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Division III
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NO. 36809-2-III

COURT OF APPEALS, DIVISION III

OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

BETHANY WALLACE-CORFF,

Appellant.

BRIEF OF RESPONDENT

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2 Did the State present sufficient evidence that Ms. Wallace-Corff intended to inflict great bodily harm when the record suggests that the gun accidentally discharged when Mr. Whitaker reached for it?

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2 The State presented sufficient evidence to the trial court sitting as the finder of fact for it to conclude the Appellant intentionally shot the victim with intent to cause great bodily injury.

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I. ASSIGNMENTS OF ERROR

A. ISSUES PRESENTED BY ASSIGNMENTS OF ERROR.

Appellant has raised two issues in this appeal. Those assignments of error can be summarized as follows:

1. Did the trial court err when it concluded that Wallace-Corff's recorded statement was admissible when her waiver of the right to remain silent was coerced by the prospect of her children being placed with CPS if the police also arrested her ex-husband during the investigation?
2. Did the State present sufficient evidence that Ms. Wallace-Corff intended to inflict great bodily harm when the record suggests that the gun accidentally discharged when Mr. Whitaker reached for it?

B. ANSWERS TO ASSIGNMENTS OF ERROR.

1. The trial court did not err when it concluded the Appellant made her statement to Det. Shaw knowingly, intelligently and voluntarily and that the statement was not coerced.
2. The State presented sufficient evidence to the trial court sitting as the finder of fact for it to conclude the Appellant intentionally shot the victim with intent to cause great bodily injury.

II. STATEMENT OF THE CASE

Det. Drew Shaw, a twenty-one-year veteran of the Yakima Police Department went to the defendant's apartment and arrested her. At the time of arrest the Appellant was advised of her rights per Miranda. She chose to exercise those rights by requesting an attorney. Det. Shaw ceased all communication with Wallace-Corff. Trial RP 12-14.

Wallace-Corff told Det. Shaw she understood the rights that were read to her. RP 15. At the time of this interaction between the Appellant and the detective, the Appellant did not appear to be under the influence of anything and was able to coherently answer questions put to her. RP 15, 19

Appellant was transported to jail and held in an interview room. Det. Shaw later contacted Appellant again to advise her that a patrol officer would be transporting her to jail. When re-contacted Wallace-Corff stated to the detective she now wanted to talk to him about the incident. RP 16. At that time or around that time Appellant asked the detective if an attorney would be coming to the police department. Det. Shaw informed her that she would receive counsel after she had gone through the booking process. RP 16. Wallace-Corff stated that she wanted to speak to the detective. Shaw reminded her about her previous request to have an attorney but Wallace-Corff persisted in her desire to give the officer a statement.

Det. Shaw was unaware of anyone else questioning Wallace-Corff while she was in custody at the police department. He again asked her if she wished to give a statement outside the presence of an attorney and she continued to want to make a statement. Det. Shaw read Wallace-Corff her Miranda rights a second time. RP 16-17. The detective again asked

Wallace-Corff is she understood the rights read to her and waived those rights and she again verbally acknowledged that she understood those rights and wanted to waive those rights and speak with the detective.

Det. Shaw testified the defendant was not under the influence of any intoxicants that he knew of, that he did not threaten Wallace-Corff to get her to make this statement. At no time during this interview did Wallace-Corff ask that the questioning stop or again ask for an attorney. RP 19-20. She was asked by the detective whether he had used threats to induce her to make her statement. She indicted no. RP 20.

The entire statement after Wallace-Corff waived her rights was recorded and a copy of that was filed with the court at the time of the hearing. RP 20-21 Trial Exhibit 17, 22. The trial court referred extensively to that recording when it ruled that the statement was admissible for trial. RP 63-65.

When questioned on cross examination Det. Shaw testified that he might have seen Wallace-Corff after he read her her Miranda rights but he did not recall seeing her and that because she was not being interviewed the recording equipment was not activated and on. RP 23. Det. Shaw was very specific that "[t]here was no conversation between she and I after he initial invocation of her rights and the second time." RP 24. When asked on cross examination about specific facts alleged to have been known

about and asked of Wallace-Corff by Det. Shaw after appellant invoked and then reinitiated the officer stated that those facts, such as the gun used and who owned that gun were not actually known to the offices until after Wallace-Corff made her statement to the police. RP 24.

Det. Shaw reentered the interview room to advise the Appellant that she would soon be transported to the jail by another officer, at that time she had been in police custody for approximately two hours. RP 26 Det. Shas stated on cross that he did not ask specific questions of a detained person who had invoked their rights. He stated that there could be conversation regarding "procedures" regarding transportation and custody of her children. PR 27.

