Supreme Court No. 90417-1
COA No. 43240-4-II

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

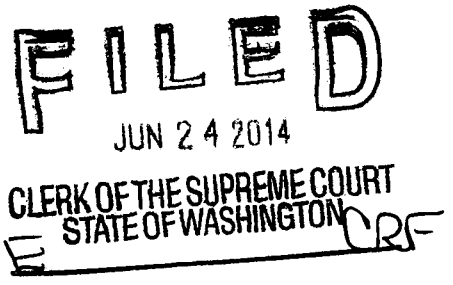
Respondent,

v.

BARBARA ANN CLAYTON,

Petitioner.

PETITION FOR REVIEW



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A. IDENTITY OF PETITIONER/DECISION BELOW

Barbara Ann Clayton requests this Court grant review pursuant to RAP 13.4 of the unpublished decision of the Court of Appeals in State v. Clayton, No. 43240-4-II, filed May 13, 2014. A copy of the opinion is attached as an appendix.

B. ISSUES PRESENTED FOR REVIEW

1. Long-standing case law from this Court holds that in a criminal case where a defendant asserts a defense of insanity, almost any of her statements made at around the time of the incident are admissible because they tend to show her mental condition. The statements are not objectionable as hearsay because they are not offered to prove the truth of the matters asserted but rather to elucidate the defendant's state of mind. In addition, a defendant has a fundamental constitutional right to present evidence relevant to her defense. In this case, Ms. Clayton asserted a defense of insanity to a charge of murder and offered statements she made in the hours following the incident as evidence of her state of mind. The Court of Appeals ignored this Court's case law and held that the out-of-court statements were not admissible because they were not relevant to Ms. Clayton's state of mind. Does the Court of Appeals' holding conflict with this body of

case law and undermine Ms. Clayton's constitutional right to present a defense, warranting review by this Court? RAP 13.4(b)(1), (4).

2. Did the Court of Appeals err in upholding the trial court's decision to exclude information regarding prior abuse inflicted by the victim on Ms. Clayton, where that information was central to her expert's opinion that she was insane at the time of the crime?

3. Did the Court of Appeals err in holding that Ms. Clayton did not present a sufficient offer of proof to justify admitting a prosecution witness's prior inconsistent statement in order to impeach the witness?

4. Does Ms. Clayton's three-strike sentence based on findings of prior convictions that were not proved to a jury beyond a reasonable doubt violate constitutional due process and her right to a jury trial?

5. Does the three-strike sentence violate Ms. Clayton's constitutional right to equal protection of the laws?

C. STATEMENT OF THE CASE

Barbara Clayton shot her boyfriend Curtis Giffin, killing him. 1/23/12RP 82-85. She had found out he was seeing another woman and had gotten her pregnant. 1/23/12RP 61-63, 77; 1/24/12RP 174, 178, 184, 248. Although Ms. Clayton was angry at Mr. Giffin's betrayal, she was also afraid of his anger. 1/23/12RP 61-63, 106. Her

daughter testified to witnessing several occasions on which Mr. Giffin had physically assaulted her mother. 1/23/12RP 67-71, 101-08. At the same time, Ms. Clayton was afraid of leaving Mr. Giffin because she felt she had nowhere else to go. 1/23/12RP 67.

Witnesses testified that Ms. Clayton was acting unusually and erratically at around the time of the incident. 1/23/12RP 112-14, 122; 1/24/12RP 278. Her emotions were like a "roller coaster." 1/23/12RP 38-40.

After the shooting, Ms. Clayton called the police. 1/23/12RP 94. While waiting for them to arrive, she drank a large quantity of whiskey. 1/23/12RP 97-98.

Ms. Clayton was too intoxicated to be booked into jail and was taken to the hospital, where she was treated for several hours before being transported back to jail. 12/02/11RP 58-60, 66. At the hospital, she blurted out several statements that were addressed to no one but were overheard by a police officer. 12/02/12RP 62-72.

Ms. Clayton was charged with one count of premeditated first degree murder and one count of second degree felony murder based on the predicate felony of second degree assault.[1] CP 6-7.

Ms. Clayton pled not guilty by reason of insanity. CP 26. A psychologist who examined her concluded she was in a temporary psychotic state at the time of the incident and could not tell right from wrong in relation to her actions. 1/03/12RP 50-62; CP 61-62.

