No. 43240-4

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION TWO

STATE OF WASHINGTON,

Respondent,

v.

BARBARA ANN CLAYTON,

Appellant.

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

APPELLANT'S OPENING BRIEF

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A. SUMMARY OF APPEAL

After a thorough evaluation, a psychologist concluded that Barbara Clayton shot her boyfriend while she was in a temporary psychotic state and was unable to perceive the nature and quality of her actions or tell right from wrong in relation to them. Ms. Clayton became psychotic as a result of her mental illness and her extreme fear of her boyfriend, which arose from the serious and repeated assaults he had inflicted upon her. Yet at the jury trial, the court did not allow the psychologist to testify about the details of the prior assaults, despite their importance to his opinion. Also, the court did not permit the defense to introduce statements Ms. Clayton made soon after the shooting, despite their relevance in establishing her state of mind. Finally, the court did not permit defense counsel to impeach a prosecution witness with her prior inconsistent statements about Ms. Clayton's apparent mental state. As a result of these erroneous rulings, Ms. Clayton was denied her constitutional rights to confront the witnesses and present a full insanity defense.

In addition, (1) Ms. Clayton's constitutional right to be free from double jeopardy was violated when the trial court refused to vacate one of her murder convictions; and (2) the sentence of life

without the possibility of parole based on prior convictions that were not proven to a jury beyond a reasonable doubt violated Ms. Clayton's rights to due process and equal protection of the law.

B. ASSIGNMENTS OF ERROR

1. The trial court abused its discretion and violated Ms. Clayton's right to present a full defense when it refused to permit her expert to testify about the basis of his opinion, which included details of the serious abuse Ms. Clayton suffered at the hands of her boyfriend.

2. The trial court abused its discretion and violated Ms. Clayton's right to present a full defense when it excluded the statements Ms. Clayton made at the hospital following her arrest.

3. The trial court abused its discretion and violated Ms. Clayton's right to confront the witnesses when it refused to permit defense counsel to impeach a prosecution witness with her prior inconsistent statements.

4. The trial court's refusal to vacate one of the murder convictions violated Ms. Clayton's constitutional right to be free from double jeopardy.

5. The sentence of life without the possibility of parole based on prior convictions that were not proven to a jury beyond a reasonable

doubt violated Ms. Clayton's constitutional rights to due process and equal protection of the law.

C. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Few rights are more fundamental than an accused person's right to present a full defense to a criminal charge. A trial court may not exclude evidence relevant to an asserted defense unless the State shows the evidence is so prejudicial that it will disrupt the fairness of the fact-finding process. If the evidence is highly probative, no state interest is sufficiently compelling to justify its exclusion. Did the trial court violate Ms. Clayton's right to present an insanity defense when it excluded information central to her expert's opinion that Ms. Clayton was insane at the time of the incident? Did the court violate Ms. Clayton's right to present a defense when it excluded statements she made soon after the incident which demonstrated her state of mind?

2. An accused's right to impeach a prosecution witness with evidence of a prior inconsistent statement is guaranteed by the constitutional right to confront witnesses. A witness may be impeached with extrinsic evidence of a prior out-of-court statement if the statement relates to a material fact and is inconsistent with the witness's testimony in court. Did the trial court violate Ms. Clayton's right to

confront the witnesses when it refused to allow defense counsel to impeach a prosecution witness with her prior inconsistent statement about Ms. Clayton's mental state, where Ms. Clayton's mental state was the central issue in the case?

3. When a criminal defendant is convicted twice for the same offense, the Double Jeopardy Clause requires the trial court to vacate one of the convictions. Here, Ms. Clayton was convicted twice for a single homicide. Did the court violate Ms. Clayton's right to be free from double jeopardy when it refused to vacate one of the convictions?

4. The right to due process of law encompasses the right to have any fact necessary to increase a defendant's maximum possible sentence be proved to a jury beyond a reasonable doubt. Was Ms. Clayton's right to due process violated where the trial court increased her maximum possible sentence based solely on findings of prior convictions that were not proved to a jury beyond a reasonable doubt?

5. The Equal Protection Clauses of the Fourteenth Amendment and article I, section 12 of the Washington Constitution require that similarly situated people be treated the same with regard to the legitimate purpose of the law. With the purpose of punishing more harshly recidivist criminals, statutes authorize greater penalties for

specified offenses based on recidivism. However, in some instances prior convictions are treated as "elements" that must be proven to a jury beyond a reasonable doubt, and in other instances, they are treated as "sentencing factors" proven to a judge by a preponderance of the evidence. Where no rational basis exists for this arbitrary distinction and its effect is to deny some persons the protections of a jury trial and proof beyond a reasonable doubt, does it violate equal protection?

D. STATEMENT OF THE CASE

1. The incident.

Barbara Clayton and Curtis Giffin had a romantic relationship and lived together for about seven years. 1/23/12RP 57. They lived in Mr. Giffin's home in Roy along with Ms. Clayton's young daughter, Shayna Clayton.[1] 1/23/12RP 56-57.

At first, Ms. Clayton and Mr. Giffin got along well. 1/23/12RP 61. But in June 2010, Mr. Giffin met Keisha Montgomery-Joyner and the two quickly became romantic. 1/24/12RP 246. Mr. Giffin continued to live with Ms. Clayton while he was seeing Ms. Montgomery-Joyner. 1/23/12RP 62; 1/24/12RP 174, 178. Ms.

[1] Shayna was 14 years old at the time of trial. 1/23/12RP 56, 58.

Montgomery-Joyner became pregnant with Mr. Giffin's child in December 2010. 1/24/12RP 248.

Ms. Clayton was aware that Mr. Giffin was seeing Ms. Montgomery-Joyner and had gotten her pregnant. 1/23/12RP 61-63; 1/24/12RP 174, 178. She was very upset about it. 1/23/12RP 62. She would often share her troubles with Shayna. 1/23/12RP 61, 63, 110. She also shared her troubles with Mr. Giffin's grown-up daughter, Lea, who lived next door. 1/24/12RP 166, 219. Ms. Clayton would often go to Ms. Giffin's house crying and looking for consolation. 1/24/12RP 219-20, 241.

Ms. Clayton told Shayna she was afraid to leave Mr. Giffin because she felt she had nowhere else to go. 1/23/12RP 67. She told Shayna it was important to try to avoid making Mr. Giffin angry and gave her suggestions on how to do so. 1/23/12RP 106. Shayna tried to follow her mother's suggestions. 1/23/12RP 106. Ms. Clayton herself tried to avoid making Mr. Giffin angry but was only sometimes successful. 1/23/12RP 106.

Despite Ms. Clayton's efforts to appease Mr. Giffin, he would sometimes yell at her and beat her. 1/23/12RP 68, 107. The two argued more and more frequently about Mr. Giffin's relationship with

Ms. Montgomery-Joyner. 1/23/12RP 67; 1/24/12RP 178, 241. More than once, Shayna witnessed Mr. Giffin physically assault Ms. Clayton during these arguments. On one occasion, Mr. Giffin pushed Ms. Clayton on the couch, punched her and slapped her head. 1/23/12RP 68. He kicked her and left a bruise on her leg in the shape of a boot print. 1/23/12RP 102-03; 1/24/12RP 222. Another time, while Ms. Clayton was taking a bath, Mr. Giffin kicked down the bathroom door and pulled her out of the tub by her hair. 1/23/12RP 70, 107. She ran into the bedroom, where he punched her several times as she lay crying. 1/23/12RP 108. Still another time, Mr. Giffin pushed Ms. Clayton against a van and yelled at her. 1/23/12RP 105. Once, Shayna saw bruises on her mother's arm; it looked as though someone had punched her in the arm. 1/23/12RP 102-03. One night, Shayna and her mother spent the night in the ice cream truck that Ms. Clayton used for her business. 1/23/12RP 104. Ms. Clayton told Shayna that they had to sleep there. 1/23/12RP 104.

Shayna never saw her mother strike Mr. Giffin first. 1/23/12RP 70. If she struck him, it was only in response to his assaults. 1/23/12RP 71.

