

64927-2

REC'D

64927-2

FEB 28 2011

King County Prosecutor  
Appellate Unit

NO. 64927-2-I

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

STATE OF WASHINGTON,

Respondent,

v.

TRACY FLOREN,

Appellant.

2011 FEB 28 PM 4:33

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

The Honorable Harry McCarthy, Judge

BRIEF OF APPELLANT

CHRISTOPHER H. GIBSON  
Attorney for Appellant

NIELSEN, BROMAN & KOCH, PLLC  
1908 E Madison Street  
Seattle, WA 98122  
(206) 623-2373

**TABLE OF CONTENTS**

	Page
A. <u>SUMMARY OF THE APPEAL</u> .....	1
B. <u>ASSIGNMENTS OF ERROR</u> .....	2
<u>Issues Pertaining to Assignments of Error</u> .....	3
C. <u>STATEMENT OF THE CASE</u> .....	4
1. <u>Procedural History</u> .....	4
2. <u>Substantive Facts</u> .....	4
a. <i>Discovery of the Body</i> .....	4
b. <i>Tracy Floren's Arrival, Interrogation, Release and             Eventual Arrest.</i> .....	6
c. <i>The Prosecution's Experts</i> .....	9
d. <i>Civilian Witnesses for the Prosecution</i> .....	15
e. <i>The Defense</i> .....	21
f. <i>Facts Relevant to Admissibility of Gardner's Testimony             Regarding Timing and the Post-Trial Motion for a New             Trial.</i> .....	26
D. <u>ARGUMENT</u> .....	31
1. <u>FAILURE TO HOLD A FRYE HEARING REGARDING         THE BASIS FOR GARDNER'S OPINION REGARDING         THE TIME OF DEATH REQUIRES REVERSAL</u> .....	31
2. <u>THE TRIAL COURT'S COMMENT ON THE EVIDENCE         VIOLATED ARTICLE 4, § 16 OF THE WASHINGTON         CONSTITUTION AND DENIED TRACY FLOREN A         FAIR TRIAL</u> .....	37

**TABLE OF AUTHORITIES (CONT'D)**

Page

3.	TRACY FLOREN WAS DENIED A FAIR TRIAL BECAUSE NUMEROUS WITNESSES WERE ALLOWED TO TESTIFY HE DID NOT REACT AS THEY WOULD HAVE EXPECTED TO NEWS OF HIS WIFE'S DEATH, THEREBY INFERRING THEY THOUGHT HE WAS GUILTY OF MURDERING HER.....	43
E.	<u>CONCLUSION</u> .....	46

**TABLE OF AUTHORITIES**

	Page
<u>WASHINGTON CASES</u>	
<u>Seattle v. Arensmeyer</u> 6 Wn. App. 116, 491 P.2d 1305 (1971).....	40
<u>State v. Baxter</u> 134 Wn. App. 587, 141 P.3d 92 (2006).....	38
<u>State v. Becker</u> 132 Wn.2d 54, 935 P.2d 1321 (1997).....	39
<u>State v. Buckner</u> 133 Wn.2d 63, 941 P.2d 667 (1997).....	31
<u>State v. Cauthron</u> 120 Wn.2d 879, 846 P.2d 502 (1993).....	31, 33, 36
<u>State v. Copeland</u> 130 Wn.2d 244, 922 P.2d 1304 (1996).....	31, 33
<u>State v. Eaker</u> 113 Wn. App. 111, 53 P.3d 37 (2002).....	38
<u>State v. Gore</u> 143 Wn.2d 288, 21 P.3d 262 (2001).....	31
<u>State v. Gregory</u> 158 Wn.2d 759, 147 P.3d 1201 (2006).....	31, 33
<u>State v. Haga</u> 8 Wn. App. 481, 507 P.2d 159 (1973).....	43
<u>State v. James</u> 63 Wn.2d 71, 385 P.2d 558 (1963).....	40, 41, 43
<u>State v. Kirkman</u> 159 Wn.2d 918, 155 P.3d 125 (2007).....	44, 45

**TABLE OF AUTHORITIES (CONT'D)**

	Page
<u>State v. Lampshire</u> 74 Wn.2d 888, 447 P.2d 727 (1968).....	39
<u>State v. Levy</u> 156 Wn.2d 709, 132 P.3d 1076 (2006).....	38, 39
<u>State v. Roberts</u> 142 Wn.2d 471, 14 P.3d 713 (2000).....	26, 33, 34
<u>State v. Russell</u> 125 Wn.2d 24, 882 P.2d 747 (1994).....	31
<u>State v. Vaughn</u> 167 Wash. 420, 9 P.2d 355 (1932) .....	41, 42, 43
 <b><u>FEDERAL CASES</u></b>	
<u>Erye v. United States</u> 293 F 1013 (D.C. Cir. 1923).....	26, 29, 30, 31, 32, 33, 34, 35, 36, 37
 <b><u>OTHER JURISDICTIONS</u></b>	
<u>People v. McDonald</u> 37 Cal.3d 351, 690 P.2d 709 (1984) .....	32
<u>People v. Mendoza</u> 23 Cal.4th 896, 4 P.3d 265 (2000) .....	32
<u>People v. Young</u> 425 Mich. 470, 391 N.W.2d 270 (1986).....	32
 <b><u>RULES, STATUTES AND OTHER AUTHORITIES</u></b>	
ER 702.....	33
RAP 2.5.....	44
RCW 9A.32.030 .....	4

**TABLE OF AUTHORITIES (CONT'D)**

	Page
RCW 9.94A.533 .....	4
Strengthening Forensic Science in the United States: A Path Forward The National Academies 2009 .....	28, 35
Wash. Const. Art. IV, § 16.....	2, 3, 37, 38, 43

A. SUMMARY OF THE APPEAL

Appellant Tracy Floren (Tracy) was convicted of first-degree murder for the shooting death of his wife, Nancy Floren (Nancy). King County Sheriff deputies discovered Nancy's body at about 6:20 am, while responding to a 5:52 am alarm triggered at the Floren home.

Tracy was absent when police arrived, but returned at about 7:50 am. Police told him his wife had been injured and taken to a hospital. They then asked Tracy to give a statement regarding his whereabouts that morning. When Tracy agreed, he was locked in a patrol car and interrogated. Tracy told police he had attended an Alcoholic Anonymous (AA) meeting from 6:30 am to 7:30 am, and produced a confirming sign-in record, along with receipt for a nearby Circle-K store time-stamped 5:24 am that morning, where he said he stopped for coffee and a muffin on the way to the meeting. Tracy subsequently engaged in a three-hour taped interview with detectives, during which the detectives maintained the ruse that his wife was alive and undergoing treatment at the hospital. At the conclusion of the interview the detectives told Tracy his wife had died, and insinuated that they suspected he was her killer. Tracy was not arrested, however, until several months later.

At trial, the prosecution's case relied heavily on the condition of the blood in Nancy's hair and the pools of blood that formed around her head before she was found. The prosecution found a blood spatter expert willing

to testify, over defense objection, that the extent of coagulation of blood in Nancy's hair, and the extent of serum separation in the pools of blood around her head, as depicted in the initial photograph taken at about 6:40 am, meant she was shot and killed before the alarm was triggered. On this basis, the State argued Tracy killed Nancy and then attempted to stage the scene to make authorities think she was killed by a burglar after triggering the alarm.

Three claims are made on appeal: (1) it was error to admit expert testimony on timing based on blood conditions because the science is unsound; (2) a comment on the evidence by the trial court that the expert's calculation were correct violated Tracy's right to a fair trial; and (3) allowing multiple witnesses to testify Tracy's reaction to Nancy's death was, in their opinion, unusual in its lack of emotion, also deprive Tracy of a fair trial.

#### B. ASSIGNMENTS OF ERROR

1. The trial court erred in admitting the State expert's opinion that the condition of the blood at the scene showed Appellant's wife was dead before the alarm was triggered.

2. The trial court violated Appellant's constitutional rights under article 4, § 16 of the Washington Constitution by stating the blood evidence established Appellant's wife was dead before the alarm was triggered.