Ms. Clayton described extreme acts of abuse inflicted by Mr. Giffin to the expert. 1/09/12RP 51-52; CP 61. Some of these incidents were not witnessed by her daughter, and some of the details of the incidents her daughter witnessed were not revealed at trial. CP 61. The expert said these details were essential to help explain the basis of his opinion that Ms. Clayton had entered a transient psychotic state. CP 61-62; 1/09/12RP 50-51.

Prior to trial, the defense moved to admit the statements Ms. Clayton had made at the hospital after her arrest which were overheard

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[1]The State also charged firearm enhancements and alleged the aggravating circumstance that the crime involved domestic violence and was committed within sight or sound of the victim's or the offender's minor child under the age of eighteen years. CP 6-7. In addition, Ms. Clayton was charged and convicted of one count of unlawful possession of a firearm and one count of second degree malicious mischief, for damage allegedly caused to Mr. Giffin's car. CP 7-8, 186-90.

by the police officer, to show her state of mind. 1/09/12RP 84-86. The court excluded the evidence, reasoning that Ms. Clayton's state of mind at the hospital was not relevant to her insanity defense because she had become intoxicated after the incident. 1/09/12RP 91-92.

Also prior to trial, the State moved to limit the expert's testimony about the prior assaults. 1/09/12RP 36, 41, 47. The court ruled the expert could not testify about specific instances of abuse, despite the court's acknowledgement that the evidence was relevant to the insanity defense. CP 78; 1/09/12RP 99-103.

At trial, Ms. Clayton's expert testified she was in a transient psychotic state at the time of the incident and could not tell right from wrong or perceive the nature and quality of her actions. 1/30/12RP 496-621. She entered that state due to her personality disorder combined with her extreme fear of being abandoned by Mr. Giffin, her fear of any further abuse by him, and other situational stresses. 1/30/12RP 493-520. Her distorted thinking caused her to believe she had to shoot him in order to be safe. 1/30/12RP 545-47, 559-60.

The jury found Ms. Clayton guilty of the lesser-included charge of second degree intentional murder, as well as second degree felony murder. CP 186-90. Based on prior convictions that were not proved

to a jury beyond a reasonable doubt, Ms. Clayton received a "three-strike" sentence. CP 254, 257.

On appeal, Ms. Clayton argued the trial court abused its discretion and violated her constitutional right to present a defense by (1) excluding the out-of-court statements she made at the hospital which elucidated her state of mind; (2) excluding the details of abuse inflicted by Mr. Giffin she recounted to her expert; and (3) refusing to allow her to impeach a prosecution witness with the witness's inconsistent statements. She also challenged her three-strike sentence on constitutional grounds.[2]

The Court of Appeals affirmed. Inexplicably, and with little analysis, the court concluded that Ms. Clayton's out-of-court statements made in the hours following the incident were not relevant to her state of mind at the time. Slip Op. at 6. The court also rejected Ms. Clayton's other arguments. Slip Op. at 5-9.

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[2] Ms. Clayton also argued on appeal that the trial court violated the Double Jeopardy Clause by refusing to vacate one of her murder convictions. The Court of Appeals agreed and that holding is not at issue in this petition. Slip Op. at 7-8.

D. ARGUMENT WHY REVIEW SHOULD BE GRANTED

1. The Court of Appeals' conclusion that the statements Ms. Clayton made in the hours following the incident were not relevant or admissible to elucidate her state of mind or to support her insanity defense is inconsistent with long-standing Washington case law and undermines Ms. Clayton's constitutional right to present a defense, warranting review by this Court, RAP 13.4(b)(1), (4)

In a series of cases that pre-date the adoption of the Rules of Evidence, this Court held that when a criminal defendant asserts a defense of insanity, almost any of the statements she made at around the time of the incident are admissible because they tend to bear on her state of mind at the time. These cases have never been overruled yet they were completely ignored by the Court of Appeals in this case. Instead, the Court of Appeals held, with little explanation, that Ms. Clayton's statements made in the hours following the incident were *not* relevant to her state of mind. The Court of Appeals' bald conclusion that a person's utterances are not relevant to show her state of mind is untenable and inconsistent with this Court's case law. Review is therefore warranted.