The defendant took the stand during the CrR 3.5 hearing. Appellant testified that she did not remember if Det. Shaw was one of the officers who was at her apartment when she was taken into custody. She testified that she was read her Miranda rights and invoked. She stated that she was allowed to complete dressing her children, had their father called and was told by the officers that they would not handcuff her until her children had left. The officers waited to take action until the children's father came and got the children. RP 31-32. She stated no, no officer asked her if there were any weapons present and no one searched her purse. RP 32 She stated she was taken to the police department by a

uniformed officer(s) and no one questioned her during that transport. She was taken to the police station and placed in a room. RP 34

She stated that at some point Det. Shaw came into the interrogation room and asked her "…did you use the Colt .45?" When led by her attorney's question "[d]id he tell you that it was Daniel's Colt .45?" She stated "yes" and further testified that "[h]e told me we're going to get Daniel involved." Her interpretation of this question/statement was that the police suspected Daniel had the weapon that was used in the "alleged assault" and they were going to arrest Daniel who had just taken custody of their children and "I don't know where they would go, probably into foster care. RP 34-5.

Wallace-Corff stated that Det. Shaw came back a few times and asked her questions about the case including requesting Daniel Ronald's [sic] phone number and stating at least twice that he, Det. Shaw, was "going to get Daniel Rodello involved." RP 35 Appellant finished her direct testimony as follows:

> Q. Did you speak to an attorney?
> A. No.
> Q. Having made the decision you wanted to talk to an attorney, apparently you changed your mind at some point.
> A. Only because I was afraid that Daniel Rodello was going to be arrested. I didn't want him to be involved in this. He had no involvement.
> Q. That was enough to get you to not want to talk to a lawyer?
> A. My number one priority is my children. If Daniel Rodello

was arrested, then I was afraid my children would go to CPS. I want them to be at home with their father.

Q. Prior to asking you the questions about the gun and about Daniel's involvement, did he advise you that you didn't have to answer them?

A. I'm sorry. Repeat the question.

Q. After the rights were read to you at your house and prior to him asking you any questions about the gun and Daniel's involvement, did he reread you your rights?

A. No.

Q. Did he tell you that the only thing he could talk to you about was whether or not you wanted -- you still wanted to speak to an attorney?

A. No.

Q. Did he ever ask you, other than when he read you your rights your second time, any questions about wanting to speak to an attorney? RP 36-37.

During cross examination Wallace-Corff acknowledged that while at her apartment no officer asked her questions about the assault. RP 37. She acknowledged that Det. Shaw read her her rights per Miranda and that she invoked those rights and asked to see an attorney. Her claim was that Det. Shaw read her those same rights at the police station "…after asking me a few questions about – questions that had to do with the assault." and she again acknowledged those rights and at that time did not request an attorney. RP 38. She stated that Det. Shaw asked her question about the Colt .45 before he had read her Miranda the second time. That these questions were while she was in the interrogation room and before she was advised that she would be transported to the jail. RP 39

The Court itself questioned the Appellant:

BY THE COURT:
Q. You say that Detective Shaw, before you were advised on the second occasion of your Miranda rights, asked you about a Colt .45?
A. Yes.
Q. And what did you say?
A. I said, no, that it was not involved in the assault and that Daniel was not involved.
Q. Okay. That's it?
A. He just asked me, did you use a Colt .45?
Q. And you said, no?
A. I said, no. He said, does Daniel own a Colt .45? I said, yes.
Q. What other questions were asked of you by Detective Shaw during the time that you were in the interrogation Room before you were advised of your rights the second occasion?
A. He asked me what Daniel Rodello's phone number was.
Q. Okay. Is that it?
A. (Nods head affirmatively.)
THE COURT: Does that raise any questions for anybody?
RP 39-40

On redirect Wallace-Corff's attorney elicited a response as to "[w]hat did the [alleged questions pre second Miranda] mean to you." Wallace-Corff stated it meant they were "suspecting" him in the assault because he had the weapon they believe was used and he (Rodello) was going to be arrested." RP 41

The State clarified with Appellant that Det. Shaw had questioned her about this weapon after the second advisement of her Miranda rights. Wallace-Corff agreed there was questioning about the gun after the second

advisement.

The Court interposed its own additional questions based on its review of the transcript of the recorded statement and the fact that in that statement the term "Colt .45" was not used by Det. Shaw, the detective referred to it as a "cowboy gun" a "revolver." Wallace-Corff responded "[w]ell, to me that's a cowboy gun, a Colt .45." RP 42-43 To which the Court responded "It's a manufacturer. It's a type of weapon. It's not necessarily a cowboy gun." RP 42-43.

The State recalled Det. Shaw who testified that he had gone to Mr. Rodello's home after Wallace-Corff was arrested to look for the weapon the police suspected had been used in this assault. Rodello indicated to the police that he had two weapons and that he was not very good at keeping track of them. He retrieved a small safe and there was only one weapon in that safe. The missing firearm was a .380 semiautomatic which was the type of firearm the police believed had been used in this assault. The detective clarified that he would not have asked Wallace-Corff about a "Colt .45" because the police were not looking for that type of weapon, they were looking for a .380 semiautomatic. RP 45-6.

Wallace-Corff's attorney cross examined Det. Shaw further regarding the timing of the detective's interaction with Mr. Rodello. The detective testified he spoke to Rodello about the weapons and that Rodello

owned a .357 and a .380, the .357 was the weapon which was still in the safe. The detective testified the reason he was looking for a .380 not a .357 or Colt .45 was that there was a spent shell casing found at the scene of the assault which was a .380. He also testified that the shell which was found was "ejected" from the firearm which would suggest a semiautomatic weapon and that he did not know of a .380 revolver. RP 46.

