NO. 46212-5

COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON

STATE OF WASHINGTON, RESPONDENT

v.

GREGORY LEE BONDS, APPELLANT

Appeal from the Superior Court of Pierce County
The Honorable John R Hickman

No. 13-1-02223-2

BRIEF OF RESPONDENT

MARK LINDQUIST
Prosecuting Attorney

By
JAMES SCHACHT
Deputy Prosecuting Attorney
WSB # 17298

930 Tacoma Avenue South
Room 946
Tacoma, WA 98402
PH: (253) 798-7400

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A. ISSUES PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR.

1. Did the trial court err by admitting non-testimonial oral statements from the victim to a patrol officer at the scene, when the statements were given in a brief informal interview during an emergent, active search for a suspect?

2. Did the trial court abuse its discretion by excluding a defense witness, when the witness had violated a court order and the defendant did not make a showing of materiality and admissibility?

B. STATEMENT OF THE CASE.

1. Procedure

On June 3, 2013, appellant Gregory Lee Bonds (the "defendant") was charged with four felony offenses stemming from a domestic violence incident that took place on May 19, 2013, at the home of his former wife, Antoinette Jordan. CP 1-3. The original charges were amended three times. The last amendment was filed on March 18, 2014, during the second trial. CP 144-47. The amended charges were first degree burglary, felony violation of a protection order, felony harassment, and two counts of witness tampering.

Pre-trial motions began on February 7, 2014. 1 RP 3. The motions included a motion to admit victim Antoinette Jordan's oral statements to patrol officer Brandon Showalter. CP 15-26. 4 RP 89. Antoinette Jordan committed suicide on June 13, 2013, less than two weeks after the incident, and was thus unavailable to testify. 1 RP 6. The suppression motion was heard on February 27, 2014.

Two of the responding patrol officers, John Moses and Brandon Showalter, testified at the suppression hearing. 4 RP 90-92 and 116-117. Together they testified about responding to the call, about locating victim, Antoinette Jordan, hiding and terrified in an upstairs closet during a security sweep, and about statements that she made a short time later during a brief interview downstairs at the scene. 4 RP 106-09 and 116-126.

At the conclusion of the hearing the trial court ruled that Antoinette's Jordan's oral statements to Officer Showalter were admissible with minor redactions related to drug use. 4 RP 158-62. The state did not seek to admit her written statement, nor subsequent statements to detectives. 4 RP 148.

During a break in the suppression hearing the defense attorney had a chance encounter in the restroom that led to a request to call a new witness. 4 RP 164. The witness, Treyvion Tucker, was said to have been

present during the May 19 incident but had not been previously contacted because he gave the police a false name. 4 RP 163.

Tucker did not testify. The trial court ruled that Tucker could not testify since he had violated a pretrial order *in limine* excluding witnesses and had heard the testimony of the patrol officers. 4 RP 166-67. The record is unclear whether Tucker would have been called at both the suppression hearing and at trial. The court inferred that his proffered contradiction of the officers' motion testimony was convenient and suspicious. 4 RP 164-68.

The defense attorney did not make a detailed offer of proof concerning Treyvion Tucker. The scant record concerning his testimony was presented during a brief colloquy and included that he was present and that he had opinions about the credibility and motives of Antoinette and Veatrice Jordan and the police. 4 RP 164. The defense did not offer any authority or argument as to how such testimony would be admissible at trial.

The record is silent about whether Tucker was in attendance after the restroom encounter. In particular there is no showing that he was available to testify during the remainder of the pretrial motions, nor during the first trial (which ended in a mistrial on March 5, 2014) [7 RP 377-83], nor during the second trial.

After the pretrial motions, and after the first trial ended in a mistrial, testimony commenced at a second trial on March 13, 2014. 10 RP 440. Eight witnesses testified including the defendant. After deliberations the jury returned guilty verdicts for counts two through four, that is for felony violation of a protection order, felony harassment and two counts of witness tampering. CP 226-38. The jury returned a lesser included fourth degree assault verdict for count one thereby precluding sentencing as a persistent offender. CP 239-43.

2. Facts

The domestic violence incident at issue in this case took place on May 19, 2013. 11 RP 511. At 2:38 in the afternoon Tacoma Police responded to an emergency 911 call from 508 South L Street. 12 RP 687-90. The call was made by Veatrice Jordan, Antoinette Jordan's daughter. 11 RP 511. The initial information available to the responding patrol officers included that the incident was an aggravated assault and that a weapon had been involved. 4 RP 90-97 and 109-110. A number of patrol officers responded to the call. 4 RP 126-128.