3. The trial court erred in denying Appellant's motion for a new trial.

4. The trial erred in allowing numerous witnesses to inferentially opine that Appellant's lack of reaction to the death of his wife meant he was guilty.

Issues Pertaining to Assignments of Error

1. Did the trial court erred in admitting the State expert's opinion that Appellant's wife was dead before the alarm was triggered based on the condition of the blood at the scene, without first holding a hearing to determine whether such novel scientific evidence could meet the standard for admissibility?

2. Did the trial court violate article 4, § 16 of the Washington Constitution, and thereby deny Appellant a fair trial, when, in the course of ruling on an objection, it remarked that analysis of the blood at the scene established that Appellant's wife was dead before the alarm was triggered?

3. Did the trial court err in allowing numerous witnesses to testify that Appellant's reaction to the death of his wife was, in their opinions, unusual or abnormal?

C. STATEMENT OF THE CASE

1. Procedural History

On March 28, 2008, the King County Prosecutor charged appellant Tracy Floren with one count of first degree murder, while armed with a firearm. CP 1; RCW 9A.32.030(1)(a); RCW 9.94A.533(3). The prosecutor alleged Tracy shot and killed his wife, Nancy, on September 2, 2007, at their home in Kent. CP 1.

A jury trial was held before the Honorable Harry J. McCarthy. 8RP-16RP.<sup>1</sup> The jury found Tracy guilty as charged. Supp CP \_\_ (sub no. 104, Verdict Form, 12/10/09); Supp CP \_\_ (sub no. 105, Special Verdict Form, 12/10/09). CP 34. Tracy was sentenced to 360 months of incarceration, and now appeals. CP 1006-22; 16R 2657.

2. Substantive Facts

*a. Discovery of the Body*

At 5:52 am on September 2, 2007, ADT Security Services received a "hold-up" alarm from the Floren home in Kent. 16RP 796. King County

---

<sup>1</sup> There are 33 volumes of verbatim report of proceedings referenced as follows: 1RP 2/27/09; 2RP - 3/6/09; 3RP - 4/14/09; 4RP - 4/17/09; 5RP - 5/22/09 (before the Honorable Palmer Robinson); 6RP - 7/1/09; 7RP - 9/11/09; 8RP - 9/21/09; 9RP - 9/25/09; 10RP - 10/5/09; 11RP - 10/7/09; 12RP - 10/8/09; 13RP - 10/12/09; 14RP - 10/13/09; 15RP - 10/14/09; 16RP - 18-volume consecutively paginated set for the dates of October 26 & 29, 2009, November 2-5, 9, 12, 16-19, 23-24, 30, 2009, December 1-4, 7-8, 10, 2009, and January 13, 2010.

Sheriff deputies Carol Neely and Paul Saulet were dispatched and arrived at the home at about 6:15 am. 16RP 44-46, 106. There was no alarm sounding when they arrived.<sup>2</sup> 16RP 47, 107. They went to the front door and knocked, but no one answered, although they could see a dog moving around in the house. 16RP 47, 108. The front door was locked, so Neely went around the side of the house, where she found a man-door to the garage slightly ajar. 16RP 50-53, 109. Saulet joined her and they entered the garage and then the house through another unlocked door that opened from the garage into a mud/laundry room. 16RP 53-54, 109-11.

Once inside they discovered Nancy lifeless body on the floor in the hallway to the garage, near an alarm panel, with a gun by her right hand. 16RP 55-57. Saulet immediately called for medics, and then he and Neely checked the rest of the house; no one else was there. 16RP 55, 58, 113.

According to one of the responding medics, his crew was dispatched at 6:26 am, and arrived at 6:32 am. 16RP 72. The medics immediately declared Nancy deceased and left the scene without providing any treatment. 16RP 60, 74-75.

---

<sup>2</sup> When law enforcement tested the alarm at a later date, the audible alarm ended four minutes after the alarm was triggered. 16RP 1160.

According to Saulet, the medics were at the scene for less than 10 minutes. 16RP 115. After they left, Saulet took photographs of Nancy's body. 16RP115-16; Ex. 2.

The sheriff deputy supervisor for the day, Sergeant James Corey, received a call from Saulet at 6:24 am, and arrived at the scene at 6:41 am. 16RP 86, 119. Corey instructed Saulet and Neely to check the neighborhood for potential witnesses while he notified other sheriff's office personnel needed at the scene. 16RP 87.

*b. Tracy Floren's Arrival, Interrogation, Release and Eventual Arrest.*

At about 7:50 am, Saulet, Neely and Corey were outside the Floren home when Tracy drove up. 16RP 62, 89, 96, 120. When Tracy asked what was going on, either Corey or Saulet told him they had responded to an alarm at his home and that his wife had been injured and hospitalized, even though her dead body remained in the house. 16RP 90, 97-99 121, 2064. Shortly thereafter, at Corey's direction, Tracy agreed to provide a statement to Saulet. 16RP 93, 96.

According to Corey, prior to giving a statement to Saulet, and possibly in response to an inquiry from one of the officers, Tracy explained he had just come from attending an early morning AA meeting, and went to his car and retrieved a sales receipt documenting the purchase

of coffee and a muffin at 5:24 am that morning at a nearby Circle-K store. 16RP 92-93, 102-03; Ex. 3 (Circle-K receipt). According to Saulet, Tracy did not retrieve anything from his car, and instead already had the sales receipt in his front shirt pocket, along with his AA sign-in log, both of which he produced to corroborate what he had already told the officers regarding his whereabouts. 16RP 124-26, 135-36; Ex. 4 (AA sign-in log).

Saulet searched Tracy and then locked him in the back of his patrol car in order to take his statement. 16RP 121, 2065. Tracy recalled asking Saulet for information about his wife's health status, which Saulet refused to provide. 16RP 2066. Saulet, however, testified, "I don't really remember that[,]" and could only recall Tracy's initial question after driving up. 16RP 121-22. Tracy completed a written statement for Saulet, and was then left locked in the car for over an hour until he agreed to go with John Pavlovich, the lead detective, to the Regional Justice Center (RJC) for a more detailed interview. 16RP 2068, 2070; Ex. 9 (Tracy's statement to Saulet).

Pavlovich and his partner, Detective Thein Do, took Tracy to the RJC; about a 15-minute drive from the Floren home. 16RP 316. Do did not recalled any conversation during the drive. 16RP 317, 358. Pavlovich recalled some conversation about Tracy's job, but nothing else. 16RP 428-29. Tracy, however, specifically recalled Pavlovich denying his request to

go see his wife at the hospital before going to the RJC, telling Tracy that "No, they won't let us do that." 16RP 2072, 2125.

Once at the RJC, Pavlovich and Do interviewed Tracy for approximately three hours, during which Tracy repeatedly denied having any role in Nancy's injuries. 16RP 322; Ex. 85 (94-page interview transcript). For most of the interview the detectives maintained the ruse that Nancy was still alive and being treated. 16RP 321; Ex. 85. In the late stages, however, Pavlovich told Tracy that Nancy was dead, claiming the hospital called and said she could not be saved. Ex. 85 at 74.

At the conclusion of the interview the detectives did not arrest Tracy, but did seize all the clothes he was wearing, including his shoes, watch and ring, and photographed his naked body. 16RP 323-24, 432-33, 435-36, 652, 2084. The detectives gave Tracy a paper jumpsuit, a pair of pants and some socks to wear before dropping him off, shoeless, at a Target store near South Center after the interview, and told him he could not return home until law enforcement completed their work. 16RP 324, 326, 436, 653, 2085-86, 2089-90. Tracy eventually rented a room for the night at the South Center Doubletree Inn, where Pavlovich later came to collect a DNA sample from him. 16RP 655, 1818, 2090, 2092.