The trial court excluded, over defense objection, the statements that Ms. Clayton blurted out at the hospital soon after her arrest which

were overheard by a police officer. 12/02/12RP 62-72; 1/09/12RP 91-92. The statements showed that, in the hours immediately following the incident, Ms. Clayton was still mentally consumed by memories of Mr. Giffin's assaults upon her. In a rambling and repetitive manner, she blurted out statements such as, "[he] kicked me so hard with his boot," and "[h]e picked up an axe and threw it at me." 12/02/11RP 71. She said, "I was his Negro slave" and, "I've been beat up so bad" and, "He was the worst of anyone in my entire life." 12/02/12RP 71. The statements were offered as evidence of her state of mind and to support her insanity defense. CP 73-75; 1/09/12RP 84-86.

Ms. Clayton's mental condition during the hours following the incident was highly probative of the ultimate question in the case—whether she was temporarily psychotic at the time of the crime. When an insanity defense is raised, the defendant is entitled to "go to great length in offering evidence" to demonstrate her mental condition "not only at the time of the offense, but prior and subsequent thereto." State v. O'Dell, 38 Wn.2d 4, 20, 227 P.2d 710 (1951). The defendant's state of mind soon after the incident is relevant to demonstrate what her state of mind must have been at the time of the alleged acts. Id. at 19-22. Statements made at around the time of the incident are not excludable

as hearsay because they are not offered to prove the truth of the matters asserted but to show the declarant's state of mind at the time. State v. Stubsjoen, 48 Wn. App. 139, 146, 738 P.2d 306 (1987).

This Court has long held 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).

Similarly, this Court has consistently held that, in a criminal case where the defendant asserts a defense of insanity, almost any of her statements made at around the time of the incident are admissible because they tend to shed light on 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).

These cases have not been overruled. The principles on which they rely are still current. The Court of Appeals' decision to ignore these cases is inexplicable. Its conclusion that a person's utterances are not relevant to show her state of mind does not bear scrutiny.

Moreover, Ms. Clayton had a fundamental constitutional right to present evidence relevant to her defense of insanity. Few rights are as fundamental as that of an accused in a criminal trial to present evidence in her own defense. Both the Sixth Amendment and article I, section

22 guarantee a criminal defendant the right to compel the testimony of witnesses. State v. Maupin, 128 Wn.2d 918, 924, 913 P.2d 808 (1996); Const. art. I, § 22; U.S. Const. amend. VI. The United States Supreme Court made clear, "[t]he right to offer the testimony of witnesses, and to compel their attendance, if necessary, is in plain terms the right to present a defense." Washington v. Texas, 388 U.S. 14, 19, 87 S. Ct. 1920, 18 L. Ed. 2d 1019 (1967). Also, the right to offer testimony in one's own behalf has long been recognized as essential to due process. Chambers v. Mississippi, 410 U.S. 284, 294, 90 S. Ct. 1038, 35 L. Ed. 2d 297 (1973); U.S. Const. amend. XIV; Const. art. I, § 3.

A defendant's right to be heard in her defense includes the right to offer testimony and is "basic in our system of jurisprudence." State v. Jones, 168 Wn.2d 713, 720, 230 P.3d 576 (2010). The right to present testimony in one's behalf encompasses the right to present relevant testimony. Id.

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 to her defense. 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. 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 the Court of Appeals' opinion conflicts with this Court's long-standing case law and undermines Ms. Clayton's constitutional right to present a defense, this Court should grant review.

2. Ms. Clayton's statements to her psychological expert recounting details of prior abuse inflicted on her by Mr. Giffin were relevant and admissible to support her insanity defense

Ms. Clayton's expert testified that she entered a psychotic state as a result of her mental disorder and the extreme stress and fear she was experiencing. 1/30/12RP 485-86, 493-94, 504-06, 520-21, 565, 602-03. Ms. Clayton was afraid of Mr. Giffin because of the repeated and serious assaults he had inflicted upon her. 1/30/12RP 494, 521, 565. Those prior assaults caused her to exaggerate the threat that he posed and led her to believe that the only way she could be safe was to shoot him. 1/30/12RP 517, 535, 545-47, 559-62, 565-66.

Yet the trial court refused to allow the expert to testify about the details of the prior assaults that Ms. Clayton told him about. CP 78;

1/09/12RP 99-103. This Court should grant review and reverse the Court of Appeals' decision to uphold the trial court's ruling.

The evidence of Ms. Clayton's mental condition, which was the central issue in the case, consisted principally of the testimony of her expert. ER 703 expressly allows experts to base their opinion testimony on facts or data that are not otherwise admissible in evidence "[i]f of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject." ER 705 provides that an "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." Together, these rules permit a trial court to allow an expert to relate otherwise inadmissible out-of-court statements to the jury in order to explain the reasons for his opinion. 5B Karl B. Tegland, Washington Practice: Evidence Law and Practice, §705.5, at 293-94 (5th ed. 2007); see also In re Det. of Marshall, 156 Wn.2d 150, 162-63, 125 P.3d 111 (2005) (expert could relate otherwise inadmissible material for purpose of explaining basis for her opinion).

