NO. 43632-9-II

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

STATE OF WASHINGTON,

Respondent,

v.

DARLENE GREEN,

Appellant.

FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR KITSAP COUNTY

The Honorable Jay B. Roof, Judge

BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. There was insufficient evidence of the corpus delicti of this charge to support the conviction.

2. The trial court erred and denied appellant her constitutional right to present a defense by excluding expert testimony on how post-traumatic stress disorder and battered woman syndrome affected her perception of and reaction to her husband's death. U.S. Const., amends. 6, 14; Const., art. I, §§ 3, 22.

3. The trial court erred by excluding the substance of the argument and physical interactions between the defendant and the decedent in the hours leading up to his death. U.S. Const., amends. 6, 14; Const., art. I, §§ 3, 22.

4. The trial court erred by excluding all evidence of past violence by the decedent against the defendant in the years leading up to his death. U.S. Const., amends. 6, 14; Const., art. I, §§ 3, 22.

5. The trial court erred by refusing the defense proposed instruction:

> If you have a reasonable doubt as to whether or not William Green committed suicide, then you must acquit Darlene.

CP 379; RP 740-42.

6. To the extent it could be deemed a "finding of fact," appellant assigns error to the trial court's statement in its memorandum opinion: "Here, neither party has requested a Frye hearing." CP 101.

Issues Pertaining to Assignments of Error

1. Where the medical experts were unable to determine whether the gunshot was a suicide or homicide, forensic evidence supported suicide, and the defendant "confessed" to the shooting but later recanted, was there sufficient evidence of corpus delicti to permit the conviction?

2. Where the defendant immediately told her sons and police she shot her husband, but a few days later had no memory of these conversations but remembered her husband shot himself and fell onto her lap, was she entitled to present expert testimony of her psychological state, a diagnosis of PTSD and battered woman syndrome with dissociation, to explain why she would say she shot him when he shot himself?

3. Did the trial court err by excluding all evidence of the interactions between the defendant and the decedent in the 24 hours leading up to his death, including incidents of domestic violence and an "argument" that demonstrated his dementia?

4. Where the defense was based on a diagnosis of battered woman syndrome, was it error to exclude all evidence of prior domestic violence?

5. Was the defense entitled to an instruction on its theory that if the jury had a reasonable doubt whether it was a suicide, it must find the defendant not guilty?

6. Where the record shows both parties offered to conduct a Frye hearing, did the court err finding neither party requested a Frye hearing?

B. STATEMENT OF THE CASE

1. Substantive Facts

a. June 18, 2010

On June 18, 2010, about 4:00 p.m., 79-year-old Darlene Green called her son Brad. She said his dad was dead, she had shot him. When Brad arrived at his parents' home, his brother Kirt and the police were already there. RP 260-64.

Kirt Green flagged police down on the driveway. His mother stood on the deck of the house in her bathrobe, waving. Deputy Watson held his AR-15 assault rifle on Mrs. Green until she showed him her other hand. Then he handcuffed her and led her to his patrol car. RP 294-95.

Inside the house, sheriff's deputies found the body of William Green. He lay on the living room floor next to a recliner. A revolver was next to him on the floor. He had suffered a bullet wound between his eyes. CP 125-26; RP 276-77, 310. The chair was somewhat reclined. CP 115-16, 121-22.

Mrs. Green had blood on the front of her robe from the lap down. There was none on her torso, face, or sleeves. RP 287-88; CP 157-60.

She told Deputy Anderson, "I don't know what the big deal is. I just did what he told me to." She said she didn't know how to load or operate the gun, so her husband loaded and cocked it and told her exactly where to shoot him, and she did. RP 281-82. All day he urged her to shoot him. RP 295-98.

Mrs. Green said her husband of 57 years was suffering from Alzheimer's "real bad for the past

two or three years." She said he had been hitting and biting her, he liked to drag her around by her hair. She said she told the family about what was going on and no one would help her. She said he had gotten really bad in the past six months. CP 364 [Subno. 110 at 0009]; RP 701-02.

Deputies took four photos of Mrs. Green at the patrol car. CP 155-62; RP 320-25. There were no photos of her hands. RP 480-82.

Detective Rodrigue interviewed "that nice lady" at the precinct. RP 440-45. Mrs. Green explained it began the night before when her husband started talking about how he had sex with his sister when they were young. They argued. She went to bed to end the argument. But the next morning, he was still argumentative. RP 457-67; CP 367 [Subno. 110 at 00015.]

Mrs. Green told the detective her husband came into her bedroom that morning and told her to get up. She replied she'd get up "when she was damn good and ready." She didn't get up until about 2:00 p.m. She ate something. The two of them sat in the living room watching television. Mr. Green said he was going to the bedroom to get the gun;

she could shoot him, but she knew where she would go -- to jail. He went to the bedroom and came back with a handgun. He had to manually cock it for her, to pull the hammer back, because she didn't have the hand strength. She said he held it up to his head and leaned over her and told her to shoot him. She said she reached up, took the gun, and shot him. RP 447-49, 474-77. She called Kirt and said she shot his dad, but he didn't believe her, so she called Brad and told him. Then she went out on the front porch and waited. RP 449-50.

Detective Rodrigue asked Mrs. Green if she was injured. She showed him her left wrist where her husband had bitten her. She said he was a biter. The detective did not ask if she had any other injuries and did not photograph what he saw. RP 466-67; CP 367 [Subno. 110 at 00015]

After being booked into the jail, Mrs. Green was taken to the hospital for blood pressure problems. RP 729-30. Nursing staff noted multiple bite marks on her wrist, forehead and back. RP(1/30/2012) at 13; RP 3; CP 83.

b. Mrs. Green at Trial

At trial, Mrs. Green testified she did not kill her husband. He went into his bedroom and came out with the gun. He asked her to shoot him. She said, "No, absolutely not. Go put the gun away." He got up. She thought he was putting the gun away. She didn't look to see if he had it when he came back into the room. She was reclined in the chair with the footrest up. He said, "I only had sex ..."[1] He put the gun to his forehead, told her to "Look up here now." When she looked, she saw a big ball of white stars, then he fell onto her legs. When she lowered the footrest, he rolled off her onto the floor. She never put her hands on the gun.[2] RP 701-09, 720-24.

Mrs. Green did not remember telling her sons or the police that she shot her husband. She only vaguely remembered being booked into the jail. On cross-examination, she agreed she would not intentionally have tried to cause her sons emotional pain. She did not know why she would

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[1] The court sustained the objection to completing this sentence. RP 705-06.

[2] Her hands were very arthritic. CP 249-50 (Ex. 90).

intentionally lie to the police. It took her a few days after the shooting to recall what happened. RP 709-25.

b. Police Investigation

Detective Doremus was in charge of gathering evidence at the scene. Based on his one-week basic course on blood spatter evidence, he concluded Mr. Green was leaning over the recliner when the gun fired. He took photos of the recliner in the living room, but he did not take the recliner into evidence. RP 390-92, 421-24; CP 243-48. He took Mrs. Green's and Mr. Green's clothing into evidence, but he never sent them to the crime lab. RP 403-04.

c. Autopsy

Dr. Gina Fino, the forensic pathologist, performed the autopsy. RP 329-40, 355-57; CP 163-98. Dr. Donald Reay reviewed the autopsy for the defense. RP 625-56.

Both experts agreed Mr. Green died of a contact gunshot wound to the forehead that caused immediate death. Such an injury initially caused "blowback," a fine mist of blood spatter, then almost immediately a heavy flow from the entry

wound, described as "blood dumping." Mr. Green's hands bore both kinds of blood spatter, indicating both hands had been very close to the wound. RP 340-43, 354-55, 535-36, 628-31.

