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Division III
State of Washington

31845-1-III

COURT OF APPEALS

DIVISION III

OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, RESPONDENT

v.

CLAY DUANE STARBUCK, APPELLANT

APPEAL FROM THE SUPERIOR COURT

OF SPOKANE COUNTY

BRIEF OF RESPONDENT

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I. APPELLANT'S ASSIGNMENTS OF ERROR

1. Insufficient evidence supported the conviction for Aggravated Murder.
2. Insufficient evidence supported the conviction for Sexually Violating Human Remains.
3. The trial court erroneously excluded evidence that other(s) may have committed the murder.
4. The trial court erroneously restricted defendant's ability to impeach witnesses.
5. The trial court erroneously restricted defendant's ability to present evidence of a biased police investigation
6. The trial court erred admitting the audio portion of the 911 call from victim.
7. Deputy Prosecutor committed misconduct during closing argument.

II. ISSUES PRESENTED

1. Did the State fail to prove the essential elements of Aggravated First Degree Murder?
2. Did the State fail to prove the essential elements of Sexually Violating Human Remains?

3. Did the trial court deprive defendant of a fair trial by restricting introduction of “other suspect” evidence?
4. Did the trial court abuse its discretion by limiting the admission of the content of some texts between victim and another individual on the date of offense?
5. Did the trial court abuse its discretion by limiting evidence of the allegation that law enforcement failed to competently and thoroughly investigate the case?
6. Did the trial court violate defendant’s right to present a defense by limiting evidence that defendant honestly described victim’s sexual activities?
7. Did the trial court abuse its discretion by admitting the audio portion of the 911 call from victim?
8. Did the prosecutor commit error by arguing in closing that defendant’s DNA was a match to that found on the victim?
9. Did the prosecutor commit error by arguing that defendant falsely told others that victim was sexually promiscuous?
10. Did the prosecutor commit error by arguing that defendant may not have acted alone in murdering victim?

III. STATEMENT OF THE CASE

The respondent accepts appellant's statement of the case for purposes of this appeal only.

IV. ARGUMENT

A. SUFFICIENT EVIDENCE SUPPORTED THE JURY VERDICT FINDING DEFENDANT GUILTY OF AGGRAVATED FIRST DEGREE MURDER.

Appellant/defendant contends that insufficient evidence was produced at trial to support the guilty verdict rendered with respect to the Aggravated Murder in the First Degree charge. Appellant argues that insufficient evidence proved that defendant viciously tortured and murdered Chanin Starbuck on December 1, 2011. Appellant bases this argument upon the analysis of the evidence produced at trial from his perspective that formed his theory of the case presented to the jury.

Defendant argued to the jury that the texts from victim's cellular telephone the afternoon of December 1, 2011 prove that victim was still alive at that time. Further, that John Kenlein was just as capable of sending those texts because he knew the kids' names and schedules so that he and victim could arrange for their sexual encounters. RP 2716. Defendant argued to the jury that John Kenlein used a false identity to interact with the victim and was at her home four times on December 1, 2011. RP 2716-2717. Defendant argued that the lack of defendant's DNA

on the victim's telephone meant that another suspect committed the murder. Defendant argued that the DNA evidence did not support State's theory that the DNA found on the deceased victim's body did not identify defendant as the perpetrator despite being a "match" to defendant's DNA. RP 2727. Defendant argued that the State failed to conduct a thorough and complete investigation because it did not test all the evidentiary items collected for identification evidence. RP 2728-2735. Defendant exercised his right to confront the witnesses and challenge the State's evidence, including the allegedly incomplete investigation. Appellant's brief offers his perspective of the evidence and the State's theory of the case, yet a careful review of the record does not support defendant's analysis. On appeal, appellant is asking this Court to overturn the verdict because the jury did not accept his perspective of the evidence.

"A claim of insufficiency admits the truth of the State's evidence and all inferences that reasonably can be drawn therefrom." *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). All reasonable inferences from the evidence are drawn in the State's favor and are interpreted most strongly against the defendant. *State v. Partin*, 88 Wn.2d 899, 906-07, 567 P.2d 1136 (1977).

