No. 31845-1-III
Spokane County Superior Court No. 12-1-00424-3

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

STATE OF WASHINGTON,
Plaintiff-Appellee,
v.

CLAY DUANE STARBUCK,
Defendant-Appellant.

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

The Honorable Gregory Sypolt, Judge

APPELLANT'S OPENING BRIEF

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I.
ASSIGNMENTS OF ERROR

1. There was insufficient evidence to convict Clay[1] Starbuck in the murder of his ex-wife, Chanin Starbuck.

2. There was insufficient evidence to prove that any person violated Chanin's remains after her death.

3. The trial court deprived Clay of a fair trial when it prohibited him from introducing evidence to show that others may have murdered Chanin, restricted his ability to impeach the State's witnesses and restricted his ability to present evidence of a biased police investigation.

4. The trial court erred when it permitted the introduction of the audio portion of the 911 tape.

5. The prosecutor committed misconduct in closing argument.

II.
ISSUE PERTAINING TO ASSIGNMENTS OF ERROR

1. Where the evidence demonstrated that Chanin could not have been murdered on the morning of December 1, 2011, and where Clay's whereabouts and activities were known every minute thereafter, was there sufficient evidence to convict him of murder?

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[1] In order to avoid confusion, this brief will use the first names of the many members of the Starbuck family discussed in the statement of the case. No disrespect is intended.

2. Where there was no evidence that anyone violated Chanin's remains, was there sufficient evidence to convict Clay of that act?

3. Did the trial court deprive Clay of a fair trial when it prohibited him from introducing relevant evidence to show that there were at least two other potential suspects in Chanin's murder?

4. Did the trial court violate Clay's right to a fair trial, including the right to confront and cross-examine witnesses, when the trial court prohibited Clay from introducing all of the text messages between another suspect and Chanin?

5. Did the trial court violate Clay's right to a fair trial, to present a defense and to cross-examine witnesses when it prevented Clay from fully exposing the investigators' failure to undertake a competent and thorough investigation?

6. Where the State presented evidence suggesting that Clay was dishonest in describing Chanin's sexual activities, did the trial court violate Clay's right to present a defense and to cross-examine the witnesses against him when it prohibited Clay from rebutting the State's evidence?

7. Did the trial court err in admitting the audio portion of the 911 tape when there was no identification of the caller and no discernable communication on the tape?

8. Did the prosecutor commit misconduct in closing argument when he argued facts he knew to be untrue in regard to the DNA evidence?

9. Did the prosecutor commit misconduct in closing argument when he argued that Clay falsely told others that Chanin was sexually promiscuous when the State knew Clay's statements were true?

10. Did the prosecutor commit misconduct when for the first time in closing argument he argued a new theory that Clay did not act alone in murdering Chanin?

III.
SUMMARY OF THE ARGUMENT

Chanin Starbuck was found dead in her Deer Park home on December 3, 2011 at about 9:11 a.m. RP 946. The State's theory is that Clay Starbuck, her ex-husband, used a ruse to get her out of the house at 8:00 a.m. on December 1, 2011. RP 875-76, 2691. While she was out, he broke in and lay in wait. RP 2692. When she returned, he beat her to death between 9:15 a.m. and 9:20 a.m. RP 96. The police "believed" that after 9:30 a.m., Clay remained in Chanin's house and used her phone to respond to two sexual partners and the couple's children in order to hide the fact that he was in Chanin's house and had murdered her. CP 26. The State believed that Clay's motives in killing his ex-wife were "greed, anger, obsession and jealousy." RP 2682. *See also* RP 99-102.

The defense evidence was that someone else murdered Chanin. But, because the police almost instantly assumed Clay did it, they did very little to test the wealth of forensic evidence found at the scene that implicated others. And they ignored the facts that made the State's theory impossible.

On December 3 at 11:40 a.m., Detective Mark Renz spoke briefly with Clay. Despite the fact that police had yet to process one single piece of evidence at the scene or speak to any other person or even conclude that a homicide had been committed, Detective Renz opined that because Clay gave him information about his ex-wife's lifestyle, he was "trying to lead us in a different direction." [2] RP 1005. As it turns out, Clay's statements were entirely truthful.

Detective Renz immediately shared his conclusions with lead Detective Michael Ricketts. RP 1006. By December 6, 2011, Ricketts, convinced that Clay was the murderer, told the Washington State Crime lab to test Chanin's cell phone for DNA evidence because he already believed that the "suspect" had used the phone to "text his alibi." RP 2483-84. And he deliberately limited the forensic testing of a myriad of other items seized at the scene.

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[2] Similarly, at 11:03 a.m. on December 3, 2011, Detective James Dresback was informed that Clay was a "person of interest." RP 1086.

This bias – in favor of naming Clay as Chanin's murderer – infected the rest of the police investigation and led to a conviction that is not supported by the evidence and is the product of prosecutorial misconduct and a denial of Clay's state and federal constitutional rights to present a defense.

IV.
STATEMENT OF THE CASE

A. PROCEDURAL HISTORY

On February 9, 2012, Clay D. Starbuck was charged with aggravated premeditated murder in the first degree with aggravating circumstances in violation of RCW 9A.32.030, and sexually violating human remains. RCW 9A.44.105. CP 14-15. The jury convicted him as charged. CP 785-790.[3] The trial judge sentenced him to life in prison without the possibility of parole. CP 904-914.

B. FACTS

Clay and Chanin Starbuck married, divorced, remarried and divorced again. They had four children together: Austin, Blake, Sutton and Loghan. Between the marriages, Chanin became pregnant by another man. Nonetheless, Clay embraced that child, Marshall, as his own. The

[3] The jury also found that the murder was committed with "deliberate cruelty," although this finding was superfluous and had no effect on the sentence imposed.

couple lived together at 509 North Reiper in Deer Park from May 2008 until June 7, 2009. RP 2584, 2602. Clay moved to Alaska for a time and then returned to Deer Park and lived in a house about half a mile away from Chanin. RP 2549.

The second divorce was finalized in July 2011. RP 2539. In December 2011, Chanin had primary residential custody of the minor children. *Id*. The children stayed with Clay every other weekend. They also stayed with him every Wednesday after school. Clay also picked up the three school aged children every morning and drove them to school. RP 2540.

Clay, who had been working in Alaska, suffered a significant back injury and was on sick leave beginning in February, 2011. RP 2497-98, 3540. He underwent invasive surgery on July 18, 2011. RP 2487. As a result, he fell behind on his child support obligations. RP 2586. On October 28, 2011, he was ordered to pay Chanin $9,600 in back child support and attorney fees. RP 2585-86; Exhibit 445.

His back pain was such that in December 2011 he was not sleeping well. He was up at night until midnight or 1:00 a.m. RP 2542. He would get up and take the kids to school about 8:00 a.m. RP 2543. Then he would come home and go back to sleep until noon. *Id.*

C. THE EVENTS OF DECEMBER 1, 2011

On December 1, 2011, Clay was driving a 1988 two-door Toyota Tercel. RP 2544. He got up a little after 7:00 a.m. and started out to pick up the children but his car died en route. RP 2553. He texted the children about getting ready for school at 7:11, 7:14, 7:52 and 7:53 a.m. *See* RP 2341-2342. At 7:54 a.m. he texted his daughter Loghan and said: "Is mom up, car is acting up." RP 2342. At 8:06 a.m., Clay texted Chanin and said: "Car quit. Can you take the kids?" RP 2342. At 8:08 a.m., Chanin texted back: "K." RP 2343, 2554.

Clay then walked home and went back to bed. RP 2556. He did not recall exactly how long he slept that day. *Id*. Clay plugged his cell phone into the car charger because the phone was out of power. RP 2562-63, 2605-06.

Chanin was awake because at 8:06 a.m. she began texting with her two sexual partners, Tom Walker and John Kenlein (who was masquerading as John Wilson). She continued to text with these two men throughout the morning and early afternoon of December 1. She took the children to school at about 8:00 a.m. RP 1423. And, unbeknownst to anyone at the time, Chanin's phone called 911 at 9:17 a.m. This was a hang-up call. When the 911 operator returned the call, there was no answer. RP 1452-1464.

Tom Walker was asked if he was dating Chanin in November and December 2011. He answered: "If that's what you want to call it." RP 1474. He knew Chanin for about three weeks before her death. *Id.* He and Chanin arranged to have dinner at Walker's house on Monday, December 5, 2011.

Walker and Chanin sent several messages to each other in the hour between 8:00 and 9:00 a.m. on December 1, 2011. At 8:06 a.m. Walker texted Chanin, "Good morning sexy." CP 494. At 8:20 Chanin texted to Walker: "Good morning handsome." *Id.* At 8:29, Walker texted to Chanin: "I'm looking back at our texts and I think that you should send me a picture of your vibrator in your pussy. Sorry.... But you made me think of it." CP 495. Chanin responded at 8:38 and said: "I so want your cock in me right now." CP 593. Walker texted at 8:42: "Me too. I want to fell [sic] your set [sic] pussy around my cock and your mouth sliding down it too. Damn… You make me so friggin horny." *Id.* He sent two more texts: "Wet no Set [sic] ;)" at 8:42 a.m. *Id.* Finally, at 8:47 he texted: "I have to tell you I really like blow jobs. I hope you like oral back." *Id.*

On December 1, Walker did not go to work in the morning. He went to a funeral at 9:40 a.m. and was there until "real close to 10:30." RP 1476. He said that he went "directly back to work" after the funeral.

However, he continued texting with Chanin. At 10:49 a.m. he texted Chanin to see "how her day was going." RP 1478. He said: "I just got done going to the funeral, how about yours, what do you have doing [sic] on today." RP 1778; Ex. 269-C. Chanin responded at 12:10 p.m.: "I had to leave to stop by the bank. Can you meet me at the Onion for lunch at 1:00?" RP 1479; Ex. 271-C. Walker texted back at 12:12 p.m.: "No I wish I could. I had to leave work to go to a funeral so that was my lunch." RP 1481; Ex. 272-C. At 12:19 p.m., Chanin again asked Walker if he was on his way to the Onion. RP 2345. At 12:26 p.m., Walker texted Chanin and said: "No I'm back at work from the funeral." RP 2345. At 12:45 p.m. Walker texted Chanin and said: "I wish I could meet you. Is [sic] like a few kisses to get me by till Monday." RP 1482; Ex. 284 B. Chanin sent another text at 2:19 p.m. regarding the Onion restaurant. RP 1484; Ex. 275B.

John Kenlein testified that he met Chanin via a dating website in September 2011. RP 1492. Prior to December 1, 2011, they met six times, twice during the day and four times at night, to have sex at Chanin's home. RP 1525. He had arranged to get together with Chanin on the morning of December 1, 2011 at 10:30 am. He took the day off from work in order to make this date. RP 1493. Kenlein used the name "John Wilson" when communicating with Chanin. His screen name was "Just

Wondering?" RP 1527. On the dating website Kenlein represented that he was single, but he was married with children. *Id.* Kenlein, a Spokane school teacher, stated that he never wanted his relationship with Chanin to become public or to become an "actual dating relationship." RP 1533.

Kenlein dropped his kids at school at 9:20 a.m. RP 1494. Kenlein testified that he stopped at a Starbucks Coffee at 9:45 a.m. *Id.* At 10:00 a.m., he stopped by the Whitworth library and tried to contact Chanin. RP 1542. He said that he proceeded to Chanin's house, stopping once to go to the bathroom at a McDonald's restaurant. RP 1495. He estimated he arrived at Chanin's home at 10:20 am. He knocked and got no response so he left and went to a payphone and called Chanin. There was no answer so he returned to her home and walked around to see if he saw anyone. RP 1497-98.

When he received no response at the house, Kenlein went to the Deer Park Public Library and tried to email Chanin. He estimated that by this time it was about 10:30 am. RP 1498. Kenlein testified that he drove back to Whitworth library and again tried to email Chanin. RP 1499.

At 12:37 p.m., Kenlein received a text from Chanin that said: "Eating did you cum by[?]" Ex. 280A. RP 1507-08. Kenlein texted back: "yes . . . will you be home soon? Or no . . ." (Ex. 281A) and: "sorry to have missed you . . . are you headed back to Deer Park?" Ex. 282A.

Chanin responded: "Did you stop by??? Do you[]want to come over tonight[?]" Ex. 283. At 12:46 p.m. Kenlein texted back: "Yes, to later tonight . . . or are you headed home now?" RP 1511; Ex. 285A. He then said: "Yes I will see you tonight at 10:30-10:45ish." Ex. 287A. Chanin texted: "No[t] tonight I hav[e] a headache aand [sic] I will have clay take the kids." Ex. 288A. Kenlein responded: "closer to 9:30?" Ex. 289A. At 1:32 p.m. Chanin said: "Nope an[o]ther hour." Ex. 290A. *See also* RP 1482-1516.

When Clay woke back up he tried to start his car again but it was still dead. RP 2557. He returned home shortly after noon. *Id.* He ate and played on an X-Box. RP 2559.

At 2:45 p.m., Loghan texted her mother asking who was going to pick her up from school. Ex. 292A. Chanin texted back: "Dad. I have a headache, stay there." RP 2347. Loghan texted again at 3:05 and said she was cold. Ex. 295A. Chanin returned the text at 3:06 and said: "Send [M]arsh a note dad will be there in 10 Minutes." Ex. 296A. Loghan sent two more texts to her mother that went unanswered. RP 2348. Finally, she called her brother Austin who picked up Loghan and Marshall and took them to Clay's house. RP 2348. Austin picked the children up just after 3:00 p.m. RP 1413.

Because Clay thought Chanin was picking up the children from school, he went back to try and fix the car to get it started. RP 2561. He was successful in doing so. *Id*. After he started the car, he drove straight home. RP 2564. At 3:28 p.m. he texted Chanin that Austin had picked up Loghan and Marshall at school and they were at his house. RP 1072.

At 5:45 p.m. Clay texted Chanin and said: "We are [going] to the game now. If you feel better, call me, and I'll meet you at the booths so you don't have to pay." RP 1072. Then Clay, Marshall and Sutton returned to the school to see Blake's basketball game. RP 2568. At 9:06 p.m. Clay texted Chanin: "Loghan is pissed and we didn't see your [sic] at the game. You should be involved in your child's activities." RP 1072.