Mr. Green's right hand had a powder burn and bruise on the palm. All experts agreed this hand was gripping the gun around the top of the revolver's cylinder when it fired. RP 353-54, 579-80, 629-30; CP 173-78, 279-80, 341-42.

Mr. Green's left hand had blood on the top but not the palm side. Blood spattered the base and tip of his left thumb, but left a gap with no blood across the thumb's knuckle. Dr. Fino did not explore the cause of this pattern. RP 359-960, 631-32; CP 179-88, 271-74.

Dr. Reay concluded the gap on the left thumb was consistent with the thumb having been on the trigger at the time the gun was fired. The trigger or trigger guard protected it from blood spatter. RP 631-32, 649, 654.

Dr. Fino and Dr. Reay agreed the gunshot could have been self-inflicted or inflicted by someone else. RP 362-63, 633-34, 648. The State conceded Mr. Green's left hand and left thumb could have

been in the trigger guard or on the trigger. RP 755.

Dr. Reay noted Mr. Green's blood-alcohol content of .10 was common for suicides. RP 649, 683-85.

d. Charges

The State charged Mrs. Green with second degree murder, under both intentional murder and felony murder, and the alternative charge of manslaughter in the first degree. CP 1-7.

e. Subsequent Investigation

Defense expert Kay Sweeney, founding director of the Washington State Crime Lab, studied the evidence to recreate the event. He reviewed all the photographs, examined the clothing with a microscope, and saw the actual recliner. He attempted to recreate the blood patterns on Mr. Green's left hand. RP 547-613; CP 251-350.

He concluded the lack of blood on part of Mr. Green's left thumb was caused by having that thumb on the trigger. RP 563, 580-81, 587-90; CP 267-68, 261-64, 343-52. A close-up photograph showed a shape of fingertips outlined by blood on the gun's grip consistent with Mr. Green's left thumb being

in the trigger and the fingers continuing around the grip -- in a position unlike a hand normally holding the gun and pointing it away from oneself. RP 561-63; CP 265-66.

Extensive blood on both Mr. Green's hands and shirt cuffs showed his hands had been very close to the wound when shot. RP 563-64; CP 267-70.

Under microscopic examination, Mrs. Green's long-sleeved robe had no blood spatter on the torso or cuffs. This proved her cuffs were not close to the gun when it fired. RP 584-89; CP 155-62.

Mr. Sweeney concluded Mr. Green held the gun in his right hand, wrapped over the top, and had his left thumb on the trigger when it fired. Mrs. Green's hands were not close to the gun when it fired. RP 587-90.

Blood on the top edge confirmed the recliner's footrest was extended when the gun fired, then went down while blood was flowing. RP 568-72; CP 287-98.

Darlene Green weighed 110 pounds and was less than 5' tall. RP 707-08. Mr. Green was 5'6-1/2" tall; he weighed 136 pounds. RP 350-51. With the footrest extended, the back of the recliner's seat

was 40" from the edge of the footrest. RP 571; CP 295-96.[3] The gun's barrel was shorter than 5-1/2". Mr. Green's right hand was 2-1/2" to 3" from the contact wound. RP 534-35. The gun required nine pounds to pull the hammer back. The trigger-pull was 3-1/4 pounds. RP 500.

The State's crime lab analyst agreed with all the experts that Mr. Green's right hand had to be "right on" the gun's cylinder when it fired. RP 511. She could not say where his left hand was. RP 513. She could not tell if Mr. Green or someone else pulled the trigger. RP 542-43.

The fine mist of blood backspatter does not travel far; it is a small amount of blood that easily dries and is affected by gravity. RP 537. She did not examine Mrs. Green's clothing. RP 524.

f. Evidence of Domestic Violence

Mrs. Green called the police in 2006 because her husband had pushed her down. When the police arrived, she slapped her husband in front of them. The police arrested her. With considerable

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[3] The blood patterns on Mr. Green's pants and shoes showed the pants were against the raised footrest and the toes of the shoes were beneath the footrest. RP 571-74; CP 299-316.

ambivalence and discomfort, she accepted pretrial diversion to a misdemeanor charge. RP(1/30/12) at 21, 23-24; CP 78. As Dr. Maiuro reported:

> According to Darlene, and contrary to the impression held by authorities, she had been the primary victim of a variety of forms of domestic violence and abuse perpetrated by William for nearly 10 years. Although she acknowledges that most of her marriage was "satisfactory, happy, and free [of] violence and abuse," Darlene reports that things began to change during their later years as William began to experience [a] variety of health problems, most notably the onset of memory difficulties and dementia. ...
>
> Darlene acknowledged that both she and William engaged in [physically abusive behavior] but that William had initiated it and progressively escalated his violence to the point of recurrent physical injury to Darlene and life threatening gestures with a handgun. As the elderly couple became more and more emotionally estranged, William would reportedly become frustrated and upset when Darlene would reject his attempts at physical intimacy and would punitively lash out at her physically by grabbing her, pushing and slapping her, biting her, and dragging her around the house. A[t] times, Darlene reported that William would make self-disparaging and self-loathing remarks, retrieve his hand gun, and beg and taunt Darlene to shoot him [in] the head to put him out of his misery.
>
> In keeping with her psychological profile, Darlene was reluctant to talk about and report these events. She would, on occasion, confide in her son Kirt, that she was afraid, and ask him to

> intervene. ... According to Kirt, there would be periodic calls made by both parties, reporting that the other had been violent and abusive, leading to a sense of frustration, embarrassment, and avoidance among the adult sons. ... As all of Darlene and William's children were male, with Darlene often reluctant to talk about things, the sons were reportedly inclined to believe and align themselves with the plight of their father more than Darlene. According to Kirt, "we had a traditional home life and tended to value the bread winner more than the bread maker."

CP 80.[4]

A neighbor saw the Greens yelling at each other about three months earlier. They were both on their front porch. Mrs. Green was yelling at her husband to stay away and not touch her. They yelled until they saw the neighbor, then went inside and things got quiet. CP 369 [Subno. 110 at 00017].

Kirt reported his parents had fights, some verbal and some physical. He initially reported he believed his mother had been the aggressor and his father the victim. CP 375 [Subno. 110 at 00005].

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[4] Kirt was the only son to visit his parents in recent years. Brett installed a phone block so his parents couldn't call. RP 712. Brad filed a lawsuit against his mother for wrongful death and under the slayer statute, hoping to gain part of his father's estate. RP 266-68.

After spending some time reflecting on the family's history, what he had heard and seen, he came to believe she was in fact the victim. CP 80.[5]

g. Psychological Evaluation

Dr. Roland Maiuro diagnosed Darlene Green with battered woman syndrome, a subset of post-traumatic stress disorder ("PTSD"). Her initial statements that she shot her husband, followed by complete denial, were consistent with this diagnosis. CP 77-85.

> In the study of serious trauma events, it is commonly observed that individuals sometimes "step outside of themselves" or partially dissociate when they are in a state of recoil and shock. Consequently, they may attempt to piece together what has happened much as an outside observe[r] would. As Darlene observed, and apparently many others may have observed in this case, at first glance it looks like Darlene may have committed the act. This conclusion, however, would appear to be more a matter of circumstance and perception rather than reality. The present evaluation data clearly supports the presence of post-traumatic symptoms for Darlene Green associated with the shooting, supporting

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[5] "If a battered woman can be labeled as 'passively not caring about herself,' as 'hysterical,' as 'making much ado about nothing,' or characterized as a 'provocative, angry bitch who stirs up trouble and only gets what she deserves,' then others will not have to acknowledge her genuine pain." Walker, Lenore, TERRIFYING LOVE at 163 (Harper & Row, 1989).

