Supreme Court No. _____
Court of Appeals No. 31845-1-III

92363-9

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

STATE OF WASHINGTON,
Respondent,

v.

CLAY D. STARBUCK,
Petitioner.

PETITION FOR REVIEW

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IV.
STATEMENT OF THE CASE

On February 9, 2012, Clay D. Starbuck was charged with aggravated premeditated murder in the first degree with aggravating

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[1] *State v. Franklin*, 180 Wn.2d 371, 325 P.3d 159 (2014).

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. The trial judge sentenced him to life in prison without the possibility of parole. CP 904-914.

Chanin Starbuck[2] 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.

Clay denied killing his wife and sought to present "other suspect" evidence at trial.

Clay and Chanin Starbuck married, divorced, remarried and divorced again. They had four children together: Austin, Blake, Sutton and

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[2] 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.

Loghan. Between the marriages, Chanin became pregnant by another man. Nonetheless, Clay embraced that child, Marshall, as his own. The 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.*

A. 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 both 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 Walker: "Good morning handsome." *Id.* at 8:29, Walker texted 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: "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: "No I'm back at work from the funeral." RP 2345. At 12:45 p.m. Walker texted Chanin: "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 to have sex at Chanin's home, twice during the day and four times at night. 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 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 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 to fix the car to get it started. RP 2561. He was successful. *Id.* After he started the car, he drove straight home. RP 2564. At 3:28 p.m. he texted Chanin that Austin 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.

B. 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.*

C. 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. 665-67. 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 with the text messages. 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.[3] Clay 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 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 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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[3] Dresbeck later said 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. On that same day, Clay brought his children to the police station so they could all be interviewed. RP 2578, 2096.

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.

D. 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.*

Lorraine 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 the 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's body. 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.[4] Although not entirely clear from Heath's testimony, 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.

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.

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

E. PRETRIAL

The State moved to suppress any "other suspect evidence." CP 593. 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." 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 asked 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 defense 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 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 found the call admissible and the call was 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.

F. TRIAL

Detective Ricketts determined that Chanin's body 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' 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' 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 who testified that Clay told her 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 Chanin was promiscuous and 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 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 testified: Austin, RP 1402; Blake, RP 1356; Loghan, RP 1422; Sutton, RP 1428; and Marshall, RP 1339-55. 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 their mother's home did not have a

key. 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 after the basketball game on the evening of December 1, 2011, 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.

G. APPEAL

On appeal Starbuck argued that the evidence was insufficient to convict him, that the trial court erred in excluding the full quantum of evidence regarding the other suspects, erred in admitting evidence about the 911 call and that the prosecutor committed misconduct in closing argument. The Court of Appeals affirmed in a published decision.

V.
ARGUMENT

A. THIS COURT SHOULD GRANT REVIEW BECAUSE THE COURT OF APPEALS OPINION AFFIRMING THE EXCLUSION OF ADMISSIBLE EVIDENCE RELEVANT TO STARBUCK'S DEFENSE CONFLICTS WITH THIS COURT'S OPINION IN *STATE V. FRANKLIN* AND INVOLVES A SIGNIFICANT CONSITUTIONAL ISSUE. RAP 13.4(B)(1)&(3).

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)). Evidence rules that "'infring[e] upon a weighty interest of the accused' and are 'arbitrary' or 'disproportionate to the purposes they are designed to serve'" abridge this essential right. *Holmes*, 547 U.S. at 324.

"[I]f relevant, the burden is on the State to show the evidence is so prejudicial as to disrupt the fairness of the fact-finding process at trial." *State v. Darden*, 145 Wn.2d 612, 622, 41 P.3d 1189 (2002). In this case

the "other suspect evidence" was relevant because it cast a reasonable doubt on the State's claim that Starbuck was the murderer and it was a portion of his challenge to the adequacy of a police investigation. Information concerning third-party culprits casts doubt on whether the police took reasonable steps to investigate the crime.

The State's interest in excluding prejudicial evidence must also "be balanced against the defendant's need for the information sought," and relevant information can be withheld only "if the State's interest outweighs the defendant's need." *Id.* The Court must remember that "the integrity of the truthfinding process and [a] defendant's right to a fair trial" are important considerations. *State v. Hudlow*, 99 Wn.2d 1, 14, 659 P.2d 514 (1983). For evidence of high probative value "it appears no state interest can be compelling enough to preclude its introduction consistent with the Sixth Amendment and Const. art. 1, § 22." *Id.* at 16.

The Court of Appeals violated Starbuck's right to present this relevant evidence by applying the incorrect test for the admission of other suspect evidence. That court stated: "Washington permits a criminal defendant to present evidence that another person committed the crime when he can establish a train of facts or circumstances as tend clearly to point out someone besides the accused as the guilty party." *State v.*

Starbuck, 188 Wn. App. 1030, 2015 WL 3934209, *5 (June 25, 2015), *published*, 355 P.3d 1167 (Sep. 8, 2015).

But this is the wrong test. In *State v. Franklin*, this Court said:

> The standard for relevance of other suspect evidence is whether there is evidence "tending to connect" someone other than the defendant with the crime. Further, other jurisdictions have pointed out that this inquiry, properly conducted, focuses 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.

Franklin, 180 Wn.2d at 381 (internal citations omitted). The standard set forth by the trial court and approved of by the Court of Appeals conflicts with *Franklin* by establishing a bar to admission of other suspect evidence significantly higher than the standard set forth in *Holmes* and *Franklin*, previous Washington cases and higher than the standard used in other jurisdictions. Rather than focusing on whether the excluded evidence in this case tended to create a reasonable doubt as to Starbuck's guilt, the Court of Appeals focused on whether Starbuck demonstrated that someone else was guilty of the crime.

The Court of Appeals incorrectly states that: "The focus, then, is on whether Mr. Starbuck sufficiently connected Walker or Kenlein to the crime." *Starbuck*, 2015 WL 3934209 at *5. Instead, the correct inquiry was whether the excluded evidence was minimally relevant to the identity

of the perpetrator and the flawed police investigation. To the extent that the Court of Appeals does discuss Walker's text, the discussion demonstrates the court's application of the wrong text. The court says:

> *The Walker text similarly does not assist in identifying him as the killer.* The primary probative value of the text, given that the victim was posed partially in conformance with the photo requested therein, was that the killer had access to the victim's phone and used the information therein, clumsily, to cast suspicion toward Walker. *It did not put him at the scene*—indeed, the phone records put him well away from Deer Park the entire day; he had no opportunity to commit the crime. Walker's photograph request is not suggestive of a motive for murder or of any violent intention at the least. *It also does not constitute a step toward committing murder.* In short, the text does nothing to suggest Walker committed the crime.

Starbuck, 2015 WL 5223962 at *7 (emphasis added).

It is important to note that the Court of Appeals opinion does not accurately set forth the nature of the excluded evidence. That court discusses the evidence regarding Tom Walker and John Kenlein but fails to discuss two critical facts. The opinion does not set forth the actual content of Walker's texts, one of which mirror the manner in which Chanin's body was found. At 8:06 a.m. Walker texted Chanin, "Good morning sexy." CP 494. At 8:20 Chanin texted Walker: "Good morning handsome." *Id.* At 8:29, Walker texted 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.*

The Court of Appeals also overlooks the fact that Kenlein's whereabouts from 10:00 p.m. until the next morning are unknown. 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.