Defendant argues that insufficient evidence supports the verdict because there was an incomplete investigation of other suspects, yet

acknowledges that circumstantial evidence and direct evidence are equally reliable. *State v. Delmarter*, 94 Wn.2d 634, 638, 618 P.2d 99 (1980). The reviewing court will defer to the trier of fact regarding issues of conflicting testimony, witness credibility, and the persuasiveness of the evidence. *State v. Thomas*, 150 Wn.2d 821, 83 P.3d 970 (2004). The relevant question is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *State v. Green*, 94 Wn.2d 216, 616 P.2d 628 (1980); *State v. Smith*, 106 Wn.2d 772, 725 P.2d 951 (1988); *State v. Myles*, 127 Wn.2d 807, 816, 903 P.2d 979 (1995).

Appellant argues that the evidence he proffered at trial is worthy of greater weight and credibility than evidence to the contrary. The difficulty is that this is precisely what he argued to the jury at trial. The jury was thereby forced to reconcile defendant's differing accounts of what occurred, and then incorporate with the other, independent evidence of the murder. At trial, defendant did not deny the detectives' testimony about the ride-along and interviews wherein he said that he walked a specific route to and from his broken-down vehicle to his home. Instead, defendant claimed that the detectives had not told him that they were checking out his alibi. RP 2615-2616. Defendant was confronted with his

own statements to the investigators about his activities on the December 1, 2011, and the fact that he did not appear on the neighbor's surveillance video that was on the route he said he took. RP 2613. The jury was not required to accept the version of the incident that defendant proffered at trial over his earlier statements. The defendant argued that testing all the other items of evidence collected would have supported investigation of other suspects. RP 2727-2732. Nevertheless, further testing *would not have excluded defendant* since his DNA was a match to that found on the deceased victim at the location where the Medical Examiner determined the death was finalized.

The jury weighed the credibility of defendant's trial testimony, his statements to investigators, and all the other evidence to arrive at its verdict. The body of evidence separate from that offered by defendant corroborated the evidence included in his original statements to the deputies. The jury had a sufficient basis to evaluate and resolve the credibility of the entire body of evidence in rendering its verdict.

Defendant has not claimed any irregularities in the jury's deliberations. This is the same jury that defendant selected to try his case after voir dire. It is hard to accept that the jury defendant selected to weigh the evidence in his trial was rendered irrational because it returned a verdict contrary to defendant's theory of the case. Sufficient evidence

supported the jury's verdict finding defendant guilty of Aggravated Murder in the First Degree.

B. SUFFICIENT EVIDENCE SUPPORTED THE JURY VERDICT FINDING DEFENDANT GUILTY OF SEXUALLY VIOLATING HUMAN REMAINS.

Appellant/defendant contends that insufficient evidence supported the jury returning a guilty verdict of Sexually Violating Human Remains. Appellant argues that there is no evidence that anyone had sex with the victim after death. App. Brf., p. 44. Appellant's contention significantly dismisses the results of the autopsy conducted by Medical Examiner Dr. Aiken, which certified the cause of death as asphyxia due to compression of the neck. RP 1696. Dr. Aiken noted that the "fact that victim had bruises on both knees, tops of feet, both hips means that at some point she was facedown because those things would have been in contact with the surface ... this area of postmortem injury indicates she was moved from that position, facedown, after she died." RP 1676. Dr. Aiken found and removed the sexual device from the victim's vagina and noted that the anus had "an odd appearance because anus is dilated ... isn't typical ... around the anus are hemorrhoids suggesting something had been put in the anus for a period and removed." RP 1672. Finally, Dr. Aiken observed that "certainly death occurred before the anal device was removed ... because the anus wouldn't have stayed dilated ... so

death had to have occurred before that device was removed.” RP 1729-1730.

Applying the standard of review for an insufficiency claim to the evidence establishing defendant’s actions, presence at the crime scene, and the autopsy results supports the conclusion that sufficient evidence supported the jury verdict on Count II.

C. THE TRIAL COURT PROPERLY LIMITED “OTHER SUSPECT” EVIDENCE WITH REGARD TO THE CHARGED OFFENSES.

Appellant/defendant claims that his right to a fair trial was denied by the trial court’s pre-trial ruling limiting “other suspects” evidence.