Veatrice Jordan and Demarcus Tate testified about the incident prior to the arrival of the police. They described the defendant entering the residence through a back door, hitting Antoinette Jordan in the head

and body and dragging her outside where the assaults continued. 10 455-56. 11 RP 516-20, 537-39, 546-49. Veatrice Jordan testified that Antoinette Jordan's injuries included scratches on her arms, face and neck. 11 RP 529. Demarcus Tate testified that during the incident Antoinette Jordan threw a brick through a window of a car. 10RP 456-58.

The police response was quick. Officer Showalter arrived within two minutes of the 911 call. 4 RP 116-17 and 12 RP 689. He entered the residence, made contact with Veatrice Jordan, and was soon joined by Officer Moses. 4 RP 117-118. The residence included an upper floor. At the time Officer Moses arrived the upper floor had not been secured. 12 RP 691. The officers performed a security check of the upper floor with guns drawn. 12 RP 691-94. They found Antoinette Jordan hiding behind clothing in a closet. 12 RP 712.

The officers coaxed and pulled Antoinette Jordan from the closet. 12 RP 694 and 713. Officer Showalter stayed with her while Officer Moses and other officers began an area check for the defendant. 12 RP 696-97. Officer Showalter waited for five to ten minutes for Antoinette Jordan to calm down enough to talk. 4 RP 120-22 and 12 RP 714-18. She spoke with Officer Showalter in the living room of the home. 4 RP 123-25. She told him (1) that the defendant had been high on methamphetamine, (2) that he had forced his way into the home, (3) that

he was screaming and angry, (4) that he hit her and choked her, and (5) that his anger was related to a prior case in which she had testified against him. 4 RP 125-26 and 12 RP 718-20. Her posture during the interview was hunched over and defensive; she whispered her information to the officer. 4 RP 126 and 12 RP 720.

After gathering information from Antoinette Jordan and the others at the scene, Officer Showalter joined the other officers in looking for the defendant. 12 RP 696 and 721-22. They checked several locations suggested by Veatrice and Antoinette Jordan. 4 RP 127-2812 RP 722. They were unsuccessful in locating the defendant. 12 RP 722.

After completing their duties related to the call, the officers continued to check back throughout the day. 4 RP 128. They did not consider the emergency to have concluded because, "I wasn't sure what state Mr. Bonds was in. She did mention that she believed that he was high on meth. I wasn't able to confirm that, but due to the fact of my experience and knowledge that people who are high on meth, they don't make rational decisions. If he had already made the decision to break into someone's house and assault someone, then I wasn't sure what else he would do." 4 RP 142-43.

The state called several additional law enforcement witnesses related to the witness tampering charges. They testified about jail calls

and documentary evidence that tied the defendant to efforts to dissuade Antoinette and Veatrice Jordan from testifying. 11 RP 616. The calls were played for the jury and used in the cross examination of the defendant. 12 RP 783-792.

The defendant testified. He testified (1) that he had lived at the residence for several months [12 RP 756], (2) that the night before he had left at about 10:00 p.m. [12 RP 761-62], (3) that he returned the next day in the early afternoon and that Antoinette Jordan was upset that he had been gone [12 RP 763], (4) that Antoinette Jordan picked up a brick and threw it through a window of one of the cars [12 RP 760], (5) that she was preparing to throw another brick when he physically restrained her from doing so and called for help [12 RP 771], (6) that he left [12 RP 772], and (7) that subsequently he wanted Antoinette and Veatrice Jordan contacted about the burglary charge [12 RP 773-74]. On cross examination the defendant admitted knowledge of the protection order [12 RP 777-78, 780], and that during multiple jail calls he had multiple conversations with relatives, including Treyvion Tucker, similar to: "somebody's got to get at them broads" in reference to Antoinette and Veatrice Jordan, and that "I was mainly talking about Antoinette." 12 RP 785-89, 794-95.

Having been found guilty by the jury of five offenses, the defendant was sentenced on April 25, 2014, to an exceptional sentence

totaling 120 months in prison. CP 233. The defendant's timely notice of appeal was filed on May 2, 2014. CP 267-86.