Det. Shaw again testified the Appellant was placed into custody, Rodello was called to pick up the children, while Rodello was at the station Det. Shaw asked him about the firearms, the detective then traveled to Rodello's home to examine the weapons. Det. Shaw then returned to the station finished his "SIR" report, reiterated he had not independent recollection of mentioning looking for the weapon to Wallace-Corff and that Wallace-Corff was unaware that Det. Shaw had spoken to Rodello about the weapons. RP 47-48.

In closing Appellant's trial counsel argued under the circumstances as testified to by Wallace-Corff, "[u]nder those circumstances, in the light of what she said, if Daniel (Rodello) were to become involved and arrested, there would be no one to care for her children. That was coercive."

The court immediately asked, "If you're saying that is a threat

doesn't it have to be overt?" Trial counsel's response was that there did not even need to be a threat, just talking to the Appellant after she had invoked her right to remain silent. RP 52. Counsel stated that the officers knew the child custody issue was a "pressure point" and the officers "should have suspected it was a pressure point."

The trial court stated that prior to a final ruling it needed to listen to the recorded interview. The court did note that in its review of the transcript "…there's no mention of a Colt .45. There's extensive questioning of the defendant regarding the firearm and where it is and where it might be and things of that nature, which is inconsistent with her testimony about this other. She also was adamant that it was a Colt .45. I didn't put those words in her mouth. Those are her own utterances." RP 54. The trial court took the matter under consideration. PR 54

At the next court hearing the defendant waiver her right to trial by jury. The court confirmed on the record this was what Appellant wished to do. RP 57-62. During this same hearing documents were filed with the court under seal, purporting to address Wallace-Corff's ongoing request for new counsel. She also stated to the court that she felt that she had not been adequately represented. She stated she felt her only defense was diminished capacity, but the expert hired didn't address this issue. RP 58-9.

The court then proceeded with its ruling on the CrR 3.5 hearing. That ruling is as follows:

> THE COURT: I am prepared to rule on the 3.5 issue. If you want me to address that, I certainly will. It's really not a legal question as much as it is a factual question. There's some divergence obviously in the testimony from Detective Shaw and from Ms. Wallace-Corff, some divergence as to two items in particular, which are the ones that are in dispute factually.
>
> Ms. Wallace-Corff says she was contacted twice after she invoked her right to counsel while she was at the police department in the holding cell or the interview room and the inquiry was two things. Did you use a Colt .45 was one inquiry that was made and then a statement attributed to Detective Shaw that we're going to get Daniel involved.
>
> The difficulty with putting those statements attributed to Detective Shaw in context is that they're in conflict with the statement, the recorded statement, which is Ms. Wallace-Corff's recorded utterances. So I find a significant conflict there.
>
> In the statement, in the recorded statement, she's not sure of the make or model of the firearm that was used in the alleged assault. There's no mention of a Colt .45 by the defendant. There's a reference by Detective Shaw as to a cowboy gun, which I know from previous cases I've heard Detective Shaw testify that that's a phrase he uses to distinguish between automatic and revolvers when he's interviewing people who aren't terribly conversant in firearms. So, there's no reference to the Colt .45.
>
> Clearly in Ms. Wallace-Corff's testimony, she specifically referenced that term. There used to be some beverage that was a Colt 45. In any event, at the end of the taped statement she said that no threats or promises were made. There's no mention anywhere in the statement any concern about the daughters and about CPS becoming involved in some fashion.
>
> The taped statement starts off with the colloquy

> between Ms. Wallace-Corff and Detective Shaw about why she's been arrested. In fact, he starts off with, you know, because we didn't have a chance to talk about this at your apartment, let me tell you why you've been arrested. So that's also inconsistent with the notion that these other statements were made by Detective Shaw prior to the taking of the taped statement.
>
> I am not saying Ms. Wallace-Corff is being deceitful about that. I think she's mistaken. I think that if these other statements were made by Detective Shaw, I think they were made after the taped statement and not before.
>
> Consequently, I do find that the statement was voluntarily given. It was made after the appropriate advice and waiver of Miranda rights and that it is admissible at the time of trial.
>
> …
>
> THE COURT: Yes, I did. I guess, to clarify, Detective Shaw's summary, if you would, of the circumstances that led to Ms. Wallace-Corff contacting him and saying that she did at that point want to make a statement, having previously invoked her right to counsel, I believe that that is what occurred. I don't think that there was anything that was said by Detective Shaw to, you know, prompt that change of heart.

Officer Huizar was the first officer to the scene of this crime. When he arrived, he met with the gunshot victim who was later determined to be Mr. Whitaker. The officer observed that victim had a gunshot wound to his left leg. The victim was in the bathroom and appeared to be in substantial pain. Also, in the residence was the victim's girlfriend and the girlfriend's mother. Throughout this initial contact the victim refused to tell the officer who he was. This officer finally identified the victim when he looked through his wallet as part of the investigation.

