73219-6

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Court of Appeals
Division I
State of Washington

NO. 73219-6-I

IN THE COURT OF APPEALS
OFTHE STATE OF WASHINGTON
DIVISION ONE

STATE OF WASHINGTON

Respondent

v.

ALAN JUSTIN SMITH,

Appellant

BRIEF OF RESPONDENT

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II. STATEMENT OF THE CASE

A. FACTS RELATED TO THE MURDER.

On February 11, 2013 Susan Smith neither called in sick nor showed up for work at Z-2 Live where she worked as an English to German translator for mobile games. She also missed an appointment with her attorney without calling to cancel first. Ms. Smith's co-workers attempted to contact her throughout the day without success. When she failed to come to work the next day without calling in, the HR manager called the police to conduct a welfare check. 1/15/15 RP 11-16; 1/26/15 RP 126-127.

Officer Caban responded to the request at about 10:26 a.m. He knocked on Ms. Smith's front door and rang the doorbell several times but received no answer. He did not see anything unusual by looking in the front window. When he looked in the back window he saw blood spatter on the wall and a pool of blood on the floor. The furniture in that room was askew. Officer Caban called for back-up officers and arranged to have the street closed off. When the back-up officers arrived they entered the unlocked front door. 1/15/15 RP 20-30.

Officer Caban called out for anyone at home, but got no answer. Police noticed that a child's large foam mat on the living room floor had blood on it. Officers located blood in the hallway and master bedroom. Officer Valentino found Susan Smith face down in the bathtub full of water. She was deceased. An autopsy showed that she had 12 sharp force injuries and 10 blunt force injuries to her neck and head. She also had bruising on her forearms. She had water in her lungs. The cause of death was determined to be from the injuries to her head and asphyxia due to drowning. 1/15/15 RP 30-32, 45-47; 1/20/15 RP 108, 111-114, 151-155.

The weekend before she was found dead Ms. Smith had a party for her children, socialized with friends, and went to a play at

the Fifth Avenue Theater. The last time anyone saw her alive was at about 10:40 p.m. on February 10. Computer records showed that after coming home from the play, Ms. Smith watched a show until about 11:35 p.m. 1/16/15 RP 45-49, 60-62, 66-69, 74, 77-78; 1/27/15 RP 147-148.

Ms. Smith was married to the defendant Alan Smith. They had two children F.S. age 3 and N.S. age 6. The Smiths were in the process of getting a divorce. Court orders for support and visitation had been entered in August 2012. The defendant was ordered to pay child support, maintenance, and attorney's fees for Ms. Smith. Ms. Smith was named the custodial parent, and the defendant was awarded visitation. 1/20/15 RP 85-861/21/15 RP 132; 1/26/15 RP 98-108.

As time went on the defendant became increasingly agitated about the custody arrangement. He often spoke disparagingly of Ms. Smith. He sought advice from people regarding how to get more time with his children. He told people that Ms. Smith had mental health problems. Mr. Smith was also concerned that Ms. Smith would take the children back to Germany where she was originally from. In December 2012 he told a co-worker that he would not let Ms. Smith get custody of the children. That same

month he sought an order to appoint a guardian ad litem for the children alleging Ms. Smith was not a suitable parent. The court denied the motion. In a motion for reconsideration the defendant alleged for the first time that Ms. Smith had sexually abused the children. The motion for reconsideration and a later motion for revision were also denied in January 2013. 1/20/15 42-44, 52-57, 92; 1/26/15 RP 116-123.

The defendant dated Rachel Amrine in September and October 2012. The defendant often talked to Ms. Amrine about his anger and frustration regarding the child custody arrangements for his children and the child support he was paying. He told Ms. Amrine that his therapist told him that Ms. Smith was mentally ill and that he did not like the way that Ms. Smith treated their children. On one occasion in late October, the defendant talked to Ms. Amrine about getting rid of Ms. Smith. Ms. Amrine jokingly suggested a way to kill Ms. Smith. When she realized the defendant was considering her suggestion she quickly added that plan would not work. The defendant then suggested that he could kill her with a rubber mallet. 1/21/15 RP 131-148.

On October 27, 2012 the defendant bought two types of coveralls, shoe covers, one sheet of plywood, and one mallet.

Police later purchased a mallet and coveralls that were identical to the ones the defendant purchased. A forensic examiner compared fabric from the coveralls to bloody impressions on the bathtub. He concluded that the type of weave on one pair of coveralls could have made those impressions. Another forensic examiner compared the mallet to the blunt force injuries documented at Ms. Smith's autopsy. The examiner noted that the shape of the mallet head corresponded to the blunt force injuries on her head and face. The examiner concluded that a weapon with a similar circular head circumference could have left the injuries.1/27/15 RP 25-27, 31-35, 49-60, 98-109.

On November 24, 2012, the defendant purchased a bicycle and head light from Gregg's Green Lake Cycle for $617.56. The defendant lived at the Canyon Point Apartments on 228th Street. Ms. Smith lived on 240th Street. A video surveillance camera situated between those two addresses on the Bothell-Everett Highway showed a person riding a bike south from 228th towards 240th Street on February 11, 2013 at 2:24 a.m. Richard Cain drives a delivery route which puts him at 240th and the Bothell Everett Highway at between 3:50 a.m. and 4:10 a.m. on Monday mornings. He recalled seeing a white male wearing dark clothing riding a bike

without a helmet or reflective gear at that location one Monday in February 2013. In late February 2013 the defendant's bike was abandoned at QFC a short distance from the defendant's apartment complex. It later was seen in a ravine behind that complex. 1/26/27 RP 149-152, 159-165, 167-174, 178-179; 1/27/15 RP 4-9.