> such an interpretation in this case. The fact that she said, or may have initially thought, she was responsible for the shooting, does not necessarily mean that her current, more considered, assertion that she did not is not credible.
>
> When pressed further about her memory and feelings at the time, Darlene added: "I am sure now that I didn't do it...but I felt to blame...that's the way it was when he was violent and abusive...he would go on and on about things, until I finally admitted it was my fault and I was to blame."
>
> Such a tendency to subjectively self-blame, even in the absence of objective data to suggest otherwise, is a classically documented symptom of intimate partner abuse and domestic violence victimization. The fact that Darlene Green was repeatedly and severely abused and developed a mindset of inappropriately accepting blame and guilt is clearly supported in this case. This point is well illustrated and inadvertently compounded by the fact that both the legal system and some of her own family, in the throes of their misunderstanding, anger and grief, have historically reinforced this view by identifying and treating her as a perpetrator rather than a "victim defendant" of domestic violence.

CP 84-85.

h. Dementia

William Green was diagnosed in October 2009 with early stage Alzheimer's disease. Patients told early of an Alzheimer's diagnosis have an increased chance of suicide. RP 686-700.

2. Procedural Facts

a. Exclusion of Expert Testimony and Domestic Violence

The State moved in limine to exclude Dr. Maiuro's testimony, any evidence of domestic violence, any evidence of Mrs. Green's injuries found when she was arrested, and Mrs. Green's statements to the police about Mr. Green's dementia and abuse of her. CP 66-92; RP(1/30/2012) 5-25; RP 2-10, 457-67. The State argued battered woman syndrome was admissible solely for self-defense or failure to report abuse; a Frye[6] hearing was required for this application. The defense twice offered a Frye hearing if the court believed it necessary. RP(1/30/2012) at 13-15.

The court entered a written memorandum of its ruling. CP 99-104. Because the judge did not find "dissociation and altered perception of the traumatic event during or immediately after the event" listed as a symptom of PTSD in the DSM-IV, he concluded Dr. Maiuro's theory was "novel." CP

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[6] Frye v. United States, 293 F. 1013 (D.C. Cir. 1923), provides the admissibility standard for new scientific evidence in Washington. State v. Gregory, 158 Wn.2d 759, 829-30, 147 P.3d 1201 (2006).

101. He thus concluded a Frye hearing was necessary to see if his theory was generally accepted in the psychological community. He ultimately did not order such a hearing, because he concluded the testimony would not be helpful to the trier of fact. CP 102-03.

> However, the testimony Dr. Maiuro proposes to give--that Defendant's perception of the shooting would have been different at different times due to the incredibly stressful nature of the situation--appears to be within the common knowledge of a layperson. Further, because the testimony clearly bears on Defendant's credibility, it is likely to invade the fact-finding province of the jury.

CP 102. The court ruled Dr. Maiuro could not testify regarding Mrs. Green's "Battered Spouse Syndrome and PTSD insofar as it attempts to explain her inconsistent statements about the shooting." CP 104.

The court also excluded any evidence regarding the substance of the argument Mr. Green was having before he died; his statement just before shooting himself that he only had sex with his sister once; any evidence of previous domestic violence between the couple, and specifically that he bit Mrs. Green all over the night before; and the evidence of the

bite marks found on Mrs. Green at the hospital. RP 472-73, 704-06, 728-29.

b. Voir Dire

Jurors said the most reliable evidence of guilt is a confession. RP 135. When pressed, they said possible reasons for a false confession would be mental illness, medication, someone might blame oneself for not being there, or promises or coercion. RP 207-09.

c. Defense Proposed Instruction

The defense proposed one instruction outlining the defense theory of the case.

> Darlene Green's theory of the case is that her husband William on June 18, 2010 committed suicide in front of her by taking his Ruger Single Six pistol, placing it to his forehead and pulling the trigger thereby ending his life.
>
> The State has presented you with three alternate theories of their case,
>
> 1. Darlene intentionally but without premeditation shot her husband which caused his death.
>
> 2. That Darlene assaulted her husband and by either committing that assault, or fleeing from that assault, caused the death of William.
>
> 3. Or that Darlene recklessly caused the death of William.
>
> If you have a reasonable doubt as to whether or not William Green committed suicide, then you must acquit Darlene.

CP 379; RP 740-42.

The court refused the instruction, concluding the defense is only entitled to an instruction on its theory if it presents an affirmative defense. Counsel objected that although not a statutory affirmative defense, the defense theory was affirmative proof that Mr. Green killed himself and no crime was committed.

> And we're entitled to an instruction which instructs the jury that if he did kill himself, then Mrs. Green must be acquitted. If they have beyond [sic] a reasonable doubt whether he killed himself, Mrs. Green should be acquitted.

RP 748-49. The court noted the exception.

d. Closing Argument

In closing, the State acknowledged:

> Is it conceivable that [Mr. Green's] left hand and the left thumb could have been in the trigger guard, could have been pressing up against the trigger? That's possible.

RP 755. But the prosecutor argued there was no rational explanation for why Mrs. Green would "claim credit" for shooting her husband unless that's what happened. RP 761. In rebuttal, he argued there was no explanation for why Darlene Green would fabricate such a horrible lie. RP 797.

e. Verdict and Sentence

The jury acquitted Mrs. Green of second degree murder, but convicted her of manslaughter in the first degree. The court imposed five years in prison, an exceptional sentence below the standard range. CP 46-57. The court denied Mrs. Green an appeal bond. RP(5/9/12). At age 81, she is serving her sentence at Purdy.

C. ARGUMENT

1. THERE WAS INSUFFICIENT EVIDENCE OF THE CORPUS DELICTI TO SUPPORT A CONVICTION IN THIS CASE.

> The corpus delicti doctrine generally is a principle that tests the sufficiency or adequacy of evidence, other than a defendant's confession, to corroborate the confession. ... The purpose of the rule is to ensure that other evidence supports the defendant's statement and satisfies the elements of the crime. Where no other evidence exists to support the confession, a conviction cannot be supported solely by a confession. The purpose of the corpus delicti rule is to prevent defendants from being unjustly convicted based on confessions alone.

State v. Dow, 168 Wn.2d 243, 249, 227 P.3d 1278 (2010).

> Notably, we are among a minority of courts that has declined to adopt a more relaxed rule used by federal courts. ... Under the federal rule, the State need only present independent evidence sufficient to establish that the

> incriminating statement is trustworthy. ... Under the Washington rule, however, the evidence must independently *corroborate*, or confirm, a defendant's incriminating statement.
>
> In addition to corroborating a defendant's incriminating statement, the independent evidence "must be consistent with guilt and inconsistent with a[] hypothesis of innocence." ... If the independent evidence supports "reasonable and logical inferences of both criminal agency and noncriminal cause," it is insufficient to corroborate a defendant's admission of guilt.

State v. Brockob, 159 Wn.2d 311, 328-29, 150 P.3d 59 (2006) (Court's emphasis; citations omitted).

> *"Corpus delicti"* literally means "body of the crime." In a homicide case, the corpus delicti consists of two elements the State must prove at trial: (1) the fact of death and (2) a causal connection between the death and a criminal act.

State v. Aten, 130 Wn.2d 640, 655, 927 P.2d 210 (1996). In Dow and Brockob, the Supreme Court reaffirmed its holding in Aten, which controls this case.[7]

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[7] "[W]e hold that any departure from the traditional corpus delicti rule under RCW 10.58.035 pertains only to admissibility and not to the sufficiency of evidence required to support a conviction. The corpus delicti doctrine still exists to review other evidence for sufficiency, i.e., corroboration of a confession. **That is, the State must still prove every element of the crime charged by evidence independent of the defendant's statements.**" Dow, 168 Wn.2d at 253-54 (emphasis added).