After the game Clay and the children went to Chanin's house but the door was locked and there was no answer. RP 2570. They walked around and saw no one so they headed back to Clay's house so the children could go to bed. RP 2570.

At 7:22 p.m. Kenlein surreptitiously used a phone at his daughter's school to try to call Chanin. RP 1522. He received no answer. Nonetheless, at 9:45 p.m., he left home and went to Chanin's house. He could hear the heat running. He repeatedly knocked, but there was no answer. He also testified that he tried the doorknob. RP 1523.

At 11:57 p.m. Kenlein bought a cleaning product, Drain Pro Gel, at a Spokane area Walmart. RP 2196.

Kenlein never contacted the police when Chanin's murder was reported. RP 2187. He refused to meet with officers until they threatened to tell the public about his involvement in the case. RP 2188.

D. THE EVENTS OF DECEMBER 2, 2011

On December 2, 2011, Clay's three youngest kids did not go to school because they did not have fresh clothes. RP 2571.

At 5:00 p.m. the police received a call from Chanin's mother (who was in Florida) asking them to check on Chanin because she had not heard from her. RP 1757. Deputy Dutton and another officer went to Chanin's house at 6:15 p.m. They checked all the doors and windows and there was no indication of foul play so, after 10 minutes, they left. RP 1758. Dutton proceeded to Clay's house to see if he had any information. Clay was on the phone with the police when Dutton arrived. Clay said he did not know where Chanin was and showed Dutton his phone and text messages. RP 1760. He also told Dutton that Chanin was engaging in online dating and sending nude photos to men over the internet. RP 1761-62.

At 11:42 p.m. Clay called Dutton to see if he had located Chanin because he was concerned. RP 1766, 2204. He was also concerned because the children needed fresh clothes. *Id*.

E. THE EVENTS OF DECEMBER 3-6, 2011

On the morning of December 3, 2011, there was another call for a welfare check from one of Chanin's friends, Doug Carter. RP 946-47. At 9:11 a.m. the police finally entered the home and found Chanin dead on her bed. There was no sign of forced entry, although there were at least two unsecured windows in the home. RP 950, 975. She was naked on her back with a dildo in her vagina and a massager placed on her stomach. RP 949-51. Her phone was on the nightstand beside her bed. RP 951, 978-79.

Soon thereafter many police officers, the medical examiner, and forensic specialists arrived and began collecting and preserving evidence. At 11:03 a.m. Detective Dresbeck named Clay a "person-of-interest" in the case. RP 1086. The police forensic examiners took more than 100 pictures of the house. RP 1229. They attempted many, many fingerprint lifts. Latent prints were actually recovered from the bathroom mirror, the bathroom sink, the bathroom sink faucet handle, the top of the dryer, the dryer door and the interior of the front door. RP 1862. In particular, in one of the bathrooms, an observer can clearly see a handprint on the bathroom wall. RP 1301-02; Ex. 63. There were items that appear to have blood on them and those items were swabbed. RP 1305, 1863-64. *See also* Ex. 665-62. The police swabbed the bathroom drain. RP 1881.

The police swabbed the keyboards and mouse pads for Chanin's computer. RP 1914.

In addition to the dildo found inside Chanin, the police seized other sexual devices. RP 1314. The police seized bedding, towels, a washcloth and a mattress pad that had a large stain on it. RP 1778, 2200.

At about noon Blake called Clay and told him about the police activity at Chanin's home. Clay drove to the home and asked Detective Renz what was happening. RP 2576. He showed Renz his phone with various text messages. RP 996, 100-02. Renz said "my perception he was probing me for information of what we were doing at the residence and any details referencing the investigation." RP 997. He also opined: "I think he was trying to lead us in a different direction." RP 1005.

Renz sent Clay to speak with other officers. RP 2577. Detective Dresbeck told Clay that Chanin was dead. RP 1067, 2577. Clay was shocked. RP 1068, 2577. Clay spoke freely and gave Dresbeck his phone and text messages to look at. RP 1069-71. Dresbeck asked Clay what he thought might have happened. RP 1073. Dresbeck wrote down the texts. RP 1101. He testified that he wanted Clay to "give me all the information he's got." RP 1096. Clay told Dresbeck to get Chanin's laptop because "that will tell you everything you need to know." RP 1073. Clay then told Dresbeck that Chanin had a history of engaging in phone sex, on-line

dating, sexual encounters and "sex stuff." RP 1073-74. The children gave him some of this information. RP 1074.[4] He also said that Chanin left the children with him on Mother's Day so that she could go on a date. *Id*.

Dresbeck asked Clay the names of the men Chanin had been dating. Clay said that he did not know the men. RP 1074. He had observed her with a man at her home. *Id*. Dresbeck asked Clay if Chanin ever expressed an interest in "autoerotic asphyxiation." RP 1078. Clay did not know what that was but after Dresbeck explained, Clay said that she had never expressed any interest. *Id*. By the end of the conversation Dresbeck felt Clay was "telegraphing" the crime scene to him because he mentioned dildos when discussing his wife. RP 1105, 1107.

One officer was detailed to canvas the neighbors to see if anyone had seen anything suspicious. He went to 40 homes but there was no answer at 19. Of the remaining homeowners he spoke with, 13 saw nothing. No further efforts were ever made to talk to the neighbors. RP 1030.

Later on December 3, 2011, Dr. Sally Aiken performed Chanin's autopsy. RP 1664. Chanin weighed 169 pounds. RP 1729. Dr. Aiken stated that Chanin had been moved post-mortem, but that it would have

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[4] Dresbeck later said that the children confirmed that Chanin had dildos. RP 1107-08.

been difficult. RP 1728-29. She stated that Chanin had been severely beaten. RP 1663. Chanin's body was found on her bed, face up. There was a massager on her stomach and a dildo in her vagina. RP 1671-72. There was no question that she was murdered by strangulation. RP 1696. Many swabs of her body were taken at the scene and her fingernails were clipped. RP 1663-1670. There were "flecks of black material between the hands." RP 1672-73.

Dr. Aiken said there were injuries on Chanin's breast and left hand. RP 1691. The prosecutor asked: "what could have caused those injuries?" RP 1691. Dr. Aiken answered: "The thing I was most concerned about. Looking at those two pattern injuries, was the use of a stun gun. There are other possible explanations." RP 1691. When asked a second time, she again stated that the "pattern" injuries "could be possibly stun gun marks. So there are other explanations." RP 1695.

But she concluded: "I attributed the death to compression of the neck, sort of vaguely because of the uncertainty about what was actually used." RP 1698. Dr. Aiken speculated at length about whether or not a ligature was used and what kind. *Id.*

There were no vaginal or anal injuries. RP 1729. She found sperm on Chanin's left ankle (never tested by the police) and left

paravaginal area (unidentified male). RP 1720. She found hairs that were "probably not" from Chanin's head. RP 1721.

Dr. Aiken could not set a time of death. She testified that her estimated time of death was not very accurate but it could have been Thursday, December 1st or early December 2nd. RP 1732.

On December 5, 2011, Clay was interviewed by the investigating officers for three hours. RP 2580, CP 115-245. Clay cooperated fully, giving the officers his cell phone information, a DNA sample and fingerprints. RP 2580-82, 2094-96. Because Chanin had been beaten, the investigators asked Clay to come to the station for pictures. The police stated that they "wanted to document any potential injuries on his hands." RP 2087. They found no injuries. RP 2088-87; *see also* RP 2088-2094. The pictures admitted as Exhibits 308 to 318 confirm this fact.

On that same day, Clay brought his children to the police station so they could all be interviewed. RP 2578, 2096. The Starbuck children told the police their mother left them alone when she went out on dates and she had nude photos of herself and men on her computer. In addition, the prosecutor admitted that: "During the investigation of this crime, it was learned that Ms. Starbuck was having a sexual relationship with a few of the men she was dating." CP 593.

On December 6, 2011, two officers went to Clay's house and asked him to show them the route he took on December 1 and the spot where his car broke down. RP 1109-21. The police did not record the conversations during the ride. RP 1124.

F. THE REMAINDER OF THE INVESTIGATION

The police collected hair strands from Chanin's nightgown that had sufficient biological material for DNA testing. RP 2371; Ex. 470. The police collected loose hair on Chanin's chest and abdomen that contained sufficient biological material for DNA testing. RP 2371; Ex. 471. The police collected loose hair from around Chanin's vaginal opening that also had sufficient biological material for DNA testing. RP 2375; Ex. 472. The police collected unknown hairs from the massager box that had sufficient biological material for DNA testing. RP 2376; Ex. 487. The police collected unknown hair from the plug end of the massager that had sufficient biological material for DNA testing. RP 2377. But *none* of the DNA material on those hairs – 19 in all – was tested by the crime lab. RP 2384-89. At least some of the hairs were suitable for mitochondrial DNA testing. *Id.* Detective Ricketts did not ask to have any of these items tested.

The police also seized a mattress pad, a fitted sheet and a towel from Chanin's laundry room. RP 2508-09. These items had some sort of

stain or bodily fluids on them, but they were not tested. RP 2510. Similarly, the DNA from the autopsy vaginal wash was not tested. *Id.*

Loraine Heath, a forensic DNA examiner from the Washington State Patrol Crime Lab (WSPCL) testified that her lab did not perform mitochondrial DNA testing. RP 2399. Instead, Heath's lab tested swabs obtained from Chanin's phone keypad, neck, her right and left hand fingernail clippings, eye and nose area and the vaginal swab for Y-STR DNA. RP 1792, 2404-05, Exs. 467, 468, 469, 479, 481. Y-STR DNA testing is far less "discriminating" than mitochondrial DNA testing. RP 2419. Y-STR DNA can exclude certain males, but because it is inherited directly from father to son, it is identical in all the males in Clay's family "going backward up the genetic lineage" and in all of Clay's male offspring, including his sons Drew, Austin and Blake. RP 2408. The results were as follows:

Phone Keypad: Detective Ricketts testified that the perpetrator had to have handled Chanin's cellphone. RP 2358. Male DNA was found on the keypad of that phone. Yet the WSPCL excluded Clay as the donor of that DNA. RP 2412. In total there was DNA from three unidentified males on the limited number of items tested by the lab. RP 2491.

Vaginal Swab: The vaginal swab had sperm on it but the DNA testing excluded Clay as the donor of sperm. RP 2408, 2483.

Hands: The testing on the material found on Chanin's left hand did not locate any male DNA. RP 2409. The DNA on Chanin's right hand "originated from two different male individuals" and one sample could have originated from male Starbuck DNA. The results on her right hand could occur in one in every 2,800 men in the United States. RP 2419.

Neck: The results from material on Chanin's neck came from two male sources. One of the two could have originated from male Starbuck DNA. RP 2409. But Heath made it clear that the partial DNA profile on this swab could occur in one in every 46 males in the United States population. RP 2411. The other male contributor could not be identified.

At trial, the prosecutor tried over and over again to get Heath to testify that the DNA recovered from Chanin was a "match" to Clay. But Heath persisted in stating that, unlike mitochondrial DNA testing, "I can't narrow down to an individual" with Y-STR DNA testing. RP 2416, 2919. In fact, her lab's protocols prevented her from stating that the DNA was a match and cautioned that: "A Y-STR profile is not unique and cannot identify a single specific individual." RP 2474. She testified that unless there were 16 loci present on both the questioned sample and the unknown sample, she could not call the DNA from the victim and the alleged perpetrator a "match." RP 2475.

Heath stated that if Clay had slept in the bed with Chanin for a number of years, a significant amount of his DNA could still be present on the mattress or mattress pad. RP 2476. The crime lab did not test the mattress pad, mattress cover or other bedding, however. RP 2478.

Heath testified that because Y-STR testing was far less discriminating than other forms of forensic testing, her manual instructed that all other items suitable for DNA testing "should be exhausted before Y-STR testing is attempted." RP 2480. Yet she admitted that the crime lab never tested the sexual device found in Chanin at the scene. In fact, neither Heath nor any of her employees even looked at the sexual device per an agreement reached with Detective Ricketts on December 6, 2011, three days after Chanin's body was discovered. RP 2481.

The sperm found on her ankle was not tested and the sperm found at the "paravaginal area" was tested but was from an unknown male.[5] Although not entirely clear from Heath's transcripts, it appears that she and Detective Ricketts also decided not to test these items on December 6, 2011. RP 2422-26. Detective Ricketts also authorized the total consumption of some samples so they were unavailable for retesting by the defense. RP 2432.

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[5] There were three separate unknown male profiles discovered from the limited items tested.

The police found a latent finger print on the massager box but it did not belong to Clay. RP 1912.

The police seized and reviewed 36 electronic items from Clay's home and found no evidence of any value. RP 2293.

Clay was arrested on February 6, 2012. The police interviewed him again for almost five hours and repeatedly accused him of killing his ex-wife. CP 115-245. But Clay denied their accusations.

G. PRETRIAL

1. The State's Pretrial Motions

As discussed above, the State learned of Chanin's various online dating habits and sexual relationships during the course of the investigation. But as late as Friday, April 12, 2013, the State had not conducted a forensic search of Chanin's laptop computer. RP 89. In fact, the lead prosecutor stated that he knew nothing about sugerdaddy.com, a website that Chanin was visiting. RP 92. The prosecutor stated that the police had only "identified at least three potential friends or boyfriends of Chanin . . ." RP 95. But Clay told the investigating officers that Chanin was engaged in on-line dating and mentioned singles.net. CP 130, 134, 136. The State also had a copy of a video of Chanin engaging in sex with an unidentified male. CP 454.

But during the course of the defense investigation, defense counsel determined that Chanin had in fact been in contact via the internet with several other men from across the country. Specifically, Chanin's laptop had several nude photos and videos saved on it, and several images and videos had been sent to online suitors. Chanin sent several men a video of her with the sexual device that was discovered in her body. It was also determined during the investigation that the Starbuck children may have seen some of these images on the computer prior to Chanin's death. At least two of the Starbuck children said they found these videos/pictures on Chanin's laptop and gave this information to their father. CP 246-260, 493-525.