A trial court’s ruling on a motion in limine or the admission of evidence is reviewed to determine whether it was manifestly unreasonable or based on untenable grounds. *State v. Powell*, 126 Wn.2d 244, 258, 893 P.2d 615 (1995); *State ex rel. Carroll v. Junker*, 79 Wn.2d 12, 26, 482 P.2d 775 (1971). Here, the record reflects that the trial court granted the pre-trial motion because the defense failed to establish the relevance of the proffered evidence.

The trial court noted that the defense counsel had identified three possible named alternative suspects – Mr. Kenlein, Mr. Walker, and Mr. Broadhurst. RP 118. The trial court accepted that the evidence established that each of the named individuals had some sort of

relationship with the victim. RP118. The trial court summarized the defense theory that:

because of the salacious nature of these relationships and the desire on the part of each of them to maintain confidentiality ... that that would equate and translate into a motivation to kill the alleged victim. And it's also offered by the defense that there are other individuals who haven't been named here ... who might well be in a similar position as the three named alternative suspects who have the same motivation. ... Nonetheless, that appears to be as far as it goes. ... It is true also that the alibis are not completely airtight.... Nonetheless, the state and law enforcement specifically went to effort to seek out evidence to establish whether ... there were alibis in the case of each of these gentlemen ... and also others including Austin [Starbuck] and Drew [Starbuck].... I am aware of the line of cases that says in situations where the evidence is primarily circumstantial then the defense may seek to counter with similar type evidence to establish the foundation. In this particular matter, based on the counsel's pleadings and argument and offers of proof, it appears ... there is no direct evidence nor even circumstantial evidence that provide the clear connection and ... train of facts or circs between any of the alternative named suspects and the homicide of Ms. Starbuck. So ... I would grant the motion to exclude evidence of alternative suspects.

RP 117-120.

The defense proffer with respect to Tom Walker included sexually explicit texts between the victim and Mr. Walker on the morning of December 1, 2011. The defense wanted to admit one text that suggested the victim take and send to Mr. Walker a photo of herself positioned in exactly the manner in which her body was found by law enforcement two

days later. The trial court ruled that the fact that the texts occurred on the date of the homicide did not heighten the relevance of the contents thereof. RP 128-129. Nevertheless, the fact that there was a relationship and texts between the victim and Mr. Walker was presented to the jury. RP 1474-1488; 2339; 2345-2346. The evidence before the jury included the fact that the Sheriff's Office contacted Mr. Walker and his employer to investigate the validity of his alibi. RP 21257-2158; 2197. The Sheriff's Office collected a sample of Mr. Walker's DNA and had it compared to the DNA found on the deceased victim; no match was found. RP 2116-2118; 2158; 2197. The Sheriff's Office checked the call log of Mr. Walker's cellular telephone and established that he did make calls and texts throughout December 1, 2011; however, none of those occurred in Deer Park. RP 2339. The Sheriff's investigation discovered that some of the texts between Mr. Walker's phone and the victim's phone had been deleted from the victim's phone, yet remained in Mr. Walker's log. RP 2344-2345. The trial court only excluded a text after examining its relevance, materiality, and weighing its probative versus prejudicial value vis-à-vis the entire body of evidence. The trial court did not abuse its discretion in determining the admissibility of the contents of some of the texts between Mr. Walker and the victim's phone in light of the significant investigation of Mr. Walker as a suspect. The record reflects that the jury

was provided a complete record from which to assess the viability of Mr. Walker as an alternative suspect.

The defense initially offered Mr. Broadhurst as another alternative suspect, yet could not overcome Mr. Broadhurst's alibi that he was at work on December 1, 2011, which the Medical Examiner set as the date of the murder. RP 105. Mr. Broadhurst's alibi was confirmed by the fact that his employment utilizes an access card which records the date and time access is made. Moreover, the defense could not connect Mr. Broadhurst to the crime because his DNA was not found on the victim's phone used to call 911. RP 107. Finally, the defense could not provide a motive for Mr. Broadhurst to kill the victim nor overcome the fact that his DNA did not match that found on the victim.