Police located a washcloth under Ms. Smith's body when they drained the bathtub. A DNA exam showed that the washcloth contained a mixture of DNA from the defendant and Ms. Smith. It was 40,000 times more likely that the mixture came from those two people than from Ms. Smith and some unrelated person selected at random from the population of the United States.[1] 1/21/15 RP 40-42; 1/22/15 RP 130-132.

The defendant made several internet searches on February 12 and 13, 2013. He searched for flights to Venezuela and cities in Canada for one adult and two children ages six and three or just one adult. There were also searches for bus route from the area of the defendant's apartment complex to Sea-Tac airport. There was

[1] Although the defendant and Ms. Smith's children could also have been contributors to the DNA mixture, the mixture could not have been from only one of the parents. 1/22/15 RP 135.

another internet search for the Bellevue Transit Center. 1/27/15 RP 151-159.

Data from the defendant's GPS found in his car and DOT traffic cameras showed that on February 11 between 7:42 a.m. and 8:31 a.m. the defendant left home, took his children to daycare, and then went to work. This was a standard travel pattern based on the data from the GPS. However there was a deviation from that pattern. The defendant stopped at an Albertson's parking lot for about 10 minutes. There were dumpsters located in that parking lot. 1/28/15 RP 21-28.

Data from the defendant's GPS from February 12, 2013 showed that during his lunch period, the defendant travelled from his place of employment to Walmart and Home Depot on Highway 99. The data showed the defendant then drove to Ms. Smith's home. Police had already barricaded the street at that point. The defendant drove past and went back to work. According to GPS data dating back to October 2011, this was the only time the defendant had made that kind of mid-day trip. 1/28/15 RP 32-40.

B. FACTS RELATED TO PRETRIAL MOTIONS.

1. Motion To Suppress The Defendant's Confession To Wendell Morris As Protected By The Clergy-Penitent Privilege.

Wendall Morris was a member of Eastside Baptist Church from 2001 until he left in 2010 and joined City Church. Arthur Banks is the sole pastor that church. Mr. Morris became an associate minister. As an associate minister he was licensed to perform various duties, including counseling, under Pastor Banks's supervision. He could not perform those functions absent the supervision of Pastor Banks or an ordained pastor. His license as an assistant minister was limited to duties performed at Eastside Baptist Church. When Mr. Morris left Eastside Baptist Church he was no longer a member, and Pastor Banks no longer had any contact or control over him. 4/4/14 RP 106-112, 121, 175-176, 178.

Mr. Morris left Eastside Baptist Church in 2010 because he no longer wanted to be an associate minister. When he first joined City Church he did not have any duties. Later he became a member of a City Group. A City Group is an opportunity for people from that church who have similar interest to get together outside the context of the church. The interests are as varied as knitting to sports to bible study. Most of the groups focus on discussing the message preached at the Sunday service. City Groups have a

leader who is trained by church staff. A leader is not considered a member of the church staff. Nor is a leader considered the equivalent of a licensed pastor for the church. Mr. Morris joined a men's bible study group. Eventually he became the leader of that group. 4/4/14 RP 129-131, 181-183.

City Church has four campuses in the Seattle area, including one in Belltown and one in Kirkland. Pastors are licensed through that church by either going through a program of study or by participating in an intern program. Licensed ministers go through a ceremony at the church before they become licensed. There are not many licensed ministers in City Church. Mr. Morris never became a licensed minister in that church, nor has he been on the church staff. 4/4/14 RP 122-129, 132-133, 154-155, 183.

Eastside Baptist Church does not have a doctrine of confession through a minister or third person. That church believes that individuals need to confess and seek forgiveness from God directly. Pastor Banks did offer counseling to individuals. The church did not have a position regarding confidentiality during those counseling sessions. Pastor Banks told people that he reserved the right to notify authorities if a person talked about any illegal acts during counseling. 4/4/14 RP 113-114.

City Church also has no formal doctrine for confession. Rather a person who confesses does so directly to God or Jesus. Employees of the church are instructed to advise a person who is being counseled that the pastoral staff reserves the right to report the content of a disclosure to government authorities if the staff person deems it appropriate. A communication made in counseling is disclosed solely at the counselor's discretion. 4/4/14 RP 138-141.

The defendant began attending services at City Church at the Belltown campus in 2013. He was introduced to the church through his girlfriend, Love Thai, who had been attending services there sporadically for about one year. Ms. Thai notified the campus pastor, Jason Michalski, that the defendant had been accused of some "horrific stuff" but that it was not true. On occasion, Pastor Michalski spoke to the defendant and Ms. Thai about their inappropriate behavior at church. Eventually the pastor asked them to not return to the church. Pastor Michalski did so when Ms. Thai told him that they had invited the media to the church to promote their message that the defendant was innocent of his wife's murder. Pastor Michalski notified Pastor Troy Anderson at the Kirkland campus what he had told the defendant and Ms. Thai. 4/14/14 RP 134-137, 155.

On June 23, 2013 Pastor Anderson was informed that the defendant and Ms. Thai were attending services at City Church's Kirkland campus. Pastor Anderson talked to them and clarified that Pastor Michalski's request that they not attend services applied to all City Church campuses. 4/4/14 RP 155-156.

Mr. Morris met the defendant briefly at a potluck social hosted by a church member after services one Sunday in the late spring. At that same potluck Ms. Thai met Mr. Morris's wife, Amanda Morris, and the two women exchanged contact information. On June 23, 2013 Ms. Thai contacted Ms. Morris asking to meet with the Morrises because they were upset about the situation at City Church. Mr. Morris was told that Ms. Thai said that the defendant had been forgiven, even if he had committed the murder. Mr. and Ms. Morris decided to meet Ms. Thai and the defendant to "minister the Word of God" to them at a Starbucks on South Lake Union. Mr. Morris chose that location because it was away from the media attention and also physically removed from the church property. Mr. Morris was not acting as a pastor when he talked to the defendant. 4/4/14 RP 185-186, 191-194.

