

64927-2

64927-2

NO. 64927-2-1

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

STATE OF WASHINGTON,

Respondent,

v.

TRACY FLOREN,

Appellant.

2011
08
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APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE HARRY McCARTHY

BRIEF OF RESPONDENT

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A. ISSUES PRESENTED.

1. A Frye hearing is required when a party presents scientific or technical evidence that is based on a novel scientific principle. Washington courts have recognized that bloodstain pattern analysis is not a novel science. Did the trial court properly refuse to hold a Frye hearing where the State's expert testified as to principles of bloodstain pattern analysis that are not novel or disputed in the scientific community?

2. A trial court unconstitutionally comments on the evidence when the court makes a statement that conveys its opinion about the merits of the case or instructs the jury that a disputed fact has been established. The trial court's brief explanation of its ruling on a defense objection could not reasonably be construed as a comment on the evidence. Was the comment an unconstitutional and prejudicial comment on the evidence?

3. A witness may testify as to his or her personal observations of the defendant's demeanor, where relevant. A witness may also express an opinion regarding the defendant's demeanor if the opinion is based on personal observations and is logically supported by those observations. Did the trial court

properly exercise its discretion in admitting the testimony of a number of witnesses regarding the defendant's demeanor following his wife's murder, based on their personal observations, particularly where the testimony was not objected to below?

B. STATEMENT OF THE CASE.

1. PROCEDURAL FACTS.

Tracy Floren was found guilty by jury verdict of the crime of murder in the first degree while armed with a firearm. CP 1116-17. He was sentenced to 360 months of confinement. CP 1006-22.

2. FACTS OF THE CRIME.

Nancy Floren was found murdered in her home on the morning of Sunday, September 2, 2007. 16RP 45, 56.¹ At the time of her murder, Nancy and Tracy Floren had been married for 24 years. 16RP 1891. She was the chief financial officer for Husky International Trucks. 16RP 1981. He was a supply chief analyst at Boeing. 16RP 1892. The couple had just returned from a two-week vacation in Sequim, Washington, where they had begun construction on a retirement home. 16RP 1988.

¹ The State will reference the verbatim report of proceedings in the same manner as the Brief of Appellant. For clarification, all of the trial testimony is contained in 18 consecutively paginated volumes labeled "16RP." The preceding volumes contain pretrial proceedings.

a. The Murder Scene.

At 6:15 a.m. on the morning of September 2, 2007, King County Deputies Neely and Saulet responded to a security alarm call at the Floren home. 16RP 46, 105-06. Receiving no response when they knocked on the front door and rang the doorbell, they proceeded to the back of the house. 16RP 47. Through windows, they could see a dog walking around inside the house. 16RP 47. The dog did not bark at them. 16RP 47.

The deputies found that the door leading from the backyard into the attached garage was ajar approximately one foot. 16RP 52, 110. They entered the garage and saw nothing unusual. 16RP 54. The door leading from the garage into the house was closed but unlocked. 16RP 53-54, 111. As they entered through that door into the laundry room of the house, they found the victim lying in the adjacent hallway. 16RP 55, 112. She was dressed in a bathrobe, lying on her back, with two gunshot wounds to her head. 16RP 55-56, 1725-26; Ex. 149. A large pool of blood had formed around her head, and Deputy Saulet observed what looked like "a white fluid substance mixed in with the blood." 16RP 112. A small .38 caliber revolver was on the floor near her right hand. 16RP 57, 112, 132, 1272. The deputies called for medical aid.

16RP 55. The deputies meanwhile secured the large, neatly-kept home and found no one else inside. 16RP 58, 114.

A medical aid unit arrived at 6:32 a.m. and immediately pronounced the victim dead. 16RP 60, 72. Deputy Saulet took pictures of the victim's body when the medical aid personnel left. 16RP 115-16.

The Floren house was protected by an ADT alarm system. 16RP 195-96. At 5:52 a.m. on September 2, 2007, ADT received a "hold up alarm" from the Floren home. 16RP 796. The alarm can be activated by pressing a "panic button" or entering a duress code. 16RP 797. If the alarm is activated by pressing the "panic button" a very loud alarm, audible outside the home, sounds for four minutes. 16RP 342-44, 797, 1171.² If the alarm is activated by entering the duress code, there is no audible alarm. 16RP 797, 344. There is no way to determine from ADT records whether the alarm received was activated by the panic button or the duress code. 16RP 797, 802. However, neighbors of the Florens heard no alarm on that morning. 16RP 229-30, 268, 1155. There were two alarm panels

² The Florens' housekeeper testified that when she accidentally tripped the alarm it was "blaring" and that "everybody within a mile" could hear it. 16RP 1171. When Detective Pavlovich tested the alarm, neighbors came out to see what was happening. 16RP 344.

in the Floren home: one in the master bedroom and one in the hallway near where Nancy's body was found. 16RP 342. The piece of plastic that covers the buttons on both alarm panels was snapped shut when police searched the home. 16RP 1154, 1161.

The police found no evidence that the home had been ransacked in any way, or that anything had been stolen from the home. 16RP 185, 823, 1153. There was no evidence of forced entry. 16RP 167, 819. The home contained many valuable items including multiple computers, camera equipment, guns, and a large amount of cash. 16RP 282-84, 394-95, 1784-85. The police searched the home for fingerprints and no fingerprints other than those belonging to the defendant, the victim and police officers were found. 16RP 1201.

b. The Defendant's Statements To Police.

Floren arrived home at 7:50 a.m. and was intercepted by police officers before he could enter the house. 16RP 89, 90. Floren asked what was going on, and was told that the police had responded to an alarm at the house, that his wife was seriously injured, and that she had been taken to the hospital. 16RP 90. Floren showed no emotion when given this information. 16RP 91. He asked no further questions about what had happened. 16RP

91-92. He stated that he had just come from an AA meeting and produced an attendance slip from the meeting, as well as a sales receipt showing that he had purchased a cup of coffee and a muffin at 5:24 a.m. 16RP 92, 125, 1250. Deputy Saulet interviewed Floren in his patrol car outside the home. 16RP 121. Floren was cordial, showed no emotion and asked no questions about his wife's condition. 16RP 123-28. He gave a written statement. 16RP 123.

Floren was transported to the Regional Justice Center, where he was interviewed by Detectives Pavlovich and Do and gave a recorded statement. 16RP 321-20; CP 1198-1294. The statement took three hours. 16RP 322. During those three hours, Floren never asked to be taken to his wife, and did not ask any additional questions about what had happened or about her condition. 16RP 322, 429.

