NO. 43240-4

COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON

STATE OF WASHINGTON, RESPONDENT

v.

BARBARA ANN CLAYTON, APPELLANT

Appeal from the Superior Court of Pierce County
The Honorable Frank E. Cuthbertson

No. 11-1-01404-7

BRIEF OF RESPONDENT

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B. STATEMENT OF THE CASE.

1. Procedure

On April 4, 2011, the State charged Barbara Ann Clayton with one count of murder in the first degree as a crime of domestic violence with a firearm enhancement and an aggravating circumstance of domestic violence, and one count of unlawful possession of a firearm in the first degree. CP 1–2. On September 21, 2011, the State amended defendant's charges to include one count of felony murder in the second degree with a firearm enhancement and an aggravating circumstance of domestic violence, and one count of malicious mischief in the second degree. CP 6–8.

A CrR 3.5 hearing was held on December 2, 2011 before the Honorable Frank E. Cuthburtson, who ruled that statements the defendant made at the scene, in the patrol car and at the hospital were volunteered statments that were not the product of any custodial interrogation and

therefore could be adduced by the State in its case-in-chief. CP 21-25, *see also* Appendix A; 12/2/2011 RP 1 - 83.[1] The matter came back before Judge Cuthbertson for trial on January 3, 2012. IIRP 2-3. When hearing motions in limine, the court granted the State's motion to exclude the defense from adducing the content of statements made by defendant several hours after officers arrested her when she was at a hospital where she had been taken because she was too inebriated to be booked into jail. IIRP 91. The court found these statements were hearsay and did not find any exception to the hearsay rule under ER 803(a) which was applicable. IIRP 91-92.

The court also made a lengthy ruling about all of the hearsay about which Dr. Donald Dutton, the defense expert, could testify when giving his opinion about the defendant's sanity at the time of the shooting. The court permitted Dr. Dutton to testify about defendant's childhood, any abuse that she experienced during her developmental years and prior

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[1] The verbatim report of proceedings consists of eleven volumes of transcripts. Seven of these have a Roman numeral volume number on the front - I through VIII - but with no Volume III. Volumes I and II have consecutive page numbering. Volume I contains the record of the omnibus hearing and Volume II contains motion hearings before the trial judge prior to jury selection. Citations to Volumes I and II shall be referred to as "IRP" and "IIRP" respectively. Volume IV through VIII contain the trial proceedings and are consecutively paginated, but with Volume IV starting over again at page 1. The State will refer to these volumes as "RP" in its brief. The verbatim report of proceedings also includes four transcripts that are paginated separately. These proceedings occurred on April 4, 2011 (arraignment), December 2, 2011 (3.5 hearing), February 3, 2012 (reading of the verdicts), and March 23, 2012 (sentencing). The State will refer to these proceedings as "[DATE] RP" in its brief.

relationships, her parenting history, financial hardship and homelessness, her perception of the victim as an argumentative and abusive alcoholic, the victim's violence in general terms, her recollection of the events of the day of the murder, and defendant's daughter's concerns about domestic violence between defendant and the victim, the psychological testing and the reasons for the defendant's acute fear of abandonment. IIRP 99-102. The court did grant in part the State's motion to preclude the defense expert from discussing specific instances of domestic violence between defendant and the victim related to him by either the defendant or her daughter as the court found the probative value outweighed by the danger of unfair prejudice and confusion of the issues under ER 403. IIRP 99-104. The court made it clear, however, that this ruling was with regard to Dr. Dutton, and would not apply to a witness, such as the defendant or her daughter, who had firsthand knowledge of instances of domestic violence. IIRP 104-106.

After conclusion of the evidence, the State proposed, and the court gave, a lesser-degree jury instruction on the offense of intentional murder in the second degree on Count I. RP 644; CP 158–60. Defendant obtained instructions on the defense of insanity. CP 140-185. Although the jury could not reach agreement on the charge of murder in the first degree, they found defendant guilty of the lesser-degree offense of murder in the

second degree (intentional), felony murder in the second degree, unlawful possession of a firearm in the first degree, and malicious mischief in the second degree. CP 186–90 (Verdict forms A–E). The jury also found affirmatively for the firearm enhancements and domestic violence aggravating factors on both the murder and felony murder charges. CP 191–94 (Special verdict forms).

Sentencing occurred on March 23, 2012. CP 257; 3/23/12 RP 1. Over defendant's objection, the court merged defendant's second-degree felony murder conviction with her second-degree murder conviction into a single count and imposed a single sentence. CP 246-48, 251–63; 3/23/12 RP 23- 39. The court found that defendant had been previously convicted of two prior most serious offenses in Washington (a 1996 first degree robbery and a 2002 second degree assault) then sentenced defendant to life without the possibility of parole under the Persistent Offender Accountability Act (POAA) for the conviction of murder in the second degree. CP 251-63 (Judgment and sentence, paragraph 4.5); 3/23/12 RP 50-53. For defendant's conviction of unlawful possession of a firearm, the court sentenced defendant to 48 months in custody; defendant had an offender score of 4 with a standard range of 36–48 months. CP 251-63. Finally, for defendant's conviction of second-degree malicious mischief, the court sentenced defendant to 8 months in custody; defendant had an

offender score of 4 with a standard range of 3–8 months. *Id.* Defendant timely filed a notice of appeal on March 23, 2012. CP 264.

2. Facts

Defendant and her thirteen year-old daughter, S.C., lived with defendant's boyfriend, Curtis Giffen, in Mr. Giffen's mobile home in Roy, Washington. RP 57, RP 166. Mr. Giffen's adult daughter, Lea Giffen, lived down the road from the mobile home. RP 167, 176. Defendant and Mr. Giffen had been in a relationship for several years until April 1, 2011, when defendant shot Mr. Giffen six times, killing him. RP 60–61, 83–84.

Over the course of their relationship, defendant and Mr. Giffen had been involved in several instances of domestic violence with each other. RP 68–70, 101–08. Defendant's relationship with Mr. Giffen worsened in the months leading up to the shooting after Mr. Giffen announced that the status of their relationship was "open." RP 61, 174–75, 178. Mr. Giffen entered a sexual relationship with Keisha Montgomery-Joyner, which resulted in Ms. Montgomery-Joyner getting pregnant. RP 63, 246–48. Defendant became aware of this relationship when she discovered text messages between Ms. Montgomery-Joyner and Mr. Giffen on Mr. Giffen's phone. RP 62–63. During this time, defendant began to rely on Lea Giffen for emotional support. RP 177–79.

On April 1, 2011, S.C. was sitting in her room when she heard Mr. Giffen return home from work in the afternoon. RP 73. A few hours later, defendant returned from visiting her other (adult) daughter at the hospital. RP 72–73. When S.C. went out to greet her mother, defendant ignored her and went straight to the bathroom where Mr. Giffen had just gotten out of the shower. RP 74. From there, defendant and Mr. Giffen left the home in their separate vehicles. RP 75.

Shortly thereafter Joann Rardin was waiting in her car at a liquor store in Yelm when she saw defendant and Mr. Giffen engage in an argument in the store's parking lot. RP 116, 122–26. Defendant was very angry and yelled in Mr. Giffen's face, "You got the fucking bitch pregnant. Now, you're going to marry her." RP 123. After a short period of back-and-forth argument, defendant and Mr. Giffen returned to their separate vehicles and started to drive away. RP 126. As Mr. Giffen pulled up to the highway outside of the store, defendant rammed her vehicle into the driver side of his car. RP 126–27. Defendant backed up, looked around, and speeded away while Mr. Giffen remained at the scene. RP 126. Ms. Rardin called 911 to report the incident and officers arrived shortly thereafter to take Mr. Giffen's statement. RP 126–27.

