NO. 43575-6-II

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

STATE OF WASHINGTON,

Respondent,

v.

MEGAN MOLLET,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF
KITSAP COUNTY, STATE OF WASHINGTON
Superior Court No. 12-1-00262-1

BRIEF OF RESPONDENT

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SERVICE		
	Jodi R. Backlund Po Box 6490 Olympia, WA 98507-6490 Email: backlundmistry@gmail.com	This brief was served, as stated below, via U.S. Mail or the recognized system of interoffice communications, *or, if an email address appears to the right, electronically.* . I certify (or declare) under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct. DATED June 18, 2013, Port Orchard, WA **Original e-filed at the Court of Appeals; Copy to counsel listed at left.**

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2. Whether the trial court abused its wide discretion by allowing the State to cross examine the Defendant regarding the memorial she had created to Josh Blake when the defense had "opened the door" to cross examination regarding the nature of the relationship between the Defendant and Josh Blake and the State's cross-examination was a "fair response" to the testimony from the Defendant in her direct examination?

II. STATEMENT OF THE CASE

A. PROCEDURAL HISTORY

The Defendant, Megan Mollet, was charged by amended information filed in Kitsap County Superior Court with one count of Rendering Criminal Assistance in the First Degree and one count of Making a False or Misleading Statement to a Public Servant. CP 1-2. A jury found the Defendant guilty on both counts and the trial court imposed a standard range sentence. RP 377-82; CP 4. This appeal followed.

B. FACTS

Late at night on February 23, 2012 Washington State patrol Trooper Tony Radulescu stopped a vehicle on Highway 16 in Gorst, Washington. RP 108-09. Trooper Radulescu radioed in that the vehicle he was pulling over was a green F-350 pickup with license plate "B60564F." RP 118.

A few minutes later Kitsap County Sheriff's Deputy David "Rob" Corn heard the State Patrol dispatcher calling Trooper Radulescu via radio to check on his status. RP 107-09. Deputy Corn was nearby, so he went to check on the Trooper. RP 110. When he approached the scene Deputy Corn saw Trooper Radulescu's patrol car on the shoulder of the road with its overhead blue lights flashing. RP 110. There was, however, no "violator vehicle" in front of the patrol car. RP 110. Deputy Corn pulled in behind Trooper Radulescu's patrol car and got out to check on him. RP 110. Deputy Corn walked up to the passenger side of Trooper Radulescu's patrol car and shined his flashlight into the car. RP 111. The car was empty. RP 111.

Deputy Corn immediately began looking up and down the highway and found Trooper Radulescu lying on the shoulder of the road. RP 111. Deputy Corn called out via radio that an officer was down and ran to Trooper Radulescu. RP 111-12, 116. Deputy Corn found that Trooper

Radulescu was obviously deceased and that he had been shot in the head with an entry wound on his left cheek and an exit wound on the back of his head. RP 111-12.

Numerous officers from multiple agencies rapidly responded to the scene and officers immediately began searching for the green F-350 pickup, which the police quickly learned was registered to Josh Blake. RP 117-19. Sergeant Billy Renfro of the Bremerton police department was one of the officers that arrived at the scene. RP 117-19. Sergeant Renfro and Officer Greenhill began searching for the suspect vehicle by checking the route that they thought a suspect seeking to avoid the police might take. RP 118. The officers took the first exit off of Highway 16 and began searching side streets and every parking lot or place that a vehicle might have gone. RP 120.

After searching for approximately thirty minutes, Sergeant Renfro found the green truck parked in a patch of brush at 4299 Sidney in Port Orchard. RP 120. The brush was as tall as the cab of the truck, and Sergeant Renfro thus felt that it was "obvious that it had been ditched there." RP 121. Sergeant Renfro could not tell if the truck was occupied or not, so he illuminated the truck with a spotlight and confirmed via the license plate that this was in fact the truck registered to Josh Blake. RP 122-23. Sergeant Renfro then waited for other officers to arrive, and

eventually the truck was "cleared" and was found to be unoccupied. RP 122.

Two homes were located about 50 yards from the truck. RP 121. Approximately twenty to thirty patrol cars and one air unit responded to the scene. RP 123. Officers could see movement inside one of the residences and some of the officers set up a "containment" area around the property in case anyone tried to flee the scene. RP 122, 132-33. At this point the police were obviously searching for Josh Blake as a suspect in a homicide, and the officers did not know where he was. RP 122, 132-33.

The police ultimately contacted the six or so people that were in the home. RP 122. One of the occupants of the house was the Defendant, Megan Mollet. RP 136. Deputy Corey Manchester contacted the Defendant and two other people from the house and, as it was a cold February night, offered them a seat in his patrol car. RP 135-36. Deputy Manchester explained what was going on and explained that it was obviously a very serious situation. RP 137. He also explained that the truck had been found on the property, and asked all three if they knew Josh Blake. RP 137. All three people told Deputy Manchester that they did not know Josh Blake. RP 137.

The deputy then spoke to each of the three individually, outside of the patrol car and away from the others. RP 137. Deputy Manchester

asked the Defendant about the truck and asked if she knew Josh Blake. RP 137-8. The Defendant said she did not know Josh Blake. RP 139. The Defendant further stated that she had gone to Belfair earlier that night to help a friend move, and that she had returned to the Sydney residence around 1:00 am. RP 139. Deputy Manchester reminded the Defendant about the seriousness of the situation, and the Defendant again stated that she didn't know Josh Blake. RP 139-40.