Shayna began to fear that eventually Mr. Giffin would seriously hurt her mother. 1/23/12RP 101. She had a "deep feeling" something bad was going to happen in the home. 1/23/12RP 102. Shayna began to spend every other weekend at a friend's house because she did not want to see anything bad happen to her mother. 1/23/12RP 109.

To add to Ms. Clayton's stress during this time, her other, adult, daughter Shanaha became seriously ill in late March 2011. 1/24/12RP 255-56. Shanaha spent one week in the hospital but the doctors did not know what was wrong with her. 1/24/12RP 276. Ms. Clayton visited Shanaha in the hospital every day and stayed at her house at night, taking care of Shanaha's two children. 1/24/12RP 256, 276. Ms. Clayton got very little sleep because Shanaha's children were very young—one was three years old and the other was only 13 months—and did not sleep through the night. 1/24/12RP 277. On April 1, Shanaha left the hospital against medical advice. 1/24/12RP 257, 276. Her mother disapproved and the two fought about it. 1/24/12RP 276.

That day, April 1, Ms. Clayton came home at around 5 p.m. 1/23/12RP 73. Shayna was at home in her bedroom and Mr. Giffin was in the bathroom, where he had just finished taking a shower. 1/23/12RP 73-74. Ms. Clayton went straight into the bathroom.

1/23/12RP 74. Later, she told Shayna she was upset because she had found information about Mr. Giffin's pregnant girlfriend on his cell phone. 1/23/12RP 77; 1/24/12RP 184.

Shayna heard Ms. Clayton and Mr. Giffin leave in separate cars. 1/23/12RP 75. The two drove, separately, to a nearby liquor store. 1/23/12RP 120. Joann Rardin was sitting in her car in the liquor store parking lot when she saw Mr. Giffin pull in, park, get out of his car, and walk to the door of the liquor store. 1/23/12RP 120. She saw Ms. Clayton come out of the store and approach Mr. Giffin, then move away; she did this several times. 1/23/12RP 120, 122, 124. Ms. Clayton was acting very erratically. 1/23/12RP 122. She went in and out of the store while yelling at Mr. Giffin. 1/23/12RP 129.

Ms. Rardin saw Mr. Giffin and Ms. Clayton get into their cars. 1/23/12RP 124. The two drove to a stop sign, where the nose of Ms. Clayton's car hit Mr. Giffin's car. 1/23/12RP 126. Ms. Clayton drove away. 1/23/12RP 126. Ms. Rardin called 911. 1/23/12RP 126.

Ms. Clayton went home, where she told Shayna to pack her things because they had to leave. 1/23/12RP 76. Ms. Clayton was very upset and Shayna could not get her to stop crying. 1/23/12RP 112-13. Ms. Clayton then left the house. 1/23/12RP 79.

Ms. Clayton went to Lea Giffin's house next door, upset and crying. 1/24/12RP 186, 243. She handed Lea Mr. Giffin's cell phone with the information about Ms. Montgomery-Joyner and said, "Here's the proof. Here's the proof." 1/24/12RP 184. Lea refused to look at the phone. 1/24/12RP 184. Her father had called her and told her he was with the police. 1/24/12RP 182, 186-87. Lea told Ms. Clayton, "this is over. The cops are coming." 1/24/12RP 185.

Ms. Clayton returned home. 1/23/12RP 80. She told Shayna she had gone to Lea's house asking for help but Lea said she did not care anymore. 1/23/12RP 80, 111. Shayna saw her mother put something black under the chair cushion in the living room. 1/23/12RP 80. Shayna asked what it was but her mother told her to go back to her room, which she did. 1/23/12RP 81-82.

Mr. Giffin came home about 10 minutes later. 1/23/12RP 82. Shayna could hear him arguing with her mother in the living room. 1/23/12RP 82-83. Shayna then heard a gunshot. 1/23/12RP 83. She ran out of her room and saw her mother shoot Mr. Giffin. 1/23/12RP 83-85. Mr. Giffin fell to the floor. 1/23/12RP 85.

Ms. Clayton told Shayna she was going to call the police as well as Shayna's sister, Shanaha, to have her come and get Shayna.

1/23/12RP 94. Ms. Clayton then went outside, saying she had to stay there until the police arrived. 1/23/12RP 97. She was only outside for about two minutes before coming back in. 1/23/12RP 113. She then began "going in and out" of the house erratically. 1/23/12RP 113. Shayna told her "she seemed like she had two heads." 1/23/12RP 113-14. She meant that her mother was acting as though she had "two personalities." 1/23/12RP 114. Her mother was acting "weird" in a way that Shayna had never seen before. 1/23/12RP 114.

Ms. Clayton called Shanaha to come and pick up Shayna. Shanaha testified her mother sounded "weird" and "like a demon" on the phone. 1/24/12RP 278. Like Shayna, Shanaha thought her mother was acting in a way she had never witnessed before. 1/24/12RP 278.

While she waited for the police to arrive, Ms. Clayton asked Shayna to bring her a bottle of Jack Daniels. 1/23/12RP 97. Shayna saw her mother drink a large quantity of it.[2] 1/23/12RP 97-98.

When police arrived, Ms. Clayton came out of the house with her hands in the air. 1/23/12RP 21. She was placed in handcuffs and escorted to a patrol car. 1/23/12RP 22, 33. As she waited to be taken to the precinct, police observed her emotions were like a "roller

[2] There was no evidence that Ms. Clayton had been drinking before the incident. 1/25/12RP 411.

coaster." 1/23/12RP 40. She would be calm and quiet and then suddenly burst into tears. 1/23/12RP 38, 40. She seemed angry at times and blurted out, "I shot his ass dead," and, "He had this coming. This was five years in the making." 1/23/12RP 33, 36. The next moment she said she "needed her Curtis" and, "Why did you[3] do this?" 1/23/12RP 39.

Police asked Ms. Clayton if she was injured and she said, "No. He never hits me where it shows." 1/24/12RP 317. She was too intoxicated to be booked into jail so police took her to a hospital, where she was treated for several hours before being transported back to jail. 12/02/11RP 58-60, 66.

At the hospital, Ms. Clayton blurted out several statements that were addressed to no one but were overheard by a police officer. 12/02/12RP 62-72. The statements demonstrated that Ms. Clayton was mentally preoccupied with Mr. Giffin's prior assaults. For instance, she said, "I was his Negro slave" and, "He picked up an axe and threw it at me" and, "I was so shocked when the imprint of one boot was left on my thigh. I've been beat up so bad." 12/02/11RP 71. After making

[3] The officer did not know who she meant by "you." 1/23/12RP 39.

other similar statements, she cried and thrashed about hysterically then quieted down and did not say anything more. 12/02/11RP 72.

2. The charges, insanity plea, and pretrial rulings.

The State charged Ms. Clayton with one count of premeditated first degree murder, RCW 9A.32.030(1)(a), and a separate count of second degree felony murder, RCW 9A.32.050(1)(b), with second degree assault as the underlying felony, for the single act of shooting Curtis Giffin.[4] CP 6-7.

Ms. Clayton entered a plea of not guilty by reason of insanity. CP 26. She was examined by a psychologist, who concluded that she was in a temporary psychotic state at the time of the incident and could not tell right from wrong in relation to her actions. 1/03/12RP 50-51, 62; CP 61-62. According to the expert, she had entered that psychotic state due to her extreme fear of Mr. Giffin as a result of the prior assaults he had inflicted upon her, as well as her extreme fear of being abandoned by him. CP 61-63, 71.

[4]The State also charged firearm enhancements for both counts one and two and alleged the aggravating circumstance that the crime involved domestic violence and was committed within sight or sound of the victim's or the offender's minor child under the age of eighteen years. CP 6-7. In addition, the State charged one count of unlawful possession of a firearm and one count of second degree malicious mischief, for the damage allegedly caused to Mr. Giffin's car. CP 7-8.