Defendant returned to the mobile home, told S.C. that she had rammed Mr. Giffen's car, and instructed S.C. to pack their things because

they were leaving. RP 76–78. Defendant also informed S.C. that Mr. Giffen had gotten another woman pregnant. RP 76–78. While S.C. packed her bag, defendant left to discuss the matter with Lea. RP 79–80.

When defendant arrived at Lea's home, defendant was upset and showed Lea Mr. Giffen's phone as proof that he had been seeing somebody else. RP 184–86. Lea, however, had wearied of hearing about defendant's relationship difficulties with her father and turned defendant away. RP 185. As defendant walked away she said that she was "going to fix this." RP 185.

Defendant returned to the mobile home, where S.C. saw defendant place a gun under a couch cushion in the living room. RP 80. Defendant then ordered S.C. to go to her bedroom. RP 81. Mr. Giffen returned about ten minutes later, entered the home, and began yelling at defendant because she had wrecked his car. RP 82. S.C. heard them go outside to look at the car. RP 83.

As defendant and Mr. Giffen reentered the home, S.C. heard a gunshot. RP 83. The gunshot was followed by Mr. Giffen yelling, "stop." RP 83. S.C. ran out of her room to see defendant standing near Mr. Giffen as he tried to cover a gunshot wound. RP 84. Mr. Giffen pleaded for defendant to stop, but defendant raised the gun and shot him again. RP 84–85. S.C. watched Mr. Giffen fall to the ground and lay there trying to

breath until he died. RP 86. Mr. Giffen suffered six gunshot wounds, which included five wounds through his torso. RP 429–46.

After the shooting, defendant told S.C. to go back to her room and to continue packing her things. RP 95. Defendant said she was going to call the police, and then call S.C.'s older sister to come and pick S.C. up. RP 94. Defendant told S.C. that she shot Mr. Giffen because of his relationship with Ms. Montgomery-Joyner. RP 94, 100. While speaking with her daughter on the phone, defendant said Mr. Giffen was a dog, told her daughter that he was dead, that she had shot him, and that she was going to write a story about him. RP 95, 260–61. After calling the police, defendant grabbed a bottle of Jack Daniels and drank nearly the entire bottle. RP 97. S.C. watched defendant drink the bottle and vomit before S.C. returned to her room to pack and pray. RP 98.

Law enforcement officers arrived at the scene and defendant turned herself in. RP 18–21. They found Mr. Giffen's body on the ground and a loaded pistol on a coffee table next to his body. RP 27–28. Deputy Brian Heimann of the Pierce County Sheriff's Department read defendant her rights and arrested her, after which she refused to answer any questions. RP 31–32. However, while walking to and waiting in the patrol car, defendant volunteered the following statements: "I shot his ass dead,"

"He got what he had fucking coming," "He had this coming. This was five years in the making," and "I should have done this sooner." RP 33–37.

Deputies cleared the house and found S.C. sitting on her bed. RP 150. They also discovered several shell casings near Mr. Giffen's body. RP 152. As part of the investigation, they discovered defendant's journal, which contained an entry that reflected that defendant was contemplating "the hurt she would cause to her family by her actions." RP 324. When detectives tried interviewing defendant at the jail, she was too inebriated to consciously communicate. RP 308, 404.

Defendant did not testify at trial, but asserted an insanity defense. Doctor Donald Dutton of the psychology department from the University of British Columbia, who defendant retained as an expert witness, testified that defendant suffered from borderline personality—a condition whereby a person might enter a transient psychotic state and lose the ability to comprehend the rightfulness of his or her actions. RP 487, 494–99. Dr. Dutton opined that defendant, after being rejected by Lea for help, entered such a psychotic state and thereafter killed Mr. Giffen without understanding the wrongfulness of her actions. RP 506.

However, Doctors Carl Redick and Melissa Dannelet—psychologists from Western State Hospital—testified to a reasonable degree of medical certainty that defendant was not incapacitated by

insanity when she committed the crime, and that she was not unable to appreciate the nature and quality of her actions. RP 679, 708.

C. ARGUMENT.

1. DEFENDANT HAS FAILED TO SHOW THAT THE TRIAL COURT ABUSED ITS DISCRETION IN MAKING ANY OF THE EVIDENTIARY RULINGS THAT ARE CHALLENGED ON APPEAL.

The admission or exclusion of relevant evidence is within the discretion of the trial court. ***State v. Swan***, 114 Wn.2d 613, 658, 700 P.2d 610 (1990); ***State v. Rehak***, 67 Wn. App. 157, 162, *review denied*, 120 Wn.2d 1022 (1992). A party objecting to the admission of evidence must make a timely and specific objection in the trial court. ER 103; ***State v. Guloy***, 104 Wn.2d 412, 421, 705 P.2d 1182 (1985). Failure to object precludes raising the issue on appeal. ***Guloy***, 104 Wn.2d at 421. *See, e.g.*, ***State v. Posey***, 161 Wn.2d 638, 648, 167 P.3d 560 (2007). A trial court abuses its discretion when it bases its decision on manifestly unreasonable or untenable grounds. ***State v. Powell***, 126 Wn.2d 244, 258, 893 P.2d 615 (1995). The trial court's decision should be overturned only when no reasonable person could adopt the view of the trial court. ***Posey***, 161 Wn.2d at 648.

Under ER 401, evidence is relevant if it has "any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable that it would be without the evidence." ER 401. Such evidence is admissible unless, under ER 403, the evidence is prejudicial so as to substantially outweigh its probative value, confuse the issues, mislead the jury, or cause any undue delay, waste of time, or needless presentation of cumulative evidence.

A defendant may only appeal a non-constitutional issue on the same grounds that he or she objected on below. ***State v. Thetford***, 109 Wn.2d 392, 397, 745 P.2d 496 (1987); ***State v. Hettich***, 70 Wn. App. 586, 592, 854 P.2d 1112 (1993).

A defendant has a constitutional right to present a defense consisting of relevant evidence that is not otherwise inadmissible. ***State v. Rehak***, 67 Wn. App. 157, 162, *review denied*, 120 Wn.2d 1022 (1992); ***In re Twining***, 77 Wn. App. 882, 893, 894 P.2d 1331, *review denied*, 127 Wn.2d 1018 (1995). The right to present evidence is not absolute, however, and must yield to a state's legitimate interest in excluding inherently unreliable testimony. ***Chambers v. Mississippi***, 410 U.S. 284, 93 S. Ct. 1038, 35 L. Ed. 2d 297 (1973); ***State v. Baird***, 83 Wn. App. 477, 482, 922 P.2d 157 (1996), *review denied*, 131 Wn.2d 1012 (1997). Limitations on the right to introduce evidence are not unconstitutional

unless they affect fundamental principles of justice. ***Montana v. Engelhoff***, 518 U.S. 37, 116 S. Ct. 2013, 2017, 135 L. Ed. 2d 361 (1996) (stating that the "accused does not have an unfettered right to offer [evidence] that is incompetent, privileged, or otherwise inadmissible under standard rules of evidence" (quoting ***Taylor v. Illinois***, 484 U.S. 400, 410, 108 S. Ct. 646, 653, 98 L. Ed. 2d 798 (1988)). Similarly, the Supreme Court has stated that the defendant's right to present relevant evidence may be limited by compelling government purposes. ***State v. Hudlow***, 99 Wn.2d 1, 16, 659 P.2d 514 (1983) (discussing Washington's rape shield law). An appellate court reviews a claim of a denial of the Sixth Amendment right to present a defense de novo. ***State v. Jones***, 168 Wn.2d 713, 719, 230 P.3d 576 (2010).