After realizing the importance of this evidence, the State moved to suppress any "other suspect evidence." CP 593. The State argued that this evidence was "irrelevant." CP 594-94. The defense responded by pointing out that Clay had a constitutional right to present a defense. The defense noted that Walker and Kenlein had incomplete alibis, the forensic evidence (described above) was in no way conclusive as to any perpetrator, and the State limited its examination of much of the forensic evidence – particularly as it related to the unknown male contributors of biologic material. CP 246-252, 493-502. And, Kenlein had been at Chanin's house three times on the date in question, never called the police

when the public was alerted to the investigation into her death and bought cleaning products at midnight on the day of the murder.

The trial court granted the motion stating:

> There is no direct or circumstantial evidence that provides a clear connection or train of facts or circumstances between any alternative suspects and the alleged homicide of Ms. Starbuck. The defendant has the burden of showing that the other suspect evidence is admissible.

CP 530. In his oral ruling, the trial judge stated:

> It is true also that the alibis [of Walker and Kenlein] are not completely airtight to one degree or another. Nonetheless, the state and law enforcement specifically went to [the] effort to seek out evidence to establish whether or not there were alibis in the case of each of these gentlemen and not only them but others including [] Austin Starbuck and Drew Starbuck . . . it appears to me that there is no direct evidence or even circumstantial evidence that provide a clear connection and the clear train of facts or circumstances between any of the alternative named suspects and the homicide of Ms. Starbuck.

RP 119-20.

The State moved to exclude the text messages between Walker and Chanin at 8:20, 8:29, 8:38, 8:42 and 8:47 a.m. CP 594. The State argued that these texts were irrelevant and more prejudicial than probative. CP 601-02. The defense argued that these texts were extremely relevant in as much as the police believed the crime to be sexual in nature. In particular, Walker was asking for a picture of a dildo in Chanin's vagina just 24

hours before she was discovered dead with a dildo in her vagina. CP 248-49.

The trial judge agreed with the State and ruled that these texts were not relevant because "if Chanin Starbuck did engage in internet relations, it does not have a direct connection to the facts or consequences." CP 554. The trial judge said that the fact that these texts occurred on the date of the homicide "really doesn't heighten, in the court's view, the relevance of the texts." RP 128. The court also found that, even if relevant, the prejudicial impact of the evidence outweighed its probative value because the "jurors might be offended." RP 128; CP 554.

The State moved to exclude any evidence that Chanin left the children alone or unattended when she went out on dates as irrelevant and too prejudicial. CP 601-602. The defense argued that this was relevant to rebut the anticipated testimony from the State's witnesses that Chanin would never have left her children alone and that she put her children's interest ahead of her dating interests. The trial judge then directly asked the State if it was going to present evidence that Chanin was a "good mom." RP 130. The prosecutor stated: "No." *Id.* Again, the trial court found this evidence irrelevant and too prejudicial. CP 554-55.

The State moved to suppress evidence that Chanin sent nude pictures of herself to men of her acquaintance. CP 601-02. The defense

noted that the children told Detective Lyle Johnston about this when they were interviewed. RP 135. The defense argued this was relevant to the defense because there were alternate suspects and the police failed to competently investigate this case. The trial court found this evidence too prejudicial. CP 555.

The State moved to suppress the evidence that John Kenlein retained a lawyer before he would speak to the police. CP 601-02. The defense noted that Kenlein was hesitant to provide his identity and agreed to speak with the police only after they threatened to release his photo to the media. *See also* RP 2188. Moreover, while being interviewed by the police, Kenlein asked his lawyer if one of his answers was "ok." CP 504. Kenlein clearly was concerned that he was going to be accused of murder. The defense argued that the "alternate suspect" evidence was admissible. And, the police did not deem Kenlein's actions suspicious even though his actions were in stark contrast to those of Clay, whose *cooperation* the State viewed as incriminatory.

The trial court held that the probative value of this evidence was "extremely minimal" and would "revisit the alternative suspect theory" and "simply generate suspicion around Mr. Kenlein's comments not only to law enforcement but with other individuals." CP 556.

Finally, the State moved to suppress evidence that Chanin was having sexual relationships with the men she was dating. CP 601-02. The defense argued that it was extremely relevant because of the unidentified male DNA discovered on Chanin's cell phone, in her vagina, on her abdomen, and on her leg. It was also relevant to the defense claim that the police unreasonably limited their investigation once they decided that Clay was the murderer. CP 252, 500-01. Finally, it was relevant because the State intended to call witnesses who would testify that Clay was not being truthful when he told the police about his wife's activities and was just trying to "defame" her. CP 505.

The trial court said "this evidence would have a prejudicial effect on the State and the prejudice substantially outweighs the probative value." CP 556.

2. The Defense Pretrial Motions

Clay moved to exclude the testimony of Dr. Steven Bates, Jeanine Carter, Douglas Carter, Laura Leighton, Christine Levy and Lana McCay to the extent that they would testify that Clay was lying about Chanin's online and dating life or suggest that Clay would say these things to "defame" Chanin. CP 512-25. The defense pointed out that the State intended to call these people to rebut the evidence that Chanin was engaging in risky behavior in regard to meeting men on-line and then

inviting them to her home for sexual activity. RP 110-11. The State said it was "not going to get into the dating history of Ms. Starbuck or the defendant." He stated: "My intent is to stay to the facts of this case as they developed on December 1 and the statements made by the defendant and the financial state of Ms. Starbuck proceeding December 1." RP 255. The defense disagreed, stating that the only possible reason for calling these witnesses was to suggest that Clay was deliberately trying to portray his ex-wife in a negative light. RP 259. The trial judge did not grant the motion. RP 264-65.

The defense also moved to exclude evidence of a 911 hang-up telephone call made from Chanin's cellphone on the morning of December 1, 2011. That call consisted of sounds only. The State described the sounds as "a faint gurgling and/or choking [sic] sound lasting one to two seconds before the phone call was terminated." CP 606. While there was no doubt that the call was made by Chanin's cellphone, there was nothing to identify who was on the other end of the line. Thus, the defense argued that the call could not be deemed an "excited utterance." RP 78.

Prior to trial, the judge found that the 911 operator couldn't really say what the sound was. RP 1606. It was not "gruesome." *Id.* But he ruled that this call was not really a statement. RP 1605. He also found it was not an assertion. Instead, he found it was an "utterance." *Id.* But the

judge did find the actual sounds on the call more prejudicial then probative. RP 1607. He did, however, permit the State to present evidence of when the call occurred. RP 1460-62.

During trial, however, the State renewed its motion to play the 911 call for the jury. The State argued that because the defense had cross-examined Dr. Aiken, the medical examiner, about the time of Chanin's death, it had "opened the door" and "heightened the relevancy and probative value of the 911 call because they have now placed a question regarding the date and time of death." CP 702. The State said:

> The 911 call would rebut the assertion that Ms. Starbuck was texting her boyfriends and family during and after the lunch hour on December 1, 2013 and that it was actually the person who killed her who was texting because there a short utterance and the telephone call was quickly terminated.
>
> In addition, the content of the conversation and the fact that it was quickly terminated suggests either Ms. Starbuck was being incapacitated or killed at the time the telephone call was placed to 911.

CP 702. The defense pointed out that it never stated it was conceding to any particular time of death. RP 2033. The defense argued that if the State characterized the sound as an "utterance," it was inadmissible hearsay. RP 2034.

The trial judge again stated that the sound was not distinguishable as any sort of language. RP 2040. The judge said: "It really is not

definitive in terms of what the speaker was trying to communicate." RP 2043. But, since 911 calls were "commonly associated with an emergency," the call was admissible. *Id.* He also found it was relevant to the claim of "deliberate cruelty" and it provided a "marker" by which either party could argue time of death. RP 2042 . The call was later admitted as Exhibit 448 and played for the jury. RP 2083. In fact, the jury asked to have the CD replayed during their deliberations. CP 750.

H. TRIAL

Detective Ricketts testified that he was the lead detective and major crime scene investigator for the Spokane County Sheriff's Department. RP 911. Ricketts arrested Clay on February 6, 2012, because he learned on that day that John Kenlein's DNA was not found on the limited number of swabs that had been tested by the crime lab. RP 2111. Walker's DNA was not collected until March, 2012. Again, his DNA was not found on the limited number of items tested by the crime lab.

Detective Ricketts determined that Chanin had been "put on display." RP 2155. He described his method of determining what items of evidence he would seize and analyze as follows:

> So, I have them in a circle and you start in the middle where the crime is, where the victim was at, and you start there with that evidence and then you start going out as you

> need to and you start collecting more items and more items and more items and more items and so you have them.

RP 2156. Ricketts's circle included only:

> I would say her throat, where she was strangled and under her fingernails, where she had to fight her attacker off, and around the facial area around the nose and eye because she was strangled.

RP 2178. He said he had a discussion with other officers and the crime lab where he relayed "the information that I know about the investigation." RP 2157.

So, according to Ricketts, they began with the "most probative evidence first." *Id*. He stated that he and the crime lab determined the evidence to test and "the most probative and the most timely was on the neck, on the face and under the nails, because she was strangled." RP 2159. When the crime lab informed him that their testing would consume much of the forensic DNA evidence, he approved the consumption. RP 2172.

Ricketts's excuse for failing to perform testing on the massager and dildo was as follows:

> As in the crime scene here, if we talk about the sexual device and the massager, I don't know how long Mrs. Starbuck had that, if it was hers. And there's evidence to indicate that at least the massager was, because there were some fingerprints on the box and that. And I believed they belonged to Chanin Starbuck. What that would tell me is that she could have had those items for a while and used them herself or with someone else. And so potentially there

> could be DNA or fingerprints from prior to her being killed on that evidence.

RP 2217. But once the lab "recovered the DNA from where she was strangled," Ricketts determined that was the "best probative evidence." RP 2218.

Ricketts did not test evidence discovered in the hallway bathroom because it was "dirty" and used by the family's teenagers. RP 2160. He did not test the laundry room evidence because "it's been washed." RP 2161. He admitted that he did not have the material from the vaginal wash tested until March 2013, and only after the defense requested that he do so. RP 2176.

He admitted that the dildo and the massager were not tested. RP 2177. Even though the dildo was in Chanin's vagina and the massager was on her body with the cord threaded through her clothing, Ricketts said those items were not in his "circle" of investigation. RP 2176. Even though he believed the murder had taken place in the master bathroom, nothing from that room was tested or examined after being collected. RP 2183.

The forensic evidence detailed above was presented to the jury. No stun gun or Taser was ever found or observed at the crime scene or at Clay's residence. RP 1127. No evidence of any gloves was admitted.

Although the State said it was not going to present any evidence about Chanin's dating history, the prosecutor called 7 witnesses and asked them about this subject. Meredith Peterson, Marshall's school teacher, testified that after the parent-teacher conference in November, she spoke with Clay.

> He expressed that he was concerned about some of the choices she was making with men that she was seeing. He made the implication that she may be sleeping around with different men. He also was concerned because he told me that the children just hated her, they didn't like her.

RP 1440. Peterson also testified that:

> He said, I wouldn't be surprised if we found her dead. I wouldn't be surprised if we found her with her throat slit open.

Id.

The State called Dr. Stephen Bates, to testify that in April 2011 he and Clay spoke about Chanin. According to Dr. Bates:

> He basically gave me a litany of things about Chanin, about what she was doing and how she was seeing lots of other men and had internet rendezvous going on and things like that.

RP 1548.

The State called Renee Attridge to testify that Clay texted her about Chanin's lifestyle and "things she was doing" in regard to her sex life. RP 1552. She stated that she felt Clay was "trying to make her look bad." RP 1553.

The State called Anita Carter. She testified that Clay told her that Chanin just "disappears" at times. RP 1563. Carter said she did not believe that. She also stated that Chanin would never have "disappeared" on her daughter Loghan. RP 1564.

Doug Carter testified that he had a conversation with Clay on December 3, 2011. He said Clay told him that Chanin was promiscuous and that he'd been trying to help her. RP 1574. But he said he had known Chanin since she was 15 and:

> And in all the years I've known her there's never been one minute of any conversation, any time of innuendo of anything of that remotely possible.

RP 1574. According to Doug, Clay was trying to portray Chanin as a "sexual deviant." RP 1575.

The State called Lana Beck to testify that Clay told her about Chanin's infidelities. RP 1589.

Finally, the State called Christine Levy to testify that Clay told her that Chanin had been putting herself at risk by dating lots of people and engaging in promiscuous on-line dating. RP 1742. Levy said Clay also told her no one really knew Chanin's dating life. RP 1746.

All five Starbuck children – Austin, RP 1402; Blake, RP 1356; Loghan, RP 1422; Sutton, RP 1428; and Marshall, RP 1339-55 – testified. Marshall testified that their father usually took them to school. Marshall

and Austin testified that the family cars were not running properly. RP 1349, 1410. The children who lived at home did not have a key to their mother's home. RP 1340. If she was not at home, they went to their father's house. *Id.* The children got out of school about 3:00 p.m. RP 1346. Marshall said that on December 1 his father had oil and dirt on his hands. RP 1349.

Blake Starbuck testified that he lived at 509 N. Reiper for three years beginning in June 2008. RP 1365. By December 1, 2011, he lived with Clay. Blake testified that his father did not go to bed early and took naps during the day. RP 1362. Blake gave his hand-me-down clothing to Marshall. RP 1366.

Austin also lived at 509 N. Reiper for about a year beginning in June 2008. RP 1417.

The children agreed that the evening of December 1, 2011, after the basketball game, Clay took them by Chanin's house to see if she was there but there was no answer. RP 1346-47.

Clay testified that he did not kill his wife. RP 2583. The prosecutor examined Clay at length about the statements he made to others about Chanin's sexual activity. RP 2590-94. The prosecutor called it Chanin's "alleged sexual activity" in his questioning. RP 2591-92, 2597. Clay testified that the reason he told the police and others about her

activities was to help the authorities find the person who killed Chanin. RP 2592-97.

