 113 Wn. App. 482, 54 P.3d 155 (2002), and State v. Meas, 118 Wn. App. 297, 75 P.3d 998 (2003), to argue no double jeopardy violation occurred despite the trial court's refusal to vacate one of Ms. Clayton's murder convictions. SRB at 35-38. The Washington Supreme Court has never cited Johnson nor Meas and those cases are inconsistent with the rule set forth in State v. Womac, 160 Wn.2d 643, 160 P.3d 40 (2007), and State v. Turner, 169 Wn.2d 448, 238 P.3d 461 (2010). Under Womac, Turner, and the Supreme Court's more recent decision in In re Personal Restraint of Strandy, 171 Wn.2d 817, 256 P.3d 1159 (2011), the trial court was required to *wholly vacate* one of the murder convictions and remove any reference to it on the judgment. The court's decision to "merge" the two convictions instead did not solve the double jeopardy problem.

In Johnson and Meas, as in this case, the trial court entered a finding on the judgment and sentence that the two convictions "merged" and imposed only a single sentence. Johnson, 113 Wn. App. at 487; Meas, 118 Wn. App. at 300 n.1, 304-05. The Court of Appeals

acknowledged that the trial court's use of the term "merge" was incorrect and that the court was not really applying the merger doctrine. Johnson, 113 Wn. App. at 489. Nonetheless, the Court of Appeals affirmed, holding the trial court had "create[d] the effect of a merger" by imposing only a single punishment. Id. The Court concluded no double jeopardy violation occurred because Johnson did not receive multiple punishments. Id.; accord Meas, 118 Wn. App. at 304-05.

But a conviction that is referenced on the judgment *is* "punishment" for purposes of the Double Jeopardy Clause. Turner, 169 Wn.2d at 463-65. In Turner, the trial court vacated the offending conviction but entered a separate order stating the conviction remained valid and could be reinstated if the other conviction was overturned on appeal. Id. at 451-52. On review, the Supreme Court reiterated the well-established rule that "[t]he term 'punishment' encompasses more than just a defendant's sentence for purposes of double jeopardy." Id. at 454. The trial court in Turner had imposed "punishment" by including reference to the offending conviction on the judgment. Id. at 464-65. The Supreme Court reversed the trial court's decision and adopted the following rule: "[t]o assure that double jeopardy proscriptions are carefully observed, a judgment and sentence must not

include any reference to the vacated conviction—nor may an order appended thereto include such a reference; similarly, no reference should be made to the vacated conviction at sentencing." Id. at 464-65.

In Strandy, the Supreme Court made clear that the Turner rule applies—and double jeopardy principles are violated—when the trial court does not vacate the offending conviction but states on the judgment and sentence that the two convictions "merge." Strandy was convicted of two counts of felony murder and two counts of aggravated first degree murder for two homicides. Strandy, 171 Wn.2d at 818. For sentencing purposes, the trial court "merged" the felony murder convictions with the aggravated first degree murder convictions but did not vacate the felony murder convictions. Id. at 818-19. Applying Turner, the Supreme Court reversed, stating, "[w]hen a conviction violates double jeopardy principles, it must be *wholly vacated.*" Id. at 819-20 (emphasis added).

Strandy is indistinguishable from this case. Notwithstanding Johnson and Meas, the trial court was required to *wholly vacate* one of Ms. Clayton's murder convictions and remove any reference to it on the judgment. Turner, 169 Wn.2d at 464-65; Strandy, 171 Wn.2d at 819-20. Because the trial court did not do so, double jeopardy

principles were violated. The case must be remanded with instructions to vacate one of the murder convictions.

2. Ms. Clayton's statements made at the hospital soon after the murder were relevant and admissible as circumstantial evidence of her state of mind at the time of the shooting

The central issue in the case was Ms. Clayton's state of mind and whether she was legally insane at the time of the shooting. As set forth in the opening brief, case law establishes that, when a defendant asserts an insanity defense, evidence of her state of mind both before and after the charged incident is admissible as circumstantial evidence of her state of mind at the time of the incident. Such evidence may include evidence of the defendant's actions *and* words. The defendant's statements are admissible not to prove the truth of the matters asserted but rather to elucidate her mental condition. For these reasons, this Court should reject the State's arguments that Ms. Clayton's statements at the hospital were inadmissible because they were unreliable hearsay and because they were not relevant to her state of mind at the time of the shooting.