A defendant's out-of-court statements made to an expert are admissible at trial if they are offered to explain the basis for the

expert's opinion. State v. Fullen, 7 Wn. App. 369, 383-84, 499 P.2d 893 (1972). The statements are not "hearsay" because they are not offered to prove the truth of the matters asserted. Id.

The details of the prior assaults inflicted by Mr. Giffin upon Ms. Clayton, as she recounted to the expert, were relevant to the expert's opinion about Ms. Clayton's mental condition. The trial court explicitly acknowledged that the evidence was relevant to Ms. Clayton's defense. CP 78; 1/09/12RP 99-103.

In sum, the trial court's decision to exclude Ms. Clayton's statements to the expert about the details of Mr. Giffin's prior assaults was unreasonable and without justification. The evidence was relevant and necessary to explain the basis for the expert's opinion. Given the importance of the expert's opinion to Ms. Clayton's defense, the court's decision to exclude the evidence was unreasonable.

3. Ms. Clayton should have been allowed to impeach a prosecution witness with the witness's inconsistent statements

A prosecution witness, Joann Rardin, observed an interaction between Ms. Clayton and Mr. Giffin at a liquor store shortly before the shooting. 1/23/12RP 116. During cross-examination, Ms. Rardin was equivocal about whether Ms. Clayton appeared to be afraid of Mr.

Giffin and whether she appeared to be trying to avoid him or get away from him. 1/23/12RP 128-30. A police officer testified immediately after Ms. Rardin. The officer had taken a statement from Ms. Rardin at the scene. 1/23/12RP 139. During cross-examination of the officer, defense counsel attempted to impeach Ms. Rardin's testimony by introducing extrinsic evidence of her prior inconsistent statements to the officer. 1/23/12RP 140. The State objected and the court sustained the objection. 1/23/12RP 140-41.

In general, a witness's prior out-of-court statement is admissible for impeachment purposes if it is inconsistent with the witness's trial testimony. State v. Newbern, 95 Wn. App. 277, 292, 975 P.2d 1041 (1999). The purpose of using prior inconsistent testimony to impeach is to allow an adverse party to show that the witness tells different stories at different times. Id. at 293. From this, the jury may disbelieve the witness's trial testimony. Id. The witness's prior inconsistent statements are not offered to prove the truth of the matters asserted but rather to show that the witness's testimony is unreliable; the out-of-court statements are therefore not considered "hearsay." Fraser v. Beutel, 56 Wn. App. 725, 738, 785 P.2d 470 (1990).

In a criminal case, a defendant's right to impeach a prosecution witness with evidence of a prior inconsistent statement is guaranteed by the constitutional right to confront witnesses. State v. Johnson, 90 Wn. App. 54, 69, 950 P.2d 981 (1998); Davis v. Alaska, 415 U.S. 308, 316-18, 94 S. Ct .1105, 39 L. Ed. 2d 347 (1974); U.S. Const. amend. VI.

Contrary to the Court of Appeals' conclusion, the substance of this claim is 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.'" State v. Ray, 116 Wn.2d 531, 539, 806 P.2d 1220 (1991).

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. These questions are adequate to serve as an offer of proof of the

statements counsel wished to have admitted. The trial court's decision to exclude the evidence, and the Court of Appeals' decision to affirm, were unwarranted.

4. 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 a jury trial

The Due Process Clause of the United States Constitution ensures that a person will not suffer a loss of liberty without due process of law. U.S. Const. amend. XIV. The Sixth Amendment also provides the defendant with a right to trial by jury. U.S. Const. amend. VI. A criminal defendant has the right to a jury trial and may only be convicted if the State proves every element of the crime beyond a reasonable doubt. Blakely v. Washington, 542 U.S. 296, 300-01, 124 S. Ct. 2531, 159 L. Ed. 2d 403 (2004); Apprendi v. New Jersey, 530 U.S. 466, 476-77, 120 S. Ct. 2348, 147 L. Ed. 2d 435 (2000).

Blakely makes clear that the judicial finding by a preponderance of the sentencing factor used to elevate Ms. Clayton's maximum punishment to a life sentence without the possibility of parole violates due process. Ms. Clayton was entitled to a jury finding beyond a reasonable doubt that she is a persistent offender.