Tracy was allowed to return home the following day, September 3, 2007. 16RP 1819, 2093. Tracy was shocked when he entered his home

and found his wife's blood covering the floor, the office in a "topsy-turvy" mess, and fingerprint dust on everything. 16RP 2095. Tracy attempted some cleaning on his own, but eventually gave up and hired an agency that specialized in cleaning crime scenes. 16RP 2096-97. Tracy was, at that point, very upset with the Sheriff's office for several reasons, including refusing to allow him to see his wife before she died, insinuating that he was her killer, and leaving his home in a mess. 16RP 2098-99.

Tracy eventually sold the home and moved to Sequim in January 2008, in order to concentrate his efforts on finishing the home he and Nancy had broken ground on just a couple of weeks before her death. 16RP 1828, 1976, 1988, 2019, 2104-05. Tracy was arrested in Sequim on March 7, 2008, and charged with killing his wife. 16RP 604, 1830.

*c. The Prosecution's Experts*

In an attempt to solve who murdered Nancy, the Sheriff's office engaged a number of experts, including a tracker, a botanist, a forensic computer analyst, and various forensic scientists, including glass fragments analysts and a blood spatter interpreter. Their relevant findings are set forth below.

Expert tracker Detective Kathy Decker arrived at the Floren home at about 11:30 am the day Nancy's body was found. 16RP 804-07, 813. In the process of evaluating the scene, Decker noted recently disturbed

ground and damage to plants near a six-foot high fence separating the Florens' backyard from a water retention pond, indicating that someone may have climbed over the fence and into the retention pond area as they fled the scene. 16RP 934, 938-40, 947, 949.

On the retention pond side of the fence, Decker found a pair of earplugs on the ground, and evidence of a single person's footprints leading out of the retention pond, which she marked with blue tape. 16RP 942-45. When tracking dogs were later provided scent from one of Tracy's t-shirts, they did not respond to anything in the retention pond area, but when given the scent from gauze rubbed in the trail identified by Decker, the dogs tracked along the blue-tape markings. 16RP 1207-08, 1822-23.

Research botanist Peter Zika was contacted by Pavlovich about a month after Nancy's death. 16RP 833, 848. Zika was asked to evaluate grass fragments found by Pavlovich on September 3, 2007 in the back of the car Tracy drove up in as police were beginning their investigation, and various plant pieces found stuck to the pants, socks and shoes seized from Tracy after his RJC interview. 16RP 852, 868-69, 1314. Based on Pavlovich's description of the grass, along with observations of the grass and a visit to the Floren residence on October 9, 2007, Zika opined that it had probably been cut only 1-2 days before it was collected. 16RP 864. Based on Zika's visits to the Floren home, the retention pond, the nearby

Circle K, and the AA meeting location, Zika noted that some of the plant fragments found on Tracy's clothes could have come from the retention pond, while other clearly did not, and some of the plant fragments could not have come from any of the locations Zika looked at for purposes of comparison. 16RP 875-88, 925: Ex. 104 (chart showing Zika's findings). Zika conceded he never investigated what plant species Tracy may have come in contact with in Sequim, where he and Nancy were for the two weeks preceding her death. 16RP 909, 1828, 1988. There is also no indication Zika investigated what plants Tracy may have come in contact with when he went to the RJC with Do and Pavlovich the morning of Nancy's death.

Pavlovich seemed particularly interested in linking glass fragments found in Tracy's car and on his clothes, with glass in the man-door to the Florens' garage, which appeared to have been scored with a glass cutter at some point. 16RP 1069-85. To establish this link, Pavlovich employed the services of both government and private laboratories. Washington State Crime Laboratory (WSCL) scientist Kim Duddy concluded there was no link. 16RP 1094. Despite Duddy's recommendation that further analysis was unwarranted, Pavlovich retained the services of a laboratory in Florida, and then another laboratory, Micro Trace, who both, despite

additional testing, reached the same conclusion as Duddy. 16RP 1097, 1100, 1245-47.

WSCL scientist Margaret Barber checked the pants, belt and shirt seized from Tracy by Pavlovich and Do for trace evidence. 16RP 1120-21, 1131. Barber found no blood on them. 16RP 1122.

Computer forensic consultant and retired police officer David Swartzendruber was retained to assess the internet history of several computers seized from the Floren home. 16RP 688, 693, 698. Swartzendruber concluded that between March and August 2007, Tracy had been intentionally accessing various internet sites offering mail-order brides, dating services and sex. 16RP 710-12, 725-31, 734, 741, 778, 785.

WSCL DNA expert Sarah Atterbury was tasked with looking for blood on various items seized including the pants, ring and watch taken from Tracy. 16RP 982-83. Like her colleague Barber, Atterbury found no blood on any of the items she looked at. 16RP 983. Atterbury did, however, match DNA on the ear plugs found near the fence by Decker, with Tracy's DNA. 16RP 984, 992.

Associate King County Medical Examiner Dr. Aldo Fusaro conducted the autopsy of Nancy's body. 16RP 1719. Dr. Fusaro noted Nancy's injuries include two close range small caliber gun shots to the head, one to the right temple and one up the left nostril, and an abrasion to

the back left side of her head consistent with striking the ground as she fell. 16RP 1725-26, 1734, 1738. Dr. Fusaro opined that Nancy did not die instantly because of the quantity of blood she discharged at the scene, which indicated her heart was still beating after she was shot, and the presence of blood in her lungs, indicating she had taken a breath after she began to bleed. 16RP 1736-38. Dr. Fusaro also opined that although both the gunshot wounds would have bled, the one to the nostril would have bled more. 16RP 1743-44. With regard to time of death, Dr. Fusaro could conclude only that Nancy died sometime between 2:20 am and 2:20 pm, September 2, 2007. 16RP 1740. Finally, Dr. Fusaro agreed that one possible scenario was that Nancy was shot first in the right temple, and then immediately shot again in her left nostril as she fell. 16RP 1745-46.

The prosecution's star witness was Ross Gardner, a retired law enforcement officer who considered himself a "backdoor" scientist who marketed himself as an "independent consultant in blood stain pattern analysis, crime scene analysis, and crime scene processing." 16RP 1504, 1514. According to Gardner, he holds "an Associate of Applied Science Degree, a Bachelor of Science in Criminal Justice, and a Master of Arts in Computer and Information Systems." 16RP 1506. Gardner conceded, however, that he has no formal training in such disciplines as chemistry, biology, or physics. 16RP 1516.

Pavlovich retained Gardner to conduct an analysis of the crime scene at the Floren home. 16RP 1525. After reviewing various documents and photographs provided by Pavlovich, however, Gardner concluded such an analysis would not be useful, and instead recommended that he be retained instead to conduct an analysis of the blood patterns documented in the photographs. 16RP 1525-26.

In his final written report, Gardner describes seven blood patterns depicted in various photographs that he found significant for purposes of determining how Nancy was killed. Ex. 145. Gardner's interpretation of these patterns led him to make several significant conclusions. First, based on a flow of blood from the right temple wound across Nancy's forehead and ending in a "coagulated mass along the left temple/hairline" ("Pattern B"), Gardner concluded Nancy was laying on her left side after the first shot was fired into her right temple, with that area of her head where the "coagulated mass" of blood was in contact with the floor, and subsequently placed in a more supine position by lifting her head off the ground and turning it to the right. Ex. 145 at 2-3. Second, Gardner concluded most of the blood at the scene came from the second shot, which was fired up her left nostril. Ex. 145 at 3-5. Third, based on the volume of blood accumulated in the left temple/hairline, Gardner opined the repositioning and second shot had to have occurred at least 3 minutes

after the shot to the temple. Fourth, given the condition of the blood accumulated at the left temple/hairline, and the results of experiments designed and conducted by Gardner using human blood, human hair, a baseball and a ceramic tile,<sup>3</sup> Gardner concluded it was at least 17 minutes, or more likely 25 minutes or more, between the first shot to the temple and the second shot to the nostril. Ex. 145 at 5-9. Finally, based on his estimates of time between shots and the degree of serum separation evident in the blood pools around Nancy's head, Gardner concluded Nancy had to have been shot the second time "far earlier than 0552 hrs[.]" when the alarm at the home was triggered. Ex. 145 at 6. Although Gardner's report was not admitted, he testified about the same matters (except the experiments) at Tracy trial. 16RP 1526-61, 1581-1700,

*d. Civilian Witnesses for the Prosecution*

The prosecution called various neighbors, friends and relatives of the Florens to testify. The first to testify was Sandra Wilson, who lived two houses away and often took care of the Florens' dog and cat when they were away. 16RP 214, 216. Wilson was caring for the Florens' dog for the two weeks prior to Nancy's death while they were in Sequim breaking

---

<sup>3</sup> The defense moved pretrial to exclude any use of Gardner's experiments at trial, arguing the results failed to meet the standard for admissibility of novel scientific evidence under Frye v. United States, 293 F 1013 (D.C. Cir. 1923). CP 212-15, 362-67. The prosecution eventually agreed not to

ground on their retirement home. 16RP 222-24. Wilson recalled the Florens returning home from Sequim briefly the weekend before (August 25-26, 2007), and Tracy mowing the yard while wearing ear protection. 16RP 224-27.