The appellate court's misunderstanding of the relevance of the evidence is also revealed by the comment that there was some desire on Starbuck's part to "try the victim's lifestyle." There was no avoiding the

fact that the victim's texts, the crime scene and the forensic evidence demonstrated that Chanin was engaged in sex with multiple partners. Thus, evidence establishing that this fact gave others the opportunity to commit the crime was integral to the defense.

As this Court made clear in *Franklin*, alternate suspect evidence seeks to cast reasonable doubt on the material element of identity. Evidence indicating that someone else committed the crime tends to make the defendant's identity as the perpetrator less probable and, thus, creates reasonable doubt as to the defendant's guilt. The defense need not show substantial proof of a probability that the third person has committed the act; it need only be capable of raising a reasonable doubt of the defendant's guilt. Starbuck did not have to "prove" that Walker was at the scene or committed the crime. He did not have to disprove Walker's "alibi." All he had to do was establish that the evidence would raise a reasonable doubt about *his* guilt.

The Court of Appeals' analysis, which rests on the strength of the State's case, places an unreasonable burden on Starbuck to show conclusively that Walker committed the crime. Here, the trial judge and the Court of Appeals applied the wrong test and deprived Starbuck of his right to present a defense.

Moreover, the court overlooked the fact that there was evidence of other possible suspects that Starbuck was not permitted to present. During the course of the defense investigation, 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.

Under the proper test as set forth in *Franklin*, there is no doubt that the exclusion of this evidence was error. 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, and there is no compelling reason to exclude the evidence. It was relevant to establishing a reasonable doubt as to Clay's guilt in the matter. 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.

Review should also be granted because this decision perpetuates the misapplication of the rule regarding "other suspect" evidence and the

decision in *Franklin*. This decision was originally unpublished. But on June 25, 2015, Judge Cozza of the Superior Court Judge's Association filed a letter motion to publish. App. B. He stated that the decision should be published because it was a "comprehensive collection of Washington and federal case law." Regrettably, the Court granted the motion to publish. While the decision does discuss a number of cases, it does not correctly apply the law. Thus, this Court should grant review to insure that trial judges do not use the analysis in this case as opposed to the correct analysis set forth in *Franklin*.

B. THE COURT OF APPEALS FAILED TO APPLY THE PROPER HARMLESS ERROR ANALYSIS TO THE EXCLUSION OF THE "OTHER SUSPECT" EVIDENCE. THIS IS A SIGNIFICANT CONSTITUTIONAL ISSUE. RAP 13.4(B)(3).

The Court of Appeals also misapprehended the harmless error test in this case. The constitutional harmless error standard applies. *Franklin*, 180 Wn.2d at 382. Error of constitutional magnitude can be harmless only if the State established the error was harmless beyond a reasonable doubt. *Chapman v. California*, 386 U.S. 18, 24, 87 S.Ct. 824, 17 L.Ed.2d 705, *reh'g denied*, 386 U.S. 987, 87 S.Ct. 1283, 18 L.Ed.2d 241 (1967). This Court of Appeals simply states: "There was no error in excluding the evidence." *Starbuck*, 2015 WL 3934209 at *8. But nowhere does the Court explain how it is convinced beyond a reasonable doubt that a

reasonable jury would have reached the same result if they knew of Walker's texts and the true nature of Chanin's online dating life.

VI.
CONCLUSION

For these reasons, the Court should accept review and reverse the Court of Appeals.

DATED this 6th day of October, 2015.

Respectfully submitted,

Suzanne Lee Elliott

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CERTIFICATE OF SERVICE

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

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10/06/2015
Date

Peyush Soni

355 P.3d 1167
Court of Appeals of Washington,
Division 3.

STATE of Washington, Respondent,
v.
Clay D. STARBUCK, Appellant.

No. 31845–1–III. | June 25, 2015.
| Publication Ordered Sept. 8, 2015.

Synopsis

Background: Defendant was convicted in the Spokane Superior Court, Gregory D. Sypolt, J., of aggravated first-degree murder and sexually violating human remains, premised on death of defendant's ex-wife. He appealed.

Holdings: The Court of Appeals, Korsmo, J., held that:

[1] evidence of victim's sexual relationships with other men and sexually explicit text messages sent by one of men to victim did not provide clear connection between such alternative named suspects and murder to allow for admission of evidence as "other suspects" evidence;

[2] evidence was sufficient to support murder conviction;

[3] evidence was sufficient to support finding of sexual intercourse required for conviction of sexually violating human remains; and

[4] recording of emergency 911 call made from victim's cellular telephone was not testimonial hearsay subject to confrontation clause restrictions.

Affirmed.

West Headnotes (24)

[1] **Criminal Law**
Reception and Admissibility of Evidence

The trial court's decision to admit or exclude evidence is reviewed for abuse of discretion.

Cases that cite this headnote

[2] **Criminal Law**
Rulings as to evidence

Criminal Law
Rulings as to Evidence in General

An erroneous evidentiary ruling that violates the defendant's constitutional rights is presumed prejudicial unless the State can show the error was harmless beyond a reasonable doubt.

Cases that cite this headnote

[3] **Criminal Law**
Necessity and scope of proof

A criminal defendant does not have a constitutional right to present irrelevant or inadmissible evidence as part of right to present a defense. U.S.C.A. Const.Amend. 6; West's RCWA Const. Art. 1, § 22 as amended by Amend. 10.

Cases that cite this headnote

[4] **Criminal Law**
Evidence calculated to create prejudice against or sympathy for accused

A trial court's exclusion of "other suspect" evidence is an application of the general evidentiary rule that excludes evidence if its probative value is outweighed by such factors as unfair prejudice, confusion of the issues, or potential to mislead the jury.

Cases that cite this headnote

[5] **Criminal Law**
Incriminating others

Before the trial court will admit "other suspect" evidence, the defendant must present a combination of facts or circumstances that points to a nonspeculative link between the other suspect and the crime.

Cases that cite this headnote

[6] **Criminal Law**
Incriminating others

The standard for the relevance of "other suspect" evidence is whether it tends to connect someone other than the defendant with the charged crime; the inquiry focuses 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.

Cases that cite this headnote

[7] **Criminal Law**
Incriminating others

When determining its admissibility, the probative value of "other suspect" evidence must be based on whether it has a logical connection to the crime, not based on the strength of the state's case.

Cases that cite this headnote

[8] **Criminal Law**
Incriminating others

The state permits a criminal defendant to present evidence that another person committed the crime when he can establish a train of facts or circumstances as tend clearly to point out someone besides the accused as the guilty party.

Cases that cite this headnote

[9] **Criminal Law**
Incriminating others

Evidence of a third party's possible motive alone is insufficient to establish the nexus required to allow a defendant to present evidence that another person committed the crime.