5. The arbitrary labeling of a persistent offender finding as a "sentencing factor" that need not be proved to a jury beyond a reasonable doubt violates the Equal Protection Clause of the Fourteenth Amendment

The Equal Protection Clause of the Fourteenth Amendment requires that similarly situated individuals be treated alike with respect to the law. Plyler v. Doe, 457 U.S. 202, 216, 102 S. Ct. 2382, 72 L. Ed. 2d 786 (1982); U.S. Const. amend. XIV. When analyzing equal protection claims, courts apply strict scrutiny to laws implicating fundamental liberty interests. Skinner v. Oklahoma, 316 U.S. 535, 541, 62 S. Ct. 1110, 86 L. Ed. 1655 (1942). Strict scrutiny means the classification at issue must be necessary to serve a compelling government interest. Plyler, 457 U.S. at 217.

The liberty interest at issue here—physical liberty—is the prototypical fundamental right; indeed it is the one embodied in the text of the Fourteenth Amendment. "[T]he most elemental of liberty interests [is] in being free from physical detention by one's own government." Hamdi v. Rumsfeld, 542 U.S. 507, 529, 124 S. Ct. 2633, 159 L. Ed. 2d 578 (2004). Thus, strict scrutiny applies to the classification at issue. Skinner, 316 U.S. at 541.

Notwithstanding the above rules, Washington courts have applied rational basis scrutiny to equal protection claims in the sentencing context. State v. Manussier, 129 Wn.2d 652, 672-73, 921 P.2d 473 (1996). Under this standard, a law violates equal protection if it is not rationally related to a legitimate government interest. City of Cleburne v. Cleburne Living Ctr., 473 U.S. 432, 440, 105 S. Ct. 3249, 87 L. Ed. 2d 313 (1985).

Under either strict scrutiny or rational basis review, the classification at issue here violates the Equal Protection Clause because it is neither necessary to serve a compelling government interest nor rationally related to a legitimate government interest.

Where prior convictions that increase the maximum sentence available are termed "elements" of a crime, they must be proved to a jury beyond a reasonable doubt. See, e.g., State v. Roswell, 165 Wn.2d 186, 192, 196 P.3d 705 (2008).

But where prior convictions increase the maximum sentence, they have been termed "sentencing factors," and treated as findings for a judge by a preponderance of the evidence. State v. Smith, 150 Wn.2d 135, 143, 75 P.3d 934 (2003). This classification violates equal protection because the government interest in either case is exactly the

same: to punish repeat offenders more severely. See RCW 9.68.090 (elevating "penalty" for communication with a minor for immoral purposes based on prior offense); RCW 46.61.5055 (person with four prior DUI convictions in last ten years "shall be punished under RCW ch. 9.94A").

As the Supreme Court explained in Apprendi, "merely using the label 'sentence enhancement' to describe [one fact] surely does not provide a principled basis for treating [two facts] differently." Apprendi, 530 U.S. at 476. But Washington treats prior convictions used to enhance current sentences differently based only on such labels. See Roswell, 165 Wn.2d at 192. This Court should grant review and hold that the judge's imposition of a sentence of life without the possibility of parole violated the Equal Protection Clause. The case should be remanded for resentencing within the standard range.

E. CONCLUSION

For the reasons given, this Court should grant review and reverse Ms. Clayton's conviction and three-strike sentence.

Respectfully submitted this 12th day of June, 2014.

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APPENDIX

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Respondent, v. BARBARA ANN CLAYTON, Appellant.	No. 43240-4-II UNPUBLISHED OPINION

MELNICK, J. — Barbara Clayton appeals her convictions for second degree murder, malicious mischief, and unlawful possession of a firearm. She also appeals her judgment and sentence as a persistent offender under RCW 9.94A.570. She argues that (1) the trial court erred when it excluded evidence relevant to her defense, (2) the trial court violated her right to be free from double jeopardy when it merged her two murder convictions instead of vacating one of the convictions, and (3) her persistent offender sentence violates her due process and equal protection rights. We hold that (1) the trial court reasonably excluded the challenged evidence, (2) the trial court erred by not vacating one of Clayton's murder convictions, and (3) her persistent offender sentence did not violate due process and equal protection. We affirm Clayton's convictions for second degree murder (count I), unlawful possession of a firearm, and malicious mischief. We remand the case to the trial court with direction to strike her second degree felony murder (count II) from the judgment and sentence.