When Ms. Thai walked in the Starbucks she indicated that the defendant wanted to talk to Mr. Morris in his car. Mr. Morris

went to the defendant's car to talk to him. The defendant was very emotional and initially waved Mr. Morris off, but he called Mr. Morris back when Mr. Morris started to walk away. Mr. Morris talked to the defendant about preaching the gospel to him, but he told the defendant that he must be honest with Mr. Morris about what happened and if he had committed the murder. Mr. Morris told the defendant that whatever he said stayed between the two of them. The defendant did not want to talk about it in his car, and so the two men left and went for a walk. During the walk the defendant confessed that he killed his wife. He admitted that what he did was wrong. He told Mr. Morris "you know what, I trust what you do with this information....I respect what you you *(sic)* do with it". Mr. Morris took that statement to mean that Mr. Morris could report what he heard to the police. 4/4/14 RP 195-204; 4/24/14 RP 7.

Later Mr. Morris took the defendant to a church so that he could be baptized. When they were unable to have the defendant baptized at that church they went to Alki beach where Mr. Morris baptized the defendant. That was not how baptisms occurred at City Church. 4/24/14 RP 9-17.

The day after the baptism Mr. Morris encouraged the defendant to turn himself in. The defendant balked at that

suggestion. Ultimately when it became clear that the defendant was not going to turn himself in, Mr. Morris reported to the police what the defendant told him. 4/24/14 RP 19-26.

2. Motion For Frye Hearing On Barefoot Morphology Evidence.

Crime scene technicians processing Ms. Smith's home collected the foam mat that was imprinted with bloody footwear impressions. They documented other bloody footwear impressions throughout the house as well. 1/16/15 RP 104-105, 145-147; 1/20/15 RP 3-8. Detective Stone obtained photographs and inked impressions of the defendant's feet. He then sent those items along with the footwear impressions found at the scene to Sgt. Shelly Massey of the Royal Canadian Mounted Police (RCMP). 1/23/15 RP 13-22.

Sgt. Massey is an expert in forensic footprint morphology. Forensic footprint morphology is the comparison of impressions of the shape of the human foot. Sgt. Massey prepared a report in which she set out her comparison of the unknown footprints from the scene to the defendant's footprints. She used a methodology known as ACE-V. That method involves comparing unknown samples to known samples and determining whether there is sufficient detail to make an opinion as to whether the subject can

be the source or can be eliminated as the source of the questioned impression. Each evaluation is thereafter peer reviewed. Sgt. Massey concluded that the defendant could have made 6 of the unknown footwear impressions documented at the crime scene. 1/23/15 RP 25-34, 50-76; 3 CP 1196-1203, 1205-1209, 1212-1215.

Before trial, the defense moved the court for a Frye hearing to determine the admissibility of Sgt. Massey's footprint morphology testimony. 3 CP 1110-1121. The court denied the motion, holding that Sgt. Massey's testimony did not implicate any novel scientific procedure. It involved a physical comparison rather than a scientific test. 2 CP 890-892.

III. ARGUMENT

A. THE DEFENDANT'S STATEMENT TO WENDALL MORRIS WAS NOT A PRIVILGED COMMUNICATION TO A CLERGY MEMBER.

The defendant moved the court for an order suppressing his statement to Mr. Morris on the basis that it was protected under the clergy-penitent privilege, RCW 5.60.060(3). 2 CP 916-1000; 3 CP 1001-1109. After hearing testimony from pastors from Eastside Baptist Church and City Church and from Mr. Morris, the court denied the motion. 2 CP 861-869. The defendant argues that this was error.

1. The Challenged Findings Of Fact Are Supported By Substantial Evidence.

The defendant assigns error finding of fact 12, that Mr. Morris was not an ordained minister. He also assigns error to conclusion of law 1 to the extent that conclusion contains factual findings. 1 CP 864, 866. He does not challenge any of the court's other factual findings.

Challenged findings of fact are reviewed to determine if they are supported by substantial evidence. State v. Levy, 156 Wn.2d 709, 733, 132 P.3d 1076 (2006). Substantial evidence is "evidence sufficient to persuade a fair minded, rational person of the truth of the finding." State v. Mendez, 137 Wn.2d 208, 214, 970 P.2d 722 (1999). Unchallenged findings of fact are verities on appeal. Levy, 156 Wn.2d at 733. Credibility determinations are not reviewed on appeal. State v. Camarillo, 115 Wn.2d 60, 71, 794 P.2d 850 (1990). A finding of fact erroneously designated a conclusion of law will be reviewed as a finding of fact. Scott's Excavating Vancouver, LLC v. Winlock Properties LLC, 176 Wn. App. 335, 342, 308 P.3d 791 (2013), review denied, 179 Wn.2d 1011 (2014).

A finding of fact is a determination that evidence showed that something occurred or existed. State v. Niedergang, 43 Wn. App.

656, 658, 719 P.2d 576 (1986). The following conclusions of law should be considered findings of fact: (1) Wendell Morris was not acting as a member of the clergy for Eastside Baptist when he spoke to the defendant on June 23, 2013, (2) Mr. Morris had no authority conferred to him by Eastside Baptist to counsel with anyone or to conduct baptism, (3) Mr. Morris did not believe he was acting as clergy when he baptized the defendant at Alki beach, (4) Mr. Morris did not believe that the bible required one to be a member of the clergy to conduct a baptism, and (5) Mr. Morris was acting in an individual capacity when he spoke with the defendant and when he baptized him. 2 CP 866. These findings and the finding that Mr. Morris was not an ordained minister are supported by substantial evidence.