Detective Doug Dillard arrived on the scene and also spoke to the Defendant. RP 156-59. Detective Dillard again informed the Defendant that they were investigating a serious incident involving the shooting of a Washington State Patrol trooper. RP 160. Detective Dillard asked the Defendant where she had been that night, and the Defendant replied that she had been helping a friend named Andrew Bartlett move from a place in Belfair. RP 161. She also said that she had returned to the residence around 11:00 and went straight to bed. RP 161. The Defendant also said that she didn't know Josh Blake and did not know anything about the shooting of an officer. RP 162. Detective Dillard showed the Defendant a picture of Josh Blake and the Defendant again stated that she did not know him. RP 163. Detective Dillard also asked the Defendant if Josh Blake had been at the residence and the Defendant replied that he had not been there. RP 163.

Sometime after Detective Dillard concluded his interview with the Defendant, she told an officer that she wanted to leave the area. RP 179. Detective Dillard then drove the Defendant to a nearby Burger King and dropped her off. RP 179-80.

The following day the police had learned that the Defendant had been present during the shooting, and several officers (including Detective Ray Stroble) went to an apartment in Port Orchard and arrested the Defendant. RP 196, 201. Detective Stroble explained that he wanted to hear her side of the story, but the Defendant declined. RP 201-02. Later, however, the Defendant (who was by then in the Kitsap County Jail) filled out a request asking to speak with the detectives. RP 202. The Defendant was then brought from the jail down to a detective's office where she answered a number of questions and also gave a taped statement. RP 202-05; CP 21-31. The Defendant said she wanted to be truthful and that she was scared and didn't want to spend time in prison. RP 203.

The Defendant then explained what had occurred on the night of the shooting. RP 203. The Defendant first explained that she and Josh Blake had been using methamphetamine and drinking beer at Josh Blake's house in Gorst. RP 204; CP 21. The Defendant and Josh Blake later left and headed for "Dan and Corrine's"[1] house, but they were pulled over by

[1] The record later shows that Corrine was Corrine Nelson. *See* RP 256.

Trooper Radulescu on the way. RP 204; CP 22. Trooper Radulescu walked up to the passenger side of the truck and asked for the license and registration. RP 204. Josh Blake acted as if he was going to reach into the glove box for paperwork, and the Defendant then saw a handgun in Blake's hand and heard a loud shot. RP 204. Blake then started to drive away and told the Defendant that he had shot the officer in the head and that he was dead. RP 204.

Blake and the Defendant then drove to "Dan and Corrine's" on Sydney. RP 205; CP 24-25. The Defendant explained that she had known Corrine since she (the Defendant) was a baby and that Dan was Josh Blake's best friend. CP 28, 30. When Blake and the Defendant arrived at the house the Defendant went up to the smaller house and met with Corrine. CP 25, 30. Dan was initially in a shed or workshop, but he came down to the residence as well, and Blake told Dan what had happened. CP 25, 27-28. Blake then left the Sydney residence with Corrine Nelson and Andrew Bartlett. CP 25-26, RP 260.

The Defendant also testified at trial and explained that she had first met Josh Blake when she was six years old and that he had worked for her father's construction business. RP 221. The Defendant, however, said that she had not really seen the Defendant much after her father had passed away several years earlier. RP 220-21.

On the night of the shooting she had been at Blake's house drinking and hanging out. RP 221-22. Blake then asked her if she wanted to go over to Dan and Corrine's house, and the Defendant said yes. RP 222. The Defendant also explained that they were pulled over on the way to the residence and she testified that Blake had then shot Trooper Radulescu. RP 222.

Defense counsel also asked the Defendant a number of questions about how Blake was acting immediately after the shooting:

> Q: So, what was Mr. Blake like right after this happened?
>
> A: He was just acting really crazy, and just telling me not to say anything or else he was going to kill me, and I just, he was – I looked in his eyes and it wasn't the Josh that I knew. I didn't even recognize him anymore.
>
> Q: What did his eyes look like?
>
> A: He looked like he had no soul anymore, like he just blanked out. He wasn't Josh anymore.
>
> Q: How else was he acting?
>
> A: He was just crazy, and I was just really scared of him, and like I didn't know what to expect next, because I was just really scared, and he was just acting really crazy and like frantic, and just telling me not to say anything, "Don't say anything, don't say anything or else I am going to kill you," and I believed him.
>
> Q: Why?
>
> A: Because he just shot a cop, so I thought he was capable of anything after that.

RP 222-23.

The Defendant then claimed that she had lied to the police because she was afraid that Blake would kill her if she told the truth. RP 225.

The Defendant also testified that after the shooting she and Blake had gone to Dan and Corrine's house and that Blake and Dan were talking about what they were going to do. RP 223-24.[2] After about 15 minutes Blake got a ride and left the residence with Corrine Nelson and Andrew Bartlett. RP 224, 260.

Prior to starting its cross examination of the Defendant, the State informed the Court that it had some issues that it wanted the court to rule on outside the presence of the jury. RP 228. Specifically, the State wanted the trial court to rule on a photograph of some graffiti that the Defendant had written in her jail cell, stating "White Power RIP Josh Blake, 6-23-83 to 2-23-12." RP 228; CP 33. The State explained that the jail staff questioned the Defendant about the graffiti and that the Defendant had admitted to writing these things. RP 229. With respect to the phrase "white power," the Defendant explained that she didn't "believe in that" but explained that it was something that Josh Blake used to say. RP 229.

[2] The Defendant also claimed that during this time Blake kept telling her not to say anything and again threatened to kill her if she talked. RP 224.