Ms. Clayton described extreme acts of abuse inflicted by Mr. Giffin to the expert. 1/09/12RP 51-52; CP 61. For example, she said that one time Mr. Giffin struck her in the eye repeatedly, causing her to lose sight in the eye temporarily. CP 61. Another time, Mr. Giffin swung an axe at her. CP 61. She also described the incident witnessed by Shayna where Mr. Giffin dragged her out of the bathtub, naked, and repeatedly stomped on her and kicked her. CP 61; 1/09/12RP 51. The details of these incidents were essential to explain the basis for the expert's opinion that Ms. Clayton had entered a transient psychotic state. CP 61-62; 1/09/12RP 50-51.

The State moved to limit the expert's testimony about the prior assaults. 1/09/12RP 36, 41, 47. The court ruled the expert could not testify about specific instances of abuse by Mr. Giffin that Ms. Clayton described, despite the court's acknowledgement that the evidence was relevant to the insanity defense. CP 78; 1/09/12RP 99-103.

Also prior to trial, the defense moved to admit the statements Ms. Clayton had made at the hospital after her arrest which were overheard by the police officer, to show her state of mind. 1/09/12RP 84-86. The court excluded the evidence, reasoning that Ms. Clayton's state of mind at the hospital was not relevant to her insanity defense

because she had become intoxicated after the incident. 1/09/12RP 91-92. But incongruously, the court admitted, over defense objection, two photographs of Ms. Clayton taken by police at the precinct after her arrest. 1/23/12RP 44-50. The court ruled the photographs were relevant to show Ms. Clayton's state of mind. 1/23/12RP 48-49.

3. The trial.

The medical examiner testified that Mr. Giffin died as a result of multiple gunshot wounds. 1/25/12RP 424. Two of the shots entered his front and two entered his back. 1/25/12RP 458. The medical examiner could not say the order in which the wounds were inflicted. 1/25/12RP 458.

Joann Rardin testified about the incident she witnessed at the liquor store soon before the shooting. 1/23/12RP 116-32. At trial, Ms. Rardin was equivocal about her perceptions of Ms. Clayton's state of mind. Id. The trial court refused to permit defense counsel to introduce Ms. Rardin's statement to police made soon after the incident, in which she said that Ms. Clayton appeared afraid of Mr. Giffin and was trying to avoid him. 1/23/12RP 140-41.

The defense expert, Donald Dutton, testified that Ms. Clayton was in a "transient" psychotic state at the time of the incident and could

not perceive the nature and quality of her actions or tell right from wrong in relation to them. 1/30/12RP 496, 506, 530, 543, 548, 553, 620-21. Dr. Dutton diagnosed Ms. Clayton with borderline personality disorder. 1/30/12RP 485-86. A person in a transient psychotic state is delusional and has distorted thinking and beliefs. 1/30/12RP 497, 504, 523-24, 530, 543, 620, 633-34. Ms. Clayton's distorted thinking made her believe she could not get away from Mr. Giffin. 1/30/12RP 510, 519-21, 545-47. At the same time, she "catastrophized," that is, she exaggerated the threat that he posed to her. 1/30/12RP 517, 535, 565-66. She said she shot him because he came toward her and threatened her. 1/30/12RP 562. She thought she had to shoot him in order to be safe. 1/30/12RP 545-47, 559-60.

Dr. Dutton concluded Ms. Clayton entered the psychotic state as a result of her personality disorder, combined with the extreme stress and fear she was experiencing. On the one hand, she had an extreme fear of being abandoned by Mr. Giffin although she was also angry at him for cheating on her. 1/30/12RP 493-94, 504-06, 520-21, 602-03. On the other hand, she was extremely fearful of any further abuse by him. 1/30/12RP 494, 521, 565. These conflicted extremes of emotion were manifested in her chaotic and erratic behavior around the time of

the incident. 1/30/12RP 519-20. Her dire mental state was exacerbated by the stress she felt over Shanaha's illness and the fact she could no longer find comfort and help from Mr. Giffin's daughter, Lea. 1/30/12RP 516, 519. In sum, she had "spiraled upward" into a state of extreme panic, causing her to become psychotic. 1/30/12RP 519-20.

The State's experts also evaluated Ms. Clayton. 1/31/12RP 655-57. Although they agreed with Dr. Dutton that Ms. Clayton had a personality disorder, they did not agree that she was legally insane at the time of the incident. 1/31/12RP 679, 682-83.

For count one, the jury was instructed on the lesser-included crime of second degree intentional murder. CP 158-60. The jury found Clayton guilty of second degree intentional murder for count one, and guilty of counts two, three and four as charged. CP 186-90.

4. Sentencing.

At sentencing, the court refused to vacate one of the second degree murder convictions and instead entered an order "merging" counts one and two. CP 246-48. The court entered a judgment and sentence that states count two is "[m]erged into Count I." CP 253. The court found Ms. Clayton had two prior convictions for "most serious

offenses" and therefore imposed a sentence of life without the possibility of parole. CP 254, 257.

E. ARGUMENT

1. The trial court's erroneous rulings excluding evidence highly probative of Ms. Clayton's insanity defense deprived her of her constitutional rights to present a full defense and confront the witnesses against her

a. A trial court may not exclude testimony relevant to an accused's defense unless the State demonstrates the evidence is so prejudicial as to disrupt the fairness of the fact-finding process at trial.

Few rights are as fundamental as that of an accused in a criminal trial to present testimony in her own defense. Both the Sixth Amendment[5] and article I, section 22[6] guarantee a criminal defendant the right to compel the testimony of witnesses. State v. Maupin, 128 Wn.2d 918, 924, 913 P.2d 808 (1996); Const. art. I, § 22; U.S. Const. amend. VI. In addition, the right to offer testimony in one's own behalf has long been recognized as essential to due process. Chambers v.

[5] The Sixth Amendment provides: "In all criminal prosecutions, the accused shall enjoy the right . . . to have compulsory process for obtaining witnesses in his favor."

[6] Article I, section 22 guarantees that "[i]n all criminal prosecutions the accused shall have the right . . . to have compulsory process to compel the attendance of witnesses in his own behalf."

Mississippi, 410 U.S. 284, 294, 90 S. Ct. 1038, 35 L. Ed. 2d 297 (1973); U.S. Const. amend. XIV; Const. art. I, § 3.

The United States Supreme Court made clear, "[t]he right to offer the testimony of witnesses, and to compel their attendance, if necessary, is in plain terms the right to present a defense." Washington v. Texas, 388 U.S. 14, 19, 87 S. Ct. 1920, 18 L. Ed. 2d 1019 (1967). The right to offer testimony in support of one's defense is fundamental to due process, as it encompasses "the right to present the defendant's version of the facts as well as the prosecution's to the jury so it may decide where the truth lies." Id.

The Washington Supreme Court also recognizes that a defendant's right to be heard in her defense includes the right to offer testimony and is "basic in our system of jurisprudence." State v. Jones, 168 Wn.2d 713, 720, 230 P.3d 576 (2010). The fundamental right to compel the testimony of witnesses is "guarded jealously." State v. Smith, 101 Wn.2d 36, 41, 677 P.2d 100 (1984).

The right to present testimony in one's behalf encompasses the right to present relevant testimony. Jones, 168 Wn.2d at 720. The evidence need only be of "minimal relevance." Id. The State's interest in excluding prejudicial evidence is balanced against the defendant's

need for the evidence; evidence relevant to the defense can be withheld only if the State's interest outweighs the defendant's need. Id. If the evidence is relevant, the court may exclude it only if the State demonstrates it is so prejudicial as to disrupt the fairness of the fact-finding process at trial. Id. For evidence of high probative value, "'no state interest can be compelling enough to preclude its introduction consistent with the Sixth Amendment and Const. art. I, § 22.'" Id. (quoting State v. Hudlow, 99 Wn.2d 1, 16, 659 P.2d 514 (1983)).

A trial court's decision to admit or exclude evidence is generally reviewed for abuse of discretion. State v. Darden, 145 Wn.2d 612, 619, 41 P.3d 1189 (2002). A court necessarily abuses its discretion if it denies a criminal defendant's constitutional rights. State v. Iniguez, 167 Wn.2d 273, 280, 217 P.3d 768 (2009). The Court reviews a claim of denial of constitutional rights de novo. Jones, 168 Wn.2d at 719.

b. The court abused its discretion in excluding Ms. Clayton's statements to the expert about the details of Mr. Giffin's assaults upon her because the evidence was essential to explain the basis for the expert's opinion.