In his recorded statement, Floren told police that he woke at 5 a.m. that morning, showered, and left the house while his wife was still asleep. CP 1202. He left for an early AA meeting in Kent. CP 1203. The meeting started at 6:30 a.m. CP 1203. Although he normally stopped at Starbucks coffee shop on the way to the meeting, the Starbucks was not open so he went to a Circle K

convenience store in the same shopping complex and bought a cup of coffee and a muffin at 5:24 a.m. CP 1204; 16RP 1250. He stated that he left the door from the house to the garage unlocked and deactivated the alarm when he left for the meeting. CP 1205-07. When asked whether all the other doors were locked, he stated that the door from the backyard into the garage "may" have been unlocked. CP 1207. He claimed that he arrived at the AA meeting at 5:45 a.m. and stood around chatting with the smokers outside until the meeting started. CP 1208-09. In discussing the location of guns throughout the house, he stated, "I um, *have* the Glock under my bed, and Nancy *had* the 38, the 5-shot 38 under her side of the bed." CP 1213 (emphasis added).

Toward the end of the statement, the detectives informed Floren that his wife was dead. 16RP 322. Approximately 30 seconds of silence followed, and Floren said, "Damn." 16RP 322; CP 1272. He showed little or no emotion. 16RP 360.

c. Autopsy Evidence.

An autopsy was performed. 16RP 1723. The victim died of two gunshot wounds to the head, one to the right temple and one to the left nostril. 16RP 1725-26. Stippling was present around both wounds, indicating that the gun was fired at a range of less than

two feet. 16RP 1730, 1732. The trajectory of the bullet that entered the right temple was from front to back, right to left, and slightly downwards. 16RP 1734. The trajectory of the bullet that entered the left nostril was from front to back and slightly upward. 16RP 1732. The bullet fragments recovered from the victim's body were consistent with a .22 caliber weapon. 16RP 1375-77. The amount of blood that exited the nostril wound and the presence of blood in the victim's lung indicated that she continued to breathe after receiving the second shot. 16RP 1737.

d. Bloodstain Pattern Analysis Evidence.

The jury heard from two forensic scientists regarding bloodstain pattern analysis. Ross Gardner, the State's expert, testified that he had spent 19 years conducting and supervising criminal investigations and had received more than 1000 hours of formal training in crime scene analysis. 16RP 1505. He is a member of the International Association of Bloodstain Analysis, a member of the Association of Crime Scene Reconstruction, and a charter member of the FBI Scientific Work Group for Bloodstain Pattern Analysis. 16RP 1506. He has co-authored a manual on bloodstain pattern analysis, has co-authored four textbooks, and has published a number of articles on crime scene bloodstain

pattern analysis. 16RP 1507-08. He testified that he has qualified as an expert witness in 11 states, including Washington.

16RP 1512.

Gardner testified that his analysis was based primarily on photographs taken at the murder scene by Deputy Saulet and by the medical examiner staff. 16RP 1527. The photos taken by Deputy Saulet were taken between 6:30 and 6:42 a.m. 16RP 1503. In his analysis, Gardner identified six specific bloodstain patterns, labeled patterns A-F. 16RP 1529-30; Ex. 149.³

Gardner testified that the largest pool of blood, Pattern E, collected on the floor primarily to the right of the victim's head and was in a heavily coagulated condition when Deputy Saulet took his pictures. 16RP 1536. The pool of blood was in a condition known as serum separation, which is evidenced by a light-colored fluid around the edges of the pool. 16RP 1536. This light-colored fluid appears when fibrin within blood begins to mass and take on a jellied appearance. 16RP 1537. The light-colored fluid flows through the coagulated fibrin mass and separates. 16RP 1537-39.

³ The photographs used by Gardner in his analysis, contained in Exhibit 149, have been sent to this Court and are essential to understanding his testimony. Photographs A, F, G, H, K, and N in Exhibit 149 were the photos taken by Deputy Saulet between 6:30 and 6:42 a.m. 16RP 1498-1503, 1586-88, 1687.

Gardner opined that blood pool pattern E seen in photographs A, F, G, H, K and N, was in the later stages of serum separation when the photographs were taken. 16RP 1539, 1541-42. He testified that the process of serum separation begins after blood has been exposed to the environment for 30 minutes. 16RP 1539, 1667. Based on the advanced stage of serum separation seen in the photograph, he opined that the pool of blood in the photographs had been exposed to the environment for an hour or more at the time Deputy Saulet took the pictures. 16RP 1540. Gardner found it particularly significant that the photographs taken by the medical examiner's staff several hours later, such as photographs I and J, did not show dramatically more serum separation than the photographs taken by Deputy Saulet. 16RP 1540-41.

Gardner also testified as to patterns B, C and D, which are respectively: a thin trail of blood from the bullet wound at the victim's right temple across her forehead to the left (pattern B); a mass of coagulated blood in the victim's hair at her left temple (pattern C); and a transfer of blood onto the floor near the victim's left hand (pattern D). 16RP 1545. Gardner testified that these patterns indicated that the victim was initially shot in the right

temple and then lay with her head to the left; the blood flowed from the wound at the right temple to the left across her forehead, where it accumulated at her hairline at the left temple and came into contact with the floor near her left hand. 16RP 1545-50. The fact that the victim's head was eventually found leaning to the right, and that the large amount of blood in pattern E flowed from both wounds to the right, indicates that the victim's head was repositioned before she received the left nostril wound. 16RP 1550-51, 1580-83, 1641-42.

Based on the amount of blood seen in blood patterns C and D on the victim's left side, Gardner opined that the victim was lying with her head to the left for somewhere between 5 and 20 minutes before she was repositioned and shot a second time. 16RP 1557. Based on this estimate, as well as Deputy Saulet's testimony that he saw serum separation in the large pool of blood when he first observed the victim's body at 6:15 a.m., Gardner opined that the victim had been shot an hour or more before the officers arrived on the scene, and thus was not able to activate the alarm at 5:52 a.m. 16RP 1559-60, 1581, 1686.

On cross-examination, Gardner agreed that clotting times vary among individuals and vary based on the surface upon which

the blood is deposited. 16RP 1606. Also on cross-examination, Gardner agreed with a statement by defense expert Stuart James in a book James wrote on bloodstain pattern analysis, that "Clot retraction, which Wonder defines as serum separation from the fibrin mass, begins anywhere from 30 minutes to 1.5 hours after bloodshed." 16RP 1611.⁴

In addition, Gardner identified pattern A as pattern transfers caused by the dog walking through the blood and tracking blood around the body. 16RP 1543. Gardner testified that there was nothing about the scene that would indicate that the shooter would have blood on him. 16RP 1591.

The defense presented the testimony of forensic scientist Kay Sweeney. 16RP 2197. Sweeney had published no articles on bloodstain pattern analysis, and was not a member of any bloodstain pattern analysis professional organizations. 16RP 2321.

⁴ On cross-examination, defense counsel questioned Gardner at length about various time estimates he had changed between his preliminary and final report, which was partly based on the experiments that the State had chosen not to offer as evidence. 16RP 1653-56. The trial court ruled that while the facts of the experiment could not be elicited, the State could in fairness "inquire as to what the basis of his finding was, the minimum time, ranging from five, 17 and 20" on redirect examination. 16RP 1671. On redirect, Gardner testified that the range of 17 to 25 minutes for blood patterns C and D to form in his final report was based on "additional effort and experiments that I did after the preliminary report." 16RP 1689.