RP 77-78. Officer Huizar collected evidence from the scene, Whitaker's clothing and a spent shell casing in the bedroom on the bed, retrieve it and booked these items into evidence. RP 78-9 Officer Huizar met the victim at the hospital who continued to refuse to cooperate with the investigation, he would not tell the officer what occurred nor would he sign a medical release. RP 79 The items collected at the scene and the shell casing were admitted in the trial RP 85-88.

Officer Huizar testified on cross examination that he did not see evidence of an exit wound, that Mr. Whitaker was uncooperative and continued to assert that he did not know who had shot him. RP 92. The only information the Mr. Whitaker supplied to this officer regarding the shooting was he was sleeping; heard a bang and he did not know who it was who shot him. RP 97.

Det. Shaw testified that one of the initial matters that he handled was to go to the hospital where the victim, Mr. Whitaker, had been operated on and retrieved the slug that had been removed during surgery. That projectile was admitted as an exhibit. RP 103-4. Det. Shaw then attempted to contact Mr. Whitaker at the location of the shooting, he was eventually able to reach the victim who continued to be uncooperative and would not provide any information even though Det. Shaw opined that Whitaker knew who had shot him. This all occurred on either December

28th or 30th. Det. Shaw determined that due to the uncooperativeness of Whitaker he would close the case. RP 105-6

Det. Shaw testified that he was contacted several weeks later by Whitaker who at the time indicated he wished to cooperate. Whitaker came to the police department and gave a recorded statement and his injuries were photographed. Those photographs were admitted as exhibits. RP 107-8, 9. Whitaker also allowed the police access to his Facebook account which contained messages between Whitaker and Wallace-Corff. RP 109. After Whitaker allowed access the detectives printed off the string of messages exchanged between, he and the "...female that he identified as having shot him." RP 109-110. Whitaker also provided a diagram of the room where the shooting occurred and where he was when he was shot. RP 111-12.

Det. Shaw took the name given by Whitaker Bethany Corff, pulled information as well has photographs and created a photomontage which he subsequently showed to Ms. Hill who was the other person present when Whitaker was shot. At the time she was shown these pictures she also gave a statement. RP 114-5.

Det. Shaw testified that soon thereafter, the 19th of January, he and several other officers went over to Appellant's apartment and met with her. She was arrested and during the period the officers were there

arraignments were made for Mr. Rodello, the father of at least one of the young children in the apartment to come and take custody of those children. RP 114-16. Appellant was taken into custody, read her rights per Miranda, she invoked those rights and she was then transported to the police department. RP 117, 119.

While at Appellant's apartment Det. Shaw met Mr. Rodello and inquired of him if he owned any weapons. Rodello indicated that he owned two, a .380 and a .357. The detective believed the .380 was significant because the shell casing found at the scene of the shooting was a .380 casing. Rodello agreed to allow the officer to go to his residence and determine if the .380 was still in his possession. The .380 was not found and Rodello suggested that it may have been stolen. RP 119-20, 127

Det. Shaw then returned to the police department and wrote his "SIR" suspect information report and he went to the interview room where Wallace-Corff was being held and contacted her to let her know she would shortly be transported to the county jail. Wallace-Corff then began to reinitiate contact by stating she was now willing to make a statement. Det. Shaw reminded her of her previous invocation and request to see an attorney. Wallace-Corff again stated she wanted to provide a statement. The detective retrieved a record and re-Mirandized Wallace-Corff then he took a recorded statement from her. RP 120-21. The nearly hourlong

recorded statement was admitted as an exhibit. RP 122

Wallace-Corff's counsel cross examined Det. Shaw regarding her invocation of her right to an attorney. The detective clarified what he stated to the Appellant regarding when she would receive counsel. Det. Shaw stated he understood her invocation to mean the defendant was not going to speak to him without an attorney present not that she would confer with an attorney then speak to the detective. RP 125-6

Dr. Gene Griffiths testified he was the on call orthopedic surgeon when Mr. Whitaker was admitted. His initial description of what he did was "…we basically put the bones back in alignment with plates and screws in surgery." RP 130 The doctor examined his left leg and determined what he observed was consistent with a gunshot wound. The x-ray showed the remains of what was possibly a .38 or a .45 larger caliber round. The round caused a fracture of the distal femur. RP 130-31. The doctor testified that the location of the injury was near the main artery running through the leg, that depending on the location and damage it could cause damage such that the leg would have to be amputated if not corrected and could cause the victim to bleed to death. RP 131-32. The doctor described the damage: "So the bone [sic] entered through the lateral weight-bearing portion and disrupted both condyles. It split the two condyles and caused disruption to the knee." The doctor testified that he

took the shattered bone and put the pieces back together using screws and plates. RP 133

The doctor testified one of the original x-rays "…shows the disruption of the joint. The weight-bearing surface is in multiple pieces. Then it's kind of split. The CT scan shows it more definitively. From this, basically the weight-bearing surface is probably in four or five major fragments with metallic fragments consistent with gun discharge." RP 137. The doctor testified of the various risks associated with this type of injury, the risks of surgery which included infection, bleeding, risk of anesthesia, blood clots and the long-term prognosis after surgery.

