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COURT OF APPEALS
DIVISION II

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NO. 35186-2-II

STATE OF WASHINGTON
BY

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

STATE OF WASHINGTON, Respondent

v.

ROBIN TAYLOR SCHREIBER, Appellant

FROM THE SUPERIOR COURT FOR CLARK COUNTY
THE HONORABLE ROBERT L. HARRIS
CLARK COUNTY SUPERIOR COURT CAUSE NO. 04-1-01663-1

BRIEF OF RESPONDENT

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I. STATEMENT OF THE FACTS

The defendant, Robin Schreiber, had been married to Debra Phares from 1984 until their divorce in 1995. (7 RP 1303). They had two children, Taylor and Bo, who were respectively 15 and 18 years of age at the time of the incident in question. (7 RP 1304). After the divorce, the children stayed half the time with their father and the other half with their mother. (7 RP 1304). It was agreed that the defendant would pay \$500.00 per month child support to Debra Phares. (7 RP 1305). The agreement specified that the child support payments for Bo Schreiber would continue through his secondary education. (7 RP 1308). In July 2004, Bo Schreiber moved full time into his mother's home. (7RP 1308-09). Once Bo had moved into her home, Debra Phares approached the defendant proposing an increase in child support payments. (7 RP 1308). Phares spoke to the defendant about this issue five or six times. (7 RP 1309). On July 29, 2004, Debra Phares wrote a proposal to the defendant that she wanted the child support payments to continue for Bo along with an increase in the clothing allowance for Taylor. (7 RP 1310). Phares gave the note to Taylor to take to the defendant after Taylor got home from school on the afternoon of July 29, 2004. (7 RP 1310-11). The defendant was upset after he read the letter. (8 RP 1545). Even though it had been agreed that the defendant would never discuss divorce/child support issues

with the children, the defendant had an “intense” discussion with Taylor the night of July 29, 2004. (7 RP 1311; 8 RP 1545). This discussion between the defendant and Taylor resulted in Taylor leaving the house after the defendant had gone to sleep. (8 RP 1546-48).

On the morning of July 30, 2004, Kim Mortensen, the girlfriend of the defendant, woke up to find a note left by Taylor indicating that Taylor had left during the night. (8 RP 1547-48). Mortensen showed the note to the defendant. (8 RP 1548-49). The defendant became upset after reading the note from Taylor. (8 RP 1549). During trial, Mortensen testified that the defendant was afraid of losing his children to his ex-wife, that he was afraid of his wife turning his children against him, and that the defendant was afraid that his children hated him because of his ex-wife. (8 RP 1552-53). The defendant told Mortensen that his ex-wife kept coming back for more money and that he just couldn’t take it anymore. (8 RP 1555-56).

On the morning of July 30, 2004, the defendant called Phares and talked to her about her note. He told her that he would look at the proposal for more money and would call her back the next Monday. (7 RP 1311-12). In the afternoon of the same day the defendant spoke with Mortensen about meeting with an attorney on Monday. (8 RP 1555). Later in the afternoon the defendant calls Mortensen back, yet this time, he

is very upset and stated that he couldn't do this anymore. (8 RP 1557).

Mortensen drove to the defendant's home and went upstairs where she found the defendant on the master bedroom bed with a shotgun and a bag of ammunition lying next to him. (8 RP 1558, 1560-61). Mortensen yells at the defendant to unload the shotgun. (8 RP 1562). Once the defendant unloaded the shotgun, Mortensen took it downstairs and set it down onto the kitchen floor. (8 RP 1562-63). At that time Mortensen's son was on the phone with a 911 operator. (8 RP 1563). When the 911 operator inquired about any other weapons, Mortensen remembered there was a 30-06 rifle in the master bedroom so she went back upstairs. (8 RP 1565). Once upstairs Mortensen tried to prevent the defendant from getting to the 30-06 rifle by blocking his path but the defendant pushed her aside. (8 RP 1566-67). Mortensen yelled at the defendant that the police had been called at which point she left the house. (8 RP 1567). As Mortensen was leaving the house, she saw the defendant pushing out the window screen in Taylor's room that faced in a southerly direction. (8 RP 1572).