With respect to John Kenlein, the defense proffered that his creation and interaction with the victim via an alternate identity coupled with his actions on December 1, 2011, made him a much more viable suspect than defendant. RP 104-105. The defense acknowledged that Mr. Kenlein's DNA was not matched to the DNA on the victim's phone, yet argued that the "jury needs to know why he was a pathological liar." RP 107. The trial court asked defense counsel what evidence there was of Mr. Kenlein's motivation to kill the victim. RP 109. The defense responded that Mr. Kenlein went back several times to the victim's house

on December 1, 2011, and to the library to instant message the victim because it was anonymous and he did not want this whole secret identity revealed. RP 108-109. The defense argued that:

[I]t could be interpreted or inferred from the texts ... between Ms. Starbuck and Mr. Kenlein that she was either rebuffing him or not accepting his advances and that he became concerned that she would either find out about him or try to out him or find out more information about him ... he lied all the way along and I don't know if Ms. Starbuck confronted him that day."

RP 109-110.

The defense theory fails because Ms. Starbuck never knew Mr. Kenlein's true identity, so he had no motive to kill to keep his identity secret. Defense counsel conceded that the evidence of the victim's lifestyle was inadmissible. "I agree with the Court it is not evidence I can introduce in my case in chief. ... I'm not offering to admit it until the State makes their case, if the State makes their case." RP 111-112.

Finally, the defense argued that the presence of defendant's DNA under Ms. Starbuck's fingernails is a mischaracterization of the DNA evidence because the evidence will not identify the defendant as *the* person; rather it just means that defendant and his sons cannot be excluded. RP 112-113. As noted with regard to Mr. Walker, the trial court only granted the motion after examining the relevance, materiality, and weighing the probative versus prejudicial value vis-à-vis the entire

body of evidence. The trial court did not abuse its discretion in determining the admissibility of the actions of Mr. Kenlein on December 1, 2011. In fact, the record reflects that the jury was provided a very complete record from which to assess the viability of Mr. Kenlein as an alternative suspect despite the trial court's pre-trial ruling.

The record reflects that the trial court did not deprive the defendant of a fair trial by its ruling on other suspect evidence because the jury was extensively exposed to the existence of the other suspects. The record reflects the depth of the investigation conducted by the Sheriff's Office in this case. The Sheriff's Office investigation checked out and ran down every alibi that was offered by the other suspects as well as the defendant. As noted, the log of the cellular telephone of Mr. Walker confirmed that his phone was never in Deer Park, Washington, on December 1, 2011, and that there were texts from him to Ms. Starbuck that had been deleted from her phone. It begs the question, why would Mr. Walker leave the one text that the defendant points to as confirming Mr. Walker as the killer on Ms. Starbuck's phone while deleting others if he had control of her phone? A logical explanation is that when defendant saw Mr. Walker's text requesting a suggestive photo of Ms. Starbuck that the defendant reacted very violently. To that extent, the suggestive text from Mr. Walker

strengthens the motivation for the defendant to brutally torture and murder his ex-wife, Chanin Starbuck.

The Supreme Court's recent decision in *State v. Franklin*, ___ Wn.2d ___, 325 P.3d 159 (2014), examined the threshold level of proof required for a defendant to proffer other suspect evidence. The Court reiterated that: "The standard for relevance of other suspect evidence is whether there is evidence 'tending to connect' someone other than the defendant with the crime." *Id.*, at 164 (citing *State v. Downs*, 168 Wn.2d 664, 667, 13 P.2d 1 (1932)). The Supreme Court noted that the trial court in *Franklin* had excluded evidence showing that another person had both the motive and opportunity to commit the crime. *Id.*, at 164. The Supreme Court further noted that the excluded evidence amounted to a chain of circumstances that tended to create reasonable doubt as to Franklin's guilt. *Id.*, at 164. Here, the *Franklin* decision bolsters the trial court's act of discretion because the court based its decision upon the lack of evidence of a motive and/or opportunity of Mr. Broadhurst, Mr. Walker, or Mr. Kenlein to torture and murder Ms. Starbuck. As the trial court noted, the defense did not establish that the other suspect evidence it sought to introduce satisfied the relevance and materiality tests for admission. Clearly, the trial court based its evidentiary rulings on tenable grounds and for sound reasons.