He stated that he had met Whitaker in the hallway before his testimony and due to the damage in the knee that was injured, and post-operative issues, Whitaker had in fact had a total replacement of his knee. RP 138-9. He testified the basis for the need for this replacement was the injury sustained when he was shot. RP 139 Dr. Griffiths testified that post-operatively Whitaker had significant stiffness and pain in his knee that injections and shots were used in an attempt to alleviate this, but it was finally determined that a total joint replacement was the best option. RP 140-43

Gordan Whitaker testified that he had a relationship with the Appellant that had ended with them having a child. He lived with

Wallace-Corff for a while but eventually the relationship ended and "(he) didn't see her again until she shot me." RP 153-5.

He testified he had been messing around with Darlene Hill prior to being shot. At the same time, he was "messing around" with Wallace-Corff. RP 154-55. At the time he was shot he had impregnated both the Appellant and Ms. Hill. RP 155-6

He testified that he had been at a party the night he had been shot. That he went back to Ms. Hill's residence and had an argument with her and "I just laughed at her." He then fell asleep on the bed with his clothing on. RP 156-7.

The next thing he remembered was waking up and seeing the defendant standing between his legs tapping him, telling him to wake up and that he had some explaining to do. Ms. Hill was present in the room. RP 178-79. Whitaker stated he got up to leave and Wallace-Corff pulled out a gun and told him to sit down. He then testified:

> A. Yeah. When I seen the gun, I was just trying to figure it out. I was trying to focus. My vision was blurry. I was thinking to myself, is that real? She just put it right on my leg and looked at me. You F'd with the wrong B and boom.
> Q. What did she say?
> A. I just told you.
> Q. You can say it.
> A. She said, you fucked with the wrong bitch and looked at me and shot me, just put it on my leg and shot me. It happened so fast. I just seen

> smoke come out of my leg and the most pain I've ever felt in my life. RP 158-9.

Whitaker testified that injury hurt him every day and that when he first spoke to detectives, he knew who had shot him, he just couldn't tell them. RP 161. He testified his knee was shattered and the femur bone was broken in half. He was in a brace for a year and had therapy but the knee developed scar tissue and caused him to have limited use of the knee. Three months before trial he had a complete knee replacement. Even after that surgery his leg is still not functioning as it was prior to the shooting. He has not worked since the shooting. RP 163-4.

On cross examination Whitaker testified Ms. Hill had called Wallace-Corff and told Whitaker they were going to confront him because they were both pregnant by him at the same time. RP 177-8 He testified that after he was shot there was smoke coming out of the wound RP 181, 186.

III. ARGUMENT.

1. Response to allegation one – The court properly admitted Wallace-Corff's confession, there was no coercion.

It is well-established that both the Fifth Amendment and Art. I, s. 9 of the Washington State Constitution protect a suspect from being compelled to give evidence against himself. State v. Earls, 116 Wn.2d 364, 375, 805 P.2d 211 (1991); Miranda v. Arizona, 384 U.S. 436, 16 L.

Ed.2d 694, 86 S. Ct. 1602 (1966).

In determining whether custodial statements were voluntarily given, a court engages in an examination of the totality of the circumstances surrounding the giving of the statement. State v. Unga, 165 Wn.2d 95, 100, 196 P.3d 645 (2008). Coercive police conduct is a necessary predicate to a finding that a confession is not voluntary. Id., at 100-01, *citing* Colorado v. Connelly, 479 U.S. 157, 167, 107 S. Ct. 515, 93 L. Ed. 2d 473 (1986).

A statement may be found to be involuntary if law enforcement officers exert coercive pressure upon a defendant in order to obtain a confession. Id., at 101, *citing* Withrow v. Williams, 507 U.S. 680, 693-94, 113 S. Ct. 1745, 123 L. Ed. 2d 407 (1993). Coercion may be by means of an express or implied promises or by the exertion of improper influence. Id., *citing* State v. Broadaway, 133 Wn.2d 118, 132, 942 P.2d 363 (1997); Arizona v. Fulminante, 499 U.S. 279, 285, 111 S. Ct. 1246, 113 L. Ed. 2d 302 (1991).

"[F]indings of fact entered following a CrR 3.5 hearing will be verities on appeal if unchallenged, and, if challenged, they are verities if supported by substantial evidence in the record." State v. Broadaway, 133 Wn.2d 118, 131, 942 P.2d 363 (1997). This court will review de novo whether "the trial court derived proper conclusions of law from its

findings of fact." State v. Pierce, 169 Wn. App. 533, 544, 280 P.3d 1158 (2012).

If a promise has been made by law enforcement, the test is not merely whether that promise had been made, but whether the defendant's will was overborne by the promise, or in other words, whether there is a direct causal relationship between the promise and the confession. Broadaway, 133 Wn.2d at 132; United States v. Walton, 10 F.3d 1024, 1029 (3d Cir. 1993).

A police officer is not precluded from employing psychological ploys or playing on the defendant's sympathies in the interrogation of a suspect, but the officer's statements may not be so "manipulative or coercive that they deprived [the suspect] of his ability to make an unconstrained, autonomous decision to confess." Miller v. Fenton, 796 F.2d 598, 605 (3d Cir. 1986).

