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No. 66906-1-I

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

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**STATE OF WASHINGTON, Respondent,**

**v.**

**LYNDA RAE HOLMAN, Appellant.**

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**BRIEF OF RESPONDENT**

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**DAVID S. McEACHRAN,  
Whatcom County Prosecuting Attorney  
By KIMBERLY THULIN  
Appellate Deputy Prosecutor  
Attorney for Respondent  
WSBA #21210**

**Whatcom County Prosecutor's Office  
311 Grand Avenue, Second Floor  
Bellingham, WA 98225  
(360) 676-6784**

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**A. ASSIGNMENTS OF ERROR**

None.

**B. ISSUES PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR**

1. Whether the trial court acted within its discretion when it admitted evidence relevant to Holman's motive and intent to shoot McCollum, to rebut Holman's claim of accident and as Res Gestae evidence pursuant to ER 404(b)

**C. FACTS**

On February 16<sup>th</sup> 2010 at 1:59 p.m., 911 Dispatch received a telephone call reporting a shooting at 5934 Lawrence Road in Whatcom County. RP 149, 162. When deputies arrived they determined one of the residents, Mark McCollum, was dead inside the home. RP 149-150. McCollum was found in the bedroom with a shotgun blast to his left anterior chest, had a blanket tucked in unnaturally around his body and was lying on his back in an odd position on the bed-with one foot dangling over the bed frame. RP 226-230, Supp CP \_\_ (Pla. Ex. 16, 57, 62).

Linda Holman who was also at the scene, told deputies she accidentally shot McCollum the night before-February 15<sup>th</sup>, 2010. RP 156. She explained she had been in a 13 year relationship with McCollum, that they had planned to get married but that there was a lot of stress in their relationship because McCollum worked a lot. RP 156. Holman detailed

that on February 15<sup>th</sup>, 2010, prior to the shooting, she and McCollum went to a Casino where they met up with friend Rodney Portrey, they then gambled and had pizza over the course of several hours. Id. Surveillance video later confirmed that Holman, Portrey and McCollum were at the Nooksack River Casino from approximately 4:30 to 7:30 p.m. on the evening of February 15<sup>th</sup>, 2010. RP 297, 302.

Holman then explained after they returned home she and McCollum were in the bedroom, where McCollum was watching TV. and she was sleeping. RP 157. She stated that after she got up to use the bathroom, she started messing around with one of McCollum's shotguns that had been stored in a gun rack behind a recliner in the bedroom. See, Supp CP \_\_ (Pla. Ex. 16). She stated that at one point she placed the shotgun under her chin and said to McCollum "well, hell, I'll just kill myself too." RP 157. Later she told one deputy that she put the gun under her chin and told McCollum "I'll just fucking kill myself." RP 278. According to Holman, McCollum then told her to put the gun away. RP 157. Holman stated that as she went to put the 12 gauge pump action semi automatic shotgun back up on a gun rack, it accidentally discharged and hit McCollum who according to Holman, was lying flat on his back on the bed watching television. RP 157.

According to Holman, McCollum almost immediately began bleeding out of his nose and mouth, and was making gurgling sounds. RP 158. After a couple of minutes, Holman thought he was dead so she covered him up with a blanket, put the shotgun back on the gun rack and called her friend Rodney Portrey to come pick her up. RP 158, 193. See also, Supp. CP \_\_ (Pla. Ex. 6, 7 – Holman interview). The medical examiner later determined that McCollum had suffered a potentially survivable injury but that McCollum bled out having received no aid immediately following the shooting. RP 385-86.

The next morning Portrey drove Holman to the Mt. Baker Kidney center to see one of McCollum's good friends, Michael Dubois, who was there getting dialysis. RP 210-211. Holman had not yet called 911 or contacted the authorities regarding McCollum's death. While there, Holman told Dubois' friend, Valentina Vasilchenko, that she did something terrible, that she had "shot and killed Mark." RP 213. She then explained that she had not called police immediately after the shooting because she panicked. RP 214. Holman also stated the shooting was an accident. RP 214. Vasilchenko, upset with this information, gave Holman 5 minutes to call 911, telling Holman if she didn't call, Vasilchenko

would. RP 215. Later that day, Rodney Portrey called 911 to report the shooting. RP 179.

