FILED
JAN 06, 2015
Court of Appeals
Division III
State of Washington

NO. 29033-6-III

COURT OF APPEALS, DIVISION III

OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent,

v.

CLAYTON G. STAFFORD, Appellant.

BRIEF OF RESPONDENT

Tamara A. Hanlon, WSBA #28345
Senior Deputy Prosecuting Attorney
Attorney for Respondent

JOSEPH BRUSIC
Yakima County Prosecuting Attorney
128 N. 2d St. Rm. 329
Yakima, WA 98901-2621

TABLE OF CONTENTS

PAGE

TABLE OF AUTHORITIES ii

I. ASSIGNMENTS OF ERROR 1

II. STATEMENT OF THE CASE 1

III. ARGUMENT 12

A. THE DEFENDANT'S STATEMENTS WERE PROPERLY ADMITTED BY THE TRIAL COURT 12

B. THE FORENSIC SCIENTIST'S DNA TESTIMONY WAS PROPERLY ADMITTED AT TRIAL. 20

C. THE TESTIMOY OF MRS. LA FRAY WAS PROPERLY ADMITTED AS RELEVANT AND PROBATIVE EVIDENCE 24

D. THERE WAS SUFFICIENT EVIDENCE TO SUPPORT THE ELEMENTS OF AGGRAVATED FIRST DEGREE MURDER 31

E. THE JURY WAS PROPERLY INSTRUCTED AS TO THE SPECIAL VERDICT 44

IV. CONCLUSION 46

TABLE OF AUTHORITIES

WASHINGTON CASES

Dempsey v. Joe Pignataro Chevrolet, Inc., 22 Wn. App. 384, 589 P.2d 1265 (1979)........18

In re Pers. Restraint of Cross, 180 Wn.2d 664, 327 P.3d 660 (2014)........17

State v. Adams, 76 Wn.2d 650, 458 P.2d 558 (1969)........18

State v. Aronholt, 99 Wn. App. 302, 994 P.2d 248 (2000)........14

State v. Aten, 130 Wn.2d 640, 927 P.2d 210 (1996)........16,17

State v. Bashaw, 169 Wn.2d 133, 234 P.3d 195 (2010)........45,46

State v. Bernson, 40 Wn. App. 729, 700 P.2d 758 (1985)........30

State v. Cashaw, 4 Wn. App. 243, 480 P.2d 528 (1971)........18

State v. Coe, 101 Wn.2d 772, 684 P.2d 668 (1984)........26,29

State v. Cord, 103 Wn.2d 361, 693 P.2d 81 (1985)........37

State v. Delmarter, 94 Wn.2d 634, 618 P.2d 99 (1980)........32

State v. Favro, 5 Wn. App. 311, 487 P.2d 261 (1971)........28

State v. Garcia, 20 Wn. App. 401, 579 P.2d 1034 (1978)........32

State v. Gentry, 125 Wn.2d 570, 888 P.2d 1105 (1995)........31,40

State v. Gibson, 47 Wash. App. 309, 734 P.2d 32, review denied, 108 Wash.2d 1025 (1987)........41

State v. Goldberg, 149 Wn.2d 888, 72 P.3d 1083 (2003)........46

State v. Gould, 58 Wn. App. 175, 791 P.2d 56 (1990)........29

State v. Green, 94 Wash. 2d 216, 616 P.2d 628 (1980)........31

State v. Gross, 23 Wn. App. 319, 597 P.2d 894 (1979)........17,18

State v. Guzman-Cuellar, 47 Wn. App. 326, 734 P.2d 966, review denied, 108 Wn.2d. 1027 (1987)........26

State v. Guzman Nuñez, 174 Wn.2d 707, 285 P.3d 21 (2012) 45-7

State v. Hopkins, 134 Wn. App. 780, 142 P.3d 1104 (2006) 21

State v. Jackson, 62 Wn. App. 53, 813 P.2d 156 (1991). 31

State v. Lui, 179 Wn.2d 457, 315 P.3d 493, cert. denied,
134 S. C. 2842 (2014) 20

State v. Nichols, 5 Wn. App. 657, 491 P.2d 677 (1971) 26

State v. Ollens, 107 Wash. 2d 848, 733 P.2d 984 (1987) 41

State v. Radcliffe, 164 Wn.2d 900, 194 P.3d 250 (2008 14,15,16,17

State v. Robtoy, 98 Wn.2d 30, 653 P.2d 284 (1982) 14,16,17

State v. Sellers, 39 Wn. App. 799, 695 P.2d 1014 (1985) 26

State v. Smith, 74 Wn.2d 744, 446 P.2d 571 (1968), vacated,
408 U.S. 934 (1972) 26

State v. Spadoni, 137 Wash. 684, 243 P. 854 (1926). 24,26

State v. Stackhouse, 90 Wn. App. 344, 957 P.2d 218 (1998) 30

State v. Terrovona, 105 Wn.2d 632, 716 P.2d 295 (1986). 17

State v. Theroff, 25 Wn. App. 590, 608 P.2d 1254, aff'd,
95 Wn.2d 385, 622 P.2d 1240 (1980) 31,36

State v. Thomas, 150 Wn.2d 821, 83 P.3d 970 (2004) 37

State v. Varga, 151 Wn.2d 179, 86 P.3d 139 (2004) 43

State v. Whalon, 1 Wn. App. 785, 464 P.2d 730 (1970) 25

SUPREME COURT CASES

Arizona v. Miranda, 384 U.S. 436, 86 S. Ct. 1602 (1966) 16

Berghuis v. Thompkins, 560 U.S. 370, 130 S. Ct. 2250 (2010) 19

Crager v Ohio, 577 U.S. 930, 129 S. Ct. 2856 (2009). 23

Davis v. United States, 512 U.S. 452, 114 S. Ct. 2350,
129 L. Ed. 2d 362 (1994)..........13,14,15,16,17

Jackson v. Virginia, 443 U.S. 307, 99 S. Ct. 2781, 61 L. Ed. 2d 560 (1979)........31

Smith v. Illinois, 469 U.S. 91, 105 S. Ct. 490, 83 L. Ed. 2d 488 (1984)...............13

Williams v. Illinois, ___ U.S. ___, 132 S. Ct. 2221, 183 L. Ed. 2d 89 (2012)......22

OTHER CASES

People v. Smith, 102 Ill.2d 365, 375, 466 N.E.2d 236, 80 Ill. Dec. 784 (1984)....13

State v. Crager, 164 Ohio App.3d 816, 844 N.E.2d 390(2005)..........23

State v. Crager, 123 Ohio St. 3d 1210, 914 N.E.2d 1055 (2009)..........23-4

STATUTES

RCW 9A.32.020(1)..........40

RULES

Evidence Rule 401..........25,30

MISC

KARL B TEGLAND, WASHINGTON PRACTICE: COURTROOM HANDBOOK ON WASHINGTON EVIDENCE, Rule 403 (2009-2010 ed.)..........29

I. ASSIGNMENTS OF ERROR

A. ISSUES PRESENTED BY THE ASSIGNMENTS OF ERROR

1. Did the trial court properly admit the defendant's statements after he waived his Miranda rights?

2. Did the trial court properly admit the forensic scientist's testimony regarding DNA testing?

3. Did the trial court properly admit the testimony of Mrs. La Fray?

4. Was there sufficient evidence to support the elements of aggravated first degree murder?

5. Was the jury properly instructed as to the special verdict?

B. ANSWERS TO THE ISSUES PRESENTED BY THE ASSIGNMENTS OF ERROR

1. The trial court properly admitted the defendant's statements after he waived his Miranda rights.

2. The trial court properly admitted the forensic scientist's testimony regarding DNA testing.

3. The trial court properly admitted the testimony of Mrs. La Fray.

4. There was sufficient evidence to support the elements of aggravated first degree murder.

5. The jury was properly instructed as to the special verdict.

II. STATEMENT OF THE CASE

The Appellant, Clayton G. Stafford, was convicted of aggravated first degree murder. The charges stem from the following facts:

In 1993, Shawna Yandell and her boyfriend, Travis Sinden, had been dating for a couple of years. RP 1137. They were living together at the time and Travis was supporting her financially. RP 1170. They were crazy about each other and planned on getting married. RP 1205, 1252. They had traveled from Arkansas to California and then to Yakima. They had only been in Yakima for about 3 weeks to look for work. RP 1144-5. The only folks they knew in Yakima were some long-time family friends, the Wilkeys and Kennith Madden. They stayed with Junior and Joyce Wilkey. RP 1145. At the time, they didn't have a vehicle so they rode the bus. For the short time they were in Yakima, Travis and Shawna were described as practically inseparable. RP 1147, 1189-90, 1198, 1161.

