

NO. 41588-7-II-II

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

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STATE OF WASHINGTON,

Respondent,

v.

SHERYL JEAN MARTIN,

Appellant.

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ON APPEAL FROM THE SUPERIOR COURT OF THE  
STATE OF WASHINGTON FOR CLARK COUNTY

The Honorable Barbara D. Johnson, Judge

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REPLY BRIEF OF APPELLANT

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A. ARGUMENT IN REPLY

1. THE SEARCH WARRANT AFFIDAVIT DID NOT ESTABLISH PROBABLE CAUSE TO SEARCH THE HOUSE OR THE SHOP.

It is well-established that the warrant clauses of the Fourth Amendment to the United States Constitution and article I, section 7 of the Washington constitution require that a search warrant issue only on a determination of probable cause. State v. Fry, 168 Wn.2d 1, 5-6, 228 P.3d 1 (2010) (citing State v. Vickers, 148 Wn.2d 91, 108, 59 P.3d 58 (2002)). To establish probable cause, the affidavit supporting the search warrant must set forth sufficient facts to demonstrate a nexus between the criminal activity, the items to be seized, and the place to be searched. State v. Maddox, 152 Wn.2d 499, 509, 98 P.3d 1199 (2004) (citing State v. Thein, 138 Wn.2d 133, 140, 977 P.2d 582 (1999)); State v. Goble, 88 Wn.App. 503, 509, 945 P.2d 263 (1997) (citing Wayne R. LaFave, Search and Seizure § 3.7(d), at 372 (3d ed.1996)).

Review of the probable cause determination is limited to “the four corners of the affidavit.” State v. Neth, 165 Wn.2d 177, 182, 196 P.3d 658 (2008). The only information the reviewing court may consider in determining whether probable cause existed to issue the warrant is the information that was before the issuing magistrate. Id.

In this case, the warrant affidavit alleged that Martin called 911 and reported that she had just shot her husband; responding units took Martin into custody; Martin's husband, Eddie Martin, was found inside a camper attached to a pickup truck parked in front of a shop; a shotgun wad and a piece of buckshot were found inside the camper; Eddie Martin said his wife had shot him; Eddie Martin appeared to have been shot in the right shin and left elbow; and Martin had told a deputy she just shot her husband. Br. of App. Appendix A. Once information derived from an initial unlawful search of the house was redacted, the affidavit contained no information establishing a nexus between the crime and the house or the shop. The trial court nonetheless concluded there was probable cause to search those locations. CP 210-11.

As an initial matter, it should be noted that the Response Brief filed by the State misstates the standard of review, saying that this Court reviews the trial court's determination of probable cause for abuse of discretion and gives great deference to that decision. Br. of Resp. at 23 (citing State v. Jackson, 150 Wn.2d 251, 265, 76 P.3d 217 (2003)). This is not accurate. While it is true that a magistrate's decision to issue a warrant is given great deference, a trial court's conclusion that the affidavit establishes probable cause is reviewed de novo:

We generally review the issuance of a search warrant only for abuse of discretion. Normally we give great deference to the issuing judge or magistrate. However, at the suppression hearing the trial court acts in an appellate-like capacity; its review, like ours, is limited to the four corners of the affidavit supporting probable cause. Although we defer to the magistrate's determination, the trial court's assessment of probable cause is a legal conclusion we review de novo.

Neth, 165 Wn.2d at 182 (citations omitted). Thus, this Court determines de novo whether probable cause is established within the four corners of the affidavit.

Attempting to distinguish between an appropriate probable cause determination, based solely on the affidavit, and an inappropriate one, relying on other information, the Brief of Appellant pointed out that the trial court inappropriately relied on information established at the suppression hearing. Br. of App. at 17-18. The State contends in its brief that the trial court's statements regarding the connection between the house, the crime, and the evidence sought were simply pre-ruling musings and do not represent findings by the court. Br. of Resp. at 24. The State suggests that because the court did not enter a written conclusion that the nexus requirement was established by information presented at the suppression hearing, the court's probable cause determination should be given deference. Id.

This is a red herring. Whether the trial court entered findings or simply mused on the record is irrelevant. As noted above, this Court reviews the four corners of the affidavit de novo to determine if probable cause exists. This Court can determine, without relying on findings or conclusions by the trial court, that the affidavit contains no specific facts linking the criminal activity or the evidence sought with the places to be searched.

Because the redacted affidavit contained no facts establishing a reason to believe evidence would be found in either the house or the shop, the warrant allowed the police to conduct a general, exploratory search for evidence of the crime. Such searches are “unreasonable, unauthorized, and invalid.” Thein, 138 Wn.2d at 149. The search warrant was not supported by probable cause, and all evidence discovered in the search of the house and the shop should have been suppressed. See Thein, 138 Wn.2d at 150.

2. THE IMPROPER EXCLUSION OF RELEVANT EXPERT TESTIMONY REGARDING BETRAYAL TRAUMA THEORY SIGNIFICANTLY IMPAIRED MARTIN’S RIGHT TO PRESENT A DEFENSE.

