31215-1-III

COURT OF APPEALS

DIVISION III

OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, RESPONDENT

v.

SHELLYE L. STARK, APPELLANT

APPEAL FROM THE SUPERIOR COURT

OF SPOKANE COUNTY

BRIEF OF RESPONDENT

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INDEX

TABLE OF AUTHORITIES

WASHINGTON CASES

CONSTITUTIONAL PROVISIONS

STATUTES

I.

APPELLANT'S ASSIGNMENTS OF ERROR

(1) The trial court violated defendant's right to a public trial by closing the courtroom during closing arguments of counsel.

(2) The trial court erred in permitting a witness to offer his opinion regarding the defendant's guilt.

(3) The trial court erred in imposing mental health treatment as a condition of defendant's community custody.

II.

ISSUES PRESENTED

(1) Did the trial court "close" the courtroom when it asked the public to be mindful of the disruption that entering or leaving the courtroom during closing arguments could cause?

(2) Did witness Hollenbeck offer his opinion regarding the defendant's guilt during his testimony?

(3) Did the trial court err in ordering mental health treatment as a condition of the defendant's term of community custody?

III.

STATEMENT OF THE CASE

The facts as contained in the Appellant's brief are extracted largely from the Appellant's trial testimony.

Dale Stark and Shellye Stark married in 1984, in Torrance, California. RP 464, 467. They had one son, Christopher Stark, who was born in 1990. RP 167, 496. They eventually settled in Spokane, Washington, at 1620 S. Maple, in 2002. RP 167, 528. In the fall of 2007, Shellye Stark filed for divorce from Dale Stark. RP 168, 410. Shellye Stark had a boyfriend in California, Brian Moore, for whom she had left her husband, Dale Stark. RP 167-168. At the time of the shooting, Shellye Stark was living in California. RP 167. On or about December 4, 2007, Shellye Stark left California and came to Spokane. RP 316. The alleged purpose of the trip was to file new divorce papers, take custody of the house, and to take guardianship of Christopher Stark. RP 316. Shellye Stark obtained a restraining order against her husband Dale Stark on December 7, 2007. RP 168, 211. Shellye Stark insisted on serving the restraining order on Dale Stark without the assistance of police, despite the fact that police service was offered by the court. RP 212-13. On December 7, 2007, Shellye Stark's sister attempted to drive from Idaho to Spokane to give Shellye a shotgun and a pistol. RP 283-85. The pistol was eventually transferred to Shellye Stark by her nephew, Dale Johnson, on December 8, 2007. RP 284-86. At the time of delivery, the pistol

was not loaded. RP 286. Shellye Stark purchased bullets for and loaded the pistol. RP 590, 631-32. Shellye Stark, Dale Johnson, and Christopher Stark then waited at 1620 S. Maple for Dale Stark to arrive home. RP 168-69, 286-88. While waiting for Dale Stark's return, Shellye Stark and Dale Johnson sat at the kitchen table together. RP 289. Shellye placed the now loaded pistol on the kitchen table. RP 289-90. Shellye Stark positioned herself at the table such that she had a clear view of the front door of the house. RP 290. Christopher Stark was in the living room. RP 292. Dale Stark arrived home shortly after 1:00 AM on December 9, 2007. RP 168-69. Shellye Stark and Dale Johnson were still sitting at the kitchen table and the gun was still out. RP 291-92. Upon Dale Stark's arrival, Shellye Stark retreated with the pistol into the kitchen. RP 169-70. She stood in the kitchen with the gun behind her back. RP 599. Dale Johnson attempted to serve the restraining order on Dale Stark. RP 169, 293. Dale Stark asked Christopher Stark if he knew anything about what was going on. RP 322. Christopher Stark did not answer his father, Dale Stark. RP 322. Dale Stark then stepped toward the kitchen to contact Shellye Stark. RP 293-94. Shellye Stark ordered Dale Johnson and Christopher Stark to leave the house. RP 169, 294. She issued this order because she did not want Christopher or Dale to get hurt. RP 169. Both Christopher and Dale complied with Shellye Stark's order. RP 294, 323. Shellye Stark assumed the "weaver" shooting position in the kitchen with the pistol drawn. RP 772-73. Shellye Stark fired all six of the shots in the

revolver at her husband, Dale Stark. RP 599-600. Dale Stark was struck by at least 5 of the 6 bullets. RP 379. Dale Stark died of multiple gunshot wounds at 2:14 AM on December 9, 2007. RP 371. Shellye Stark admitted to officers that she had shot her husband, Dale Stark. RP 170. She testified in court that she shot her husband, Dale Stark. RP 632.