I. CLOSING ARGUMENT

The prosecutor argued to the jury that Chanin was killed after a "prolonged attack and torture." RP 2682. He stated that the medical examiner said Chanin had injuries that were consistent with being bound and shot with a Taser. RP 2687.

> On December 1st of 2011, a 911 call was placed from Chanin Starbuck's telephone, a cellular telephone, to 911 from her residence. You'll recall the testimony of Detective Johnston who testified he used the coordinates generated from the 911 call and determined that that call came directly from Ms. Starbuck's residence. And you were allowed to listen to that call. I would submit at 9:18 a.m. on December 1st of 2011 was the beginning of Ms. Starbuck's life and the end. This would not be the first time that a 911 call was interrupted by a perpetrator. A person generally calls 911 because there's an emergency. You either want the police, they want medical help or they want the fire department. At 9:19 a.m., as you recall, 911 tries to call Ms. Starbuck back and it goes to voicemail. I would submit that one can assume either Ms. Starbuck was incapacitated or she was prevented from answering the phone. At 9:19 a.m. her phone was either turned off or placed into airplane mode, one minute after calling for help.

RP 2687-88.

According to the State, Clay snuck into the house and murdered Chanin between 9:00 a.m. and noon that day. The State dealt with the dozens of texts sent by Chanin during that period by arguing that Clay had

taken Chanin's phone and he, not Chanin, sent and received the texts to and from her phone during that day in order to create the illusion that Chanin was still alive.

As to the text messages sent from Chanin's phone to others, the prosecutor argued:

> The defendant was trying to find out who was knocking on the door in the morning and trying to contact Ms. Starbuck. He didn't know whether or not the person knocking on the door would have access into the residence and could later find him inside the residence or leaving the residence.

RP 2692.

The prosecutor argued that Clay killed Chanin because he was jealous. RP 2696. The prosecutor argued that he told deputies about her on-line dating activities – not at their request or to help in the investigation – but rather to portray her in an unfavorable light. RP 2697. The prosecutor argued that it was "to portray Ms. Starbuck as a promiscuous, loose woman, that was cheating on the defendant. . ." RP 2700.

The State then argued at length about the statements Clay made to Doug Carter, Christie Levy and Renee Attridge. RP 2698-700. According to the State, Clay was upset because he was injured, out of work, in pain and owed Chanin money. RP 2701.

> And he has a perception, an obsession that Ms. Starbuck is having nothing but fun dating other men and having sex with them.

RP 2702.

In closing, the defense could not argue that Clay's statements about Chanin's lifestyle and the dangers it poses were true because the trial court had forbidden him from presenting the complete evidence of Chanin's online dating habits. So the defense concentrated on Clay's unwavering cooperation with the biased investigation, including Detective Ricketts's failure to competently test all of the available forensic evidence obtained at the scene. The defense emphasized that Chanin's phone sent and receives dozens of messages on December 1, 2011, but that there was no Starbuck DNA on the phone. RP 2716. Rather, it was DNA from an unidentified male. RP 2712. The defense emphasized that there were no DNA matches or even identifications in this case. RP 2712.

In rebuttal, as to the DNA evidence, the prosecutor argued:

> Where did they find a match to the defendant's DNA? On the fingernails, on the throat, and on the mouth area. With everything that Mr. Reid just said about what he claims wasn't tested and why, how does the defendant's DNA, the match of it on Ms. Starbuck, how does that exclude the defendant? I would submit it doesn't.

RP 2735-36.

Because the defense noted that there was unknown male DNA found at the crime scene for the first time in the entire case the State

argued: "It's not known whether or not the perpetrator of this crime acted alone." RP 2736. But he assured the jury:

> But one thing is known, a match to the defendant's DNA is found on Ms. Starbuck.

RP 2736.

The prosecutor went on to argue:

> With respect to the arms, if they would have found someone else's DNA, it would not have excluded the defendant. If they would have found DNA on the muscle massager or the sexual device, it wouldn't have excluded the defendant.

RP 2736; *see also* 2737. He continued that the sperm on Chanin's ankle would not exclude Clay as the murderer because "sperm can last up to seven days." RP 2741.

The prosecutor argued:

> You never heard any explanation from Mr. Reid about the defendant's jealousy and obsession. Why was he contacting all these people – and these are just the people we know of – about Ms. Starbuck's alleged sexual activity? There was no explanation for that.

RP 2737-38.

Finally on the subject of DNA, the prosecutor said:

> And one last point, members of the jury. Again, if the additional items had been tested by the lab and you heard why they didn't, but even if it had, it wouldn't exclude the defendant. That's the bottom line. *It was a match to his DNA.*

RP 2741 (emphasis added).

V.
ARGUMENT

A. THERE WAS INSUFFICIENT EVIDENCE TO CONVICT CLAY STARBUCK IN THE MURDER OF HIS EX-WIFE CHANIN

As a matter of federal and state constitutional law, Clay Starbuck can be convicted only if the State can establish every element of the crimes charged beyond a reasonable doubt. *In re Winship*, 397 U.S. 358, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970); *Jackson v. Virginia*, 443 U.S. 307, 99 S.Ct. 2781, 61 L.Ed.2d 560, *reh'g denied*, 444 U.S. 890, 100 S.Ct. 195, 62 L.Ed.2d 126 (1979); *State v. Green*, 94 Wn.2d 216, 220-221, 616 P.2d 628 (1980). The test for determining the sufficiency of the evidence is whether, after viewing the evidence in the light most favorable to the State, any rational trier of fact could have found guilt beyond a reasonable doubt. *Green*, 94 Wn.2d at 220-22.

The State failed to prove that Clay Starbuck was the person who murdered Chanin. Chanin Starbuck could not have been murdered on the morning of December 1, 2011. She was texting her daughter as late as 3:09 p.m. on December 1, 2011. She was using family nicknames and complaining of her headache.

Detective Ricketts testified that the perpetrator had to have handled and touched Chanin's cellphone. RP 2358. Male DNA was found on the keypad of that phone. Yet, the WSPCL excluded Clay as the donor of that

DNA. RP 2412. While the State tried to suggest that Clay used gloves when "ghosting" Chanin's text messages, this was sheer speculation unsupported by the recovery of any gloves or hand protectors. Moreover, the use of gloves conflicted with the State's additional argument that the Y-STR DNA on Chanin's face and neck were deposited when Clay strangled her to death.

Chanin's later texts completely undermine the State's case, which is based on the argument that Clay snuck into the house and murdered Chanin at 9:30 a.m. that morning. Chanin was alive and texting at 3:00 p.m. And, the evidence simply does not support any theory that Clay somehow broke into Chanin's home after 3:00 p.m., beat her to death, "posed her," cleaned himself up, disposed of gloves, a Taser and a surveillance camera, removed the hard drive to Chanin's computer, cleaned up the master bath, put some other man's DNA on Chanin's cell phone and inside her vagina, did a load of laundry (but forgot to wash the stained mattress cover), walked back to his stalled car and drove home with no one the wiser.

And the remainder of the State's case is even more absurd. Just assuming for a moment that Clay did kill Chanin at 9:30 a.m. on December 1, why did he take his children to try to enter the house at 9:00 p.m. that night? Why did he encourage the police in their efforts to locate

Chanin on the evening of December 2 by giving Deputy Dutton Chanin's text messages and later calling to see if Dutton had located her? These actions would be completely contrary to his interests in concealing a murder for as long as possible. If he was "ghosting" Chanin's phone, why was he encouraging Walker and Kenlein to come to the home where he might be discovered? If he beat Chanin to death, why were there no marks on his body? If he was the murderer, why did he offer up himself, his children and all of their DNA and electronic devices to the police for analysis?

The investigators in this case suffered from "confirmatory bias" – a loss of objectivity that may subconsciously steer the investigator to a certain conclusion. A person's "confirmatory bias" describes the situation where the fact that one already "knows" what happened, may increase the risk of obtaining inaccurate information. Here, between December 3 and 6, the lead Detective learned about Chanin's texts with others and their timing. But, because he had decided that Clay was the perpetrator, he decided within a few days to limit his efforts to confirming his misplaced conclusions. Thus, the police and the State limited the evidence available by refusing to test the many, many other items recovered at the scene. Then, they moved to suppress any evidence that would have demonstrated someone else committed this murder.

Since the evidence is clear that Clay was not using Chanin's phone, the only remaining evidence is that Chanin's last communication was with her daughter Loghan at 3:06 p.m. At that time, and for every minute following until her body was discovered, Clay's whereabouts were confirmed.

B. THERE WAS INSUFFICIENT EVIDENCE TO PROVE THAT ANY PERSON VIOLATED CHANIN'S REMAINS AFTER DEATH

Any person who has sexual intercourse or sexual contact with a dead human body is guilty of a class C felony. RCW 9A.44.105. There is no evidence to support the notion that anyone had sex with Chanin after her death. There was sperm in her vagina but no one testified about when it might have been deposited there. (And Clay was not the source of that sperm). There was a dildo in her vagina but there was no evidence whether that device was placed there before or after her death. The State speculated that it was after death but no reasonable juror could have reached that conclusion. A conviction cannot be obtained by substituting factually baseless speculation for actual evidence.

C. THE TRIAL COURT DEPRIVED CLAY STARBUCK OF A FAIR TRIAL WHEN IT PROHIBITED HIM FROM INTRODUCING EVIDENCE TO SHOW THAT OTHERS MAY HAVE MURDERED CHANIN, RESTRICTED HIS ABILITY TO IMPEACH THE STATE'S WITNESSES AND RESTRICTED HIS ABILITY TO PRESENT EVIDENCE OF THE BIASED POLICE INVESTIGATION

1. In Washington State "Relevant Evidence" Means Any Evidence that Tends to Make Any Material Fact More or Less Probable. ER 401.

ER 402 provides:

> All relevant evidence is admissible . . . Evidence which is not relevant is not admissible.

"A criminal defendant has a constitutional right to present all admissible evidence in his defense." *State v. Rehak*, 67 Wn. App. 157, 834 P.2d 651 (1992), *rev. denied*, 120 Wn.2d 1022, 844 P.2d 1018, *cert. denied*, 508 U.S. 953, 113 S.Ct. 2449, 124 L.Ed.2d 665 (1993). If the evidence is of even minimal relevancy, the court may exclude it only if there is a compelling reason to do so in order to avoid unfair prejudice. *State v. Hudlow*, 99 Wn.2d 1, 16, 659 P.2d 514 (1983).

Defense evidence is relevant if it meets or overcomes any of the State's evidence. One can view it by each piece of evidence, e.g., if the State presents a confession, the defense may present any evidence tending to contradict that confession, or that someone else confessed. Or one can compare it to the State's larger theory of the case: if the defense evidence makes that theory or a supporting inference less likely, it is admissible.

Historically, courts of this state have required a minimal foundation for evidence of another suspect where there is direct evidence of the defendant's guilt.

> Before such testimony can be received, there must be such proof of connection with the crime, such a train of facts or circumstances as tend clearly to point out someone besides the accused as the guilty party.

State v. Mak, 105 Wn.2d 692, 716, 718 P.2d 407, *cert. denied*, 479 U.S. 995, 107 S.Ct. 599, 93 L.Ed.2d 599 (1986); *State v. Downs*, 168 Wash. 664, 667, 13 P.2d 1 (1932); *State v. Kwan*, 174 Wash. 528, 533, 25 P.2d 104 (1933); *State v. Drummer*, 54 Wn. App. 751, 775 P.2d 981 (1989); *State v. Condon*, 72 Wn. App. 638, 647, 865 P.2d 521 (1993), *rev. denied*, 123 Wn.2d 1031, 877 P.2d 694 (1994).

However, courts apply a lesser foundational requirement to cases in which the State presents only circumstantial proof of the crime:

> [I]f the prosecution's case against the defendant is largely circumstantial, then the defendant may neutralize or overcome such evidence by presenting sufficient evidence of the same character tending to identify some other person as the perpetrator of the crime.

State v. Clark, 78 Wn. App. 471, 478-49, 898 P.2d 854, *rev. denied*, 128 Wn.2d 1004, 907 P.2d 296 (1995); *Jones v. Wood*, 207 F.3d 557, 562 (9th Cir. 2000); *Leonard v. Territory*, 2 Wash. Terr. 381, 396, 7 P. 872 (1885).

2. The Exclusion of Defense Evidence Implicates Significant Constitutional Rights

The "constitutional floor" established by the Due Process Clause "clearly requires a fair trial in a fair tribunal" before an unbiased court. *Bracy v. Gramley*, 520 U.S. 899, 904-05, 117 S.Ct. 1793, 1797, 138 L.Ed.2d 97, *cert. granted, judgment vacated by Collins v. Welborn*, 520 U.S. 1272, 117 S.Ct. 2450, 138 L.Ed.2d 209 (1997); U.S. Const. amend. 14, Wash. Const., art. 1 § 3, 21, 22. Erroneous evidentiary rulings violate due process by depriving the defendant of a fair trial. *Estelle v. McGuire*, 502 U.S. 62, 75, 112 S.Ct. 475, 116 L.Ed.2d 385 (1991). The right to a fair trial encompasses the additional rights.

The right to a fair trial includes the right to present a defense. The Sixth and Fourteenth Amendments of the Federal Constitution, as well as article 1, § 21 of the Washington Constitution, guarantee the right to trial by jury and to defend against the State's allegations. These guarantees provide criminal defendants a meaningful opportunity to present a complete defense, a fundamental element of due process. *Chambers v. Mississippi*, 410 U.S. 284, 294, 93 S.Ct. 1038, 35 L.Ed.2d 297 (1973); *Washington v. Texas*, 388 U.S. 14, 19, 87 S.Ct. 1920, 18 L.Ed.2d 1019 (1967); *State v. Burri*, 87 Wn.2d 175, 181, 550 P.2d 507 (1976).