In the case now before the court, defendant asserts the trial court made several errors in the exclusion of evidence. Defendant alleges that her due process right to present a defense and confrontation rights were violated by the exclusion of the following evidence: (1) precluding the defense expert from relating *details* of alleged domestic violence disclosed to him by defendant during the course of his mental evaluation of defendant, (2) precluding the defense from adducing the content of statements the defendant made after her arrest while at a hospital, and (3)

not allowing the defendant to impeach a witness with extrinsic evidence of allegedly prior inconsistent statements. Brief of Appellant at 2, 18–30.

a. Defendant failed to properly preserve some of his claims of improperly excluded evidence by failing to make the required offer of proof setting forth the content of the evidence.

Under ER 103(a)(2), error may not be asserted based upon a ruling that excludes evidence unless a substantial right of the party is affected, and the substance of the evidence was made known to the court by offer of proof or was apparent from the context of the record. "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). The party offering the evidence has the duty to make clear to the trial court: 1) what it is that he offers in proof; and, 2) the reason why he deems the offer admissible over the objections of his opponent, so that the court may make an informed ruling. ***Ray***, 116 Wn.2d at 539, *citing* ***Mad River Orchard Co. v. Krack Corp.***, 89 Wn.2d 535, 537, 573 P.2d 796 (1978).

On appeal, defendant assigns error to the trial court's exclusion of certain evidence, but she fails to identify where in the record she made an offer of proof to establish the scope and content of the evidence she claims was improperly excluded. The State has been unable to locate any offer of proof by the defendant in the verbatim report of proceedings.

The content of some of the statements the defendant made while in the hospital was established during the CrR 3.5 hearing and others were set forth in defnse briefing. 12/02/11 RP 62-72; CP 60-76. But there is nothing in the record to establish how the court's ruling impacted the expert's testimony, if at all, or what the evidence would have been regarding the allegedly inconsistent prior statements.

As such defendant failed to preserve these issues for appellate review and this court lacks the proper record necessary to engage in any sort of review. It is impossible to know the nature of the excluded evidence or its relative importance. These claims have not been properly preserved for appellate review and should be summarily dismissed.

b. The trial court properly precluded the defendant's expert witness from testifying to the details of hearsay statements defendant made to him regarding domestic violence because they would have been misleading and confusing to the trier of fact.

The record before this court shows that the trial court did not abuse its discretion in precluding the expert for relating the details of out of court statements describing domestic violence incidences. Rules 703 and 705 of the rules of evidence control the admission of facts or data that an expert witness relies upon to establish an opinion. Under ER 703:

> The facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by or made known to the expert at or before the hearing. If of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, the facts or data need not be admissible in evidence.

ER 703. Further, "[t]he expert *may* testify in terms of opinion or inference and give reasons therefor without prior disclosure of the underlying facts or data, unless the judge requires otherwise. The expert may in any event be required to disclose the underlying facts or data on cross-examination." ER 705 (emphasis added).

Although these rules allow an expert witness to disclose the underlying facts or data used to form an opinion, courts are reluctant to allow the use of ER 705 as a mechanism for admitting otherwise

inadmissible evidence as an explanation of the expert's opinion. *See, e.g.*, ***State v. Martinez***, 78 Wn. App. 870, 879, 899 P.2d 1302 (1995), *reversed on other grounds*, ***State v. Kinneman***, 155 Wn.2d 272, 286–88, 119 P.3d 350 (2005); ***State v. Anderson***, 44 Wn. App. 644, 652, 723 P.2d 464 (1986). When determining whether to allow an expert witness to disclose the underlying facts of his opinion, the trial court must weigh—under ER 403—whether the probative value of this information outweighs its prejudicial or possibly misleading effects. ***Martinez***, 78 Wn. App. at 879.

> While Rule 703 permits an expert witness to take into account matter which are unadmitted and inadmissible, it does not follow that such a witness may simply report such matter to the trier of fact: The Rule was not designed to enable a witness to summarize and reiterate all manner of inadmissible evidence.

Id. at 880 (quoting 3D. Louisell & C. Mueller, *Federal Evidence* § 389).

Anderson[2] and ***Martinez***[3]are instructive here. In ***Anderson***, the defendant murdered his wife and asserted an insanity defense at trial. 44 Wn. App. at 645–46. In his defense, Anderson presented testimony from a psychiatrist and psychologist who opined that Anderson could not distinguish right from wrong. *Id.* at 646. The trial court sustained hearsay objections to Anderson's attempts to have the experts testify to statements he made during his mental health evaluation. *Id.* Anderson argued the

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[2] 44 Wn. App. 644.
[3] 78 Wn. App. 870.

statements were necessary for the jury to understand his mental state. *See id.* at 652. When Anderson challenged these evidentiary rulings on appeal, the court reasoned that Anderson had failed to qualify his statements as exceptions to the hearsay rule and rejected his argument. *Id.* at 652–53. The court emphasized that "[t]he admission or refusal of evidence *lies largely within the sound discretion of the trial court*." *Id.* at 653 (emphasize added).

Similarly, in ***Martinez***, the defendant attempted to have an expert witness explain the basis for his opinion about the cause of a fire—of which the defendant had been charged with arson. 78 Wn. App. at 878. The trial court, however, prohibited the expert from testifying about statements others had made to him during his investigation. *Id.* at 878–79. When Martrinez challenged the trial court's ruling on appeal, the reviewing court rejected his argument, concluding, "Decisions from other jurisdictions support our position that rules 703 and 705 should not be construed so as to 'bootstrap' into evidence hearsay that is not necessary to help the jury understand the expert's opinion." *Id.* at 880. As part of its reasoning, the reviewing court emphasized that "the jury would have been likely to construe [the contested statements] as substantive evidence," and should thus be excluded. *See id.*

Defendant alleges the trial court erred in granting the State's motion to limit the extent to which Dr. Dutton could testify about details, as related to him by defendant, concerning specific acts of domestic violence between defendant and Mr. Giffen. Brief of Appellant at 20–27.

Similar to ***Anderson*** and ***Martinez***, the trial court's ruling to limit Dr. Dutton's testimony in this case was proper because disclosing the details of defendant's hearsay statements was unnecessary in order for the expert to relate the reasons for his opinion on her sanity and could have been confusing and misleading to the jury. In accordance with ***Martinez***, the trial court here weighed the potential probative value of the testimony to its prejudicial effect, concluding that the specific details of the domestic violence would have misled the jury to believe the statements were substantive evidence that defendant acted in self-defense:

> Dr. Dutton is not permitted to discuss specific instances of domestic violence between [defendant] and Giffen related by [defendant] or her daughter. While specific instances of domestic violence may be tangentially relevant to support the defendant's contention that she feared the victim, *this Court's view is that the probative value of that evidence is outweighed by the danger of unfair prejudice, confusion of the issues, and the risk of misleading the jury pursuant to Evidence Rule 403*. So if you're confused, and I hope you're not, it's clear that there is a history of domestic violence. I don't have any doubt that Dr. Dutton relied on that in coming to his diagnosis. So he can talk about that, ...
>
> Dr. Dutton, looking at his report, does not know when the events involving the tub or chasing defendant

> with the axe occurred, and because there is no corroboration that the incidents occurred, *the jury might be confused and misled to believe that the specific incidents reference—just referenced herein resulted in the shooting or that the shooting somehow in self-defense or the result of Ms. Clayton being a battered domestic partner.*
>
> There is further potential for confusion because Dr. Dutton opines that Ms. Clayton's conduct was largely the result of her reaction to a perceived fear of abandonment and the related rage which, combined with her fear of Giffen, resulted in the extreme emotional reaction or transient psychotic state she could not control because of emotional deregulation associated with abnormal brain function related to the diagnosis of borderline personality disorder.