On June 12, 1993, they went to Sportsman's Park. While they were there, Travis passed out in the public restroom after drinking too much. RP 1154. Shawna shook him and woke him up because she was cold, tired, and wanted to go home so she could go to bed. RP 1155. They tried to get a ride from a park ranger. The park ranger didn't really remember what time that was but said it was after midnight. RP 1256. Travis and Shawna called the Wilkeys for a ride but they did not come because it was too late in the evening. RP 1155-6, 1227, 1242. Junior Wilkey testified that the call came in around 1:00 a.m. His daughter, Tina Laborde, testified that the call came in between 12:30 and 1:30 a.m. RP 1240.

After being unable to secure a ride, Travis went back into the restroom and fell asleep. RP 1325. When he woke up, his girlfriend was gone and he could not

find her. RP 1156. After yelling and searching for her, he went home. RP 1159. When he woke up in the morning, he was getting worried so he went to the park to search for her again. RP 1159. When he didn't find her, he returned home and waited for her to come home. But she never came home. By that afternoon, he called the police and reported her missing. RP 1160, 1201.

On June 13, 1993, Dr. Roger Veilbig was leading a Boy Scout troop on a canoe trip down the Yakima River. He was a few miles upstream from Sportsman's Park when he came across a deceased female, later identified as Shawna, floating on a sandbar in the middle of the river. RP 974-5, 1014, 1147, 1151. Shawna's scalp had been torn open and she had a head wound near the center of her forehead. RP 1006. She was nude except for a bra that was pushed up and riding over her shoulder area. RP 979, 1006, 1067, 1932. The bra was hooked or snapped in the back. RP 1067, 1078.

At around 3 p.m., officers responded and also observed that Shawna's scalp was open and that she had a head wound. RP 1006. Officers, along with volunteers, searched the area for 4 to 5 days but did not find any additional physical evidence. RP 1004, 1017, 1025, 1068.

The next day, forensic pathologist Dr. Norman Thiersch performed the autopsy on Shawna. RP 1077. He determined the cause of death to be blunt impacts to her head and cerebral contusions (bruising of her brain). RP 1079, SE 20. There were signs of attempted strangulation: petechial hemorrhage and

bruising on the tissues under the skin of her neck and in the structures of the front part of her neck. RP 1079, 1082-3, SE 14-5, 17. Dr. Thiersch further concluded that the head injuries and strangulation appeared to have occurred about the same time. RP 1115.

There was also a laceration on the front of her forehead caused by a blunt force type of injury. RP 1084-5, SE 18. Under that laceration, Shawna's skull was actually fractured. RP 1085. On the back of her head, there were four more lacerations. RP 1086, SE 19-20. Beneath each of those lacerations, the base of her skull was also fractured. RP 1086-7, 1109. In addition, there was bleeding over the surfaces of her brain. RP 1086-7. The pathologist testified that the skull fractures were significant, lethal injuries causing damage to her brain. RP 1087. He also testified that these injuries were consistent with her being hit with an object. RP 1114-5.

Dr. Thiersch also testified that there were a number of possible defensive wounds on Shawna, including bruises on her chest, back, right knee, right lower leg, left wrist, both forearms, right hand, and left thigh. RP 1091, SE 21-5. In addition, there were numerous bruises on Shawna's chin, jaw line, forehead, and neck. RP 1081, 1084, SE 14-20. Dr. Thiersch also saw injuries with a linear pattern on Shawna's left thigh, right hip, lower abdomen, and the back of her left leg, possibly created by someone dragging her. RP 1066, 1091-3. There were scrapes on her body as well. RP 1091.

Dr. Thiersch testified that the bruises were purple or red, indicative of being caused when Shawna was still alive and were the type of bruises one would see shortly after an injury. RP 1082. He testified that she had been in the water for at least a couple hours, and perhaps longer, due to the wrinkling of her skin. RP 1100-1. Dr. Thiersch also testified that the time of death was consistent with what the officers were considering. RP 1100.

DNA Testimony

Valencia Ward, a DNA analyst for Orchid Cellmark, testified regarding the DNA evidence in the case. She testified that DNA found on swabs of both Shawna's mouth and vagina matched the DNA profile for Clayton Stafford. RP 1765, 1767.

Ms. Ward testified that each case processed in her lab goes through a significant review process. RP 1747. Ms. Ward reviews all work in the lab and then another person also reviews everything. RP 1747. Ms. Ward testified that for all of the items sent to her from the Yakima Police Department in Stafford's case, she reviewed the entire case file, and generated each report. RP 1747. Ms. Ward was one of the reviewers for every report that was submitted for this case. RP 1747. She personally signed the reports before sending them. RP 1747, 1797.

Regarding the results, she testified that she did not simply rely on the conclusions made by other analysts. RP 1748. Rather, she came to her own conclusions. RP 1748. Here, the analyst that began testing in the case was no

longer employed with Orchid Cellmark. RP 1716. But in reviewing Stafford's case, Ms. Ward found no evidence of contamination in any of the work done on his case. RP 1816. There were no errors or inconsistency in raw data or any other case file information that caused her any professional concern. RP 1823.

Defendant's Statements

After the DNA match, officers went to Stafford's home and met with him outside. RP 33. He was handcuffed and placed in a patrol car. RP 122. He was then taken to an interview room in the detective's division of the police department. RP 36, 74. Detectives Wentz and Kellett interviewed him. RP 37, 72. The entire interview from start to finish was audio tape-recorded. RP 38-9, SE 50-52. The only thing asked before the tape was turned on was whether Stafford wanted some water. RP 124.

Detective Wentz began by showing a one-page rights form to Stafford. RP 70, 93, 176, SE 50-52. Detective Wentz told Stafford, "This is kind of a participation thing, so if you will read along with me." RP 43, SE 50-51. Stafford participated and read along with the detective. RP 70, RP 155. Detective Wentz went through the case number, date and time and asked Stafford if he understood that the statement was being recorded. RP 43, SE 50-52. In response, Stafford replied, "Yes, I do." SE 50, 51. The detective continued,

"(inaudible) this right here."[1] SE 50, 51. Stafford, in response, said, "And I understand that I should have an attorney present most, pretty soon." RP 43, 92-4, SE 50, 51. Detective Wentz replied, "Okay. Well, let me go through this," referring to the rights form. RP 43, SE 50-51.

Next, Detective Wentz went though the following items: Stafford's full name, date of birth, address, and phone number. SE 50-52. The detective finished by going through the constitutional rights. RP 76, 80, SE 50-52. After each one, Stafford initialed by the right to indicate that he understood it. RP 44, 70, 77, SE 50-2. The constitutional rights that he initialed were as follows:

1. You have the right to remain silent.
2. You have the right at this time to an attorney.
3. Anything you say can and will be used against you in a court of law.
5. You have the right to an attorney before answering any further questions.
6. You have the right to have an attorney present during any questioning.
7. If you cannot afford an attorney, one will be appointment for you without cost to you before or during questioning, if you so desire.
8. Do you understand each of these rights I have explained to you?
9. Having these rights in mind, do you wish to talk with us at this time?
10. Do you understand that you may reclaim any of these rights at any time during this statement, including the right to stop the questioning altogether, and the right to the presence of an attorney?

SE 50-52.

[1] The State relies on the Yakima Police Department transcript that was admitted at the 3.5 hearing and given to the jurors to read during the trial. After listening to the CD, this transcript is the most accurate transcription of what was said during the interview. The VRPs have two different versions of what was on the CD. One version is from the 3.5 hearing and one is from the trial. In both instances in the VRP, the transcript was made from a recording of a recording. It is common to have poor sound quality when recording a CD that is played in the courtroom. This may explain the discrepancy within the VRP.

After reading number 10, Detective Wentz asked Stafford what it meant to him. RP 45, SE 50-51. Stafford answered, "That means if I want, you guys will go get an attorney before we go any further than we are right at this moment." RP 114, SE 50-51. Detective Wentz added, "And it means that if we decide—if you decide to talk to me at some time and you decide at some point that—while talking to me, that you want to change that and ask for an attorney, we stop." RP 46, 115, SE 50-51. Stafford signed the form, indicating that he was read each of his rights. RP 46, 77, 115, SE 50-2. Stafford had no questions about any of the rights. RP 70, SE 50-51.

When it came to signing the waiver portion at the bottom of the form, Stafford said "Yeah, I'm not going to sign none of that unless an attorney asks me to sign something like that." RP 82, 94, SE 50-51. Detective Wentz said, "Well, I'm not an attorney" and "I told you before that I can't advise you." RP 47, SE 50-51. Stafford replied, "right." RP 47, 95, SE 50-51.