Sweeney testified that based on his bloodstain pattern analysis he believed the victim received both shots to the head in quick succession, with the first shot to the right temple and the second shot to her left nostril. 16RP 2208. He did not agree that the evidence indicated that the victim's body had been moved between shots. 16RP 2209. He opined that the trail of blood across the victim's forehead and the pool of coagulated blood that collected at the victim's left temple happened in the second or two that the victim was falling to the floor. 16RP 2333.⁵ He agreed that the photographs taken by Deputy Saulet showed blood clotting and serum separation, and agreed that serum separation may take an hour or more. 16RP 2328. He also agreed that blood clotting takes 3 to 15 minutes in a clinical setting. 16RP 2328.

e. Tracking Evidence.

Detective Kathleen Decker, a specialist in tracking, was called to the scene on September 2, 2007, and examined the

⁵ Significantly, the bloodstain pattern analyst retained by the defense, Stuart James, agreed in pretrial testimony with Gardner's conclusion that the pool of blood that collected at the victim's left temple was the result of her lying with her head turned to the left for a period of time, and thus disagreed with Sweeney's conclusion that the pool of blood formed as the victim fell to the ground. 13RP 79-81. This is likely why James was not called to testify at trial. Dr. Richard Harruff, chief medical examiner, was called as a rebuttal witness and also agreed with Gardner that the mass at the left temple of the victim's hair was clotted blood. 16RP 2474. He saw no evidence from the direction of blood flow that the victim was standing when she was shot in the nostril. 16RP 2480.

house and yard for signs of the presence of persons. 16RP 805. She saw no signs of forced entry into the home, and no sign of any disturbance within the home other than the victim's body. 16RP 819, 822-23. In examining the six-foot wooden fence that surrounded the backyard of the home, Detective Decker discovered fresh scuff marks in the bark at the base of the fence and fresh scrapes in the wood on the fence, indicating that someone had recently climbed over the fence. 16RP 939, 947-49.⁶ On the other side of the fence from those marks, in an unmowed retention field, Detective Decker found two bright green foam earplugs on top of the grass. 16RP 942. Identical earplugs were found in the Floren home and cars. 16RP 328-29, 654. The earplugs showed no signs of weathering and looked like they had not been there for long. 16RP 942, 989-90. DNA matching Tracy Floren's DNA was found on the earplugs. 16RP 992. Detective Decker found fresh tracks made by a soft-soled shoe that led from the fence out to the street. 16RP 944. The State theorized that Floren left through the

⁶ The photographs used by Detective Decker in her testimony, contained in Exhibit 116, have been sent to this Court and are helpful in understanding her testimony.

backyard and over the fence to avoid being seen by neighbors or police leaving the home after the alarm was activated. 16RP 2613.

f. Plant Fragment Evidence.

A number of plant fragments were found on the shoes and clothes that Floren was wearing on the morning of the murder. 16RP 1124-27. These fragments were examined by research botanist Peter Zika from the University of Washington. 16RP 832-34. Zika visited the scene and determined what plants were growing in the Florens' backyard and in the retention field behind the fence. 16RP 855. He identified a number of plant fragments from Floren's clothing that were found only in the retention field. 16RP 879-82.

g. Evidence From The Defendant's Computers.

Searches of Floren's computers showed that he accessed a number of dating websites in the months preceding his wife's death. 16RP 709-51. He entered a profile on Craigslist stating that he was a male seeking a female. 16RP 733. He received an email from a website called "Great Expectations" after requesting information from them. 16RP 738, 792-93. Floren also accessed several mail-order bride websites in the week preceding his wife's murder. 16RP 741-51.

h. Weapons Owned By The Defendant.

Floren provided a list of weapons that he owned to the police. 16RP 124. He did not list any .22 handguns. 16RP 318-19, 359. Detective Pavlovich investigated what weapons were registered to Floren. 16RP 1796. He found 19 weapons that were registered to Floren. 16RP 1797. Of the 19, all but two of the weapons were either found in the home or paperwork was located showing they had been sold to someone else. 16RP 1797. Two weapons were unaccounted for, including a .22 caliber Ruger pistol. 16RP 1798.

i. The Defendant's Alcoholism.

Floren is a recovering alcoholic. 16RP 1894. In his statement to the police, Floren admitted that he started drinking again during the vacation in Sequim, but denied that his alcoholism was causing any problems in his marriage. CP 1219, 1241, 1256-57, 1264. He denied drinking the night before the murder. CP 1261-62. He claimed that Nancy did not know that he had started drinking again. CP 1256.

However, in February of 2007, Nancy Floren visited her sister in California and discussed her concerns about her husband's drinking. 16RP 503. She told her sister that this was "his last

chance." 16RP 504. In records obtained from Floren's alcohol treatment provider, Floren reported in April of 2007 that "wife is ready to bail out." 16RP 1347. In May of 2007, Nancy told a co-worker that she was frustrated by Floren's relapse into alcoholism, and that she had told him that he was ruining their lives. 16RP 622. Nancy's brother and sister both came to Seattle for the annual family reunion in July of 2007. 16RP 481, 508. They testified that the relationship between Nancy and Floren seemed distant and strained. 16RP 481, 508.

The Florens' neighbor, Sandy Wilson, testified that she never saw Floren drink alcohol before Nancy's death, but that he began drinking openly after her death. 16RP 222. The couple's long-time friend, Jeannine Dowley, also testified that Floren began drinking openly after Nancy's death. 16RP 1020-21.

j. Police Investigation Of Defendant's Alibi Claim.

Several members of AA who were at the 6:30 a.m. meeting on September 2, 2007 testified. One, who was the chair of the meeting, testified that he usually arrives at 6:00 a.m. and opens the hall. 16RP 451. He recalled seeing Floren on September 2, 2007, at 6:20 a.m. 16RP 452. He testified that smokers usually gather outside the meeting at 6:15 a.m. 16RP 454. He characterized

Floren as quiet and said Floren did not talk much at the meetings. 16RP 452. Another member of AA testified that he could not remember Floren ever socializing with others before or after the meeting. 16RP 474. He also recalled that on September 2nd, Floren arrived at the meeting at 6:20 a.m. 16RP 474.

The police further investigated Floren's alibi by observing the 6:30 a.m. AA meeting in Kent on a variety of Sunday mornings. 16RP 291-92. On September 9, 2007, the first person arrived at 5:48 a.m. and the second person arrived at 6:04 a.m. 16RP 292. There was no gathering of people outside the meeting. 16RP 294. On September 16, 2007, the first person arrived at 6:05 a.m. 16RP 1215. On September 23, 2007, the first person arrived at 6:07 a.m. 16RP 1216. On September 30, 2007, the first person arrived at 6:06 a.m. 16RP 1216.

The drive from the Floren home to the Starbucks and Circle K takes approximately two minutes. 16RP 1217. The drive from the Floren home to the location of the AA meeting takes approximately 11 minutes. 16RP 1217. The Starbucks where Floren normally purchased his coffee and pastry before his AA meetings opened at 5:30 a.m. on Sundays, but Floren apparently decided not to wait an additional five minutes for the Starbucks to

open. 16RP 574-77, 2024. The police found the muffin that Floren had purchased at the Circle K, uneaten and unwrapped, in his car. 16RP 1165.