The State argued that it should be allowed to question the Defendant about the graffiti during cross examination, as this evidence rebutted the Defendant's claim that she had been deathly afraid of Josh Blake and her claim that she was worried that Josh Blake would kill her. RP 229. The State further explained that after her direct examination, the jury was left with the impression that the Defendant wasn't really that friendly with Josh Blake and that she thought that Blake had gone crazy and that she was afraid he was going to kill her. RP 231-32. The evidence of the Defendant's "memorial" to the Blake rebutted this claim and was evidence that she had strong feelings for Blake and that she thus lied to conceal him. RP 231-33.

The trial court took the matter under advisement, and the following day the court ruled on the issue. RP 236-37. The court ruled that Exhibit 4A (the "memorial" stating "white power" and "RIP Josh Blake") was an area that the State could go into on cross examination. RP 237-39. The trial court noted that the Defendant had "opened the door" with respect to the nature of her relationship with Josh Blake. RP 237-38. The court further explained that the ruling might have been different if the State had attempted to introduce this issue during its case in chief, but that the Defendant had opened the door to these issues. RP 238.

The Defendant then objected to the mention of the phrase "white power." RP 239-40. The State argued that the phrase was important to show the nature of the relationship and pointed out it that the phrase was not something that the Defendant believed in, but that it was a memorial to Josh Blake and thus shed light on the Defendant's feelings towards him. RP 240-41. The trial agreed, stating:

> Apparently, Ms. Mollet was asked by jail staff why that was written, and she explained that that was a message or a phrase or a term that Josh Blake would refer to, and I do believe it shows an affinity, a relationship, a closeness, a closeness of mind, thought, however – it shows a clear relationship, and if she presented herself that this is written because it's what Josh Blake liked to say, or words to that effect, that is pertinent to this case and the relationship, and that door has been opened by the defense.

RP 241. The trial court further explained that it understood the Defendant's argument, but noted that:

> I am making my decision at this time based upon the fact that the defense inquired into the relationship between Ms. Mollet and Mr. Blake. That door has been opened. It is now made relevant by the defense in its line of questioning, and so now it is a fair area of inquiry for the prosecutor to further inquire into the nature of that relationship. And this Exhibit 4, written – whether scratched, written with a utensil or whatever, into the wall of the jail cell after Ms. Mollet is arrested, in the jail, demonstrates a relationship, and based upon her own presentations, at least as alleged by the prosecutor to jail staff, that this was a phrase that she was sharing or had obtained or had learned or was united with, with Josh Blake, that is pertinent and that will come out in the questioning.

RP 242-43.

On cross examination the State asked the Defendant if she recognized Exhibit 4A and the Defendant stated that that she did and that it was a picture of something that she had written on a desk in her cell. RP 259. She also acknowledged that she wrote "white power" because that was something that Josh Blake used to say and the writing was a sort of "homage" to Josh Blake. RP 260.[3]

The Defendant also admitted that on the night of the shooting she was aware that Josh Blake had driven the truck to the Sydney residence and she also knew that Blake had left the residence with Corrine Nelson ad Andrew Bartlett, but that she lied about these facts to the police that night. RP 260.

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[3] In closing argument the State specifically told the jury that the "white power" comment demonstrated nothing more that that the Defendant had a connection with Josh Blake and would have done anything for him. RP 343. Specifically, the State argued:

> And then she is placed in custody, what does she do? She writes, "Rest in peace, Josh Blake," and writes "white power." Now I don't want you to think that, you know, she is somehow a white supremacist or anything like that, but it does show, when she is asked b the jail guards, "Why did you write that?" and she says, "Because that's something that Josh used to say," that she a connection with this person. She would have done anything for him, including lie for him, including lie to keep the police from apprehending him, and that's what she did.

RP 343.

III. ARGUMENT

A. THE DEFENDANT'S CLAIM OF INSUFFICIENT EVIDENCE MUST FAIL BECAUSE, VIEWING THE EVIDENCE IN A LIGHT MOST FAVORABLE TO THE STATE, A RATIONAL TRIER OF FACT COULD HAVE FOUND THAT THE STATE PROVED THE ESSENTIAL ELEMENTS OF THE CHARGED OFFENSES BEYOND A REASONABLE DOUBT.

The Defendant argues that the evidence presented below was insufficient to support the guilty verdict on the charge of Rendering Criminal Assistance. App.'s Br. at 5. This claim is without merit because, viewing the evidence in a light most favorable to the State, a rational trier of fact could have found that the State proved the essential elements of the crimes beyond a reasonable doubt.

Evidence is sufficient if, taken in the light most favorable to the State, it permits a rational jury to find each element of the crime beyond a reasonable doubt. *State v. Pirtle*, 127 Wn.2d 628, 643, 904 P.2d 245 (1995), *cert. denied*, 518 U.S. 1026 (1996); *State v. Green*, 94 Wn.2d 216, 220-21, 616 P.2d 628 (1980). A claim of insufficiency admits the truth of the State's evidence and all inferences that reasonably can be drawn therefrom. *State v. Moles*, 130 Wn.App. 461, 465, 123 P.3d 132 (2005), *citing State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). Circumstantial and direct evidence are equally reliable. *State v.*

Delmarter, 94 Wn.2d 634, 638, 618 P.2d 99 (1980). Additionally, credibility determinations are for the trier of fact and are not subject to review. *State v. Camarillo*, 115 Wn.2d 60, 71, 794 P.2d 850 (1990). Accordingly, a reviewing court defers to the trier of fact on issues of conflicting testimony, credibility of witnesses, and the persuasiveness of the evidence. *State v. Walton*, 64 Wn. App. 410, 415-16, 824 P.2d 533 (1992). The relevant inquiry, therefore, 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. Scoby*, 117 Wn.2d 55, 61, 810 P.2d 1358, 1362 (1991), *citing State v. Baeza*, 100 Wn.2d 487, 490, 670 P.2d 646 (1983).