The State relies on State v. Parr, 93 Wn.2d 95, 606 P.2d 263 (1980), and State v. Sublett, 156 Wn. App. 160, 231 P.3d (2010), aff'd, 176 Wn.2d 58, 292 P.3d 715 (2012), to argue Ms. Clayton's statements

describing Mr. Giffin's conduct were not admissible to show her state of mind. SRB at 27. In Parr, a prosecution for murder, the defendant claimed the victim was accidentally shot after she reached for a gun during an argument and he tried to grab it away from her. Parr, 93 Wn.2d at 96. At trial, the trial court permitted the victim's brother to testify that, six months before the incident, the victim told him she was afraid of the defendant because he had threatened her with a gun. Id. at 98. The Supreme Court held the victim's out-of-court statement that she was afraid of the defendant was admissible under the "state of mind" exception to the hearsay rule because it was relevant to rebut the defendant's claim that she would have reached for a gun during an argument with him. Id. at 102-03, 106. But the victim's statement that the defendant had threatened her with a gun was *not* admissible because it was overly prejudicial. Id. at 104, 106-07. The court explained, "any evidence tending to show that the defendant was a violent person . . . was almost inevitably highly damaging to his defense. Evidence that he had threatened the victim with violence was even more damaging." Id. at 106-07. Thus, the court set forth the following rule:

> In the interest of protecting both the State's right to disprove accident or self-defense and the defendant's right to a fair trial, free of unnecessary and prejudicial evidence which is not subject to cross-examination, the

> trial court should allow the State to prove the victim's declarations about his or her own state of mind, where relevant, but should not permit it to introduce testimony which describes conduct or words of the defendant.

Id. at 104; accord Sublett, 156 Wn. App. at 198-99 (murder victim's out-of-court statement that he believed co-defendant was stealing from him not admissible under state of mind exception).

Parr does not apply to this case. It does not abrogate or even address the longstanding rule that, where the declarant's sanity is at issue, his or her statements are considered "verbal acts" that are admissible when relevant to support or rebut the claim of insanity, even if they describe the actions of another person. Such statements are not objectionable as hearsay because they are admitted not to prove the truth of the matters asserted but rather as circumstantial evidence of the declarant's mental state. The balance of interests underlying the decision in Parr are not the same as in this case, where the declarant is the defendant and the statements are offered to support a defense of insanity. In this case, Ms. Clayton's constitutional right to present a defense outweighs the State's interest in excluding the statements.

The longstanding rule in Washington is that the hearsay rule does not bar the admission of out-of-court statements when offered to prove or rebut the declarant's sanity. Such statements are "simply

verbal acts to be considered as a part of the declarant's general conduct," which tend to show that the declarant was insane or not at the time of making the statements. McFarland v. Dept. of Labor & Indus., 188 Wash. 357, 363, 62 P.2d 714 (1936).

In a criminal case where the defendant asserts a defense of insanity, any of her statements made at around the time of the incident are admissible if they tend to show her mental condition. See State v. Hawkins, 70 Wn.2d 697, 705, 425 P.2d 390 (1967) (defendant's letters written to his mother while in jail admissible to rebut insanity defense); State v. Collins, 50 Wn.2d 740, 314 P.2d 660 (1957) ("when the defense is insanity . . . *any and all conduct* of the person is admissible in evidence"; defendant's out-of-court statements admissible to support insanity defense); State v. Williams, 34 Wn.2d 367, 209 P.2d 331 (1949) ("where the sanity of a person accused of a crime is in issue, his declarations, whether written or oral, made at the time of the offense or at a time sufficiently close thereto to [sic] have some probative force in regard to his mental condition, are admissible in evidence) (internal quotation and citation omitted); State v. Flanney, 61 Wash. 482, 483, 112 P. 630 (1911) ("in all cases involving mental responsibility. . . every fact which tends to show that the mental condition of the subject

was abnormal at the time of the execution of the instrument or commission of the crime is competent."); State v. Constantine, 48 Wash. 218, 93 P. 317 (1908) (defendant's statements made to daughter, "which tended to indicate rationality," admissible to rebut defense of insanity).