In sum, in the 28 minutes between when Floren bought coffee and a muffin at the Circle K at 5:24 a.m. and when the alarm was activated at 5:52 a.m., Floren could easily have returned to his home. Likewise, in the 28 minutes between when the alarm was activated at 5:52 a.m. and when Floren was seen at the AA meeting at 6:20 a.m., he could easily have driven from his home to the AA meeting. Thus, neither the Circle K receipt nor his AA attendance slip eliminated the possibility that Floren himself set off the silent alarm at his home at 5:52 a.m.

k. The Defendant's Demeanor After The Murder.

Friends and family testified about Floren's reaction to his wife's murder. The neighbor, Sandy Wilson, saw Floren the day after the murder. 16RP 239. He expressed no grief over his wife's death, and expressed only anger at the police for "what they had done to him." 16RP 242. Wilson's partner, Al Lynden, also saw Floren express no grief over his wife's death, but rather, anger at the police. 16RP 270. Nancy's brother and sister testified when they first saw Floren two days after the murder he pointed to

Nancy's will on the table and stated, "There is her will. It's pretty straightforward. Basically, I get everything." 16RP 518. He then informed them that he wanted them to dispose of all of Nancy's possessions the next day. 16RP 518. The only emotion they saw Floren exhibit in the days following his wife's death was anger at the police. 16RP 186, 488, 516.

I. Testimony Of The Defendant.

Floren testified at trial, and maintained his claim that he was not present when his wife was murdered. He admitted that in early 2007, Nancy had confronted him about his drinking after finding empty vodka bottles in the trash. 16RP 1897-98. As a result, the couple decided that Floren would enter an outpatient treatment program. 16RP 1899-1901. He admitted that his alcoholism had created problems in the marriage, and he felt that if he could not control his alcoholism his wife would leave him. 16RP 1905, 1909. He felt that Nancy was not fully supportive of his alcohol treatment, particularly since she refused to stop drinking herself. 16RP 1960-62.

He admitted that he previously had owned a .22 caliber Ruger pistol but claimed that he had sold it at a gun show but had no paperwork from the sale. 16RP 1964.

Floren testified that he mowed the lawn a week before the murder. 16RP 1993-94. He used green foam earplugs when using the mower and weed-cutter. 16RP 1995. He claimed that he used the weed-cutter and herbicide in the retention field along the fence, in an apparent attempt to explain why his earplugs were found in the retention field and why plant fragments from the retention field were found on his socks and pants. 16RP 1996. However, pictures of the retention field taken by Detective Decker on September 2, 2007, show no evidence that any part of the field had recently been mowed or cut. Ex. 116; 16RP 2173, 2462. He denied having climbed over his back fence recently. 16RP 2012.

Contrary to what he said in his statement to the police, Floren admitted that he drank alcohol on the night before the murder. 16RP 2021, 2121. He testified that when he left the house for the AA meeting on the morning of the murder he disarmed the alarm system and left the door to the garage unlocked so as not to wake Nancy by unlocking the door when he returned. 16RP 2055, 2060. However, in leaving the garage and returning he used the automatic garage door opener, and he testified that when he arrived home he would usually immediately make a latte for Nancy,

activities that would make as much noise, if not more, than unlocking the door with a key. 16RP 2148, 2060.⁷

After Nancy's death, Floren made claims on her \$250,000 life insurance policy and her \$350,000 401(k) account and "lost the motivation" to work. 16RP 614, 1197, 2102, 2104.

C. ARGUMENT.

1. THE TRIAL COURT PROPERLY CONCLUDED THAT NO FRYE HEARING WAS REQUIRED FOR THE STATE'S EXPERT TO TESTIFY AS TO GENERALLY ACCEPTED PRINCIPLES OF BLOODSTAIN PATTERN ANALYSIS.

Floren contends that the trial court erred in not holding a Frye⁸ hearing before allowing Ross Gardner to testify as to principles of bloodstain pattern analysis, including principles of blood clotting. However, the trial court did agree to hold a Frye hearing regarding the portion of Gardner's testimony that the defense initially challenged. The trial court heard testimony from two defense experts regarding general principles of bloodstain pattern analysis. The State then elected not to present the

⁷ In his statement to police, Floren said that Nancy usually woke at 7:30 or 8 a.m. on weekends. CP 1217, 1236. Thus, it makes little sense that he was so concerned about waking her by unlocking the door when he returned from his AA meetings after 7:30 a.m.

⁸ Frye v. United States, 293 F. 1013 (D.C. Cir. 1923).

evidence that was being challenged by the defense. Gardner subsequently testified as to his bloodstain pattern analysis based on the principles that were endorsed by the defense's own expert. The trial court did not err in concluding that Gardner's trial testimony was not based on a novel science or a novel scientific technique, and did not require a Frye hearing.

a. Additional Facts Relevant To Frye Issue.

Initially, the defense did not contend that Ross Gardner's testimony as a whole should be subjected to a Frye hearing. The defense requested a Frye hearing "to determine the potential admissibility of some experiments conducted by Ross Gardner that are specific to this case." 13RP 4; CP 212-15. Based on those experiments, using human blood deposited on human hair and left on a tile surface, and alternatively, a sealed wood surface, Gardner concluded that the pool of coagulated blood seen at the victim's left temple required a minimum of 17 to 25 minutes to form. CP 724-26.

The defense agreed that bloodstain pattern analysis in general is not a novel science subject to Frye. 13RP 4, 20. However, the defense requested a Frye hearing as to the experiments conducted by Gardner. 13RP 4. The trial court

granted the defense request for a hearing and heard testimony from defense experts Stuart James and Kay Sweeney on October 12, 2009. 13RP 30-32, 35-106. The trial court then deferred ruling on the admissibility of the experiments until it heard testimony from Gardner. 13RP 107.

Defense expert Stuart James, a forensic scientist who specializes in bloodstain pattern analysis, testified that he reviewed Ross Gardner's report and that the methodology used by Gardner in conducting his experiments was not generally accepted in the scientific community. 13RP 50. He asserted that the experiment would have to be conducted 100 times with the blood of different individuals to be scientifically valid. 13RP 87. However, James did not assert that testimony regarding blood clotting and clotting times was not accepted within the scientific community. To the contrary, on cross-examination, James agreed that the observation of coagulated blood at a crime scene provides relevant information. 13RP 62-63. He agreed with the conclusion of another published expert, Anita Wonder, that the presence of clotted blood can be the basis for estimating the minimum length of time that blood has been exposed to the surrounding environment. 13RP 89. He testified that because clotting times vary with individuals and circumstances,

clotting times are "always given in ranges, and most of us have always accepted it. When I testify about clotting issues, I say in ranges, and I think that's the way it should be done." 13RP 52. He agreed that based on a published study conducted in 2001, the range of clotting time for 10 milliliters of blood on a wood surface was 27 to 37 minutes, and that he had no reason to dispute the scientific validity of that range. 13RP 74-75.