Mrs. Aten cared for four-month-old Sandra overnight while her mother worked. The baby died during the night. The pathologist could not conclude from the autopsy whether the baby died from Sudden Infant Death Syndrome (SIDS) or acute respiratory failure. He could not determine whether there had been manual interference with breathing. 130 Wn.2d at 645-46.

Mrs. Aten told the baby's mother she had smothered the baby with a pillow after she cried all night. She told police officers and a CPS worker she didn't smother her with a pillow, but she put her hand over the baby's nose and mouth to quiet her, and she was still fussing and moving her feet when she left her. Aten, 130 Wn.2d at 648-54.

The trial court found Mrs. Aten guilty of manslaughter. Id. at 654. The Court of Appeals held the evidence independent of the defendant's statements was insufficient to support a conviction. It reversed and dismissed the charge. Id. at 655. The Supreme Court affirmed the reversal and dismissal. Id. at 662.

> [S]ince the independent evidence in this case supports a reasonable and logical inference or hypothesis of innocence, that is, that Sandra died of SIDS, that

> is not sufficient to establish the corpus delicti. ...
>
> In a homicide case, where the life or liberty of a citizen is at stake, and where the guilt of the accused must be established beyond a reasonable doubt, the causal connection between the death of the decedent and the unlawful acts of the respondent [accused] cannot be supported on mere conjecture and speculation. ...
>
> The totality of independent evidence in this case does not lead to the conclusion there is a "reasonable and logical" inference that the infant Sandra died as a result of criminal negligence and that that inference is not the result of "mere conjecture and speculation."
>
> ...
>
> In light of applicable law and the facts of this case, we reasonably conclude there was insufficient evidence independent of Respondent's statements to establish the corpus delicti. The Court of Appeals was correct in reversing Respondent's conviction.

Aten, 130 Wn.2d at 661-62.

In this case, as in Aten, the issue is whether there was sufficient independent evidence that a criminal act caused the death. Two pathologists independently testified they could not determine whether the gunshot was a suicide or a homicide. As in Aten, where the pathologist could not determine whether there was an innocent or a criminal cause of death, the evidence is insufficient.

The independent forensic evidence strongly supported the conclusion that Mrs. Green did not fire the fatal shot -- indeed that she could not have done so. As in Aten, this Court should reverse and dismiss this case.

2. THE TRIAL COURT DENIED MRS. GREEN HER CONSTITUTIONAL RIGHT TO PRESENT A DEFENSE BY EXCLUDING THE EVIDENCE TO SUPPORT HER THEORY OF THE CASE.

a. Constitutional Right to Present a Defense

> Whether rooted directly in the Due Process Clause of the Fourteenth Amendment or in the Compulsory Process or Confrontation Clauses of the Sixth Amendment, the Constitution guarantees criminal defendants "a meaningful opportunity to present a complete defense." ... This right is abridged by evidence rules that "infring[e] upon a weighty interest of the accused" and are "'arbitrary' or 'disproportionate to the purposes they are designed to serve.'"

Holmes v. South Carolina, 547 U.S. 319, 324, 126 S. Ct. 1727, 164 L. Ed. 2d 503 (2006).

> The right to offer the testimony of witnesses, and to compel their attendance, if necessary, is in plain terms the right to present a defense, the right to present the defendant's version of the facts as well as the prosecution's to the jury so it may decide where the truth lies. Just as an accused has the right to confront the prosecution's witnesses for the purpose of challenging their testimony, he has the right to present his own witnesses to establish a

> defense. This right is a fundamental element of due process of law.

State v. Thomas, 150 Wn.2d 821, 857, 83 P.3d 970 (2004); Washington v. Texas, 388 U.S. 14, 17-19, 87 S. Ct. 1920, 18 L. Ed. 2d 1019 (1967).

While these rights are not absolute, if the offered evidence is relevant, "the burden is on the State to show the evidence is so prejudicial as to disrupt the fairness of the fact-finding process at trial." State v. Jones, 168 Wn.2d 713, 720, 230 P.3d 576 (2010); State v. Darden, 145 Wn.2d 612, 622, 41 P.3d 1189 (2002).

> The State's interest in excluding prejudicial evidence must also "be balanced against the defendant's need for the information sought," and relevant information can be withheld only "if the State's interest outweighs the defendant's need." ... [F]or evidence of *high* probative value, "it appears no state interest can be compelling enough to preclude its introduction consistent with the Sixth Amendment and Const. art. I, § 22."

Jones, 168 Wn.2d at 720-21 (Court's emphasis; citations omitted).

A criminal defendant is entitled to present to a jury "competent, reliable evidence bearing on the credibility of [her] confession," particularly when such evidence is central to her claim of innocence.

Crane v. Kentucky, 476 U.S. 683, 690, 106 S. Ct. 2142, 2147, 90 L. Ed. 2d 636, 645 (1986). A defendant is denied her right to present a defense if prohibited from presenting evidence about the "physical and psychological environment" in which the confession was obtained. Id., 476 U.S. at 689.

> Confessions, even those that have been found to be voluntary, are not conclusive of guilt. And, as with any other part of the prosecutor's case, a confession may be shown to be ... "unworthy of belief." Indeed, stripped of the power to describe to the jury the circumstances that prompted [her] confession, the defendant is effectively disabled from answering the one question every rational juror needs answered: If the defendant is innocent, why did [s]he previously admit [her] guilt?

Ibid.

This Court reviews a claim of a denial of the right to present a defense de novo. State v. Jones, 168 Wn.2d at 719. This Court also reviews a trial court's admission or exclusion of novel scientific evidence de novo. State v. Cauthron, 120 Wn.2d 879, 887, 846 P.2d 502 (1993).

The trial court here readily acknowledged the high relevance of the offered evidence. CP 102.

The court here erred by excluding Dr. Maiuro's diagnosis of Mrs. Green, his expert testimony of a

dissociative state and why Mrs. Green's confessions could be false; the history of domestic violence; and the subject of Mr. Green's argument the night before and day of his death.

b. Admissibility Under ER 702

> **ER 702. Testimony by Experts**
> If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise.
>
> The admissibility of expert testimony under this rule depends upon whether (1) the witness qualifies as an expert, (2) the opinion is based upon an explanatory theory generally accepted in the scientific community, and (3) the expert testimony would be helpful to the trier of fact.

State v. Allery, 101 Wn.2d 591, 596, 682 P.2d 312 (1984). There was no dispute regarding Dr. Maiuro's qualifications. CP 86, 100.

c. Expert Testimony of Battered Woman Syndrome is Admissible.

Washington courts have approved expert testimony on battered woman syndrome and PTSD.

> Where the psychologist is qualified to testify about the battered woman syndrome, and the defendant establishes her identity as a battered woman, expert testimony on the battered woman syndrome is admissible. This evidence may have a

> substantial bearing on the woman's perceptions and behavior at the time of the killing ... .

Allery, 101 Wn.2d at 597. Although Allery involved a theory of self-defense, the State presented equivalent evidence in State v. Ciskie, 110 Wn.2d 263, 265, 751 P.2d 1165 (1988), "to assist the trier of fact in understanding the mental state of a crime victim."

Ciskie involved multiple charges of rape over a period of months. The State presented expert testimony to help the jury understand why a victim would not report the rapes earlier in the abusive relationship. As the State did here, the defense there argued it went to the victim's credibility, the ultimate issue for the jury. The court admitted the evidence with limitations.

> What Mrs. Klingbeil, then, is really testifying to as her testimony is offered by the State, is Mrs. [H]'s state of mind. I rule that's relevant ... as the basis for inferring why Mrs. [H] acted or did not act in certain ways, failing to report or failing to break off the relationship. ...
>
> ... I do limit the use of Mrs. Klingbeil's testimony to Mrs. [H]'s state of mind and the inferences that can properly be drawn from the foundation, that is Mrs. [H]'s state of mind. Those do not include Mr. Ciskie's actions.