Wilson first learned something was wrong at the Floren home when she received a 6:30 am call from ADT on September 2, 2007, asking if she was aware an alarm had been triggered at the home earlier that morning. 16RP 230-31. Wilson, who had ended up with the Florens' dog while the Sheriff's office conducted its investigation, went over to see Tracy the day after Nancy's death to return the dog. 16RP 238-39. Over defense objection, Wilson recalled how "shocked" she was that Tracy was ranting about how the police treated him rather than expressing emotion about the death of Nancy. 16RP 239. Although Wilson initially claimed she "never" saw Tracy ever express any emotion or get upset about the death of Nancy, she later conceded that Tracy talked emotionally about the loss of Nancy at her funeral. 16RP 242, 253-54.

Wilson's live-in boyfriend, Alan Lynden also testified, despite only knowing the Florens for five to six months before Nancy's death. 16RP 265. Lynden noted, "It seemed to us that his main concern throughout the whole process was that the police had stolen his computer, and the police

---

use Gardner's experiments at trial. 16RP 1406-07.

were doing all this stuff from [sic] him, and zero concern for Nancy. It surprised us." 16RP 270.

Kenneth Turnbull met Tracy through participation in the "Kent Early Birds" AA meetings, held at 6:30 am everyday. 16RP 450. Turnbull was the designated meeting chair for the Sunday meetings in September 2007, and tried to arrive by 6 am to open the building. 16RP 451, 457. Turnbull saw Tracy at the meeting on September 2, 2007. 16RP 452. Although Turnbull could not recall seeing Tracy in the meeting hall until about 6:20 am, shortly before the meeting was to start, he confirmed some participants arrive earlier and congregate outside, mostly to smoke. 16RP 453, 457, 460. Turnbull noticed nothing unusual about Tracy's behavior at the September 2nd meeting. 16RP 458.

Another AA member, Otto Weiland, recalled first meeting Tracy at AA meetings in the mid 1990's. 16RP 473. Like Turnbull, Weiland recalled seeing Tracy at the meeting on September 2nd, noting Tracy was already there when he arrived at about 6:20 am. 16RP 474.

Another AA member, Mark Galbawy, recalled seeing Tracy at the Kent Early Bird meetings in September 2007. 16RP 568. Galbawy recalled arriving for the meeting on September 2, 2007, at about 6:25 am and noting Tracy was already there sitting at a table. 16RP 570. Galbawy admitted he would sometimes arrive early and smoke outside until the

meeting started, but he could not recall if Tracy ever did the same. 16RP 571-72.

Tom Harvey, the manager of a Starbucks store opposite the Circle K store where the receipt came from that Tracy gave sheriff's deputies (Ex. 3), recalled Tracy coming to the door of his store at about 5:15 am on September 2, 2007. 16RP 575, 578-79. The door was locked, however, so Tracy left. 16RP 575. Harvey also noted that, like Tracy did at Circle K, it is common for people to use credit cards to make even small purchases at his store. 16RP 579.

Cheryl Lindberg was the Florens' housekeeper, and cleaned their home every Friday. 16RP 1169-70. Lindberg recalled once setting the alarm off to the Florens' home accidentally, which she described as "very loud." Lindberg did not recall, however, anyone in the neighborhood reacting to the alarm. 16RP 1172. According to Lindberg, Tracy contacted her on the Tuesday after Nancy's death and told her she had been murdered, and that he needed Lindberg to come over to clean the house, and to bring a carpet shampooer. 16RP 1174-75. It was Lindberg's impression Tracy "was more concerned about the carpeting in the house than anything else[,]" and that he showed no emotion. 16RP 1175.

Michael Devitt and Denise Warner, co-workers of Nancy's at Husky International Trucks where she was the chief financial officer,

described Tracy as "quiet", "reserved" and "introverted." 16RP 611, 616, 624. Warner, who describe Nancy as a friend and "surrogate mother", said Nancy's marriage to Tracy was "typical" and she never recalled hearing Nancy say she was considering leaving Tracy. 16RP 619, 625.

Nancy's older brother, Michael Stroebel, was notified of Nancy's death by Pavlovich on September 2, 2007. 16RP 484. He received a call from Tracy the next day, after Tracy was allowed to go home. 16RP 485. Stroebel recalled Tracy expressing anger about how police had treated him, and that he expressed sorrow about Nancy's death, but claimed Tracy showed no emotion except anger towards police. 16RP 485-86. Stroebel recalled that when he met with Tracy on September 5, 2007, he was similarly unemotional. 16RP 488. Stroebel admitted, however, that Tracy was emotional at Nancy's funeral on September 8, 2007. 16RP 489-90. Stroebel also agreed that his impression of Tracy after knowing him several years was that he was "not a very emotional person." 16RP 495.

Nancy's younger sister, Marcia Ashley, learned of Nancy's death on September 3, 2007. 16RP 514-15. Like Stroebel, Ashley's impression when she met with Tracy on September 5th, was that he expressed no emotion about his wife's murder. 16RP 519.

Gary and Jeannine Dowley were a couple Tracy and Nancy had known for years and spent a lot of time with in Sequim, where the

Dowley's lived, and where the Florens were building a home. 16RP 1015-17, 1030-31. Gary Dowley (Gary) was aware of Tracy's hearing problems, and that he routinely wears hearing aids. 16RP 1018-19. Gary also noted that when he and Tracy would target shoot together, Tracy (like Pavlovich, 16RP 1312) would wear both foam ear plugs and additional hearing protection over them. 16RP 1019. Gary also noted that when Tracy and Nancy were on vacation in Sequim the two weeks before Nancy's death, "[e]verything seemed fine, normal." 16RP 1020.

At Tracy's request, the Dowleys drove from Sequim to Kent on September 3, 2007, to comfort him following Nancy's death. 16RP 1021, 1033. Gary recalled Tracy was "[v]ery quiet, didn't want to say much about what had happened." 16RP 1022. Similarly, Jeannine recalled Tracy appeared "upset. He was quiet. He seemed kind of lost, kind of, I don't know, he just seemed really quiet." 16RP 1034. Later, Jeannine noted Tracy started drinking a lot, to the point where she could smell it on him, and that he started acting "like Nancy never existed. He never talked about her, her name never came up. He was going about his life and never showed any emotion or anything about Nancy." 16RP 1035. According to Jeannine, she and Gary were in the process of severing their friendship with Tracy when he was arrested for Nancy's murder. 16RP 1037.

Dave Dinius, a project manager for ADT Security Services, confirmed that a "holdup" alarm was triggered at the Floren home at 5:52 am on September 2, 2007. 16RP 795-96. Dinius also noted that there are two ways for the homeowner to trigger a holdup alarm; either by depressing a single "panic" button, or by entering a "four digit duress code." 16RP 797. When the "four digit duress code" is used to trigger the alarm, the alarm is silent in that the audio aspect of the system is not activated, but an alarm signal is still sent to the ADT monitors. 16RP 798-800. The records kept by ADT Security Services does not distinguish between holdup alarms triggered by depressing the panic button and those triggered by entering the duress code. 16RP 797.