Most significantly, James agreed with many of Gardner's conclusions. For example, he agreed that coagulated blood seen at the victim's left temple came from the bullet wound to her right temple. 13RP 77-78. He agreed with Gardner's conclusion that the victim's head had been turned to the left when that pool formed. 13RP 79. He agreed with Gardner's conclusion that it would take a period of minutes for the coagulated blood on the victim's left temple to form. 13RP 77-78. As a result, he agreed that the clot seen in the hair at the victim's left temple was not the result of short-term contact with liquid blood. 13RP 81.

James also agreed with Gardner that at some point the victim's head was repositioned to the right, and that the large pool of blood to the right of her head formed after her head was moved. 13RP 79. He agreed that the level of serum separation seen within

the large pool of blood in the photographs likely would have taken an hour to occur, although it was possible for it to occur in as few as 30 minutes. 13RP 79-80. He agreed that Ross Gardner was a recognized expert in bloodstain pattern analysis. 13RP 82.

Defense expert Kay Sweeney also testified at the Frye hearing. 13RP 91. He testified that the methodology used by Gardner in his experiments was not generally accepted in the scientific community. 13RP 97.

On November 23, 2009, the State informed counsel and the court that it no longer intended to present testimony regarding the experiments conducted by Gardner. 16RP 1406-07. In response, the defense moved to exclude all of Gardner's testimony, contending that he was not an expert because he had no degree in science. 16RP 1410. The trial court reviewed the materials submitted by the parties, and heard testimony from Ross Gardner outside the presence of the jury. 16RP 1423, 1474. In the course of cross-examining Gardner, counsel requested another Frye hearing, although it is unclear on what basis that request was made. 16RP 1489-91.

The trial court ruled that Gardner was qualified to testify as an expert, that evidence relating to the experiments he conducted

was not admissible, but that no Frye hearing was necessary for Gardner to testify as to generally accepted principles of bloodstain pattern analysis that blood behaves differently over a period of time. 16RP 1493, 1620-21. The defense announced that it would call Stuart James as a witness at trial, but later chose not to do so. 16RP 1493.

After Floren was found guilty, the defense filed a motion for a new trial based on Gardner's testimony and opinions as to time ranges involved for clotting and serum separation. CP 580-604; 16RP 2636. The trial court denied the motion. 16RP 2642. The trial court explained its ruling as follows: "In the court's view allowing a qualified expert in the field to offer an opinion concerning estimated minimum and maximum time of clotting and serum separation is directly related to the accepted science." 16RP 1641. The trial court noted that the time estimates given by Gardner were consistent with the other scientific testimony and evidence presented to the court. 16RP 1641.

- b. The Trial Court Correctly Concluded That No Frye Hearing Was Necessary For Ross Gardner's Testimony Regarding His Bloodstain Pattern Analysis, Including Estimated Ranges For Blood Clotting And Serum Separation To Occur.

Washington courts adhere to the Frye standard for the admissibility of scientific or technical evidence. State v. Copeland, 130 Wn.2d 244, 261, 922 P.2d 1304 (1996); State v. Kunze, 97 Wn. App. 832, 853, 988 P.2d 977 (1999). The rationale of the Frye standard is that expert testimony should be presented to the jury only when the scientific community has accepted the reliability of the underlying principles. Copeland, 130 Wn.2d at 255. The Frye standard recognizes that judges do not have the expertise to determine whether a scientific theory is correct, and thus, under Frye, the court defers to the scientific community to assess the reliability of the science. Id. If a party presents expert testimony based upon a novel scientific principle for which general acceptance is disputed, the trial court should conduct a hearing where the proponent of the evidence must show general acceptance by a preponderance of the evidence. Kunze, 97 Wn. App. at 853-54. When general acceptance is not reasonably disputed, no hearing is necessary. Id. Acceptance in the relevant scientific community obviates the need for a Frye hearing. State v. Sipin, 130 Wn. App. 403, 415, 123 P.3d 862 (2005). A trial court's ruling at a Frye hearing, and a trial court's decision that a Frye

hearing is unnecessary, are both subject to de novo review. In re Detention of Berry, ___ Wn. App. ___, 248 P.3d 592, 595 (2011).

The proper focus of the Frye standard is the science upon which the expert's opinion is founded. Id. If the scientific principles upon which the expert's opinion is based are generally accepted, arguments as to the accuracy of the opinion go to the weight of the testimony, not the admissibility. Id. at 597. In In re Detention of Berry, a civil commitment proceeding under the sexually violent predator law, Berry argued that a psychologist's diagnosis of him should have been the subject of a Frye hearing because the diagnosis was not generally accepted in the scientific community. Id. at 595. This Court held that the scientific principles upon which the expert's testimony was based were standard psychological analysis. Id. Berry's arguments as to the shortcomings of the psychologist's diagnosis went to the weight of the testimony, not its admissibility. Id. at 597.

If the principles upon which expert testimony is based satisfy the Frye standard of general acceptance, the testimony must meet the two-part test of ER 702. Copeland, 130 Wn.2d at 256. Expert testimony is admissible pursuant to ER 702 if the witness qualifies as an expert and the testimony would be helpful to the jury. Id.

The appellate court reviews a trial court's decision to admit expert testimony under ER 702 for abuse of discretion. State v. Greene, 139 Wn.2d 64, 70, 984 P.2d 1024 (1999).

In State v. Roberts, 142 Wn.2d 471, 520-21, 14 P.3d 713 (2000), the defendant argued that the trial court erred in admitting the testimony of a forensic scientist as to her bloodstain pattern analysis without conducting a Frye hearing. The state supreme court reiterated that expert testimony that does not involve new scientific principles or new methods of proof is not subject to a Frye hearing. Id. at 520. The court then recognized that bloodstain pattern analysis "hardly qualifies as a novel scientific technique." Id. at 521. The court cited to a number of jurisdictions that have also held that bloodstain pattern analysis does not require a Frye hearing because it is not based on novel scientific principles. Id. As Ross Gardner testified in this case, bloodstain pattern analysis actually predates fingerprint analysis, having first been developed in 1898. 16RP 1510, 1536.

Cases from other jurisdictions illustrate that the presence or absence of clotting has been presented as probative of the timing of events without any dispute as to the scientific validity of such evidence. For example, in State v. Brock, 327 S.W.3d 645, 666

(Tenn. App. 2009), the defense expert in the present case, Stuart James, testified as to average clotting times in concluding that there was a significant time interval between blows that the victim sustained. In Moore v. Morales, 445 F. Supp.2d 1000, 1009 (N.D.Ill. 2006), an expert testified that the lack of any blood clotting at the scene indicated that the wound at issue occurred close to death. In State v. Faulkner, 154 S.W.3d 48, 53 (Tenn. 2005), a medical examiner testified that the beating of the victim lasted at least six minutes because blood had clotted before the end of the attack. There is no indication that testimony as to estimated clotting times was subjected to a Frye hearing in any of those cases.