Mortensen yells back to the defendant that he is a jerk as she walks toward the end of the driveway where the police had arrived. (8 RP 1575).

On July 30, 2004, at approximately 7:19 p.m. deputies from the Clark County Sheriff's Office received a call of a disturbance with a weapon at the defendant's residence, 11514 NE 128th Avenue, in Clark

County, Washington. (3 RP 589-90). Deputies arrived at approximately 7:23 p.m. (3 RP 590). Four of the responding officers positioned themselves at the tree line at the end of the defendant's driveway. (3 RP 591-94). Mortensen and a few other people exit the house and approach the officers. (3 RP 594). The officers briefly speak with Mortensen and then directed them to the far south end of the driveway. (3 RP 594-95).

While the officers were in the tree line, the defendant was observed knocking out the window screens on upstairs windows that faced to the east and south. (3 RP 601; 4 RP 817). It was around this time that the defendant called Phares telling her that he had his gun, that there were Clark County deputies at his house, and that she didn't have to worry about him anymore. (7 RP 1312).

Corporal Boynton of the Vancouver Police Department was requested to respond to the scene as a trained negotiator. He arrived at approximately 7:36 p.m. (5 RP 1130). He responded to the scene in order to gather intelligence regarding the call and the scene. (5 RP 1000-1002). While positioning themselves outside of defendant's house, officers could see the defendant moving from room to room inside the house. (3 RP 607). At one point, the defendant goes to the upper southeast bedroom window, aims the scoped 30-06 rifle out of the screenless window towards the south and east while scanning the tree line and area where the patrol

cars are parked in the driveway. (3 RP 602, 607; 4 RP 819-20; 6 RP 1136, 1144). Clark County Deputy Boardman testified that when the defendant was scanning the tree line with the rifle he observed the defendant aim the rifle in his direction. (3 RP 608-09). The defendant disappears from the south end of the residence and was then seen on the north end of the residence through an upper floor window holding a silver can. (7 RP 1407-08). The defendant rapidly leaves the north room. (7 RP 1408).

Less than one minute later the defendant opens the front door of the house and stands back in the shadows looking toward the southeast where the officers have positioned themselves. (4 RP 826-27).

Defendant then crawled out of the house with the rifle in his arm. (3 RP 611). While crawling, the defendant stopped, raised the rifle to his shoulder, and aimed it in the officers' direction. (4 RP 827-28, 830-31; 6 RP 1146). The defendant lowered the rifle and crawled to his truck which was parked off of the driveway on the east side of the house. (4 RP 834). Once he got to his truck the defendant stands up at the rear of the truck where he begins to use a "pieing" tactical method to search around his truck while using his rifle by raising the rifle to a firing position and sweeping it around corners as he looked behind and around his truck. (4 RP 835-837; 5 RP 1009-12). The defendant crawls to the passenger door of his truck, opens the door, and enters it as he crawls across into the

driver's seat. (4 RP 838-40). Officers observed the headlights of the defendant's truck come on as the truck is started. (4 RP 840).

Sergeant Brad Crawford, the victim in the case, was at the tree line with the other officers when they observed the defendant's truck being started. Crawford ran to his patrol car which had been parked at the end of the defendant's driveway and drove off heading westbound on 114th Street toward 124th Avenue. (4 RP 773). Sergeant Crawford drove to the intersection of NE 114th Street and NE 124th Avenue where he met a vehicle heading northbound on NE 124th Avenue that was occupied by Adam Wright and Mike Aulger. (8 RP 1496). Wright had driven Aulger north on NE 124th Avenue to see what was going on after they observed police cars drive by the Aulger residence on NE 124th Avenue. (8 RP 1496).