*e. The Defense*

The two key defense witnesses were Tracy and Kay Sweeney, a retired police officer and former State crime laboratory forensic scientist now in private practice. 16RP 1890-2410. Tracy, for the most part, testified consistently with what he told Pavlovich and Do during his three-hour interview on September 2, 2007. There were, however, some differences, and some additional information provided as well. For example, whereas Tracy denied in his interview with Do and Pavlovich that he drank any alcohol the night before Nancy's death, at trial he admitted sneaking four ounces of vodka that evening. 16RP 2020-21,

2120-21; Ex. 85 at 64-65. Tracy explained that during the interview with the detectives, in which he was led to believe Nancy was still alive, he lied about not drinking the night before because he was concerned Nancy would find out, and he was ashamed at his inability to maintain abstinence from alcohol. 16RP 2080, 2087.

Not discussed during the September 2, 2007 interview with Do and Pavlovich, were any details about what Tracy and Nancy did when they returned to their Kent home for a short stay the weekend before Nancy's death. See Ex. 85. At trial, however, Tracy explained that he and Nancy returned to Kent in the middle of their two-week Sequim vacation to tend to Nancy's collection of house plants, reconnect with the pets, and maintain the yard. 16RP 1992. Tracy recalled they arrived home just before noon on Friday, August 24, 2007, at which point Tracy proceeded to tend to the yard. 16RP 1993-94, 2120. Tracy explained that both his mower and "weed whacker" are gas-powered, and therefore he wears foam ear plugs when he uses them. 16RP 1994-95, 1999.

After mowing the front and back yards, Tracy noticed there was grass growing under the six-foot high fence separating the backyard from the retention pond. 16RP 1996. Tracy put his weed whacker, ear plugs and some herbicide in the backseat of Nancy's Nissan Altima, the same car he arrived home in the morning of Nancy's death, drove around to the

retention pond, and cut and applied herbicide to the grass growing along the retention pond-side of his backyard fence line. 16RP 1996-99, 2008-09, 2011. Tracy recalled taking the ear plugs out once he was done using the gas weed whacker, but could not recall what happened to them after that, although he did note that he bent over after he was done weed whacking. 16RP 2009.

With regard to whether Tracy had ever scaled his backyard fence, he admitted he had, once, in 1998 shortly after they had moved in, when he accidentally tossed a tool over it along with some debris he was clearing. 16RP 2012-13. Tracy recalled being able to climb into the retention pond area, but not being able to climb back into his yard. 16RP 2012.

Regarding the early nature of Tracy's travels the morning of Nancy's death, he explained that during the week he was used to getting up in time to be at his desk at Boeing by 5:00 am. 16RP 2025. As such, on weekends he was also an early riser, typically rising between 4:15 am and 4:45 am. 16RP 2026. When he attended early morning weekend AA meetings, Tracy would typically leave the house at between 5:15 am and 5:45 am, and stop and buy a bakery item on the way to the meeting to tide him over until he had breakfast with Nancy after the meeting, and then arrive at the meeting early and talk with others mingling outside the meeting hall. 16RP 2023, 2026-27.

Tracy also told the jury about how he and Nancy dealt with the alarm system when they were home. Tracy explained that they would arm the alarm when they went to bed, and that he would disarm it when he got up. 16RP 2055. It would not get rearmed then, whether it was during the week or on the weekend, until either they both left the house, or they went to bed the following night. As such, the alarm would be deactivated when Tracy would attend his early morning AA meetings. 16RP 2056. Tracy also explained that although the door between the garage and laundry/mud room was normally locked, he would leave it unlocked when he went to early weekend morning AA meetings so he did not wake Nancy trying to unlock it upon his return. 16RP 2059-60, 2147-48.

Tracy admitted accessing adult web sites four to five times a week, and that Nancy was aware he did so. 16RP 2107. He denied, however, any intention of obtaining a new spouse over the internet, explaining that he only accessed the mail-order-bride sites out of curiosity after he learned a friend was corresponding with a woman in China, and relatives of Nancy's had gotten a spouse that way before. 16RP 2108-09.

Finally, regarding his lack of emotion, Tracy explained;

I was raised in a strict family environment where I was to keep my emotions inside me, to not burden other people with my problems, to keep a plain face, like be happy and show that nothing was wrong. So, that [is] part of it. I think part of it is by physiology, just me. And the training

that I have had in the service and with emergency response, being a rock, so to speak, calm, not to disturb or be emotional was an attribute.

16RP 2082.

The other key defense witness, Kay Sweeney, was called to rebut Gardner's claims that he could calculate when Nancy was shot based on the condition of the blood at the scene, and to offer an expert opinion on what likely transpired to create the blood patterns noted in the various photograph documenting the scene. With regard to using the condition of the blood at the scene to predict when Nancy was shot, Sweeney stated there is no reliable basis for doing so because no accurate studies have been done upon which to rely on. 16RP 2212, 2347.

With regard to what the blood spatter patterns did show, Sweeney explained they excluded the scenario advocated by Gardner *i.e.*, that Nancy was shot first in the right temple, fell to the ground and lay on her left side for some period of time before being repositioned and shot in the left nostril. Sweeney noted that under that scenario, the blood trail that ran across Nancy's forehead from the temple shot would have run down her face and into her eyebrows and eyes when her head was lifted, which it had not done. 16RP 2344-46. Instead, based on his own independent assessment of the available data, Sweeney concluded

Ms. Floren was shot in fairly quick succession, twice, first with the shot to the right temple; the second shot was to the nasal passage of the left nostril; that she fell to the floor almost immediately. By that, I mean as quickly as a person can fall; and that the bloodstains that are present on her face, and around her are the result of that action and that action alone. There is no other manipulation indicated in the physical evidence that I see.

16RP 2208-09.

*f. Facts Relevant to Admissibility of Gardner's Testimony Regarding Timing and the Post-Trial Motion for a New Trial.*

Pretrial, the defense moved to exclude "any and all evidence, reference to evidence, testimony or argument related to an experiment in timing of blood pools, blood staining/deposits and serum separation conducted by Ross Gardner." CP 212. The defense argued the methodology employed by Gardner "is not accepted in the forensic scientific community, has not been reproduced, and is applied using a flawed technique that contains variable[s] that are dissimilar to the conditions found at the scene."

CP 215. The defense also noted that a "Erye" hearing was required to determine the admissibility of such evidence. 6RP 15; 7RP 6-7. The trial court agreed, noting that under State v. Roberts, 142 Wn.2d 471, 14 P.3d 713 (2000), "blood stain pattern analysis . . . is generally accepted in the relevant scientific community[.]" but noted there were conflicting views on whether the specific experiment conducted by Gardner "is capable of

producing reliable results and is generally accepted in the scientific community." 13RP 31-32. Thereafter, the court heard testimony from the defense experts, Kay Sweeney and Stuart James, who, like Sweeney, is a forensic scientist specializing in bloodstain pattern analysis. 13RP 35-14.

According to James,

[T]here are extreme variations in clotting time from person to person for various reasons, and these are difficult to establish and there has been no research that -- in the forensic arena in the forensic science field that addresses any real conclusions that can be drawn on clotting times for a specific case.

13RP 45.

With the regard to Gardner's experiment, James said it failed to account for numerous factors that could increase or decrease the rate at which blood clots, such as whether the hair had been treated, or if the use of a tile or baseball affected the clotting time. 13RP 46-48. James agreed with a 2001 study (the only one of its kind, 13RP 86) published in the Canadian Journal of Forensic Sciences<sup>4</sup> that concluded, "The determination of clotting times in this experiment is somewhat subjective." 13RP 49. James agreed that given the numerous variables involved it is inherently difficult to scientifically validate a forensic study attempting to establish clotting times for blood. 13RP 49. James

---

<sup>4</sup> A copy of the article is attached to the defense motion for a new trial as "Exhibit C." CP 609-615.

concluded that Gardner failed to follow proper scientific methods and procedures in conducting his experiment. 13RP 53-54. As an aside, James also stated he agreed with a recent federal report by the National Research Counsel which states in its summary assessment of forensic science of bloodstain pattern analysis:

Scientific studies support some aspects of bloodstain pattern analysis. One can tell, for example, if the blood spattered quickly or slowly, but some experts extrapolate far beyond what can be supported. Although the trajectories of bullets are linear, the damage that they cause in soft tissue and the complex patterns that fluids make when exiting wounds are highly variable. For such situations, many experiments must be conducted to determine what characteristics of a bloodstain pattern are caused by particular actions during a crime and to inform the interpretation of those causal links and their variability's. For these same reasons, extra care must be given to the way in which the analyses are presented in court. The uncertainties associated with bloodstain pattern analysis are enormous.