C. ARGUMENT.

1. THE TRIAL COURT DID NOT ERR BY ADMITTING THE VICTIM'S NON-TESTIMONIAL STATEMENTS WHERE THE STATEMENTS WERE GIVEN IN AN INFORMAL ON-SCENE INTERVIEW FOR THE PURPOSE OF RESPONDING TO AN ON-GOING EMERGENCY.

The Sixth Amendment provides that in "all criminal prosecutions, the accused shall enjoy the right ... to be confronted with the witnesses against him." In 2004 the United States Supreme Court began a reworking of its confrontation jurisprudence. It held that the confrontation clause "bars admission of testimonial statements of a witness who did not appear at trial unless he was unavailable to testify, and the defendant had had a prior opportunity for cross-examination." ***Crawford v. Washington***, 541 U.S. 36, 53-54, 124 S. Ct. 1354, 158 L. Ed. 2d 177 (2004).

The ***Crawford*** court provided limited guidance concerning the meaning of "testimonial statements" in light of modern law enforcement practices and procedure. Development of confrontation clause doctrine post-***Crawford*** has provided that guidance. In ***Davis v. Washington***, 547 U.S. 813, 126 S. Ct. 2266, 165 L. Ed. 2d 224 (2006), the court clarified "which police interrogations produce testimony" when it held:

> Statements are nontestimonial when made in the course of police interrogation under circumstances objectively indicating that the primary purpose of the interrogation is to enable police assistance to meet an ongoing emergency. They are testimonial when the circumstances objectively indicate that there is no such ongoing emergency, and that the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution.

Id. at 823.

Davis arose from two separate domestic violence incidents in two states. In the first case, a Washington case, a 911 call was held to be non-testimonial because "any reasonable listener would recognize that [the domestic violence victim] was facing an ongoing emergency. Although one might call 911 to provide a narrative report of a crime absent any imminent danger, [the victim's] call was plainly a call for help against bona fide physical threat." *Id.* at 827.

In the second case, an Indiana case, the facts were drawn from a patrol officer's testimony about oral and written statements from a domestic violence victim. The ***Davis*** court held that because there "was no emergency in progress," and because the victim's statements given "under official interrogation are an obvious substitute for live testimony, because they do precisely what a witness does on direct examination; they are inherently testimonial." *Id.* 829-30.

The ***Davis*** primary purpose test was further refined and applied in a slightly different context in ***Michigan v. Bryant,*** 562 U.S. 344, 131 S. Ct. 1143, 179 L. Ed. 2d 93 (2011). There the court affirmed the trial court's admission of excited utterances from a gunshot victim who later died from his injuries and thus could not testify at trial. The court observed that, "Implicit in Davis is the idea that because the prospect of fabrication in statements given for the primary purpose of resolving that emergency is presumably significantly diminished, the Confrontation Clause does not require such statements to be subject to the crucible of cross-examination." *Id.* at 1157. The court then held:

> As we suggested in ***Davis***, when a court must determine whether the Confrontation Clause bars the admission of a statement at trial, it should determine the "primary purpose of the interrogation" by objectively evaluating the statements and actions of the parties to the encounter, in light of the circumstances in which the interrogation occurs. The existence of an emergency or the parties' perception that an emergency is ongoing is among the most important circumstances that courts must take into account in determining whether an interrogation is testimonial because statements made to assist police in addressing an ongoing emergency presumably lack the testimonial purpose that would subject them to the requirement of confrontation. As the context of this case brings into sharp relief, the existence and duration of an emergency depend on the type and scope of danger posed to the victim, the police, and the public.

Id. at 1162 (footnote omitted).

In the Indiana case in ***Davis*** a significant fact that led the court to view the emergency as having passed was that the police were interviewing both the victim and the perpetrator at the same time in the same location. It was more than reasonable for the court to view the "emergency" as past since the police had control over both sides of the alleged domestic violence assault. ***Davis v. Washington***, 547 U.S. at 829-30.

The same could not be said in ***Bryant***. In ***Bryant*** the police found the victim mortally wounded from a gunshot wound at a gas station and learned that the shooting had taken place at a different location and that the gunman was at large. The court stated that courts should use "a combined inquiry that accounts for both the declarant and the interrogator" and that takes into account "the existence and duration of an emergency [depending] on the type and scope of danger posed to the victim, the police, and the public." ***Michigan v. Bryant***, 131 S. Ct. at 1161-62. Because the police questioning took place under informal circumstances at the scene and because "there was an ongoing emergency here where an armed shooter, whose motive for and location after the shooting were unknown, had mortally wounded Covington within a few blocks and a few minutes of the location where the police found Covington" the victim's statements were held to be non-testimonial. *Id.* at 1164.