In Fulminate, law enforcement used knowledge that an accused child murderer faced credible threats by other inmates in offering protection in exchange for a confession to the murder. The Supreme Court affirmed the state court in holding that such a promise was coercive, and the confession was involuntary. Fulminate, 299 U.S. at 286.

The Supreme Court likewise held that a confession was coerced when an interrogator told the suspect that "30 or 40 people" would be

coming to "get him", and that he would be protected if he would tell the truth. Payne , 356 U.S. at 561, 567.

A suspect's decision to cut off questioning does not raise a presumption that she is unable to proceed without a lawyer's advice, but an unequivocal request for a lawyer does. Arizona v. Roberson, 486 U.S. 675, 683, 108 S. Ct. 2093, 100 L. Ed. 2d 704 (1988) (citing Michigan v. Mosley, 423 U.S. 96, 101 n.7, 96 S. Ct. 321, 46 L. Ed. 2d 313 (1975)). The presumption raised by a suspect's request for a lawyer is that she considers herself unable to deal with the pressures of custodial interrogation without legal assistance. Id. After a request for a lawyer, "reinterrogation may only occur if 'the accused himself initiates further communication, exchanges, or conversations with the police.'" Id. at 680-81 (quoting Edwards v. Arizona, 451 U.S. 477, 485, 101 S. Ct. 1880, 68 L. Ed. 2d 378 (1981)). When a suspect asserts the right to cut off questioning, the police may honor that right by ceasing the interrogation and resuming questioning only after the passage of a significant period of time, the provision of a fresh set of warnings, and restricting the interrogation to a crime that had not been the subject of the earlier interrogation. Roberson, 486 U.S. at 683 (citing Mosley, 423 U.S. at 106).

This court defers to the trier of fact on issues of conflicting testimony, witness credibility, and the persuasiveness of the evidence.

State v. Thomas, 150 Wn.2d 821, 874-75, 83 P.3d 970 (2004). State v. Homan, 181 Wn.2d 102, 105-06, 330 P.3d 182 (2014). "Substantial evidence" is evidence sufficient to persuade a fair-minded person of the truth of the asserted premise. Homan, 181 Wn.2d at 106.

The trial court heard the testimony at the CrR 3.5 hearing and determined that the testimony of Wallace-Corff was "…not deceitful in her testimony, but she is mistaken."

Det. Shaw, an officer with 21 years of experience, testified unequivocally that he ended substantive conversation with Wallace-Corff at her apartment once she explicitly stated she wanted an attorney present. Wallace-Corff's testimony during the CrR 3.5 hearing was inconsistent with her recorded statement. She claimed Det. Shaw queried her about the gun he was looking for using terminology that he did not use later in the recorded interview.

Her claim that he questioned her regarding a "Colt .45" was also inconsistent with the weapon the detective suspected had been used in the commission of this crime. The evidence at the scene was a single cartridge which Det. Shaw opined was ejected from a semi-automatic firearm. A "Colt .45" is a revolver and does not eject its cartridge automatically and the shell casing was for a .380 semi-automatic weapon. Wallace-Corff accurately described the .380 firearm in her confession.

There is literally nothing in the record from the CrR 3.5 hearing which would indicate that Det. Shaw did anything which could be considered coercive. There is noting in the confession itself where the Appellant expresses any worry about her children being seized from her ex-husband due to his alleged involvement in this crime nor is there any mention of this alleged fear that Child Protective Services (CPS) was somehow involved or was going to come gather up her children and place them in foster care.

The confession itself details the fact that Mr. Rodello was ignorant of her actions and was not culpable in her theft of the firearm. What Wallace-Corff stated in this confession memorialized not only her culpability in this criminal act but her knowledge that others were not implicated in the methodology she employed, specifically stealing a gun and then taking that gun to Ms. Hill's residence to confront Mr. Whitaker. By her very own words at the end of that statement Wallace-Corff disproves this allegation;

> Det. Shaw:
>
> Q. Is everything you'd told me, Bethany, been true to the best of your knowledge?
> A. Yes.
> Q. Did I use any threats or force to get you to talk to me today?
> A. No. (Exhibit 22 page 15)

The recorded statement has been supplied to this court along with the transcript of the interview. This evidence along with the testimony of Det. Shaw and the Appellant was before the trial court at the time it made its determination regarding the admissibility of that confession. This court need only listen to the recording and read the transcript along with the testimony from the CrR 3.5 hearing to find the actions of Det. Shaw were not coerce by any measure. Admission by the trial court was not error.

2. <u>Response to allegation two – The evidence was insufficient to support the conviction for Assault in the First degree.</u>

Appellant challenges, the sufficiency of the evidence presented and whether that evidence supports the court's determination she committed the crime of Assault in the First degree. Specifically, she challenges the proof that she intended to inflict great bodily harm. She argues proof is insufficient because in her recorded confession she claimed she took the gun for self-protection and it accidentally went off when the victim grabbed for the gun this. Absolutely no other evidence in the record supports this theory. Appellant did not testify at trial.