Cases that cite this headnote

[10] **Criminal Law**
Incriminating others

When the state's case is entirely circumstantial, the rule permitting a criminal defendant to present evidence that another person committed the crime only when he can establish a train of facts or circumstances as tend clearly to point out someone besides the accused as the guilty party is relaxed to an extent to allow a reply in kind, in that 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.

Cases that cite this headnote

[11] **Criminal Law**
Matters preliminary to introduction of other evidence

As the proponent of "other suspect" evidence, the defendant bears the burden of establishing relevance and materiality.

Cases that cite this headnote

[12] **Criminal Law**
Incriminating others

In establishing a foundation for admission of "other suspect" evidence, the defendant must show a clear nexus between the other person and the crime.

Cases that cite this headnote

[13] **Criminal Law**
Incriminating others

In order to be admissible, proposed "other suspect" evidence must show that the third party took a step indicating an intention to act on the motive or opportunity.

Cases that cite this headnote

[14] **Homicide**
Incriminating Others

Homicide
Presence at scene

Evidence of murder victim's sexual relationships with other men and sexually explicit text messages sent by one of men to victim did not provide clear connection between such alternative named suspects and murder to allow

for admission of evidence as "other suspects" evidence; jury had already heard that at least three unidentified males had left DNA in, on, or near victim's body at crime scene, and primary value of text message, given that victim was found posed partially in conformance with photo requested therein, was that killer had access to victim's phone and used information therein, clumsily, to cast suspicion toward such individual, without putting him at scene or with opportunity to commit crime.

Cases that cite this headnote

[15] **Homicide**

Incriminating Others

Trial court did not improperly consider strength of state's case when it weighed competing evidence concerning feasibility of other named suspect having committed murder in order to determine admissibility of "other suspect" evidence.

Cases that cite this headnote

[16] **Criminal Law**

Reasonable doubt

Evidentiary sufficiency challenges are reviewed to see if there was evidence from which the trier of fact could find each element of the offense proven beyond a reasonable doubt.

Cases that cite this headnote

[17] **Homicide**

Miscellaneous particular circumstances

Homicide

Motive

Homicide

False and improbable statements

Evidence was sufficient to support aggravated first-degree murder conviction premised on strangulation death of defendant's ex-wife; DNA recovered from three areas on victim most likely contacted by killer matched that of defendant and his sons, none of whom lived in house and none of whose DNA would be expected to be found all over victim, defendant's alibi was weak and wounded by his failure to appear on security video he supposedly passed four times that day, defendant's telephone was suspiciously off during day and conveniently turned on again shortly after victim's was turned on, someone familiar with family used victim's phone to text others, even using family nicknames, and defendant had clear motive, given anger about financial aspects of divorce, custody situation, and victim's lifestyle.

Cases that cite this headnote

[18] **Dead Bodies**

Criminal prosecutions

Evidence was sufficient to support finding of sexual intercourse required to support conviction of sexually violating human remains; coroner testified that dildo had been in murder victim's anus at time of her death and was then removed and placed in her vagina. West's RCWA 9A.44.105(2)(a).

Cases that cite this headnote

[19] **Criminal Law**

Use of documentary evidence

Recording of emergency 911 call made from victim's cellular telephone was not testimonial hearsay subject to confrontation clause restrictions; at most, the 35-seconds of sounds suggested a struggle, not a declaratory statement, and regardless, recording was of a call for emergency aid. U.S.C.A. Const.Amend. 6.

Cases that cite this headnote

[20] **Criminal Law**

Arguments and conduct in general

In absence of objection at trial to alleged misconduct, defendant's claim of prosecutorial misconduct would be reviewed only for incurable flagrancy.

Cases that cite this headnote

[21] **Criminal Law**

Conduct of trial in general

A defendant claiming prosecutorial misconduct bears the burden of establishing the impropriety of the prosecuting attorney's comments and their prejudicial effect.

Cases that cite this headnote

[22] **Criminal Law**
Arguments and conduct of counsel

A court reviewing a claim of prosecutorial misconduct must first determine if the comments were improper and must assess the challenged comments in context.

Cases that cite this headnote

[23] **Criminal Law**
Arguments and conduct in general

Criminal Law
Requests for correction by court

Absent a proper objection and a request for a curative instruction, the defense waives a prosecutorial misconduct claim unless the comment was so flagrant or ill-intentioned that an instruction could not have cured the prejudice.

Cases that cite this headnote

[24] **Criminal Law**
Particular statements, arguments, and comments

None of alleged errors in prosecutor's closing argument statements, in which prosecutor indicated that DNA matched defendant's profile, suggested possibility of accomplice, implied that defendant was lying about victim's lifestyle, and characterized 911 recording of call made from victim's cellular telephone as call for help, were so egregious that they were beyond cure, so as to establish prosecutorial misconduct with respect to unpreserved claims in murder prosecution; first two statements were clear references to evidence, implication about defendant lying was rooted in fact that defendant was constantly telling others in community, usually at unnatural times, about victim's lifestyle, evidencing planning and premeditation, and characterization of call was reasonable inference from evidence.

Cases that cite this headnote

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KORSMO, BROWN and LAWRENCE–BERREY, JJ.

Opinion

KORSMO, J.

¶ 1 Clay Starbuck appeals his convictions for the aggravated first degree murder of his ex-wife and the violation of her remains, primarily arguing that the trial court erred in excluding his "other suspects" evidence. We affirm.

FACTS

¶ 2 Clay and Chanin Starbuck were married and divorced twice; they had five children. When the second marriage ended in July, 2011, the three youngest children—two girls and one boy—were minors.[1] Ms. Starbuck was awarded custody of the three[2] children, while Mr. Starbuck was ordered to pay both child support and maintenance to Ms. Starbuck. The decree of dissolution also included a restraining order against Mr. Starbuck in favor of Ms. Starbuck. He was prohibited from disturbing her peace or going on the grounds of her home or workplace.

¶ 3 After the dissolution, the couple maintained separate residences in Deer Park that were about one-half mile apart. Despite the restraining order, Mr. Starbuck appeared at Ms. Starbuck's residence to take the children to school most mornings. By October, Mr. Starbuck was in arrears on his support and maintenance obligations. The superior court entered a judgment on an order of contempt for $9,166 in unpaid obligations plus an additional $500 for attorney fees. The decision to pursue the payment obligations resulted in Mr. Starbuck sending angry text messages to Ms. Starbuck about the financial consequences and also expressing his

desire for *1170 more time with their children and more say in raising them. Exs. 586–592.

¶ 4 Clay Starbuck texted his children before 8:00 a.m. on Thursday, December 1, 2011 that his car had died and that their mother would have to take them to school. He then sent a similar text message to Ms. Starbuck that was answered with "K." Mr. Starbuck's phone was then turned off. Ms. Starbuck took the children to school.

¶ 5 At 9:18 a.m. Ms. Starbuck's cellular telephone called the Spokane County 911 service. The responder did not hear anything intelligible during the 35 second call. When the call ended, the responder dialed the number back, but the return call immediately went to voicemail; the phone was turned off. Ms. Starbuck did not pick up her children after school. When one of her daughters texted her at 2:45 p.m. asking who was going to pick them up, Ms. Starbuck's phone responded 20 minutes later with a text: "Dad, I have a headache, stay there." Her phone sent a text to Mr. Starbuck 12 minutes later that stated: "I just woke up, can you pick up the kids." Mr. Starbuck's telephone was turned on again at 3:37 p.m. By that time an older child had picked up the younger children and taken them to Mr. Starbuck's home.