The United States Supreme Court has held that a defendant is denied the right to present a defense if evidence is excluded under rules that are arbitrary or disproportionate to the purposes they are designed to serve. *Holmes v. South Carolina*, 547 U.S. 319, 324-25, 126 S.Ct. 1727, 164 L.Ed.2d 503 (2006) (citing *United States v. Scheffer*, 523 U.S. 303, 308, 118 S.Ct. 1261, 140 L.Ed.2d 413 (1998)). Specifically, the *Holmes* Court stated that when the defense proffers evidence that someone other than the defendant committed the offense, a trial court may only exclude that evidence if it is repetitive or poses an undue risk of prejudice or confusion. *Holmes*, 547 U.S. at 326-27. Absent a compelling justification, excluding exculpatory evidence deprives a defendant of the fundamental right to put the prosecutor's case to "'the crucible of meaningful adversarial testing.'" *Crane v. Kentucky*, 476 U.S. 683, 689- 690, 106 S.Ct. 2142, 90 L.Ed.2d 636 (1986) (quoting *United States v. Cronic*, 466 U.S. 648, 656, 104 S.Ct. 2039, 80 L.Ed.2d 657 (1984)).

The right to a fair trial includes the right to confront and cross-examine accusing witnesses. U.S. Const., amend. VI. The Supreme Court has confirmed that motivation and bias are proper subjects for cross-examination. *Delaware v. Van Arsdall*, 475 U.S. 673, 678, 106 S.Ct. 1431, 89 L.Ed.2d 674 (1986); *Davis v. Alaska*, 415 U.S. 308, 316, 94 S.Ct. 1105, 39 L.Ed.2d 347 (1974). This encompasses the right "to expose to the jury

the facts from which jurors, as the sole triers of fact and credibility, could appropriately draw inferences relating to the reliability of the witness." *Davis*, 415 U.S. at 318.

And, the right to a fair trial includes "elemental due process principles" that "operate to require admission of the defendant's relevant evidence in rebuttal." *Simmons v. South Carolina*, 512 U.S. 154, 164-65, 114 S.Ct. 2187, 129 L.Ed.2d 133 (1994); *Skipper v. South Carolina*, 476 U.S. 1, 106 S.Ct. 1669, 90 L.Ed.2d 1, 5, n.1 (1986); *Gardner v. Florida*, 430 U.S. 349, 97 S.Ct. 1197, 51 L.Ed.2d 393 (1977). *See also Crane* 476 U.S. at 690 (due process entitles a defendant to "'a meaningful opportunity to present a complete defense'") (citation omitted); *Ake v. Oklahoma*, 470 U.S. 68, 83-87, 105 S.Ct. 1087, 84 L.Ed.2d 53 (1985) (where the State presents psychiatric evidence of a defendant's future dangerousness at a capital sentencing proceeding, due process entitles an indigent defendant to the assistance of a psychiatrist for the development of his defense).

3. Because the State's Case was Entirely Circumstantial, The Trial Court Erred in Excluding Relevant Evidence Regarding Other Suspects and, in doing so, Violated Clay's Right to Present a Defense and to a Fair Trial

Here, the trial court's pretrial rulings limiting Clay's right to present a defense and challenge the State's case through confrontation and cross-examination resulted in a fundamentally unfair trial.

4. The Trial Court Violated Clay's Right to Present a Defense when it Prohibited Clay from Arguing that Either Walker or Kenlein or one of Chanin's other Sexual Partners Murdered Her

When the State has only a circumstantial case, the crux is the interpretation of that evidence, the inferences to be drawn, and the gaps the jury must fill. In circumstantial cases, the defense evidence "meets" and "neutralizes" the State's evidence by contradicting the evidence or the inferences, or by showing the same or similar evidence equally implicates another person.

> One main question on the trial was, Who killed the deceased? Addressed to this, the evidence for the prosecution was wholly circumstantial; and some of it, tending to identify the defendant as the slayer, was of a like description to that proposed to be obtained from this witness. Defendant, therefore, had a right to meet and neutralize or overcome the evidence of the prosecution, tending to identify himself as the guilty party, by evidence of the same nature tending to identify some other person as the perpetrator of the crime.

Leonard v. Territory, supra, 2 Wash. Terr. at 396.

> In addition, . . . the prosecution theory was that there was no other person who could have committed the crime – a theory that [the defense] was entitled to rebut once the prosecution relied upon it.

Jones v. Wood, supra, 207 F.3d at 562.

In *Jones v. Wood*, Jones was in the bedroom and his wife was bathing when he heard her scream. In the hallway he saw a man with a knife come out of the bathroom. He swung his hand toward the knife, cutting his hand. The intruder pushed him and he hit his head against the wall. Upon recovering, he went into the bathroom where his wife was bleeding profusely. The murder weapon was on the bathroom floor near the tub. Neither Jones nor his daughters had ever seen the knife before. The State charged Jones with his wife's murder because he was in the house when she was killed between 9:30-10:00 p.m., his head showed no sign of trauma, and they found no evidence that anyone else had done it. *Jones v. Wood*, 114 F.3d 1002, 1004-06 (9th Cir. 1997), *after remand*, 207 F.3d 557, 559-60 (9th Cir. 2000).

The Ninth Circuit granted a writ of habeas corpus based on post-conviction investigation that trial counsel had failed to conduct, although he was directed to do so. The investigation showed Danny Busby, a young neighbor infatuated with the Jones's daughter, was blocked by Mr. and Mrs. Jones from contacting her. He usually met her secretly at her home,

at 9:30-10:00 p.m. on Friday or Saturday when her parents were out. She told him that morning she'd be home and her parents would be out. But her parents changed their plans and she hadn't told him of the change. Although Busby and his mother told police he'd been home the entire night of the murder, his sister and a friend testified differently. *Jones*, 207 F.3d at 560-62.

The only issue on appeal after remand was whether Jones was able to lay a foundation under Washington law to admit the evidence implicating Busby. The Ninth Circuit held it was admissible. If the prosecution's case against the defendant is largely circumstantial, then the defendant may neutralize or overcome such evidence by presenting sufficient evidence of the same character tending to identify some other person as the perpetrator of the crime.

> The prosecution's case was almost entirely circumstantial. Thus, under *Clark*, Jones was entitled to offer "evidence of the same character tending to identify some other person as the perpetrator of the crime."

Jones v. Wood, 207 F.3d at 562-63, quoting *State v. Clark*, supra.

In *State v. Clark*, supra, the defendant was convicted of first degree arson for a fire at his office discovered at 11:30 p.m. He had been at the office earlier that evening. He was fully insured. He filed a claim for the

loss. He was divorced, his credit cards were "maxed out" and business was slow. *Id.*, 78 Wn. App. at 475-76.

Clark offered evidence that his girlfriend's ex-husband, Arrington, had set the fire:

> Arrington's alleged motive was revenge against Clark for having an affair with his wife and, Arrington believed, molesting his daughter. Arrington had the opportunity to set the fire because his vehicle was seen near the house prior to the fire and because, although he had a similar alibi to Clark's, he nonetheless may have had time to drive to his meeting after setting the fire. Clark also sought to offer evidence that Arrington had previously threatened to set his former wife's house afire and that he had told her he knew how to commit arson without being detected.

Clark, 78 Wn. App. at 479-80.

The trial court excluded all evidence about Arrington. The Court of Appeals reversed.

> [T]he evidence against Clark was entirely circumstantial . . . While this evidence is not insufficient to support a conviction, no evidence linked Clark directly to the fire.
>
> Similar evidence indicates that Arrington had the motive, opportunity, and ability to commit the arson . . . Like Clark, while no evidence directly linked Arrington to the fire, this evidence nonetheless provides a trail of evidence sufficiently strong to allow its admission at trial.

Clark, 78 Wn. App. at 479-80.

In *State v. Maupin*, 128 Wn.2d 918, 913 P.2d 808 (1996), a child was abducted from her home the night of January 24-25. Her body was found six months later. The State argued the defendant killed her the same

night he abducted her. The defense offered a witness who had seen the child alive with another man later on the 25th or the next day. The trial court excluded this evidence.

The Supreme Court reversed and remanded for a third trial.

> Although the State correctly notes this testimony would not necessarily have exculpated Maupin, as he may have been acting in concert with the persons Brittain claimed to have seen, it at least would have brought into question the State's version of the events of the kidnapping. An eyewitness account of the kidnapped girl in the company of someone other than Maupin after the time of the kidnapping certainly does point directly to someone else as the guilty party . . .

Maupin, 128 Wn.2d at 928 (emphasis added).

> Either way, Brittain's story directly contradicts, or at least raises considerable doubt about, the State's claim that the murder occurred right after the kidnapping on January 25.

Id.

Here, the "other suspect evidence" meets any conceivable standard of admissibility. The circumstantial evidence against Clay pales in comparison to the circumstantial evidence against the defendants in *Jones*, *Maupin* and *Clark*. The trial judge erred in concluding that the evidence was insufficient to demonstrate a clear connection or train of facts or circumstances between any alternative suspects and the homicide. Conversely, given Chanin's risky behavior (inviting men she met on the internet into her home for sex) and the amount of male DNA (not linked to

Clay), other men had an equal if not greater opportunity to murder her. There was no compelling reason to exclude the evidence.

In particular, both Walker and Kenlein had the opportunity to have intentionally or even accidentally killed Chanin on December 1, 2011. Both had been invited over that day for a sexual encounter. And neither one had a complete alibi.

On December 1, Walker asked Chanin for a picture of her with a dildo in her vagina. That is precisely how Chanin was found on December 3. No reasonable jurist could conclude that this fact was not relevant to the question of who killed Chanin.

Kenlein was, by his own admission, at Chanin's residence three times on the date in question. He did not come forward when her body was discovered. He lied about his identity and he bought cleaning products at midnight. According to the investigators, the master bathroom had been cleaned up after the murders. No one testified to his whereabouts between the time he left home after 9:00 p.m. and midnight when he went to Walmart. And, no one testified about where he was between midnight and the time his wife woke up the next morning. RP 1751-56. Walker lacked an obvious motive to kill Chanin, but her death could have happened accidentally during a sexual encounter or she could have angered him in some way. The same was true as to Kenlein. Moreover,

Chanin could have threatened to tell his wife or jeopardize his career as a teacher.

Clay was also entitled to show that Chanin was engaging in risking on-line dating practices and inviting men to her home. That could have explained the unidentified male DNA found at the scene. Arguably, even if Walker and Kenlein did not murder her, one of her other partners could have been present, had sex with Chanin and murdered her on that morning. That would also explain why she turned off her phone for a while and did not answer the door.

5. Similarly, the Trial Court Violated Clay's Right to Present a Defense when it Prevented Clay from Fully Exposing the Investigator's Failure to Undertake a Competent and Thorough Investigation

The defense is entitled to explore the adequacy of the police investigation. *See Kyles v. Whitley*, 514 U.S. 419, 446-47, 115 S.Ct. 1555, 131 L.Ed.2d 490 (1995). The judge's ruling excluding exploration of the other suspects prevented Clay from adequately raising this defense. When the trial court prohibited Clay from presenting evidence of Chanin's risky sexual relationships with multiple men she met online, Clay was prevented from fully exposing the shoddy investigation pursued by the police. Clay argued that the police failed to properly investigate and test all of the potential biological evidence found at the scene. But, by failing to allow

Clay to present evidence that the police actually knew that Chanin was engaging in high risk on-line dating, the defense was incomplete. It was unfair for the State to be able to argue that the DNA evidence excluded all other potential suspects while at the same time forbidding Clay to point out the many other potential suspects who might have been identified if only the police had actually tested all of the biological evidence available. As a result of this unfair limitation on the defense, the jury could have concluded that the limitations on the investigation were reasonable because Chanin had no other sexual partners so the biological material was irrelevant and there was no need to critically evaluate the police investigation.

But the truth was that Chanin was having sexual relationships with several different partners. That would explain why there was no sign of a struggle and no indication that someone forced their way into the home. It would have countered the State's argument that Clay was the only person who had sufficient access to and knowledge of Chanin's habits to get her alone in the home. A sexual tryst with someone else on December 1, 2011, would explain why other male DNA was present at the scene. Had the jury been informed of this, the jurors could have readily agreed with Clay's argument that the police investigation was shoddy, incomplete and influenced by a biased view of the evidence.

6. The Trial Court Violated Clay's Right of Confrontation when it refused to Permit the Defense to Fully Explore the Texts Between Chanin and Walker, Including Texts that Referenced Facts Related to Items Found at the Crime Scene

The State called Tom Walker to the stand, yet the trial court forbid the jury from hearing the following: At 8:29 a.m., Walker texted to Chanin:

> I'm looking back at our texts and I think that you should send me a picture of your vibrator in your pussy. Sorry . . . But you made me think of it.

CP 495. Chanin responded at 8:38 a.m. and said: "I so want your cock in me right now." CP 593. Walker texted at 8:42 a.m.: "Me too. I want to fell [sic] your set [sic] pussy around my cock and your mouth sliding down it too. Damn . . . You make me so friggin horny." *Id.* He sent two more texts: "Wet no Set :)" at 8:42 a.m. *Id.* Finally, at 8:47 a.m. he texted: "I have to tell you I really like blow jobs. I hope you like oral back." *Id.*

But Walker was the *State's* witness. Once he took the stand and testified that he had an "alibi" for the crime, the door was opened to every aspect of Walker's conversations with Chanin on the day the murder occurred and his motive to lie to avoid prosecution. Clay was entitled to argue that Walker actually went to Chanin's home on the afternoon or evening of December 1 to get a picture of exactly what he asked for.

Certainly, one could argue that Walker murdered her during that encounter. The failure to give Clay the opportunity to admit this text and to cross-examine Walker about it was constitutional error.

7. Because the State Presented Evidence Suggesting that Clay was Dishonest in Describing Chanin's Sexual Activities to others, Clay had the Right to rebut that Evidence

Once the State successfully moved to prohibit Clay from introducing evidence of Chanin's risky dating behavior, it was error for the State to suggest that his statements to others on this subject were either untrue or exaggerated. In fact, the State told the trial judge at the pretrial hearing that it "did not intend to get into the dating history of Ms. Starbuck or the defendant." RP 225. But despite this representation, the State called several witnesses to testify that Clay told them about Chanin's risky behavior but they believed he was either lying or exaggerating.