The Defendant in the present case was charged with Rendering Criminal Assistance in the First Degree pursuant to RCW 9A.76.070(1), which provides that a person is guilty of that crime if he or she renders criminal assistance to a person who has committed or is being sought for murder in the first degree or any class A felony. CP 1; RCW 9A.76.070(1). RCW 9A.76.050 defines the phrase "renders criminal assistance" and provides that a person "renders criminal assistance" if, with intent to prevent, hinder, or delay the apprehension or prosecution of another person who he or she knows has committed a crime or is being

sought by law enforcement officials for the commission of a crime, he or she:

> (1) Harbors or conceals such person; or
>
> (2) Warns such person of impending discovery or apprehension; or
>
> (3) Provides such person with money, transportation, disguise, or other means of avoiding discovery or apprehension; or
>
> (4) Prevents or obstructs, by use of force, deception, or threat, anyone from performing an act that might aid in the discovery or apprehension of such person; or
>
> (5) Conceals, alters, or destroys any physical evidence that might aid in the discovery or apprehension of such person; or
>
> (6) Provides such person with a weapon.

RCW 9A.76.050.

In the present case the State relied on the first prong: that the Defendant "harbored or concealed" Josh Blake. RP 15-16. On appeal, the Defendant argues that the State's evidence was insufficient and cites to *State v. Budik*, 173 Wn.2d 727, 272 P.3d 816 (2012). App.'s Br. at 7-8.

The trial court's denial of the Defendant's *Knapstad* motion.

Prior to trial the Defendant filed a *Knapstad* motion and argued that the State's evidence was insufficient pursuant to *Budik*. The trial court, however, rejected the defense claim for two reasons. First, the trial court held that the Court in *Budik* made it clear that it was only addressing

the fourth prong of the rendering definition. RP 23. Specifically, the trial court held that:

> The case of *Budik* is limited in its scope to address prong four, and that is specifically stated in the decision, and therefore, that case of *Budik* does not directly apply to the instant case brought under prong one. This court finds that the opinion of the court as it relates to the other four prongs, other than the one in issue in that case, is dicta, and not a statement of the law for the lower courts to follow.

RP 23.

Secondly, the trial court ruled that the present case involved more that a mere passive nondisclosure to law enforcement. RP 24-25. Rather, the trial court found that the Defendant made several affirmative statements which provided false information to the investigating officers. RP 24-29. Thus, even applying *Budik* to the present case, the State's evidence was sufficient. RP 29. The State respectfully submits that the trial court's ruling (while obviously not controlling) was correct and persuasive and asks this Court to adopt the reasoning of the trial court and find that the State's evidence was sufficient.

State v. Budik

The Defendant's claim in the present case clearly centers on *Budik*. In *Budik*, the Defendant was one of two victims who had been shot while inside a car. *Budik*, 173 Wn.2d at 729. The other victim died from his wounds. At the scene of the shooting several officers had asked the

Defendant who was responsible for the shooting and the Defendant consistently responded that he did not know. *Id* at 730. Later, after detectives discovered that the defendant must have necessarily seen who the shooters were (based on their proximity to the car), the detectives came to the defendant's hospital room and again asked him about the shooting. *Id* at 731. The defendant, however, said that he did not see anything and eventually asked the detectives to leave when they persisted in asking him about the identity of the shooters. *Id.*

Based on the defendant's repeated disavowals of knowledge of the shooters' identities, the State charged the defendant with first degree rendering criminal assistance, and a jury found the defendant guilty. *Budik*, 173 Wn.2d at 732. Budik appealed and argued that the evidence was insufficient. *Id.*

In addressing Budik's claim the Washington Supreme Court first outlined the statute and the six "prongs" under which a person can be found to have rendered criminal assistance. *Budik*, 173 Wn.2d at 734. The Court then specifically stated that it was only addressing the fourth prong of the statute as that was the only prong submitted to the jury:

> In this case we are solely concerned with the fourth action—"preventing or obstructing, by use of force, deception, or threat, anyone from performing an act that might aid in the discovery or apprehension" of a person sought by law enforcement officials. RCW 9A.76.050(4);

> see Clerk's Papers at 26 (jury instruction relying solely on this action).

Budik, 173 Wn.2d at 734-35. The Court held that mere false disavowals of knowledge were insufficient under the fourth prong:

> The deception contemplated by RCW 9A.76.050(4) requires an affirmative act or statement; it does not encompass mere false disavowals of knowledge. *Cf. [People v.]Plengsangtip*, 148 Cal.App.4th [825] 839, 56 Cal.Rptr.3d 165 [2007] ("Affirmative statements of positive facts are distinguishable from ... a denial of knowledge that a crime occurred."). While the term "deception" may be literally broad enough to include false disavowals, such an interpretation would ignore the statutory scheme and past interpretations of the principles underlying the crime.

Budik, 173 Wn.2d at 737. The Court thus ultimately concluded that:

> In sum, proving that an individual rendered criminal assistance by "preventing or obstructing, by use of ... deception, ... an act that might aid in the discovery or apprehension" of another who has committed, or is sought for commission of, a crime or juvenile offense, RCW 9A.76.050(4), requires an affirmative act or statement that raises a defense for the other person . . . or which, in itself, indicates an effort to shield or protect the other person. A mere false disavowal of knowledge is insufficient. Accordingly, Budik's mere false disavowal of knowledge is insufficient to support his conviction for rendering criminal assistance.

Budik, 173 Wn.2d at 737-38, *citing, Plengsangtip*, 148 Cal.App.4th at 838; *People v. Duty*, 269 Cal.App.2d 97, 104, 74 Cal.Rptr. 606 (1969).