In the present case, the trial court did not err in concluding that Gardner's testimony was based on generally accepted principles of bloodstain pattern analysis, including generally accepted principles regarding the behavior of blood over a period of time. Gardner's testimony was not based on any novel scientific techniques or principles that required a Frye hearing. Floren's claim that estimates as to when serum separation occurs are not generally accepted is simply incorrect, and not supported by the record.

Floren's own bloodstain pattern analysis expert, Stuart James, testified that blood coagulation and serum separation are relevant factors in bloodstain pattern analysis, and that he himself has testified to time ranges in regard to blood clotting. 13RP 52, 62, 89. Like Gardner, James testified that serum separation could occur in as little as 30 minutes but would likely take an hour. 13RP 79-80.

Moreover, Gardner did not, as Floren claims, testify as to the "precise timing of event[s]." Brief of Appellant, at 36. He gave general time estimates based on the condition of the blood pools seen in the photographs taken by Deputy Saulet. These time estimates were consistent with the other scientific testimony and evidence that was presented to the court. The trial court did not err in concluding that these estimates did not require a Frye hearing.

In any event, this Court can conclude that any error in admitting the testimony regarding clotting times was harmless. An error in admitting evidence is not grounds for reversal unless the reviewing court concludes that within reasonable probabilities the outcome of the trial was materially affected by the error. State v. Bourgeois, 133 Wn.2d 389, 403, 945 P.2d 1120 (1997). See also State v. Leuluai, 118 Wn. App. 780, 796-97, 77 P.3d 1192

(2003) (finding erroneous admission of canine DNA evidence without a Frye hearing harmless).

This Court can conclude within reasonable probabilities that admission of the clotting time ranges in Gardner's testimony did not materially affect the outcome of the trial because Gardner's testimony as to the minimum time for clotting did not exclude the possibility that the victim was alive at 5:52 a.m., as pointed out in defense counsel's cross-examination. On cross-examination, Gardner testified that it was his opinion that the victim lay on her left side for at least seven minutes and that the level of serum separation seen in the large pool of blood took at least 30 minutes. 16RP 1660, 1667. The photographs showing the serum separation were taken by Deputy Saulet between 6:30 and 6:42 a.m. 16RP 1660. Thus, the minimum range of time between the first shot and the photographs taken by Deputy Saulet, based on Gardner's testimony, was 37 minutes. 16RP 1677. If the victim was shot 37 minutes before 6:30 a.m., she would have been alive to activate the alarm at 5:52 a.m. Thus, Gardner's testimony regarding the timing of blood clotting and serum separation was not the critical piece of evidence, as characterized by the Brief of Appellant.

Of far more importance was the evidence indicating that the victim had been shot in the right temple, was lying with her head tilted to her left for a period of time, when blood ran across her forehead and pooled at her left temple, and then her head was repositioned and she was shot in the left nostril with her head tilted to her right, with the large pool of blood forming to the right of her head. It is absolutely implausible that a burglar, foiled in his burglary attempt and hoping to make a quick getaway, would have committed the murder in this manner. It is, however, plausible that a husband, wishing to quickly dispose of his wife, would shoot her once in the right temple, assuming that the single shot would end her life, and after discovering a number of minutes later that she was still breathing and alive, administer a second, more fatal shot.

Gardner's conclusions about the position of the victim's head at the time of the shots, which were not based on clotting times, and the other circumstantial evidence presented, provided compelling evidence of the defendant's guilt. This Court can conclude that any error in failing to hold a Frye hearing as to clotting time estimates was harmless.

2. THE TRIAL COURT DID NOT COMMENT ON THE EVIDENCE.

Floren contends that the trial court issued an unconstitutional comment on the evidence when the court overruled a defense objection during the redirect examination of bloodstain pattern analysis expert Ross Gardner. Floren's claim should be rejected. The court's statement could not be construed as conveying the court's attitude toward the evidence or issues presented in Floren's case. It was clearly nothing more than an explanation of the court's evidentiary ruling. As such, it was not an unconstitutional comment on the evidence requiring reversal.

During the redirect examination of Ross Gardner, the following exchange occurred:

Q: Mr. Gardner, I understand you have rendered an opinion that you believe that if you look at the evidence in this case, based on your analysis, and based upon some information that was provided to you, that Ms. Floren could not have been alive to trigger the alarm at 5:52?

A: Correct.

Mr. Browne: Your honor, that is a leading question.

The Court: I will overrule the objection. I think it's part of the background that has been established by the evidence.

Mr. Browne: Okay.

16RP 1686.

Under article IV, section 16 of the state constitution, a judge is prohibited from conveying her personal opinion about the merits of the case to the jury or from instructing the jury that a fact at issue has been established. State v. Levy, 156 Wn.2d 709, 721, 132 P.3d 1076 (2006). Any remark “that has the potential effect of suggesting that the jury need not consider an element of an offense” is a judicial comment on the evidence. Id.

The purpose of the prohibition against judicial comments on the evidence is to prevent the jury from being influenced by the trial judge's opinion of the evidence. State v. Jacobsen, 78 Wn.2d 491, 495, 477 P.2d 1 (1970). A statement by the court is a comment on the evidence only if the comment conveys to the jury the judge's personal attitude toward the merits of the case or allows the jury to infer that the judge personally believed the testimony in question. State v. Deal, 128 Wn.2d 693, 703, 911 P.2d 996 (1996).

Washington courts have repeatedly held that a court's explanation of an evidentiary ruling does not constitute a prohibited comment on the evidence. State v. Dykstra, 127 Wn. App. 1, 8-9, 110 P.3d 758 (2005). In State v. Cerny, 78 Wn.2d 845, 855-56, 480 P.2d 199 (1971), a murder case, the trial judge responded to a

defense objection to certain circumstantial evidence by stating, "I think the chain of evidence has been established." In holding that the trial court's statement was not a comment on the evidence, the court explained, "A trial court, in passing upon objections to testimony, has the right to give its reasons therefor and the same will not be treated as a comment on the evidence." Id. See also State v. Nesteby, 17 Wn. App. 18, 22, 560 P.2d 364 (1977) (trial court's statement that "we are not talking about possibilities" in sustaining objection not a comment on the evidence).

Similarly, in State v. Swan, 114 Wn.2d 613, 657, 790 P.2d 610 (1990), the court rejected the defendant's claim that the trial court commented on the evidence when it ruled upon whether the State's witness had qualified as an expert. The trial court stated, "Well, I think the evidence establishes her qualifications in the general subject of sexual abuse of children. The court will accept her as an expert on that subject." Id. The state supreme court explained that a trial court must be allowed to rule on evidentiary questions put to it, and must be allowed to inform counsel of its decision. Id. The court concluded that the trial court's comment did not offer a personal opinion about the doctor's testimony and was not a comment on the evidence. Id. at 658.

As in Cerny and Swan, the trial court in the present case was simply explaining its reason for overruling the defense objection. In light of the record, the court's comment cannot reasonably be construed as offering a personal opinion about the credibility of Gardner's testimony. It was not a comment on the evidence.