STRENGTHENING FORENSIC SCIENCE IN THE UNITED STATES: A PATH FORWARD (The National Academies 2009) at 178-79 (emphasis added).<sup>5</sup>

Sweeney, like James, stated that Gardner failed to employ procedures in his experiment that are accepted in the scientific community.

13RP 96-97. The two main problems Sweeney noted was the lack of specificity about the nature of the materials used, and the lack of logic in

---

<sup>5</sup> The full text of the book may be viewed on-line at [http://www.nap.edu/catalog.php?record\\_id=12589#toc](http://www.nap.edu/catalog.php?record_id=12589#toc)

how the experiment was designed and how the data was applied and interpreted. 13RP 97-98. Sweeney also noted there was insufficient data recorded to replicate, much less assess the study's efficacy. 13RP 103.

The trial court postponed ruling on the admissibility of evidence from Gardner's experiment until Gardner was available to testify. 13RP 106-08. When that time came, however, the prosecution decided not to introduce Gardner's experiment at trial. 16RP 1406-07. The defense promptly moved to exclude any testimony from Gardner, arguing that any opinion by Gardner regarding timing was based on his experiment, which the defense asserted was inadmissible as scientifically invalid. 16RP 1407-10. The trial court denied the motion, reasoning there was plenty for Gardner to testify about that was not associated with the disputed experiment. 16RP 1463. The defense countered with a motion to preclude Gardner from testifying at all about the timing of events, arguing all of Gardner's conclusions in that regard are premised on the experiment. 16RP1468-69. In the alternative, the defense moved for a Erye hearing to determine whether Gardner's opinions regarding timing based on blood spatter analysis should be admitted. 16RP 1489-91. Those defense requests were also denied. 16RP 1492-93.

During a break in Gardner's initial testimony, taken shortly after Gardner offered his overall conclusion that Nancy was dead before the

alarm was triggered at 5:52 am, 16RP 1531, the defense renewed its objection to Gardner testifying about the timing of events based on his interpretation of the condition of the blood at the scene. The defense argued that the un-rebutted pretrial testimony of James and Sweeney was sufficient to show that there is no sound scientific basis for such an opinion, and therefore should be excluded under Frye. 16RP 1532-34. The trial court summarily rejected the defense argument. 16RP 1535. Similar defense objections during the course of Gardner testimony were also overruled. 16RP 1540, 1556, 1561-63, 1620-21, 1671-72.

On December 21, 2009, after the jury found Tracy guilty, the defense filed a motion for new trial. CP 580-683. As it had at trial, the defense argued it was reversible error to allow Gardner to testify as to the timing of Nancy's death based on the condition of the blood at the scene. CP 580-604. The State filed a response, arguing that a new trial was unwarranted. CP 691-951. The trial court denied the motion. 16RP 2636-42.

D. ARGUMENT

1. FAILURE TO HOLD A FRYE HEARING REGARDING THE BASIS FOR GARDNER'S OPINION REGARDING THE TIME OF DEATH REQUIRES REVERSAL.

Washington has adopted the so-called "Erye" test under Erye v. United States, 293 F 1013 (D.C. Cir. 1923), for evaluating the admissibility of new scientific evidence. State v. Gregory, 158 Wn.2d 759, 820, 147 P.3d 1201 (2006). The goal of the test is to determine whether scientific evidence is based on established scientific methodology. State v. Russell, 125 Wn.2d 24, 41, 882 P.2d 747 (1994). "The core concern of Erye is only whether the evidence being offered is based on established scientific methodology. This involves both an accepted theory and a valid technique to implement that theory." State v. Cauthron, 120 Wn.2d 879, 888-89, 846 P.2d 502 (1993), overruled in part on other grounds by State v. Buckner, 133 Wn.2d 63, 941 P.2d 667 (1997). Unanimity is not required. State v. Copeland, 130 Wn.2d 244, 270, 922 P.2d 1304 (1996). But if there is a significant dispute among qualified scientists in the relevant scientific community, the evidence may not be admitted. State v. Gore, 143 Wn.2d 288, 302, 21 P.3d 262 (2001).

As the Michigan Supreme Court has noted, the view of those who develop a technique and maintain an interest in the technique should not be substituted for those of the general scientific community:

Scientific community approval is absent where those who have developed and whose reputation and livelihood depends on use of the new technique alone certify, in effect self-certify, the validity of the technique. . . . If this Court were to adopt the view that the testimony of persons who have developed and whose reputation and livelihood depends on the use of a new technique alone supports admissibility, then the views of the developer and his disciples would be substituted for the scrutiny of the marketplace of general scientific opinion and the substance of the *Erye* test would be eliminated.

People v. Young, 425 Mich. 470, 391 N.W.2d 270, 276 (1986).

One important reason for assuring that scientific evidence is recognized by the relevant scientific community as valid before it is admitted at trial, is that jurors often lack the information and training to independently assess its reliability:

[L]ike many laypersons, jurors tend to ascribe an inordinately high degree of certainty to proof derived from an apparently “scientific” mechanism, instrument, or procedure. Yet the aura of infallibility that often surrounds such evidence may well conceal the fact that it remains experimental and tentative.

People v. McDonald, 37 Cal.3d 351, 690 P.2d 709 (1984), overruled on other grounds by, People v. Mendoza, 23 Cal.4th 896, 4 P.3d 265 (2000).

Once the Washington Supreme Court has made a determination that the *Erye* test is met as to a specific novel scientific theory or principle, Washington trial courts can generally rely upon that determination as settling admissibility in future cases. However, trial courts must still undertake the

Erye analysis if one party produces new evidence that seriously questions the continued general acceptance or lack of acceptance as to that theory within the relevant scientific community. Cauthron, 120 Wn.2d at 888 n.3. If the Erye test has been satisfied, then the trial court must still determine admissibility under ER 702. Copeland, 130 Wn.2d at 256.

Here, the defense sought exclusion of evidence of the experiment Gardner designed and conducted to try to determine how long it took for blood clots to form in Nancy's hair. CP 212-15. When the State agreed not to introduce that evidence, the defense sought a Erye hearing on whether Gardner could testify about the timing of Nancy's death based on his interpretation of the blood evidence. 16RP 1489-91. Relying on Roberts, *supra*, that request was denied, as was the related post-trial motion for a new trial. 13RP 31-32; 16RP 1492-93, 2636-42. Review of a trial court's denial of a Erye hearing request is de novo. Gregory, 158 Wn.2d at 830.<sup>6</sup>

In Roberts, a forensic scientist, who never actually visited the crime scene, testified at a murder trial that based on "her experience, training, and

---

<sup>6</sup> The Court in Gregory stated "It is not clear what standard of review should be applied to a trial court's decision not to conduct a Erye hearing at all. Yet the trial court here declined to conduct a Erye hearing because it found that the scientific evidence has been generally accepted in the scientific community, the same question ultimately addressed on appeal after a Erye hearing. Thus, application of a de novo standard is

review of this case's blood pattern and blood deposit materials," she was able to conclude the murder victim was bound to a chair and bleeding before he was moved into a hallway, noting this conclusions was based in part on assuming two blood spots "behind" the victim were the victim's blood. 142 Wn.2d at 481. On appeal, Roberts argued this testimony was improperly admitted under *Erye*, apparently at least in part because her opinions were based on merely viewing the photographic and video documentation of the scene rather than on direct observation of the scene. 142 Wn.2d at 520-21.