Detective Wentz then explained how Shawna had been found and why he was questioning Stafford. RP 47-53, SE 50-51. Stafford continued to speak with the detectives. RP 71, SE 50-51. Towards the end of the interview, Stafford said, "I need an attorney, you know? I mean, you guys are—it looks like you're serious about this shit, so I guess it's time for me to get serious about it." RP 65, SE 50-1. He added, "I don't know what's going on here and if—you're trying to

stick me with something here it sounds like an I—so I need to see an attorney." RP 65, SE 50-1.

Stafford moved to suppress all of his statements, arguing that he invoked his right to an attorney and refused to waive his rights. RP 189-199. At the suppression hearing, Stafford testified that he told the detectives "I think I need an attorney." RP 142. He could not remember whether this was before or after the tape recorder was turned on. RP 142. He testified that he asked for an attorney at least 3 or 4 times and assumed an attorney was on the way. RP 143, 158. When asked why he continued to talk to them, he indicated "…they're in charge of your life at that point. You basically don't want to piss them off…" RP 146. On cross-examination, he admitted that he had prior experience with reading his rights before. RP 156. He acknowledged that he was familiar with his constitutional rights and Miranda warnings from when he was investigated in the past for assault and burglary. RP 156. The detectives were called in rebuttal and testified that Stafford never asked for an attorney before the interview took place. RP 168, 172.

The court ruled that no request for an attorney was made prior to the recording. RP 204. The court found that the statement, "and I understand that I should have an attorney present most, pretty soon" was not a request for counsel. It was a clarification of the rights form while going over the form with the detective. RP 205. The court also found that the refusal to sign the waiver was

not an indication that Stafford was not willing to continue answering questions. RP 205. The court also found that there was no coercion, threats or promises used by the detectives and that Stafford understood all of his rights. RP 206. As such, the court admitted all of the statements that came before his statement near the end of the interview where he said, "I need an attorney."

During the interview with the detectives, Stafford denied knowing Shawna and said that he never heard of her. RP 53, 60. He would have been 41 years old, or 20 years older than Shawna. RP 63. He said he might have been living with his girlfriend, Pam, at the time. RP 64. He denied staying with his sister. RP 52. He said he grew up on the other side of Sportsman's Park. RP 51. When told about the DNA match, he repeatedly denied that his DNA was found inside of her. RP 58.

404(b) Testimony

Mrs. Theresa La Fray testified that she has known Clayton Stafford since the summer of 1983. She testified that she did not know Shawna or Travis. RP 1451, 1461, 1467. She testified that during the summer of 1993, she was living on Victory Lane when she got a knock late at night on her door. RP 1452. She answered it and her next door neighbor, Stafford, stepped in and had blood all over him. RP 1453. She testified that he was covered in blood, from his face to his clothes. RP 1454. He wanted to know how to get the blood out of his clothes. RP 1454. She told him "I don't want to hear a word from you. I want you to get

in the shower. I'll wash your clothes and then I want you out of my house." RP 1463.

He had no injuries but he had blood on his jeans, t-shirt, over-shirt or light jacket, and the top of his underwear band. RP 1455. She washed his clothes while he was in the shower. RP 1454. She then threw his clothes in the bathroom and told him "...get dressed and get out of my house." RP 1456. He then left out the back door. RP 1457. She testified that she only about half a mile from Sportsman's park. RP 1461.

She testified that she remembered that the incident was in 1993 because her husband was in jail at the time. RP 1456. She reported the incident right before trial. She said she reported it because she was afraid that if she didn't that she wouldn't be able to live with herself. RP 1466. Before reporting it, she stressed over the incident for a long time and didn't sleep for two nights straight. 1456. Finally, she called Detective Wentz and said, "I gotta tell you everything now." RP 1466.

Jury Instructions

The jury instructions in this case read, in pertinent part, as follows:

> INSTRUCTION NO. 24 (last 2 paragraphs)
>
> Because this is a criminal case all twelve of you must agree in order to answer the special verdict form. In order to answer the special verdict form "yes", you must unanimously be satisfied beyond a reasonable doubt that "yes" is the correct answer. If you have a reasonable doubt as to the question, you must answer no."

> Because this is a criminal case, each of you must agree for you to return a verdict. When all of you have so agreed, fill in the proper form of verdict or verdicts to express your decision. The presiding juror must sign the verdict forms and notify the bailiff. The bailiff will bring you into court to declare your verdict.
>
> INSTRUCTION NO. 25 (last sentence)
>
> In order for you to find that there is an aggravating circumstance in this case, you must unanimously agree that the aggravating circumstance has been proved beyond a reasonable doubt.

CP 43-45. There was no objection to these instructions. RP 2131-2.

Jury instruction number 24 was the concluding instruction. It contains instructions for both the verdict forms and for the special verdict form. Instruction number 25 deals solely with the aggravating circumstance. CP 45.

Upon deliberating, the jury returned a guilty verdict to first degree murder and answered the special verdict form in the affirmative. RP 2273-4. Stafford was sentenced accordingly to life in prison. RP 2295.

III. ARGUMENT

A. THE DEFENDANT'S STATEMENTS WERE PROPERLY ADMITTED BY THE TRIAL COURT.

1. Stafford did not make a request for counsel.

The statement, "And I understand that I should have an attorney present most, pretty soon" was not a request for counsel. The trial court correctly found it

was Stafford expressing his understanding of his right to counsel and was not a request for an attorney.

To invoke his or her right to counsel, a suspect must do so unequivocally as "'[a] statement either is ... an assertion [of the right to counsel] or it is not.'" Smith v. Illinois, 469 U.S. 91, 97-98, 105 S. Ct. 490, 83 L. Ed. 2d 488 (1984) (quoting People v. Smith, 102 Ill.2d 365, 375, 466 N.E.2d 236, 80 Ill. Dec. 784 (1984) (Simon, J. dissenting)) (second alteration in original). Courts look to the specific wording of the defendant's request for counsel and the circumstances leading up to the request to determine whether the defendant has unequivocally invoked his or her right to counsel. Smith, 469 U.S. at 101. Where "a reasonable police officer in light of the circumstances would" understand the statement to be a request for an attorney, the request is unequivocal. Davis v. United States, 512 U.S. 452, 459, 114 S. Ct. 2350, 129 L. Ed. 2d 362 (1994).

To effectively assert a right to counsel, the suspect must actually invoke the right through a clear and unambiguous invocation. Id. Merely making an equivocal or ambiguous reference to an attorney is insufficient to require the cessation of questioning. Id. ("Maybe I should talk to a lawyer" was not a request for counsel).

Here, given the specific wording and the circumstances, no reasonable police officer would take Stafford's statement as a request for an attorney. Stafford was merely reiterating that he understood he had a right to an attorney, not asking for one. Both Stafford and Detective Wentz testified that they were

reading the rights form together. RP 70, 155. It was clear from the context that Stafford was not asking for an attorney at the time. There is a big difference between "I want an attorney present" and "I understand that I should have an attorney present." Therefore, because Stafford did not make an unequivocal request for an attorney, his statements were properly admitted at trial.

2. Assuming *arguendo* that there was an equivocal request for counsel, there was no need to ask for clarification or suspend questioning.

Stafford relies primarily on State v. Aronholt, 99 Wn. App. 302, 994 P.2d 248 (2000), for his argument that the detectives should have asked clarifying questions after his statement, "And I understand that I should have an attorney present most, pretty soon." However, the Aronholt case relied entirely on State v. Robtoy, 98 Wn.2d 30, 39, 653 P.2d 284 (1982), which was abrogated by Davis v. United States, 512 U.S. 452, 459, 114 S. Ct. 2350, 129 L. Ed. 2d 362 (1994).

In Robtoy, the Washington Supreme Court ruled that police officers who face an equivocal assertion of the right to counsel must break off interrogation and seek to clarify the subject's desire. 98 Wn.2d 30, 39, 653 P.2d 284 (1982). However, the Washington Supreme Court subsequently clarified that Davis, not Robtoy, governs equivocal assertions of the right to counsel during interrogation. State v. Radcliffe, 164 Wn.2d 900, 906-07, 194 P.3d 250 (2008). Under Davis, police need not clarify an equivocal request for counsel and need only stop interrogation when counsel is explicitly requested. 512 U.S. at 459.

Even assuming *arguendo* that Stafford's statements were an equivocal assertion of a desire to have counsel before further conversation with the detectives, in light of Radcliffe, his argument that questioning should have ceased fails. Under Davis and Radcliffe, this statement was not sufficient to require the deputy to break off questioning. As such, his statements were properly admitted at trial.