In multiple interviews, Holman contended she was to the right of the bed, in the process of placing the shotgun back in the gun rack,-a gun rack that placed the butt of the gun to the left and the barrel of the gun to the right, away from where McCollum was lying. RP 157, 193, 197; Supp CP \_\_ (Pla. Ex. 2, 16). Homan also repeatedly insisted McCollum was lying flat on his back watching television when he was shot. RP 157, 279, See Also, Supp CP \_\_ (Pla. Ex. 6, 7; Def. Ex. 69, 70). Later however, while being transported into town, Holman told Deputy Larson that McCollum had sat up in bed to tell her to put the gun away when the gun went off. RP 286-287. Holman explained the gun was out in front of her when McCollum was shot and that she got the blood on the front of her pants after the shooting when she got up on the bed after shooting Mark. RP 288-89.

The evidence at the scene demonstrated Holman's story was not plausible. RP 422. The shotgun used to shoot McCollum required 7-1/4 to 7-1/2 pound pressure to fire and was not a firearm with a hair trigger that could easily go off if bumped. RP 347. Additionally, the firearm/toolmark expert and medical examiner opined McCollum was shot

up close from a 2-5 foot range based on the satellite spray pattern observed in McCollum's chest wound, and could not have been shot from the position Holman maintained she was in when the gun went off. RP 366-67, 379. Holman alleged she was standing to the right of the bed making way to put the shot gun away in the gun rack behind a recliner chair and that McCollum was lying flat on his back to the left on the bed when McCollum was shot. A total station computer mapping demonstrated however, it was impossible to shoot McCollum in his left anterior chest area from the right side of the bed where Holman stated she was standing at the time of the blast. RP 422; see also Supp. CP \_\_ (Pl. Ex. 57, 58, 62).

After reporting the shooting, Holman disclosed to deputies that she and McCollum had been arguing a bit because McCollum worked so much but that the fights didn't last longer than 5 minutes and they never yelled at each other. Supp CP \_\_ (Pl. Ex. 6; Def. Ex. 69 at 18). She also explained that McCollum slept at his mom's house on February 13<sup>th</sup> because he needed to get some sleep and he was worried she or Portrey's music would keep him up. Id. Holman also stated she had asked McCollum to marry her earlier on the day of the shooting. Supp CP \_\_ (Pl. Ex. 7; Def. Ex. 70 at 35-36). According to Holman, she pleaded with

McCollum to marry her telling him, “Please, is there a chance?” “I’ve asked you before to marry me and you haven’t.” “Can we please make this. It’s time to really get together and get married.” Id. Holman asserted that while they didn’t “make a date” they talked about it, and as far as she was concerned she figured they would have been married within a couple of months. Supp CP \_\_ (Pla. Ex. 7; Def. Ex. 70 at 36).

In McCollum’s home however, deputies found a hand written note on a note pad on a bedroom table that stated:

I keep holding back hope for you and I, Mark [hand drawn frowning face] I can’t keep holding back my emotions for you.

RP 230. In a bathroom deputies found another message written on the mirror that Holman later acknowledged writing that stated:

One more kiss could mean everything – but one more lie could end everything.

RP 279. McCollum’s mother, Shirley McKeever, testified in contrast to Holman, her son’s relationship with Holman had deteriorated the year prior to the shooting. RP 336. McCollum would often come over to her house – a home located on the same property as the McCollum/Holman residence, to try to get some sleep. RP 337; see also Supp CP \_\_ (Pla. Ex. 1). McKeever testified McCollum was staying with her more and more prior to the shooting. RP 338. When McCollum did come over, Holman

would repeatedly call McKeever's house or come over and repeatedly knock on her door. RP 338, 340. Holman sometimes also would turn up McCollum's stereo really loud to get McCollum's attention. RP 338, 340. McKeever accompanied McCollum to try to talk to Holman but that didn't seem to help resolve the on going discord. RP 341. McKeever recalled that she also observed Holman's clothing had been thrown out of McCollum's home at some point and that the clothing stayed out there for a long time. RP 338-39.

McCollum's younger brother Scott testified that when he was visiting in December of 2009, McCollum's relationship with Holman seemed to be deteriorating. RP 348. He recalled that Holman turned McCollum's stereo up so loud when McCollum was over visiting with him at McKeever's home he was worried the speakers would blow. RP 348. When McCollum went back to his house to get Holman to turn his stereo down, he heard Holman and McCollum screaming back and forth at each other before the stereo was finally turned down. RP 348. McKeever testified that McCollum had also started going into Ferndale to stay at a motel when he needed to get some sleep. RP 339.