Moreover, the Cerny court noted that the jury in that case was instructed that anything said by the court should not be taken as an opinion of the court as to the facts of the case, and that the jury is presumed to follow the court's instructions. Cerny, 78 Wn.2d at 856. Likewise, in the present case, the court instructed the jury, both before the evidence was presented and in the final instructions to the jury, as follows:

The law does not permit me to comment on the evidence in any way, and I will not intentionally do so. By a comment on the evidence, I mean some expression or indication from me as to my opinion on the value of the evidence or the weight of it. If it appears to you that I do comment on the evidence, you are to disregard such apparent comment entirely.

16RP 41.

It would be improper for me to express, by words or conduct, my personal opinion about the value of testimony or other evidence. I have not intentionally done this. If it appeared to you that I have indicated my personal opinion in any way, either during trial or

in giving these instructions, you must disregard this entirely.

CP 560. As in Cerny, the jury is presumed to follow the court's instructions.

The cases cited by Floren are inapposite. City of Seattle v. Arensmeyer, 6 Wn. App. 116, 118, 491 P.2d 1305 (1971), involved many unsolicited comments by the trial court during the course of a three-day trial. The appellate court found that the trial court issued an unconstitutional comment on the evidence when the court sua sponte interrupted defense counsel's closing argument and criticized his interpretation of the facts, stating, "Just a minute--that isn't the testimony." Id. at 120. Because the appellate court viewed counsel's argument as containing reasonable inferences from the evidence, it found, unsurprisingly, that the court's statement was a comment on the evidence. Id. at 121. The comments in Arensmeyer are a far cry from the trial court's brief explanation of its evidentiary ruling in this case.

The other two cases cited by Floren predate Cerny. In State v. James, 63 Wn.2d 71, 76, 385 P.2d 558 (1963), the appellate court found that the trial court had commented on the evidence in instructing the jury that the charges against a co-defendant were

being dismissed so he could testify as a witness, "providing that he testify fully as to all material matters within his knowledge." The appellate court found this instruction to be a comment on the credibility of the witness. Id. James did not involve a court's explanation of an evidentiary ruling.

Finally, State v. Vaughn, 167 Wash. 420, 424, 9 P.2d 355 (1932), involved the unusual situation of the prosecuting attorney being called as a witness by one of the co-defendants. In discussing how the prosecutor would cross-examine himself, the court stated, "I dare say he wouldn't answer anything that he shouldn't." Id. at 424. The appellate court viewed the trial court's statement as vouching for the credibility of the prosecuting attorney. Id. at 426. The statement at issue in this case was not a clear statement of the court's view of the credibility of the witness, and thus both James and Vaughn are distinguishable.

Even if the instruction was a comment on the evidence, it was not prejudicial. A judicial comment on the evidence in a jury instruction is presumed prejudicial, and the burden is on the State to show that the defendant was not prejudiced. State v. Jackman, 156 Wn.2d 736, 743, 132 P.3d 136 (2006). The State can meet that burden in this case, because on its face the court's comment

was innocuous. In direct examination, Gardner testified that he had reached a conclusion as to whether the victim was alive at 5:52 a.m., and that based on his analysis he concluded that the pool of blood around the victim's head had formed more than an hour before the photographs were taken. 16RP 1531, 1581. The question that prompted the challenged statement by the court occurred near the beginning of redirect examination. 16RP 1686. Defense counsel objected to the question as leading. 16RP 1686. In responding to the objection, the court merely noted that the question contained background information that had already been testified to by the witness, and thus was not improperly leading. The court's statement cannot be construed as an endorsement of Gardner's opinion itself. As such, it could not have been prejudicial.

In sum, the trial court's explanation for its evidentiary ruling was not an unconstitutional comment on the evidence pursuant to Cerny and Swan. The jury is presumed to have followed the court's repeated instructions, and thus, the brief statement explaining the court's ruling would not have been construed by the jury as an expression of the court's opinion of the testimony. The trial court did not issue an unconstitutional comment on the evidence, and the court's innocuous statement could not have been prejudicial.

3. THE TRIAL COURT PROPERLY EXERCISED ITS DISCRETION IN ADMITTING EVIDENCE OF THE DEFENDANT'S Demeanor FOLLOWING HIS WIFE'S DEATH.

Floren contends that the trial court abused its discretion in admitting opinion evidence of the defendant's guilt from a number of witnesses. Floren fails to offer any substantive analysis of the testimony at issue, and simply mentions eight witnesses in a footnote. As to six of these eight witnesses, no objection was raised below, and the error was not preserved for appeal. As to all of the witnesses, none of the testimony constituted inadmissible opinion testimony on the defendant's guilt. The witnesses were properly allowed to testify about observations they made of the defendant's statements, demeanor and behavior following the victim's death. Some of the witnesses properly drew logical conclusions regarding those observations. The trial court did not abuse its discretion in admitting any of the testimony concerning the defendant's demeanor following his wife's death.

ER 704 provides that testimony in the form of opinion "otherwise admissible is not objectionable because it embraces an ultimate issue to be decided by the trier of fact." The trial court has discretion to admit opinion testimony when it concerns critical facts,

but opinion testimony as to the defendant's guilt is inadmissible.

State v. Allen, 50 Wn. App. 412, 417, 749 P.2d 702 (1988).

Washington courts have repeatedly held that testimony describing personal observations of a defendant's reaction, or lack of reaction, to emotional news is admissible evidence. State v. Stenson, 132 Wn.2d 668, 724, 940 P.2d 1239 (1997); State v. Day, 51 Wn. App. 544, 552, 754 P.2d 1021 (1988); Allen, 50 Wn. App. at 417. Testimony that simply recounts a defendant's statements, behavior and demeanor is not opinion testimony and is admissible as long as it is relevant. Id. Opinion testimony as to the nature of the defendant's reaction, such as testimony that a defendant's reaction is "inappropriate," is also admissible if it has a proper foundation. Id. The opinion must be based on personal observations of the defendant's conduct, factually recounted, and the opinion must be directly and logically supported by those observations. Day, 51 Wn. App. at 552.

For example, in State v. Day, the court held that police officers were properly allowed to testify that the defendant showed very little emotion as he was questioned about his wife's murder, and that his reaction was "inappropriate." 51 Wn. App. at 552. In State v. Allen, the court held that a police detective was properly

allowed to testify that the defendant's reaction to her husband's death was "insincere" where the opinion was based on the detective's observations of the defendant's facial expression, lack of tears and lack of redness in the face. 50 Wn. App. at 416. Likewise, in State v. Stenson, 132 Wn.2d at 724, the court held that a paramedic was properly allowed to testify that he was surprised to learn that the defendant was the deceased's husband because the defendant was calm, unemotional and showed no grief.⁹

In the present case, the trial court addressed the admissibility of evidence of the defendant's demeanor, reactions and behavior following his wife's murder before the trial began. 14RP 167, 171-77. The court made a preliminary ruling that witnesses would be allowed to testify as to their observations of the defendant's behavior, and would be allowed to express an opinion if a proper foundation was laid. 14RP 176-77.