Ciskie, 110 Wn.2d at 272. The Supreme Court affirmed, holding expert testimony of battered woman syndrome was helpful to the jury.

> Domestic violence is a widely prevalent and underreported phenomenon. "The general public is unaware of the extent and seriousness of the problem of domestic violence."

Id. at 272-73. The Supreme Court held the diagnosis and treatment of battered women is generally accepted in the community of mental health experts. Ciskie at 271-72. The Supreme Court approved the evidence and the trial court's limitations:

> The defense challenged C.H.'s credibility and attempted to persuade the jury that her failure to leave the relationship, or to complain earlier to a doctor or police was inconsistent with that of a rape victim. To dispel this impression, the State asked Klingbeil to express her expert opinion about C.H.'s behavior. At defense counsel's request, **the question was phrased as a hypothetical case history that paralleled the evidence presented by the State.** Klingbeil said that the woman in the hypothetical case history suffered from post-traumatic stress disorder. She said that the facts in the hypothetical example **were consistent with** the cycle theory of violence. In Klingbeil's expert opinion, the failure of the woman in the hypothetical to report the sexual assaults until 2 days after the last incident and 9 months after the first, was characteristic of a person suffering from the battered woman syndrome. **This**

> **testimony was helpful to the jury's understanding of a matter outside the competence of an ordinary lay person, and the trial court limited the admission of that testimony to its appropriate purpose.**

Ciskie, 110 Wn.2d at 278-79 (emphases added). The court prohibited Klingbeil from testifying she diagnosed C.H. as a rape victim, the ultimate issue for the jury; but permitted her to testify she examined C.H. and diagnosed her as suffering from PTSD. Id. at 279.

> In the context of this trial, the court did an admirable job of limiting the expert's testimony to that which would be of maximum benefit to the jury, without invading its role as judge of credibility.

Id. at 280.

Dr. Maiuro's proffered evidence was equally admissible. He diagnosed Mrs. Green with PTSD, specifically battered woman syndrome. His testimony was relevant to her "state of mind," a dissociative state, at the time her husband was shot and when she said she shot him. The State challenged Mrs. Green's credibility, as the defense did Ms. H's in Ciskie. As there, the testimony would have been helpful to the jury's understanding of a matter outside the competence of a lay person.

As there, the court could have limited the opinion to avoid the ultimate question before the jury.

d. Expert Testimony of PTSD is Admissible.

Washington cases acknowledge PTSD is recognized within the mental health communities. State v. Bottrell, 103 Wn. App. 706, 714-18, 14 P.3d 164 (2000) (PTSD admissible for diminished capacity); State v. Janes, 121 Wn.2d 220, 233-36, 850 P.2d 495 (1993) (battered woman and battered child syndromes, a subset of PTSD, admissible to show how severe abuse affects the battered person's perceptions and reactions).

The trial court here concluded PTSD did not include dissociation. CP 101. In Bottrell, this court held evidence of PTSD was admissible specifically regarding dissociative states:

> Ordinarily, persons with PTSD are in contact with reality and do not display any symptoms of psychosis such as hallucinations or delusions. PTSD is essentially an anxiety disorder. However, some patients, especially **those who are subsequently subjected to extreme stress, develop a transient dissociative reaction with episodes of depersonalization or derealization.** Most of the time, these feelings of unreality pass without incident, but occasionally criminal behavior may erupt. The question of criminal responsibility, therefore, is pertinent since a person's cognitive or

> volitional state may be impaired during this dissociative reaction.

Bottrell, 103 Wn. App. at 715 (emphasis added).[8]

In Bottrell, the dissociative reaction was relevant to the defendant's mental state at the time she struggled with and killed the decedent. If the dissociative state is relevant to a person's ability to intend a crime, it is equally relevant to her ability to perceive events at the time. There is nothing novel about Dr. Maiuro's diagnosis and assessment in this case.

e. Expert Testimony Is Admissible For Claims of False Confessions.

> Confessions have long been regarded the gold standard in evidence, so much so that in the words of one legal scholar, "the introduction of a confession makes the other aspects of a trial in court superfluous."

Saul M. Kassin, *Symposium: Wrongful Convictions: Understanding and Addressing Criminal Injustice: False Confessions*, 73 ALB. L. REV. 1227 (2010).

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[8] Quoting Scrignar, Chester B., POSTTRAUMATIC STRESS DISORDER: DIAGNOSIS, TREATMENT, AND LEGAL ISSUES, 245 (2d ed. 1988). See also: State v. Warden, 133 Wn.2d 559, 564, 947 P.2d 708 (1997) (expert testified defendant suffered PTSD "which resulted in dissociative episodes"); State v. Martin, 169 Wn. App. 620, 624-25, 281 P.3d 315 (2012) (State's expert diagnosed defendant with PTSD, dissociating at times; admitted this evidence, although excluded diagnosis of "betrayal trauma theory").

Counsel found only one Washington published opinion addressing expert testimony of false confessions: State v. Rafay, 168 Wn. App. 734, 781-97 & n.78, 285 P.3d 83 (2012) (petition for review pending) -- a case dramatically different from Mrs. Green's.[9] Cf. State v. Thompson, 173 Wn.2d 865, 872 n.1, 271 P.3d 204 (2012) (DNA evidence has proven innocent people can and do confess to crimes they do not commit). Other jurisdictions have addressed cases very like Mrs. Green's case.

i. State v. Beagel

The case at bar is eerily similar to State v. Beagel, 813 P.2d 699 (Alaska, 1991). Mrs. Beagel was convicted of killing her husband. The night he died, Mrs. Beagel called 911 saying she shot her

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[9] In Rafay, the defendants admitted killing Rafay's family during a complex long-term undercover scheme by Canadian police. The defense sought to present Richard Leo, an expert on false confessions and custodial police interrogations. Prof. Leo would testify only generally to how false confessions can occur during police interrogations; he did no individual assessment of either defendant. Id. at 787 & nn. 88-93 (distinguishing cases with individual psychological assessments). The court held it was not an abuse of discretion to exclude this limited evidence given the "fundamentally different circumstances" of the non-custodial interactions. Id. at 785.

husband. It was his gun, he gave it to her, he told her to shoot him, and she did. Police arrived to find Mr. Beagel with a gunshot wound to his forehead. Mrs. Beagel repeatedly stated she shot him during a big argument because she wanted to see a fertility specialist.

The defense theory at trial was that David Beagel died of a self-inflicted bullet wound.

> During the course of the argument, David became volatile and hysterical. David brought out the gun. He held the gun out, away from himself, and shouted that Lesley should kill him. He yelled at Lesley, "Do it, just do it, do it and get it over with." Lesley testified that she remembered reaching her hands out, and all of the sudden the gun went off. She then saw that David had been shot. Lesley remembered calling 911, and having a "bunch of people" arrive at the house, and the next thing she remembered was "waking up" at the Sixth Avenue jail.

Beagel, 813 P.2d at 704. As here, the state's expert testified the gun shot could have been self-inflicted.

The defense offered Dr. Wolf, a psychiatrist who conducted an extensive analysis and written evaluation of Mrs. Beagel.

> Mr. Beagel was trying to force Mrs. Beagel to take the gun. He evidently repeated this in an insistent, screaming voice over and over again. She states that she was terribly frightened by his

> actions. It is extremely conceivable that because Mr. Beagel was attempting to force the gun on Mrs. Beagel and that he indeed was then shot, and that she has no memory for 36 hours after the incident, that what she put together in this state were his words to the effect that she should shoot him. Thus the fact that he was shot got transposed in the 911 call to the statement that she shot him. She was told to shoot him and he was shot and in this shock-like state, she verbalized it to the authorities that she shot him. ... Her whole world was falling apart and given those kind of circumstances, it simply would not be unusual for her to have a fugue state in which she didn't remember and in which she would have responded in a way that almost made sense to her.