RP 101–03 (emphasis added). The court reiterated that while its ruling precluded testimony that might unnecessarily confuse the jury, defendant could still fully argue her insanity defense:

> This Court's ruling allows Ms. Clayton to argue the fear factor and to argue the history of domestic violence without confusing the jury. . . . .
> . . . And again, I think that the defendant gets a right to confront and deal with the issue of domestic violence and fear she might have as a result of domestic violence. *But the specific instances of conduct, I believe, would be misleading.* It is—all evidence is prejudicial to one side or the other, but in this case not only does the potential prejudice to the State outweigh the probative value, the Court is also concerned under Evidence Rule 403 about the confusion that those specific incidents may cause the jury or how they may mislead the jury.

RP 103–04 (emphasis added). The record shows the trial court struck a balance between ER 703 and 705, permitting Dr. Dutton to disclose the facts and data he relied on to form his opinion, and ER 403, precluding Dr.

Dutton to reveal any details that might confuse or mislead the jury to considering irrelevant side issues.

As the State pointed out in its argument, while it was clear that there had been domestic violence in the relationship between defendant and victim, allowing in details of specific instances of domestic violence created issues of whether one party was the aggressor; the prosecutor had obtained some information from the defendant's daughter about domestic violence, but which cast it in a light of mutual combat. IIRP 41-43. As the domestic violence incidents were not reported, there was no corroborating evidence that such events had even occurred; the prosecutor would be unable to cross-examine the doctor about the details of the underlying events as he had no firsthand knowledge. IIRP 41-43.

The court correctly identified that defendant did not assert a theory of self-defense, but rather insanity. IIRP 99–103. Allowing the expert to discuss domestic violence in general terms allowed him to present his opinion that due to a history of abuse, abandonment, and fear, defendant entered a transient psychotic state, lost her ability to determine right from wrong, and shot Mr. Giffen, without getting the jury confused as to whether defendant was or was not a battered woman acting in self-defense. Defendant was sufficiently able to demonstrate her history of abuse and the effects of that abuse on her psyche under the court's ruling.

The court indicated that Dr. Dutton was still permitted to testify about: (1) defendant's recollection of the day of the murder, (2) the abuse she experienced from family members as a child, (3) details about defendant's abusive relationships with a previous boyfriends, including acts of both physical and mental abuse, (4) her history of parenting, financial hardship, and homelessness, (5) her perceptions of Mr. Giffen as an argumentative, abusive alcoholic, (8) S.C.'s concerns about the ongoing domestic violence between defendant and Mr. Giffen, and that Mr. Giffen was the initiator of such violence, (9) any psychological testing performed by Dr. Dutton on defendant, and (10) the history of and reasons for defendant's fear of abandonment. IIRP 100–01.

During direct examination, Dr. Dutton testified in detail about several of these, including defendant's recitation of the events of the day of the shooting (RP 517–24), the abuse she experienced as a child (RP 515), and the psychological tests defendant participated in (RP 478–86). Dr. Dutton's diagnosed defendant as a "borderline personality" and it was his theory that she simultaneously feared violence from of the victim and was afraid that he would abandon her; this combined with a series of events sent her into a transient psychotic state that rendered her insane at the time she shot the victim. RP 504, 517- 21, 561, 566, 602-03. But the doctor also indicated that the "maximum extreme stressor" for a borderline personality

was fear of abandonment rather than fear of violence. RP 504. Thus it would be defendant's fear that the victim might leave her for his new paramour that would have her the most upset under the expert's analysis. In light of this testimony, it was unnecessary for the jury to hear Dr. Dutton testify about defendant's uncorroborated account of any abuse she might have suffered because it does not appear that this additional testimony would have provided any additional support for Dr. Dutton's opinion that was not already before the jury.

Finally, the court made it clear that its ruling prohibiting the doctor from going into the details of any domestic violence incident because it was be hearsay would not necessarily be applied to a witness who had first hand knowledge of the incident, such as defendant or her daughter. IIRP 104-105. Thus the court's ruling did not preclude defendant from getting this information before the jury, but did require her to present a firsthand witness to the domestic violence. Defendant fails to show how this ruling deprived her of her ability to present her defense.

The trial court exercised its discretion properly to balance the admission of necessary facts and data that Dr. Dutton relied on to form his opinion and exclusion of substantially prejudicial hearsay. The jury could easily have construed the hearsay as substantive evidence of self-defense.

The trial court thus properly exercised its discretion under ***Anderson*** and ***Martinez***.

c. The court did not abuse its discretion in precluding the defendant from adducing evidence of her hearsay statements made at the hospital when defendant could not show any relevant exception or materiality of the evidence.

Hearsay is "a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." ER 801(c). Hearsay is not admissible unless an exception applies. ER 802; ***State v. Chapin***, 118 Wn.2d 681, 685, 826 P.2d 194 (1992).

Hearsay does not include a statement that shows the declarant's then-existing state of mind, such as mental feeling. ER 803(a)(3). The court may allow the evidence if it "finds that two circumstances concur: (1) if there is some degree of necessity to use out-of-court, uncrossexamined declarations, and (2) if there is circumstantial probability of the trustworthiness of the out-of-court, uncrossexamined declarations." ***State v. Parr***, 93 Wn.2d 95, 98-99, 606 P.2d 263, 265 (1980). "[I]f the circumstances do not import trustworthiness, such evidence may be inadmissible unless there is some other corroborating evidence." *Id.* at 99. This exception to the hearsay rule does not allow "statements discussing

the conduct of another person that may have created the declarant's state of mind." ***Parr***, 93 Wn.2d 99-106; ***State v. Sublett***, 156 Wn.App. 160, 199, 231 P.3d 231 (2010), *aff'd*, 176 Wn.2d 58, 292 P.3d 715 (2012). Thus, if a declarant's fear of a person is relevant to an issue in the case, it may be shown by an out-of-court statement expressing such fear, but an out-of-court statement explaining what that person did to create such far would *not* be admissible under this exception. Finally, for a statement to be admissible under the "state of mind" exemption to the hearsay rule, the declarent's state of mind must be an issue in controversy. *See* ***State v. Edwards***, 131 Wn. App. 611, 614, 128 P.3d 631 (2006).

Relevant evidence means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable than it would be without the evidence. ER 401.