The State argued *Erye* was inapplicable because the "testimony did not encompass any novel scientific theories[.]" 142 Wn.2d at 520. Agreeing with the State, the Court concluded the scientist's testimony did not qualify "as a novel scientific technique[.]" noting numerous jurisdictions have concluded the science of analyzing blood stains either meets the *Erye* standard, or does not implicate *Erye* at all. 142 Wn.2d at 520-21.

Here, the trial court's reliance on *Roberts* to deny a *Erye* hearing was error. The testimony by the forensic scientist in *Roberts* dealt with using the spatial distribution of blood at the scene to determine the order in which certain events occurred, i.e., the victim was moved into the hallway *after* he was bleeding. 142 Wn.2d at 481. This falls within the scope of

---

appropriate." 158 Wn.2d at 830.

the general consensus of what the science of bloodstain patterns analysis can reveal;

The patterns left by blood can suggest the kind of injury that was sustained, the final movements of a victim, the angle of a shooting, and more. Bloodstains on artifacts such as clothing and weapons may be crucial to understanding how the blood was deposited, which can indicate the source of the blood. For example, a stain on a garment, such as a shirt, might indicate contact between the person who wore the shirt and a bloody object, while tiny droplets of blood might suggest proximity to a violent event, such as a beating.

STRENGTHENING FORENSIC SCIENCE IN THE UNITED STATES: A PATH FORWARD at 177.

In contrast, Gardner's testimony about the precise timing of events based on the degree of coagulation and serum separation, is not a generally accepted theory within the scientific community of blood spatter analysts. To the contrary, Gardner's testimony appears to go "far beyond what can be supported" by the science of blood stain pattern analysis. *Id.* at 178. That was, in fact, the conclusions of two of the three bloodstain pattern analyst who testified. 13RP 45-49, 96-98.

The trial court seemed to recognize this initially when it concluded a Erye hearing was needed to determine the admissibility of Gardner's experiments with the blood, hair, baseball and tile. 13RP 31-32. Once evidence of the experiments was withdrawn, however, the trial court

erroneously concluded Gardner could testify freely about his time estimates simply because he is an expert at analyzing bloodstain patterns. 16RP 1492-93. As James and Sweeney testified, and as the one available study on the topic notes, using the extent of coagulation and serum separation to predict elapsed time is not a sufficiently developed science to allow for accurate and reliable predictions. Even one of the prosecution's rebuttal witnesses, Chief King County Medical Examiner Dr. Richard Haruff, noted that studies on serum separation and clotting times have not been performed in the "forensic setting." 16RP 2487. At the very least, given the pretrial testimony of James and Sweeney, and the need for additional studies on the topic noted by one article on the topic, the trial court should have held a *Erye* hearing to determine whether the science of predicting the precise timing of event based on the degree of coagulation and serum separation had gained general acceptance in the relevant scientific community.

Because the State failed to rebut the defense's prima facie evidence of a lack of general acceptance of the theories and methods used by Gardner to make precise time prediction based on the condition of the blood at the scene, the trial court should have held a *Erye* hearing. Failure to do so constitutes error. *Cauthron*, 120 Wn.2d at 888 n.3. Similarly, the trial court erred in denying the defense motion for a new trial.

The error was prejudicial. Had a Erye hearing resulted in the exclusion of Gardner's time prediction, the State's claim that Nancy was dead before the alarm was triggered would have had little support beyond speculation and conjecture. Without Gardner's testimony, evidence about the timing of events was limited to when the alarm was triggered and when police initially arrived. See 16RP 1740 (Dr. Fusaro can only narrow time of death to a 12-hour period between 2:20 am and 2:20 pm on September 2, 2007); 16RP 2212 (Kay Sweeney noting there is no accurate way to predict time elapsed based on degree of serum separation); 16RP 2487 (Dr. Haruff noting studies for such predictions have not been done yet). That Nancy was dead before the alarm was triggered was critical to the State's theory of the case. See 16RP 2524-26 (prosecutor argues Gardner's testimony is critical to establishing the timing of events). As such, absent Gardner's testimony on timing, there is a reasonable possibility the jury would have been unable to reach a unanimous guilty verdict. This Court should therefore reverse.

2. THE TRIAL COURT'S COMMENT ON THE EVIDENCE VIOLATED ARTICLE 4, § 16 OF THE WASHINGTON CONSTITUTION AND DENIED TRACY FLOREN A FAIR TRIAL.

Even if it was not error to allow Gardner to testify that based on his interpretation of the condition of the blood at the scene Nancy was dead before the alarm was triggered, it was error when the trial court conveyed

to the jury that it believed Gardner. 16RP 1686. Because the State cannot show this error was harmless beyond a reasonable doubt, reversal is required.

Washington's constitution states, "Judges shall not charge juries with respect to matters of fact, nor comment thereon, but shall declare the law." Wash. Const. art. 4, § 16. It is thus error for a judge to instruct the jury that matters of fact have been established as a matter of law. State v. Baxter, 134 Wn. App. 587, 592-93, 141 P.3d 92 (2006). The court's personal feelings need not be expressly conveyed to the jury; it is sufficient if they are merely implied. State v. Levy, 156 Wn.2d 709, 721, 132 P.3d 1076 (2006). The prohibition forbids comments that permit the jury to infer whether the judge believed or disbelieved certain testimony. State v. Eaker, 113 Wn. App. 111, 117, 53 P.3d 37 (2002). Whether a comment on the evidence is improper depends on the facts and circumstances in each case. Eaker at 117-18.

Judicial comments are presumed prejudicial. The burden is on the state to show the record affirmatively shows no prejudice could have resulted. Levy, at 723.

[T]he burden is not carried, and the error therefore prejudicial, where the jury conceivably could have determined the element was not met had the court not made the comment.

134 Wn. App. at 593 (emphasis added).

A violation of Wash. Const. art. 4, § 16 may be raised for the first time on appeal. The failure to object or to move for mistrial does not preclude review. Levy, 156 Wn.2d at 719-720; State v. Becker, 132 Wn.2d 54, 64, 935 P.2d 1321 (1997); State v. Lampshire, 74 Wn.2d 888, 893, 447 P.2d 727 (1968).

Here, during redirect examination of Gardner by the prosecutor, the following exchange occurred in front of the jury:

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.

[Defense Counsel]: Your Honor, that is a leading question.

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

16RP 1686 (emphasis added).

By commenting in front of the jury that the evidence had established Nancy was not alive to trigger the alarm, the trial court weighed in, against the defense, on the most hotly contested factual issue at trial. This improper comment is similar to the one discussed in Seattle

v. Arensmeyer, 6 Wn. App. 116, 120, 491 P.2d 1305 (1971).

The Arensmeyer Court deemed the trial court's interruption of counsel during closing argument -- to say counsel was mistaken as to the evidence -- an unconstitutional comment on the evidence. 6 Wn. App. at 120. This Court found that while the trial court was duty-bound to restrict counsel's argument to the facts in evidence, "[t]he court cannot compel counsel to reason logically or draw only those inferences from the given facts which the court believes to be logical." *Id.* Thus, when the trial court interrupted, it commented on the evidence by revealing to the jury what it believed the evidence to mean. *Id.*

Similar to Arensmeyer, here the trial court wrongly commented on a contested issue. More importantly, however, the trial court also signaled to the jury that it believed the prosecution, through Gardner, had established as a fact that Nancy was not alive to trigger the alarm.

Similarly, in State v. James, 63 Wn.2d 71, 385 P.2d 558 (1963), the Court held the defendant was deprived of a fair trial when the trial court commented on the credibility of a witness. Two defendants, William James and Richard Topper, were charged for three separate crimes and tried in the same trial. During the course of the trial, Topper pled guilty and became the State's key witness. The jury was informed by the court that Topper was being discharged from the trial to be a witness for the

State "providing that he testify fully as to all material matters within his knowledge[.]" *Id.* 74. The appellate court found that this inferential statement by the trial court was significant to the jury:

The die was cast when Topper left the courtroom; his counsel took no further part in the trial, and the court, in its final instructions, reiterated that Topper had been discharged. The jury could draw only one conclusion; the court was satisfied that Topper had testified fully as to all material matters within his knowledge. We conclude...that the court's remarks constituted a comment upon the evidence and an approval of the credibility of the witness[.]