Beagel, 813 P.2d at 706-07. The psychiatrist referred to the DSMR-III, which defined his theories of "confabulation" and "fugue" states. He also offered an opinion that based on David's medical history, he was more likely to commit suicide than the average person.

As here, the trial judge excluded the expert testimony, concluding the defense had not shown that the expert opinion was based on generally accepted principles in the field of psychiatry, as required by the Frye standard. Id.

The Court of Appeals held the trial court abused its discretion by excluding this evidence.

Alaska Rules of Evidence 702 and 703 track Washington's. Id. at 707-08. As here, there was no challenge to the expert's qualifications.

> He testified that his opinion was based on a standard diagnosis which was contained in the Comprehensive Textbook of Psychology and the DSMR-III, which are reliable psychiatric authorities. Wolf's testimony established at least a *prima facie* case that his testimony was based on principles which had gained general acceptance in the field of psychiatry.

Beagel, 813 P.2d at 708.[10]

> We conclude that Wolf's specialized knowledge was the kind of knowledge which the defense was entitled to present on this issue. We conclude that admission of Wolf's expert testimony was critical to Beagel's defense, particularly Wolf's explanation of Beagel's statements.

Id. The Court of Appeals similarly held the trial court erred in excluding Dr. Wolf's testimony that David was more likely to commit suicide. Id.

ii. State v. King

The court faced a similar issue in State v. King, 387 N.J. Super. 522, 904 A.2d 808 (2006). Arrested for a murder, Mr. King admitted to another

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[10] The Washington Supreme Court similarly accepts the DSM as "a compilation of mental disorders that 'reflect[s] a consensus of current formulations of evolving knowledge' in the mental health field." State v. Klein, 156 Wn.2d 102, 117, 124 P.3d 644 (2005).

murder and offered "information" regarding other unsolved homicides. He pleaded guilty to the original murder, but claimed his other confession and additional "information" was false.

Defense expert Dr. Harris diagnosed Mr. King with various personality disorders and opined that the symptoms of the disorders made him vulnerable to falsely confess to police. King at 531.

The State moved to exclude the expert testimony. As here, it argued it was not relevant and not admissible because the expert failed to provide a scientific basis specifically linking the disorder to making a false confession. Id. at 532.

The trial court ruled Dr. Harris could testify to his diagnoses, the characteristics of those disorders, that defendant suffered from these diagnoses on the date of his confession, and that "defendant's psychiatric disorders **are consistent with** the defendant's claim of false confession or are ... associated with false confessions." It ruled he could not testify that the psychiatric diagnoses caused the false confessions.[11] It also

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[11] The defense did not challenge this limitation. Id. at 528 n.1.

restricted him from testifying "as to anything the defendant or anyone else told him about the circumstances surrounding the giving of the confession." Id., 387 N.J. Super. at 528.

Applying the New Jersey equivalent of ER 702-703 and the Frye standard, Id. at 539-41, the appellate court upheld admitting the expert testimony, and reversed the limitation on the basis for that opinion.

Regarding the State's argument that the testimony would not be "helpful to the jury" or relevant, the court held:

> We are also satisfied that expert testimony pertaining to such psychiatric diagnoses and the analysis of defendant's psychological makeup is beyond the ken of the average juror.

Id. at 540-41. It then cited to cases admitting expert testimony about battered women's syndrome and the behavior, attitudes and feelings of victims of child abuse as other examples of conditions not readily understood by persons of average intelligence and ordinary experience.[12]

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[12] Compare: Allery and Ciskie, supra; State v. Graham, 59 Wn. App. 418, 423-24, 798 P.2d 314 (1990) (expert testimony re rape trauma syndrome admitted to explain victim's delay in reporting abuse was not inconsistent with her allegations);

Specifically as to Frye, the State argued the psychiatrist did not refer to an authoritative source or study specifically linking the asserted mental health condition with the making of a false confession or a vulnerability to make a false confession. The court concluded Dr. Harris's general qualifications, his extensive evaluation of this specific defendant, and his reliance on the DSM-IV, satisfied Frye.

> General acceptance of the DSM in the psychiatric community is beyond dispute. Furthermore, it is clear that Dr. Harris' testimony was based on the relevant provisions of the DSM. ...
>
> It is not fatal to the scientific reliability of Dr. Harris' proffered testimony that he was unable to present any supporting studies dealing specifically with false confessions. His proffered testimony does not deal with causation. The proffer is that the presence of the disorders renders a person vulnerable to making a false confession and provides an explanation, other than truth, for the statements. Thus, it was neither illogical nor erroneous for the trial court to permit Dr. Harris to testify that defendant suffered from a personality disorder that **was "consistent with"** his claim of making a false confession, though not "causative" of such claim.

State v. Cleveland, 58 Wn. App. 634, 646, 794 P.2d 546 (1990) (expert's testimony re typical behaviors of child victims of sexual abuse admissible to aid jury in evaluating victim's credibility).

Id. at 544 (emphasis added). The court also held the expert must be able to testify to what the defendant told him, on which he relied in making his diagnoses. Id. at 548; ER 703.

iii. United States v. Shay

In United States v. Shay, 57 F.3d 126 (1st Cir. 1995), the defendant made incriminating statements after a bomb was discovered on his father's car. A psychiatrist concluded the defendant suffered from "pseudologia fantastica," a disorder from the DSMIII-R. The district court excluded the evidence under Fed. R. Evid. 702, concluding as the trial court did here, "the jury was capable of determining the reliability of Shay Jr.'s statement without the testimony." Id., 57 F.3d at 130. The Court of Appeals reversed.

> The fundamental question that a court must answer in determining whether a proposed expert's testimony will assist the trier of fact is "whether the untrained layman would be qualified to determine intelligently and to the best degree, the particular issue without enlightenment from those having a specialized understanding of the subject matter involved."

Id. at 133. It concluded the district court's reasons were insufficient "under any plausible reading of Rule 702." Id.

> [W]hether or not the jury had the capacity to *generally* assess the reliability of these statements in light of the other evidence in the case, it plainly was unqualified to determine without assistance the *particular* issue of whether Shay Jr. may have made false statements against his own interests because he suffered from a mental disorder. Common understanding conforms to the notion that a person ordinarily does not make untruthful inculpatory statements. *See Fed. R. Evid. 804(b)(3)* advisory committee's note (statements against interest are especially reliable because "persons do not make statements which are damaging to themselves unless satisfied for good reasons that they are true"). Dr. Phillips would have testified that, contrary to this common sense assumption, Shay Jr. suffered from a recognized mental disorder that caused him to make false statements even though they were inconsistent with his apparent self-interest. Thus, Dr. Phillips was prepared to offer specialized opinion testimony, grounded in his expertise as a psychiatrist, that could have "exploded common myths" about evidence vital to the government's case.

Id., 57 F.3d at 133 (court's emphases).[13]

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[13] See also: Hannon v. State, 2004 WY 8, 84 P.3d 320, 343-53 (Wyo. 2004) (rape conviction reversed for excluding expert testimony of defendant's limited intellectual skills and effect on confession); Miller v. State, 770 N.E.2d 763, 774 (Ind. 2002) (murder conviction reversed for exclusion of expert on interrogation and confessions); Pritchett v. Commonwealth, 263 Va. 182, 557 S.E.2d 205 (2002) (error to exclude expert testimony of defendant's mental retardation and hypothetical effect of that disorder on a person in the defendant's situation; expert may not opine on truth of the statement at issue); Holloman v. Commonwealth, 37 S.W.3d 764 (Ky. 2001) (same);

These cases compel reversal here. Dr. Maiuro performed the same individual psychological assessment as did the experts in Allery, Ciskie, Beagel, King, and Shay, to explain how Mrs. Green's psychological state could affect her perceptions and confession. His specialized knowledge, grounded in his expertise as a psychologist, would have "exploded common myths" about the confession, the central evidence of the State's case.

f. The Expert Evidence Was Relevant and Essential to the Defense.