Prior to trial the State moved in limine to preclude the defense from adducing the defendant's volunteered statements, which were overheard by Deputy Greiman, as they were hearsay unless adduced by the State. IIRP 78-79. These statements were the subject of the CrR 3.5 hearing and the facts and circumstances pertaining to them were set out in the findings and fact entered following that hearing. CP 21-25, *see also*, Appendix A. The statements were made hours after the shooting and after defendant had consumed considerable alcohol. *Id.* In the defense reply

memorandum, defense counsel set out the content of the statements- as they had been set out in Deputy Greiman's report- and argued that the statements fell under the state of mind exception and/or the excited utterance exception to the hearsay rule. CP 60-76. At the hearing, defense counsel acknowledged that not all of defendant's statements were reflective of her then existing state of mind, but as a whole the statements showed her current emotional state of mind. IIRP 83-85. Defense counsel acknowledged that his own expert would opine that she was no longer in a transient psychotic state when she made these statements as contrasted when she fired the gun at the victim; counsel acknowledged that these statements were probably affected by the half bottle of bourbon she had consumed after the shooting and prior to the arrival of the officers, but that should go to weight and not admissibility. IIRP 85-86. Defense counsel also acknowledged that not all of the statements qualified as excited utterances and indicated that he could specify which ones he thought were, but defendant fails to identify where in the record the statements sought to be admitted under this exception were identified. IIRP 89. In her Opening Brief , defendant abandons any argument that these were excited utterances but continues to argue that her statements that "[h]e kicked me so hard with his boot," "[h]e picked up an axe and threw it at me," "I was his Negro slave," "I've been beat up so bad," and "[h]e was the worst of

anyone in my entire life." should have been admitted under the state of mind exception to show her fear of the victim.

As can be seen by the content of these statements, none of them express fear of the victim, but all relate to past events that might be a cause of the fear. Under the case law cited above, the state of mind exception does not allow for the admission "statements discussing the conduct of another person that may have created the declarant's state of mind." Thus, the exception does not apply to the statements identified in the brief as being improperly excluded.

Additionally, the court was free to consider whether the circumstances surrounding the statements indicate trustworthiness in assessing admissibility. Here, the defendant's consumption of a large amount of alcohol made her extremely inebriated and put the trustworthiness of her statements into doubt. Even taken at face value, the defendant's statements showed that her emotions were swinging rapidly and that her statements were referring to events that occurred throughout her lifetime. *See* CP 60-76, pages 14-16. As such it is impossible to be certain when some of these recalled events might have occurred or, in some instances, to be certain who the "he" was she was referring to.

The court did not abuse its discretion in excluding the defendant from adducing hearsay statements when there was no applicable

exception. This exclusion did not preclude the defense expert from considering such information in forming his opinion even though he could not divulge the details of her statements to the jury. Nor was the defendant's state of mind at the hospital- hours after the shooting - reflective of the point of time where her state of mind was at issue- at the time of the shooting. This was outside of the time frame where the defense expert indicated that she was in a transient psychotic state and therefore, insane. As such the exclusion in no way impeded her ability to present her expert testimony setting forth her insanity defense. Thus, defendant has failed to show that the trial court abused its discretion in excluding the hearsay statements or that this ruling deprived her of her ability to present a defense.

d. Defendant fails to show that any evidence existed showing inconsistent statements by Ms. Rardin or that such evidence was improperly excluded at trial.

The confrontation clause in the Sixth Amendment protects a defendant's right to cross-examine witnesses. ***State v. Johnson***, 90 Wn. App. 54, 69, 950 P.2d 981 (1998). Generally, a defendant is allowed great latitude in cross-examination to expose a witness's bias, prejudice, or interest. ***State v. Knapp***, 14 Wn. App. 101, 107-08, 540 P.2d 898, *review denied*, 86 Wn.2d 1005 (1975). Nevertheless, the trial court still has

discretion to control the scope of cross-examination and may reject lines of questions that only remotely tend to show bias or prejudice, or where the evidence is vague or merely speculative or argumentative. ***State v. Jones***, 67 Wn.2d 506, 512, 408 P.2d 247 (1965); ***State v. Kilgore***, 107 Wn. App. 160, 184-185, 26 P.3d 308 (2001).

Extrinsic evidence is generally not admissible to impeach a witness on collateral matters. ***State v. Carlson***, 61 Wn. App. 865, 812 P.2d 536 (1991), *review denied*, 120 Wn.2d 1022, 844 P.2d 1017 (1993). To determine whether a fact is collateral, the court asks whether "the fact upon which error is based have been brought into evidence for a purpose independent of the contradiction." ***State v. Dickenson***, 48 Wn. App. 457, 468, 740 P.2d 312 (1987). The impeachment must be on something of consequence to the case. ***State v. Allen S.***, 98 Wn. App. 452, 459–60, 989 P.2d 1222 (1999).

Defendant complains that she was improperly denied the right to impeach a witness, Joann Rardin with inconsistent statements allegedly made to Officer Ericksen. Joann Rardin witnessed an incident between defendant and the victim at a liquor store that occurred earlier the day of the murder, which ended with the defendant ramming her car into the victim's. 4RP 114-28. Ms. Rardin testified that she did not speak to an officer at the scene but was called later that day and spoke with an officer

over the phone; she also typed up a statement later that night and saved it on a flash drive. 4RP 127.

As noted earlier, defendant's failure to make an offer of proof as to the content of Officer Erickson's excluded testimony makes it impossible for the court to consider this claim. It is unknown exactly what was written in the report or whether Officer Erickson was paraphrasing what Ms. Rardin had said as opposed to documenting an exact quote. It is clear that defense counsel had a copy of Ms. Rardin's statement that she had written the night of the incident (and before she knew the victim had been shot), but did not use it to try to impeach her with any of her own prior statements. RP 131-133. This would indicate that Ms. Rardin's testimony had been very consistent with her own recorded recollection of events. Without knowing the content of what Officer Erickson's excluded testimony, it is impossible to assess whether any relevant and material impeachment evidence existed - much less conclude that it was improperly excluded. Nevertheless, from what is in the record, it does not indicate that any error occurred.

On cross examination, five times defense counsel asked Ms. Rardin about statements she had made to Officer Ericksen. 4RP 128-130. Most of the time the question either did not reveal a prior statement that was inconsistent with Rardin's testimony or it generated a response by the

witness acknowledging her statement to the officer. As a consequence there was nothing to impeach.

Defense counsel asked whether she had told the officer "the male came close to the female multiple times causing the female to back up." RP 128. On direct she had testified that:

> She would go towards him, or he would make a step towards her and she would move away. She would run to the liquor store, and she would open up the liquor store door, stand in the doorway, yell at him. He would just stand there. She would come back out again, like she was going to walk to her car. He would take a step. She would run back to the sidewalk again in front of the liquor store.

RP 122 She went on to testify that this back and forth action happened so many time that she couldn't tell you how many times it happened and it seemed very erratic. *Id.* Defendant fails to show that her alleged statement was inconsistent with her testimony leaving nothing to impeach.

Defense counsel asked whether she had told the officer "that you were under the impression the female might be afraid of the male." To which Ms. Rardin responded:

> That's what it seemed like. I also made some other statements in regard to my opinion about it.

RP 128. Defendant fails to establish that Ms Rardin ever testified inconsistently with this statement, but as she acknowledged that she made such a statement, there was nothing left to impeach.

Defense counsel asked twice whether she had told the officer that the female had gone in and out of the store a few times in what appeared to be "an attempt to get away from the male." Ms. Rardin responded:

> I don't remember telling her [the officer] it was an attempt to get away from him. I -maybe to avoid the situation.