There are several critical points regarding the *Budik* opinion and its application to the present case. First, although the opinion does briefly state that the five other prongs of the rendering statute require some affirmative act or statement, that portion of the opinion is clearly dicta and is not controlling. "Statements in a case that do not relate to an issue before the court and are unnecessary to decide the case constitute obiter dictum, and need not be followed." *State v. Potter*, 68 Wn. App. 134, 150, 842 P.2d 481 (1992); *citing Bellevue v. Acrey*, 103 Wn.2d 203, 207, 691 P.2d 957 (1984); *Concerned Citizens v. Coupeville*, 62 Wn. App. 408, 416, 814 P.2d 243 (1991); *Peterson v. Hagan*, 56 Wn.2d 48, 53, 351 P.2d 127 (1960) ("General expressions in every opinion are to be confined to the facts then before the court and are to be limited in their relation to the case then decided and to the points actually involved.").[4]

It is also important to note that the *Budik* opinion repeatedly cited and quoted from a California case, *People v. Plengsangtip*, 148 Cal.App.4th 825, 838, 56 Cal.Rptr.3d 165 (2007) as persuasive authority.

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[4] Futhermore, Justice Madsen in her concurring/dissenting opinion in *Budik* concluded that "[U]nder RCW 9A.76.050(1) concealment of the offender can occur as a result of a defendant's false denial of knowledge about where the offender is or has gone." *Budik*, 173 Wn.2d at 744 (Madsen, C.J. concurring/dissenting). The Chief Justice further explained that "If the defendant knows that the offender is hiding in nearby shrubbery, but with intent to keep that location hidden he tells the police that he does not know where the offender went, the defendant has affirmatively concealed the offender." *Id* at 744-45. Given the Chief Justice's persuasive reasoning, this Court should not conclude

Specifically, the Washington Supreme Court cited the California case for its holding that "Affirmative statements of positive facts are distinguishable from ... a denial of knowledge that a crime occurred." *Budik*, 173 Wn.2d at 737, *citing Plengsangtip*, 148 Cal.App.4th at 839). A further examination of this California is instructive.

People v. Plengsangtip

In *Plengsangtip*, the government had alleged that the defendant, with knowledge of a murder, "did harbor, conceal, and aid" a third person with the intent that the third party might avoid and escape from arrest, trial, conviction, and punishment for his crime. *Plengsangtip*, 148 Cal.App.4th at 828. The court explained that the government's evidence showed that the defendant had been present in the office of a food processing company when another person had murdered the victim and that it was inconceivable that the defendant was unaware of the assault. *Id* at 837-38. Nevertheless, when the Defendant was subsequently interviewed by the police he claimed that did not see the victim in the office and that he did not see an assault or "anything unusual." *Id* at 838.

In addressing the defendant's claims on appeal, the California court explained that,

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that the dicta in the *Budik* majority opinion is the final say on this critical issue.

> "The offense of accessory is not committed by passive failure to reveal a known felony, by refusal to give information to authorities, or by a denial of knowledge motivated by self-interest. On the other hand, an affirmative falsehood to the public investigator, when made with the intent to shield the perpetrator of the crime, may form the aid or concealment denounced by section 32." *[People v.] Duty*, 269 Cal.App.2d [97,] 103–104, 74 Cal.Rptr. 606 [1969]. Thus, a person generally does not have an obligation to volunteer information to police or to speak with police about a crime. If the person speaks, however, he or she may not affirmatively misrepresent facts concerning the crime, with knowledge the principal committed the crime and with the intent that the principal avoid or escape from arrest, trial, conviction, or punishment. Furthermore, in determining whether a defendant had the requisite knowledge and intent to commit the crime of accessory, the jury may consider "such factors as [the defendant's] possible presence at the crime or other means of knowledge of its commission, as well as his companionship and relationship with the principal before and after the offense.

Plengsangtip, 148 Cal.App.4th at 837 (some internal citations omitted).

The California court then applied the law to the facts of the case and rejected the defendant's claim of insufficient evidence. *Plengsangtip*, 148 Cal.App.4th at 838. The court acknowledged that a statement that one knows nothing about a crime, even if false, is equivalent to a passive nondisclosure or refusal to give information, which would be insufficient to support an accessory charge. *Id* at 838. The court, however, found that the defendant had done more that merely tell the police that he knew nothing about the murder. Rather,

> The evidence showed that defendant was present in the Rama Foods office with [the victim] and that [the victim] was murdered in the office. But defendant told Detective Lee he did not see [the victim]in the office or at any other time; he did not witness any assault on [the victim]; and, indeed, he saw "nothing unusual" happen at Rama Foods on the afternoon of November 23. These statements were affirmative representations of positive facts: that [the victim] was not present at Rama Foods on the afternoon of November 23 and that no murder occurred at that time and place. These affirmative representations, if false, and if made with requisite knowledge and intent (i.e., with the knowledge that [the killer] murdered [the victim] and with the intent that [the killer] avoid prosecution for the murder) were an overt attempt to change the picture of what happened on November 23 at Rama Foods and thereby shield [the killer] from prosecution. As such, they are sufficient to support the accessory charge. Affirmative statements of positive facts are distinguishable from a passive refusal to provide information or a denial of knowledge that a crime occurred.

Plengsangtip, 148 Cal.App.4th at 838-39. The last sentence of the above passage was specifically quoted by the *Budik* court. *Budik*, 173 Wn.2d at 737, *quoting Plengsangtip*, 148 Cal.App.4th at 839 ("Affirmative statements of positive facts are distinguishable from ... a denial of knowledge that a crime occurred). Viewing the passage in its full context demonstrates that the court clearly held that defendant's false statement that he had not ever seen the victim and did not see anything unusual were sufficient to support the charge, and that these statements were, in fact *affirmative statements* of facts and not a mere disavowal of knowledge.