D. THE TRIAL COURT PROPERLY SET THE RELEVANCE AND MATERIALITY BOUNDARIES WITH RESPECT TO THE IMPEACHMENT OF WITNESSES.

Appellant/defendant claims that the trial court abused its discretion by limiting the admission of the content of some texts between victim and another individual on the date of offense. As noted, the trial court based its pre-trial rulings regarding other suspects evidence upon an evaluation of the relevance and materiality of that evidence, including the texts. The defense argued that the content of those texts demonstrated that the defendant was not lying when he told people that Ms. Starbuck was engaged in a risky lifestyle. As noted, the defense simply did not proffer evidence sufficient to make the salacious content of some of those texts relevant. Such evidence neither established a motive for those named other suspects to kill Ms. Starbuck nor negated the fact that defendant's DNA was found on her body at the points which corresponded to the means of death identified by the Medical Examiner. The right to present a defense is not absolute as "a criminal defendant has no constitutional right to have irrelevant evidence admitted in his or her defense." *State v. Maupin*, 128 Wn.2d 918, 924-925, 913 P.2d 808 (1996) (citing *State v. Hudlow*, 99 Wn.2d 1, 15, 659 P.2d 514 (1983)). Here, the trial court properly exercised its discretion in admitting the fact that the texts occurred while limiting the admission of the salacious contents thereof.

The fact of the texts was the relevant and material evidence which permitted the defense to argue their case theory that there were others who could have committed the murder. The admission of the salacious content of those same texts would not have increased their relevance or materiality because such would not have overcome the fact that defendant's DNA was found on Ms. Starbuck, yet not the DNA of the named other suspects.

The trial court properly exercised its discretion in delineating that the fact of the texts was relevant and admissible, yet the content added nothing other than to demean the victim's character. As noted, the Sheriff's Office tracked down and confirmed the alibis for every named suspect. Mr. Walker was never in Deer Park, Washington, on December 1, 2011, as confirmed by his employer and his cellular telephone log. In fact, Mr. Walker did not even leave his work until about 9:40 a.m., which is several minutes *after* the 911 call from the victim. RP 1476. The Sheriff's Office tracked down the texts, emails, and instant messages that Mr. Kenlein sent to the victim on December 1, 2011, and confirmed that the "IP addresses" of the computers he used matched his alibi. Mr. Broadhurst and Drew Starbuck were both confirmed to have been at work on December 1, 2011. Applying the Supreme Court's analysis employed in *State v. Franklin, supra*, the trial court properly limited the proffered evidence because it lacked relevance, materiality,

and was more prejudicial than probative. The defense simply did not establish a motive for any of the named suspects to kill Ms. Starbuck and the DNA evidence excluded each of the named other suspects specifically, yet was a “match” to the defendant’s DNA. The record reflects that the trial court did not abuse its discretion in ruling on the admissibility of the other suspects evidence.

E. THE TRIAL COURT PROPERLY SET THE RELEVANCE AND MATERIALITY BOUNDARIES WITH RESPECT TO THE CLAIM OF A BIASED POLICE INVESTIGATION.

Appellant/defendant claims that the trial court violated his right to present a defense when it prevented him from fully exposing the Sheriff Office’s failure to complete a thorough investigation.

As previously noted, a defendant has the constitutional right to present a defense. *State v. Hudlow*, 99 Wn.2d 1, 14, 659 P.2d 514 (1983). A defendant’s right to present a defense is not unlimited and must conform to “established rules of procedure and evidence designed to assure both fairness and reliability in the ascertainment of guilt or innocence.” *State v. Finch*, 137 Wn.2d 792, 825, 975 P.2d 967 (1999). Nevertheless, a defendant has no constitutional right to present inadmissible evidence. *State v. Hudlow, supra*, at 15.

Here, appellant contends that the court prohibited the defense from offering sexually explicit texts between the victim and other men which

proved her risky lifestyle that resulted in her murder. Appellant also argues that the court's limiting of the other suspect evidence prevented the defense from exposing the inadequacy of the Sheriff Office's investigation. The defense argued to the jury that there were items of evidence that were specifically not tested for DNA and fingerprints. On appeal, appellant argues that it was unfair for the State to argue that DNA evidence excluded all other suspects while forbidding the defense from pointing out that many other suspects might have been identified if all the biological evidence had been tested. App. Brf., p. 57. The record reflects that Washington State Patrol Crime Lab Supervising DNA Scientist Lorraine Heath testified that:

So, on the vaginal swabs, a trace Y-STR DNA typing profile was obtained ... suitable for *exclusions only*, and all the referenced samples ... the donors were excluded as the contributor.

RP 2408 (emphasis added).