On appeal, Stafford argues that the detective completely ignored his statement and proceeded with his interrogation. Appellant's Brief at 18. This is not true. Detective Wentz did not simply proceed with his interrogation. He proceeded with reading Stafford all his Constitutional rights, including the following specific rights that pertain to an attorney:

> 1. "You have the right at this time to an **attorney**,"
> 2. "You have the right to an **attorney** before answering any further questions,
> 3. "You have the right to have an **attorney** present during any questioning,
> 4. If you cannot afford an **attorney**, one will be appointed for you without cost to you before or during questioning, if you so desire, and
> 5. Do you understand that you may reclaim any of these rights at any time during this statement, including the right to stop the questioning altogether, and the right to a presence of an **attorney**?

RP 76, 80, SE 50-52 (emphasis added). Detective Wentz then asked what that meant to Stafford. Stafford answered, "That means if I want, you guys will go get an attorney before we go any further than we are right at this moment." RP 114. Detective Wentz added, "And it means that if we decide—if you decide to talk to

me at some time and you decide at some point that—while talking to me, that you want to change that and ask for an attorney, we stop." RP 46, 115. So, to argue that the detective simply proceeded with his interrogation and ignored Stafford is quite a stretch. The detective went over Stafford's rights in detail with him, especially his right to an attorney, and confirmed that Stafford understood them.

Stafford argues on appeal that Radcliff and Davis do not apply because in those cases there was a waiver before an equivocal request. He claims that State v. Aten, 130 Wn.2d 640, 651, 927 P.2d 210 (1996), and Robtoy control the issue in this case. In Robtoy, however, there was also a full waiver before the statement "maybe I should call my attorney." RP 286-7. The State would note that after the equivocal request was made, the detective reminded Robtoy that he could cease questioning immediately, just as Detective Wentz advised Stafford. And here, the detective went even farther and advised Stafford of all his rights and made sure Stafford understood them.

In State v. Aten, the detective began reading Miranda rights when the suspect asked, "Do I have to have an attorney present?" 130 Wn.2d at 651. The detective told her "only if you request one" and continued to read her rights. Id. The suspect acknowledged her rights but when asked if she wanted to talk, she said that she better have an attorney present. Id. In Aten, the detective ceased questioning but didn't have to. Id. at 666. The four-justice plurality, said that "Under Robtoy, [he] could have questioned Respondent to clarify her request for

counsel, but he was not required to do so." Id. The concurrence questioned the plurality's reliance on Robtoy in light of Davis. Id. at 669.

Therefore, by Stafford's reasoning, Robtoy, Radcliff, and Davis should be put in the same category of cases where there is a waiver before an equivocal request, and Aten is in another category of cases where there is an equivocal request before waiver. Yet Aten relied solely on Robtoy, a case involving a waiver before an equivocal request. 130 Wn.2d at 666. As such, Stafford has provided no compelling reason why the issue in this case should not be controlled by Radcliff and Davis.

3. Stafford voluntarily waived counsel.

In Arizona v. Miranda, 384 U.S. 436, 457-58, 86 S. Ct. 1602 (1966), the Supreme Court established a conclusive presumption that all confessions or admissions made during a custodial interrogation are compelled in violation of the Fifth Amendment's privilege against self-incrimination. In re Pers. Restraint of Cross, 180 Wn.2d 664, 682, 327 P.3d 660 (2014). This presumption is overcome only upon a showing that law enforcement officials informed the suspect of his or her right to remain silent and right to an attorney and that the suspect knowingly and intelligently waived those rights. Id. (citing Miranda at 479). If a defendant fails to unequivocally invoke his Miranda rights, a waiver may be inferred when a defendant freely and selectively responds to police questioning. Id. at 687 (citing State v. Gross, 23 Wn. App. 319, 597 P.2d 894 (1979); see also State v. Terrovona, 105 Wn.2d 632, 646-647, 716 P.2d 295 (1986).

In State v. Gross, the defendant was given the standard advisement of rights form. 23 Wn. App. at 321. He signed the explanation of rights but refused to sign the waiver portion of the form. Id. The officer said "You don't have to sign it. It is not mandatory" and proceeded with the interrogation. Id. The court relied on State v. Adams, 76 Wn.2d 650, 571, 458 P.2d 558 (1969), which said that "The Supreme Court has not required an express statement by the accused for an effective waiver…." Gross, 23 Wn. App. at 324. The Gross court stated:

> Thus, there is no talismanic significance to Gross' refusal to sign the waiver. A determination of waiver must be made on the basis of the whole record before the court, and must be determined on the basis of testimony accepted as correct by the trial court. State v. Cashaw, 4 Wn. App. 243, 247, 480 P.2d 528 (1971). Further, a trier of fact may draw from the evidence all inferences fairly deducible therefrom. Dempsey v. Joe Pignataro Chevrolet, Inc., 22 Wn. App. 384, 390, 589 P.2d 1265 (1979).
>
> . . .
>
> [T]he court had the right to infer the existence of waiver from its finding that the defendants answers were freely and voluntarily made without duress, promise or threat and with full understanding of his constitutional rights.

Id. Thus, although a suspect refuses to sign a waiver, one can infer a waiver from a suspect's understanding of his rights and from his voluntary conversation with officers.

The concept of implied waiver has been reiterated by our United States Supreme Court in Berghuis v. Thompkins, 560 U.S. 370, 383-5, 130 S. Ct. 2250 (2010):

> ...waivers can be established even absent formal or express statements of waiver that would be expected in, say, a judicial hearing to determine if a guilty plea has been properly entered.
>
> ...
>
> An "implicit waiver" of the "right to remain silent" is sufficient to admit a suspect's statement into evidence. Butler, supra, at 376. Butler made clear that a waiver of Miranda rights may be implied through "the defendant's silence, coupled with an understanding of his rights and a course of conduct indicating waiver." 441 U.S., at 373. The Court in Butler therefore retreated from the language and tenor of the Miranda opinion, which "suggested that the Court would require that a waiver...be 'specifically made.'" Connecticut v. Barrett, 479 U.S. 523, 531-532 (1987) (Brenan, J., concurring in judgment).
>
> ...
>
> Where the prosecution shows that a Miranda warning was given and that it was understood by the accused, an accused's uncoerced statement establishes an implied waiver of the right to remain silent.
>
> ...
>
> As a general proposition, the law can presume that an individual who, with a full understanding of his or her rights, acts in a manner inconsistent with their exercise has made a deliberate choice to relinquish the protection those rights afford.

Here, after Stafford was told of his right to an attorney, Detective Wentz asked him what it meant to him. RP 45. Stafford answered, "[t]hat means if I want, you guys will go get an attorney before we go any further than we are right at this moment." RP 114. From his own words, it is clear that Stafford

understood perfectly what his rights were. He also signed the rights form. The fact that he continued to converse with the detectives and answer their questions establishes an implied waiver of his right to remain silent.

On appeal, Stafford claims that there is no evidence in the record of his prior knowledge of his constitutional rights through other contacts with law enforcement. Appellant's Brief at 30. However, Stafford admitted on the stand that he had such prior knowledge. RP 156. When asked if he had prior experience with his constitutional rights, he answered, "I've read those before, yes." RP 156. Stafford admitted that he was familiar with his constitutional rights from prior assault and burglary investigations. RP 156.

Furthermore, in Gross, during the third interview, the defendant eventually asserted his right to silence. 23 Wn. App. at 324. This later invocation especially suggested that Gross fully understood his rights. Id. at 324-5. Similarly, Stafford's invocation of his right to attorney near the end of the interview (when he says it's time to get serious and that he needs an attorney) demonstrates that he understood his rights as well.

B. THE FORENSIC SCIENTIST'S DNA TESTIMONY WAS PROPERLY ADMITTED AT TRIAL.

Stafford argues that expert testimony violated his right to confrontation. The case that controls the issue is State v. Lui, 179 Wn.2d 457, 315 P.3d 493, cert. denied, 134 S. C. 2842 (2014). In Lui, an expert witness testified that DNA profiles from two different samples matched, although the expert had not

personally performed the testing or observed the testing. 179 Wn.2d at 460. The expert testifying about the DNA results merely reviewed the results produced by others. The trial court allowed the testimony because ER 703 allows experts to rely on hearsay in forming opinions. Id. at 466.

Here, Ms. Ward, a DNA analyst for Orchid Cellmark, testified that DNA found on swabs of both Shawna's mouth and vagina matched the DNA profile for Clayton Stafford. RP 1765, 1767. The analyst that began testing no longer worked for Orchid Cellmark. RP 1716. But although Ms. Ward testified based on another analyst's examination, she used her own expertise to evaluate the records, and she was subject to cross-examination.