With respect to the present case, the Defendant's actions closely mirror the actions of the Defendant in *Plengsangtip* and are distinguishable from the actions of the defendant in *Budik*. For instance, the Defendant in the present case claimed that she did not know Josh Blake and that he had not been present at the Sydney residence. This closely paralleled the defendant's statements in *Plengsangtip* where the defendant had told the police that the he had not seen the victim at the office in question (nor had he ever seen the victim).

The defendant in *Budik*, on the other hand, merely disavowed any knowledge and claimed he did not know who had shot him. Furthermore, just as in *Plengsangtip*, the Defendant's statements in the present case that she had spent the evening with Andrew Bartlett and that Josh Blake had not been at the Sydney residence were an "an overt attempt to change the picture of what happened" on the night of the murder, and thus were "affirmative statements of positive facts" that are distinguishable from "a passive refusal to provide information or a denial of knowledge that a crime occurred."

Furthermore, the reasoning in *Plengsangtip* was incorporated into the *Budik* opinion, as the *Budik* court was quite clear that although a false disavowal of knowledge is insufficient, an *affirmative statement* that indicates, in itself, an effort to shied or protect the other person would be

sufficient. *Budik*, 173 Wn.2d at 737-38 (the statute "requires an affirmative act or statement that raises a defense for the other person . . . or which, in itself, indicates an effort to shield or protect the other person").[5] The Defendant in *Budik*, of course, made no such statements. Rather, he merely disavowed any knowledge of the shooters' identities. The Defendant in the present case, however, did not merely disavow any knowledge regarding the shooting of Trooper Radulescu. Rather, the Defendant made multiple affirmative false statements that, in themselves, indicated an effort to shield Josh Blake.

Specifically, the Defendant repeatedly stated that she did not know Josh Blake. RP 137, 139, 162-63. The Defendant, however, went further and specifically stated to the police that Josh Blake had not been at the Sydney residence that night. RP 163. This statement was not a mere disavowal of knowledge, but rather was an affirmative false statement that directly provided misinformation to the police regarding Blake's activities after the shooting. As the California court noted, a person generally does not have an obligation to volunteer information to police or to speak with police about a crime, but if the person speaks "he or she may not affirmatively misrepresent facts concerning the crime." *Plengsangtip*, 148 Cal.App.4th at 837. Common sense dictates that the police officers in the

present case wanted to know if Blake had been to the Sydney residence as this was critical to their efforts to trace his movements and locate him. Although the Defendant clearly knew that Blake had been at the residence and had left with Corrine Nelson and Andrew Bartlett, the Defendant lied to the police and stated that Blake had not been to the residence that night. This was an affirmative statement that, in itself, indicated an effort to shield or protect Josh Blake.

The Defendant, however, went still further. Although she was an eyewitness to the shooting and had been with Josh Blake before and after the shooting, the Defendant gave additional affirmative false statements. For instance, the Defendant repeatedly lied to the police and affirmatively told them that she had been helping Andrew Bartlett move on the night of the shooting. RP 139, 161. Common sense dictates that police hunting for a fugitive murderer would clearly be interested in having an accurate picture of the fugitive's activities and companions both before and before and after the murder, yet the Defendant clearly gave the police false information about Josh Blake's activities since she lied and claimed that she had been somewhere other than with Blake. These statements constitute an affirmative misrepresentation of the facts and demonstrate an overt attempt to change the picture of what happened on the night of the shooting. *Plengsangtip*, 148 Cal.App.4th at 837-39.

In short, the Defendant in the present case did not merely disavow any knowledge regarding the murder of Trooper Radulescu. Rather, the Defendant's affirmative statements created an entirely false picture to the police. Based solely on the Defendant's statements, the police were informed that: the Defendant did not know Josh Blake; the Defendant had spent the evening with Andrew Bartlett, not Blake; and that Blake had not been to the Sydney residence, when in fact Blake and the Defendant had driven there together and Blake had subsequently left with Corrine Nelson and Andrew Bartlett.

The affirmative false statements made by the Defendant in the present case are clearly distinguishable from the mere disavowal of knowledge made by the defendant in *Budik* who merely claimed that he did not know who had shot him. In addition, the Defendant's affirmative statement's closely mirror the statements made by the defendant in *Plengsangtip* which the court held were "affirmative misrepresentations" that were an "overt attempt to change the picture of what happened" on the night of the murder.

While the Defendant in the present case claimed that she lied out of fear, the jury was clearly in the best position to judge her credibility on this point, and the jury was free to conclude, as the evidence suggested, that the Defendant lied and concealed Josh Blake even though she knew

full well that he had left the Sydney residence with Corrine Nelson and Andrew Bartlett.

In short, viewing the evidence in a light most favorable to the State and drawing all reasonable all reasonable inferences from that evidence, the evidence was sufficient to permits a rational jury to find each element of the crime beyond a reasonable doubt. Nothing more is required. The Defendant's claim regarding the sufficient of the evidence, therefore, should be rejected.

B. THE TRIAL COURT DID NOT ABUSE ITS WIDE DISCRETION BY ALLOWING THE STATE TO CROSS-EXAMINE THE DEFENDANT REGARDING THE MEMORIAL SHE HAD CREATED TO JOSH BLAKE BECAUSE THE DEFENSE HAD "OPENED THE DOOR" TO CROSS-EXAMINATION REGARDING THE NATURE OF THE RELATIONSHIP BETWEEN THE DEFENDANT AND JOSH BLAKE AND THE STATE'S CROSS-EXAMINATION WAS A "FAIR RESPONSE" TO THE TESTIMONY FROM THE DEFENDANT IN HER DIRECT EXAMINATION.