Mr. Whitaker, the victim of the assault, testified that prior to being shot he got up to leave and Wallace-Corff pulled out a gun and told him to sit down. "I stood up because I was about to try to leave. Then she pulled out the gun and was like, just sit down. I was like, whoa…when I seen the

gun, I was just trying to figure it out. I was trying to focus. My vision was blurry. I was thinking to myself, is that real? She just put it right on my beg [sic] and looked at me. You F'd with the wrong B and boom. RP 158-59

He further clarified this, the only sworn statement in the record, as follows: "[s]he said, you fucked with the wrong bitch and looked at me and shot me, just put it on my leg and shot me. It happened so fast. I just seen smoke come out of my leg and the most pain I've ever felt in my life." RP 158-59.

Wallace-Corff corroborated this stamen in her confession:

> Q. Did you say anything to him like you fucked with the wrong girl or the wrong bitch or anything like that?
> A. Probably at one point when Darlene's smacking him around. You know, was, was mad then.
> (Exhibit 21 page 13.)

The facts meet the test set forth in, State v. Bucknell , 144 Wn.App. 524, 527, 183 P.3d 1078 (Div. 3 2008) "In reviewing a sufficiency of the evidence challenge, the test is whether, after viewing the evidence in a light most favorable to the jury's verdict, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. State v. Green, 94 Wn.2d 216, 220-21, 16 P.2d 628 (1980)."

To determine whether sufficient evidence supports a conviction,

they view the evidence in the light most favorable to the prosecution and determines whether any rational fact finder could have found the elements of the crime beyond a reasonable doubt. State v. Engel, 166 Wn.2d 572, 576, 210 P.3d 1007 (2009). When a defendant claims the evidence is insufficient, they admit the truth of the State's evidence and all reasonable inferences that can be drawn from it. State v. Drum, 168 Wn.2d 23, 35, 225 P.3d 237 (2010).

This court defers to the trier of fact on issues of conflicting testimony, witness credibility, and the persuasiveness of the evidence. State v. Thomas, 150 Wn.2d 821, 874-75, 83 P.3d 970 (2004). State v. Homan, 181 Wn.2d 102, 105-06, 330 P.3d 182 (2014). "Substantial evidence" is evidence sufficient to persuade a fair-minded person of the truth of the asserted premise. Homan, 181 Wn.2d at 106.

Following a bench trial, this court's review is limited to determining whether substantial evidence supports the findings of fact, and if so, whether the findings support the conclusions of law. State v. Homan, 181 Wn.2d 102, 105-06, 330 P.3d 182 (2014). This court will review challenges to a trial court's conclusions of law de novo. State v. Gatewood, 163 Wn.2d 534, 539, 182 P.3d 426 (2008). Review is to determine if substantial evidence supports any challenged findings and whether the findings support the conclusions of law. Dorsey v. King

County, 51 Wn.App. 664, 668-69, 754 P.2d 1255, review denied, 111 Wn.2d 1022 (1988).

While Appellant challenged two of the findings and conclusion of the trail court which addressed the CrR 3.5 hearing she has **not** challenged any of the findings or conclusions entered by the court after the trial to the bench. Unchallenged findings of fact are verities on appeal. State v. O'Neill, 148 Wn.2d 564, 571, 62 P.3d 489 (2003). Finding number 5:

> 5. Subsequently, Ms. Wallace-Corff and Mr. Whitaker had a conversation via Facebook. Ms. Wallace-Corff sent Mr. Whitaker a message with the following statement: "your lucky I found out after I all ready broke up with you or I woulda gave u a lot worse. I hope you think of me and your fatherless child everytime u pull your pants over your knees." This statement supports the theory that Ms. Wallace-Corff did not intend to kill Mr. Whitaker, but intended to inflict great bodily harm by the practice known as kneecapping. CP 80

This finding is a verity, it has not been challenged.

There was no conflicting testimony from the State's witnesses. The only alleged conflict was from the statement made to Det. Shaw by Appellant. This court ruled in State v. Hill, 83 Wn.2d 558, 520 P.2d 618 (1974), "[t[he Court will still accord an "appropriate and substantial effect" to state court "resolutions of conflicts in evidence as to the occurrence or nonoccurrence of factual events and happenings." The reason given for this is the "trial judge and jury are closest to the trial

scene and thus afforded the best opportunity to evaluate contradictory testimony." (Citations omitted)

By claiming insufficiency Wallace-Corff is bound to accept the State's evidence and all reasonable inferences drawn in favor of the State, with circumstantial evidence and direct evidence considered equally reliable. State v. Salinas, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992); State v. Delmarter, 94 Wn.2d 634, 638, 618 P.2d 99 (1980). The elements of a crime can be established by both direct and circumstantial evidence. State v. Brooks, 45 Wn. App. 824, 826, 727 P.2d 988 (1986). One is no less valuable than the other. All reasonable inferences are drawn in favor of the State and strongly against the defendant. See State v. Jackson, 137 Wn.2d 712, 730, 976 P.2d 1229 (1999).