When Wright and Aulger approached the intersection, Sergeant Crawford, who had the emergency lights activated on his patrol car, stopped the Wright vehicle. (8 RP 1497-98). According to Mike Aulger, Sergeant Crawford told them to "stay put." (12 RP 2462). After contacting them, Sergeant Crawford backed his patrol car off of the road to the west of the intersection of NE 114th Street and NE 124th Avenue. (8 RP 1508; 12 RP 2463-64).

Pulling up and stopping directly behind the Wright vehicle were Kyle and Jodi Robbins who had been driving north on NE 124th Avenue looking for new homes in the area. (7 RP 1449, 1468). Both Kyle and Jodi Robbins testified that they saw Sergeant Crawford's patrol car with its emergency lights on and that it was parked off of the road. (7 RP 1452-53, 1470-71, 1476, 1478-79).

The positioning of Sergeant Crawford's patrol car mostly off of the roadway was subsequently confirmed by the analysis of evidence by Vancouver Police Officer Capellas, who is a certified traffic collision reconstructionist. (10 RP 2058-60, 2105-2112, 2125; 11 RP 2217-20, 2354). The observation of the witnesses and the opinion of Officer Capellas are in stark contrast to the opinions of three defense experts, who even contradicted each other, in regard to the placement of Sergeant Crawford's patrol car just prior to impact. (Sweeney: 13 RP 2637-40, 2675-82; Fries: 14 RP 2735-50; Moebes: 15 RP 2955-70).

After the defendant started his truck, he sat in it for approximately fifteen to twenty seconds before quickly accelerating away. (4 RP 840-42). The defendant first drove southbound toward the end of the driveway at the tree line where the officers had positioned themselves. (6 RP 1151). Observing that the defendant's truck was heading toward the end of the driveway, Corporal Boynton gets into his patrol car and drives

up the driveway with his emergency lights activated to block the defendant's path. (5 RP 1016, 1021). The defendant turns westbound heading for the west end of the tree line. (5 RP 1017-18; 6 RP 1152). Corporal Boynton drives to the west end of the tree line and meets the defendant where the defendant holds up a metal object in his right hand and then proceeds to drive westbound through the field. (5 RP 1017-18).

Defendant quickly drove the truck westbound through the field which included going through a barbed wire fence. (10 RP 2129; 13 RP 2593). The truck was moving so fast that it was fishtailing, which was evidenced by the back wheels of the truck tracking outside of the front wheels. (10 RP 2131-32). Once the defendant got to the gravel driveway of the neighbor to the west of his residence, he drove southbound on that gravel driveway, or NE 126th Avenue, toward NE 114th Street. (13 RP 2596). When the defendant reached the end of the driveway, he made a right turn heading westbound onto NE 114th Street. (7 RP 1331; 10 RP 2135-36). The defendant was able to make the sharp ninety degree turn from the gravel driveway onto NE 114th Street at 19 miles per hour without causing the truck to leave the roadway. (10 RP 2136-38). As the defendant's truck made the ninety degree turn, the defendant used his brakes, which was evidenced by Corporal Boynton's testimony that he

saw brakes lights come on the truck as it came onto NE 114th Street from the driveway. (5 RP 1024).

As the defendant's truck accelerated westbound on NE 114th Street, he was closely pursued by four patrol cars: Deputy Schanaker who had his emergency lights on, Sergeant Chapman who also had his emergency lights on, Corporal Boynton who had his emergency lights and siren on, and Deputy Boardman who had his emergency lights and siren on. (7 RP 1332; 5 RP 925; 5 RP 1042-22; 3 RP 616). During the pursuit, Corporal Boynton moved his patrol car into the opposing lane of traffic and was able to observe a patrol car facing southbound while parked off the side of the road at the intersection of NE 114th Street and NE 124th Avenue. (5 RP 1042-43, 1048-49). As he got closer, Corporal Boynton could see Sergeant Crawford sitting in the patrol car trying to shift his patrol car into gear. (5 RP 1044).