Pastor Banks testified that he was the only pastor on staff at Eastside Baptist Church. To become pastor, he went through seminary and earned Masters in Christian ministry and a Doctorate of Ministry in education and counseling. As an ordained pastor, he was examined by several churches within that church's denomination and then recommended to Eastside Baptist, who accepted the recommendation. His duties included administrative responsibilities for the church, as well as performing rituals and

services for the church and its members. As pastor he was able to perform those functions without supervision of another pastor. 4/4/14 RP 107-108.

Both Pastor Banks and Mr. Morris testified that Mr. Morris was an associate minister at Eastside Baptist. His authority to act on behalf of the church was limited as a licensed minister. An individual can become a licensed minister after going through less rigorous training. After some counseling, and one year of training a person can obtain a permanent license. Licensed ministers are assistant ministers. They obtain a temporary license after presenting a trial sermon. A licensed minister cannot perform any church function without direct supervision of the pastor. The license is limited to the authority Pastor Banks gave a licensed minister. When Mr. Morris left Eastside Baptist, he was no longer a member of that church and was not under Pastor Banks's authority. 4/4/14 RP 110-112, 121, 175-177.

Mr. Morris and the two pastors at City Church all testified that Mr. Morris's sole role at that church was as a City Group leader. He was not a pastor or minister. City Group leaders are volunteers, and are not on staff at the church. They are not allowed

to speak officially for the church. 4/4/14 RP 131-133, 155, 177-178, 183; 4/24/14 RP 25-26.

Mr. Morris testified that he did not tell the defendant that he had previously been licensed as a minister at another church. He said that he was not acting as a clergy person when he talked to the defendant and did not present himself as such at that time. He concluded that it was not always necessary to have someone baptized in a church with a pastor presiding over the baptism. 4/24/14 RP 14-15, 25-26.

This evidence established that there was a difference between an ordained pastor and an associate or licensed minister. There was no evidence that Mr. Morris ever was an ordained minister at either church. He was no longer acting as a licensed minister once he left Eastside Baptist Church. The court's finding that he was never an ordained minister and that he was acting in his individual capacity when he spoke to the defendant is supported by substantial evidence.

2. The Court's Factual Findings Support The Conclusion That The Defendant's Statements To Mr. Morris Were Not A Privileged Communication.

The clergy-penitent privilege is defined in RCW 5.60.060(3):

> A member of the clergy, a Christian Science practitioner listed in the Christian Science Journal, or a priest, shall not, without the consent of a person making the confession or sacred confidence, be examined as to any confession or sacred confidence made to him or her in his or her professional character, in the course of discipline enjoined by the church to which he or she belongs.

Three elements must exist for this privilege to apply: (1) the clergy-person must be ordained, (2) the confession must be in the course of the discipline enjoined by the church, and (3) the communication must be confidential. State v. Glenn, 115 Wn. App. 540, 546, 62 P.3d 921 (2003), review denied, 149 Wn.2d 1007 (2003), State v. Martin, 137 Wn.2d 774, 784, 975 P.2d 1020 (1999).

a. The Privilege Did Not Apply Because Mr. Morris Was Not A Member Of The Clergy.

The term "clergy" is not defined in 5.60 RCW. This court has applied the definition for that term in RCW 26.44.020 as it was interpreted in State v. Motherwell, 114 Wn.2d 353, 788 P.2d 1066 (1990). State v. Buss, 76 Wn. App. 780, 785, 887 P.2d 920 (1995), abrogated on other grounds, Martin, 137 Wn.2d at 784-787. "Clergy" is defined as "any regularly licensed or ordained minister, priest, or rabbi of any church or religious denomination, whether acting in an individual capacity or as an employee or agent of any public or private organization or institution." RCW 26.44.020(6).

In Motherwell three paid religious counselors were charged with violating the mandatory reporting statute, RCW 26.44.030(1). Motherwell, 114 Wn.2d at 356. One of the three counselors was an ordained minister, and asserted that he was exempt from that requirement pursuant to the clergy-penitent privilege. This argument did not apply to the other two defendants because they were not ordained ministers. Id. at 358.

Similarly this court found the clergy-penitent privilege did not apply in Buss. There, the defendant made inculpatory statements to a non-ordained "family minister" at her Catholic church. Buss, 76 Wn. App. at 782. This court found the privilege did not apply because the family minister was not ordained clergy. Id. at 785. The Supreme Court later distinguished the circumstances presented in Martin from Buss on the basis that the statements in Martin were made to an ordained minister and pastor of a church and not a person who had not been an ordained member of the clergy. Martin, 137 Wn.2d at 778, 791.

These cases illustrate the strict construction applied to the statute establishing the privilege. Statements made to a person who is not an ordained clergy member are not privileged. Mr. Morris was never ordained in any church. He chose to join City Church

because he no longer wished to act as a licensed minister. He was so far removed from that role that he never told the defendant that he held any such license. In any event, his license was limited to acts under the supervision of Pastor Banks. Pastor Banks was not supervising Mr. Morris when Mr. Morris agreed to talk to the defendant. Mr. Morris was acting outside the scope of his license to minister at Eastside Baptist Church.

Moreover the status of clergy is limited to that "conferred by license or ordination *within one's church or religious denomination*." Motherwell, 114 Wn.2d at 360 (emphasis added). At the time that Mr. Morris spoke with the defendant Mr. Morris was no longer a member of Eastside Baptist church. If that license ever did qualify Mr. Morris as "clergy" for purposes of the privilege, that designation ended when he left that church and was no longer under the pastor's supervision.