The essence of Ms. Clayton's defense was that she was temporarily psychotic at the time of the shooting and was unable to perceive the nature and quality of her actions or tell right from wrong in

relation to them. 1/30/12RP 496, 506, 543, 548, 553, 620-21. An expert, Dr. Dutton, testified that she entered this psychotic state as a result of her mental disorder and the extreme stress and fear she was experiencing. 1/30/12RP 485-86, 493-94, 504-06, 520-21, 565, 602-03. Ms. Clayton was afraid of Mr. Giffin because of the repeated and serious assaults he had inflicted upon her. 1/30/12RP 494, 521, 565. Those prior assaults caused her to exaggerate the threat that he posed and caused her to believe that the only way she could be safe was to shoot him. 1/30/12RP 517, 535, 545-47, 559-62, 565-66.

Yet the trial court refused to permit the expert to testify about the details of the prior assaults inflicted by Mr. Giffin that Ms. Clayton told him about. CP 78; 1/09/12RP 99-103. The trial court expressly acknowledged that the testimony was relevant. CP 78; 1/09/12RP 99-103. Yet the court reasoned that the testimony might mislead the jury because Ms. Clayton had not raised a battered woman defense. CP 78; 1/09/12RP 99-103. The court also reasoned that the testimony was not sufficiently reliable because there was no corroborative evidence of some of the incidents. Id. Neither of these reasons justified excluding the evidence that was not only relevant but essential to effectively present Ms. Clayton's defense.

First, even if the evidence might have been relevant to a battered woman defense, this does not mean it was not relevant to Ms. Clayton's asserted insanity defense. To prove the defense of insanity, Ms. Clayton was required to prove by a preponderance of the evidence that, as a result of a mental disease or defect, her mind was affected to such an extent that she was unable to perceive the nature and quality of the acts with which she was charged or was unable to tell right from wrong with reference to them. RCW 9A.12.010; CP 145 (jury instruction).

The well-established rule is that, when a criminal defendant raises an insanity defense, the jury may consider events occurring both before and after commission of the alleged act, if the evidence relates to the defendant's condition of mind at the time of the crime. State v. O'Dell, 38 Wn.2d 4, 19-22, 227 P.2d 710 (1951). "[G]reat latitude is allowed in proving the mental condition of the accused. Both the state and the defendant may go to great length in offering evidence as to acts, conditions, and conduct of the accused, not only at the time of the offense, but prior and subsequent thereto." Id. at 20.

The evidence of Ms. Clayton's mental condition consisted principally of the testimony of her expert, Dr. Dutton. ER 703 expressly allows experts to base their opinion testimony on facts or data

that are not otherwise admissible in evidence "[i]f of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject." ER 705 provides that an "expert may testify in terms of opinion or inference and give reasons therefor without prior disclosure of the underlying facts or data, unless the judge requires otherwise." Together, these rules permit a trial court to allow an expert to relate otherwise inadmissible out-of-court statements to the jury in order to explain the reasons for his opinion. 5B Karl B. Tegland, Washington Practice: Evidence Law and Practice, §705.5, at 293-94 (5th ed. 2007); see also In re Det. of Marshall, 156 Wn.2d 150, 162-63, 125 P.3d 111 (2005) (expert could relate otherwise inadmissible material for purpose of explaining basis for her opinion).

Here, there was no dispute that the information conveyed by Ms. Clayton to the expert was the type of information reasonably relied upon by the expert in forming his opinion about Ms. Clayton's mental condition. See 1/09/12RP 74. Instead, the State argued the statements were inadmissible because they were hearsay and were not relevant. 1/09/12RP 41-42. But the defense did not offer the evidence as proof

of the matters asserted.[7] 1/09/12RP 52-54. A defendant's out-of-court statements made to a psychologist expert are admissible at trial if they are offered to explain the basis for the expert's opinion. State v. Fullen, 7 Wn. App. 369, 383-84, 499 P.2d 893 (1972). The statements are not considered "hearsay" because they are not offered to prove the truth of the matters asserted. Id. The trial court may provide a limiting instruction to the jury to explain that the evidence is not to be considered for its truth. Marshall, 156 Wn.2d at 163.

The details of the prior assaults inflicted by Mr. Giffin upon Ms. Clayton, as she recounted to the expert, were relevant to the expert's opinion about Ms. Clayton's mental condition. The trial court explicitly acknowledged that the evidence was relevant to Ms. Clayton's defense. CP 78; 1/09/12RP 99-103. The trial court's conclusion that the evidence was nonetheless inadmissible because it was also relevant to a different defense that Ms. Clayton did not raise is illogical and unreasonable.

The second reason the trial court gave for excluding the evidence was that there was no corroboration for some of the assaultive

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[7] "Hearsay" is defined as "a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." ER 801(c).

incidents that Ms. Clayton described. CP 78; 1/09/12RP 99-103. In other words, the trial court reasoned that the evidence was not sufficiently reliable. But the evidence was not offered to prove that the assaults actually occurred, and therefore the court's concern about whether the alleged incidents were corroborated was unfounded. In addition, the proper means of ensuring the reliability of the expert's testimony was through cross-examination of the expert, not through exclusion of the evidence.

In State v. Eaton, 30 Wn. App. 288, 292-93, 633 P.2d 921 (1981), the defendant presented a diminished capacity defense and the trial court required him to testify and subject himself to cross-examination so that the State could test the truth of his out-of-court statements to the psychiatrist expert. This Court reversed, holding "the proper way to test the reliability of the [expert's] opinion was through cross examination of the psychiatrist, not by requiring the defendant to testify." Id. at 292. As discussed, ER 703 permits an expert to base his opinion upon data not admissible in evidence so long as the data is of a kind reasonably relied upon by experts in the field. Id. at 293-94. Although the probative value of expert medical testimony may be lessened when it is based on subjective symptoms and narrative

statements given by a defendant charged with a crime, the assumption underlying ER 703 is that opposing counsel will forcefully bring that point to the jury's attention during cross-examination of the expert. Id. at 294. Further,

> Jurors are quite aware that a criminal defendant may be motivated to fabricate a defense and are unlikely to be influenced unduly by an expert opinion that is shown to rest on questionable sources of information. Moreover, experienced forensic psychiatrists are equally aware of the danger of fabrication and are trained to detect untruthful answers to their questions.

Id. at 295 (citations omitted). Thus, admission of Ms. Clayton's statements to the expert presented no meaningful threat to the truth-finding function of the trial.

In sum, the trial court's decision to exclude Ms. Clayton's statements to the expert about the details of Mr. Giffin's prior assaults was unreasonable and without justification. The evidence was relevant and necessary to explain the basis for the expert's opinion. The proper way to test the reliability of the expert's reliance upon the evidence was to cross-examine the expert, not exclude the evidence. Given the importance of the expert's opinion to Ms. Clayton's defense, and the State's failure to show that exclusion of the evidence was necessary,

the court's decision to exclude the evidence violated Ms. Clayton's constitutional right to present a defense. Jones, 168 Wn.2d at 720.

c. The court abused its discretion in excluding Ms. Clayton's statements at the hospital because the evidence was highly probative of her mental state.

The trial court excluded, over defense objection, the statements that Ms. Clayton blurted out at the hospital soon after her arrest which were overheard by a police officer. 12/02/12RP 62-72; 1/09/12RP 91-92. The statements showed that, in the hours immediately following the incident, Ms. Clayton was still mentally consumed by memories of Mr. Giffin's assaults upon her. In a rambling and repetitive manner, she blurted out statements such as, "[he] kicked me so hard with his boot," and "[h]e picked up an axe and threw it at me." 12/02/11RP 71. She said, "I was his Negro slave" and, "I've been beat up so bad" and, "He was the worst of anyone in my entire life." 12/02/12RP 71.