In this case, the emergency was every bit as on-going as the emergency in ***Bryant***. The police arrived at the victim's residence within minutes of a 911 call about an aggravated assault and a possible weapon. 4 RP 90-97 and 109-110. The perpetrator had fled, and as in ***Bryant***, the police were engaged in an active area search. 4 RP 111. The police cleared the residence with weapons drawn and made contact with victim Antoinette Jordan. 4 RP 92-95. They found Ms. Jordan hiding in a closet, resistant to coming out and looking "just kind of frozen as if she was just scared to death, literally just scared to death." 4 RP 93-96, 106. She was interviewed by one of the patrol officers, Officer Showalter, while other officers were engaged in the area search for the defendant. 4 RP 96-97. Officer Moses and the assisting officers considered the emergency to be on-going because "it would be prudent for me to find the suspect involved before he could harm anybody else or return to the scene." 4 RP 111.

In Washington the standard of review for alleged confrontation violations is *de novo*. ***State v. Reed***, 168 Wn. App. 553, 562, 278 P.3d 203 (2012) foot note 2, citing ***State v. Koslowski***, 166 Wn.2d 409, 417, 209 P.3d 479 (2009). *De novo* review should lead this court to uphold the trial court's ruling because the circumstances in this case are not only closely analogous to ***Bryant***, but are also quite similar to the leading post-

Davis Washington case as well. ***State v. Ohlson***, 162 Wn.2d 1, 168 P.3d 1273 (2007).

The Washington Supreme Court in ***Ohlson*** upheld admission of statements from a vehicular assault victim. ***Ohlson***, 162 Wn.2d 1. The Court in ***Ohlson*** identified four criteria to assist in determining whether statements made to law enforcement are testimonial: "(1) the timing relative to the events discussed, (2) the threat of harm posed by the situation, (3) the need for information to resolve a present emergency, and (4) the formality of the interrogation." *Id.* at 13. These criteria compliment ***Bryant*** which focused on the informality of the interview and the at-large-gunman emergency. The ***Ohlson*** criteria are also objective, as was required by ***Davis***. They focus attention on a "combined inquiry" of the circumstances of the declarant and the interrogator. ***Davis v. Washington***, 126 S. Ct. at 2273-74, ***Michigan v. Bryant***, 131 S. Ct. at 1161-62.

Application of the ***Ohlson*** criteria to this case reinforces the correctness of the trial court's ruling that Antoinette Jordan's statements were non-testimonial. Trial testimony showed that the timing of her interview relative to the actual incident was measured in a small number of minutes. 12 RP 689-90. The perpetrator was at large. 12 RP 697. As the interview was being conducted the victim was afraid for her life: "She

kept repeating that he was – he was -- he's going to kill me, he's going to kill me." 12 RP 720. The interview was anything but formal since it was conducted at the scene in the house without a recording device. 12 RP 719, 791. The officers used Ms. Jordan's information together with information from Veatrice Jordan to immediately search for the defendant. 12 RP 721-22. Unfortunately they were not successful. Under these facts the interview was directly and primarily related to the on-going emergency.

Statements are not testimonial where an "objective evaluation of the 'circumstances in which the encounter occurs and the statements and actions of the parties' demonstrates that the primary purpose of the investigation was to meet an ongoing emergency." ***State v. Reed***, 168 Wn. App. 553, 565, 278 P.3d 203 (2012) quoting ***Michigan v. Bryant***, 1131 S. Ct. at 1156. In ***Reed*** the court upheld admission of statements from two 911 calls and statements to a patrol officer who had arrived at the scene in response to those calls. *Id.* at 569-70. Concerning the statements to the patrol officer, the court reasoned that, "because an objective evaluation of the circumstances makes clear that Ta's initial, spontaneous statements were primarily intended to secure police assistance, the trial court did not err by determining that these statements did not implicate the confrontation clause." *Id.* at 570.