Ms. Ward testified that each case in the lab goes through a review process. RP 1747. She reviews all work in the lab and then another person also reviews everything. RP 1747. She testified that for all of the items sent to her lab from the Yakima Police Department, she reviewed all of the information, the entire case files, and generated each report. RP 1747. Ms. Ward was one of the reviewers for every report that was submitted for Stafford's case. RP 1747. She personally signed the reports before sending them. RP 1747, 1797. Regarding the results, she testified that she does not simply rely on the conclusions made by other analysts. RP 1748. Rather, she comes to her own conclusions. RP 1748.

Stafford claims that his case conflicts with State v. Hopkins, 134 Wn. App. 780, 142 P.3d 1104 (2006), a sex abuse case in which a nurse practitioner

who examined a child could not testify at trial due to a family emergency. In that case, a doctor testified that the nurse documented that the child stated the defendant performed oral sex on her. The doctor testified that the physical exam was normal but consistent with the reported sexual activity. 134 Wn. App. at 784. The nurse's report was held inadmissible because it was relevant to an ongoing legal investigation and would be available for use at a later trial. Id. at 791.

Hopkins is completely distinguishable from the case at hand and Lui. The Washington State Supreme Court noted that in Hopkins, "there is no suggestion that the doctor did anything other than read the nurse's statements to the jury." Lui, 153 Wn. App. at 321 n.16. In Lui and here, the experts did more than act as "mere conduits for the testimonial assertions" of other experts. 153 Wn. App. at 320. In Lui, the expert testifying about the autopsy used his own expertise and independent review of the data to reach his conclusions. 153 Wn. App. at 320. And the expert testifying about the DNA match used her own expertise to interpret the data generated by others. 153 Wn. App. at 320-21. So too here, Ms. Ward used her own expertise to draw conclusions regarding the DNA match; she did not simply relate the findings of the non-testifying analyst. RP 1748. Thus, under Lui, Ms. Ward's testimony did not violate the Confrontation Clause.

Furthermore, the United States Supreme Court's recent decision in Williams v. Illinois, ___ U.S. ___, 132 S. Ct. 2221, 183 L. Ed. 2d 89 (2012) (plurality opinion), supports the outcome of Lui. In Williams, a witness testified

at a bench trial that a suspect's DNA profile matched a profile produced by another expert who did not testify. 132 S. Ct. at 2229-30. A plurality of the Court held that when an expert witness relies on another expert's report in order to form an opinion, the information from such a report is not offered for the truth of the matter asserted, but only to explain the basis for the expert's opinion. 132 S. Ct. at 2228. Hence, under the plurality's reasoning, such testimony is not hearsay and does not violate the Confrontation Clause's prohibition on testimonial hearsay.

Stafford relies on State v. Crager, 123 Ohio St.3d 1210, 914 N.E.2d 1055 (2009), for his argument that a new trial is needed. That case, however, was based on a finding that a lab report was inadmissible as a business record where the author of the report was not available for cross-examination. State v. Crager, 164 Ohio App.3d 816, 844 N.E.2d 390 (2005). The court did not reach the question of whether the presence of a competent analyst along with the records would make a difference under Crawford. The Supreme Court granted certiorari in Crager, but never rendered a decision on the merits. Crager v. Ohio, 577 U.S. 930, 129 S. Ct. 2856 (2009). It is important to note that the United States Supreme Court did not reverse the Ohio Supreme Court's ruling in Crager.

Without engaging in further analysis, the Ohio Supreme Court vacated the trial court's decision and remanded so that the trial court could reconsider admissibility of DNA evidence in light of Melendez-Diaz. State v. Crager, 123

Ohio St. 3d 1210, 2009 Ohio 4760, 914 N.E.2d 1055 (2009). Lower courts may, and occasionally do, come to the same conclusion they previously reached after a remand by the United States Supreme Court to reconsider a case in light of new law. However, there are no reported decisions in Crager considering the remanded question. So Crager does not help Stafford's argument.

Stafford also points to one inconsistency in the non-testifying analyst's record-keeping that was brought up during cross-examination. Appellant's Brief at 31. However, inconsistencies go to the weight of the testimony, not admissibility. State v. Spadoni, 137 Wash. 684, 691, 243 P. 854 (1926).

In sum, there was no confrontation violation here. Ms. Ward generated and signed the reports in this case. RP 1747, 1797. Her conclusions were her own. RP 1748. She was not simply a "mere conduit for the testimonial assertions" of another expert. As such, her testimony was properly admitted by the trial court.

C. THE TESTIMONY OF MRS. LA FRAY WAS PROPERLY ADMITTED BY THE TRIAL COURT.

During the summer of 1993, Mrs. La Fray got a knock in the middle of the night on her door. RP 1452. She answered it and her next door neighbor, Clayton Stafford, stepped in and his face and clothes were covered in blood. RP 1453. He wanted to know how to get blood out of his clothes. RP 1454. She told him not to say another word and to get in the shower. RP 1463. She said, "I'll wash your clothes and then I want you out of my house." RP 1463.

He had no injuries but had blood on his jeans, t-shirt, jacket or over-shirt, and the band of his underwear. RP 1455. She washed his clothes while he took a shower. RP 1454. She then gave him his clothes and told him to get out of her house. 1456. He left out the back door. RP 1457. Mrs. La Fray lived only about half a mile from Sportsman's Park. RP 1461.

1. The testimony was relevant.

Evidence Rule 401 provides as follows:

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

ER 401. As indicated in State v. Whalon, 1 Wn. App. 785, 791, 464 P.2d 730 (1970):

> A trial court has discretion concerning the admissibility of evidence insofar as its relevance is concerned. The standard for relevancy is whether the evidence gives rise to reasonable inferences regarding contested matter or throws any light upon it. Relevancy means a logical relation between evidence and the fact to be established. Any evidence which tends to identify the accused as the guilty person is relevant.
>
> Any competent evidence which tends logically to prove a defendant's connection with a crime is material. Materiality is judged not only upon what the evidence shows standing alone, but also on whatever inferences may be drawn when it is viewed in connection with other evidence. Relevant and material evidence is admissible. Its cogency

> and the degree to which it elucidates facts in issue become matters of the weight given the evidence by the jury.

(citations omitted). The testimony need not be in itself sufficient to support a conviction in order to be admissible. Rather, it is enough, if it has a tendency to that effect. State v. Spadoni, 137 Wash. 684, 691, 243 P. 854 (1926).

Here, Mrs. La Fray's testimony goes to the identity of the person who committed the crimes. When the identity of the perpetrator of a crime is in issue, any evidence tending to identify the accused as the guilty party is relevant. State v. Guzman-Cuellar, 47 Wn. App. 326, 734 P.2d 966, review denied, 108 Wn.2d. 1027 (1987) (citing State v. Coe, 101 Wn.2d 772, 781-82, 684 P.2d 668 (1984)); State v. Sellers, 39 Wn. App. 799, 805, 695 P.2d 1014 (1985)); see also State v. Smith, 74 Wn.2d 744, 769, 446 P.2d 571 (1968), vacated, 408 U.S. 934 (1972); Spadoni, 137 Wash. at 691; State v. Nichols, 5 Wn. App. 657, 491 P.2d 677 (1971).

Here, the evidence was clearly relevant and admissible. Mrs. La Fray remembered a very unusual event happening right around the time period when Shawna was murdered. Stafford, her next door neighbor, went to her house in the middle of night, covered in blood, yet with no injuries. The incident was not something that happened ever before. It was a unique and isolated incident that stuck in Mrs. La Fray's mind for 17 years. Mrs. La Fray testified that she lives very close to Sportsman's park, where Shawna was last seen alive. Further, almost every piece of clothing Stafford was wearing had blood on it. The severe

injuries inflicted upon Shawna would have resulted in a lot of blood loss, especially the head wounds. After a brutal attack like this, one would expect her murderer to have a lot of blood on his clothes.

Stafford points to the fact that Mrs. La Fray was not certain in which month this incident occurred or whether it was connected to his case. Appellant's Brief at 33. First of all, when Mrs. La Fray testified about when the 1993 incident took place, she said it took place during the summer. RP 1452. She couldn't say which month but knew it was warm out. RP 1452. As for a time, she said it was in the "middle of the night" and "late at night." RP 1453. She testified that she thought it was between 10:30 p.m. and midnight based on her sleep habits, but said every once in awhile she stays up later than midnight. RP 1462, 1468.

Stafford argues on appeal that her testimony is unconnected to the case because it is inconsistent with that of other witnesses. However, we know that witness' memories are not always exact as to what month or time something transpired. Memories fade over time. The more time goes on, the harder it is to recall, with precision, when an event occurred. Here, Mrs. La Fray testified in 2010 as to something that occurred in 1993. Some discrepancies as to dates and times are expected amongst witnesses when testifying to something that occurred 17 years ago. The discrepancies, however, do not prove that the incident was unconnected to the case.