On February 14<sup>th</sup>, 2010, Holman left a series of messages on McKeever's answering machine. RP 341. Message one stated:

Hey Shirley I need you to please call the cops here, because I don't know, uh Mark obviously did not approve anything, anything but um, I want to report a stolen vehicle in the shop and all above. So you can call the cops on me or anything? Hello, Okay. Well, I'm going to call them on my own. I don't have a problem with that, and do you know what, your involved in all that because you have your car in there and your that- your involved. Your protecting stolen fucking goods. So is Mark, so Happy VD.

Message two:

Well I'm not promising or threatening, I am promising, matter of fact, I'm not threatening. Because by morning, I want Mark's shit out of here, because I'm calling the cops in here and you better call them on me first because I really want the cops here, so whoever is brave enough, bring it on little boys. Mark you started this, I'll finish it. Happy V-fucking D.

Message three:

Well Shirley, I'm glad that I don't qualify this family but since you couldn't call the cops, I did. And I suppose that you and Mark don't have time to hide the car, but thanks.

CP 64, RP 194, 342; Supp CP \_\_ ( Pla. Ex. 9). McCollum's brother Scott testified he did own and keep a 1975 Pontiac Trans Am in a garage adjacent to McCollum's home but the car was not stolen. RP 349-50. On February 16<sup>th</sup> 2010 McKeever received another telephone call from Holman advising McKeever that Holman had shot McCollum. RP 342. Prior to trial the State moved to admit several prior acts of Holman pursuant to ER 404(b). CP 106. Specifically, the State sought to admit evidence of the three telephone messages Holman left on McKeever's

voicemail the day before the shooting, the note Holman left on the bathroom mirror and testimony from Scott McCollum and Shirley McKeever regarding the hostile nature and deterioration of the relationship between Holman and McCollum. CP 105, 106, 73-74. The trial court admitted this evidence pursuant to ER 404(b), after determining this evidence was relevant to prove motive, intent and or, the absence of mistake. CP 66. Following a jury trial Holman was found guilty of second degree murder. CP 32-33.

**D. ARGUMENT**

- 1. The trial court acted well within its discretion pursuant to ER 404(b) to admit evidence relevant to proving Holman had intent and motive to intentionally shoot McCollum and to rebut her claim the shooting was an accident.**

Holman contends the trial court abused its discretion by admitting evidence of Homan's volatile relationship with McCollum pursuant to ER 404 (b). Specifically, Holman contends evidence of the note Holman left on the mirror, a note left on a notepad in the bedroom, voicemail messages left by Holman the day before the shooting and evidence pertaining to the increasing discord in their relationship was not relevant to prove Holman had motive or intent or to rebut her claim the shooting was an accident pursuant to ER 404(b). See, Br. of App. at 1. Holman contends therefore,

that the admission of this evidence violated her right to due process and a fair trial. Br. of App. at 10-11.

A trial court's decision to admit evidence pursuant to ER 404(b) is reviewed for abuse of discretion and will not be disturbed absent a manifest abuse of that discretion. State v. Mason, 160 Wn.2d 910, 933-34, 162 P.3d 396 (2007), *cert. denied*, 553 U.S. 1035 (1995). A trial court abuses its discretion when its decision is manifestly unreasonable or based on untenable grounds or reasons. State v. Powell, 126 Wn.2d 244, 258, 893 P.2d 615 (1995).

ER 404(b) provides:

Evidence of other crimes, wrongs or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan knowledge, identity or absence of mistake or accident.

ER 404 (b) generally prohibits admission of evidence of other crimes, wrongs or acts to prove character or to demonstrate the person acted in conformity with that character. Evidence may be admissible for another purpose however, such as to prove motive, opportunity, intent or absence of mistake or accident. In other words, ER 404 (b) does not preclude the State from presenting "relevant evidence necessary to establish an essential element of its case." State v. Lough, 125 Wn.2d 847,

859, 889 P.2d 487 (1995). It is instead designed to “prevent the State from suggesting that a defendant is guilty because he or she is a criminal-type person who would be likely to commit the crime charged. Id.

In order to admit evidence of other crimes or misconduct under ER 404(b), the court applies a four factor test:

the trial court must (1) find by a preponderance of the evidence that the misconduct occurred, (2) identify the purpose for which the evidence is sought to be introduced, (3) determine whether the evidence is relevant to prove an element of the crime charged and (4) weigh the probative value against the prejudicial effect.