FACTS

On April 1, 2011, Clayton shot and killed her boyfriend, Curtis Giffin. They, along with Clayton's minor daughter, had been living together for several years. In the months before the shooting, Clayton and Giffin had been arguing over Giffin's seeing another woman.

Before the shooting, Clayton and Giffin argued in a parking lot. Both parties entered separate cars. Clayton then "rammed" her car into Giffin's car and drove off. 4 Report of Proceedings (RP) at 126. Clayton returned to their home, told her daughter to pack her belongings, and said that they were leaving because Giffin had impregnated another woman. Clayton also retrieved a gun and placed it under a couch cushion. Giffin arrived at the house approximately 10 minutes later and began arguing with Clayton. Clayton obtained the gun and shot Giffin approximately four times. He died at the scene.

The State charged Clayton with premeditated first degree murder (count I) and second degree felony murder (count II). The State charged firearm enhancements for both counts and alleged that the shooting was a domestic violence incident. It further alleged the incident occurred within the sight or sound of Clayton's minor child. The State also charged Clayton with first degree unlawful possession of a firearm; and, for the car ramming incident, second degree malicious mischief. Clayton pleaded not guilty by reason of insanity.

Prior to trial, Clayton was interviewed by a psychologist, Dr. Donald Dutton, who diagnosed her as suffering from borderline personality disorder. Dutton believed that, at the time of the shooting, Clayton was in a transient psychotic state. He opined that Clayton felt a sense of abandonment that caused her to become extremely anxious and panicked. Dutton based his opinions on his own interviews with Clayton, police reports, psychological tests, Clayton's journal entries, and Clayton's phone calls from jail.

The State moved to prohibit Dutton from testifying about specific acts of domestic violence involving Clayton and Giffin that occurred prior to the shooting. The trial court granted the motion because Dutton did not know when the events had occurred and because no corroborating evidence existed. The court held that the danger of unfair prejudice outweighed

the probative value of the evidence. It also found a high risk of misleading the jury and confusing the issues.

The trial court permitted Dutton to testify about numerous events Clayton apprised him of, including her recollection of the day of the shooting; her early years growing up in California, including childhood traumas and abusive family relationships; her relationship history with other men, including their jealousies, control issues, and physical abuse perpetration; and, her history of parenting, including financial hardship and homelessness. Dutton could also testify about Clayton's perceptions of her relationship with Giffin, which included his being argumentative, abusive, violent, and an excessive alcohol user, as well as Clayton's daughter's observations about ongoing domestic violence between Clayton and Giffin and how Clayton would sometimes fight back. Additionally, Dutton could testify about psychological testing he performed and the bases for his diagnosis.

The State also moved to prohibit Clayton from introducing her post-arrest statements in the State's case-in-chief. The trial court granted the motion and held the statements were hearsay that did not fit within any exception.

The jury found Clayton guilty of the lesser included charge of second degree murder (count I), second degree felony murder (count II), unlawful possession of a firearm, and malicious mischief. The jury also found that she was armed with a firearm during the murder and that the murder was an aggravated domestic violence offense. Clayton moved to vacate her second degree murder conviction (count I) because it violated double jeopardy. The trial court merged count II, felony murder, into count I, second degree murder, for purposes of sentencing and noted this on the judgment and sentence. The court also merged the firearm enhancements.

The trial court found that Clayton was a persistent offender and sentenced her to life without parole. Clayton appeals.

ANALYSIS

I. EVIDENTIARY RULINGS

Clayton first argues that several of the trial court's evidentiary rulings deprived her of the right to present a defense. Because the court did not abuse its discretion, we affirm.

A criminal defendant has a constitutional right to present relevant, admissible evidence in her defense. *State v. Rehak*, 67 Wn. App. 157, 162, 834 P.2d 651 (1992). But this right is not absolute. *Rehak*, 67 Wn. App. at 162. The decision to admit or exclude evidence lies within the sound discretion of the trial court. *State v. Neal*, 144 Wn.2d 600, 609, 30 P.3d 1255 (2001). An abuse of discretion exists "[w]hen a trial court's exercise of its discretion is manifestly unreasonable or based upon untenable grounds or reasons." *Neal*, 144 Wn.2d at 609 (quoting *State v. Stenson*, 132 Wn.2d 668, 701, 940 P.2d 1239 (1997)).