In State v. Jones, supra, the defendant was charged with forcible rape. The complaining witness K.D. testified that he put his hands around her neck, said he would kill her, and raped her. The defense offered context for the allegations:

> Jones was prepared to testify that Jones and K.D. went to the King City Truck Stop

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State v. Beuchler, 253 Neb. 727, 572 N.W.2d 65 (1998) (murder conviction reversed for exclusion of psychologist's testimony re confession); State v. Lopez, 946 P.2d 478 (Colo. App. 1997) (same); United States v. Hall, 93 F.3d 1337 (7th Cir. 1996) (same); State v. Hamilton, 163 Mich. App. 661, 667, 415 N.W.2d 653 (1987) (psychologist's testimony admissible and helpful); McIntosh v. State, 532 So.2d 1129 (Fla. App. 1988) (murder conviction reversed for excluding psychological evidence regarding her confession); Commonwealth v. Banuchi, 335 Mass. 649, 141 N.E.2d 835 (1957) (same).

> where they met two men and one woman and that during a nine-hour alcohol- and cocaine-fueled sex party the two women danced for money and engaged in consensual sexual intercourse with all three males.

Jones, 168 Wn.2d at 717. The trial court found this evidence was barred by the rape shield statute and ruled Mr. "Jones could not testify to these claims or cross-examine K.D. about them." Id. at 718. A jury convicted. The Washington Supreme Court reversed.

> This is not marginally relevant evidence that a court should balance against the State's interest in excluding the evidence. Instead, it is evidence of extremely high probative value; it is Jones's entire defense. Jones's evidence, if believed, would prove consent and would provide a defense to the charge of second degree rape. Since no State interest can possibly be compelling enough to preclude the introduction of evidence of high probative value, the trial court violated the Sixth Amendment when it barred such evidence.

Id. at 721. The trial court said before closing argument it did not preclude Mr. Jones from testifying K.D. had consented, yet it prohibited any discussion of the night's events. This limitation was no less unconstitutional.

> The trial court's formulation would have allowed testimony of consent, but devoid of any context about how the consent

> happened or the actual events. ... These were essential facts of high probative value whose exclusion effectively barred Jones from presenting his defense.

Id. at 721.

As in Jones, the entire defense in this case was that Mr. Green killed himself. Mrs. Green testified she did not shoot him, that he shot himself. But the court's exclusion of her expert testimony, of why she would have said she shot him if she didn't, prohibited her from presenting her defense. As shown on cross-examination, she could not herself explain why she would have told her sons and police something that was not true. She had no memory of making those statements. RP 712-21. The State argued there was "no explanation" for why she would create such a lie. RP 797. But there was an explanation; she just wasn't permitted to provide it.

g. The Expert Evidence Would Have Been Helpful to the Jury.

Ultimately, the trial court excluded Dr. Maiuro's testimony because it concluded the evidence would not be "helpful to the trier of fact." CP 102-03.

> However, the testimony Dr. Maiuro proposes to give--that Defendant's perception of the shooting would have been different at different times due to the incredibly stressful nature of the situation--appears to be within the common knowledge of a layperson.

CP 102.[14]

"[M]ental disorders are beyond the ordinary understanding of lay persons." Bottrell, supra, 103 Wn. App. at 717.

> ... [Mental] disorders exist, and the very fact that a layperson will not always be aware of the disorder, its symptoms, or its consequences, means that expert testimony may be particularly important when the facts suggest a person is suffering from a psychological disorder.

United States v. Hall, 93 F.3d 1337, 1342-43 (7th Cir. 1996).

The trial court had no evidence of what information is "common knowledge" for a lay juror -

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[14] The court relied on State v. Swan, 114 Wn.2d 613, 656, 790 P.2d 610 (1990). But see In re PRP of Morris, ___ Wn.2d ___ (No. 84929-3, 11/21/2012) (Slip Op. at 14-15) (Swan language that suggestibility of young children is generally understood by jurors was clarified in State v. Willis, 151 Wn.2d 255, 87 P.3d 1164 (2004); expert testimony is not precluded, "specialized knowledge regarding the effects of specific interview techniques and protocols' is not likely within the common experience of the jury.'").

- except that these jurors believed a confession was the most reliable evidence of guilt. RP 135.

In fact, laypeople have a great deal of incorrect information regarding false confessions. In one study,

> nearly three-quarters (73%) of respondents believed that an innocent person who has been accused of a crime would either "never confess" or would only confess after "strenuous interrogation pressure."

And 80% agreed with the statement

> in a case where the truthfulness of a confession is disputed, jurors would benefit by hearing from a witness who is an expert on interrogation and confession.

Chojnacki, D.E., Cicchini, M.D., & White, L.T., "An Empirical Basis for the Admission of Expert Testimony on False Confessions," 40 ARIZ. ST. L.J. 1, 39-40 (2008).

Dr. Maiuro's diagnosis and expertise regarding Mrs. Green's psychological make-up and reaction to her husband's death was not within the common knowledge of the jury.

h. The Evidence Would Not Invade the Fact-Finding Province of the Jury.

> Further, because the testimony clearly bears on Defendant's credibility, it is likely to invade the fact-finding province of the jury.

CP 102.

An expert's testimony can be limited at trial to avoid this issue. See: Ciskie, Beagel, King, supra (expert may testify symptoms "consistent with" effect, may not say caused ultimate fact). The State routinely uses experts in precisely this setting. See: Ciskie, Graham, Cleveland, supra.

i. The Parties Offered a *Frye* Hearing.

Contrary to the court's assertion "neither party has requested a *Frye* hearing," CP 101, defense counsel twice offered a *Frye* hearing, and the State said one was needed. RP(1/30/2012) at 14-15, 22-23.

However, as Ciskie held, expert testimony of PTSD and battered woman syndrome already are approved as generally accepted in the mental health field.

> General acceptance may be found from testimony that asserts it, from articles and publications, from widespread use in the community, or from the holdings of other courts.

State v. Martin, 169 Wn. App. 620, 626, 281 P.3d 315 (2012); Cauthron, supra, 120 Wn.2d at 887-88.

The DSM-IV-TR defines Posttraumatic Stress Disorder:

> **309.81 Posttraumatic Stress Disorder**
> Diagnostic Features
> The essential feature of Posttraumatic Stress Disorder is the development of characteristic symptoms following exposure to an extreme traumatic stressor involving direct personal experience of an event that involves actual or threatened death or serious injury, or other threat to one's physical integrity; or witnessing an event that involves death, injury, or a threat to the physical integrity of another person; or learning about unexpected or violent death, serious harm, or threat of death or injury experienced by a family member or other close associate (Criterion A1). The person's response to the event must involve intense fear, helplessness, or horror ... .

DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS ("DSM-IV-TR") (4th Ed., Text Revision, Amer. Psych. Ass'n. 2000) at 463.[15] As in Beagel and King, supra, inclusion in the DSM is at least prima facie evidence of general acceptance in the field of mental health. Klein, supra.[16]

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[15] "The likelihood of developing this disorder may increase as the intensity of and physical proximity to the stressor increase." DSM-IV-TR at 464. One can hardly imagine a greater intensity or physical proximity than having one's mate of 57 years shoot himself and fall dead into one's lap.