And actually, her testimony was very consistent with that of other witnesses. The timeframe is consistent with when the park ranger thinks he last saw Shawna and Travis. And is also consistent with when they called for a ride home. The month of the crime, June, is also consistent with Mrs. La Fray's testimony that it was warm outside at the time. Sgt. Salinas testified that when Shawna was found it was a sunny day. RP 1009. Furthermore, the amount of blood is consistent with the blood that would have resulted from Shawna's numerous injuries.

Stafford also points to the fact that Mrs. La Fray did not know if the incident was connected to the State's case. Whether a witness believes her testimony is relevant is not the issue. She certainly was not familiar with all the facts of the State's case. She was one witness, amongst many, that testified for the State. The fact that she did not know if the incident was connected to the murder is irrelevant to the analysis. It is for the court to determine relevance, not witnesses.

2. Credibility issues go to the weight of the evidence.

Stafford claims on appeal that the validity and credibility of Mrs. La Fray's testimony was questionable. Appellant's Brief at 33. As with any witness, her credibility was at issue. Under our adversary system, witness credibility is tested by cross-examination and is the subject of fair comment in final argument. State v. Favro, 5 Wn. App. 311, 313, 487 P.2d 261 (1971). The record discloses that trial counsel availed himself of every opportunity to discredit

the witness. RP 1458-67. But neither reason nor precedent supports any argument that Mrs. La Fray's testimony should have been suppressed because her credibility was in issue.

3. The probative value was not substantially outweighed by the danger of unfair prejudice.

Under Evidence Rule 403, relevant evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice. State v. Coe, 101 Wn.2d 772, 782, 684 P.2d 668 (1984). Rule 403, however, is considered an extraordinary remedy, and the burden is on the party seeking to exclude the evidence to show that the probative value is substantially outweighed by the undesirable characteristics. KARL B TEGLAND, WASHINGTON PRACTICE: COURTROOM HANDBOOK ON WASHINGTON EVIDENCE, Rule 403 (2009-2010 ed.). Because of the court's considerable discretion in administering this rule, reversible error is found only in the exceptional circumstance of a manifest abuse of discretion. Coe, 101 Wn.2d at 782.

"Unfair prejudice" is that which is more likely to arouse an emotional response than a rational decision by the jury. State v. Gould, 58 Wn. App. 175, 182, 791 P.2d 56 (1990) . It requires more than testimony which is simply adverse to the opposing party. Id. The addition of the word "unfair" in ER 403 "obligates the court to weigh the evidence in the context of the trial itself, bearing

in mind fairness to both the State and defendant." State v. Bernson, 40 Wn. App. 729, 736, 700 P.2d 758 (1985). "In almost any instance, a defendant can complain that the admission of potentially incriminating evidence is prejudicial in that it may contribute to proving beyond a reasonable doubt he committed the crime with which he is charged." Bernson, 40 Wn. App. at 736. As such, the focus must be on whether it was *unfairly* prejudicial evidence. State v. Stackhouse, 90 Wn. App. 344, 358, 957 P.2d 218 (1998).

Where, as here, the defense is "it wasn't me," virtually all evidence tending to prove or disprove the identity of the crime's perpetrator is probative. While the evidence was prejudicial in the sense that it was offered to persuade the trier of fact to arrive at one conclusion and not another, it was not unfairly prejudicial within the meaning of ER 403. The nature of the evidence was neither unduly inflammatory nor likely to prevent the jury from making a rational decision. It was also unlikely to arouse an emotional response from the jury. Rather, it likely assisted the jury in identifying the person who committed the crimes charged. The fact that it was adverse to Stafford does not mean it was *unfairly* prejudicial.

In light of the other evidence, including the uncontroverted DNA evidence, Stafford's statements, the testimony of other witnesses, and the highly persuasive circumstantial evidence presented, Mrs. La Fray's testimony was not unfairly prejudicial. Therefore, Stafford's motion to exclude her testimony was

unfounded and there was no manifest abuse of discretion on the part of the trial court.

D. THERE WAS SUFFICIENT EVIDENCE TO SUPPORT THE ELEMENTS OF AGGRAVATED FIRST DEGREE MURDER.

Stafford claims that there is insufficient evidence of aggravated first degree murder. In reviewing a challenge to the sufficiency of the evidence, courts review the evidence in the light most favorable to the State to determine whether *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. State v. Green, 94 Wash. 2d 216, 221, 616 P.2d 628 (1980) (citing Jackson v. Virginia, 443 U.S. 307, 319, 99 S. Ct. 2781, 61 L. Ed. 2d 560 (1979)). The verdict will be upheld unless no reasonable jury could have found each element proved beyond a reasonable doubt. State v. Gentry, 125 Wn.2d 570, 596-97, 888 P.2d 1105 (1995).

A challenge to the sufficiency of the evidence admits the truth of the State's evidence and all inferences that can reasonably be drawn therefrom. State v. Theroff, 25 Wn. App. 590, 599, 608 P.2d 1254, aff'd, 95 Wn.2d 385, 622 P.2d 1240 (1980). The evidence is interpreted most strongly against the defendant. Id. Evidentiary inferences favoring the defendant are not considered in a sufficiency of the evidence analysis. State v. Jackson, 62 Wn. App. 53, 58 n.2, 813 P.2d 156 (1991).

Circumstantial evidence may be used to prove any element of a crime. State v. Garcia, 20 Wn. App. 401, 405, 579 P.2d 1034 (1978). "In determining the sufficiency of the evidence, circumstantial evidence is not to be considered any less reliable than direct evidence." State v. Delmarter, 94 Wn.2d 634, 638, 618 P.2d 99 (1980).

1. A rational trier of fact could have found each element of first degree murder proved beyond a reasonable doubt.

Here, the essential elements of first degree murder are as follows:

> (1) That on or about June 13, 1993, the defendant acted with intent to cause the death of ShawnaYandell;
> (2) That the intent to cause the death was premeditated;
> (3) That Shawna Yandell died as a result of the defendant's acts; and
> (4) That any of these acts occurred in the State of Washington.

CP 29. Considering the evidence in the light most favorable to the State, a rational jury could have found all of these essential elements. The State will address each element in turn. The date of the crime "on or about June 13, 1993" was not in dispute and was proven beyond a reasonable doubt.

a. Identity

The first element is "that on or about June 13, 1993, the defendant acted with intent to cause the death of ShawnaYandell." There is overwhelming evidence that Stafford was the person who acted with intent to cause Shawna's

death. It is uncontroverted that Stafford's DNA was found in semen found in Shawna's mouth and vagina. The forensic scientist concluded that the chance of finding another person with the same DNA profile is 1 in 19.63 quadrillion in the Caucasian population.

This undeniable statistic means that the chance of another person having the same DNA profile is tremendously small. If investigators properly collect and handle biological evidence and forensic scientists conduct the analysis correctly, as was done here, DNA evidence is extremely accurate. There is a reason courts often rely on DNA evidence over other means of identification such as eyewitness testimony. DNA evidence has one of the highest level of accuracy in criminal identifications.

Counsel argues that it is possible that Stafford had consensual sex. But all of his arguments are about what *possibly* could have happened. Counsel writes that based on drug usage, "it is quite *conceivable* that this young woman...would wander off or get into a car with just about anyone—even someone she did not know." Appellants Brief at 42. The standard for sufficiency of evidence is not what is *conceivable*. Moreover, his argument is mere speculation and wholly unsupported by the evidence. There is absolutely no evidence that Stafford had a consensual sexual encounter with Shawna.

There was also no evidence that Shawna was high on drugs at the time of her murder. The park ranger testified that he spoke to her and Travis for nearly

20 minutes. RP 1264. Most of the time he was talking to Shawna and the few words that Travis said were slurred and unclear. RP 1262. While he specifically remembered that Travis was unclear, he had no problem at all speaking to Shawna and understanding her clearly. RP 1262-4. Further, Kennith Madden testified that earlier that day, Shawna was not drinking heavily and was "far from being drunk." RP 2084. Simply put, there was no evidence as the defense claims, that Shawna was so out of it at the time that she might have consensual sex with someone and not even remember it. Appellant's Brief at 42-3.

In fact, all of the evidence is overwhelmingly to the contrary. Shawna, who was 21 years old, had only been in Yakima for about 3 weeks with her boyfriend whom she lived with. RP 1145. She and her boyfriend were practically inseparable and were crazy about each other. RP 1252. Shawna did not go out and frequent bars or clubs. RP 1178, 1208, 1230. This was testified to by Travis as well as Junior Wilkey, who let the couple reside at his home in Yakima. RP 1145, 1230. The overwhelming evidence at trial was that Stafford was a complete stranger to Shawna and everyone who knew her. Travis, Junior Wilkey, Tina Wilkey, and Kennith Maddon testified that they had never seen or heard of Stafford. RP 1147, 1178, 1229, 1239, 2085. Theresa La Fray, Stafford's next door neighbor whose husband was friends with Stafford, had never met Travis or Shawna. RP 1451, 1460-1.