IV.

ARGUMENT

A THE TRIAL COURT DID NOT "CLOSE" THE COURTROOM IN VIOLATION OF THE DEFENDANT'S RIGHT TO A PUBLIC TRIAL WHEN IT ASKED THE PUBLIC TO BE MINDFUL OF THE DISRUPTION CAUSED BY ENTERING OR EXITING THE COURTROOM DURING CLOSING ARGUMENTS.

Initially, defendant contends that the trial court "closed" the courtroom based upon the Judge's comments prior to the start of closing arguments. The Court stated:

> I ask all the spectators, I don't really want people coming or going during closings, so if you don't think you can last the morning, you might want to rethink being in here, unless you really need to. It's just very disruptive."

RP 891.

The case law does not support the Appellant's "closed court" contention. Whether a trial court procedure violates the right to a public trial is a question of

law which is reviewed *de novo*. *State v. Brightman*, 155 Wn.2d 506, 514, 122 P.3d 150 (2005).

A public trial is a core safeguard in our system of justice. Be it through members of the media, victims, the family or friends of a party, or passersby, the public can keep watch over the administration of justice when the courtroom is open. The open and public judicial process helps assure fair trials. It deters perjury and other misconduct by participants in a trial. It tempers biases and undue partiality. The public nature of trials is a check on the judicial system, which the public entrusts to adjudicate and render decisions of the highest import. It provides for accountability and transparency, assuring that whatever transpires in court will not be secret or unscrutinized. Openness allows the public to see, firsthand, justice done in its communities. The right to a public trial is so important, in fact, that its violation is an error deemed structural: the error affects the framework within which the trial proceeds. *State v. Wise*, 176 Wn.2d 1, 5-6, 288 P.3d 1113 (2012).

However, it is not an inflexible right. When a court decides to close a courtroom, there exists a simple yet significant balancing test to apply to consider whether specific circumstances warrant closing part of a trial to the public, set out in *State v. Bone–Club*, 128 Wn.2d 254, 258-59, 906 P.2d 325 (1995). *Id* at 6.

The *Bone-Club* court dealt with, as a matter of first impression, the trial court's responsibility to protect a defendant's right to a public trial under article I,

§ 22 of the Washington Constitution in the face of the State's motion for full closure (emphasis added) of a criminal hearing. *Bone Club* at 257. The court stated that, prior to ordering the temporary, full closure of the courtroom, the court must apply the closure test previously articulated by the State Supreme Court in *Allied Daily Newspapers v. Eikenberry*, 121 Wn.2d 205, 210, 848 P.2d 1258 (1993) and related cases. *Bone-Club* at 257. The court went on to hold that by failing to engage in this case-by-case weighing of the competing interests before ordering the temporary, full closure of a pretrial suppression hearing, the trial court had violated the Defendant's public trial right. *Id.*

The threshold question in every case, however, is whether the trial court "closed" the courtroom. Here, the specific issue is whether the trial court's comments constituted closure as contemplated by case law. The Appellant claims that the trial court "closed the courtroom" by "prohibiting" the public from entering or leaving the courtroom during closing arguments. Appellant's Brf. at 11. The trial court's comments to the spectators are not consistent with the Appellant's contention. Further, case law simply does not support the Appellant's contention either.