This is the same vaginal swab from which the Crime Lab was able to detect the presence of only *one* spermatozoon which was the basis for the lab to report that it had found semen, yet insufficient to detect male-DNA.

RP 2427.

The record reflects that the jury was fully advised of the decision-making process regarding which items to test and what tests to perform

based upon the nature of the subject items. RP 2431-2432. Washington State Patrol Crime Lab Scientist Heath testified that the process of determining which items of evidence to test is a decision not exclusively within the province of the investigating agency. RP 2431-2432. Rather, the process includes the input and discussion of the investigating agency and that of the scientific experts who test such evidence, the Washington State Patrol Crime Lab. RP 2431-2432. Here, the results of the investigation identified several named suspects – Mr. Walker, Mr. Kenlein, Mr. Broadhurst, Drew Starbuck, Austin Starbuck, and the defendant.

Based upon the identification of those individuals, the Sheriff's Office tracked down the evidence to confirm their respective alibis. The investigation confirmed the alibis of all the identified suspects except that of the defendant. The Sheriff's Office afforded the defendant on multiple opportunities to confirm his alibi for December 1, 2011, yet the evidence simply was not there. It was only after the Sheriff's Office could not confirm the defendant's alibi and his DNA was found on the victim that he was formally charged with the aggravated murder of Chanin Starbuck.

Throughout the trial, the defense focused the jury on what items of evidence the Sheriff's Office did not collect or have tested. The defense focused the jury on the activities of the other name suspects,

Mr. Walker and Mr. Kenlein. The defense extensively cross-examined Mr. Walker and Mr. Kenlein about the nature of their relationships with Ms. Starbuck. The cross-examination of the “other suspects” included the facts that they met online and that relationships were exclusively sexual in nature. The addition of sexually explicit texts would have been, at best, cumulative since the authors of those texts admitted the nature of their relationships with the victim. The defense created a trial record sufficient for the jury to accept its case theory, yet the jury applied the law to the evidence and found the defense theory wanting. In the final analysis, the defense could not negate the fact that Mr. Starbuck’s DNA was found on the deceased victim’s body. The defendant’s DNA was a “match” to the DNA found on Chanin Starbuck’s neck where the Medical Examiner concluded that the manner of homicide had been perpetrated. The trial court’s rulings and the record establish that the defendant was not deprived of the right to present a defense.

F. THE TRIAL COURT PROPERLY ADMITTED INTO EVIDENCE THE AUDIO PORTION OF THE 911 CALL FROM THE VICTIM’S CELLULAR TELEPHONE.

Appellant claims that the admission of the audio portion of the 911 call from Chanin Starbuck violated his constitutional confrontational right under *Crawford v. Washington*, 541 U.S. 36, 124 S.Ct. 1354, 158 L.Ed.2d 177 (2004). It is noteworthy that the record does not reflect that the

defense ever raised a claim that the admission of the 911 call would violate his confrontation rights. On appeal, appellant contends that the 911 call was a testimonial statement of a witness absent from trial. Actually, the record shows that the discussion of the character of the 911 call was quite involved and detailed. Initially, the defense advised the court that he was going to reserve argument with regard to the 911 call for trial. RP 78. Then the defense used the fact of the 911 call to support its argument for the introduction of other suspects evidence, including that “a jury ... needs to hear that minutes before 911 call ... Tom Walker requested a photo of the exact position of the sexual device.” RP 107-108. The defense used the fact of the 911 call during its examination of Sheriff’s Deputies Shover, Trautman, and Dutton to have them acknowledge they would have been more thorough in the first welfare check on the victim had they known about the 911 call. RP 953, 963, 1764. The trial court carefully scrutinized the call with reference to the applicable evidentiary rules, the law, and argument of the parties to conclude that audio portion of the 911 call would be excluded. RP 1603-1607.

It was only after the defense extensively cross-examined the Medical Examiner regarding her opinion, the date and time of death became very relevant in light of the alibis of all the identified suspects,

including the defendant. The defense's extensive examination of several witnesses regarding their activities on December 1, 2011, made the date and time of death a focal point for resolving the case. It was only after the defense had made the date and time of death such a focal point that the probative value of the audio portion of the 911 call outweighed its potential prejudicial effect.