The trial court stated the following when it made its oral ruling determining the State had proven its case against the Appellant beyond a reasonable doubt:

> I don't believe -- based upon the Facebook message that came after the fact and the admission that she made to Detective Shaw about you fucked with the wrong bitch and Mr. Whitaker's testimony to the same effect, she took the handgun, put it up against his knee and pulled the trigger, a practice which is known as kneecapping.
>
> She didn't intend to kill him. She did, in fact, intend to inflict great bodily harm, bodily injury that caused a significant and serious and permanent loss or impairment of the function of Mr. Whitaker's leg.
>
> The Facebook posts reiterates what her intent was, to

> make him remember what he did to her every day when he puts his pants on. That was her motivation. That was her intent. RP 231.

Overwhelming evidence – Harmless error.

The trial court annotated the findings of fact and conclusions of law for the CrR 3.5 hearing handwriting in to that document; "I would have convicted the (defendant) of 1° Assault even if her statement to Det. Shaw had not been offered or admitted." CP 101.

Even if this court were to find error State v. Carlin, 40 Wn. App. 698, 700 P.2d 323 (1985) addresses the method of review where, as here, the totality of "untainted" evidence is overwhelming, "The Washington Supreme Court has applied two different tests to determine whether error is harmless beyond a reasonable doubt. Under the "contribution" test, the question is whether the tainted evidence contributed to the finding of guilt. Under the "overwhelming evidence" test, the question is whether the untainted evidence is so overwhelming that it leads necessarily to a finding of guilt. Harris, at 157-58; State v. Jones, 101 Wn.2d 113, 125, 677 P.2d 131 (1984)."

As set forth above the evidence presented by the State was overwhelming, State v. Thompson, 151 Wn.2d 793, 92 P.3d 228 (2004):

> This constitutional error may be considered harmless if we are convinced beyond a reasonable doubt that any reasonable trier of fact would have

> reached the same result despite the error. State v. Brown, 140 Wn..2d 456, 468-69, 998 P.2d 321 (2000). To make this determination, we utilize the "overwhelming untainted evidence" test. State v. Smith, 148 Wn.2d 122, 139, 59 P.3d 74 (2002). Under this test, we consider the untainted evidence *admitted at trial* to determine if it is so overwhelming that it necessarily leads to a finding of guilt. *Id.* (Emphasis in original)

The trial court acknowledged this with this annotation. The trial court at the time the findings were discussed and entered determined it would add this information acknowledging it would have found guilt even without the admission of the defendant's statement. RP 278.

State v. Flores, 164 Wn.2d 1, 186 P.3d 1038, 1047 (2008) "Evidence that is merely cumulative of overwhelming untainted evidence is harmless. State v. Nist, 77 Wn.2d 227, 236, 461 P.2d 322 (1969); *see also* Dennis J. Sweeney, *An Analysis of Harmless Error in Washington: A Principled Process,* 31 GONZ. L.REV. 277, 319 (1995) ("Regardless of the announced standard of review for harmless error, Washington has a long history of ruling error harmless if the evidence admitted or excluded was merely cumulative.")."

The State is uncertain why this annotation is contained in the findings and conclusions for the CrR 3.5, the State can only speculate that it done on that document because the trial court was addressing various issues and findings. What does matter is the trial court recognized that

this allegation might be raised, and if the court's finding of guilt, which was partially based on the confession, was found to be in error this court would be able to affirm the conviction without need for remand or retrial.

The ruling in question were discretionary, State ex rel. Carroll v. Junker, 79 Wn.2d 12, 26, 482 P.2d 775 (1971) "Judicial discretion is a composite of many things, among which are conclusions drawn from objective criteria; it means a sound judgment exercised with regard to what is right under the circumstances and without doing so arbitrarily or capriciously. State ex rel. Clark v. Hogan, 49 Wn.2d 457, 303 P.2d 290 (1956). Where the decision or order of the trial court is a matter of discretion, it will not be disturbed on review except on a clear showing of abuse of discretion, that is, discretion manifestly unreasonable, or exercised on untenable grounds, or for untenable reasons. MacKay v. MacKay, 55 Wn.2d 344, 347 P.2d 1062 (1959); State ex rel. Nielsen v. Superior Court, 7 Wn.2d 562, 110 P.2d 645, 115 P.2d 142 (1941)."

IV. CONCLUSION

This defendant argues the actions of the primary detective in this case were so coercive that her will was overborne and she was in effect forced to confess in order to insure that her children were not spirited away by Child Protective Services where they then would be relegated into foster care. The flaw in this theory is that there is literally nothing to

support this alleged coercion occurred other than some statements of Wallace-Corff. These were never expressed to anyone at the time of the confession and interview.

This court need only look to that interview to determine this detective did not conduct an abusive interview that beat down Wallace-Corff's will and belief for the safety and welfare of her children coercing her to the point she just had to confess.

Wallace-Corff's testimony, her statements to the victim when she shot him and in subsequent statements by text and social media, demonstrate her actions were intentional and that her goal was to inflict great bodily harm on Whitaker which he would remember every day.

For the reasons set forth above this court should deny this appeal and affirm the actions of the trial court.

Respectfully submitted this 18th day of February 2020,

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I, David B. Trefry state that on February 18, 2020, I emailed a copy of the Respondent's Brief, to Lise Ellner at liseellnerlaw@comcast.net

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

DATED this 18th day of February, 2020 at Spokane, Washington.

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