RP 129. Again, the fact that the defendant went in and out of the store several times was consistent with Ms Rardin's direct testimony. RP 122-124. This is the critical portion of her testimony- her recitation of the objective facts. Ms. Rardin's opinion as to what the defendant was thinking or what was her motivation as she did this would be irrelevant speculation, not a subject for proper impeachment. Finally, Ms. Rardin did acknowledge making a similar statement to the officer. Even looking at Ms. Rardin's recollection of how she had characterized the situation to the officer- as being to "avoid the situation" rather than "to get away from the man" is not so different as to constitute an impeachable inconsistency by extrinsic evidence.

Finally, defense counsel asked whether she had told the officer that she felt the manner in how defendant was getting into her car -via the passenger side - "was a way to stay away from the male." RP 130. Ms. Rardin did not recall making that statement and further testified:

> I don't recall that that's the way she would stay away from the male. I think that she just didn't want to get in between the two vehicles

RP 130. Ms. Rardin had described the manner that the defendant got into her car on direct examination. RP 124. Nothing in defense counsel question indicates that she had given the officer a conflicting statement as to the manner that had occurred. Ms. Rardin doubted that she had made a statement about "staying away from the male" because it did not comport with her recollection of events. Even assuming that defendant had evidence of such a statement to Officer Ericksen, such a statement would be offering a personal opinion as to the defendant's motivations for entering her car in the manner she did; this would be speculative evidence at best. The court does not abuse its discretion in excluding impeachment on such an immaterial matter.

In sum, defendant has failed to show that he was precluded from adducing evidence that Ms. Rardin ever made an inconsistent statement on any material fact on which she was competent to testify. The record does not indicate any abuse of discretion in the trial court's evidentiary rulings.

Nor does defendant show that the exclusion of this evidence was critical to her case. Despite this issue being raised as one of "denied impeachment of a prosecution witness," defendant was not trying to impeach Ms. Rardin to cast doubt on her testimony, but rather was trying

to get her speculations of the defendant's motivations into evidence. To some extent, she was successful at accomplishing this, but defendant fails to show that such evidence was ever properly admissible and therefore could properly be excluded.

2. THE COURT'S DECISION TO MERGE THE TWO VERDICTS FINDING DEFENDANT GUILTY OF COMMITTING MURDER IN THE SECOND DEGREE USING TWO DIFFERENT MEANS INTO A SINGLE COUNT FOR SENTENCING DID NOT VIOLATE DOUBLE JEOPARDY.

The double jeopardy provisions of the federal and state constitutions protect a defendant from being punished multiple times for the same offense. ***State v. Allen***, 150 Wn. App. 300, 312, 207 P.3d 483 (2009); Fifth Amendment; Art. I, sec. 9 state constitution. These provisions prohibit (1) a second prosecution for the same offence after acquittal, (2) a second prosecution for the same offense after conviction, and (3) multiple punishments for the same offense imposed in the same proceeding. ***In re Percer***, 150 Wn.2d 41, 48–49, 75 P.3d 488 (2003). "Double jeopardy may be implicated where multiple convictions arise out of the same act, even if the court has imposed concurrent sentences." ***State v. Meas***, 118 Wn. App. 297, 304, 75 P.3d 998 (2003).

For purposes of double jeopardy, second-degree intentional murder and second-degree felony murder are alternative means of committing the crime of second-degree murder. ***State v. Berlin***, 133 Wn.2d 541, 553, 947 P.2d 700 (1997). Thus, where the trial court "merges" a felony murder conviction into a conviction of intentional murder, the question is whether the defendant received multiple punishments. *See* ***State v. Johnson***, 113 Wn. App. 482, 487, 54 P.3d 155 (2002); *see also* ***State v. Meas***, 118 Wn. App. 297, 304, 75 P.3d 998 (2003).

Here, defendant argues that her sentence violates double jeopardy because the trial court refused to vacate either of her murder convictions. Brief of Appellant at 40. Washington state courts, however, have previously rejected this argument, specifically—as is the situation here—where the trial court merges the challenged convictions and the defendant is only punished once. *See, e.g.*, ***Johnson***, 113 Wn. App. at 487–89.

The court's analysis in ***Johnson*** is indistinguishable from the double jeopardy issue in this case. In ***Johnson***, the defendant was charged with one count of first-degree premeditated murder and one count of second-degree felony murder. 113 Wn. App. at 486. On defendant's motion, the court also instructed the jury on the lesser-included offense of second-degree murder. *Id.* The jury convicted Johnson of second-degree felony murder and the lesser-included offense of second-degree murder.

Id. at 487. At sentencing, the court ruled that the two counts described alternative means for one crime of second degree murder and entered a finding on the judgment and sentence that "[the murder counts] merge into one conviction of Murder in the Second Degree." *Id.* The court imposed only a single sentence between the murder and felony murder convictions. *Id.*

On appeal, Johnson argued that his sentence violated double jeopardy because the "merged" charges counted as two convictions, citing authority that multiple convictions violate double jeopardy even if the sentences run concurrently. *Id.* at 488. Specifically, Johnson challenged the trial court's usage of "merge" to argue the merger doctrine—as defined by the Sentencing Reform Act—did not apply. *Id.* The reviewing court, however, rejected this argument:

> Johnson focuses on the court's use of the word "merge'" and argues that the merger doctrine does not insulate the sentence from his double jeopardy challenge because merger is defined in the Sentencing Reform Act and is limited to "situations where multiple convictions are counted as one crime for purposes of calculating the offender score." This argument fails for two reasons. First, merger is not simply a creation of the Sentencing Reform Act." The double jeopardy clauses of the United States and Washington constitutions are the foundation for the merger doctrine." The second and more important reason is that despite using the word "merge," the court was not applying the merger doctrine. The doctrine is a rule of statutory construction used to determine when the Legislature intends that an act violating more than one statute is to be punished

> as a single crime. Here the court properly understood that because felony murder and intentional murder are alternative means, there could be only one conviction. The court chose its language not to invoke the merger doctrine but to create the effect of a merger." *Where offenses merge and the defendant is punished only once, there is no danger of a double jeopardy violation.*"

Johnson, 113 Wn. App. at 488–89 (internal citations omitted) (emphasis added); *accord* ***Meas***, 118 Wn. App. at 304–06. The ***Johnson*** court found that Johnson's multiple convictions did not violate double jeopardy because on the judgment and sentence, the trial court (correctly) recited that Johnson was guilty of both counts by jury-verdict, but found that the two counts only constituted a single conviction. *Id.* at 488. The court in ***Johnson*** reiterated that the trial court had properly noted that the two counts had "merged" and sentenced Johnson to only one count (second-degree murder). *Id.* at 488.

In ***State v. Meas***, 118 Wn. App. 297, 304–05, 75 P.3d 998 (2003), this court adopted the ***Johnson*** court's analysis above. 118 Wn. App. at 304–06. The defendant in ***Meas*** also challenged his sentence where the trial court merged his convictions of first-degree murder and felony murder, but only sentenced the defendant on the first-degree murder conviction. 118 Wn. App. at 304–06. The reviewing court, however, found that double jeopardy was not violated because defendant was only sentenced on a single, "merged," count of murder. *See id.*

Johnson and ***Meas*** are clear that where a defendant is only punished once for merged murder and felony murder convictions, there is no double jeopardy violation.

In this case, the record shows the trial court properly merged defendant's convictions of second degree intentional murder and second degree felony murder into a single count and sentenced defendant only on a single count of second degree murder. The judgment and sentence reflects that the defendant was found guilty of three counts by jury-verdict—noting that count II "Merged into Count I" and omitted any reference to the nature of this conviction. CP 253 (paragraph 2.1). Under the "Sentencing Data" on the judgment and sentence, the trial court did not calculate an offender score or standard range for count II, noting that the count had "Merged into Count I." CP 254 (paragraph 2.3). Finally, under its "Sentence and Order," the court sentenced defendant to count I (second-degree murder), count III (unlawful possession of a firearm in the first degree), and count IV (malicious mischief in the second degree). CP 257 (paragraph 4.5). Defendant's sentence does not violate double jeopardy because the trial court only sentenced her to one count of second-degree murder.