The defense offered the statements as evidence of Ms. Clayton's state of mind. CP 73-75; 1/09/12RP 84-86. The court concluded that the statements were inadmissible hearsay and that Ms. Clayton's state of mind was not relevant because she had become intoxicated after the shooting. 1/09/12RP 91-92. The court abused its discretion because Ms. Clayton's state of mind following the incident was highly

probative of her insanity defense. The statements were not hearsay because they were not offered to prove the truth of the matters asserted.

Ms. Clayton's mental condition during the hours following the incident was highly probative of the ultimate question in the case—whether she was temporarily psychotic at the time of the crime. When an insanity defense is raised, the defendant is entitled to "go to great length in offering evidence" to demonstrate her mental condition "not only at the time of the offense, but prior and subsequent thereto." O'Dell, 38 Wn.2d at 20. The defendant's state of mind soon after the incident is relevant to demonstrate what her state of mind must have been at the time of the alleged acts. Id. at 19-22.

Ms. Clayton's defense was that she was temporarily psychotic at the time of the incident in part due to the extreme fear she felt as a result of the repeated and serious assaults Mr. Giffin had inflicted upon her. 1/30/12RP 494, 517, 521, 535, 545-47, 559-66. That Ms. Clayton was still consumed by memories of those assaults even hours after the incident is highly probative of the defense theory. Although Ms. Clayton became intoxicated directly after the shooting, this does not negate the relevance of her state of mind.

In a separate ruling, the trial court explicitly recognized that Ms. Clayton's state of mind during the hours after the incident was relevant even though she had become intoxicated. The court admitted two photographs of Ms. Clayton taken by police at the precinct after her arrest which were offered by the State to show her state of mind. 1/23/12RP 44-50. The court's ruling admitting evidence of Ms. Clayton's state of mind at the precinct is inconsistent with its ruling excluding evidence of her state of mind at the hospital. If any of that evidence was relevant, it was all relevant.

Additionally, Ms. Clayton's statements at the hospital were not inadmissible hearsay. ER 803(a)(3) provides that "[a] statement of the declarant's then existing state of mind, emotion, sensation, or physical condition (such as intent, plan, motive, design, mental feeling, pain, and bodily health)" is not excluded by the hearsay rule. Such statements are not considered hearsay because they are not offered to prove the truth of the matters asserted but to show the declarant's state of mind at the time of the utterances. State v. Stubsjoen, 48 Wn. App. 139, 146, 738 P.2d 306 (1987).

In sum, Ms. Clayton's mental state during the hours following the shooting was highly probative of her insanity defense. O'Dell, 38

Wn.2d at 19-22. Admission of her statements at the hospital would not have disrupted the truth-finding function of the trial because the statements were not offered to prove the truth of the matters asserted. ER 803(a)(3); Stubsjoen, 48 Wn. App. at 146. Therefore, exclusion of the evidence violated Ms. Clayton's constitutional right to present a defense. Jones, 168 Wn.2d at 720.

d. The court abused its discretion and violated Ms. Clayton's constitutional right to confront the witnesses when it refused to allow defense counsel to impeach a prosecution witness with her prior inconsistent statements.

Joann Rardin observed the interaction between Ms. Clayton and Mr. Giffin at the liquor store shortly before the shooting. 1/23/12RP 116. During cross-examination at trial, Ms. Rardin was equivocal about whether Ms. Clayton appeared to be afraid of Mr. Giffin and whether she appeared to be trying to avoid him or get away from him. The following exchange took place on cross-examination:

Q You saw these two vehicles parked next to each other; is that correct?
A Yes.
Q Okay. And you saw the male come close to the female; is that correct?
A He actually came out of his car and was just standing. He wasn't approaching anybody. He was just standing there.
Q Do you remember telling Officer Eriksen that the

male came close to the female multiple times causing the female to back up?

A He made a step in her direction.

Q Okay.

A And as he did so, she backed up.

Q Do you remember telling Officer Eriksen that you were under the impression the female might be afraid of the male?

A That's what it seemed like. I also made some other statements in regard to my opinion about it.

Q We'll get there. Do you remember telling Officer Eriksen that the female went in and out of the store a few times in what appeared to be an attempt to get away from the male?

A She went in and out of the store with the door open and was yelling towards him. I could only make out part of –

Q Do you remember telling her that you thought it was an attempt to get away from the male?

A I don't remember telling her it was an attempt to get away from him. I – maybe to avoid the situation.

Q Okay. And at one point, the male went into the trunk of his car and got something?

A Yes.

Q And you were concerned about that?

A I was concerned just because of what I was watching, yes.

Q You were concerned it might be a weapon?

A I didn't know what it was.

Q And then at some point, both of these folks got into their vehicle?

A (Indicating affirmatively.)

Q Okay. And the female entered on the passenger side; is that correct?

A Yes.

Q And did that concern you? It's not the way one normally gets into a car. Did that concern you?

A Well, it didn't really concern me because she was standing over by there. He was standing at the

trunk, at the rear quarter panel by the passenger side door. They were actually exchanging some words over there, so –

Q Do you remember telling Officer Eriksen that you felt that this was a way to stay away from the male?

A No.

Q That's why she got in on the passenger side?

A No, I don't recall that that's the way she would stay away from the male. I think she just didn't want to get in between the two vehicles.

Q Okay.

1/23/12RP 128-30.

Yelm Police Officer Liz Eriksen testified immediately after Ms. Rardin. Officer Eriksen had taken a statement from Ms. Rardin at the liquor store on the evening of the incident. 1/23/12RP 139. Ms. Rardin made that statement before learning that Mr. Giffin had been shot. 1/23/12RP 132.

During cross-examination of Officer Eriksen, defense counsel attempted to impeach Ms. Rardin's trial testimony by introducing extrinsic evidence of her prior inconsistent statements to the officer. Counsel asked,

Q And isn't it true that Ms. Rardin told you that the – that she was under the impression that the female might be afraid of the male?

1/23/12RP 140. The State objected, arguing this was "collateral impeachment." 1/23/12RP 140. The court sustained the objection.

1/23/12RP 141. Defense counsel then asked, "Did she tell you that this female went in and out of the store several times to avoid the male?" 1/23/12RP 141. The State made the same objection and again the court sustained the objection. 1/23/12RP 141. Finally, counsel asked, "Did she tell you that the female entered on the passenger side, that she was trying to avoid the male?" 1/23/12RP 141. Again the State objected and the court sustained the objection. 1/23/12RP 141.

The court abused its discretion in refusing to permit counsel to impeach Ms. Rardin with her prior inconsistent statements. The subject matter of the impeachment was not "collateral."

In general, a witness's prior out-of-court statement is admissible for impeachment purposes if it is inconsistent with the witness's trial testimony. State v. Newbern, 95 Wn. App. 277, 292, 975 P.2d 1041 (1999). The purpose of using prior inconsistent testimony to impeach is to allow an adverse party to show that the witness tells different stories at different times. Id. at 293. From this, the jury may disbelieve the witness's trial testimony. Id. The witness's prior inconsistent statements are not offered to prove the truth of the matters asserted but rather to show that the witness's testimony is unreliable; the out-of-

court statements are therefore not considered "hearsay." Fraser v. Beutel, 56 Wn. App. 725, 738, 785 P.2d 470 (1990).

In a criminal case, a defendant's right to impeach a prosecution witness with evidence of a prior inconsistent statement is guaranteed by the constitutional right to confront witnesses. State v. Johnson, 90 Wn. App. 54, 69, 950 P.2d 981 (1998); Davis v. Alaska, 415 U.S. 308, 316-18, 94 S. Ct .1105, 39 L. Ed. 2d 347 (1974); U.S. Const. amend. VI.[8]

Here, the prosecutor objected to the impeachment of Ms. Rardin, claiming it pertained to a "collateral" matter. The prosecutor was invoking the well-established rule that extrinsic evidence is inadmissible to contradict a witness on a collateral matter. State v. Carr, 13 Wn. App. 704, 708, 537 P.2d 844 (1975).