As the defendant got closer to Sergeant Crawford's patrol car, he steered his truck into a straight line directly toward the center of Sergeant Crawford's patrol car and accelerated into it. (5 RP 1043-45; 7 RP 1455, 1466, 1473, 1477). At no time prior to impact with Sergeant Crawford's patrol car did anyone see the defendant's truck brake lights come on. (3 RP 620; 5 RP 1047; 7 RP 1337-38). A subsequent examination of the defendant's truck found that the brake lights worked. (10 RP 2141). It

was determined that the defendant's truck was going approximately 31-40 miles per hour upon impact with Sergeant Crawford's patrol car. (10 RP 2221). In addition, the force of the 7,400 pound truck colliding with the patrol car caused the truck to override the car which resulted in the body of the patrol car being ripped from the frame. (10 RP 2089, 2096). The force of the collision compressed the driver's seat of the patrol car to approximately seven inches or seven-tenths of a foot wide. (10 RP 2093).

The four civilian witnesses who were close to the collision scene reported observations they had made just prior to impact. Adam Wright saw the defendant grab the steering wheel with both hands, make a "serious type look on his face", and then heard the truck accelerate into impact. (8 RP 1500-01, 1508). Mike Aulger saw the defendant grip the steering wheel with two hands, make an "angry" face, and rapidly accelerate into impact. (12 RP 2467-68). Kyle Robbins stated that he estimated that the defendant's truck was going 40 miles per hour and accelerated into impact with the patrol car. (7 RP 1454-55, 1462, 1465). Jodi Robbins heard the defendant's truck accelerating and saw it go straight, impacting the patrol car. (7 RP 1473, 1477-78).

In addition to these witnesses at the collision scene, there were others who were east of the collision scene on NE 114th Street who witnessed defendant's driving. One witness was Ms. Angie Owens who

stated that she was “kitty-corner” to the gravel driveway (NE 126th Avenue), saw the defendant’s truck come south out of the gravel driveway and then fishtail, almost striking mailboxes, as it turned west onto NE 114th Street. (6 RP 1247). The pickup then traveled from the wrong lane, to the center of the road, and then back into his lane of travel as he went westbound on NE 114th Street. (6 RP 1247, 1262). The defendant’s truck accelerated down the road and then Ms. Owens heard a “big” crash. (6 RP 1247).

Another witness was Ms. Ruth Locy who stated that she was standing at the end of her driveway on NE 114th Street where she could see north up the gravel driveway (NE 126th Avenue). (6 RP 1278-80). She stated that she saw the defendant’s truck driving across the back field through the fences and turn down the gravel driveway. (6 RP 1268-69). She added that as the truck turned it made a wide swing and appeared to be slipping a little on the grass before coming onto the gravel driveway. (6 RP 1268). The truck came very fast down the gravel driveway and then made a right turn almost wiping out the mailboxes on the south side of NE 114th Street. (6 RP 1268). With police cars directly behind him, the defendant’s truck accelerated down NE 114th Street until he hit the police car at the corner. (6 RP 1269-73).

Defense witness, Mr. Scott Beckstrom, stated that he was at a neighbor's house to the west of the defendant's house when he heard a lot of noise and saw the defendant's truck bouncing through the fence line toward the neighbor's house. (13 RP 2593). The truck was fishtailing. (13 RP 2593). The truck then made a large sweeping turn and headed south down the neighbor's gravel driveway also known as NE 126th Avenue. (13 RP 2596, 2707). The truck then turned onto NE 114th Street. (13 RP 2608). The truck continued to accelerate down 114th until it "T-boned" the white car parked at the corner. (13 RP 2600-2608). Mr. Beckstrom did not see any brake lights come on the defendant's truck nor did he notice any sounds or hear anything that suggested the truck was trying to slow or stop. (13 RP 2610-11).