In addition, the manner in which Shawna was found shows that this was not a friendly, consensual encounter. She was found dead, with five skull fractures from blunt force blows to her head. RP 1079-87, 1114. She also had numerous defensive wounds all over her body, evidence indicative of a struggle while she was alive and a lack of consent. RP 1091. In addition, there were signs of attempted strangulation, as well as evidence of her being dragged. RP 1066, 1091-3, 10779, SE 14-5, 17, 21-5. She was also naked except for her bra, which was pushed up by her shoulder area and still hooked in the back. RP 979, 1006, 1067, 1078, 1932, SE 5, 15. Furthermore, she had injuries consistent with a sexual assault, including a contusion on her left thigh, and scrapes on her right lower abdomen and thigh. RP 1116.

Furthermore, Stafford said the he did not know her. RP 49, 53, SE 50-1. His statement to the detectives was *not* that he had consensual sex with her or may have had consensual sex with her. He completely denied knowing her and later denied that his DNA was found inside of her. SE 50-1. His statement denying that he knew her was made before police told him of the DNA match. RP 53. These statements inculpate him in the rape and murder of Shawna Yandell. The only reason to completely deny knowing her and to deny the presence of his DNA is to distance himself from the crime and the victim in an attempt to avoid conviction.

The evidence at trial also showed Shawna's intent that night at the park. According to multiple witnesses, she was tired and wanted to go home. RP 1155-6, 1227, 1242. The park ranger's testimony supports this as well. RP 1259-62. He testified that on the night in question, he ran into a young female and male near a restroom. She wanted money for a pay phone and needed a ride, but he wasn't able to help her. RP 1260-1.

The State also presented testimony that Stafford showed up at his next-door neighbor's house, covered in blood, in the middle of the night during the summer of 1993. This was around the same time that Shawna went missing. And she lives only half a mile from Sportsman's Park, where Shawna was last seen alive. RP 1453. And nearly every article of clothing Stafford was wearing (except his shoes and socks) had blood on it. RP 1455. Importantly, the injuries to Shawna would have involved a lot of blood splatter, especially her head wounds. SE 18-20. Stafford also denied living at this location with his sister, yet Mrs. La Fray testified that he lived there for all of 1993. RP 52, 1452.

For his sufficiency argument, Stafford points to inconsistencies amongst witnesses as to whether Travis and Shawna were practically inseparable. Appellant's Brief at 39. However, a challenge to the sufficiency of evidence admits the truth of the State's evidence and all inferences that can reasonably be drawn therefrom. State v. Theroff, 25 Wn. App. 590, 593, 608 P.2d 1254 (1980). This court must defer to the trier of fact on issues of conflicting testimony,

credibility of witnesses, and the persuasiveness of the evidence. State v. Thomas, 150 Wn.2d 821, 874-75, 83 P.3d 970 (2004) (citing State v. Cord, 103 Wn.2d 361, 367, 693 P.2d 81 (1985)). The jury, alone, has had the opportunity to view the witnesses' demeanor and to judge their veracity.

Thus, the facts must be viewed in the light most favorable to the State, not the defendant. Here, the State's testimony showed that Travis and Shawna were always together. Other than a handful of folks, they did not know anyone in Yakima and had only been in the area for a really short time. The reasonable inference is that Shawna did not know Stafford at all. This inference must be admitted for purposes of analyzing the sufficiency of the evidence.

Stafford also references Dr. Thiersch's testimony for his sufficiency argument. But, he examines Dr. Thiersch's testimony in the light most favorable to the defense, which is not the relevant standard. While the pathologist admitted on cross the possibility that some defensive wounds could have been caused by Shawna falling down, the doctor testified that Shawna would have had to fallen down *multiple times* given the pattern of bruising. RP 1104. The defense suggestion that the bruises could have been caused by Shawna falling down ignores the extent of her injuries and the fact that recent bruises were found on all over her body. SE 14, 16-7, 21-5.

On appeal, Stafford suggests that the bruising could have been caused by falling down from being intoxicated. Stafford's own witness, Kennith Maddon,

testified that on June 12, 2013, he spent the day with his girlfriend, Kim Moyer, as well as Travis and the victim. They went to the tri-cities to look for work and when they returned, he dropped off Travis and the victim near at an intersection near a gas station. RP 2079. Mr. Madden testified that the victim was not drinking heavily and was "far from being drunk." RP 2084.

Stafford's argument also ignores the presence of bruising in light of the more serious injuries, including multiple skull fractures, lacerations, scrapes, and evidence of strangulation. SE 15, 18-20. Furthermore, there was no evidence that Shawna had any sort of recent fall or history of falling. Dr. Theirsch also testified that the injuries were all caused around the same time. RP 1118. He described the bruises as the type of bruises one would expect to see shortly after an injury. RP 1082. They were fresh purplish-red bruises that had not had a chance to heal.

Given the totality of the evidence, including the manner of the victim's death (multiple skull fractures from blunt force strikes), evidence of strangulation, and multiple lacerations and bruises, and viewing this evidence in the light most favorable to the *State*, the bruising was more likely related to the rape and murder of Shawna.

Similarly, while Dr. Thiersch admitted that the spermatozoa might have persisted in her vagina for days prior to her death, he also testified that on average, it is typically only 24, maybe 30 hours. RP 1096, 1109. He said that the time period is much shorter for sperm found in the oral cavity. RP 1099. This

time frame is consistent with when the autopsy was done. The autopsy was done on June 14, the morning after Shawna's body was found. RP 1077, SE 26. The fact that on average sperm only last 24 to 30 hours in the vagina is consistent with Stafford raping Shawna after Shawna was last seen by Travis.

Appellant argues that this time frame is consistent with a theory of consensual sex. However, when you consider the fact that Stafford's spermatozoa was present in the victim's oral cavity *and* vagina, and the totality of the evidence admitted at trial, the time frames actually are more consistent with the State's theory of the case —that he murdered Shawna close in time to when he raped her and left his sperm behind.

b. Intent

There is overwhelming evidence that Stafford acted with intent to cause the death of the victim. The forensic pathologist testified as follows regarding the fractures on the front part of Shawna's skull: "This is a forceful strike, injury impact that occurred at that location, enough to cause fracturing of the underlying skull." RP 1085. He described the injuries as significant, lethal injuries, causing damage to the brain as well as fracturing the skull. RP 1087. With the injuries Stafford inflicted on her, there can only be one intent, an intent to kill. From the evidence presented a rational trier of fact could have concluded that he intentionally struck her with a weapon multiple times, on the back and front of her head in order to kill her.

c. Premeditation

Further, there was sufficient evidence that his intent to cause her death was premeditated. Premeditation has been defined as "the deliberate formation of and reflection upon the intent to take a human life" and involves "the mental process of thinking beforehand, deliberation, reflection, weighing or reasoning for a period of time, however short." State v. Gentry, 125 Wash.2d 570, 598-99, 888 P.2d 1105, cert. denied, 116 S. Ct. 131 (1995). Premeditation must involve more than a moment in point of time. RCW 9A.32.020(1).

Premeditation may be inferred when the circumstances of the crime suggest that the defendant considered the death prior to acting. Gentry, 125 Wash.2d at 598-99. Premeditation may be proved by circumstantial evidence where the inferences drawn by the jury are reasonable and the evidence supporting the jury's finding is substantial. Id. at 598. A number of appellate cases have considered the sufficiency of evidence with respect to premeditation and demonstrate that a wide range of proven facts will support an inference of premeditation. Id.

For example, sufficient evidence to infer premeditation has been found where (1) multiple wounds were inflicted; (2) a weapon was used; (3) the victim was struck from behind; and (4) there was evidence of a motive, such as robbery or sexual assault. Id. at 599. Here, Shawna suffered five skull fractures to both the front and back of her head. RP 1085-6, 1114. The fractures were likely

caused from an unknown weapon. RP 1114-5. Further, there is evidence of a motive: sexual assault.

In addition, evidence that a homicide was preceded by a different type of attack is sufficient to show premeditation. See State v. Gibson, 47 Wash. App. 309, 734 P.2d 32, review denied, 108 Wash.2d 1025 (1987). Here, there is evidence that Stafford attempted to strangle her, and that strangulation was not the ultimate cause of her death. RP 1083, 1102. The jury may well have inferred that Stafford strangled prior to striking her in the head. From this, they may have inferred that Stafford had to find a weapon when his attempt at strangulation failed.