But, because it was admitted, Clay had a constitutional right to present all of the relevant rebuttal evidence. Evidence of Chanin's on-line dating habits obtained from the analysis of her computer and via the testimony of the children would have rebutted the testimony of the State's witnesses who said that Clay was lying about Chanin's lifestyle. It may be that these witnesses were telling the truth when they said they did not believe Clay. But, Clay had a constitutional right to show that Chanin did not necessarily reveal her true activities to her friends and family.

8. The Trial Court's Determination that all of this Defense Evidence as More Prejudicial than Probative was an Abuse of Discretion

Nearly all evidence is prejudicial in the sense that it is offered for the purpose of inducing the trier of fact to reach one conclusion and not another. This is not the sense in which the term "prejudice" is used in ER 403. 5 Wash. Prac., Evidence Law and Practice § 403.3 (5th ed.). Evidence is "unfairly prejudicial" if it is likely to stimulate an emotional response rather than a rational decision by the jury. *Salas v. Hi-Tech Erectors,* 168 Wn.2d 664, 671, 230 P.3d 583 (2010). Here, the trial judge excluded the probative value because the "jurors might be offended."

It is true that the Chanin Starbuck's lifestyle choices were a sensitive matter. But the jury knew at least some of this information when it learned that she was communicating with two different men about sex on the day of her death. Thus, the content of her email exchanges with men and her risky sexual behavior were extremely relevant and probative on the question of who killed her. And, in a homicide case much of the evidence will be the State's evidence, including the pictures of Chanin's body at the scene that were gruesome and sexual in nature.

D. THE TRIAL COURT ERRED WHEN IT PERMITTED THE INTRODUCTION OF THE AUDIO PORTION OF THE 911 TAPE

The admission of the 911 call recording violated Clay's rights under the confrontation clause of the Sixth Amendment. A testimonial statement of a witness absent from trial is properly admitted only where (1) the declarant is unavailable and (2) the defendant has had a prior opportunity to cross-examine the declarant. *Crawford v. Washington*, 541 U.S. 36, 59, 124 S.Ct. 1354, 158 L.Ed.2d 177 (2004). "Testimony" is typically defined as "'[a] solemn declaration or affirmation made for the purpose of establishing or proving some fact.'" *Crawford*, 541 U.S. at 51 (quoting 1 Noah Webster, An American Dictionary of the English Language (1828)). *See also*, *State v. Williams*, 136 Wn. App. 486, 502, 150 P.3d 111, 119 (2007).

In this case, the State assumed the "declarant" on the 911 tape was Chanin Starbuck. But because the sound on the tape was not even identified as a human voice, there is no evidence from which one could reach this conclusion. Thus, there was no showing that the declarant was "unavailable." As is obvious from this fact, the State failed to establish that Clay had a prior opportunity to cross-examine the declarant.

It is anticipated that the State will argue that this sound was not admitted "for the truth of the matter asserted." *See* ER 801(c). But that

argument should be rejected. The State told the jury that this call was from Chanin, that it was the sound of her being strangled and that it conclusively set the time of death. Clay was not able to confront or effectively cross-examine the person who made the sound on the call. Thus, the admission of the audio portion was constitutional error.

E. THE PROSECUTOR COMMITTED MISCONDUCT IN CLOSING ARGUMENT

"It's the easiest thing in the world for people trained in the adversarial ethic to think a prosecutor's job is simply to win." *United States v. Kojayan*, 8 F.3d 1315, 1324 (9th Cir. 1993). It is not. An attorney for the government is a

> representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done.

Berger v. United States, 295 U.S. 78, 88, 55 S.Ct. 629, 79 L.Ed. 1314 (1935). Put differently: "The prosecutor's job isn't just to win, but to win fairly, staying well within the rules." *Kojayan*, 8 F.3d at 1323.

To prevail on a claim of prosecutorial misconduct, a defendant must show that the prosecutor's conduct was both improper and prejudicial. *In re Pers. Restraint of Glasmann*, 175 Wn.2d 696, 707-10, 286 P.3d 673 (2012). To show prejudice, a defendant must demonstrate a

substantial likelihood that the misconduct affected the jury verdict. *Id.* In this case, there were no objections to the prosecutor's improper arguments. That does not bar review, however, where the misconduct was so flagrant and ill-intentioned that it caused an enduring and resulting prejudice that could not have been neutralized by an admonition to the jury. *Id.*

1. The Prosecutor Committed Misconduct when he argued that the DNA Found at the Scene "Matched" Clay Starbuck's DNA to the Exclusion of all others

When forensic scientists compare an unknown sample of DNA from a crime scene with a known sample from a suspect, they may find a scientifically relevant number of similarities. But in doing so they are not stating unequivocally that the suspect is the source of the DNA or a "match." Instead, they are merely stating a probability that the suspect was the source of the DNA. *State v. Bander*, 150 Wn. App. 690, 720, 208 P.3d 1242, 1256, *rev. denied*, 167 Wn.2d 1009, 222 P.3d 800 (2009). In this case, the probability was very low because Starbuck's Y-STR DNA would be the same as one in every 2,800 men randomly selected in the population.[6]

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[6] Stated another way, Spokane County has a population of about 475,000 people. Assuming 50% are men, Starbuck's Y-STR DNA could be the same as that of 84 other men in the area. If a man lived in a community with lots of brothers, uncles, cousins and sons – i.e., a non-random population, it seems that Y-STR DNA testing would be almost worthless *except* when used solely to exclude certain persons.

This is what the State's witnesses testified to. Despite the State's repeated questions, there was no testimony that Clay's DNA was a "match" to the DNA found at the scene and certainly not in the sense the prosecutor argued it. Nonetheless, the prosecutor repeatedly told the jury that Starbuck's DNA "matched" the DNA found at the scene.[7] Moreover, he argued that this "match" was so conclusive that any further DNA testing of items found at the scene would not exclude Clay as the perpetrator. But, of course, that would not necessarily be true. If the other untested items contained DNA from Walker, a man who, the morning of December 1, wanted a picture of Chanin in exactly the position she was found, Clay's status as suspect would have diminished quickly. The same would be true if the untested items contained Kenlein's DNA, a man who was at Chanin's house three times on the day of the murder and who bought cleaning products on midnight that night.

"[A]n attorney may not mislead the jury in summarizing the evidence during closing arguments." *State v. Thompson*, 73 Wn. App. 654, 663-64, 870 P.2d 1022, *rev. denied*, 125 Wn.2d 1014, 889 P.2d 499

[7] Because of their bias – or perhaps a lack of understanding to the limitations on this type of testing – Detective Ricketts also treated the Y-STR results as conclusive proof of guilt. Once he received word that the limited testing included Starbuck DNA but excluded Kenlein and Walker, he arrested Clay and stopped looking at any other evidence. He did not re-canvas the neighborhood, he did not analyze Chanin's computer or investigate any other men she was associating with, he discounted the children's testimony and he did not subject the sperm found on Chanin's ankle and abdomen to any other DNA testing.

(1994), citing, *State v. Reeder*, 46 Wn.2d 888, 892, 285 P.2d 884 (1955). *See also, United States v. Watson*, 171 F.3d 695, 699 (D.C. Cir. 1999); *United States v. Carter*, 236 F.3d 777, 785 (6th Cir. 2001); *United States v. Universita*, 298 F.2d 365, 367 (2d Cir.), *cert. denied*, 370 U.S. 950, 82 S.Ct. 1598, 8 L.Ed.2d 816 (1962) ("The prosecution has a special duty not to mislead."); ABA Standard Prosecution Function, 3-5.8 Argument to the Jury ("The prosecutor should not intentionally misstate the evidence or mislead the jury as to the inferences it may draw.").

This was flagrant and ill-intentioned. DNA forensic evidence is complex so the prosecution has a special duty not to mislead jurors who are not as well versed in the nuances of the DNA forensic results. Because popular television programs focusing on forensic science, like CSI, and media coverage of high-profile cases, may give jurors an incomplete picture of the various types of DNA evidence and the limitations of certain DNA testing results. Some may believe that any similarity between the known and unknown samples is conclusive proof of guilt. Given these issues, the prosecutor's argument that Heath's findings were a "match" was very prejudicial. The jury likely presumed – incorrectly – that the Y-STR testing conclusively proved that Starbuck was the killer.

Based upon this argument alone, this Court should reverse.

2. The Prosecutor Committed Misconduct in Closing Argument when he argued that Clay Falsely Told Others that Chanin was Sexually Promiscuous and Engaged in Risky Situations by Meeting Men for Sex at Her Home

Here, before trial, the State convinced the judge to bar Clay from presenting evidence that Chanin was meeting men online at sites like surgardaddy.com, inviting men she met online to her home for sex and sending men pictures of her nude. Then, having barred this evidence, the State argued that Clay was *falsely* telling others that Chanin was engaging in risky sexual behavior with men she met on line. This argument was flagrant and ill-intentioned. The State is simply not permitted to argue that Clay was lying when it had substantial evidence that he was telling the truth. *State v. Gregory*, 158 Wn.2d 759, 865-66, 147 P.3d 1201, 1256 (2006); *United States v. Blueford*, 312 F.3d 962, 968 (9th Cir. 2002) ("[I]t is decidedly improper for the government to propound inferences that it knows to be false, or has very strong reason to doubt"); *United States v. Toney*, 599 F.2d 787, 789 (6th Cir. 1979) (trial court's erroneous exclusion of evidence, coupled with a highly questionable attempt by the prosecutor to capitalize on this error, that requires reversal).

Chanin was engaging in risky behavior as evidenced by the items found on her computer, the records of other men she was communicating with and the statements of her children – and the State knew it.

3. The Prosecutor Committed Misconduct when, for the First Time in Closing Argument, He Argued a New Theory – that Clay did not Act Alone in Murdering Chanin

The U.S. Supreme Court has clearly established that the due process clause prohibits the government from misleading the defense about the evidence it will present. *See Gray v. Netherland*, 518 U.S. 152, 116 S.Ct. 2074, 135 L.Ed.2d 457, *reh'g denied*, 518 U.S. 1047, 117 S.Ct. 22, 135 L.Ed.2d 1116 (1996); *Richardson v. Briley*, 401 F.3d 794 (7th Cir. 2005), *cert. denied*, 546 U.S. 1177, 126 S.Ct. 1346, 164 L.Ed.2d 59 (2006). And a prosecutor may not engage in a last-minute "ambush" by arguing a new theory of homicide.

But the State did precisely that in rebuttal here. For the first time, the State argued that Clay might not be the only perpetrator of the crime. This argument had no basis in fact and was simply a last ditch attempt by the prosecutor to explain the biased and incomplete police investigation. But it was misconduct because Clay had absolutely no opportunity to rebut this 11th hour allegation.

4. The Prosecutor Committed Misconduct when he argued that the 911 Call was a Call by Chanin for Assistance

The prosecutor similarly committed misconduct when he misled the jury on the inferences they could draw from the 911 call. There was no evidence that the call was made by Chanin, the sounds were made by

her or that they were the sounds of her dying. There was no evidence that it was anything other than a misdial. Thus, it was completely speculative for the prosecutor to argue all of those things to the jury.

VI.
CONCLUSION

The jury's verdict in this case is based upon a paucity of evidence and a biased and half-hearted police investigation. The jury's verdict would have been different if the trial court had not unconstitutionally prevented Clay from presenting the complete set of facts. Thus, this Court must reverse the conviction.

DATED this 5 day of May, 2014.

Respectfully submitted,

Suzanne Lee Elliott

Suzanne Lee Elliott, WSBA #12634
Attorney for Clay Duane Starbuck

CERTIFICATE OF SERVICE

I hereby certify that on the date listed below, I served by First Class United States Mail, postage prepaid, one copy of this brief on the following:

Mr. Clay Starbuck #366799
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5.5.14
Date


William Brenc

IN THE COURT OF APPEALS FOR THE STATE OF WASHINGTON
DIVISION III

STATE OF WASHINGTON, Plaintiff-Respondent, v. CLAY STARBUCK, Defendant-Appellant.	No. 31845-1-III SUPPLEMENTAL AUTHORITY

Pursuant to RAP 10.8, Starbuck submits the attached supplemental authority to support his argument that the trial court erroneously excluded "other suspect" evidence in this case:

State v. Andre Luis Franklin, -- Wn.2d -- , -- P.3d -- (slip opinion filed May 8, 2014).

DATED this 8th day of May, 2014.

Suzanne Lee Elliott

Suzanne Lee Elliott, WSBA 12634
Attorney for Clay Duane Starbuck

CERTIFICATE OF SERVICE

I declare under penalty of perjury that on May 8, 2014, I mailed one copy of this document in the U.S. Mail, postage prepaid, to:

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IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent, v. ANDRE LUIS FRANKLIN, Petitioner.	NO. 87253-8 EN BANC Filed MAY 08 2014

GORDON McCLOUD, J.—The trial court excluded defendant Andre Franklin's proffered evidence that someone else committed the cyberstalking-related crimes with which he was charged. Specifically, it excluded evidence that Franklin's live-in girl friend Rasheena Hibbler had sent threatening e-mails to his other girl friend Nanette Fuerte despite the fact that Hibbler had the motive (jealousy), the means (access to the computer and e-mail accounts at issue), and the prior history (of sending earlier threatening e-mails to Fuerte regarding her relationship with Franklin) to support Franklin's theory of the case.

The trial court reasoned that this was "other suspect" evidence, and that such evidence is inadmissible unless it overcomes a "high" bar. Partial Report of Proceedings (RP) (June 22, 2009) at 10. The trial court clearly meant a bar higher than the relevance, foundation, and similar prerequisites to admissibility established by Washington's Rules of Evidence (ER); the trial court meant that it could consider all the other evidence of Franklin's guilt and exclude the "other suspect" evidence because the other proof of the defendant's guilt was great.