¶ 6 Ms. Starbuck did not attend her son's basketball game that evening. There was no response when Mr. Starbuck and the children went to her house after the game. The house was locked and dark. Mr. Starbuck called the Spokane County Sheriff's Office the next day to ask for a welfare check and because the children needed to enter the house to obtain their clothing. Deputies responded that evening and found the lights out, the doors locked, and a package sitting by the front door. Obtaining no response and lacking information to obtain a warrant, they left.

¶ 7 On December 3rd, a friend of Ms. Starbuck's called the sheriff's department and asked them again to check on her. The responding deputies had her landlord unlock the door. They entered and found her dead on her bed. The body was naked,[3] bruised, and battered. Only a mattress pad was on the bed. The blankets were somewhat folded on the floor, but the bed sheets were not in the room. The body was "posed" with a dildo placed in the vagina, her hands were on a massager placed on her pubic area, and her cell phone was on the nightstand next to the bed. A gun safe near the bed was open, displaying sexual devices on the shelves.

¶ 8 The coroner determined that Ms. Starbuck had been strangled with something soft, like a towel, or by a chokehold with an arm. She had chest injuries consistent with the use of a stun gun. The body exhibited multiple bruises—including one on the brain which suggested a blow to the head, eleven broken ribs, and a broken bone in the trachea area. There was indication that her hands may have been bound during the ordeal. The coroner believed the victim died on December 1st. She had been facedown when killed and then moved to the bed.

¶ 9 Clay Starbuck arrived at Chanin's home during the initial investigation. He volunteered to a detective that Chanin was heavily involved with on-line dating and was seeing several men at the same time. He was directed to go to the sheriff's substation in Deer Park. There he repeated his allegations to two other detectives and also provided family history information for them.

¶ 10 Extensive investigation ensued, with much of the emphasis on DNA analysis and cell phones records. Law enforcement obtained DNA (deoxyribonucleic acid) from Mr. Starbuck and his two older sons to establish the "Y–STR DNA" consistent to the male Starbuck lineage.[4] Samples of DNA were also gathered from additional men who recently had contact with Ms. Starbuck. DNA testing of swabs taken from the victim's neck, face, and fingernails revealed that the male Starbuck lineage matched the Y–STR DNA found in those areas. One additional— *1171 and unidentified—male contributed Y–STR DNA to Ms. Starbuck's neck. Y–STR DNA was also found in the vaginal swab and on Ms. Starbuck's cell phone, but the male Starbuck lineage (and the other males tested) did not match. A total of three unidentified males contributed DNA found in these locations.

¶ 11 Ms. Starbuck's cell phone records were also extensively reviewed. One person who had exchanged text messages with Ms. Starbuck on December 1 was Tom Walker, a man she had met three weeks earlier.[5] The two had a date for the following Monday, December 5. Mr. Walker testified that he left work at 9:40 a.m. that day to attend a funeral in Spokane Valley and left the funeral at 10:30 a.m. to return to work. He texted Ms. Starbuck about 10:50 a.m. to ask how her day was and tell her he had attended a funeral. She replied at 12:10 p.m., asking if he would like to meet her for lunch at 1:00 p.m. He responded that he could not as he needed to be at work. At 12:19 she texted back asking if he was on his way for lunch. He responded at 12:26 that he could not. She did not respond to his texts.

¶ 12 Ms. Starbuck's cell phone also showed calls and texts to and from "John Wilson" on December 1, 2011. John "Wilson" was actually John Kenlein, a married Spokane teacher who had met Ms. Starbuck on a dating website in mid-September 2011 and began engaging in sexual relations with her. He testified that he had plans to meet with Ms. Starbuck on December 1, 2011, and had arrived at her house at 10:30 a.m. that day.[6] When she did not respond to his knocking, he unsuccessfully tried to call her a couple of times from a pay phone in Deer Park.[7] He then drove to Whitworth College and tried to "instant message" her from a college computer, but got no response. Just after noon, he began to receive texts from Ms. Starbuck's cell phone on the public computers at Whitworth or at a Spokane County Library. She stated that she had been eating and asked if he had come by. He responded that he had been to her house and asked if she was coming back soon. He then texted that he would see her at around 10:30 that night. At 1:17 p.m., Ms. Starbuck's cell phone texted back, "No tonight I hav[e] a headache [ ]and I will have clay take the kids." Mr. Kenlein then texted, "closer to 9:30?" The final text from Ms. Starbuck's cell phone to Mr. Kenlein was sent at 1:32 p.m.: "Nope an[o]ther hour." Mr. Kenlein drove back to Ms. Starbuck's house late that night, but found the house dark and he could not get her to respond to phone calls or knocking.

¶ 13 The prosecutor filed charges against Mr. Starbuck on February 9, 2012. The document alleged one count of aggravated first degree murder, with five aggravating factors, and one count of sexually violating human remains. The prosecutor did not file notice of a special sentencing proceeding (death penalty). Trial eventually was delayed until spring, 2013.

¶ 14 The court heard a series of motions-in-limine by the parties on the eve of trial. As relevant to this appeal, the court granted the State's motions to exclude "other suspects" evidence and evidence concerning the victim's sexual activities with men she was dating. The court found that Mr. Starbuck was unable to sufficiently connect either Mr. Walker or Mr. Kenlein to the crime, and the dating history was unduly prejudicial to the State while offering little or no value to the defense.

¶ 15 Jury trial was conducted in May and June, 2013. The defense concentrated its closing argument on the unidentified DNA and inadequacies in the sheriff's investigation, pointing to a large number of items in the house that were not tested. The defense also pointed to Mr. Kenlein as a possible killer:

> ***1172** We heard the state a moment ago talk about, well, only Clay would know the—the content of those text messages [sent to the children]. Only Clay would —would say things like dad or Marsh [(the nickname of the youngest son)]. That's not what we heard from John Wilson [(Mr. Kenlein's alias)]. That's not what we heard from John Kenlein. He said he knew the kids' names and he knew the kids' schedule. Why? So that they could arrange their dates, so that they could arrange their sexual encounters. John Wilson—John Kenlein knew this. Chanin didn't even know his real name.
>
> The state asked you who else could have done this. Ladies and gentlemen, John Kenlein was there four times that day. He didn't see anything. He was there at 10:30. Now this is in the time frame where the state believes Ms. Starbuck is still alive. So we're clear, ladies and gentlemen, you are the sole judges of credibility, and I leave Mr. Wil—I mean, Mr. Kenlein's credibility in your hands. Interesting about Ms. Starbuck's cell phone is what I guess I'll call the gloves-on versus gloves-off theory. If we're talking about Ms. Starbuck's phone, which to a hundred percent certainty does not contain Mr. Starbuck's DNA, but does have the DNA of another man, an unidentified man. Now, the state will say, well, obviously his [Mr. Starbuck's] DNA isn't on the phone; he's wearing gloves. They don't explain why the other male DNA is there.