Nor was Mr. Morris a clergy member at City Church. His role as City Group leader was to facilitate discussions during men's Bible study meetings. His role was similar to the "family minister" in Buss. Like the person in Buss, Mr. Morris was not a "member of the clergy" to whom the privilege applied.

The court's finding that Mr. Morris was acting in his individual capacity when the defendant confessed to him is supported by substantial evidence. That finding in turn mandates the conclusion that the privilege did not apply to those communications.

b. The Defendant's Confession Did Not Occur In the Course Of A Discipline Enjoined By the Church.

The privilege also only applies when statements are made in the context of the practices or rules of the clergy member's religion to receive the confidential communication and provide spiritual counsel. Martin, 137 Wn.2d at 789. The court's unchallenged finding of fact was that City Church had no doctrine requiring confession to anyone but Jesus. The church's policy outlined in the employee handbook indicated that confidentiality did not apply to confessions and that a counselee was to be informed of that at the beginning of the counseling session. 2 CP 865 (finding of fact 18). For these reasons the court concluded that even if Mr. Morris qualified as a member of the clergy, the statements at issue were not made during a discipline enjoined by the church. 2 CP 867-868.

This conclusion logically follows from the evidence supporting the court's factual findings. If the clergy person's church

has no doctrine or practice that involves confession to God through a third person, then there is no "discipline enjoined by the church" covering a confession to a clergy person. Additionally, if the church permits a clergy person to reveal communications from a penitent at the clergy person's discretion, there is no practice or rule that permits the clergy-person to receive truly confidential communications.

The defendant argues that his statement to Mr. Morris was made in the course of a discipline enjoined by the church because Mr. Morris was a City Group leader. Since the structure of City Church addressed a majority of church member's issues in those groups, and Mr. Morris met with the defendant with the intent to have him confess his sins in order to give meaning to the defendant's claimed conversion, he argues that the confession was part of Mr. Morris' duties as a minister of the church.

The court should reject this argument because Mr. Morris's intent when he agreed to meet with the defendant is irrelevant. "Confession" as it is used in the statute has been interpreted to mean the definition given by the religion of the clergy person. Martin, 137 Wn.2d at 789. Thus, City Church doctrine determines whether the confession was made in the context for which the

statute allows privileged communications. Since confession in that church does not contemplate a pastoral intermediary, and communications to pastors are not necessarily confidential, the defendant's admission to Mr. Morris was not made in the context which is protected by the statute.

This argument should also be rejected because City Groups are just that, groups of people that get together with a common interest. Any statements made in the group would not be confidential. The church treats communications in City Group as distinct from communications made in the pastoral counseling context. 4/4/14 RP 172-173.

Nor was the process for pastoral counseling within the structure of City Church employed when the defendant made his admissions to Mr. Morris. In order to be afforded pastoral counseling in City Church, a person was required to go through certain steps. The first step was to meet in a City Group. There, the group leader could assess whether individual pastoral counseling was necessary. 4/4/14 RP 165-166. Here defendant and Mr. Morris were not meeting in the context of a City Group. Mr. Morris was not acting on behalf of the church at the time that he met with the defendant. 4/4/14 RP 193-194.

c. The Defendant's Confession Was Not Confidential.

Lastly, in order for the privilege to apply the communication must be confidential. The defendant does not challenge the court's finding that the defendant told Mr. Morris: "I respect what you do with this information" after the defendant admitted killing his wife. Nor does the defendant challenge the court's finding that Mr. Morris took the comment to mean that Mr. Morris was given permission to go to the authorities with the information about the murder. 2 CP 863 (findings 6 and 7). These findings are therefore verities on appeal. These findings support the court's conclusion that that this statement constituted a waiver of any confidentiality. 2 CP 868 (conclusion 6).

The defendant argues that the communication was confidential because before the defendant admitted killing his wife, Mr. Morris told him "this stays between you and I." 4/4/14 RP 203. Mr. Morris's testimony relates to a period of time before the defendant told Mr. Morris that he respected what Mr. Morris did with the defendant's admissions. The defendant's statement that he respected what Mr. Morris did with the information was an offer to keep or not keep his confession confidential according to how Mr. Morris saw fit. It became clear in the following days that Mr. Morris

expected the defendant's confession to be revealed to the police, as Mr. Morris repeatedly urged the defendant to turn himself into the authorities. The defendant, however, never retracted his statement concerning what Mr. Morris could do with his confession. In this context the defendant had waived any expectation of confidentiality. Given Mr. Morris' urging that he go to the police, the defendant could reasonably expect Mr. Morris to go to the police if the defendant did not do so himself.

The defendant failed to establish any of the facts necessary to finding the statutory clergy-penitent privilege applied to his confession to Mr. Morris. The court properly found those statements were not privileged communications that barred their admission at trial.

B. NO FRYE HEARING WAS NECESSARY WHEN BAREFOOT MORPHOLOGY EVIDENCE DID NOT INVOLVE A NOVEL SCIENTIFIC THEORY OR PRINCIPAL.

The defendant argues the court erred when it denied his motion for a Frye hearing before admitting Sgt. Massey's footprint comparison testimony. Where novel scientific evidence is at issue the court should hold Frye[2] hearing to determine whether it has gained sufficient acceptance to warrant admission into evidence.

[2] Frye v. United States, 293 F. 1013, 34 A.L.R. 145 (D.C. Cir 1923).

State v. Copeland, 130 Wn.2d 244, 259, 922 P.2d 1304 (1996). Under the Frye test evidence is admissible if it is based on a theory or principal which is generally accepted in the relevant scientific community. State v. Pigott, 181 Wn. App. 247, 249, 325 P.3d 247 (2014). The inquiry involves two steps: (1) was the scientific theory on which the evidence based generally accepted in the scientific community, and (2) was the technique used to implement that theory also generally accepted in the scientific community. State v. Gentry, 125 Wn.2d 570, 585, 888 P.2d 1105, cert denied, 516 U.S. 843 (1995).