Under these authorities, Ms. Clayton's statements at the hospital were admissible because they shed light on her mental condition, which was the central issue in the case. They were not objectionable as hearsay because they were not offered to prove the truth of the matters asserted, i.e., to prove that Mr. Giffin actually committed the acts alleged in the statements. Instead, they were offered to show Ms. Clayton's mental preoccupations. They were relevant and admissible because they "tend[ed] to show that the mental condition of [Ms. Clayton] was abnormal at the time of . . . commission of the crime." Flanney, 61 Wash. at 483.

Because Ms. Clayton's statements made at the hospital were offered to elucidate her mental condition, the truthfulness of the statements was not at issue. Indeed, it is logical to assume that statements offered to prove a claim of insanity will often be untruthful. This does not make them inadmissible and may even add to their

probative value. Thus, the trial court abused its discretion in ruling that the statements were inadmissible in part because they were uncorroborated. See 5C Karl B. Tegland, Washington Law and Practice: Evidence Law and Practice § 803.11 (5th ed. 2013) (ER 803(a)(3), state of mind exception, "says nothing about trustworthiness, and it is questionable whether otherwise admissible evidence should be excluded simply because the judge disbelieves it or otherwise regards the evidence as untrustworthy").

Finally, Ms. Clayton's statements made at the hospital were sufficiently close in time to the shooting that they were relevant to show what her state of mind was at the time of the shooting. The State essentially conceded this point at trial when it successfully moved to admit two photographs of Ms. Clayton taken by police at the precinct after her arrest, as probative of her state of mind. 1/23/12RP 44-50.

In sum, Ms. Clayton's statements made at the hospital were admissible to support her insanity defense and the trial court abused its discretion in excluding the evidence.

3. The details of prior incidents of domestic violence between Ms. Clayton and Mr. Giffin were admissible because they were necessary to explain the basis of the expert's opinion about Ms. Clayton's mental state

Contrary to the State's argument, the defense presented a sufficient offer of proof to raise this error on appeal. The issue is whether "the substance of the evidence was made known to the court by offer or was apparent from the context within which questions were asked." ER 103(a)(2).

"An offer of proof serves three purposes: it informs the court of the legal theory under which the offered evidence is admissible; it informs the judge of the specific nature of the offered evidence so that the court can assess its admissibility; and it creates a record adequate for review." State v. Ray, 116 Wn.2d 531, 538, 806 P.2d 1220 (1991).

A formal offer of proof is not necessary "if the substance of the excluded evidence is apparent either from the questions asked, the context in which the questions are asked, 'or otherwise.'" Id. at 539. ER 103(a)(2) does not require that the "details" of the testimony be apparent, as long as the substance of the testimony is apparent from the record. Id.

In In re Detention of McGary, 175 Wn. App. 328, 335, 306 P.3d 1005 (2013), the State moved to preclude the defense expert from opining about the detainee's risk of recidivism based upon the expert's use of the "MATS-1" actuarial instrument. During voir dire, the expert did not testify exactly what score McGary received on the MATS-1 or exactly how that score would have affected the assessment of his risk of recidivism. Id. at 337. But the expert did testify that, given McGary's age, his maximum rate of recidivism under the MATS-1 would be 25.5 percent. Id. Thus, the Court concluded the potential significance of the expert's testimony was adequately disclosed for purposes of ER 103(a)(2). Id.

As in McGary, the potential significance of the expert's testimony about the prior incidents of domestic violence was adequately disclosed on the record in this case. In his reply to the State's motion to exclude the evidence, defense counsel described the prior incidents of abuse Ms. Clayton recounted to the expert. Ms. Clayton described "being struck repeatedly in the eye by Cutis [sic] that she temporarily lost sight in the eye. There was one occasion in which Curtis swung an axe at her. She describes being pulled out of a

bathtub, naked, and repeatedly being stomped and kicked by Curtis." CP 61.

In the reply brief and at the hearing on the State's motion to exclude the evidence, counsel explained why that information was necessary to the expert's opinion. Dr. Dutton had performed a "detailed analysis" of Ms. Clayton and her relationship with Mr. Giffin and concluded that "the mixture of fear and terror of Curtis from prior abuse and a fear of abandonment that Curtis was, in Barbara's mind, about to abandon her for another woman, placed her in a transient psychotic state at the time of the shooting." CP 61. Counsel explained that, according to Dr. Dutton, the prior acts of domestic violence were the "critical factor" that created the fear that caused Ms. Clayton to enter into a psychotic state at the time of the offense. CP 71. Dr. Dutton's report was "tied into the specific incidents of domestic violence." 1/09/12RP 54. The details of the abuse were critical to his opinion because of their severity. 1/09/12RP 54-55. Dr. Dutton's report explained that scientific studies show that different kinds of events can trigger different kinds of reactions in borderline personalities, including psychosis, depending upon the severity of the triggering event. 1/09/12RP 59. Thus, in order to understand why Ms.