Report of Proceedings (RP) at 2716–17.

¶ 16 The prosecution insinuated that Mr. Starbuck had faked his car troubles[8] and lay in wait in the house while Ms. Starbuck took the children to school, and then assaulted her after her return. He used gloves to text message the two men in order to suggest Ms. Starbuck was still alive. The alleged motives were rage over the victim's lifestyle and financial —his support and maintenance obligations tallied $4,700 a month and he was already in arrears.

¶ 17 The jury convicted Mr. Starbuck as charged on the two crimes and found that four of the five aggravating factors were present. The court imposed the mandatory sentence of life in prison without possibility of parole for the murder conviction. Mr. Starbuck then timely appealed to this court.

ANALYSIS

¶ 18 Mr. Starbuck raises four arguments in this appeal. We first address the contention that the court erred in excluding his "other suspects" evidence before turning to the remaining three contentions. In order of our review, those issues are whether the evidence supported the verdicts, whether the 911 recording should have been admitted into evidence, and whether the prosecutor committed misconduct in closing argument.

Other Suspects Evidence

¶ 19 Mr. Starbuck argues that the trial court erred in prohibiting him from presenting and arguing "other suspects" evidence to the jury. While it appears that the exclusion order was not strictly followed, we also conclude that the trial court properly determined that a sufficient foundation was not presented to admit the evidence.

[1] [2] [3] ¶ 20 The trial court's decision to admit or exclude evidence is reviewed for abuse of discretion. *State v. Franklin,* 180 Wash.2d 371, 377 n. 2, 325 P.3d 159 (2014); *State v. Strizheus,* 163 Wash.App. 820, 829, 262 P.3d 100 (2011), *review denied,* 173 Wash.2d 1030, 274 P.3d 374 (2012). "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." *Franklin,* 180 Wash.2d at 377 n. 2, 325 P.3d 159. Both the Sixth Amendment of the United States Constitution and article I, section 22 of the Washington Constitution guarantee the criminal defendant's right to present a defense. *Strizheus,* 163 Wash.App. at 829–30, 262 P.3d 100. But a criminal defendant does not have a constitutional right to present irrelevant or inadmissible evidence. ***1173** *State v. Jones,* 168 Wash.2d 713, 720, 230 P.3d 576 (2010); *State v. Hudlow,* 99 Wash.2d 1, 15, 659 P.2d 514 (1983).

[4] [5] [6] [7] ¶ 21 As noted in *Franklin,* a trial court's exclusion of "other suspect" evidence is an application of the general evidentiary rule that excludes evidence if its probative value is outweighed by such factors as unfair prejudice, confusion of the issues, or potential to mislead the jury. 180 Wash.2d at 378, 325 P.3d 159 (citing *Holmes v. South Carolina,* 547 U.S. 319, 326–27, 126 S.Ct. 1727, 164 L.Ed.2d 503 (2006)). Before the trial court will admit "other suspect" evidence, the defendant must present a combination of facts or circumstances that points to a nonspeculative link between the other suspect and the crime. *Franklin,* at 381, 325 P.3d 159. The standard for the relevance of such evidence is whether it tends to connect someone other than the defendant with the charged crime. *Id.* The inquiry " '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.' " *Id.* (quoting *Smithart v. State,* 988 P.2d 583, 588 (Alaska 1999)). Additionally, the probative value of "other suspect" evidence must be based on whether it has a logical connection to the crime, not based on the strength of the State's case. *Id.* at 381–82, 325 P.3d 159.

[8] [9] [10] ¶ 22 Washington permits a criminal defendant to present evidence that another person committed the crime when he can establish "a train of facts or circumstances as tend clearly to point out someone besides the accused as the guilty party."[9] *State v. Downs,* 168 Wash. 664, 667, 13 P.2d 1 (1932); *State v. Rehak,* 67 Wash.App. 157, 162, 834 P.2d 651 (1992), *cert. denied,* 508 U.S. 953, 113 S.Ct. 2449, 124 L.Ed.2d 665 (1993). The United States Supreme Court has approved this standard for admitting "third party guilt" evidence. *Holmes,* 547 U.S. at 327, 126 S.Ct. 1727.[10] When the State's case is entirely circumstantial, the *Downs* rule is relaxed to an extent to allow a reply in kind: 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 Wash.App. 471, 479, 898 P.2d 854 (citing *Leonard v. Territory of Wash.,* 2 Wash. Terr. 381, 396, 7 P. 872 (1885)), *review denied,* 128 Wash.2d 1004, 907 P.2d 296 (1995); *accord, State v. Hilton,* 164 Wash.App. 81, 99, 261 P.3d 683 (2011).

[11] [12] [13] ¶ 23 As the proponent of the evidence, the defendant bears the burden of establishing relevance and materiality. *State v. Pacheco,* 107 Wash.2d 59, 67, 726 P.2d 981 (1986). In establishing a foundation for admission of "other suspect" evidence, the defendant must show a clear nexus between the other person and the crime. *State v. Rafay,* 168 Wash.App. 734, 800, 285 P.3d 83 (2012), *review denied,* 176 Wash.2d 1023, 299 P.3d 1171, *cert. denied,* —— U.S. ——, 134 S.Ct. 170, 187 L.Ed.2d 117 (2013). The proposed evidence must also show that the third party took a step indicating an intention to act on the motive or opportunity. *Id.*

¶ 24 The focus, then, is on whether Mr. Starbuck sufficiently connected Walker or Kenlein to the crime. As earlier

cases confirm, the trial judge correctly concluded that the connection was not made.

¶ 25 Division One nicely analyzed this problem in its recent decision in *State v. Wade,* 186 Wash.App. 749, 346 P.3d 838 (2015). As here, there the defendant was convicted of murder in the strangulation death of a woman; his counsel had argued that the police investigation was flawed for failure to investigate other suspects. *Id.* at 845. The defendant also argued that his right to present a defense was violated by the trial court's exclusion of evidence and argument that an ex-boyfriend committed the crime. *Id.* at 845–46. The former boyfriend ***1174** had previously assaulted the victim by strangling her several years earlier, was subject to a no-contact order, and left voicemail "implied threats" three months before the killing. *Id.* at 846. Extensive testing did not turn up any of the former boyfriend's DNA or fingerprints at the crime scene—the victim's apartment. He also did not appear on the security camera recordings for the apartment building. *Id.* at 846–47.

¶ 26 In the absence of any evidence putting the ex-boyfriend at the scene, Division One agreed with the trial court that the other suspects evidence was not admissible, noting that the trial court "properly focused solely on the connection of the proffered other suspect evidence to the crime." *Id.* at 847. The fact that the ex-boyfriend was a "bad actor" with a violent history and "a motive to harm her" was not enough. *Id.* The court noted that there was "no physical evidence connecting" the boyfriend to the murder and "no evidence" that he "was anywhere near" the "apartment when the crime occurred." *Id.* Accordingly, there was no evidence leading to a "nonspeculative" link between the crime and the ex-boyfriend. *Id.* at 848.