A Frye hearing is not necessary where a scientific method is already generally accepted in the relevant scientific community. Pigott, 181 Wn. App. at 249. Nor is it necessary when the testimony involves a physical comparison rather than a scientific test. State v. Brewczynski, 173 Wn. App. 541, 556, 294 P.3d 825, review denied, 177 Wn.2d 1026 (2013).

In Brewczynski the court admitted evidence comparing an impression of the defendant's footprint to a bloody footprint found near a murder victim. The court noted that the defendant could not challenge the general acceptance of footwear impression evidence in the forensic science community because that kind of evidence

has been accepted by courts for over one hundred years. Brewczynski, 173 Wn. App. at 555. It rejected the defendant's argument that the technique used by the examiner to compare the impression was not generally accepted in the community of footwear experts on the basis that the method was not a scientific test, but rather a comparison of physical evidence. Id. at 556.

Other courts have held that no Frye hearing was necessary before admitting footprint comparison testimony into evidence. In one case the court admitted testimony from a forensic expert comparing a pair of tennis shoes to bloody footprints found on linoleum at a murder scene. State v. Hasan, 534 A.2d 877, 880-881 (Conn. 1987). The court held no Frye hearing was necessary because the testimony involved the comparison of two items. The court reasoned that the examiner's "conclusions relied on no advanced technology, nor did he employ scientifically sophisticated methods, the understanding of which lies beyond the intellectual powers of the ordinary layperson." Id. at 881.

In another case an FBI agent with a background in forensic footprint morphology compared shoeprints at a robbery scene to a pair of shoes. He also compared the imprints on the insoles of a pair of shoes to the defendant's feet. The witness testified that the

shoes made the shoeprints, and either the defendant or someone with his same foot morphology wore those shoes. Thiel v. State, 762 P.2d 478, 484-485 (Alaska 1988). The court found the testimony was admissible without a Frye hearing because the underlying technique of comparison was not novel or an unaccepted scientific procedure. The court commented that the result may have been different had the witness opined that no one other than the defendant could have worn those shoes. That opinion would have assumed foot morphology is unique to an individual, which was arguably a scientific theory that had not been generally accepted. Id. at 485.

The evidence at issue here is no different from the evidence at issue in the preceding cases. Sgt. Massey's testimony involved a comparison of unknown footprints to known footprints. She explained how she made that comparison and the basis for her conclusion that the defendant could have made those prints. As in Thiel, Sgt. Massey did not testify that her examination established conclusively that the defendant made the footprints found at the crime scene. Because her testimony was not based on any novel scientific principal or method a Frye hearing was not a necessary prerequisite to admission.

The defendant argues that the court should have held a Frye hearing because Sgt. Massey was employing scientific, technical, or specialized knowledge. BOA at 27. Whether she did so does not dictate whether a Frye hearing was necessary. DNA analysis does involve scientific and specialized knowledge. However, no Frye hearing is necessary before it is admissible because it does not involve novel scientific evidence. State v. Bander, 150 Wn. App. 690, 712, 208 P.3d 1242 (2009), review denied, 167 Wn.2d 1009 (2009). Similarly, the evidence here is not novel. Sgt. Massey used the ACE-V method to compare the characteristics from the unknown impressions to the known impressions. 3 CP 1205; 1/23/15 RP 32-34. In the context of fingerprint impression comparison this court has said that methodology is generally accepted for forensic comparisons. Pigott, 181 Wn. App. at 250.

The defendant also argues that barefoot morphology has not gained general acceptance in the scientific community. He asserts that Sgt. Massey's testimony should have been excluded for that reason. To support his position he cites three out-of-state cases: State v. Jones, 541 S.E.2d 813 (S.C. 2001) (Jones I), State v. Jones, 681 S.E.2d 580 (S.C. 2009), (Jones II); and State v. Berry, 547 S.E.2d 145 (N.C. 2001). These cases do not provide

persuasive authority for the proposition that the challenged testimony here should have been excluded. Each case involved expert opinions that differed from the expert opinion at issue here, as well as different standards for admission of that evidence.

In Jones I and Jones II the court considered the testimony from a South Carolina Law Enforcement Division[3] agent who compared the barefoot impressions left on the insoles of a pair of boots that were associated with a bloody footprint at the scene of a murder. Those imprints were compared to the insoles of boots known to be worn by the defendant. The agent was permitted to testify that the impressions from each boot were "consistent" with each other. Jones, 541 S.E.2d at 818. South Carolina does not employ the Frye standard for admissibility. Jones, 681 S.E.2d at 590. Rather evidence is admissible under SCRE 702[4] if (1) the evidence will assist the trier of fact (2) the expert witness is qualified, and (3) the underlying science is reliable. Jones, 541

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[3] SLED is a statewide investigative law enforcement agency in South Carolina.
https://en.wikipedia.org/wiki/South_Carolina_Law_Enforcement_Division

[4] "If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise."

S.E.2d at 818[5]. In Jones I the court held that the evidence was not reliable because the expert who studied barefoot morphology, and who consulted with the SLED agent who conducted the analysis, stated that at the time of trial he was still collecting data in order to determine which standards were appropriate for comparison purposes. In addition there was no quality control procedures used to ensure reliability. Jones 541 S.E.2d at 819. In Jones II, the court again rejected the agent's testimony in part because the consensus among experienced examiners was that identification of a suspect as the wearer of a shoe was "rare." Jones, 681 S.E.2d at 591.