The Defendant next claims that the trial court abused its discretion in admitting evidence that the Defendant had written some graffiti in her jail cell as a sort of memorial to Josh Blake. App.'s Br. at 9. This claim is without merit because the trial court properly found that the defense had "opened the door" regarding the nature of the relationship between the

Defendant and Josh Blake and thus the line of inquiry regarding the Defendant's memorial to Josh Blake was appropriate for cross-examination and was a fair response to the evidence brought out during the Defendant's direct examination.

A trial court's admission of evidence is reviewed for an abuse of discretion. *State v. Thang*, 145 Wn.2d 630, 642, 41 P.3d 1159 (2002). An abuse of discretion occurs "if the trial court relies on unsupported facts, takes a view that no reasonable person would take, applies the wrong legal standard, or bases its ruling on an erroneous view of the law." *State v. Lord*, 161 Wn.2d 276, 284, 165 P.3d 1251 (2007).

The Defendant argues on appeal that the trial erred in admitting evidence regarding the Defendant's "memorial" to Josh Blake and argues that this evidence should have been excluded under ER 404(b). App.'s Br. at 10-11. The Defendant's reliance on ER 404(b), however, is misplaced. Rather, the relevant inquiry is whether the trial court properly admitted the evidence under Washington's longstanding "fair response" or open door" rule.[6]

[6] See, for instance, *State v. Munguia*, 107 Wn. App. 328, 334, 26 P.3d 1017 (Div. 3 2001) (after defendant claimed to have been unfairly placed in isolation while in pretrial detention, the prosecution was properly allowed to cross-examine defendant about his misconduct that led to his isolation, and court held that this "was not an ER 404(b) situation" since the questions were asked to impeach or rebut the defendant's claims).

Washington courts have long held that once a party has raised a material issue, the opposing party is permitted to explain, clarify, or contradict the evidence. *State v. Berg*, 147 Wn. App. 923, 939, 198 P.3d 529 (2008), *citing State v. Price*, 126 Wn. App. 617, 109 P.3d 27 (2005). This is the long-recognized rule that when a party opens up a subject of inquiry, that party "contemplates that the rules will permit cross-examination or redirect examination ... within the scope of the examination in which the subject matter was first introduced." *Berg*, 147 Wn.App. at 939, *citing State v. Gefeller*, 76 Wn.2d 449, 455, 458 P.2d 17 (1969); *see State v. Jones*, 111 Wn.2d 239, 248–49,759 P.2d 1183 (1988)(comments by State's expert regarding defendant's statements about the Fifth Amendment were a "fair response" and were properly admitted as defense expert had "opened the door"); *State v. Ortega*, 134 Wn.App. 617, 625, 142 P.3d 175 (2006) ("A party's introduction of evidence that would be inadmissible if offered by the opposing party 'opens the door' to explanation or contradiction of that evidence"), *citing State v. Avendano–Lopez*, 79 Wn.App. 706, 714, 904 P.2d 324 (1995).

Similarly, in *State v. Gakin*, 24 Wn.App. 681, 603 P.2d 380 (1979), *review denied*, 93 Wn.2d 1011 (1980) the Court held that it is permissible to admit "evidence of unrelated criminal conduct both as impeachment evidence and as substantive evidence, despite the danger of

undue prejudice, when the defendant has interposed a defense to the crime charged and the offered evidence is relevant and necessary to refute the defense." *Gakin*, 24 Wn.App. at 685. The Court reasoned that

> [I]t would be basically unfair to allow a defendant to raise a defense and not allow the State an opportunity to impeach it, solely because the impeachment shows prejudicial details concerning defendant's participation in another crime. Under these circumstances, the evidence becomes highly probative and should be deemed to substantially outweigh the danger of unfair prejudice. See ER 403. The search for the truth, the ultimate objective of a criminal trial, would be defeated by a contrary result.

Gakin, 24 Wn.App. at 685-86. Furthermore, the Washington Supreme Court has explained that:

> It would be a curious rule of evidence which allowed one party to bring up a subject, drop it at a point where it might appear advantageous to him, and then bar the other party from all further inquiries about it. Rules of evidence are designed to aid in establishing the truth. To close the door after receiving only a part of the evidence not only leaves the matter suspended in air at a point markedly advantageous to the party who opened the door, but might well limit the proof to half-truths. Thus, it is a sound general rule that, when a party opens up a subject of inquiry on direct or cross-examination, he contemplates that the rules will permit cross-examination or redirect examination, as the case may be, within the scope of the examination in which the subject matter was first introduced.

State v. Gefeller, 76 Wn.2d 449, 455, 458 P.2d 17 (1969).

In short, under the "open door" doctrine, a party may "open the door" for the other party to pursue evidence that would not otherwise be admissible. *Berg*, 147 Wn.App. at 939. Once a party has raised a material issue, the opposing party is generally permitted to explain, clarify, or contradict the evidence. *Id* at 939.[7]

Finally, Washington Courts have made it clear that a trial court's decision to allow cross-examination under the "open door" rule is reviewed for abuse of discretion. *State v. Wilson*, 20 Wn.App. 592, 594, 581 P.2d 592 (1978); *Ortega*, 134 Wn.App. at 626. A trial court abuses its discretion when its decision is manifestly unreasonable, or is exercised on untenable grounds for untenable reasons. *State v. Michielli*, 132 Wn.2d 229, 240, 937 P.2d 587 (1997). In addition, a trial judge has wide discretion in balancing the probative value of evidence against its prejudicial impact. *State v. Stenson*, 132 Wn.2d 668, 702, 940 P.2d 1239 (1997) (*citing State v. Rivers*, 129 Wn.2d 697, 710, 921 P.2d 495 (1996)). An abuse of discretion exists only if no reasonable person would have taken the view adopted by the trial court. *Holaday v. Merceri*, 49 Wn.App. 321, 324, 742 P.2d 127, *review denied*, 108 Wn.2d 1035 (1987).