We reverse. First, the United States Constitution bars the trial court from considering the strength or weakness of the State's case in deciding whether to exclude defense-proffered other suspect evidence. The United States Supreme Court expressly reiterated this rule not long ago in *Holmes v. South Carolina*, 547 U.S. 319, 126 S. Ct. 1727, 164 L. Ed. 2d 503 (2006). Second, Washington law reinforces this constitutional mandate. We have never adopted a per se rule against admitting circumstantial evidence of another person's motive, ability, or opportunity. Instead, our cases hold that if there is an adequate nexus between the alleged other suspect and the crime, such evidence should be admitted. The trial court violated both of these rules: it considered the strength of the State's case against the defendant and it applied a per se standard to exclude the other suspect evidence. Thus, its exclusion

of the proffered other suspect evidence was error under both our case law and our constitution.

FACTS

Franklin had a romantic relationship with two women. Fuerte and Franklin began an intermittent romantic relationship while working together during the fall of 2005; it lasted until late 2008. Meanwhile, Franklin lived with Hibbler and Hibbler disapproved of Franklin's relationship with Fuerte.

Things deteriorated between Franklin and Fuerte in October 2008, after Fuerte borrowed $3,000 from Franklin to cover an unexpected expense. The two agreed in writing that she would pay him back on November 26, 2008. On November 6, 2008, Franklin showed up at Fuerte's home uninvited. Fuerte and a male friend were watching a movie. Fuerte did not invite Franklin in but did talk with him outside for a few hours. At trial, she testified that Franklin seemed upset that she had another man at her house.

The next night, Fuerte began receiving numerous lewd calls and texts from numbers that she did not recognize. Fuerte eventually discovered that the callers were responding to a Craigslist ad urging readers to contact Fuerte for sexual favors. In total, she received between 75 and 100 calls or texts from the ad posting.

Then, on November 8, 2008, Franklin interrupted Fuerte's dinner at a restaurant, threatened to tell her employers "exactly what type of person" she was, and demanded the money she owed him. RP (June 29, 2009) at 37. Franklin left after Fuerte told him she would pay him back the following Monday.

But on Monday, Fuerte began receiving e-mails from a new personal e-mail account, time4gamez@yahoo.com, to set up a time for her to deliver the payment. The e-mail stated, "[I]f I was u[,] i would stop playing gamez." Ex. 40. Fuerte replied that she was not playing games and that she was trying to get the money. The response she received stated,

> [C]ommunication is key...u friday then u said monday @ noon. u asked me 2 b patient I no longer have any patients for u and Ur games. the way i c it is that u are useing my money 2 go out and have fun while i am working hard 2 save money...u have till 1pm then u know what will happen.

Id.

Soon after the above e-mail, Fuerte received another e-mail that contained a copy of a new Craigslist ad. That new ad listed Fuerte's name and work phone number and asked readers to tell Fuerte what they would like to do to her. Two sexually explicit photos of Fuerte were attached to the e-mail, one of which also featured Franklin.

Fuerte testified that she eventually cashed a $3,000 check and met Franklin at his home to deliver it. Fuerte testified that Franklin laughed at her when she gave him the money and that he stated, "[D]o you think this is the end of it? This is just the beginning." RP (June 29, 2009) at 51.

Later that day, Fuerte received an additional e-mail from the time4gamez account: "[S]o r u going to play my game or not?" Ex. 42. This was followed by another threatening e-mail. The next day, Fuerte received another e-mail containing the same proposed Craigslist ad stating that Fuerte was offering free sexual services.

Fuerte then received more threatening e-mails from the time4gamez account asking whether Fuerte would play the "game." *E.g.*, Exs. 48-51. One of the time4gamez e-mails stated, "[N]ow u may lose it all B-cuz u wanted 2 play games . . . . I told u a # of time I am not the 1 2 play with . . . but u still thought it was OK." Ex. 54. At one point Franklin called Fuerte and laughed while telling her that she should have gotten a receipt for the $3,000 payment because he could just pretend she had not paid. Fuerte was particularly upset because he had contacted her through her son's phone. The next morning, Fuerte reported the call to the police.

After several more rounds of e-mails and phone calls, during one of the calls, Fuerte asked Franklin to stop everything. He told her that he would not stop, that the first Craigslist post "was just the tip of the iceberg," and that she "should start

looking over [her] shoulder." RP (June 29, 2009) at 73-74. He also stated that he knew people who could "do dirt" for him. *Id.* at 74.

Shortly after ending that phone call, Fuerte began receiving sexually explicit responses to another Craigslist ad, which also contained the sexually explicit photos from the first posting. Fuerte eventually contacted Human Resources, because the e-mails were directed to her work e-mail address, and contacted the police. She obtained a temporary protection order, and Franklin was placed on administrative leave. In total, prior to Fuerte's reporting of the harassment, there were 13 Craigslist postings similar to the ones listed above.

On December 8, 2008, the State charged Franklin with one count of first degree perjury, one count of stalking, and one count of cyberstalking. The perjury charge was based on Franklin's testimony at a hearing for a permanent restraining order where he testified under oath that he did not post any ads or possess any explicit pictures of the victim. The stalking charge alleged that Franklin "repeatedly harass[ed]" Fuerte, Clerk's Papers (CP) at 2, and the jury instructions defined "to harass" as "to carry out a knowing and willful course of conduct directed at a specific person which seriously alarms, annoys, or harasses or is detrimental to such person," CP at 46. The cyberstalking charge alleged that Franklin, "with intent to harass . . .

Fuerte, . . . ma[de] an electronic communication to her . . . using . . . lewd, lascivious, indecent, or obscene words [or] images . . . ." CP at 2.

One of Franklin's primary defenses to the charges was that Hibbler, with whom he lived, had posted the Craigslist ads and sent the harassing e-mails. His basis for this other suspect defense was that Hibbler's personal laptop was the only computer in their home, and she had previously sent threatening messages to Fuerte via e-mail, text message, and phone, expressing displeasure about Fuerte's relationship with Franklin. Moreover, Hibbler had accessed Franklin's e-mail in the past.

The State, however, moved to exclude evidence that Hibbler had posted the Craigslist ads, arguing that there was not a sufficient nexus between her and the crime. The trial court granted the State's motion, explaining that "the other suspect bar, quite frankly, is high" and that it required more than showing mere motive and opportunity—it required specific facts showing that someone else committed the crime. RP (June 22, 2009) at 10-11. Moreover, the trial court stated, "I not only look at the foundation for other suspect evidence, but I also look at the evidence against the defendant." RP (June 29, 2009) at 13.

The jury convicted Franklin of all three crimes. CP at 124-26. On appeal, he argued that the trial court erred in excluding the other suspect evidence. Franklin

also argued that the court had erred by applying a Fifth Amendment[1] privilege to Hibbler's testimony in open court, by excluding Franklin's brother as a witness, by closing the courtroom to conduct an in camera hearing, and by excluding Franklin from the in camera hearing. The Court of Appeals affirmed. *State v. Franklin*, noted at 166 Wn. App. 1041, 2012 WL 745227, at *1. Franklin petitioned for review, and we granted it on all issues except for the closed courtroom issue. *State v. Franklin*, 174 Wn.2d 1017, 282 P.3d 96 (2012).

ANALYSIS

The trial court in this case erred when it excluded Franklin's alternate suspect evidence.[2] The trial court's ruling conflicts with both federal and state law because it considered the strength of the State's case against the defendant and because it applied a per se standard to exclude the other suspect evidence.

a. The Trial Court's Reasoning Conflicts with United States Supreme Court Precedent

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[1] U.S. CONST. amend. V.

[2] We review a trial court's decision to exclude evidence for abuse of discretion. *State v. Perez-Valdez*, 172 Wn.2d 808, 814, 265 P.3d 853 (2011) (citing *State v. Bashaw*, 169 Wn.2d 133, 140, 234 P.3d 195 (2010)). An erroneous evidentiary ruling that violates the defendant's constitutional rights, however, is presumed prejudicial unless the State can show the error was harmless beyond a reasonable doubt. *State v. Guloy*, 104 Wn.2d 412, 425, 705 P.2d 1182 (1985) (citing *State v. Stephens*, 93 Wn.2d 186, 190-91, 607 P.2d 304 (1980)).

"Few rights are more fundamental than that of an accused to present witnesses in his own defense." *Chambers v. Mississippi*, 410 U.S. 284, 302, 93 S. Ct. 1038, 35 L. Ed. 2d 297 (1973). It is a right of constitutional magnitude. *See id.* For that reason, the United States Supreme Court has ruled that a trial court cannot exclude defense-proffered other suspect evidence because of the perceived strength of the State's case. *Holmes*, 547 U.S. at 327-29. In *Holmes*, the Court expressly distinguished cases where other suspect evidence was excluded on the basis of "well-established rules of evidence," from the case before it where "the critical inquiry concern[ed] the strength of the prosecution's case." *Id.* at 326, 329.

The *Holmes* Court explained that the exclusion of other suspect evidence is a "specific application" of the general evidence rule permitting a judge "to exclude evidence if its probative value is outweighed by certain other factors such as unfair prejudice, confusion of the issues, or potential to mislead the jury." *Id.* at 327, 326. But when a rule that is "intended to be of this type" instead strays into evaluating the strength of the State's case, then it "does not rationally serve the end that [it was] designed to promote, *i.e.*, to focus the trial on the central issues by excluding evidence that has only a very weak logical connection to the central issues." *Id.* at 328, 330.

The trial court's reasoning in this case suffers from the same flaw as did the South Carolina rule rejected by *Holmes*. The trial court stated that in considering whether the defense had laid the foundation for other suspect evidence, "I not only look at the foundation for other suspect evidence, but I also look at the evidence against the defendant." RP (June 29, 2009) at 13. Under *Holmes*, this is unconstitutional. It impermissibly inquires into the strength of the prosecution's case, rather than focusing on the relevance and probative value of the other suspect evidence itself. *See Holmes*, 547 U.S. at 329.

b. The Trial Court's Reasoning Is Inconsistent with Prior Washington Case Law

The trial court also stated that other suspect evidence is inadmissible unless the proponent of the evidence shows that the alternate suspect had "more than mere opportunity" and "[m]ore than motive." RP (June 22, 2009) at 10. It ruled that "other suspect evidence . . . requires specific facts to show that another person actually committed the crime." *Id.* at 11. The State argues that the trial court's statements are justified by a line of cases stemming from our 1932 decision in *State v. Downs*, 168 Wash. 664, 13 P.2d 1 (1932). In that case, we held that other suspect evidence is admissible only if the defendant can show "a train of facts or circumstances as tend clearly to point out some one besides the [accused] as the guilty party." *Id.* at 667 (citing *State v. Caviness*, 40 Idaho 500, 235 P. 890, 892

(1925)). The defendants in *Downs* offered evidence that a potential suspect—the apparently infamous burglar "'Madison Jimmy'"—was in town at the time the charged burglary was committed. *Id.* at 666. There was no evidence actually connecting Madison Jimmy in any way to the particular burglary. Without the necessary "train of facts or circumstances" linking him to the crime, opportunity and character evidence alone were insufficient to infer any third-party guilt; it was "the most remote kind of speculation." *Id.* at 668. As such, it was properly excluded as irrelevant.

While *Downs* remains good law, we have since developed the "train of facts or circumstances" standard. One year after *Downs*, we held that "[m]ere evidence of motive in another party, or motive coupled with threats of such other person, is inadmissible, unless coupled with other evidence tending to connect such other person with the actual commission of the crime charged." *State v. Kwan*, 174 Wash. 528, 533, 25 P.2d 104 (1933) (citing *People v. Mendez*, 193 Cal. 39, 52, 223 P. 65 (1924), *overruled in part on other grounds by People v. McCaughan*, 49 Cal. 2d 409, 317 P.2d 974 (1957)). Further, we stated in *Kwan* that "[r]emote acts, disconnected and outside of the crime itself, cannot be separately proved for such a purpose." *Id.* (citing *Downs*, 168 Wash. at 667). And we cited with approval a California case that explained:

> [This rule] rests upon the necessity that trials of cases must be both orderly and expeditious . . . To this end it is necessary that the scope of inquiry into collateral and unimportant issues must be strictly limited. It is quite apparent that if evidence of motive alone upon the part of other persons were admissible, that in a case involving the killing of a man who had led an active and aggressive life it might easily be possible for the defendants to produce evidence tending to show that hundreds of other persons had some motive or *animus* against the deceased . . . .

Mendez, 193 Cal. at 52. In effect, this limitation on collateral evidence was similar to the requirement that evidence must have sufficient "probative value" to be relevant and admissible under ER 403. Evidence establishing nothing more than suspicion that another person might have committed the crime was inadmissible because its probative value was greatly outweighed by its burden on the judicial system. Other suspect evidence that establishes only such suspicion is inadmissible.

In contrast, we held in *State v. Maupin* that eyewitness testimony that a kidnapping victim was seen after the kidnapping with a person other than the defendant was both relevant and sufficiently probative to pass the *Downs* test. 128 Wn.2d 918, 928, 913 P.2d 808 (1996). Such evidence links the other suspect to the specific crime charged, either as the true perpetrator or as an accomplice or associate of the defendant. Evidence of this sort differs from evidence of motive, ability, opportunity, or character in that the proffered evidence *alone* is sufficient under the circumstances to establish the necessary connection. However, neither *Maupin* nor

the earlier cases stand for the proposition that motive, ability, opportunity, and/or character evidence together can never establish such a connection. The *Downs* test in essence has not changed: some combination of facts or circumstances must point to a nonspeculative link between the other suspect and the charged crime.

The trial court was thus incorrect to suggest that direct evidence rather than circumstantial evidence is required under our cases. The standard for relevance of other suspect evidence is whether there is evidence "'tending to connect'" someone other than the defendant with the crime. *Downs*, 168 Wash. at 667 (quoting 16 C.J. *Criminal Law* § 1085, at 560 (1918)), *quoted in Maupin*, 128 Wn.2d at 925. Further, other jurisdictions have pointed out that this inquiry, properly conducted, "focuse[s] upon whether the evidence offered tends to create a reasonable doubt as to the *defendant*'s guilt, not whether it establishes the guilt of the *third party* beyond a reasonable doubt." *Smithart v. State*, 988 P.2d 583, 588 & n.21 (Alaska 1999). The standard set forth by the trial court establishes a bar to admission of other suspect evidence significantly higher than the standard we have previously set forth and higher than the standard used in other jurisdictions.