The numerous defensive wounds also show she was alive at the time, RP 1082, and indicate that she and Stafford struggled before the fatal blows that took her life. See State v. Ollens, 107 Wash. 2d 848, 850, 733 P.2d 984 (1987) (sufficient evidence of premeditation where victim was stabbed multiple times with defensive wounds because jury may have reasonably determined that the defendant sought a weapon and continued stabbing the victim to effectuate a robbery after victim fought back).

In addition, the jury may have inferred that Stafford killed the victim to conceal the rape that had just occurred. A motive of that kind is circumstantial evidence of premeditation. See Ollens, 107 Wash. 2d at 851. Here, the physical evidence shows deliberate premeditation and planning to take the victim's life in

those five lethal blows. These were strikes so forceful that they actually fractured her skull in multiple places. This was in addition to the evidence of strangulation, forcible rape, and numerous defensive wounds. This evidence was sufficient to support the jury's finding of premeditation.

d. Causation

The State must prove that the victim died as a result of the defendant's acts. The uncontroverted testimony was that she died from the blunt impacts to her head with cerebral contusions. RP 1079, SE 20. Counsel argues that Shawna's "behavior likely contributed to her being victimized resulting in her tragic end." Appellant's Brief at 43. For one, whether Shawna "contributed" in any way to her death is irrelevant for purposes of this appeal. One could foreseeable "contribute" to their death by walking alone at night as well. It simply is irrelevant. Secondly, while it is easy to place blame on a victim who is not able to speak for herself because she is dead, Shawna did not cause her tragic end. Clayton Stafford did. The evidence at trial was overwhelming in that regard.

e. Location

Stafford argues that there was no evidence of a crime scene or where the murder occurred. Appellant's Brief at 37. First of all, the State does not need to prove the existence of a crime scene. Here, the crime scene was where Shawna's body was discovered, in the Yakima River, a constantly moving crime scene in which evidence can be easily washed away.

Second of all, the State does not need to prove the exact location where the crime occurred-only that it occurred in the State of Washington. Here, Shawna's body was found in the middle of the Yakima River not long after she was last seen by her boyfriend at Sportsman's Park in Yakima, Washington. Her body was found upstream about 2.5 miles from the park. RP 1014. As such, there was overwhelming evidence to support the essential element that this crime occurred in the State of Washington. In sum, there was substantial evidence that a rational jury could have found all the essential elements of first degree murder beyond a reasonable doubt.

2. A rational trier of fact could have found the presence of the aggravating factor beyond a reasonable doubt.

By way of a special verdict form, the jury was also asked whether the murder was committed in the course of, in furtherance of, or in immediate flight from the crime of first or second degree rape. CP 45. The standard of review is whether any rational trier of fact could have found the presence of the aggravating factor beyond a reasonable doubt. State v. Varga, 151 Wn.2d 179, 201, 86 P.3d 139 (2004).

As discussed previously, there was substantial evidence that the sexual encounter between Stafford and Shawna was not consensual. A rational jury could have found that he committed the murder "in the course of, in furtherance of, or in immediate flight from the crime of first or second degree rape." Based on the uncontroverted evidence, Stafford's semen was present in the victim's

vagina and mouth when her nude body was discovered. At the same time, there was evidence that the victim had suffered a horrendous death and had defensive wounds indicative of a struggle and lack of consent to sexual intercourse.

There was also substantial evidence that Stafford was a complete and utter stranger to her. No one had ever seen him with the victim, young lady more than 20 years younger than Stafford. Shawna was in a committed relationship with her boyfriend and had only been in Yakima for a short time to find work. Further, numerous witnesses testified that the victim was not one to go out and only wanted to get home that night and go to sleep. And as indicated previously, Stafford denied knowing who she was and denied that his DNA was inside of her.

It would have been completely reasonable for a jury to infer that Stafford killed Shawna in order to conceal the forcible rape he committed and then threw her naked body in the Yakima River in an attempt to wash any evidence that he may have left behind. Based on all this evidence, the only logical answer to the special verdict question was that the murder was committed in furtherance of, or in immediate flight from the crime of first or second degree rape. As such, a rational trier of fact could have found the presence of the aggravating factor beyond a reasonable doubt.

E. THE JURY WAS PROPERLY INSTRUCTED AS TO THE SPECIAL VERDICT.

The jury instructions in this case read, in pertinent part, as follows:

> INSTRUCTION NO. 24 (last 2 paragraphs)
>
> Because this is a criminal case all twelve of you must agree in order to answer the special verdict form. In order to answer the special verdict form "yes", you must unanimously be satisfied beyond a reasonable doubt that "yes" is the correct answer. If you have a reasonable doubt as to the question, you must answer no."
>
> Because this is a criminal case, each of you must agree for you to return a verdict. When all of you have so agreed, fill in the proper form of verdict or verdicts to express your decision. The presiding juror must sign the verdict forms and notify the bailiff. The bailiff will bring you into court to declare your verdict.
>
> INSTRUCTION NO. 25 (last sentence)
>
> In order for you to find that there is an aggravating circumstance in this case, you must unanimously agree that the aggravating circumstance has been proved beyond a reasonable doubt.

CP 43-45. Stafford did not object at trial to these instructions. RP 2131-2, Appellant's Brief at 43.

Stafford argues that in light of State v. Bashaw, 169 Wn.2d 133, 234 P.3d 195 (2010), overruled by State v. Guzman Nuñez, 174 Wn.2d 707, 285 P.3d 21 (2012), the sentencing enhancements must be vacated because the jury was incorrectly instructed that it had to be unanimous to answer "no" to the special verdict forms. Appellant's Brief at 43. Under Bashaw, juror unanimity "is not required to find the *absence* of such a special finding." 169 Wn.2d at 147.

However, in Guzman Nuñez, the Washington State Supreme Court held that a trial court's instruction requiring unanimity to answer "no" to a special

verdict form addressing an aggravating factor was not manifest constitutional error and could not be raised for the first time on appeal. 160 Wn. App. at 159-64. It upheld the giving of instructions requiring unanimity for either "yes" or "no" special verdict answers. This case overruled the non-unanimity rule for aggravating circumstances expressed in Bashaw and, before that, in State v. Goldberg, 149 Wn.2d 888, 72 P.3d 1083 (2003).

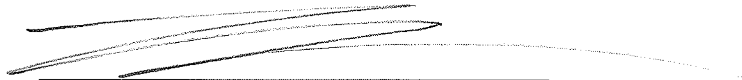
The court found that such a rule "conflicts with statutory authority, causes needless confusion, does not serve the policies that gave rise to it, and frustrates the purpose of jury unanimity." Guzman Nuñez, 174 Wn.2d at 709-10. In reaching this decision, the court noted that for SRA aggravating circumstances, the legislature "intended complete unanimity to impose or reject an aggravator." Id. at 715. In light of the Supreme Court's overruling of Bashaw, Stafford's argument challenging the special verdict jury instruction fails.

IV. CONCLUSION

In sum, Stafford's statements were properly admitted at trial. The statements were made after a valid waiver of Miranda and prior to any invocation of an attorney. Secondly, the DNA testimony was properly admitted pursuant to Lui, a nearly identical case. Thirdly, Mrs. La Fray's testimony was properly admitted as it was relevant and probative and the trial court did not abuse its discretion in admitting it. Fourthly, there was sufficient evidence to support all of the elements of aggravated first degree murder. Finally, pursuant to Guzman

Nuñez, Stafford's argument challenging the special verdict jury instruction fails.

Respectfully submitted this 6th day of January, 2015,



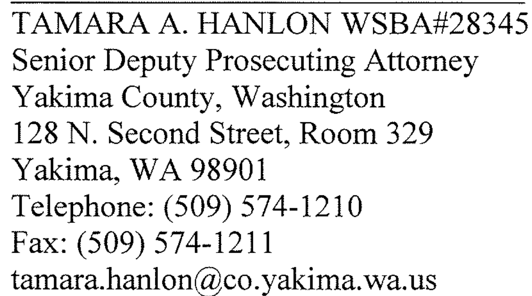
TAMARA A. HANLON WSBA 28345
Deputy Prosecuting Attorney

DECLARATION OF SERVICE

I, Tamara A. Hanlon, state that on January 6, 2015, by agreement of the parties, I emailed a copy of BRIEF OF RESPONDENT to Mr. David Gasch at gaschlaw@msn.com

I certify under penalty of perjury under the laws of the state of Washington that the foregoing is true and correct.

DATED this 6th day of January, 2015 at Yakima, Washington.



TAMARA A. HANLON WSBA#28345
Senior Deputy Prosecuting Attorney
Yakima County, Washington
128 N. Second Street, Room 329
Yakima, WA 98901
Telephone: (509) 574-1210
Fax: (509) 574-1211
tamara.hanlon@co.yakima.wa.us