A. Psychologist's Testimony

Clayton asserts that the trial court erred when it prohibited Dutton from providing hearsay testimony about specific instances of abuse between Clayton and Giffin. We disagree.

Generally, hearsay evidence is inadmissible. ER 802. An expert may rely on inadmissible evidence as a basis for an opinion or inference if the facts or data utilized are the type reasonably relied on by experts in that particular field for forming opinions. ER 703. An expert may testify in terms of opinion or inference and the reasons behind it without prior disclosure of the underlying facts or data. ER 705. Additionally, relevant evidence may be excluded if the danger of unfair prejudice, confusion of the issues, or misleading the jury substantially outweighs its probative value. ER 403.

Here, Clayton argues that the statements were admissible under ER 703 and 705. But the trial court concluded that the risk of confusing and misleading the jury outweighed the relevance of the evidence. Because Dutton did not know when the incidents occurred, the trial court was concerned that the jury might be misled into believing that the incidents had resulted in the shooting or that the shooting had been in self defense, something Clayton had not raised. Her sole defense was insanity.

Moreover, the trial court allowed Dutton to make general references to Clayton's allegations of abuse against Giffin. Dutton referenced Giffin and Clayton's abusive relationship and how it related to his findings regarding her mental state at the time of the shooting. Consequently, Dutton explained to the jury the reasoning used to arrive at his opinion. And Clayton did present specific instances of abuse through the testimony of her daughter, who witnessed some of the incidents. For the preceding reasons, the trial court did not abuse its discretion and there is no error.

B. Clayton's Post-Arrest Statements

Clayton next argues that the trial court erred when it excluded her post-arrest statements as hearsay because they were admissible under the state of mind hearsay exception. Because the statements related to Giffin's actions rather than to Clayton's state of mind, the state of mind hearsay exception does not apply and we affirm.

Generally, a defendant's self-serving out-of-court statements are not admissible in the State's case-in-chief as an exception to the hearsay rule, when offered on his behalf. *State v. Bennett*, 20 Wn. App. 783, 787, 582 P.2d 569 (1978). To be admissible, they must fit within an exception to the rule. An out-of-court statement of the declarant's then existing state of mind is admissible as a hearsay exception. ER 803(a)(3). However, a declarant's out-of-court

statements are inadmissible when they relate to the conduct of another person who may have created the declarant's state of mind. ER 803(a)(3). *State v. Sublett*, 156 Wn. App. 160, 199, 231 P.3d 231 (2010).

In this case, Clayton contends that the trial court erred by excluding her out-of-court statements about past incidents of domestic violence. The proffered statements were made after the shooting and after Clayton drank a large amount of alcohol and was admitted to the hospital. The officer who accompanied her to the hospital heard her make the following comments: "I was his Negro slave"; "[t]hat mother fucker kicked me so hard with his boot"; "[h]e picked up an axe and threw it at me"; "[h]e was the worst of anyone in my entire life"; and "I've been beat up so bad." RP (Dec. 2, 2011) at 71. Clayton argues that these statements are admissible under the state of mind hearsay exception.

Because Clayton's statements at the hospital described Giffin's past conduct and did not reflect her state of mind, they were inadmissible. ER 803(a)(3); *Sublett*, 156 Wn. App. at 199. The trial court did not err when it excluded Clayton's statements at the hospital as hearsay.

C. Impeachment

Next, Clayton argues that the trial court erred when it prohibited her from impeaching a witness's testimony. Because Clayton failed to make an offer of proof, this issue is not preserved for appeal.

The State called Joann Rardin, who testified about Clayton and Giffin's argument and car wreck in the parking lot. Clayton attempted to impeach Rardin with her prior statement to police. Not satisfied with Rardin's answers on cross examination, Clayton then attempted to impeach Rardin through the responding officer's testimony. The State objected that the officer's testimony regarding Rardin's statements constituted impeachment on a collateral matter, and the

trial court upheld the objection. Because the police officer was not able to testify about Rardin's statements and because Clayton did not make an offer of proof, this issue is not preserved for appeal. ER 103(a)(2).

For a prior statement to be admissible for impeachment purposes, the statement must be inconsistent with the witness's in-court testimony. *State v. Newbern*, 95 Wn. App. 277, 294, 975 P.2d 1041 (1999). Here, as the State points out, it is not possible to determine whether Rardin's statements at trial were inconsistent with her prior statements to police because the defense never made an offer of proof. ER 103(a)(2) requires that a party make an offer of proof where error is predicated on a ruling excluding evidence. Because Clayton failed to make an offer of proof, this issue is not preserved for appeal.