State v. Thang, 145 Wn.2d 630, 642, 41 P.3d 1159 (2002). Holman questions only the relevance of the ER 404(b) evidence admitted below, asserting that the disputed evidence was not relevant and therefore not admissible to prove intent, motive or the absence of mistake. Br. of App. at 9.

To be relevant, evidence must tend to “make the existence of any fact that is of consequence to the determination of the action more probable or less probable.” ER 401. The determination of whether evidence is relevant is best weighed by the trial court. Therefore the trial court is afforded great deference and the standard of review is an abuse of discretion. State v. Lough, 125 Wn.2d at 861; State v. Scherner, 153 Wn.App. 621, 225 P.3d 248 (2009).

Motive is considered the motivation that prompts a person to act. State v. Powell, 126 Wn.2d at 261. Generally speaking, evidence of previous disputes and “ill-feeling” may be admissible to prove motive so long as motive is a consequence to the action justifying the admission of such evidence. Establishing motive is often necessary, for example, when guilt is proven by circumstantial evidence. Powell, *citing* Wayne LaFave & Austin W.Scott, Criminal Law sec.3.6 at 22 (2<sup>nd</sup> Ed. 1986). Evidence of motive is relevant in this case because the forensic evidence that demonstrated Holman could not have accidentally shot McCollum in the manner she repeatedly described, was circumstantial. Therefore, evidence that Holman may have been motivated by anger, was becoming increasingly more volatile, and seemed frustrated with the deteriorating relationship was relevant to proving Holman had motive to shoot McCollum.

McCollum’s mom, McKeever, testified that McCollum was increasingly coming over to stay with her or getting a motel room in Ferndale to get away from Holman. McKeever also testified Holman would turn up McCollum’s speakers really loud, repeatedly call or knock on her door when McCollum would escape to her home. This evidence, along with the notes found within the home and voicemails left the day

before the shooting, show collectively that Holman was motivated to shoot McCollum because she was losing control of the deteriorating relationship. By Holman's own admission, she wanted McCollum to marry her but he hadn't. Initially, she stated she and McCollum had no real problems in their relationship just normal relationship issues. Supp CP \_\_ (Pls. Ex. 6; Def. Ex. 69 at 18). The evidence presented however, gave the jury important information regarding the state of McCollum's relationship with Holman at the time of the shooting. Evidence that made it more probable Holman was motivated to shoot McCollum, more probable that she intended to shoot McCollum and certainly to rebut her claims and establish that the shooting wasn't an accident. Holman's message infers it all, "One more kiss could mean everything, one more lie could end everything." RP 234.

Intent, on the other hand, refers to the state of mind with which an act is done. State v. Powell, 126 Wn.2d at 262. Typically "evidence of quarrels between the victim and the defendant preceding the crime, and evidence of threats by the defendant are probative upon the question of intent." State v. Powell, 126 Wn.2d at 244, *citing* State v. Parr, 93 Wn.2d 95, 102, 606 P.2d 263 (1983). This evidence is typically admissible because in murder cases this evidence tends to show the relationship of the

parties, their feelings and attitudes toward one another which often bears on the defendant's state of mind. State v. Powell, 126 Wn.2d at 262.

Intent and absence of mistake were issues in this case. Although Holman readily admitted she shot and killed McCollum, she insisted her actions were accidental and that she did not intend to kill McCollum. Given that intent was not implicit in the death itself in this case, any evidence regarding the volatility and deteriorating state of Holman/McCollum's relationship leading up to and immediately preceding the shooting was highly relevant to demonstrating whether Holman intended to shoot McCollum and that the shooting was not accidental. As such, this evidence was not offered or used as mere propensity evidence.

Furthermore, the use of other acts to rebut Holman's claim of accident, or to rebut any "material assertion by a party" is a well-established exception under ER 404(b). State v. Roth, 75 Wn.App. 808, 813, 881 P.2d 268 (1994), *citing* 5 Karl. B. Tegland, Washington Practice, Evidence sec 114 at 314, 117 at 411 (3<sup>rd</sup> Ed 1989). A material issue of accident arises when the defense is denial and the defendant affirmatively asserts that the victim's injuries occurred by happenstance. State v. Roth, 75 Wn.App. at 813. This was the scenario here. Holman admitted she shot McCollum but that the act was accidental. Under those

circumstances the State is permitted to introduce other acts that tend to show the act was not an accident.