¶ 27 *Franklin,* discussed in detail in *Wade,* provides a contrasting example of sufficient evidence to link another suspect to a crime. *Franklin* involved a prosecution for "cyberstalking-related crimes." 180 Wash.2d at 372, 325 P.3d 159. There the defendant blamed his live-in girlfriend for the cyberstalking. As the court summarized the case, the live-in girlfriend:

> ... 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 [the victim] regarding her relationship with Franklin) to support Franklin's theory of the case.

Id. at 372, 325 P.3d 159. Under those facts, it was error to exclude evidence that she had sent the threatening e-mails to the victim as there was a sufficient nexus between the other suspect and the crime. *Id.* at 373, 325 P.3d 159.

¶ 28 Other post-*Holmes* cases have involved fact patterns where no connection was established. In *Rafay,* the defendant had provided evidence that violent Muslim groups had marked the victim for assassination, but provided no evidence that any member of the groups had been near the scene or acted upon the motive; the evidence therefore was properly excluded. 168 Wash.App. at 800–01, 285 P.3d 83. In *Hilton,* this court found that other suspect evidence was properly excluded where there was only a motive and proximity to the crime, but no evidence that the other suspect actually had the specialized weaponry used to kill the victims or had been at the scene during the time of the killings. 164 Wash.App. at 101, 261 P.3d 683.

¶ 29 *Strizheus* presents yet another example of insufficient connection between the other suspect and the crime. In a prosecution for assault and attempted murder, the victim initially identified her husband as the attacker, but at trial could not remember who had attacked her. 163 Wash.App. at 828, 262 P.3d 100. Subsequent to that attack, the couple's son told 911 operators that he should be in jail for something bad he had done; he later assaulted his mother. *Id.* at 824–25, 262 P.3d 100. The court concluded that "there was no evidence establishing a nexus" between the son and the attempted murder. *Id.* at 832, 262 P.3d 100. He was not at the scene, had never been identified as the attacker by the victim, and there was no evidence of any step taken by the son to commit the act. *Id.*

[14] ¶ 30 These cases confirm the trial court's reasoning here. Mr. Starbuck contends that he should have been permitted to put on evidence of Ms. Starbuck's sexual relationships with other men and the sexually explicit text messages sent by Mr. Walker. The trial court concluded that such evidence did not "provide the clear connection" between the "alternative named suspects and the homicide." RP at 119–120. The noted case law is in accord with that conclusion. The fact that Ms. Starbuck may have had sexual relationships with more men than the jury learned[11] about simply does not enlighten ***1175** anyone concerning the identity of her killer. The jury already heard that at least three

unidentified males had left DNA in, on, or near her body at the crime scene. Knowing that she may have been sexually involved with additional unidentified men who were not connected to the crime scene could only lead to speculation about her activities, but it presented no information about the issues before the jury. That she knew many men did not further identify which one killed her. [12]

¶ 31 The Walker text similarly does not assist in identifying him as the killer. The primary probative value of the text, given that the victim was posed partially in conformance with the photo requested therein, was that the killer had access to the victim's phone and used the information therein, clumsily, to cast suspicion toward Walker. It did not put him at the scene—indeed, the phone records put him well away from Deer Park the entire day; he had no opportunity to commit the crime. Walker's photograph request is not suggestive of a motive for murder or of any violent intention at the least. It also does not constitute a step toward committing murder. In short, the text does nothing to suggest Walker committed the crime.

[15] ¶ 32 Mr. Starbuck argues that consideration of the strength of Walker's alibi is forbidden by *Holmes*. His argument misconstrues that case. There, South Carolina had a rule in derogation of the common law rule followed in this state—and approved [13] by the United States Supreme Court in *Holmes*—which prohibited other suspect evidence when the government's case was strong. 547 U.S. at 323–324, 126 S.Ct. 1727. In other words, the common law rule could be ignored, despite the defendant's showing, if the State's case against the defendant was strong enough. The *Holmes* prohibition, however, was not directed at governmental evidence that weighed on the strength of the defendant's other suspects evidence. It simply prohibited consideration of unrelated evidence when making that determination. The trial court was free to consider evidence introduced by the State on the topic—Mr. Walker testified where he was during the day and the phone and employment records backed him up. The trial court properly used that information while determining whether Mr. Starbuck made a nonspeculative showing that Mr. Walker could have committed the crime.

¶ 33 *Wade* presents another example of the trial court considering all of the relevant evidence in adjudging whether a sufficient showing had been made to blame another named person for the crime. The court noted the complete absence of fingerprints and DNA from the crime scene as well as the ex-boyfriend's absence from the surveillance video in its assessment of the trial court's decision to exclude the other suspect evidence. *Wade*, 346 P.3d at 847. In the course of its analysis, *Wade* then went on to reject the view of *Holmes* that Mr. Starbuck takes here. *Id.* at 848. Consistent with *Wade*, we agree that the trial court did not consider the strength of the State's case when it weighed the competing evidence concerning the feasibility of the other suspect having committed the crime.

¶ 34 *Holmes* requires that only relevant factors be taken into consideration when adjudging the admissibility of this type of evidence. It does not limit which party's evidence is considered. The trial judge here did not violate *Holmes*.

¶ 35 The trial court also correctly concluded that the other suspect evidence did not rise above the level of speculation. The trial court did not abuse its discretion in determining that the prejudice to the State's case substantially outweighed any probative value of the excluded evidence. The defendant's desire to try the victim's lifestyle was irrelevant ***1176** because he could not present any nonspeculative evidence that someone else could have committed the crimes. The defense was able to argue from the evidence, and did, that Kenlein was as likely a suspect as anyone else given his repeated visits to the home that day. But there was no other evidence that suggested that someone else committed the crimes. Whether or not the victim was dating multiple other men simply did not inform the jury about the identity of her killer.

¶ 36 There was no error in excluding the evidence.

Sufficiency of the Evidence

¶ 37 Mr. Starbuck challenges the sufficiency of the evidence to support the convictions, arguing that the identity of the killer was not established and that there was no evidence that anyone had sexual intercourse with the body after death. Properly viewed, the evidence supported the jury's determinations.

[16] ¶ 38 Long settled standards govern our review of these claims. Evidentiary sufficiency challenges are reviewed to see if there was evidence from which the trier of fact could find each element of the offense proven beyond a reasonable doubt. *State v. Green*, 94 Wash.2d 216, 221–22, 616 P.2d 628 (1980) (citing *Jackson v. Virginia*, 443 U.S. 307, 319, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979)). The reviewing court will consider the evidence in a light most favorable to the prosecution. *Id.* Reviewing courts also must defer to the

trier of fact "on issues of conflicting testimony, credibility of witnesses, and the persuasiveness of the evidence." *State v. Thomas,* 150 Wash.2d 821, 874–75, 83 P.3d 970 (2004). "Credibility determinations are for the trier of fact and are not subject to review." *Id.* at 874, 83 P.3d 970.