Immediately after the collision, officers ordered the defendant out of his truck and onto the ground but he was non-compliant, resulting in officers physically subduing the defendant. (5 RP 1053-54; 12 RP 2472-73). The loaded 30-06 rifle was removed from the defendant's truck and was unloaded by law enforcement. (4 RP 780-81; 6 RP 1157-59).

Eventually the defendant was transported to Southwest Washington Medical Center in Vancouver, Washington, for the purposes of a blood draw. (7RP 1415-16). Officer Capellas read the defendant the special evidence warning for blood. The defendant did not seem confused

by the warning. (10 RP 2067-68). Blood was taken from the defendant. (10 RP 2068-69). The blood was tested by the Washington State Toxicology Lab which showed that it had a blood alcohol content (BAC) of .14. (12 RP 2410-11).

Back at the collision scene, officers separated the defendant's truck and the patrol car by pushing the defendant's truck back an unknown distance onto the roadway but at least to an area north of the telephone pole located on the southeast corner of the curve. (5 RP 942, 947, 987-88; 6 RP 1232-33). The officers were working on getting the patrol car out from against a telephone pole and blackberry bushes, where it had come to rest, by using the winch located on the front of the defendant's truck. (4 RP 640-41; 5 RP 942-43; 6 RP 1203-04). Deputy Nelson unspooled the winch cable and attached it to the front push bumper of the patrol car. (6 RP 1204; 5 RP 943-45). Sergeant Chapman began operating the winch control and was able to pull the patrol car about four to five feet out of the blackberry bushes. (5 RP 945, 1057). The patrol car then stopped moving and the defendant's truck began rolling forward. (5 RP 946, 1058). In an effort to stop the truck from rolling forward, Deputy Paulson got into the truck and began applying the brakes. (4 RP 850-51). The truck continued forward and would not stop. (4 RP 851-52). Afraid that the truck would be pulled into the patrol car, Deputy Paulson jumped out of the truck

yelling to Sergeant Chapman to stop the winching process. (4 RP 852-53). Deputy Paulson and other officers jumped in front of the truck and physically held the truck to bring it to a stop. (4 RP 852-53). A battering ram was placed under the truck's left rear tire in order to get the truck to come to a complete stop. (4 RP 642, 853; 6 RP 1216, 1220-21). Sergeant Crawford was removed from the damaged patrol car where he was transferred to the Life Flight medical helicopter and then the hospital. (4 RP 642; 6 RP 1205). Sergeant Crawford died from multiple blunt force injuries as a result of the collision. (3 RP 569-71).

Post-collision investigation by Officer Capellas found that the right front brake line on the defendant's truck had been severed. (10 RP 2103). An examination of the collision scene revealed only one brake fluid trail behind the defendant's truck that was approximately 34 feet in length. (10 RP 2120; 11 RP 2249). Officer Capellas did not find any evidence of tire marks (scrub, slide, or scuff) in the pre-collision area. (10 RP 2115-19).

On August 18, 2005, Officer Capellas, along with Deputy Harada, Mr. Heusser, a civilian collision reconstructionist who specializes in braking, and Mr. Temple from the Washington State Patrol's Major Accident Investigation Team, removed the defendant's truck from the Clark County Sheriff's Office property unit and took it out to the collision

scene for additional testing. (10 RP 1935-39, 2151, 2160). The primary purpose of the tests was to determine the truck's braking efficiency with the torn brake line by use of a "load cell" that helps in calculating such braking efficiency. (10 RP 1949-51, 2160-61). Even though it was determined that the defendant's truck had a braking efficiency of thirty-seven percent with the torn brake line, Officer Capellas was still able to get the rear tires of the truck to lock up on the pavement when the brakes were applied. (10 RP 1952, 2163). After examining all the reports and evidence, collision reconstructionist expert Heusser opined that on the day of the collision the defendant could have slowed, steered to the right, or steered to the left to avoid striking Sergeant Crawford's patrol car. (10 RP 1953).