If anything this case involves an even better example of non-testimonial statements. There can be little doubt that from the patrol officers' perspective, the interview of Antoinette Jordan was necessary to resolve an ongoing emergency. An aggravated assault suspect was at large and the officers needed information about what had happened, what he was doing, and where he might have gone. Their actions were entirely directed at taking action not building a court case.

There can also be little doubt that Antionette Jordan's purpose in speaking to the officers was likewise related to the ongoing emergency. "I looked at her face, and she was kind of staring off into space, if you will. Her eyes were really large. She was shaking. She had the fear of God in her face. She had tears coming down her -- from her tear ducts. Her face was wet and -- but she wasn't making any noises. She wasn't making any sounds. She was just kind of frozen as if she was just scared to death, literally just scared to death." 4 RP 94. Antoinette Jordan was primarily concerned with self preservation: "Then she kept repeating to me at the time that, he's going to kill me, he's going to kill me, he's going to kill me. She kept repeating that." 4 RP 126. She was too in shock to recognize the police at first but when she had gained control of herself, she spoke to them as rescuers. 4 RP 94. Under the objective, combined inquiry approach established by ***Davis***, ***Byrant***, and ***Ohlson***, the purpose

of the interview of Antoinette Jordan had everything to do with the on-going emergency, little to do with court proceedings, and was therefore properly admitted as a non-testimonial statement.

2. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION BY EXCLUDING A DEFENSE WITNESS WHERE THE WITNESS VIOLATED A COURT ORDER AND THE DEFENDANT MADE AN INSUFFICIENT SHOWING OF MATERIALITY AND ADMISSIBILITY.

The Sixth Amendment provides that all criminal defendants shall have the right "to have compulsory process for obtaining witnesses in his favor." This amendment has been held to protect the right of the defendant "to offer the testimony of witnesses, and to compel their attendance, if necessary, [and] is in plain terms the right to present a defense, the right to present the defendant's version of the facts as well as the prosecution's to the jury so it may decide where the truth lies." ***Washington v. Texas,*** 388 U.S. 14, 19, 87 S. Ct. 1920, 18 L. Ed. 2d 1019 (1967).

The right to present a defense is applicable to the states through the due process clause of the Fourteenth Amendment. *Id.* at 19. However it is not an absolute right to present any and all witnesses or evidence. ***United States v. Valenzuela-Bernal,*** 458 U.S. 858, 102 S. Ct. 3440, 73 L. Ed. 2d 1193 (1982). Where a defendant alleges a violation of the right to present

a defense, it is incumbent on the defendant to "make some plausible showing" of how the witness' testimony "would have been material and favorable to his defense, in ways not merely cumulative to the testimony of available witnesses." *Id.* at 867, 873.

The mere presence of a witness with personal knowledge at the scene of a criminal offense is, by itself an insufficient showing of materiality. ***State v. Smith***, 101 Wn.2d 36, 677 P.2d 100 (1984). In ***Smith*** the Washington Supreme Court applied the materiality requirement from ***Washington v. Texas*** to a marihuana distribution case. At trial the defendant in ***Smith*** sought to compel disclosure of the identity of a confidential drug informant. He claimed that the informant would confirm that the defendant had sold marihuana only because the informant had "convinced him that [an undercover officer] was her dying husband who needed marijuana to ease his pain." *Id.* at 40. The court held that the defendant had made an insufficient showing of materiality because "the informant was not a material witness" and "the facts alleged by the petitioner, even if corroborated entirely by the informant, are inadequate as a matter of law" to support the defendant's entrapment defense. *Id.* at 42.

Washington courts have consistently required a showing of materiality in cases alleging violation of the right to present a defense. In

State v. Thomas, 150 Wn.2d 821, 857, 83 P.3d 970 (2004), an aggravated murder case, the testimony at issue was other suspect evidence. The court stated, "In keeping with the right to establish a defense and its attendant limits, 'a criminal defendant has no constitutional right to have irrelevant evidence admitted in his or her defense.'" *Id.* at 857, quoting ***State v. Hudlow***, 99 Wn.2d 1, 15, 659 P.2d 514 (1983). Likewise, in an assault and robbery case, inadmissible propensity and mental health evidence was held to have been properly excluded because a "defendant's right is subject to reasonable restrictions and must yield to 'established rules of procedure and evidence designed to assure both fairness and reliability in the ascertainment of guilt and innocence.'" ***State v. Donald***, 178 Wn. App. 250, 263-64, 316 P.3d 1081 (2013), citing ***United States v. Scheffer***, 523 U.S. 303, 308, 118 S. Ct. 1261, 140 L. Ed. 2d 413 (1998) and quoting ***State v. Finch***, 137 Wn.2d 792, 825, 975 P.2d 967 (1999).