63 Wn.2d at 76.

Here, as in *James*, once the trial court stated the evidence "established" Nancy was dead before the alarm was triggered, the jury could draw only one conclusion; the trial court believed Gardner. This constituted a comment on the evidence and an approval of Gardner's credibility.

Finally, in *State v. Vaughn*, 167 Wash. 420, 9 P.2d 355 (1932), the court held the defendant was deprived of a fair trial because the trial court commented on the credibility of a witness. Two defendants, William Vaughn and George Miller, were charged with grand larceny and were tried in the same trial. During trial, Miller testified against Vaughn and received a suspended sentence. Vaughn suspected a secret agreement was made between the prosecuting attorney and Miller. Vaughn's counsel

called the prosecuting attorney as a witness to prove the alleged secret agreement. The prosecutor, after he was examined by the Vaughn's counsel, stated:

Prosecutor: "I will ask myself a question on cross examination."

Trial Court: "You needn't ask the question, [prosecutor] Foley."

Vaughn's Counsel: "Just wait a minute. Ask yourself the question first."

Prosecutor: "His Honor said I didn't need to."

Vaughn's Counsel: "Well, he has got to ask his question if he wants to answer it. I want to know what he is going to state."

Trial Court: "It seems to be a senseless procedure, Mitchell [Vaughn's counsel], to ask yourself a question. I dare say [the prosecutor] wouldn't answer anything that he shouldn't."

167 Wash. at 424.

The appellate court found the fact that prosecutor Foley

not only testified as a witness but was the attorney representing the State made it doubly important that no statement be made by the court calculated or which might result in influencing the jury. The court, in effect, vouched for the veracity and rectitude of the witness. The conclusion is irresistible that the statement of the learned trial court was clearly a comment upon the weight of the testimony and the credibility of the witness, and hence in violation of the Constitution.

167 Wash. at 426.

As in Vaughn, the trial court here improperly commented on the evidence and veracity of prosecution's key witness by stating the evidence

established Nancy was dead before the alarm was triggered and therefore violated Const. art. 4, § 16. "The object of the constitutional provision, doubtless, is to prevent the jury from being influenced by knowledge conveyed to it by the court of what the court's opinion is on the testimony submitted." James, 63 Wn.2d at 75. That objective was defeated here.

The jury here was likely influenced by knowledge conveyed to it by the trial court. As in Vaughn, the conclusion here is irresistible that the inference of the trial court was a comment upon the weight of the testimony and hence in violation of the constitution depriving Tracy Floren of a fair trial. Vaughn, 167 Wash. at 426.

3. TRACY FLOREN WAS DENIED A FAIR TRIAL BECAUSE NUMEROUS WITNESSES WERE ALLOWED TO TESTIFY HE DID NOT REACT AS THEY WOULD HAVE EXPECTED TO NEWS OF HIS WIFE'S DEATH, THEREBY INFERRING THEY THOUGHT HE WAS GUILTY OF MURDERING HER.

No witness, lay or expert, may testify to his or her opinion as to the guilt of a defendant, whether by direct statement or inference, because it violates the defendant's right to a trial by an impartial jury and his right to have the jury make independent evaluation of the facts. State v. Haga, 8 Wn. App. 481, 490, 507 P.2d 159 (1973). Likewise, witnesses are not permitted to testify, whether by direct statement or inference, regarding the veracity of another witness because such testimony invades the fact-

finding province of the jury. State v. Kirkman, 159 Wn.2d 918, 927, 155 P.3d 125 (2007). Where the defendant fails to object to a witness's comment on the veracity of another witness at trial, the standard of review on appeal is "manifest error." RAP 2.5(a)(3). "Manifest error" exists when the jury hears "a nearly explicit statement by the witness that the witness believed the accusing victim." Kirkman, 159 Wn.2d at 936.

Here, the jury had to determine, as an element of the crime of murder, whether Tracy killed Nancy. CP 567 (Instruction 7). Numerous witnesses during the course of the trial were allowed to testify that in their opinion, Tracy did not react to the news of Nancy death the way they would have expected.<sup>7</sup> Moreover, in closing argument the prosecution made a point of reminding the jury that numerous witnesses had testified they "were disturbed about how he acted." 16RP 2513. The clear

---

<sup>7</sup> See e.g., 16RP 91-92 (Sgt. Corey state's Tracy showed "no emotional reaction, very stoic"); 16RP 128 (Deputy Saulet state's Tracy was "nonchalant" about news that Nancy had been injured and showed no emotion); 16RP 239 (over defense objection, neighbor Sandra Wilson allowed to testify that she was "shocked" that Tracy seemed more upset with how he was treated by police than by the death of Nancy); 16RP 270 (Wilson's boyfriend, Alan Lynden, states Tracy showed "zero concern for Nancy"); 16RP 486, 488, 519-20 (Nancy's brother and sister both states Tracy showed no emotion other than anger towards the police); 16RP 1045-53 (Jeannine Dowley allowed to testify over defense objection that her opinion that Tracy could not have killed Nancy had changed); 16RP 1175 (the housecleaner, Cheryl Lindberg state's Tracy showed no emotion and was concerned only with the condition of the carpet in the house after the murder).

implication being that Tracy's lack of emotional response was, in the opinion of numerous witnesses, proof he killed Nancy.

Allowing witness after witness to infer that Tracy's lack of emotional response meant he was guilty was impermissible and constitutes constitutional error. *Kirkman*, 159 Wn.2d at 936. Moreover, the error was not harmless. As Washington courts have noted, such comments are particularly troubling when the testifying witness is an officer, as was the case in some instances here, because "[t]estimony from a law enforcement officer regarding the veracity of another witness may be especially prejudicial because an officer's testimony often carries a special aura of reliability." *Kirkman*, 159 Wn.2d at 28.

The prejudice of these comments was amplified by the prosecutor's closing remarks, which encouraged the jurors to accept the opinion of the Tracy's friend and relatives, and of the responding police officer, that his lack of reaction was a sign of guilt. The combined impact of the improper opinion testimony of numerous witnesses and the prosecution's use of that testimony to argue for a guilty verdict deprived Tracy Floren of a fair trial. This Court should therefore reverse his conviction.

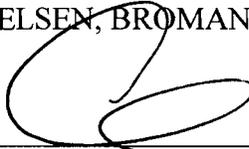
E. CONCLUSION

For the reasons stated herein, this Court should reverse Tracy Floren's conviction.

DATED this 28<sup>th</sup> day of February, 2011.

Respectfully submitted,

NIELSEN, BROMAN, & KOCH, PLLC



---

~~CHRISTOPHER H. GIBSON~~

WSBA No. 25097

Office ID No. 91051

Attorneys for Appellant

**IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON  
DIVISION ONE**

---

STATE OF WASHINGTON	)	
	)	
Respondent,	)	
	)	
v.	)	COA NO. 64927-2-I
	)	
TRACEY FLOREN,	)	
	)	
Appellant.	)	

---

**DECLARATION OF SERVICE**

I, PATRICK MAYOVSKY, DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOLLOWING IS TRUE AND CORRECT:

THAT ON THE 28<sup>TH</sup> DAY OF FEBRUARY 2011, I CAUSED A TRUE AND CORRECT COPY OF THE **BRIEF OF APPELLANT** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

[X] TRACEY FLOREN  
DOC NO. 337937  
WASHINGTON STATE PENITENTIARY  
1313 N. 13<sup>TH</sup> AVENUE  
WALLA WALLA, WA 99362

**SIGNED** IN SEATTLE WASHINGTON, THIS 28<sup>TH</sup> DAY OF FEBRUARY 2011.

x Patrick Mayovsky