During the August 18th tests, Officer Capellas observed that when the truck was moving at speeds of twenty miles per hour or greater an application of the brakes with the torn brake line resulted in only drips or drops of brake fluid onto the road surface with no solid grouping. (10 RP 2161-62, 2167). However, when the truck was winched at slow speeds and the brakes were applied with the torn brake line, a fluid trail was produced onto the road surface. (10 RP 2163-66).

Another test conducted on August 18, 2005, involved pushing the defendant's truck backwards away from the west edge of the roadway by

Mr. Temple and Deputy Hirada. (10 RP 2168). Because of the crown of the road, once the vehicle was pushed it rolled back onto the roadway and proceeded back across the centerline and near the center portion of the roadway. (10 RP 2169-70).

Since the brake fluid patterns on the roadway were ancillary observations during the August 18, 2005, load cell test, the defendant's truck was taken back out to the collision scene on May 3, 2006, for additional tests regarding brake fluid patterns. (11 RP 2194-95, 2197). Once the torn brake line was placed back onto the truck, it was put through a series of braking tests during winching, and while traveling at speeds of 30 miles per hour, 20 miles per hour and 10 miles per hour, respectively. (11 RP 2196-98). The tests confirmed that a solid fluid trail was only reproduced when the truck brakes were applied during the slow speed winching process. (11 RP 2200-06). Speeds of ten miles per hour and greater would only produce a spray and then droplets that had no pattern or grouping. (11 RP 2200-06). Additional tests of pushing the defendant's truck backward from the roadway edge were conducted. (11 RP 2199). Two push back tests were performed, one with the engine off and one with the engine on. (11 RP 2199). In both tests the truck ended up at "a position over the centerline and back to a position in the

middle of the roadway, in the middle portion of the corner.” (11 RP 2199-2200).

During trial, Officer Capellas opined that any kind of evasive maneuver, to include braking, steering, or turning by the defendant would have resulted in little or no contact between the defendant’s truck and the patrol car. (11 RP 2232). During trial, Officer Capellas acknowledged that his first impression of the existence of the brake fluid trail at the collision scene was “most likely” from pre-impact braking but then explained that he had not had an opportunity to conduct any additional testing and that evidence of a torn brake line was the only indication he had at that point in time that would point to the probability of pre-impact braking. (11 RP 2366). Since Officer Capellas had conducted additional testing on the defendant’s truck with the torn brake line, his final opinion was that the brake fluid trail found on the roadway could only have been produced by pumping the brakes at a very slow speed. (11 RP 2232).

After observing the incident surrounding the death of Sergeant Crawford, Corporal Boynton had sought psychological counseling. (1 RP 16, 20). On April 12, 2006, a pre-trial motion hearing was held where the defendant moved to review the psychological records of Vancouver Police Corporal Duane Boynton. (1 RP 15). Defense argued that they believed Corporal Boynton had been traumatized by this incident

and that they should have a right to examine his psychological records as this goes directly to his credibility in that it affected his ability to not only observe at the time but to recall and remember. (1 RP 16). Defense did indicate that they would not be opposed to an in-camera review of Corporal Boynton's psychological records by the Court so that the Court could make a determination as to whether or not defense should be allowed to review and use those records in their confrontation with Corporal Boynton. (1 RP 17). The State and Vancouver City Attorney argued to the Court that the psychological records of Corporal Boynton are privileged and are not subject to compulsory disclosure. (1 RP 18-23). The Court reserved ruling until a later date. (1 RP 28).

On May 22, 2006, another pre-trial motion hearing was held where the Court acknowledged that it would order the production of Corporal Boynton's psychological records for an in-camera review. (2 RP 226). The City of Vancouver advised the Court that Corporal Boynton had not authorized the City to release his treatment provider's name. (2 RP 237). Over the State's objection that the compulsory process requirements of RCW 70.02.060 and the HIPAA regulations in 45 CFR were not being correctly followed, the Court directed that a subpoena be served on Corporal Boynton to compel production of the records for an in-camera

review. (2 RP 231-32, 236). These records were delivered to the court and are under seal. Neither the State nor defendant has seen them.