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[7] Furthermore, the trial court's ruling makes it clear that the State was allowed to cross examine the Defendant on these issues because the Defendant had testified regarding her relationship with Josh Blake during her direct examination and had opened the door on

In the present case, the Defendant's testimony on direct examination painted the picture that she had known Josh Blake for a long time but that she had not seen him much in recent years. RP 220-21. In addition, the Defendant specifically explained that she lied to the police because she was afraid Blake would kill her, and she further described that Blake was acting crazy and appeared to have "no soul." RP 222-25. This testimony was clearly designed to suggest that the Defendant had no strong affinity for Blake, feared that he would kill her, and her fear of Blake is what drove her to lie to the police. This was a central issue in the case, since the State was required to prove that the Defendant acted "with intent to prevent, hinder, or delay the apprehension or prosecution" of Blake and that she concealed Blake.

The evidence that the Defendant had created a memorial to Blake in her jail cell directly contradicted the picture painted by her direct testimony and revealed a strong connection between the Defendant and Blake. The trial court, therefore, did not abuse its discretion in allowing the State to cross examine the Defendant on this critical issue.

The Defendant further argues that the mention of the slogan "white power" added nothing and was highly prejudicial. App.'s Br. at 11-12.

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these issues. See RP 237-43.

The Defendant's own testimony, however, demonstrated that she wrote this slogan because it was something she associated with Blake, as he used the phrase. RP 260. The State did not allege or suggest that the slogan was something the Defendant used herself or that she believed in or was otherwise associated with white supremacy. Rather, the State specifically argued that the "white power" comment demonstrated nothing more that that the Defendant had a connection with Josh Blake and would have done anything for him. RP 343. Specifically, the State argued:

> And then she is placed in custody, what does she do? She writes, "Rest in peace, Josh Blake," and writes "white power." Now I don't want you to think that, you know, she is somehow a white supremacist or anything like that, but it does show, when she is asked b the jail guards, "Why did you write that?" and she says, "Because that's something that Josh used to say," that she a connection with this person. She would have done anything for him, including lie for him, including lie to keep the police from apprehending him, and that's what she did.

RP 343. The record does not support a claim that the State tried to unfairly portray the Defendant as a racist. Rather, the trial court properly allowed the State to introduce evidence that demonstrated that the Defendant had a close affinity for Josh Blake, contrary to the picture painted in her direct testimony. Furthermore, although the phrase "white power" was mentioned it was clear that this was a phrase used by Josh Blake. Thus any suggestion of racism was directed at Blake, not the

Defendant: a point which the State carefully pointed out in closing argument.[8]

In conclusion, the Washington courts have made it clear that a trial court's ruling regarding the "open door" rule is reviewed for abuse of discretion and that the trial court is in the best position to weigh the probative value of certain evidence against the danger of unfair prejudice. *See, e.g, State v. Posey*, 161 Wn.2d 638, 648, 167 P.3d 560 (2007) ("Generally, we defer to the assessment of the trial judge who is best suited to determine the prejudicial effect of apiece of evidence."). Given the facts and law outlined above, the Defendant in the present case has failed to show that no reasonable person would have taken the view adopted by the trial court, and the Defendant has thus failed to demonstrate that the trial court abused its wide discretion in allowing the State to cross examine the Defendant regarding the memorial she had made to Josh Blake.

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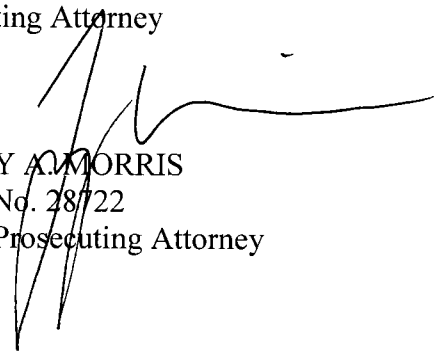
[8] Although the phrase "white power" certain is offensive and has negative implications, the evidence does not differ substantially from evidence of gang affiliation, which Washington courts have routinely admitted when relevant. *See, e.g., State v. Boot*, 89 Wn.App. 780, 789, 950 P.2d 964, *review denied*, 135 Wn.2d 1015 (1998); *State v. Embry*, 171 Wn.App. 714, 732, 287 P.3d 648 (2012); *State v. Scott*, 151 Wn.App. 520, 527, 213 P.3d 71 (2009), *review denied*, 168 Wash.2d 1004, 226 P.3d 780 (2010); *State v. Yarbrough*, 151 Wn.App. 66, 81, 210 P.3d 1029 (2009). Furthermore, as outlined above, the State did not argue or imply that the Defendant believed in "white power." To the contrary, the State was careful to point out that the phrase was something that Josh Blake used to say. The undisputed evidence at trial showed that Blake had murdered Trooper Radulescu in cold blood. Thus Blake's character deficiencies were already firmly established and the mention of the fact that he used the phrase "white power" could hardly have done any more damage to the jury's views of him.

IV. CONCLUSION

For the foregoing reasons, the Defendant's conviction and sentence should be affirmed.

DATED June 18, 2013.

Respectfully submitted,
RUSSELL D. HAUGE
Prosecuting Attorney



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