Holman contends nonetheless that the writing on the mirror and on the notepad were “innocuous” and failed to infer the shooting was intentional, that the phone messages left on McKeever’s voicemail had no relevance to McCollum’s death and finally, that the evidence regarding the state of Holman and McCollum’s relationship leading up to the shooting “failed to rise to a level showing an intent to harm or intent to kill.” Br. of App. At 11-12. Holman’s argument is without merit.

The note on the mirror-which was ominous by both the manner in which it was left- and by its content, and the message on the notepad gave the jury a glimpse of the state of their relationship at the time of the shooting. This evidence reflects there was discord between them to the point that perhaps the relationship was coming to a breaking point. Therefore, these notes were relevant to establishing Holman may have been motivated to shoot McCollum, and that the shooting was intentional and, tended to rebut her claim that the shooting was just an accident.

Holman similarly contends the telephone messages left by Holman on McKeever’s voicemail did “nothing to prove an intent by Ms. Holman to harm or kill Mr. McCollum.” See, Br. of App at 11. These messages

however, in context to other evidence – that McCollum was increasingly staying with McKeever to get away from Holman, that Holman would harass McCollum at McKeever’s home by making repeated phone calls to her house or knocking on her door when McCollum fled to her house for refuge, tends to suggest the shooting was more probably not an accident and, when coupled with the circumstantial forensic evidence, overwhelmingly demonstrates Holman intentionally shot McCollum.

The trial court therefore reasonably determined within its discretion that it was appropriate that the jury knew that the day before the shooting Holman was upset, was repeatedly calling McKeever ostensibly to reach McCollum and was essentially threatening to get at McCollum by calling the police regarding an alleged ‘stolen vehicle’ in their garage and that she wanted his stuff “out of here.” CP 64. This evidence therefore was admissible pursuant to ER 404(b) because it also reasonably tends to establish Holman had motive, intended to shoot McCollum and to rebut Holman’s contention that the shooting occurred accidentally. The voicemails and messages are also arguably admissible under the Res Gestae exception. Under the Res Gestae exception, evidence of other acts may be admissible “[t]o complete the story of the crime on trial by proving its immediate context of happenings near in time and place.”

State v. Powell, 126 Wn.2d at 263, *quoting*, State v. Tharp, 27 Wn.App. 198, 204, 616 P.2d 693(1980).

Holman finally contends the “generic evidence of the nature of the relationship between Ms. Holman and Mr. McCollum failed to raise to the level showing an intent to harm or intent to kill.” Br. of App. At 12.

Holman acknowledges evidence of previous disputes or quarrels between the defendant and the victim are generally admissible in murder cases because such evidence “often bears directly upon the state of mind of the accused...” Id. Holman nonetheless contends the evidence in this case was so mild that it was not relevant to proving intent pursuant to ER 404(b). Br. of App. At 13.

Evidence that Holman and McCollum were not getting along, that their relationship was deteriorating in the months and days prior to the shooting was, contrary to Holman’s accident theory, highly probative to Holman’s intent at the time of the shooting and also tended to show Holman may have been motivated to intentionally shoot McCollum. The fact that Holman had not previously assaulted McCollum does not render this evidence less relevant or admissible under the rule, particularly when the State was required to prove the shooting was intentional and where Holman continued to assert, in contrast to the forensic evidence provided,

that the shooting was accidental. The trial court therefore did not abuse its discretion in admitting the message Holman left on the mirror, the message on the note pad, evidence of relationship discord leading up to the shooting and the voicemail messages Holman left the day before the murder. Finally, any error in admitting any of the challenged evidence (which the State does not concede) was, when viewed in light of the overwhelming forensic evidence presented below, harmless beyond a reasonable doubt. State v. Guloy, 104 Wn.2d 412, 426; 705 P.2d 1182(1985). Holman's conviction should be affirmed.

**E. CONCLUSION**

For the reasons set forth above, the State respectfully requests that this Court affirm Holman's murder conviction.

Respectfully submitted this 16 of February, 2012.



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KIMBERLY THULIN, WSBA #21210  
Appellate Deputy Prosecutor  
Attorney for Respondent

CERTIFICATE

I certify that on this date I placed in the mail with proper postage thereon, or otherwise caused to be delivered, a true and correct copy of the document to which this certificate is attached to this Court, and appellant's counsel of record, Thomas Kummerow, addressed as follows:

Washington Appellate Project  
1511 Third Avenue, Suite 701  
Seattle, WA 98101

Sydney A. Kass                      02/16/2012  
Legal Assistant                      Date