In this case the defendant has shown only that his proffered witness was present at the scene. He did not provide the trial court with a detailed offer of proof to show what crucial facts his witness had personal knowledge of. He would have this court assume that the witness could testify about facts that would have supported his defense. This claim should be evaluated in light of all of the evidence, including the defendant's own testimony. Like the defendant in ***Smith*** the defendant in

this case admitted most of the facts supporting conviction of the crimes that he was found guilty of. He has not attempted to show and likely could not show materiality because the facts that his witness could have testified about were not in dispute.

The standard of review in a case such as this that arises from the admission or refusal of evidence is abuse of discretion. "Nonetheless, the admission or refusal of evidence lies largely within the sound discretion of the trial court; its decision will not be reversed on appeal absent an abuse of discretion." ***State v. Rehak***, 67 Wn. App. 157, 162, 834 P.2d 651 (1992) citing ***State v. Stubsjoen***, 48 Wn. App. 139, 147, 738 P.2d 306, *review denied*, 108 Wn.2d 1033 (1987). "An abuse of discretion exists only where no reasonable person would take the position adopted by the trial court." *Id.* citing ***State v. Huelett***, 92 Wn.2d 967, 969, 603 P.2d 1258 (1979).

The trial court's exercise of discretion in this case was reasonable. Although the request to add Treyvion Tucker as a witness was not revisited after the suppression hearing, Tucker's role in the case did come up during the trial. During cross examination of the defendant, the defendant was confronted with a jail phone call involving Treyvion Tucker. After excerpts from that jail call were played for the defendant,

the defendant admitted encouraging Tucker to contact the prosecution's witnesses. 12 RP 792-94. The defendant testified:

> Q. Then later on in that same phone call, you say "Somebody's got to call that broad Poo." Do you remember saying that?
>
> A. I don't remember saying that. I didn't hear that.
>
> Q. Same phone call, about ten minutes and 45 seconds into the phone call.
>
> A. Uh-huh.
>
> (Excerpt of telephone call played.)
>
> Q. You hear that?
>
> A. Okay, yes.

12 RP 795.

It requires little imagination to understand why Treyvion Tucker was never revisited. According to the recorded phone call he would have likely supported the prosecution's case on the witness tampering charges and would have added nothing to the defense case. Under these circumstances materiality has not been shown and the court did not abuse its discretion.

The trial court's exercise of discretion should also be reviewed in light of the scant showing of admissibility from the defendant. During the colloquy the defense attorney stated that (1) Tucker was in Antoinette

Jordan's house when the police arrived; (2) that Antoinette Jordan hid because she had a warrant; (3) that everything Veatrice Jordan had said was a lie; (4) that Antoinette Jordan wanted to give her statement to the police after Veatrice Jordan; and (5) that Antoinette Jordan gave her statement reluctantly. 4 RP 164. "Washington cases have held generally that weighing the credibility of a witness is the province of the jury and have not allowed witnesses to express their opinions on whether or not another witness is telling the truth." ***State v. Casteneda-Perez***, 61 Wn. App. 354, 360, 810 P.2d 74 (1991) citing ***State v. Swenson***, 62 Wn.2d 259, 283, 382 P.2d 614 (1963), ***State v. Fitzgerald***, 39 Wn. App. 652, 657, 694 P.2d 1117 (1985) and ***State v. Maule***, 35 Wn. App. 287, 297, 667 P.2d 96 (1983).

Surely the trial court cannot be said to have abused its discretion when Tucker's testimony amounted to speculation about what Antoinette and Veatrice Jordan's intentions were when they talked to the police. Such testimony would have been of questionable relevance and admissibility even if Tucker had been permitted to testify at the suppression hearing or at trial. This court should hold that the trial court did not abuse its discretion concerning Tucker.

D. CONCLUSION.

For the foregoing reasons, the state urges the court to affirm the defendant's conviction.

DATED: Monday, May 11, 2015.

MARK LINDQUIST
Pierce County
Prosecuting Attorney

JAMES SCHACHT
Deputy Prosecuting Attorney
WSB # 17298

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

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