Like South Carolina, North Carolina does not employ the Frye standard to determine whether scientific or specialized evidence is admissible. State v. Goode, 461 S.E. 631, 640 (N.C. 1995). In Berry an expert testified that shoes found at the scene of a murder were compared to shoes known to be worn by the defendant and inked impressions and photographs of the defendant's feet. The expert was permitted to testify that the shoes at the scene and the defendant's shoes were likely worn by the

[5] A court determines the evidence is reliable taking into consideration (1) the publications and peer reviews of the technique; (2) prior application of the method to the type of evidence involved in the case; (3) the quality control procedures used to ensure reliability; and (4) the consistency of the method with recognized scientific procedures. Jones, 541 S.E.2d at 819.

same person. Berry, 546 S.E.2d at 149, 154. Because the expert admitted that barefoot impressions were not a positive means to identify someone based on his current research, the court concluded his testimony was not sufficiently reliable at the time of trial. Id. at 156.

The testimony presented at trial here differed from the testimony in Jones I, Jones II, and Berry. Sgt. Massey's opinion did not conclusively identify the person who made the footprints at the crime scene. Rather her testimony was limited to the conclusion that she was unable to exclude the defendant as source of those prints, and therefore that he could have made the particular impression in question. 1/23/15 RP 53.

This testimony is consistent with what the court found permissible in State v. Kunze, 97 Wn. App. 832, 988 P.2d 977 (1999), review denied, 140 Wn.2d 1022 (2000). There the court considered the admissibility of ear-print identification evidence. Two experts testifying on behalf of the State offered evidence that Kunze was "a likely source for the ear print and cheek print that were lifted" from the scene of the murder. Id. at 836-387. The court ruled that testimony was inadmissible because the majority of experts who testified indicated that latent ear print identification was

not generally accepted in the scientific community, Id. at 855. However the court also stated that on retrial, the forensic experts could testify to visible similarities and differences between the latent prints and exemplars, and testimony that based on a comparison between the two that the defendant could not be excluded as the maker of the latent print. "An opinion of non-exclusion (e.g., that a particular person cannot be excluded as the maker of a latent print) can rationally be based on readily discernable class characteristics, but an opinion of inclusion (e.g., that particular person made or probably made a latent print) cannot be." Id at 856.

This is precisely the type of evidence introduced by the State. Sgt. Massey did not opine that the defendant was the person nor that he was likely the person who left the footprint impressions at the scene of the crime. She only testified that the impressions agreed with a class of characteristics that could have been made by either the defendant's right or left foot. 1/23/15 RP 80-81.

Sgt. Massey's testimony involved a comparison of unknown to known impressions. Her opinion was confined to the class characteristics of those impressions. And she used a methodology that has been generally accepted in the forensic scientific

community. Therefore the court did not err when it denied the defendant's motion for a Frye hearing and admitted Sgt. Massey's testimony.

Finally, the defendant argues that the error in admission of Sgt. Massey's testimony was not harmless. If her testimony was subject to a Frye hearing, and it should have been excluded, then the defendant bears the burden to show that within reasonable probabilities that but for that error the outcome of his trial would be different. State v. Sipin, 130 Wn. App. 403, 421, 123 P.3d 862 (2005).

Here the footprint evidence was one of several pieces of circumstantial evidence that placed the defendant at the scene of the murder. 1 CP 2-4. The court found that none of the circumstantial evidence, alone or in conjunction with one another, was sufficient to establish beyond a reasonable doubt that the defendant committed the murder. 1 CP 4. The evidence was sufficient to convict the defendant of murder only when it was considered in conjunction with the defendant's confession to Mr. Morris. 1 CP 4-5. Because the footprint evidence alone did not convince the court that the defendant was guilty, he has not shown that its admission, if error, was not harmless.

C. THE COURT DID NOT ABUSE ITS DISCRETION WHEN IT DENIED THE DEFENDANT'S MOTION TO SUBSTITUTE COUNSEL.

After the defendant was convicted and before sentencing he filed a motion for new counsel on the basis that he believed he received ineffective assistance of counsel. Specifically he cited several strategic choices counsel made as a basis for his motion. He also alleged that he had lost faith in counsels' ability to represent him. He also moved the court for an order transferring the motion to another judge. 1 CP 88-94. The motion was transferred to the presiding judge. 2/20/15 RP 6; 2/25/15 RP 3.

The court considered the defendant's written motion, and then gave the defendant the opportunity to further explain why the court should appoint him new counsel. Several of the points the defendant made related to the value of the evidence presented at trial. The defendant argued that he disagreed with the manner in which counsel chose to cross examine witnesses who presented that evidence. The court clarified however that the discrepancies in the evidence were presented to the court. 2/25/15 RP 6-13. The defendant also discussed matters related to the dependency action involving his two minor children that were not discussed at trial. 2/25/15 RP 12, 14-16.

In response to the court's inquiry, the defendant stated that his "longstanding disagreements" with his attorney that caused him to make "uncomfortable choices" included his decision not to seek new counsel before trial in order to avoid further delay, and the decision to not testify. 2/25/15 RP 17, 23. The defendant also confirmed that he continued to communicate with his attorneys both before and during trial, although he did not speak with them as often as he would have liked, and there were areas of disagreement during the course of their discussions. 2/25/15 RP 6, 17-20.

The court denied the defendant's motion to for new counsel. The court found that the defendant did not seek new counsel until after he had been convicted of the murder. The defendant's reasons for seeking new counsel related to his dissatisfaction with the strategic decisions counsel made during trial. Other things the defendant had complained about were presented to the court, or were irrelevant to the murder case. 2/25/15 RP 30-32. The court found that there was no irreconcilable conflict between the defendant and counsel, and no complete breakdown in communication between them. 2/25/15 RP 35. The court found that based on a review of the trial record, the defendant's attorneys

diligently represented him by bringing appropriate motions. The court also considered its personal observations of counsel for more than a quarter century, noting that she was a "capable, diligent, dedicated lawyer who achieves remarkable results for her client." 2/25/15 RP 32-33. Finally the court found that a substitution of counsel would likely result in delaying sentencing for an undetermined period of time since new counsel would likely investigate a motion for new trial. 2/25/15 RP 34.