But prior inconsistent statements are not collateral and therefore extrinsic evidence is admissible if the statements have as their subject facts relevant to the issues in the cause. State v. Dickenson, 48 Wn. App. 457, 466, 740 P.2d 312 (1987). "A witness may be impeached with a prior out-of-court statement of a material fact that is inconsistent with his testimony in court." Id. The Court applies the following test

[8] The Sixth Amendment provides, "In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him."

to determine whether a fact is a collateral matter: Could the fact upon which error is based have been brought into evidence for a purpose independent of the contradiction? Id. A matter is collateral if the evidence is inadmissible for any purpose independent of the contradiction. Id.

The subject matter of the proposed impeachment of Ms. Rardin was not collateral because it pertained to the central issue in the case: Ms. Clayton's state of mind. Again, Ms. Clayton's state of mind both before and after commission of the alleged act was highly probative of her insanity defense. O'Dell, 38 Wn.2d at 19-22. The defense expert testified that Ms. Clayton entered a temporary psychotic state in part because she was extremely afraid of Mr. Giffin as a result of his prior assaults. 1/30/12RP 494, 521, 562, 565. Defense counsel's attempt to impeach Ms. Rardin pertained to her perceptions of whether Ms. Clayton seemed afraid of Mr. Giffin at the liquor store. The witness's perceptions of Ms. Clayton's mental state at that time, soon before the shooting, would have been admissible independent of the contradiction. The impeachment therefore pertained to a material, and not a collateral, matter. Dickenson, 48 Wn. App. at 466.

A witness's out-of-court statement need not directly contradict the witness's trial testimony in order to justify the use of the statement for impeachment. Sterling v. Radford, 126 Wash. 372, 375, 218 P. 205 (1923). "As as general principle, it is to be understood that this inconsistency is to be determined, not by individual words and phrases alone, but by the whole impression or effect of what has been said or done. On a comparison of the two utterances, are they in effect inconsistent? Do the two expressions appear to have been produced by inconsistent beliefs?" Id.

Generally, if the witness testifies at trial about an *event* but claims to have no knowledge of a material detail, or no recollection of it, the witness's prior statement indicating knowledge of the detail may be used for impeachment. Newbern, 95 Wn. App. at 292. Even if the witness cannot remember making a prior inconsistent statement, if the witness testifies at trial to an inconsistent story, the need for the jury to know that the witness may be unreliable is compelling. Id. at 293.

Here, material aspects of Ms. Rardin's testimony were inconsistent with her prior statement to police. At trial, Ms. Rardin testified she did not remember telling Officer Eriksen that Ms. Clayton went in and out of the liquor store in an apparent attempt to get away

from Mr. Giffin. 1/23/12RP 128-30. She also testified she did not remember telling the officer that Ms. Clayton entered her car on the passenger side in an apparent attempt to stay away from him. Id. Instead, she said, "I think she just didn't want to get in between the two vehicles." Id.

The "impression or effect" of what Ms. Rardin said at trial was that Ms. Clayton did not appear to be afraid of Mr. Giffin and was not trying to get away from him. But in her statement to police, Ms. Rardin said Ms. Clayton *did* appear to be afraid of Mr. Giffin and *was* trying to avoid him. 1/23/12RP 140-41. Therefore, the trial court should have allowed the defense to impeach Ms. Rardin with her prior inconsistent statements. Newbern, 95 Wn. App. at 292; Sterling, 126 Wash. at 375.

It was particularly important for the jury to hear the material details of Ms. Rardin's statement to police because she made the statement soon after the event and before learning that Mr. Giffin had been shot. 1/23/12RP 132, 139. "Courts and commentators have both acknowledged that the jury is better able to determine the value and weight to give a witness's trial testimony if it knows that the witness expressed contrary views while the event was still fresh in the witness's

memory and before the passage of time created opportunities for outside influence to distort the statement." Newbern, 95 Wn. App. at 295. The passage of time, as well as knowledge of the shooting, may well have influenced Ms. Rardin's memory and caused her to view Mr. Giffin in a more sympathetic and less threatening light at the time of trial than on the date that she gave her police statement.

In sum, the trial court abused its discretion when it did not allow defense counsel to impeach Ms. Rardin's testimony with her prior inconsistent statements about matters that were material to the defense. Newbern, 95 Wn. App. at 292; Dickenson, 48 Wn. App. at 466; Sterling, 126 Wash. at 375. As a result, Ms. Clayton's constitutional right to confront the witness was violated. Johnson, 90 Wn. App. at 69.

e. The court's erroneous rulings seriously undermined the defense and require reversal of the convictions.

Violations of the constitutional rights to present a defense and confront the witnesses are presumed prejudicial and are harmless only if the State proves they are harmless beyond a reasonable doubt. Jones, 168 Wn.2d at 724; Chapman v. California, 386 U.S. 18, 24, 87 S. Ct. 824, 17 L. Ed. 2d 705 (1967); Johnson, 90 Wn. App. at 69. The State must prove beyond a reasonable doubt that the errors complained of did

not contribute to the verdict obtained. Chapman, 368 U.S. at 24 Error is harmless only if the reviewing court is "convinced beyond a reasonable doubt that any reasonable jury would have reached the same result without the error." Jones, 168 Wn.2d at 724.

Here, it is reasonable to conclude that a rational jury would not have reached the same result in the absence of the errors. The trial court made several rulings, throughout the trial, that precluded Ms. Clayton from presenting highly probative evidence in support of her insanity defense. Ms. Clayton's mental state at the time of the incident was hotly contested and the central issue in the case. The State presented evidence and argued that Ms. Clayton acted out of anger and jealousy. The trial court's erroneous rulings precluded Ms. Clayton from presenting evidence of her mental state that contradicted the State's evidence and theory of the case. Had Dr. Dutton been able to testify about the details of abuse Ms. Clayton told him about, the jury would have been much more likely to accept his opinion that she was extremely fearful of Mr. Giffin at the time of the shooting. Had Ms. Clayton's statements at the hospital been admitted, the jury would have been much more likely to conclude she was mentally consumed with Mr. Giffin's abuse and did not act simply out of jealousy. Had the

court permitted counsel to impeach Ms. Rardin's testimony about her perceptions of Ms. Clayton's mental state, the jury would have been much more likely to find that she was indeed afraid of Mr. Giffin.

In sum, the court's erroneous rulings excluding the evidence were not harmless beyond a reasonable doubt. Therefore, the convictions must be reversed and Ms. Clayton must be given a new trial at which she may present a full defense. Jones, 168 Wn.2d at 724; Johnson, 90 Wn. App. at 69.

2. The trial court's refusal to vacate one of the murder convictions violated Ms. Clayton's constitutional right not to be punished twice for the same offense

The double jeopardy doctrine protects criminal defendants against multiple punishments for the same offense. State v. Womac, 160 Wn.2d 643, 650, 160 P.3d 40 (2007); U.S. Const. amend. V; Const. art. I, § 9.

It is well-settled that double jeopardy is violated if a defendant receives multiple convictions for the same offense, even if only a single sentence is imposed. Womac, 160 Wn.2d at 656-57. "[C]onviction, and not merely imposition of a sentence, constitutes punishment" for purposes of the Double Jeopardy Clause. Id. That is because the separate conviction alone has potential adverse collateral consequences;

for example, it "'may be used to impeach the defendant's credibility and certainly carries the societal stigma accompanying any criminal conviction.'" Id. (quoting Ball v. United States, 470 U.S. 856, 865, 105 S. Ct. 1668, 84 L. Ed. 2d 740 (1985)). The Court reviews a double jeopardy claim *de novo*. State v. Turner, 169 Wn.2d 448, 454, 238 P.3d 461 (2010).

In Womac, the Supreme Court held unequivocally that, when multiple convictions constitute the same criminal conduct, the proper remedy is to enter judgment on only one offense and vacate the remaining convictions. 160 Wn.2d at 656, 660. In that case, the trial court found all three of the defendant's convictions constituted the same criminal conduct but nonetheless found two of the counts to be "valid convictions." Id. at 651, 655. Although the court imposed a sentence on count one only, it entered judgment on all three convictions and therefore, "the other convictions were left on his record." Id. at 647. Thus, double jeopardy was violated. Id.