The State asked the trial court to reconsider its ruling regarding the admissibility of the audio portion of the 911 call only after the defense had made the date and time of death such a pivotal issue. At that point of the trial, the existence of the 911 call and the time it was received by the Spokane 911 Center had already been admitted. The trial court was advised by both counsel that anticipated evidence would include that the 911 call came from the victim's phone, pinging off the cell-tower near her house at 9:18 a.m. on December 1, 2011. RP 2032-2036. The trial court incorporated its earlier statements regarding whether the utterance was a statement, then summed up its analysis as follows:

the sound ... heard on the 911 call is not distinguishable as language, nor does it display or depict any sort of intent on the part of the person making the call, i.e. Ms. Starbuck, what she may have been intending to assert and thus this utterance falls outside the Hearsay rule. That being the case, the analysis ... goes to the question that involves ER 403 and 401 and 402 ... whether ... the utterance itself and recording of it engenders unfair prejudice such that it should be excluded. ... [T]he court does not believe there is

an implication of *Crawford* or *Davis* ... in reference to violation of the right to confrontation. ... [W]ithout doubt this call was not testimonial and thus wouldn't be indicated.

...

[B]rings the court to the point of whether ... based on questioning of Dr. Aiken and her testimony, has there been a change in the relevance vs. prejudicial content of the 911 call. ... Dr. Aiken testified ... as to the cause of death ... the manner of death. She did opine that the death could have occurred on December 1, 2011, and indeed there was a significant cross-examination of Dr. Aiken with a view towards ... expanding the range of time within which the victim could have died beyond what the initial expert opinion of Dr. Aiken was ... am also mindful of rules related to whether ... unfair prejudice results from introduction of evidence, and not only inflammatory evidence may cause undue prejudice but giving undue importance to certain evidence may also have the same result ... I'm aware that that aspect is present here insofar as it needs to be recognized for the court to conduct an appropriate balancing. The State's case ... is not limited ... to simply the elements of the offense charged in count one. There are other points the State seeks to prove ... that there was deliberate cruelty and there's ... been testimony when a person has neck compressed and strangulation results ... often there is onset of pneumonia ... may be rapid ... [or] somewhat slower but it consistently happens ... the lapse of time here then becomes significant from the point at which ... victim had her neck compressed to when she developed pneumonia and eventually expired ... deliberate cruelty is one of aggravating factors ... the State must prove beyond a reasonable doubt ... there has been rigorous questioning of Dr. Aiken on the time of death and what might have caused that time frame to expand again ... the phone call ... although not definitive, and the utterance within ... time of death, it does provide a marker from which argument can be made either way ... from State ... or defense ... in addition ... there was at least one call to a voicemail and ... texts following that time frame when the call went in to 911 ... the court is also informed there will be evidence that the

location from which the call emanated was the residence Ms. Starbuck in Deer Park.

[I]n terms of the utterance itself ... I don't believe it is gruesome or troubling to the extent that unfair prejudice would result ... it is a brief ... not really definitive of what speaker was trying to communicate ... we know it was a 911 call which is ... commonly associated with an emergency situation ... taking all these things into consideration and observing that both counsel may receive some benefit in being able to argue certain things from the trier of fact hearing the tape ... the court finds ... the admissibility is established. The weight ... is for the trier of fact to determine. ... So, am reconsidering and this is based on the factors outlined here in adequate detail. ... [I] have ... found it's not a statement ... it is an utterance.

RP 2040 - 2044.

This record establishes the depth of analysis the trial court applied to this issue in rendering its ruling. The trial court did not abuse its discretion in admitting the audio portion of the 911 call from the victim on December 1, 2011. Further, the admission of the audio portion did not deprive the defendant on any right of confrontation since it was not a statement, merely a sound. The court's instructions to the jury vis-à-vis evidence and argument would enable the jury to accord the sound the proper weight and credibility in the body of evidence. The State's argument regarding what the 911 audio constituted is simply that, argument, to which the jury was instructed to give no weight in rendering its verdicts.

G. THE DEPUTY PROSECUTING ATTORNEY DID NOT COMMIT MISCONDUCT DURING CLOSING ARGUMENT TO THE JURY.

Appellant claims that comments made by the prosecutor during closing argument were improper, constituted misconduct, and justify reversal of the verdicts.