Defendant's argument reiterates the same argument the courts rejected in both ***Johnson*** and ***Meas***. Defendant cites no legal authority that

supports her position on this issue. Each of the authorities that defendant does cite are inapposite to this case, ***Johnson***, and ***Meas***, because they do not pertain to defendants with one conviction and one sentence. This court should reject defendant's double jeopardy claim because the trial court acted in accordance with ***Johnson*** and ***Meas***.

3. THE TRIAL COURT'S IMPOSITION OF A SENTENCE UNDER THE POAA DID NOT VIOLATE DUE PROCESS OR EQUAL PROTECTION.

Defendant claims she was denied her rights to due process and a jury trial when the trial court ruled her prior convictions were established by a preponderance of evidence and found her to be a persistent offender. Defendant relies on ***Apprendi v. New Jersey***, 530 U.S. 466, 120 S. Ct. 2348, 147 L. Ed. 2d 435 (2000), ***Ring v. Arizona***, 536 U.S. 584, 122 S. Ct. 2428, 153 L. Ed. 2d 556 (2002), ***Blakely v. Washington***, 542 U.S. 296, 124 S. Ct. 2531, 159 L. Ed. 2d 403 (2004), and ***Southern Union Co. v. United States***, ___U.S. ___ 132 S. Ct. 2344, 183 L. Ed. 2d 318 (2012), for the proposition that any increase in punishment contingent on a finding of fact, including prior convictions, must be found by a jury beyond a reasonable doubt.

a. Under controlling precedent, the "fact of a prior conviction" need not be proved to a jury beyond a reasonable doubt.

In ***Almendarez-Torres v. United States***, 523 U.S. 224, 247, 118 S. Ct. 1219, 140 L. Ed. 2d 350 (1998), the Supreme Court held that prior convictions are sentence enhancements rather than elements of a crime, and therefore need not be proved beyond a reasonable doubt to a jury. In ***Apprendi*** the United States Supreme Court stated "*[o]ther than the fact of a prior conviction*, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." ***Apprendi***, 530 U.S. at 490 (emphasis added). The decision in ***Blakely*** maintained the ***Apprendi*** exception for proof of prior convictions when it determined that most Washington aggravating factors must be submitted to a jury. ***Blakely***, 542 U .S. at 301.

The Washington Supreme Court recognizes the ***Apprendi*** exception and has confirmed that prior felony convictions used to support a persistent offender sentence do not need to be proved to a jury beyond a reasonable doubt. ***State v. Wheeler***, 145 Wn.2d 116, 121, 34 P.3d 799 (2001); *see also* ***State v. Witherspoon***, 171 Wn. App. 271, 286 P.3d 996 (2012). It earlier had also reached the same result under our state constitution. ***State v. Thome***, 129 Wn.2d 736, 782–83, 921 P.2d 514 (1996). After the United States Supreme Court's decision in ***Ring***

the issue of whether proof of prior convictions had to be submitted to the jury was again brought before the Washington Supreme Court and again, it held that prior convictions need not be proved to a jury. ***State v. Smith***, 150 Wn.2d 135, 143, 75 P.3d 934 (2003).

Defendant does not acknowledge that the rule pronounced in ***Apprendi*** also announced an exception to the rule for the fact of a prior conviction. Rather, she argues that the United States Supreme Court has "never conclusively held the Sixth Amendment does not apply to proof of prior convictions which elevate the maximum punishment" and that the decision in ***Almendarez -Torres v. United States***, 523 U.S. 224, 118 S. Ct 1219, 140 L. Ed. 2d 350 (1998) has been misconstrued or, alternatively, wrongly decided. Appellant's Brief at p. 46-7. Although she does not expressly acknowledge that her arguments have been rejected by the Washington Supreme Court, she does criticize that court's following of ***Almendarez- Torres*** and suggests that this court is not bound to follow our Supreme Court's decisions.

Defendant's suggestion for this court to ignore controlling precedent of ***Wheeler*** and ***Smith*** should be summarily rejected. Until the Washington Supreme Court overrules its decisions, this court is bound to follow these controlling decisions. E.g., ***State v. Gore***, 101 Wn.2d 481, 487, 681 P.2d 227 (1984).

b. The legislatures decision to classify prior convictions as sentencing factors under the POAA does not violate equal protection.

In ***State v. Witherspoon***, 171 Wn. App. 271, 286 P.3d 996 (2012), Division II of the Court of Appeals addressed whether the Legislature's decision to classify prior convictions as a sentencing factor under the POAA violated equal protection when in other circumstances, it had made proof of a prior conviction an element of a crime. *See e.g.,* ***State v. Roswell***, 165 Wn.2d 186, 192–94, 196 P.3d 705 (2008). It found that it did not. 165 Wn. App. at 305

Noting that "[w]hen a statutory classification implicates physical liberty, it is subject to rational basis scrutiny unless that classification also affects a semisuspect class" and that "[r]ecidivist criminals are not a suspect class" Division II applied rational basis scrutiny to Witherspoon's challenge. The court applied the standard set forth in ***State v. Smith***, 117 Wn.2d 263, 279, 814 P.2d 652 (1991), for testing the constitutionality of a statute under the rational basis test:

> [A] statute is constitutional if (1) the legislation applies alike to persons within a designated class, (2) reasonable grounds exist for distinguishing between those who fall within the class and those who do not, and (3) there is a rational relationship between the classification and the purpose of the legislation.

Witherspoon, 171 Wn. App. at 304. The court found that there was a rational basis for distinguishing between "persistent offenders" and "non-persistent offenders" especially when the POAA "targeted the most serious, dangerous offenders." *Id.* at 305. As the purpose of the POAA was to improve public safety by confining the most dangerous criminals in prison for life, the court found the Legislature acted within its discretion in defining what facts constitute elements of a crime and the penalty for the crime. It also noted that the other two division of the Court of Appeals had reached similar determinations holding that "under the POAA there is a rational basis to distinguish between a recidivist charged with a serious felony and a person whose conduct is felonious only because of a prior conviction for a similar offense." ***Witherspoon***, 171 Wn. App. at 305, citing ***State v. Langstead***, 155 Wn. App. 448, 454–57, 228 P.3d 799, *review denied*, 170 Wn.2d 1009, 249 P.3d 624 (2010) and ***State v. Williams***, 156 Wn. App. 482, 496–99, 234 P.3d 1174, *review denied*, 170 Wn.2d 1011, 245 P.3d 773 (2010).

Defendant raises the same argument that Mr. Witherspoon did and which was rejected by this court. Defendant fails to address the controlling authority of ***Witherspoon*** in her brief although she was aware of the decision as she cited to it in another section of her brief. *See* Appellant's brief at p. 47. Under ***Witherspoon***, defendant's argument fails.

D. CONCLUSION.

For the foregoing reasons, the State respectfully asks this court to affirm the judgment and sentence below.