Closure occurs when the courtroom is completely and purposefully closed to spectators such that no one may enter and no one may leave. *State v. Sublett*, 176 Wn.2d 58, 71, 292 P.3d 715 (2012) (emphasis added); *quoting State v, Lormor*, 172 Wn.2d 85, 93, 257 P.3d 624 (2011). The *Sublette* court

listed a number of instances wherein the State Supreme Court has examined the issue of courtroom closure: For example, in *In re PRP of Orange*, 152 Wn.2d 795, 807, 100 P.3d 291 (2004), the trial court closed the courtroom during *voir dire*. In *State v. Brightman*, 155 Wn.2d at 511, the trial court closed the courtroom for security reasons during *voir dire*. In *State v. Easterling*, 157 Wn.2d 167, 172, 137 P.3d 825 (2006), the trial court closed the courtroom during pretrial motions in a joint trial at the request of a codefendant. Finally, in both *State v. Momah*, 167 Wn.2d 140, 146, 217 P.3d 321 (2009), and *State v. Strode*, 167 Wn.2d 222, 224, 217 P.3d 310 (2009), the trial courts conducted a portion of the *voir dire* in chambers, at the exclusion of the public. In each of the cases cited in *Sublett*, the trial court completely and purposefully barred the public from attending the listed portions of the trial. Rightfully, the State Supreme Court reversed convictions and remanded for new trials.

Here, the trial court did not close the courtroom. The public was not prohibited from entering or leaving the courtroom. The courtroom was not completely and purposefully closed to spectators. No one was ordered out of the courtroom and no one was denied entry. The trial court merely expressed concern over the potential length of the expected closing arguments and the disruptive effect of persons coming and going during the arguments. The trial court's comments merely asked the present spectators to exercise good judgment in leaving from and returning to the courtroom during the arguments and to try to

remain in the court for the duration, if they could do so. RP 891. The Appellant's contention that the courtroom was closed is not supported by the trial court's statements, actions, or the law interpreting closure. There was no error.

B. WITNESS HOLLENBECK DID NOT OFFER HIS OPINION REGARDING THE DEFENDANT'S GUILT DURING THE TRIAL TESTIMONY.

Defendant next contends that Detective Hollenbeck gave impermissible opinion testimony regarding the Appellant's guilt or veracity. Appellant's Brf at 13. The Appellant claims that Detective Hollenbeck "essentially" testified that Ms. Stark's self-defense claim was fabricated. Appellant's Brf at 13, 14.

Generally, no witness may offer testimony in the form of an opinion regarding the defendant's guilt or veracity. This testimony unfairly prejudices the defendant because it invades the exclusive province of the jury to make an independent determination of the relevant facts. To determine whether a statement constitutes improper opinion testimony, a court considers the type of witness, the specific nature of the testimony, the nature of the charges, the type of defense, and the other evidence before the trier of fact. The improper testimony of a police officer raises additional concerns because "an officer's testimony often carries a special aura of reliability." *State v. Rafay*, 168 Wn. App. 734, 805-06, 285 P.3d 83 (2012).

However, testimony that is based on inferences from the evidence, does not comment directly on the defendant's guilt or on the veracity of a witness, and is otherwise helpful to the jury, does not generally constitute an opinion on guilt. *Id.*

Here, Detective Hollenbeck's testimony was in response to a question posed by defense counsel. RP 786. Defense counsel was commenting, in a rambling "question", about the lack of rapport between the Defendant and the Detective and finally asked if the conversation stopped rather abruptly. RP 786. Detective Hollenbeck stated that "Shellye Stark told me what she wanted me to hear and then the conversation ended." RP 786.

Defense counsel immediately objected to the response as an "opinion" and asked for the response to be stricken. RP 786. The trial court denied the request but invited defense counsel to ask the witness to clarify the response. RP 786. Defense counsel went on to ask if Detective Hollenbeck knew what was in Ms. Stark's mind. RP 786-87. The Detective stated that he did not know what was in Ms. Stark's mind. RP 787. Detective Hollenbeck stated that all he knew was what Ms. Stark told him. RP 787. Defense counsel did not object to the clarification responses given by Detective Hollenbeck. RP 787.