The admissibility of scientific evidence is determined under a two-part inquiry. First, the proposed evidence must meet the standard for admissibility under Frye v. United States, 293 F. 1013, 34 A.L.R. 145

(D.C.Cir.1923). Second, the testimony must be admissible under ER 702. State v. Greene, 139 Wn.2d 64, 70, 984 P.2d 1024 (1999). The court below ruled that evidence of Betrayal Trauma Theory did not meet either standard. This Court reviews admissibility under Frye de novo, and admissibility under ER 702 for abuse of discretion. Greene, 139 Wn.2d at 70.

Under Frye, novel scientific evidence is admissible if (1) the theory is generally accepted in the scientific community of which it is a part and (2) there are generally accepted methods of applying the theory capable of producing reliable results. Greene, 139 Wn.2d at 70 (citing State v. Riker, 123 Wn.2d 351, 359, 869 P.2d 43 (1994)). Unanimous acceptance by experts in the field is not required, however. State v. Copeland, 130 Wn.2d 244, 270, 922 P.2d 1304 (1996).

At the pretrial Frye hearing, the defense presented expert testimony and exhibits establishing that Betrayal Trauma Theory is generally accepted in the relevant scientific community of trauma psychology. See Br. of App. at 20-27, 32-33. The State contends in its brief that Appellant cites no authority for the position that the trauma psychology community—rather than the psychological community as a whole—is the relevant scientific community. Br. of Resp. at 28. Appellant readily concedes that no case has yet held that the trauma psychology community

is the relevant scientific community when determining the admissibility of Betrayal Trauma Theory evidence. Likewise, the State has cited no case holding that the psychological community as a whole is the relevant scientific community. But this Court is not limited to decisions by other courts in a Frye determination, or even to the record before the trial court. See Copeland, 130 Wn.2d at 255-256. Contrary to the State's suggestion, Appellant has cited relevant authority regarding the appropriate scientific community, including information from the American Psychological Association, as well as testimony from experts and exhibits at the Frye hearing. See Br. of App. at 32-34.

The State also claims that Appellant has failed to provide any argument that exclusion of evidence regarding Betrayal Trauma Theory impaired her constitutional right to present a defense. Br. of Resp. at 38. This is simply false. Appellant argued at length that expert testimony on Betrayal Trauma Theory would have provided the necessary context for the jury to determine whether Martin lacked capacity to form intent, noted that the constitution guarantees the defendant the opportunity to put his or her version of facts before the jury, and concluded that the improper exclusion of relevant expert testimony substantially impaired her diminished capacity defense. Br. of App. at 37-45. The State's contention that no argument was presented on this issue is specious at best.

3. THE TRIAL COURT IMPROPERLY EXCLUDED EVIDENCE NECESSARY TO MARTIN'S DIMINISHED CAPACITY DEFENSE.

Martin raised a defense of diminished capacity, which required her to produce expert testimony demonstrating that a mental disorder impaired her ability to form the culpable mental state to commit the charged offense. See State v. Atsbeha, 142 Wn.2d 904, 914, 16 P.3d 626 (2001). Dr. Laura Brown testified at trial that she diagnosed Martin with histrionic personality disorder as well as major depression. 21RP<sup>1</sup> 1080. Brown explained that histrionic personality disorder can contribute to a vulnerability to dissociate, and she concluded that Martin experienced a dissociative episode before the shooting, through an interaction of her personality disorder, her depression, and the psycho-social stressors she experienced that night. 21RP 1125-26. While in this dissociative episode, Martin was unable to form the intent necessary to commit the crime. 21RP 1142.

Brown's diagnosis was based in significant part on Martin's description of her marriage. Frye Exhibit 33, at 14. Brown concluded that

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<sup>1</sup> The Verbatim Report of Proceedings is contained in 25 volumes, designated as follows: 1RP—5/7/08; 2RP—6/3/08; 3RP—6/19/08; 4RP—7/3/08; 5RP—11/20/08; 6RP—2/19/09; 7RP—5/21/09; 8RP—6/4/09; 9RP—8/20/09; 10RP—10/1/09; 11RP—11/4/09; 12RP—1/14/10; 13RP—3/18/10; 14RP—5/3/10; 15RP—8/4/10; 16RP—8/5/10; 17RP—9/29/10; 18RP—10/12/10; 19RP—10/18/10; 20RP—10/19/10; 21RP—10/20/10; 22RP—10/21/10; 23RP—10/22/10; 24RP—10/25/10; 25RP—11/23/10.

Martin's perceptions of the relationship and her reasons for staying in it were evidence of histrionic personality disorder. 21RP 1114-21. But the trial court excluded significant portions of the evidence on which Brown based her diagnosis. Although Martin had described multiple incidents of physical and mental abuse during her marriage, the court limited the defense to general testimony that the marriage was volatile and Martin was unhappy and felt emotionally isolated. 19RP 744-45. The court's exclusion of relevant evidence substantially impaired Martin's diminished capacity defense. The fact that Martin described specific incidents rather than just claiming her marriage was volatile adds weight to Brown's conclusion that Martin suffered a mental disorder which caused a dissociative episode in which she was unable to form the necessary intent.