DATED: JULY 30, 2013

MARK LINDQUIST
Pierce County
Prosecuting Attorney

KATHLEEN PROCTOR
Deputy Prosecuting Attorney
WSB # 14811

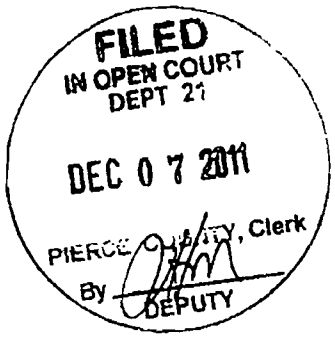
Kiel Willmore
Rule 9

Certificate of Service:
The undersigned certifies that on this day she delivered by ~~U.S. Mail~~ or ABC-LMI delivery to the attorney of record for the appellant and appellant c/o his attorney true and correct copies of the document to which this certificate is attached. This statement is certified to be true and correct under penalty of perjury of the laws of the State of Washington. Signed at Tacoma, Washington, on the date below.

7/30/13
Date Signature

APPENDIX "A"

Findings of Fact and Conclusions of Law



SUPERIOR COURT OF WASHINGTON FOR PIERCE COUNTY

STATE OF WASHINGTON, Plaintiff, vs. BARBARA CLAYTON, Defendant	CAUSE NO. 11-1-01404-7 FINDINGS OF FACT AND CONCLUSIONS OF LAW, ADMISSIBILITY OF STATEMENTS, CrR 3.5

THIS MATTER having come on for hearing before the Honorable Frank Cuthbertson on December 2, 2011, the defendant Barbara Clayton having been present and represented by her attorneys Dino Sepe and Denise Whitley, and the State having been present and represented by Deputy Prosecutors Gerald Costello and Thomas Howe, and the court having heard testimony from Pierce County Sheriff's Deputies William Ruder and Brian Heimann and Brian Greiman, and having considered the declaration of Gerald Costello, and having reviewed the briefs and supporting exhibits submitted by the parties, having heard argument from counsel, and ruled orally that the statements of the defendant are admissible; now, therefore, the court sets forth the following Findings of Fact and Conclusions of Law as to admissibility.

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I.

UNDISPUTED FACTS

1. On April 1, 2011 at approximately 8:00 p.m. Curtis Giffin was shot to death inside of his home, in rural Pierce County, south of Roy. Defendant has made statements that she was the person who shot Giffin.

2. Defendant's 13 year old daughter S.C was inside the home at the time of the homicide. After the shooting, defendant drank at least ½ of a bottle of Jack Daniels whiskey, which caused her to vomit. Defendant had not been drinking alcohol before the shooting. Within approximately 30-60 minutes after deputy sheriffs arrested defendant she was obviously very drunk

3. Deputy Sheriffs Brian Heimann and William Ruder and Brian Greiman arrived at the homicide scene at approximately 8:21 p.m. Without prompting, defendant came out of the home with her arms extended above her head and Deputy Ruder arrested defendant and placed handcuffs on her wrists. Curtis Giffin's body was visible through the front doorway. Within a few minutes, Deputy Heimann took custody of defendant.

4. Within minutes of being arrested, defendant made unsolicited statements to Deputy Heimann about shooting Mr. Giffin and why it happened. Deputy Heimann then advised defendant of her *Miranda* warnings by reading aloud from a pre-printed card that he carried. Defendant verbally acknowledged that she understood her rights. Defendant said she did not wish to talk with Deputy Heimann about what happened in the home. Defendant was not questioned but nevertheless made additional statements to Deputy Heimann about killing Mr. Giffin. Deputy Heimann did not say or do anything to prompt defendant to make statements. He did not coerce defendant or make any promises to her to prompt her to talk about what happened.

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5. Approximately 30-60 minutes after defendant's arrest she was transported to the South Hill Precinct by Deputy Greiman as requested by case detectives. At this time defendant was obviously very drunk. Defendant made statements that Deputy Greiman heard that he did not solicit from her. Deputy Greiman did not say or do anything to prompt defendant to make statements. He did not coerce defendant or make any promises to her to prompt her to talk. At the precinct, detectives did not try to question defendant and directed that she be booked at the Pierce County Jail.

6. Deputy Greiman brought defendant to the jail but she was denied booking due to her medical condition. Defendant was brought to St. Joseph's Hospital in Tacoma where she was admitted to the emergency room. Medical staff asked defendant a series of questions about her health and needs, but she did not answer any of the questions.

7. Deputy Greiman did not say or do anything to prompt defendant to make statements at the hospital. Defendant became highly emotional and began talking loudly to nobody in particular. Defendant spoke about her relationship with Curtis Giffin and other men, including relatives. She talked about her feelings on Giffin's death. She spoke about the events of the evening leading up to the shooting. At one point Deputy Greiman tried to get defendant's attention to ask if she wanted to talk with him, but she did not respond. He did not ask her any questions about the events. Defendant's blood alcohol content was determined by hospital staff to be .36.

8. When defendant was discharged from the hospital Deputy Greiman took her to the jail for booking, which was accomplished at approximately 5:15 a.m. on April 2nd.

9. Corrections Officer Laura Stone booked defendant into the jail. Officer Stone asked defendant a series of routine questions that are posed to all persons booked. One of the questions

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asked if defendant had any medical problems or issues. Defendant indicated that the only medical problem she had was high blood pressure. Officer Stone asked no questions specifically related to the facts of defendant's case.

II.

DISPUTED FACTS

1. There are no disputed facts.

III.

CONCLUSIONS OF LAW

1. When defendant made statements she was in the custody of State agents. Defendant was not interrogated by any sheriff's deputies within the meaning of *Miranda v Arizona* and *Rhode Island v Innis* and deputies therefore had no legal duty to advise defendant of her constitutional rights or to seek a waiver of her right to remain silent before noting what defendant said.

2. Defendant's statements that were heard by deputies at the scene of the homicide and while she was inside Deputy Greiman's patrol car, and at the hospital were volunteered, and were not made in response to any form of interrogation as defined by *Rhode Island v Innis*. Deputies did not use coercion or promises to induce defendant to make statements.

3. Defendant was advised of her constitutional rights at the scene of the homicide by deputy Greimann, who recited the *Miranda* warnings, and she understood her rights. Defendant clearly expressed her wish to not be questioned by deputy Greimann, and deputy Greimann did not attempt to get defendant to talk. Defendant nevertheless continued to make voluntary statements after receiving advice of her rights.

3. Defendant's statement to Corrections Officer Stone about her medical status was made in response to a routine question at the jail booking desk that is asked of all detainees. The

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Corrections Officer would not have reasonably expected that her question about defendant's medical status would lead to an incriminating response. Routine questions at booking are an exception to the requirements of *Miranda v Arizona*, and the Corrections Officer had no duty to advise defendant of her constitutional rights or to seek a waiver of her right to remain silent before noting what defendant said

IV.

CONCLUSIONS AS TO ADMISSIBILITY

1. Defendant's statements at the homicide scene and at the hospital were made voluntarily, and were not the result of interrogation and are therefore admissible.

2. Defendant's statement at the jail was in response to a routine booking question which does not fall under *Miranda* and her answer is therefore admissible

DONE IN OPEN COURT this 7 day of December, 2011.

Honorable Frank Cuthbertson
JUDGE of the Pierce County Superior Court

Presented by:

Gerald Costello
Deputy Prosecuting Attorney
WSB# 15738

Approved by:

Dino Sepe
Attorney for Defendant
WSB# 15879

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PIERCE COUNTY PROSECUTOR

July 30, 2013 - 1:24 PM

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Court of Appeals Case Number: 43240-4

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