Our more restrained interpretation of the *Downs* standard is also compelled by the United States Supreme Court's holding in *Holmes*, 547 U.S. 319. As discussed above, in that case, the Court examined the South Carolina Supreme

Court's transformation of the "train of facts or circumstances" test—i.e., the *Downs* test—into a balancing of the relative probative value of other suspect evidence against strong forensic evidence implicating the defendant. *Id.* at 328-29. The Supreme Court held that trial courts may exclude evidence on the ground that its probative value is outweighed by other considerations, but the probative value must be based on whether the evidence has a logical connection to the crime—not based on the strength of the State's evidence: "[j]ust because the prosecution's evidence, *if credited*, would provide strong support for a guilty verdict, it does not follow that evidence of third-party guilt has only a weak logical connection to the central issues in the case." *Id.* at 330. The South Carolina rule at issue in *Holmes*, like the rule applied by the trial court in this case, contradicts this constitutional standard and prior state case law.

c. The Trial Court's Error in Excluding the Other Suspect Evidence in This Case Was Not Harmless

The trial court in this case excluded evidence showing that another person had both the motive and opportunity to commit the crime. More than that, the excluded evidence, taken together, amounts to a chain of circumstances that tends to create reasonable doubt as to Franklin's guilt.

The trial court's error directly affected Franklin's right, under both the state and federal constitutions, to present witnesses on his own behalf. *See Maupin*, 128

Wn.2d at 927. The error is therefore constitutional in nature. "[C]onstitutional error is presumed to be prejudicial and the State bears the burden of proving that the error was harmless. A constitutional error is harmless if the appellate court is convinced beyond a reasonable doubt that any reasonable jury would have reached the same result in the absence of the error." *State v. Watt*, 160 Wn.2d 626, 635, 160 P.3d 640 (2007) (citing *State v. Guloy*, 104 Wn.2d 412, 425, 705 P.2d 1182 (1985) (citing *State v. Stephens*, 93 Wn.2d 186, 190-91, 607 P.2d 304 (1980))).

The State concedes that if the trial court erred in excluding the other suspect evidence, the error is subject to constitutional harmless error analysis. Br. of Resp't at 28. However, the State claims any error in excluding Hibbler's testimony was harmless beyond a reasonable doubt. It asserts the error was harmless because "the evidence that Franklin had wanted to elicit from Hibbler was largely admitted through other witnesses." *Id.* at 35.

An error is harmless only if we cannot reasonably doubt that the jury would have arrived at the same verdict in its absence. *State v. Jones*, 168 Wn.2d 713, 724, 230 P.3d 576 (2010) (quoting *State v. Smith*, 148 Wn.2d 122, 139, 59 P.3d 74 (2002)). Here, Franklin offered evidence that Hibbler had the motive, ability, and opportunity to commit the charged crime, and that she had personally threatened Fuerte regarding her relationship with Franklin via text and e-mail in the past.

Moreover, some of the circumstantial evidence against Franklin pointed equally to Hibbler. Though some of this evidence emerged at trial through other witnesses, some of it did not. And the trial court barred Franklin from arguing that the limited evidence on this point that was presented at trial implicated Hibbler. If the jury had been allowed to consider all of the other suspect evidence, it may have reached a different verdict.[3]

CONCLUSION

The trial court erred in excluding other suspect evidence in this case, and the error was not harmless beyond a reasonable doubt. We therefore reverse Franklin's convictions and remand to the trial court.

[3] We note that the other suspect evidence was relevant not only to the cyberstalking charge against Franklin, but also to the stalking and perjury charges. The stalking jury instructions allowed the jury to consider the e-mails and Craigslist ads as proof of that crime, CP at 41-46; the perjury charge was based on Franklin's assertion at a pretrial hearing that he did not post any ads on Craigslist, CP at 1. Because we reverse all of Franklin's convictions and grant a new trial based on the other suspect issue, we do not reach his other claims.

George McCad, J.

WE CONCUR:

Stephens, J.

Wiggins, J.

Fairhurst, J.

González, J.

No. 87253-8

OWENS, J. (dissenting) -- The majority reverses the Court of Appeals and overturns the trial court's discretionary ruling to exclude speculative evidence that another suspect cyberstalked the victim in this case. In doing so, the majority makes three critical errors. Frist, it alters our standard for admitting other-suspect evidence while claiming to leave it unchanged. Second, it fails to analyze the evidence using that—or any—standard and instead reverses the trial court for its questionable choice of words. And third, it misinterprets a United States Supreme Court case, expanding its limited holding well beyond its intended reach. The majority does all this to reverse Andre Luis Franklin's convictions based on a trial court ruling correctly referred to by the Court of Appeals as a "close call." *State v. Franklin*, noted at 166 Wn. App. 1041, 2012 WL 745227, at *6, *review granted*, 174 Wn.2d 1017, 282 P.3d

96 (2012). That call was well within the trial court's discretion to make, and I dissent because I cannot say that the trial court abused its discretion in doing so.

ANALYSIS

A defendant's constitutional right to present a defense does not include the right to present irrelevant evidence. *State v. Maupin*, 128 Wn.2d 918, 924-25, 913 P.2d 808 (1996); ER 402. Evidence is relevant if it has "any tendency to make the existence of any [material] fact . . . more probable or less probable than it would be without the evidence." ER 401. Relevant "evidence may [nevertheless] be excluded if its probative value is substantially outweighed by" certain considerations such as prejudice or confusion, or if it will mislead the jury. ER 403.

In this case, Franklin sought to introduce evidence that another suspect committed the crimes. To establish other-suspect evidence as relevant and admissible, a defendant must connect the other suspect to the charged crime through "such a train of facts or circumstances as tend clearly to point out someone besides the accused as the guilty party." *State v. Downs*, 168 Wash. 664, 667, 13 P.2d 1 (1932). "Mere opportunity to commit the crime is not enough as such evidence is 'the most remote kind of speculation.'" *State v. Thomas*, 150 Wn.2d 821, 857, 83 P.3d 970 (2004) (quoting *Downs*, 168 Wash. at 668). A defendant must show the other suspect intended to commit the charged crime or took an actual step to do the same. *State v. Kwan*, 174 Wash. 528, 532-33, 25 P.2d 104 (1933); *State v. Strizheus*, 163 Wn. App.

820, 830, 262 P.3d 100 (2011) (quoting *State v. Rehak*, 67 Wn. App. 157, 163, 834 P.2d 651 (1992)), *review denied*, 173 Wn.2d 1030, 274 P.3d 374 (2012). "'Remote acts, disconnected and outside of the crime itself, cannot be separately proved for such a purpose.'" *Downs*, 168 Wash. at 667 (quoting *Greenfield v. People*, 85 N.Y. 75, 89 (1881)). The defendant has the burden of showing that the other-suspect evidence is admissible. *State v. Pacheco*, 107 Wn.2d 59, 67, 726 P.2d 981 (1986).

The majority claims to leave the standard described above unchanged, majority at 12-13, yet the majority alters it fundamentally. Citing a footnote from an Alaska case, the majority holds that rather than showing a train of facts and circumstances that connect the other suspect to the crime, a defendant needs to show only some "chain of circumstances that tends to create reasonable doubt as to [the defendant's] guilt." *Id.* at 13, 14. That has not been the law in Washington, and it opens the door to irrelevant, speculative evidence in future cases. I would apply the *Downs* standard, which has remained good law for 82 years in this state, and evaluate whether Franklin's evidence sufficiently connects the supposed other suspect to the crime.

In addition to altering the standard for admitting other-suspect evidence, the majority spends its time criticizing the unartful language of the trial judge rather than analyzing the record to determine whether Franklin met his burden to show that the evidence was admissible. In fact, the majority skips any analysis of the evidence altogether and summarily concludes that "the excluded evidence, taken together,

amounts to a chain of circumstances that tends to create reasonable doubt as to Franklin's guilt." *Id.* at 14. In fact, a full analysis of the evidence that Franklin submitted shows that the trial court did not abuse its discretion in excluding it.

First, the fact that Franklin's girl friend Rasheena Hibbler had access to the computer is merely evidence of opportunity—the most remote kind of speculation. Second, Franklin in no way connected Hibbler to the time4gamez@yahoo.com account—the account actually used to perpetrate the crime. Franklin did not show that Hibbler even knew of the account, let alone that she created or accessed it. Third, as for prior threats, the evidence shows only that Hibbler sent threatening e-mails two to three years before the cyberstalking occurred. Though Hibbler contacted the victim five months before the cyberstalking began, she made no specific threats, and none of her e-mails suggest an intent to post salacious Craigslist ads or to send the harassing e-mails that supported the charges. These "'[r]emote acts, disconnected and outside of the crime itself, cannot be separately proved'" to show that Hibbler intended to cyberstalk the victim or took an actual step to do so. *Downs*, 168 Wash. at 667 (quoting *Greenfield*, 85 N.Y. at 89).

The evidence in this case is akin to that in *Strizheus*, as the Court of Appeals correctly concluded. In *Strizheus*, the defendant—accused of assaulting and attempting to murder his ex-wife and identified as the assailant by her—sought to introduce evidence of their son's recanted confession, motive, and bad character. 163

Wn. App. at 826. The trial court excluded the evidence, and the Court of Appeals affirmed its decision because no direct evidence contravened the State's version of events and no evidence showed an intent by the son to commit the crime. *Id.* at 832-33. The same conclusion applies here because Franklin's other-suspect evidence does not contravene the State's version of events and does not show intent or any actual step to commit the crime on Hibbler's part.

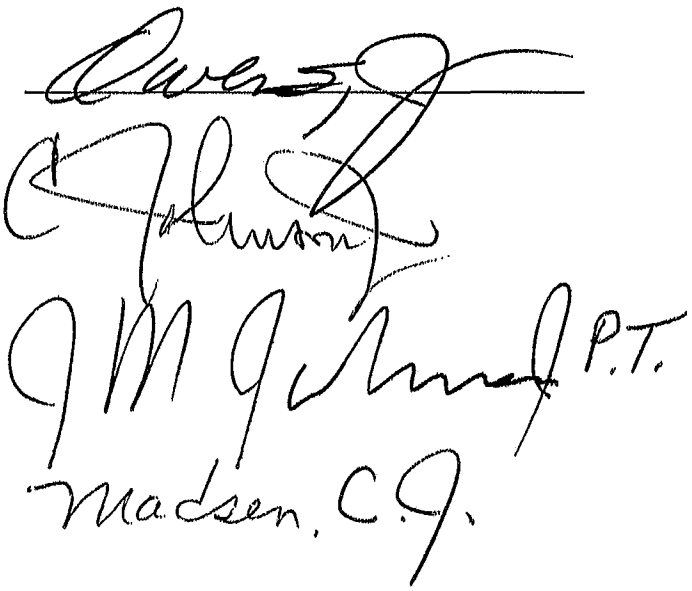
The majority reverses in large part due to the trial court's statement that it considered both the "foundation for other suspect evidence" as well as the "evidence against the defendant" when it ruled to exclude the other-suspect evidence. Partial Report of Proceedings (PRP) (June 29, 2009) at 13. The State's direct evidence included Franklin's separate confessions to his two superiors that he posted the ads and the victim's identification of him as the person she delivered $3,000 to on November 10, 2008. The majority contends that considering the State's evidence, in any way, runs afoul of the United States Supreme Court's holding in *Holmes v. South Carolina*, 547 U.S. 319, 126 S. Ct. 1727, 164 L. Ed. 2d 503 (2006). *Holmes* supports no such contention.

In that case, the Supreme Court reviewed the following standard created and applied by the South Carolina Supreme Court: "'[W]here there is strong evidence of an appellant's guilt, especially where there is strong forensic evidence, the proffered evidence about a third party's alleged guilt does not raise a reasonable inference as to

the appellant's own innocence.'" *Id.* at 324 (quoting *State v. Holmes*, 361 S.C. 333, 342-43, 605 S.E.2d 19 (2004)). The Court held that the standard was arbitrary, reasoning that "by evaluating the strength of *only one party's evidence*, no logical conclusion can be reached regarding the strength of contrary evidence offered by the other side to rebut or cast doubt." *Id.* at 331 (emphasis added).

The standard applied by the trial court was far different from the one the Supreme Court struck down in *Holmes*. Here, the trial court did not look to only one party's evidence, but rather determined—based on the totality of the evidence—that Franklin's evidence was too weak to meet the standard for admissibility. I find no abuse of discretion in that determination. Hibbler sent threatening e-mails years before the cyberstalking began. Those actions were too remote in time to connect to Franklin's crimes. Beyond that remote evidence, Franklin speculated only that Hibbler committed the crime because she had access to his computer, and he offered no other evidence or witness to corroborate her involvement in the crime. Here, the other-suspect evidence is far less than the evidence in *Holmes*, for example, where the defendant offered eight witnesses connecting the other suspect to the crime. *See State v. Holmes*, 361 S.C. at 339-41. After considering all the evidence on both sides of the issue, the trial court did not abuse its discretion in excluding the other-suspect evidence for lack of sufficient connection to the crime.

Finally, while the trial court did not abuse its discretion in excluding the other-suspect evidence, I note that Franklin was nevertheless able to argue that the State failed to meet its burden "by showing that there are other people who have . . . access to the IP Address." PRP (June 22, 2009) at 11. In fact, Franklin presented evidence to the jury that Hibbler had accessed his personal e-mail account and sent an e-mail to the victim from that account. Thus, Franklin cannot say that the trial court completely restrained his right to defend himself on this point. The majority admits that some of this evidence made it to the jury, yet—with little explanation—finds reversible error because "some of it did not." Majority at 15-16. At the very least, the fact that the jury heard this evidence weighs on the side of finding harmless error, to the extent one finds that any error occurred. But I do not find any reversible error in the trial court's decision to exclude the other-suspect evidence. I respectfully dissent.


P.T.
Madsen, C.J.