When a defendant is convicted twice for the same criminal conduct, the trial court must not only vacate one of the convictions but must also refrain from referring to that conviction on the record. "[W]hen faced with multiple convictions for the same conduct, courts

should enter a judgment on the greater offense only and sentence the defendant on that charge *without reference to the verdict* on the lesser offense." Turner, 169 Wn.2d at 463 (internal quotation marks and citation omitted). The "judgment and sentence must not include any reference to the vacated conviction—nor may an order appended thereto include such a reference; similarly, no reference should be made to the vacated conviction at sentencing." Id. at 464-65.

In Turner, the trial court issued a written order vacating the lesser conviction but still referenced that conviction in the judgment by stating the conviction was "nevertheless a valid conviction" for which Turner could be sentenced if his remaining conviction did not survive appeal. Id. at 452-53, 464. Double jeopardy prohibits courts from explicitly recognizing the validity of a vacated conviction, either in the judgment, a separate order, or otherwise. Id. at 465. "It is the validity that this practice lends to the vacated conviction that is the problem." Id. at 465.

Here, contrary to Womac and Turner, the trial court refused to vacate one of Ms. Clayton's convictions and instead referenced that conviction in the judgment and sentence as well as in a separate written order. There was no dispute that Ms. Clayton's two convictions for

second degree intentional murder and second degree felony murder for a single homicide amounted to the same criminal conduct for double jeopardy purposes. Yet despite counsel's objection, the trial court refused to vacate one of the convictions. CP 246-48, 253. Instead, the court stated on the judgment and sentence that count two "merged into Count I." CP 253. The court also entered a separate order "merging" the two counts. CP 246-48. The court's refusal to vacate one of the convictions, and remove any reference to it on the judgment, violated Ms. Clayton's constitutional right to be free from double jeopardy. Turner, 169 Wn.2d at 463-65; Womac, 160 Wn.2d at 647.

The trial court's conclusion that the double jeopardy violation could be avoided by "merging" the two convictions was an inappropriate application of the merger doctrine.

> [T]he merger doctrine is a rule of statutory construction which only applies where the Legislature has clearly indicated that in order to prove a particular degree of crime (*e.g.*, first degree rape) the State must prove not only that a defendant committed that crime (*e.g.*, rape) but that the crime was accompanied by an act which is defined as a crime elsewhere in the criminal statutes (*e.g.*, assault or kidnapping).

State v. Freeman, 153 Wn.2d 765, 777-78, 108 P.3d 753 (2005). The purpose of the merger doctrine is to determine whether two offenses constitute the same offense for double jeopardy purposes. Id.

Here, there was no dispute that Ms. Clayton's two convictions amounted to the same offense. Second degree intentional murder and second degree felony murder are alternative means of committing the crime of second degree murder. State v. Berlin, 133 Wn.2d 541, 553, 947 P.2d 700 (1997). One is not a lesser crime of the other and the two offenses do not "merge."

Ms. Clayton's constitutional right to be free from double jeopardy was violated because she was convicted twice for the same offense. One of the two second degree murder convictions must be vacated and any reference to the conviction must be removed from the record. Turner, 169 Wn.2d at 463-65; Womac, 160 Wn.2d at 647.

3. Imposition of a sentence of life without the possibility of parole based on prior convictions that were not proved to a jury beyond a reasonable doubt violated Ms. Clayton's rights to due process and equal protection of the law

a. Due process requires a jury find beyond a reasonable doubt any fact that increases a defendant's maximum possible sentence.

The Due Process Clause of the United States Constitution ensures that a person will not suffer a loss of liberty without due process of law. U.S. Const. amend. XIV. The Sixth Amendment also provides the defendant with a right to trial by jury. U.S. Const. amend.

VI. A criminal defendant has the right to a jury trial and may only be convicted if the State proves every element of the crime beyond a reasonable doubt. Blakely v. Washington, 542 U.S. 296, 300-01, 124 S. Ct. 2531, 159 L. Ed. 2d 403 (2004); Apprendi v. New Jersey, 530 U.S. 466, 476-77, 120 S. Ct. 2348, 147 L. Ed. 2d 435 (2000).

The United States Supreme Court recognized this principle applies equally to facts labeled "sentencing factors" if they increase the maximum penalty faced. Blakely, 542 U.S. at 304. Blakely held that an exceptional sentence imposed under Washington's Sentencing Reform Act (SRA) was unconstitutional because it permitted the judge to impose a sentence over the standard sentence range based upon facts that were not found by the jury beyond a reasonable doubt. Id. at 304-05; see Ring v. Arizona, 536 U.S. 584, 609, 122 S. Ct. 2428, 153 L. Ed. 2d 556 (2002) (invalidating death penalty scheme where jury does not find aggravating factors). In Apprendi, the Court found a statute unconstitutional because it permitted the court to give a sentence above the statutory maximum after making a factual finding by the preponderance of the evidence. 530 U.S. at 492-93.

More recently, the Supreme Court recognized that the jury's traditional role in determining the degree of punishment included

setting fines, and concluded that under Apprendi, the jury must find beyond a reasonable doubt the facts that determine the maximum fine permissible. Southern Union Co. v. United States, _ U.S. _, 132 S. Ct. 2344, 2356, 183 L. Ed. 2d 318 (2012).

In these cases, the Court rejected the notion that arbitrary labeling of facts as "sentencing factors" or "elements" was meaningful. "Merely using the label 'sentence enhancement' to describe the [one act] surely does not provide a principled basis for treating [the two acts] differently." Apprendi, 530 U.S. at 476. A judge may not impose punishment based on additional findings. Blakely, 542 U.S. at 304-05.

b. The rights to a jury trial and proof beyond a reasonable doubt apply in this case.

The Supreme Court has never conclusively held the Sixth Amendment does not apply to proof of prior convictions which elevate the maximum punishment. Before Apprendi, it held that recidivism was not an element of the substantive crime that needed to be pled in the information. Almendarez-Torres v. United States, 523 U.S. 224, 246, 118 S. Ct. 1219, 140 L. Ed. 2d 350 (1998).

Since Almendarez-Torres, the Court has not analyzed recidivism and distinguished prior convictions from other facts used to enhance the penalty. Blakely, 542 U.S. at 301-02; Apprendi, 530 U.S.

at 476. Apprendi explained that Almendarez-Torres only addressed the charging document. 530 U.S. at 488, 495-96. Apprendi also noted "it is arguable that Almendarez-Torres was incorrectly decided, and that a logical application of our reasoning today should apply if the recidivist issue were contested." 530 U.S. at 489. This demonstrates the Court has not yet considered the issue of prior convictions under Apprendi. Colleen P. Murphy, The Use of Prior Convictions After *Apprendi*, 37 U.C. Davis L. Rev. 973, 989-90 (2004).

The Washington Supreme Court has noted the United States Supreme Court's failure to embrace the Almendarez-Torres decision. State v. Smith, 150 Wn.2d 135, 142, 75 P.3d 934 (2003) (addressing Ring); State v. Wheeler, 145 Wn.2d 116, 121-24, 34 P.2d 799 (2001) (addressing Apprendi). But it has felt it must "follow" Almendarez-Torres. Smith, 150 Wn.2d at 143; Wheeler, 145 Wn.2d 123-24. Since Almendarez-Torres only addressed the requirement that elements be included in the indictment, this Court is not bound to follow it.

Indeed, the Washington Court's "following" of this case has been sharply criticized. State v. Witherspoon, 171 Wn. App. 271, 286 P.3d 996 (2012) (Quinn-Brintnall, J, dissenting in part). The Washington Supreme Court's original decisions addressing the Sixth

Amendment's application to the Persistent Offender Accountability Act were premised upon the conclusion that the legislative characterizations of a fact as either an "element" or "sentencing fact" was determinative of the constitutional protections to be afforded. Moreover, the court found it significant whether the Legislature codified the applicable fact to be proved at sentencing. State v. Thorne, 129 Wn.2d 736, 783, 921 P.2d 514 (1994). The distinctions upon which Thorne rested ceased to be constitutionally relevant following Apprendi and Blakely. Apprendi, 530 U.S. at 476; Blakely, 542 U.S. at 304-05. The Washington Supreme Court has not addressed this question following the decisions in Blakely and Cunningham v. California, 549 U.S. 270, 127 S. Ct. 856, 166 L. Ed. 2d 856 (2007), which plainly rejected the artificial distinction between elements and sentencing factors.