[17] ¶ 39 Although circumstantial, the identification evidence was sufficient to support the jury's determination. The DNA recovered from the victim's fingernails, face, and neck—the three areas of the body most likely contacted by the killer during the struggle—matched that of Clay Starbuck and his sons, none of whom lived in the house and none of whose DNA would be expected to be found all over the body.[14] Clay's alibi was weak and wounded by his failure to appear on the private security video that he supposedly passed four times that day. Suspiciously, his telephone was off during the day and conveniently turned on again shortly after Chanin's was turned on. Someone familiar with the family used Chanin's phone to text others, even using family nicknames in the communications. That person also texted Walker and tried to steer him into a meeting, behavior that strongly suggested that someone other than Chanin was controlling the telephone—someone who was trying to cast suspicion on other men. The killer was quite familiar with Chanin's life and acted upon that information. By constantly and needlessly volunteering information about Chanin's relationships with numerous people, Clay Starbuck showed knowledge of her affairs and was the most likely person to use that information to ensnare others. He also appeared to be attempting to steer a future investigation away from himself.

¶ 40 Clay Starbuck also had the clearest motives. The dissolution caught him at a bad time financially while he was recovering from surgery, leading to the judgment for support arrearages. He was angry about the financial aspects of the dissolution and angry about the custody situation. He also was angry about Chanin's lifestyle and appeared obsessed with her life after the dissolution. The killer who battered her to death—eleven broken ribs and numerous bruises—was someone who was extremely angry at Chanin. That anger did not dissipate with her murder. He then had to pose her in a sexually explicit manner, thus demonstrating further anger about her lifestyle. Clay Starbuck was the one person who had repeatedly expressed his anger about her lifestyle. That anger was not shared by the men who currently were dating her.

¶ 41 Clay Starbuck had the motives and the opportunity, and was the one best situated to attempt the cover-up that delayed discovery of the crime for two days. This was a classic case of circumstantial evidence, variations ***1177** of which have been seen in murder cases throughout the centuries. It was sufficient to permit the jury to identify Clay Starbuck as the killer.

[18] ¶ 42 There also was sufficient evidence of sexual intercourse to support the jury's verdict on the sexual violation charge. The coroner testified that the dildo had been in the victim's anus at the time of her death and then removed and placed in her vagina. Sexual intercourse is defined, in part, for purposes of this crime, as any post-mortem penetration of the vagina. RCW 9A.44.105(2)(a). The coroner's testimony expressly supplied this element of the offense. The jury had sufficient evidence to conclude that the crime was proven.

¶ 43 The evidence allowed the jury to find, beyond a reasonable doubt, the contested elements of these crimes.

911 Recording

[19] ¶ 44 Mr. Starbuck next argues that the court violated his confrontation clause rights by admitting the recording of the 911 call, contending that the recording constituted testimonial hearsay. For three reasons, it did not.

¶ 45 Modem confrontation clause analysis is driven by the decision in *Crawford v. Washington,* 541 U.S. 36, 124 S.Ct. 1354, 158 L.Ed.2d 177 (2004). There the court concluded that the right of confrontation extended only to "witnesses" who "bear testimony" against the accused. *Id.* at 51, 124 S.Ct. 1354. This "testimonial" hearsay rule reflected "an especially acute concern with a specific type of out-of-court statement." *Id.* "An accuser who makes a formal statement to government officers bears testimony in a sense that a person who makes a casual remark to an acquaintance does not." *Id.*

¶ 46 The trial court concluded that the recording did not contain any statements. At most, the 35 seconds of sounds suggests a struggle, not a declaratory statement. In the absence of an actual statement, there was not testimony. If there was a statement on the recording, it certainly was not testimonial. There was no indicia of formality that suggests an intent to bear testimony. Finally, a call for emergency aid is not a testimonial statement under *Crawford. See Michigan v. Bryant,* 562 U.S. 344, 131 S.Ct. 1143, 179 L.Ed.2d 93 (2011); *Davis v. Washington,* 547 U.S. 813, 126 S.Ct. 2266, 165 L.Ed.2d 224 (2006).

¶ 47 For all three reasons, the constitutional challenge to the admission of the 911 recording is without merit. There was no error.

Closing Argument

¶ 48 Finally, Mr. Starbuck contends that the prosecutor committed misconduct in closing argument by saying that the DNA matched his profile, suggesting that there may have been an accomplice, implying that Clay Starbuck was lying about Chanin's lifestyle, and characterizing the 911 recording as a call for help. These unchallenged statements did not amount to misconduct.

[20] [21] [22] [23] ¶ 49 "A defendant claiming prosecutorial misconduct bears the burden of establishing the impropriety of the prosecuting attorney's comments and their prejudicial effect." *State v. Corbett*, 158 Wash.App. 576, 594, 242 P.3d 52 (2010) (citations omitted). A reviewing court must first determine if the comments were improper and must assess the challenged comments in context. *Id.* "Absent a proper objection and a request for a curative instruction, the defense waives a prosecutorial misconduct claim unless the comment was so flagrant or ill intentioned that an instruction could not have cured the prejudice." *Id.* In this case, counsel did not object to the alleged misconduct; thus, this court reviews the statements for incurable flagrancy.

¶ 50 The primary statements in question came from the opening paragraph of the prosecutor's rebuttal argument:

> 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. He speaks of another contributor on the DNA. It's not known whether or not the perpetrator of this crime acted alone. But one thing is known, a match to the ***1178** defendant's DNA is found on Ms. Starbuck. That does not exclude the defendant.

RP at 2735–36.

[24] ¶ 51 It was not improper to say that the DNA profile matched Clay Starbuck's profile. That is, in fact, what the expert testified to on cross-examination by the defense; the expert also told the jury that the test was not powerful enough to identify just a single individual as the contributor. RP at 2474–75. The prosecutor did not err in using the same language as the expert witness.

¶ 52 In context, there also was no error in using the word "matched" or in referencing the possibility of additional perpetrators. The argument is a clear response to defense counsel's claim that additional testing would have shown that other males had left DNA in the house. The prosecutor properly noted that additional DNA contributors did not explain how Mr. Starbuck's DNA turned up in the most incriminating areas and did not exonerate him, even as evidence of additional perpetrators would not have excluded the Starbuck male DNA match. This was not a case of the prosecutor overstating the evidence or injecting a new theory of liability. He simply pointed out that the defense theory of inadequate investigation failed to explain away the evidence against Clay Starbuck.

¶ 53 The prosecutor likewise did not err in pointing out that Mr. Starbuck was constantly telling individuals in the community, usually at times and circumstances when it was not a natural topic of conversation, about his ex-wife's lifestyle. Whether or not he was inventing this image, he certainly was trying to spread and sell it to others. The importance of this information was not whether it accurately reflected the victim's lifestyle, but the fact that the defendant communicated it to so many others without any apparent need to do so. This strongly suggested an early effort to paint a dangerous lifestyle and throw future suspicion off Clay Starbuck. This was evidence of planning and premeditation, two elements the prosecutor needed to prove at trial.

¶ 54 Finally, little need be said about the characterization of the 911 recording as a call for help. That was a reasonable inference from the evidence. People normally call 911 for emergency assistance, and a person who contacts 911 while being assaulted would understandably be seeking aid. The importance of the call was in helping establish a timeframe for the crime. The prosecutor could properly reference that evidence and draw a reasonable inference about the purpose of the call. A person who misdialed 911 would be likely to stay on the line and explain the error rather than turn off her telephone.