“We have consistently held that unless prosecutorial conduct is flagrant and ill-intentioned, and the prejudice resulting therefrom so marked and enduring that corrective instructions or admonitions could not neutralize its effect, any objection to such conduct is waived by failure to make an *adequate timely objection and request a curative instruction.*” *State v. Charlton*, 90 Wn.2d 657, 144-45, 585 P.2d 142 (1978), (emphasis added). Here, the defendant neither objected to nor requested a curative instruction with regard to any of the claimed prosecutorial misconduct.

Assuming, *arguendo*, that the defendant’s failure to object or request a curative instruction did not constitute a waiver of objection to the prosecutor’s comments, the focus turns to whether the comments were so flagrant and ill-intentioned that a proper objection from the defendant was unnecessary.

To prevail on an allegation of prosecutorial misconduct, a defendant must show both improper conduct *and* prejudicial effect. *E.g.*, *State v. Pirtle*, 127 Wn.2d 628, 672, 904 P.2d 245 (1995) (citing *State v.*

Furman, 122 Wn.2d 440, 455, 858 P.2d 1092 (1993)). Prejudice is established by demonstrating a substantial likelihood that the misconduct affected the jury's verdict. *Pirtle*, *supra* at 672.

Here, appellant claims that the prosecutor committed error by arguing in closing that defendant's DNA was a "match" to that found on Chanin Starbuck. As noted previously, the Washington State Patrol Crime Lab DNA Scientist Lorraine Heath testified that the defendant's DNA was a "match" to the DNA found on the deceased victim. RP 2409-2411, 2416. In fact, Ms. Heath clarified that there are only three typical results for the DNA testing used in this case – match or inclusion, exclusion, or inconclusive. RP 2399-2400. Clearly, the record included evidence from which the prosecutor could viably argue to the jury that the defendant's DNA was a "match" for that found on the deceased victim's body.

Appellant also claims that the prosecutor committed error by arguing that defendant falsely told others that victim was sexually promiscuous. Appellant bases this claim upon the pre-trial ruling by the trial court that the defendant could not offer sexually explicit texts into evidence to show the victim's sexual promiscuity. Nevertheless, the record before the jury included the admission of extensive evidence from which the defendant argued that her murder was the result of the victim's sexual promiscuous lifestyle. Appellant offers no citation to the record to

support this characterization of the argument by the prosecutor. At no point in his closing did the prosecutor characterize the defendant's comments about his ex-wife's sexually promiscuous lifestyle as "false."

Appellant claims that the prosecutor committed error by arguing that defendant may not have acted alone in murdering the victim. The record reflects that the prosecutor's comment was in response to the closing arguments made by defense counsel with regard to the "match" of defendant's DNA to the DNA found on the deceased victim. RP 2735-2736. This was not a new theory offered by the prosecutor, merely a response to defense counsel's arguments.

Finally, appellant contends that the prosecutor committed misconduct by arguing that the 911 call was a call by the victim for help. The record reflects that the 911 Center received a call from the victim's cellular telephone on December 1, 2011, at 9:18 a.m. RP 2081-2083; 2315-2316. The Center confirmed that the victim's phone was the origin of the call when it immediately called the originating phone number back and noted that the call went to the *victim's voicemail*. RP 2081-2083. Detective Johnston testified that he was able to confirm that the location of the victim's phone when the 911 call was made was her home in Deer Park, Washington. RP 2315-2316. Clearly, the prosecutor did not mislead the jury with regard to the inferences it could draw from the

existence of the 911 call from the victim's cellular telephone on December 1, 2011.

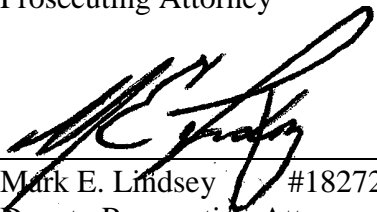
The jury is presumed to follow the trial court's instructions which include the admonition that the lawyers' arguments are not evidence. *State v. Johnson*, 124 Wn.2d 57, 77, 873 P.2d 514 (1994). The record does not support the appellant's contentions that the prosecutor's comments were flagrant and ill-intentioned. The record does not support appellant's claims that the prosecutors' allegedly improper comments deprived him of a fair trial.

V. CONCLUSION

For the reasons stated above the defendant's convictions and sentences should be affirmed.

Dated this 23 day of July, 2014.

STEVEN J. TUCKER
Prosecuting Attorney



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