The defendant argues on appeal that testimony from Sergeant Corey, Deputy Saulet, Sandra Wilson, Alan Lynden, Michael Strobel, Marcia Ashley, Jeannine Dowley and Cheryl

⁹ Similarly, in State v. Magers, 164 Wn.2d 174, 190, 189 P.3d 126 (2008), the court held that a police officer was properly allowed to testify that "something was terribly wrong" and the victim seemed "obviously traumatized" based on his personal observations that she was crying and seemed unfocused.

Lindberg constituted improper opinion testimony as to the defendant's guilt, thus invading the province of the jury. However, the only objections raised at trial were to the testimony of Sandra Wilson and Jeannine Dowley. 16RP 239, 1045-53. By failing to object to the testimony of Sergeant Corey, Deputy Saulet, Alan Lynden, Michael Strobel, Marcia Ashley and Cheryl Lindberg at trial, Floren failed to preserve the issue for appeal. State v. Kirkman, 159 Wn.2d 918, 926, 155 P.3d 125 (2007).

Any error in admitting these witnesses' testimony could be raised for the first time on appeal only if Floren could show that the error was a manifest error of constitutional dimension. Id. Improper opinion testimony constitutes manifest error only if it is an explicit witness statement on an ultimate issue of fact. Id. at 936. Floren has made no effort to analyze why these witnesses' testimony was manifest constitutional error. His claim of error raised for the first time on appeal as to these six witnesses must be rejected.

Moreover, none of the testimony was improper. Sergeant Corey testified that when he spoke to Floren on the morning of the murder, he observed no emotional reaction, and described Floren as "very stoic." 16RP 91. This testimony was based upon

Sergeant Corey's personal observations and was proper pursuant to Day and Stenson. Deputy Saulet similarly testified that on the morning of the murder, Floren's demeanor was "nonchalant," and he expressed no emotion. 16RP 128. This testimony was likewise proper pursuant to Day and Stenson.

Sandra Wilson, the Florens' neighbor, testified that she spoke to Floren the day after the murder and was shocked that he "raved about the police and what they had done to him" but expressed no concern about his wife. 16RP 239. She testified that the only emotion that Floren exhibited on that day was anger toward the police. 16RP 239-40. Defense counsel's objection to this line of questioning was properly overruled. Wilson testified as to her personal observations of the defendant on that day. Her expression of surprise at his statements and demeanor was properly based on her personal observations, which were factually recounted, and was a logical conclusion based on those observations. The testimony was properly admitted pursuant to Allen and Day.

Alan Lynden, Sandra Wilson's boyfriend, similarly testified that he observed Floren's demeanor as Floren interacted with the police outside the home on the morning of the murder, and that he

appeared "calm, cool and collected." 16RP 270. He also testified that he had a number of interactions with Floren shortly after the murder, and that Floren seemed primarily concerned with the police having taken his things and expressed "zero concern for Nancy." 16RP 270. This was proper testimony recounting the defendant's statements and behavior.

Nancy Floren's siblings, Michael Strobel and Marcia Ashley, testified that they spoke to Floren by phone the day after the murder, then arrived from out of town and helped Floren remove all of Nancy's belongings from the house. They testified that during their contact with Floren they saw him exhibit no emotion other than anger at the police. 16RP 485-86, 488, 519-20. This was proper testimony recounting personal observations of the defendant's demeanor.

Cheryl Lindberg, the Florens' housekeeper, testified that she cleaned the home several days after the murder and that Floren was primarily concerned about the carpeting and showed no emotion. 16RP 1174-75. Again, this was proper testimony recounting personal observations of the defendant's demeanor.

Finally, Jeannine Dowley, a longtime friend of the Florens, testified on direct examination that she saw the defendant the day

after the murder and that he seemed "upset," "quiet," and "kind of lost." 16RP 1034. She testified that as they continued to socialize with Floren after the murder he "acted like Nancy never existed," and never spoke of her. 16RP 1035-37. She and her husband eventually decided to end their friendship with Floren. 16RP 37. On cross-examination, defense counsel asked her whether she had previously stated in an interview that she "couldn't imagine any situation where Tracy would hurt Nancy and not kill himself as well." 16RP 1043. She admitted having made that statement previously. 16RP 1043. On redirect examination, the prosecutor asked, "When this first happened, you couldn't imagine the defendant harming Nancy. Has that changed?" 16RP 1045. Dowley answered "yes." 16RP 1045.

After the defendant objected, and after extensive argument, the trial court ruled that the defense had opened the door to the subject of whether Jeannine Dowley believed that Floren could harm his wife, and let the answer stand. 16RP 1051. Dowley then testified on further redirect that, after Floren moved to Sequim, she never saw him demonstrate grief over Nancy's death. 16RP 1053.

Most of Jeannine Dowley's testimony involved her recounting her personal observations of the defendant's demeanor

and behavior, and was proper. Jeannine Dowley's testimony regarding her opinion as to whether Floren could ever harm his wife was invited error, if error, because the defense opened the door to this subject. The State may elicit testimony that would otherwise be inadmissible if the defense opens the door to it. State v. Jones, 111 Wn.2d 239, 248-49, 759 P.2d 1183 (1988). Once the door is opened, the doctrine of invited error precludes the defendant from raising the issue on appeal. State v. Myers, 133 Wn.2d 26, 36, 941 P.2d 1102 (1997).

Moreover, Dowley did not testify that she believed Floren was guilty of murdering his wife. Her testimony that her opinion had changed as to whether Floren was capable of ever harming his wife was not an opinion as to whether Floren actually committed the murder. See State v. Russell, 125 Wn.2d 24, 72, 882 P.2d 747 (1994) (holding that testimony about the probability of the defendant having committed the three very similar murders was not an improper opinion on guilt).

In sum, as to six of the eight witnesses who testified about Floren's statements, demeanor and behavior following the murder of his wife, the defense failed to preserve the issue below. As to the other two witnesses, the testimony was properly admitted

because it was based on the witnesses' personal observations and logical conclusions based on those observations, pursuant to Allen, Day, and Stenson.

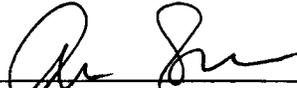
D. CONCLUSION.

The defendant's conviction should be affirmed.

DATED this 18th day of May, 2011.

Respectfully submitted,

DANIEL T. SATTERBERG
King County Prosecuting Attorney

By: 
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Certificate of Service by Mail

Today I deposited in the mail of the United States of America, postage prepaid, a properly stamped and addressed envelope directed to Christopher Gibson, the attorney for the appellant, at Nielsen Broman & Koch, P.L.L.C., 1908 E. Madison Street, Seattle, WA 98122, containing a copy of the Brief of Respondent, in STATE V. FLOREN, Cause No. 64927-2-I, in the Court of Appeals, Division I, for the State of Washington.

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

CCBrame

Name

Done in Seattle, Washington

5/19/11

Date