Treating a persistent offender finding as a sentencing factor is in stark contrast to this state's prior habitual criminal statutes, which required a jury determination of prior convictions as consistent with due process. Chapter 86, Laws of 1903, p. 125, Rem. & Bal.Code, §§ 2177, 2178; Chapter 249, Laws of 1909, p. 899, § 34, Rem.Rev.Stat. § 2286; State v. Furth, 5 Wn.2d 1, 19, 104 P.2d 925 (1940). Historically, Washington cases required a jury determination of prior convictions

before sentencing as a habitual offender. State v. Manussier, 129 Wn.2d 652, 690-91, 921 P.2d 473 (1996) (Madsen, J., dissenting); State v. Tongate, 93 Wn.2d 751, 613 P.2d 121 (1980) (deadly weapon enhancement): Furth, 5 Wn.2d at 18. Many other states' recidivist statutes require proof beyond a reasonable doubt. Ind. Code Ann. § 35-50-2-8; Mass. Gen. Laws Ann. ch. 278 § 11A; N.C. Gen. Stat. § 14-7.5; S.D. Laws § 22-7-12; W.Va. Code An.. § 61-11-19.

Blakely makes clear that the judicial finding by a preponderance of the sentencing factor used to elevate Ms. Clayton's maximum punishment to a life sentence without the possibility of parole violates due process. The "narrow exception" in Almendarez-Torres has been marginalized out of existence. Ms. Clayton was entitled to a jury finding beyond a reasonable doubt that she is a persistent offender.

c. The arbitrary labeling of a persistent offender finding as a "sentencing factor" that need not be proved to a jury beyond a reasonable doubt violates the Equal Protection Clause of the Fourteenth Amendment.

The Equal Protection Clause of the Fourteenth Amendment requires that similarly situated individuals be treated alike with respect to the law. Plyler v. Doe, 457 U.S. 202, 216, 102 S.Ct. 2382, 72 L.Ed.2d 786 (1982); U.S. Const. amend. XIV. When analyzing equal

protection claims, courts apply strict scrutiny to laws implicating fundamental liberty interests. Skinner v. Oklahoma, 316 U.S. 535, 541, 62 S. Ct. 1110, 86 L. Ed. 1655 (1942). Strict scrutiny means the classification at issue must be necessary to serve a compelling government interest. Plyler, 457 U.S. at 217.

The liberty interest at issue here—physical liberty—is the prototypical fundamental right; indeed it is the one embodied in the text of the Fourteenth Amendment. "[T]he most elemental of liberty interests [is] in being free from physical detention by one's own government." Hamdi v. Rumsfeld, 542 U.S. 507, 529, 124 S.Ct. 2633, 159 L.Ed.2d 578 (2004). Thus, strict scrutiny applies to the classification at issue. Skinner, 316 U.S. at 541.

Notwithstanding the above rules, Washington courts have applied rational basis scrutiny to equal protection claims in the sentencing context. Manussier, 129 Wn.2d at 672-73. Under this standard, a law violates equal protection if it is not rationally related to a legitimate government interest. City of Cleburne v. Cleburne Living Ctr., 473 U.S. 432, 440, 105 S. Ct. 3249, 87 L. Ed. 2d 313 (1985).

Under either strict scrutiny or rational basis review, the classification at issue here violates the Equal Protection Clause because

it is neither necessary to serve a compelling government interest nor rationally related to a legitimate government interest.

The Legislature has an interest in punishing repeat criminal offenders more severely than first-time offenders. Defendants who have twice previously violated no-contact orders are subject to significant increase in punishment for a third violation. RCW 26.50.110(5); State v. Oster, 147 Wn.2d 141, 146, 52 P.3d 26 (2002). Defendants who have twice previously been convicted of "most serious" (strike) offenses are subject to a significant increase in punishment (life without parole) for a third violation. RCW 9.94A.030(37); RCW 9.94A.570. However, the prior offenses that cause the significant increase in punishment are treated differently simply by virtue of the arbitrary labels "elements" of a crime or "sentencing factors" which have been attached to them.

Where prior convictions increase the maximum sentence available are termed "elements" of a crime, they must be proved to a jury beyond a reasonable doubt. See State v. Roswell, 165 Wn.2d 186, 192, 196 P.3d 705 (2008) (prior conviction for sex offense must be proved to the jury beyond a reasonable doubt when elevating communicating with a minor for immoral purposes to a felony); Oster,

147 Wn.2d at 146 (prior convictions for violation of a no-contact order must be proved to jury beyond a reasonable doubt to punish current conviction for violation of a no-contact order as a felony). The State must prove to a jury beyond a reasonable doubt that a defendant has four prior DUI convictions in the last ten years in order to punish a current DUI conviction as a felony. State v. Chambers, 157 Wn. App. 456, 475, 237 P.3d 352 (2010). The courts have simply treated these factors as elements.

But where prior convictions increase the maximum sentence, they have been termed "sentencing factors," and treated as findings for a judge by a preponderance of the evidence. Smith, 150 Wn.2d at 143. Just as the legislature has never labeled the facts at issue in Oster, Roswell, or Chambers as "elements," the Legislature has never labeled the fact at issue here as a "sentencing factor." Instead in each instance it is an arbitrary judicial construct. This classification violates equal protection because the government interest in either case is exactly the same: to punish repeat offenders more severely. See RCW 9.68.090 (elevating "penalty" for communication with a minor for immoral purposes based on prior offense); RCW 46.61.5055 (person with four

prior DUI convictions in last ten years "shall be punished under RCW ch. 9.94A").

If anything, there might be more of a reason for requiring proof of prior convictions to a jury beyond a reasonable doubt in the "three strikes" context due to the severity of the punishment. Rationally, the greatest procedural protections should apply in that context. It makes no sense to for greater procedural protections where the necessary facts only marginally increase punishment, but not where the necessary facts result in the most extreme increase possible.

Being free from government-imposed physical detention is one of our basic civil rights. Hamdi, 542 U.S. at 529. The legislation at issue here forever deprives Ms. Clayton of this basic liberty; it subjects her to life in prison without the possibility of parole. It does so based on proof by only a preponderance of the evidence, to a judge and not a jury—even though proof of prior convictions to enhance sentences in other cases must be proved to a jury beyond a reasonable doubt.

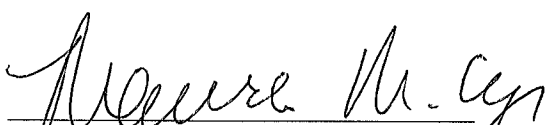
As the Supreme Court explained in Apprendi, "merely using the label 'sentence enhancement' to describe [one fact] surely does not provide a principled basis for treating [two facts] differently." Apprendi, 530 U.S. at 476. But Washington treats prior convictions

used to enhance current sentences differently based only on such labels. See Roswell, 165 Wn.2d at 192. This Court should hold that the judge's imposition of a sentence of life without the possibility of parole violated the Equal Protection Clause. The case should be remanded for resentencing within the standard range.

F. CONCLUSION

Several of the trial court's erroneous rulings deprived Ms. Clayton of her constitutional rights to present a full defense and confront the witnesses against her. The convictions must therefore be reversed and the case remanded for a new trial. Also, Ms. Clayton's two convictions for second degree murder violate her constitutional right to be free from double jeopardy. One of the convictions must be vacated. Finally, Ms. Clayton's sentence of life without the possibility of parole based on judicial fact-finding violated her constitutional rights to due process and equal protection, requiring reversal of the sentence and remand for sentencing within the standard range.

Respectfully submitted this 1st day of April, 2013.



MAUREEN M. CYR (WSBA 28724)
Washington Appellate Project - 91052
Attorneys for Appellant

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

STATE OF WASHINGTON,	)	
	)	
RESPONDENT,	)	
	)	NO. 43240-4-II
v.	)	
	)	
BARBARA ANN CLAYTON,	)	
	)	
APPELLANT.	)	

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