[16] Contrast: Martin, supra, 169 Wn. App. at 628 ("betrayal trauma theory" not included in DSM-IV; affirmed exclusion of evidence).

Dissociation is well-established as a symptom of PTSD.[17] "Self-blame" is commonly experienced by battered women.[18] These cases and literature demonstrate PTSD and battered woman syndrome involve dissociation and self-blame, as Dr. Maiuro described. No Frye hearing is required.

However, if this Court disagrees, it should remand for the Frye hearing that counsel proposed.

j. The Court Erroneously Excluded Other Evidence Essential to the Defense.

i. Past Domestic Violence

The court excluded past incidents of domestic violence, prohibiting even Mrs. Green from

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[17] Dissociative symptoms may occur and are more commonly seen in association with interperson stressors, e.g., domestic battering. DSM-IV-TR at 465. See also: Briere, John, Ph.D., "Dissociative Symptoms and Trauma Exposure: Specificity, Affect Dysregulation, and Posttraumatic Stress," 194(2) J. OF NERVOUS AND MENTAL DISEASES 78-82 (Feb. 2006); Feeny, N.C., Zoellner, L.A., Fitzgibbons, L.A., "Exploring the Roles of Emotional Numbing, Depression and Dissociation in PTSD," 13 J. OF TRAUMA STRESS 489-98 (2000); Lipschitz, D.S., Kaplan, M.L. Sorkenn, J., Chorney, P., Asnis, G.M., "Childhood Abuse, Adult Assault and Dissociation," 37 COMPR. PSYCHIATRY 261-66 (1996); Walker, Lenore E.A., THE BATTERED WOMAN SYNDROME 44, 148, 388 (3d Ed., Springer Publ. Co., 2009) (some women deal with the trauma by dissociating their minds from their bodies).

[18] THE BATTERED WOMAN SYNDROME at 72; Walker, Lenore, TERRIFYING LOVE 70, 235, 237 (Harper & Row, 1989),

testifying that Mr. Green bit her all over the night before the shooting, and the bite marks seen at the hospital. RP 472-73, 703.

In State v. Baker, 162 Wn. App. 468, 259 P.3d 270, review denied, 173 Wn.2d 1004 (2011), the court held evidence of prior domestic violence was admissible and relevant to the credibility of the domestic violence victim.

> Ms. Grant's credibility was a central issue at trial. The jury was entitled to evaluate her credibility with full knowledge of the dynamics of a relationship marked by domestic violence and the effect such a relationship has on the victim.

Id. at 475. Here Mrs. Green's credibility was a central issue at trial. She was the only witness to the shooting. The jury was entitled to evaluate her credibility with full knowledge of the dynamics of a relationship marked by domestic violence and the effect such a relationship had on her. Furthermore, Dr. Maiuro is permitted under ER 703 to testify to the facts on which he bases his opinion. It was constitutional error to exclude this evidence. Crane, supra; Jones, supra; U.S. Const., amends. 6, 14; Const. art. I, §§ 3, 22.

ii. Mr. Green's Dementia

The additional context of the defense was Mr. Green's dementia. The previous night he argued with his wife of 57 years about having had sex with his sister long, long ago. This evidence was not intended to convey Mr. Green's character for sexual misconduct, but to provide a context for his mental state, the actual symptoms of his dementia, which Mrs. Green witnessed. With this context, a jury could understand an elderly man's shame, fixation, and perhaps belief that his wife should kill him for his past misdeeds. Combined with the alcohol he consumed that day, these memories and shame support the defense theory that he killed himself.

This was the essence of the defense. It was constitutional error to exclude this evidence. Holmes, Crane, Jones, supra; U.S. Const., amends. 6, 14; Const., art. I, §§ 3, 22.

3. THE TRIAL COURT ERRED AND DENIED APPELLANT DUE PROCESS AND THE RIGHT TO PRESENT A DEFENSE WHEN IT REFUSED AN INSTRUCTION ON HER THEORY OF THE CASE.

This Court reviews de novo the alleged errors of law in a trial court's jury instructions. Barrett v. Lucky Seven Saloon, Inc., 152 Wn.2d 259, 266, 96 P.3d 386 (2004).

A criminal defendant is entitled to an instruction on his or her theory of the case if the evidence supports the instruction. State v. Werner, 170 Wn.2d 333, 336, 241 P.3d 410 (2010); State v. Ager, 128 Wn.2d 85, 93, 904 P.2d 715 (1995). The refusal to give instructions on a party's theory of the case when there is supporting evidence is reversible error when it prejudices a party. Werner, 170 Wn.2d at 337; Barrett, supra, 152 Wn.2d 259, 266-67.

In this case, it was the defense theory that William Green shot himself without the assistance of Darlene Green. If the jury concluded the State did not prove beyond a reasonable doubt that Mr. Green did not commit suicide, then the law required the jury to find Mrs. Green not guilty.

The proposed instruction merely stated this double-negative maxim in the positive: If the jury had a reasonable doubt whether Mr. Green committed suicide, it must acquit Mrs. Green. The instruction was an accurate statement of the law. The evidence supported it. It was the defense theory of the case.

Where the outcome of the case turned on which version of events the jury believed, the failure to give an instruction on the defense theory was prejudicial error. Werner, 170 Wn.2d at 338.

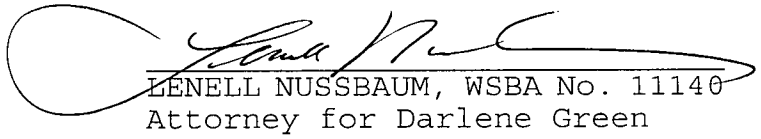
D. CONCLUSION

The evidence in this case was insufficient to establish the corpus delicti of a homicide without Mrs. Green's confession. For this reason, the Court should reverse the conviction and dismiss the charge.

The trial court erred and violated Mrs. Green's constitutional right to present a defense by excluding the defense's expert evidence, Mrs. Green's recent interactions with her husband, including his biting and arguing about having had sex with his sister, and other evidence of prior domestic violence. The court further erred by refusing to instruct the jury on the defense theory of the case. For these reasons, this Court should reverse the conviction and remand for a new trial.

DATED this 17th day of January, 2013.

Respectfully submitted,



LENELL NUSSBAUM, WSBA No. 11140
Attorney for Darlene Green

APPENDIX

Constitution, art. 1, § 3

> "No person shall be deprived of life, liberty, or property, without due process of law."

Constitution, art. I, § 22

> "In criminal prosecutions the accused shall have the right to appear and defend in person, and by counsel, ... [and] to have a speedy public trial by an impartial jury of the county in which the offense is charged to have been committed ... ."

United States Constitution, amend. 6

> "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury ..., and to have the Assistance of Counsel for his defence."

United States Constitution, amend. 14, § 1

> "[N]or shall any State deprive any person of life, liberty, or property, without due process of law."

DECLARATION OF SERVICE

I declare on this date I filed an original and a copy of the Substitute Brief of Appellant, postage prepaid, addressed as follows:

Court of Appeals: Division II
Mr. David Ponzoha, Clerk/Administrator
950 Broadway, Suite 300
Tacoma, Wa 98402

and I caused a copy of this document to be served via email on the following:

Mr. Jeremy Morris
Kitsap County Prosecutor
kcpa@co.kitsap.wa.us

as well as, I caused a copy of this document to be served on the following entities by depositing them in the United States Mail Service, postage preapaid, address as follows:

Ms. Darlene Green – 358-826
WCCW
9601 Bujacich Rd. NW
Gig Harbor, WA 98332-8300

I declare under penalty of perjury under the laws of the state of Washington that the above statement is true and correct to the best of my knowledge.

1/17/13- SEATTLE, WA
Date and Place

Alex Fast
ALEXANDRA FAST