Clayton had such an extreme reaction on that day, it was necessary for the jury to hear the details of the prior abuse as she recounted them to Dr. Dutton. 1/09/12RP 59.

This record was more than adequate to make known to the trial court the substance of the proffered evidence and therefore satisfies ER 103(a)(2). Indeed, the court made detailed findings and conclusions in its order delineating what the expert could and could not testify about. CP 77-79. At no time did the court express any difficulty in entering its ruling or complain about the inadequacy of the record.

As set forth in the opening brief, Ms. Clayton's statements to the expert recounting details of prior incidents of abuse inflicted upon her by Mr. Giffin were admissible to explain the basis for the expert's opinion. The details were necessary to support the expert's opinion about why Ms. Clayton had such an extreme reaction and became temporarily psychotic at the time of the incident. According to the expert, Ms. Clayton's fear arising from the prior incidents of abuse was a necessary ingredient of her mental state. Thus, exclusion of the details of the abuse seriously undermined the effectiveness of the expert's testimony. The trial court's concern that the jury could have misused the evidence could have been cured by an instruction

informing the jury of the limited purpose of the evidence. Exclusion of the evidence violated Ms. Clayton's right to present a defense.

4. Ms. Rardin's statements to police were admissible to impeach her testimony at trial

The substance of this claim is also adequately set forth in the record. A formal offer of proof is not necessary "if the substance of the excluded evidence is apparent either from the questions asked, the context in which the questions are asked, 'or otherwise.'" Ray, 116 Wn.2d at 539.

Here, the substance of the excluded evidence is apparent from the questions counsel asked Officer Eriksen on cross-examination. Counsel asked Officer Eriksen if Ms. Rardin said "she was under the impression that the female might be afraid of the male." 1/23/12RP 140. Counsel also asked, "Did she tell you that this female went in and out of the store several times to avoid the male?" 1/23/12RP 141. Finally, counsel asked, "Did she tell you that the female entered on the passenger side, that she was trying to avoid the male?' 1/23/12RP 141. From these questions, it is apparent that these are the statements Ms. Rardin made to police that counsel believed were inconsistent with her testimony on the stand.

As argued in the opening brief, Ms. Rardin's statements to police were inconsistent with her trial testimony and were therefore proper impeachment.

5. **Imposition of a sentence of life without the possibility of parole based on prior convictions that were not proved to a jury beyond a reasonable doubt violated Ms. Clayton's rights to due process and equal protection of the law**

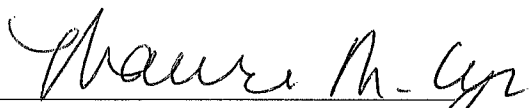
Ms. Clayton relies on the briefing contained in the opening brief for these issues and notes that the case on which the State relies, State v. Witherspoon, 171 Wn. App. 271, 286 P.3d 996 (2012), review granted, 177 Wash.2d 1007, 300 P.3d 416 (2013), is currently on review in the Washington Supreme Court. Oral argument is scheduled for October 22, 2013.

B. CONCLUSION

For the reasons given above and in the opening brief, Ms. Clayton's constitutional rights to present a full defense and confront the witnesses against her were violated, requiring reversal of the convictions and remand for a new trial. Also, Ms. Clayton's two convictions for second degree murder violated her constitutional right to be free from double jeopardy, requiring that one of the convictions be vacated. Finally, Ms. Clayton's sentence of life without the

possibility of parole based on judicial fact-finding violated her constitutional rights to due process and equal protection, requiring reversal of the sentence and remand for sentencing within the standard range.

Respectfully submitted this 23rd day of September, 2013.



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

STATE OF WASHINGTON,	)	
	)	
RESPONDENT,	)	
	)	NO. 43240-4-II
v.	)	
	)	
BARBARA ANN CLAYTON,	)	
	)	
APPELLANT.	)	

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