None of Detective Hollenbeck's responses were "comments directly on the defendant's guilt or veracity". This point is conceded by the Appellant in her brief. In two places, the Appellant states that Detective Hollenbeck "essentially

testified" as to the Defendant's guilt or veracity. Appellant's Brf at 12-13. This response did not comment directly on the Defendant's guilt or veracity, was based on an inference from the evidence (the Defendant's conversation with the Detective), was invited by defense counsel's question, and was not, therefore, an opinion on guilt.

In *Carlin*, a police officer testified without objection that a police dog had located the defendant by following a "fresh guilt scent." *State v. Carlin*, 40 Wn. App. 698, 700 P.2d 323 (1985). The court in *Carlin* did not expressly decide that the "fresh guilt scent" testimony actually constituted an opinion on the defendant's guilt (testimony "arguably" was an improper opinion). *Id.* at 703. Instead, the court held that even if the testimony was error, it was harmless beyond a reasonable doubt. *Id.* at 705.

C. INSUFFICIENT EVIDENCE IN THE RECORD SUPPORTS THE TRIAL COURT'S IMPOSITION OF MENTAL HEALTH TREATMENT AS A CONDITION OF DEFENDANT'S COMMUNITY CUSTODY.

As a condition of community custody, the trial court ordered, among other things, that Ms. Stark undergo an evaluation for mental health. CP 469, RP 1019.

The imposition of crime-related prohibitions is generally reviewed for abuse of discretion. *State v. Ancira*, 107 Wn. App. 650, 653, 27 P.3d 1246 (2001). However, when the key question is not whether the trial court abused its discretion in exercising existing authority, but rather whether the trial court

had any authority under the SRA to impose a condition of community custody, the answer hinges on a matter of statutory interpretation. *State v. J.P.*, 149 Wn.2d 444, 449, 69 P.3d 318 (2003). In such cases, the appropriate standard of review becomes *de novo*. *Id.*

The goal of statutory interpretation is to discern and implement the legislature's intent. *Id.* at 450. In interpreting a statute, the court looks first to its plain language. *Id.* If the plain language of the statute is unambiguous, then the court's inquiry is at an end. *Id.* The statute is to be enforced in accordance with its plain meaning. *Id.*

Where the plain language of the statute is subject to more than one reasonable interpretation, it is ambiguous. *Cockle v. Dep't of Labor & Indust.*, 142 Wn.2d 801, 808, 16 P.3d 583 (2001). The court may attempt to discern the legislative intent underlying an ambiguous statute from its legislative history. *Id.* Likewise, the court may look to authoritative agency interpretations of disputed statutory language. *Port of Seattle v. Pollution Control Hearings Bd.*, 151 Wn.2d 568, 593, 90 P.3d 659 (2004).

The statute at issue in the instant case is former RCW 9.94A.505(9), which has now been recodified as RCW 9.94B.080, Mental Status Evaluations. The statute states:

> The court may order an offender whose sentence includes community placement or community supervision to undergo a mental status evaluation and to participate in available outpatient

> mental health treatment, if the court finds that reasonable grounds exist to believe that the offender is a mentally ill person as defined in RCW 71.24.025, and that this condition is likely to have influenced the offense. An order requiring mental status evaluation or treatment must be based on a presentence report and, if applicable, mental status evaluations that have been filed with the court to determine the offender's competency or eligibility for a defense of insanity. The court may order additional evaluations at a later date if deemed appropriate.

RCW 9.94B.080.

In reviewing the report of proceedings in the instant matter, it does not appear that the statutorily required record was made and, therefore, there was insufficient basis for the trial court to order a mental evaluation of Ms. Stark. Further, based on the verdict in the case, it appears the jury rejected the notion, required by the statute, that Ms. Stark's mental condition had influenced her conduct in the offense.

V.

CONCLUSION

For the reasons stated, the existing convictions should be affirmed.

Respectfully submitted this 14th day of August, 2013.

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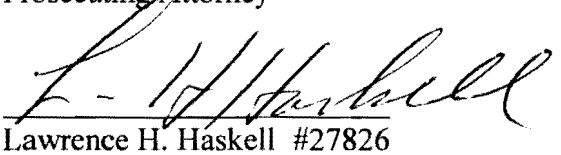

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