¶ 55 For all of those reasons, the prosecutor did not commit misconduct in his closing argument. But, even if some of

the statements were capable of being misconstrued, a timely objection and request for judicial assistance would have cured any misconceptions about the prosecutor's statements. None of these alleged errors were so egregious that they were beyond cure.

¶ 56 For all of these reasons, we conclude that there was no prosecutorial misconduct. This claim is without merit.

¶ 57 Affirmed.

¶ 58 A majority of the panel has determined this opinion will not be printed in the Washington Appellate Reports, but it will be filed for public record pursuant to RCW 2.06.040.

WE CONCUR: BROWN, A.C.J., and LAWRENCE-BERREY, J.

All Citations

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Footnotes

1 Clay Starbuck was not the father of the youngest boy, a fact confirmed by DNA testing during the investigation.

2 Another son, 17, lived with Clay Starbuck. The marriage dissolution and parenting plans also addressed his custody and support (a small transfer payment from Chanin to Clay) for the limited remaining period of his minority.

3 A nightgown/bathrobe covered her arms, but had been pulled up from behind her back.

4 Y-STR is a type of DNA testing specific to the Y chromosome, which is only present in males. Although the test is considered reliable, it is less discriminating and cannot narrow the identification to a particular individual male.

5 Between 8:20 a.m. and 8:47 a.m. on December 1st the two exchanged sexually explicit text messages. That evidence was excluded by the pre-trial ruling. Cell tower records established that Mr. Walker was nowhere near Deer Park when he communicated with Ms. Starbuck's phone that day.

6 Much of Kenlein's testimony was corroborated by receipts that helped establish the timeline of his activities that day.

7 Kenlein did not have a cell phone and did not text.

8 Mr. Starbuck had told detectives he walked the same route four times that day (twice to and from his disabled car), but surveillance videos never showed him on the route.

9 Evidence of possible motive alone is insufficient to establish this nexus. *State v. Kwan,* 174 Wash. 528, 533, 25 P.2d 104 (1933); *State v. Condon,* 72 Wash.App. 638, 647, 865 P.2d 521 (1993), *review denied,* 123 Wash.2d 1031, 877 P.2d 694 (1994).

10 *Holmes* cited *Thomas* as following this rule. *Id.* at 327 n. *, 126 S.Ct. 1727.

11 In addition to the unidentified male DNA found in the vaginal wash, Mr. Kenlein testified to having sexual relations with Ms. Starbuck a half dozen times, including twice at her residence. No trace of his DNA was ever found at the scene.

12 Appellant appears to implicitly assume that there is a connection between multiple sexual relationships and murder, thus making his evidence relevant, although he presents no evidence or convincing argument in support of this position. It is no more relevant than whether the victim worked for an organization with a large number of employees or a small number.

13 547 U.S. at 327, n. *, 126 S.Ct. 1727.

14 The only boy who lived in the house did not have this DNA profile.

End of Document

Superior Court Judges Association

Criminal Law & Rules Committee

Chief Judge Laurel Siddoway
Court of Appeals Division III
500 North Cedar Street
Spokane, WA 99201-1905

June 25, 2015

Re: State v. Starbuck, # 31845-1-III Motion to Publish

Dear Judge Siddoway:

I am the Chair of the Criminal Law & Rules Committee for the Superior Court Judges Association. One of our primary duties is to educate our members in the best practices and current case law in criminal procedure. The Court of Appeals has issued an unpublished decision authored by Judge Kevin Korsmo in the case of State v. Starbuck (#31845-1-III) that is of considerable interest in situations dealing with allegations of "alternative perpetrator" evidence raised by defendants.

As I am sure you can appreciate, this is often a very difficult matter for a trial judge to weigh. To the extent that "real life" examples of such fact patterns can be offered, it is much more helpful than an abstract principle. Additionally the decision is a comprehensive collection of Washington and federal case law on the subject of "other perpetrator" evidence.

I would therefore ask that the Court would find that there is good cause per RAP 12.3(e)(5) to authorize publication of the decision.

Sincerely,

Judge Salvatore F. Cozza
SCJA Criminal Law & Rules Committee

cc: Brian O'Brien, Spokane County Dep. Pros.
Suzanne Elliot, Appellant Counsel ✔
Judge Kevin Korsmo

SUZANNE LEE ELLIOTT LAW OFFICE

October 06, 2015 - 12:59 PM

Transmittal Letter

Document Uploaded:	318451-Petition for Review.10.06.15.pdf
Case Name:	State of Washington v. Clay Starbuck
Court of Appeals Case Number:	31845-1
Party Respresented:	Clay Starbuck
Is This a Personal Restraint Petition?	☐ Yes ☑ No

Trial Court County: Spokane - Superior Court # 12-1-00424-3

Type of Document being Filed:

- ☐ Designation of Clerk's Papers
- ☐ Statement of Arrangements
- ☐ Motion: ____
- ☐ Response/Reply to Motion: ____
- ☐ Brief
- ☐ Statement of Additional Authorities
- ☐ Affidavit of Attorney Fees
- ☐ Cost Bill
- ☐ Objection to Cost Bill
- ☐ Affidavit
- ☐ Letter
- ☐ Electronic Copy of Verbatim Report of Proceedings - No. of Volumes: ____ Hearing Date(s): _____
- ☐ Personal Restraint Petition (PRP)
- ☐ Response to Personal Restraint Petition
- ☐ Reply to Response to Personal Restraint Petition
- ☑ Other: Petition for Review

Comments:

Please note that an order of indigency has been granted in this matter, so a filing fee is not required.

Proof of service is attached and an email service by agreement has been made to lsteinmetz@spokanecounty.org.

Sender Name: Suzanne L Elliott - Email: peyush@davidzuckermanlaw.com

SUZANNE LEE ELLIOTT LAW OFFICE

October 06, 2015 - 12:56 PM

Transmittal Letter

Document Uploaded:	318451-Motion for Overlength P4R 10.06.15.pdf
Case Name:	State of Washington v. Clay Starbuck
Court of Appeals Case Number:	31845-1
Party Respresented:	Clay Starbuck
Is This a Personal Restraint Petition?	☐ Yes ☑ No

Trial Court County: Spokane - Superior Court # 12-1-00424-3

Type of Document being Filed:

- ☐ Designation of Clerk's Papers
- ☐ Statement of Arrangements
- ☑ Motion: Other
- ☐ Response/Reply to Motion: ____
- ☐ Brief
- ☐ Statement of Additional Authorities
- ☐ Affidavit of Attorney Fees
- ☐ Cost Bill
- ☐ Objection to Cost Bill
- ☐ Affidavit
- ☐ Letter
- ☐ Electronic Copy of Verbatim Report of Proceedings - No. of Volumes: ____ Hearing Date(s): _____
- ☐ Personal Restraint Petition (PRP)
- ☐ Response to Personal Restraint Petition
- ☐ Reply to Response to Personal Restraint Petition
- ☐ Other: _____

Comments:

Motion to File Overlength Petition for Review

Proof of service is attached and an email service by agreement has been made to lsteinmetz@spokanecounty.org.

Sender Name: Suzanne L Elliott - Email: peyush@davidzuckermanlaw.com