II. DOUBLE JEOPARDY

Clayton next argues that the trial court violated her right to be free from double jeopardy by merging her murder convictions rather than striking one of them from her judgment and sentence. We agree.

Double jeopardy violations are questions of law that we review de novo. *State v. Fuller*, 169 Wn. App. 797, 832, 282 P.3d 126 (2012), *review denied*, 176 Wn.2d 1006 (2013). The state and federal constitutions prohibit a defendant from being punished multiple times for the same offense. *State v. Turner*, 169 Wn.2d 448, 454, 238 P.3d 461 (2010); U.S. CONST. amend. V; WASH. CONST. art. I, § 9. A conviction alone, even without an accompanying sentence, may constitute "punishment" in the double jeopardy context. *Turner*, 169 Wn.2d at 454-55 (citing *State v. Womac*, 160 Wn.2d 643, 657, 160 P.3d 40 (2007)). Accordingly, where a jury finds the defendant guilty of multiple alternative means of committing a crime, the trial court "'should enter a judgment on the greater offense only and sentence the defendant on that charge *without*

reference to the verdict on the lesser offense.'" *Turner*, 169 Wn.2d at 463 (quoting *State v. Trujillo*, 112 Wn. App. 390, 411, 49 P.3d 935 (2002)).

In *Fuller*, we determined that the trial court did not violate the defendant's right to be free from double jeopardy where it merged the defendant's two murder convictions at sentencing and included only one conviction in the judgment and sentence. 169 Wn. App. at 835. There, the trial court entered a judgment stating that the defendant was guilty of only one count of murder and sentenced him to only one count of murder. *Fuller*, 169 Wn. App. at 835. Because the judgment and sentence did not reference the other murder verdict, it did not violate the defendant's right to be free from double jeopardy. *Fuller*, 169 Wn. App. at 835. But, here, the trial court listed both merged counts on the judgment and sentence.[1]

Because the trial court did not sentence Clayton "'without reference to the verdict on the lesser offense,'" the sentence violates Clayton's right to be free from double jeopardy. *Turner*, 169 Wn.2d at 463 (quoting *Trujillo*, 112 Wn. App. at 411). And we remand to the trial court to strike her second degree felony murder conviction, count II, from the judgment and sentence.

III. PERSISTENT OFFENDER SENTENCE

Finally, Clayton argues that her due process and equal protection rights were violated when the trial court sentenced her as a persistent offender because her prior convictions were not proved to a jury. Washington courts have already rejected these same arguments; therefore, there is no error.

Our Supreme Court has rejected Clayton's due process argument based on binding federal and state authority. *State v. Wheeler*, 145 Wn.2d 116, 34 P.3d 799 (2001). We are bound by our Supreme Court's precedent. *State v. McKague*, 159 Wn. App. 489, 514, 246 P.3d 558

[1] The judgment and sentence lists count II and states, "Merged into Count I." CP at 253.

(2011). Similarly, we have previously rejected Clayton's equal protection argument in *State v. Reyes-Brooks*, 165 Wn. App. 193, 207, 267 P.3d 465 (2011), and *State v. Williams*, 156 Wn. App. 482, 496-98, 234 P.3d 1174 (2010).

We affirm Clayton's convictions for second degree murder (count I), unlawful possession of a firearm, and malicious mischief. We remand the case to the trial court with direction to strike second degree felony murder (count II) from the judgment and sentence.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record in accordance with RCW 2.06.040, it is so ordered.

Melnick, J.

We concur:

Hunt, J.

Worswick, C.J.

DECLARATION OF FILING AND MAILING OR DELIVERY

The undersigned certifies under penalty of perjury under the laws of the State of Washington that on the below date, the original document **Petition for Review to the Supreme Court** to which this declaration is affixed/attached, was filed in the **Court of Appeals** under **Case No. 43240-4-II**, and a true copy was mailed with first-class postage prepaid or otherwise caused to be delivered to the following attorney(s) or party/parties of record at their regular office / residence / e-mail address as listed on ACORDS / WSBA website:

☒ respondent Kathleen Proctor, DPA
[PCpatcecf@co.pierce.wa.us]
Pierce County Prosecutor's Office

☒ petitioner

☐ Attorney for other party

MARIA ANA ARRANZA RILEY, Legal Assistant
Washington Appellate Project

Date: June 12, 2014

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