The State argues that because Brown did not testify that the mistreatment Martin suffered *caused* her mental disorders, there is no basis for admission of evidence describing that mistreatment. Br. of Resp. at 38. The State cites no authority for the proposition that an expert's testimony regarding a mental disorder must be limited to the cause of that disorder. In fact, the evidence rules permit an expert to testify about any evidence relied on in reaching his or her opinion, if such evidence is reasonably relied on by experts in the field. ER 703; State v. Eaton, 30 Wn. App. 288, 294, 633 P.2d 921 (1981). Brown indicated she relied on

Martin's description of the mistreatment when diagnosing Martin with histrionic personality disorder. It was a factor which informed Brown's opinion, regardless of whether it was the cause of the diagnosed disorder. Frye Exhibit 33, at 14. The State makes no argument that Brown did not reasonably rely on the excluded evidence in reaching her diagnosis.

The State then inexplicably claims that Brown did not rely on Martin's mistreatment by her husband to reach a diagnosis. Br. of Resp. 39. This is a clear misstatement of the evidence. Brown's report, on which the parties relied in arguing the admissibility of this evidence, states as follows:

A Histrionic Personality Disorder is the best explanation for Ms. Martin's actions throughout her marriage, as well as for her extreme emotional response to the news of Ed's infidelity and possible abandonment of their marriage. Her life as a submissive wife, and traditionally feminine woman whose main interpersonal strategy was to be pleasing to others, particularly her husband, is a common way of relating for histrionic women.

The Histrionic Personality Disorder diagnosis is supported by a number of other factors.

First, histrionic personality is associated with low levels of insight into oneself and one's own behavior. It is characterized by the frequent use of avoidant psychological defenses, such as repression, dissociation and, in more psychologically sophisticated individuals than Ms. Martin, of denial and minimization as strategies for coping with difficulties and emotional distress. Ms. Martin's life-long use of these defenses and her paucity of insight were both apparent to me as she described how she coped with her marital difficulties by simply hoping that Mr. Martin would eventually change, even after 30 years. She clearly knew that she was unhappy with her husband, but would deflect herself from those feelings of unhappiness and dissatisfaction by focusing on

pleasing him, on remediating her alleged mistakes as a wife, and becoming increasingly disconnected from herself emotionally.

Frye Exhibit 33, at 14.

Next, the State claims there is some inconsistency in Appellant's citation of both the abuse of discretion standard of review and the constitutional harmless error standard. Br. of Resp. at 41. Actually, the State is confusing two separate questions. Whether the court's decision to exclude evidence is erroneous is determined by the abuse of discretion standard. State v. Grant, 83 Wn. App. 98, 920 P.2d 609 (1996). Once it is determined that the court erred, the question becomes whether that error requires reversal. Since the error in this case impaired Martin's constitutional right to present a defense, the constitutional harmless error standard applies, and the State bears the burden of proving beyond a reasonable doubt that the error was harmless. See State v. Maupin, 128 Wn.2d 918, 928-29, 913 P.2d 808 (1996). The State has not met that burden.

Instead, the State again claims that that Appellant makes no argument that her right to present a defense has been impaired. Br. of Resp. at 41. Again, this claim is specious. Appellant argued that the excluded evidence was admissible, relying on Grant, 83 Wn. App. at 109; State v. Lopez, 142 Wn. App. 341, 355, 174 P.3d 1216 (2007); Eaton, 30

Wn. App. at 294; ER 703; and ER 705. Appellant argued that “It was vital to the diminished capacity defense that the jury understand why the events on the night of the shooting would trigger a dissociative reaction. Martin’s description of specific incidents within the marriage, rather than just general statements about her perception of the relationship, would lend credibility to the expert’s opinion.” Br. of App. at 46. Appellant further argued, “[T]he fact that Martin described these specific incidents rather than just claiming the relationship was volatile adds weight to Brown’s conclusion that Martin suffered a mental disorder which caused a dissociative episode in which she was unable to form the necessary intent.” Br. of App. at 47. And further, “Because the court limited Brown’s testimony regarding the basis for her diagnosis, the jury was missing crucial evidence by which to assess the credibility of her opinion.” Br. of App. at 48. The State has failed to prove that the court’s error in excluding relevant expert testimony was harmless, and Martin is entitled to a new trial.

B. CONCLUSION

For the reasons stated above and in the Brief of Appellant, this Court should reverse Martin’s conviction and remand for a new trial.

DATED this 18<sup>th</sup> day of November, 2011.

Respectfully submitted,



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Certification of Service by Mail

Today I delivered a copy of the Reply Brief of Appellant in *State v. Sheryl Jean Martin*, Cause No. 41588-7-II as follows:

Sheryl J. Martin, DOC# 345252  
Washington Corrections Center for Women  
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I certify under penalty of perjury of the laws of the State of Washington that the foregoing is true and correct.



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Catherine E. Glinski  
Done in Port Orchard, WA  
November 18, 2011

# GLINSKI LAW OFFICE

**November 18, 2011 - 1:53 PM**

## Transmittal Letter

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