The defendant argues the trial court erred when it denied his motion for new counsel. Because the court conducted an adequate inquiry into the defendant's reasons for seeking substitution of counsel, and because the record supports the trial court's findings, the court should reject this argument.

The Sixth Amendment right to counsel does not encompass the right to choose any advocate he chooses if he wishes to be represented by counsel. Wheat v. United States, 486 U.S. 153, 159 n. 3, 108 S.Ct. 1692, 100 L.Ed.2d 140 (1988), State v. DeWeese, 117 Wn.2d 369, 375-376, 816 P.2d 1 (1991). Where a defendant seeks to substitute appointed counsel the court must consider (1) the reasons given for the dissatisfaction, (2) the court's own evaluation of counsel, and (3) the effect of any substitution upon

the scheduled proceedings. In re Stenson, 142 Wn.2d 710, 723, 16 P.3d 1 (2001).

A trial court's decision to deny a motion to substitute counsel is reviewed for an abuse of discretion. State v. Lindsey, 177 Wn. App. 233, 248, 311 P.3d 61 (2013), review denied, 180 Wn.2d 1022 (2014). A court abuses its discretion when its decision is based on facts unsupported in the record or when the decision was reached by applying the wrong legal standard. Id. at 249. When reviewing the decision to deny the motion to substitute counsel the court considers (1) the extent of the conflict, (2) the adequacy of the inquiry, and (3) the timeliness of the motion. Stenson, 142 Wn.2d at 724.

Here the court carefully went through each of the factors outlined in Stenson before denying the motion. Those reasons are supported by the record. The court's evaluation of counsel was based in part on the work counsel performed before trial. 2/25/15 RP 32-33. The record showed that counsel had filed motions to suppress evidence obtained in search warrants, the defendant's statements to police, and his confession to Mr. Morris. 2 CP 577-856, 916-1000; 3 CP 1001-1175. The defendant admitted that he had continued to communicate with counsel, even though there

were areas of disagreement. Those areas of disagreement related to trial strategy, which is reserved for counsel's judgment and not the defendant's. Stenson, 142 Wn.2d at 734. In addition, the existence of disagreements between counsel and client do not alone constitute a complete collapse in the relationship between them. State v. Cross, 156 Wn.2d 580, 606, 132 P.3d 80, cert denied, 549 U.S. 1022 (2006). Nor is a conflict over strategy a conflict of interest. Id. at 607. Finally, the motion had been made on the eve of sentencing. Since new counsel would have to become familiar with the case before sentencing, the court reasonably anticipated that a substitution would result in delaying the proceedings.

The defendant argues that the court erred because it did not conduct an adequate inquiry into the reasons he sought new counsel. This court stated that "a trial court conducts an adequate inquiry by allowing the defendant and counsel to express their concerns fully." State v. Schaller, 143 Wn. App. 258, 271, 177 P.3d 1139 (2007), review denied, 164 Wn.2d 1015 (2008). The court did that, first by inviting the defendant and counsel to address the points they wished to make in support of his motion and then by

specifically asking the defendant about specific points relevant to the factors outlined in Stenson. 2/25/15 RP 4-21.

The defendant faults the court for not conducting a more probing inquiry. He does not cite any authority that requires a specific inquiry by the court beyond the three areas outlined in Stenson, 142 Wn.2d at 723. Even so, the areas that he argues the court should have inquired into were discussed during the hearing.

The defendant argues that the court should have inquired further into the nature of the "communication problems" the defendant alleged he had with counsel. BOA at 35. The court did discuss at length whether the defendant and his attorney were able to talk to each other when she met with him. Although the defendant indicated he disagreed with a lot of what she said, and he expressed frustration that she missed meetings, he ultimately agreed that they did communicate with each other. 2/25/15 RP 17-20. Contrary to the defendant's claim, the record clearly demonstrates that there had been no complete breakdown in communications between attorney and client. The court's inquiry into that factor, as well as other factors, was adequate for the court to make a reasoned judgment on the motion.

Finally, the defendant argues that the remedy for the court's error in failing to conduct an adequate inquiry is to remand for resentencing. If this court finds that the trial failed to conduct an adequate inquiry it should not automatically result in remand for resentencing. Rather the remedy should be remand for additional inquiry to further assess whether the defendant should be entitled to new counsel for sentencing.

IV. CONCLUSION

For the foregoing reasons the State asks the court to affirm the defendant's conviction and sentence.

Respectfully submitted on March 4, 2016.

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Attorney for Respondent

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

THE STATE OF WASHINGTON, Respondent, v. ALAN J. SMITH, Appellant.	No. 73219-6-I DECLARATION OF DOCUMENT FILING AND E-SERVICE

AFFIDAVIT BY CERTIFICATION:

The undersigned certifies that on the 4th day of March, 2016, affiant sent via e-mail as an attachment the following document(s) in the above-referenced cause:

BRIEF OF RESPONDENT

I certify that I sent via e-mail a copy of the foregoing document to: The Court of Appeals via Electronic Filing and to Thomas Kummerow, Washington Appellate Project, tom@washapp.org; and wapofficemail@washapp.org.

I certify (or declare) under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

Dated this 4th day of March, 2016, at the Snohomish County Office.

Diane K. Kremenich
Legal Assistant/Appeals Unit
Snohomish County Prosecutor's Office