During trial, and in the absence of the jury, defense raised the issue of reviewing Corporal Boynton's psychological records. (3 RP 415). The Court indicated that it had the records and that they were under seal. (3 RP 415). The Court also stated that "[t]here apparently will be no waiver of the claim of privilege." (3 RP 415). For the record, the State attempted to advise the Court that Corporal Boynton was asserting that his rights were violated under RCW 70.02.060 and HIPAA under 45 CFR when the Defendant and the Court failed to comply with the requirements under those respective statutes and/or regulations. (3 RP 415-16). The Court refused to hear the State's argument and advised that Corporal Boynton could file "a claim". (3 RP 416-17).

During a recess of Corporal Boynton's testimony at trial, and out of the presence of the jury, the Court inquired about Corporal Boynton's position on his psychological records. (5 RP 1033). Corporal Boynton asserted that he did not want those released and that the City of Vancouver was representing him to not have those records released. (5 RP 1033). The Court confirmed that Corporal Boynton was claiming privilege. (5 RP 1033). The Court permitted defense to inquire of Corporal Boynton outside the presence of the jury. (5 RP 1033).

The Court permitted defense to ask Corporal Boynton about the fact that he saw a psychologist, that he saw the doctor four times within one month, that the doctor reached a diagnosis, that Corporal Boynton was never prescribed medication as a result of this diagnosis, and that Corporal Boynton was not being treated by a doctor. (5 RP 1033-37). Due to the privilege claimed by Corporal Boynton, the Court would not permit defense to ask for the name of the doctor, nor for the specifics of the doctor's diagnosis. (5 RP 1033-37). The Court did indicate that it had reviewed the records and the fact that there was even a diagnosis was questionable. (5 RP 1038).

During cross-examination of Corporal Boynton in the presence of the jury, the following exchange took place regarding the issue of Corporal Boynton seeing a psychologist:

DEFENSE: That was a tough night for you?

BOYNTON: Yeah.

DEFENSE: Still is?

BOYNTON: Yeah.

DEFENSE: Very traumatic?

BOYNTON: Yeah.

DEFENSE: And you went to counseling because of it?

...

BOYNTON: The city offered a counseling program for all traumatic incidences [sic], and yes, I took advantage of that.

DEFENSE: You went on four occasions?

BOYNTON: Three or four.

DEFENSE: Thanks, Officer.

(6 RP 1127).

The jury found the defendant guilty of intentional Murder in the Second Degree. (19 RP 3451). By special verdict the jury also found that the defendant was armed with a firearm at the time of the commission of the crime of Murder in the Second Degree and that he knew the victim was a law enforcement officer performing official duties at the commission of the offense. (19 RP 3452).

The standard sentencing range in this case was 123 to 220 months. (19 RP 3558). At sentencing the Court imposed a mid-range sentence of 167 months, plus 60 months for the firearm enhancement, and 120 months for the law enforcement factor, for a total of 347 months. (19 RP 3558).

II. RESPONSE TO ASSIGNMENT OF ERROR NO. 1

The trial judge did not abuse discretion by failing to recuse himself from the case.

Under the appearance of fairness doctrine, "the test for determining whether the judge's impartiality might reasonably be questioned is an

objective test that assumes that a 'reasonable person knows and understands all the relevant facts.'" State v. Graham, 91 Wn. App. 663, 669, 960 P.2d 457 (1998) (quoting Sherman v. State, 128 Wn.2d 164, 206, 905 P.2d 355 (1995) (citation omitted)). Accordingly, the appropriate inquiry is whether a reasonably prudent and disinterested observer would conclude that all parties obtained a fair, impartial, and neutral hearing. State v. Bilal, 77 Wn. App. 720, 722, 893 P.2d 674, review denied, 127 Wn.2d 1013, 902 P.2d 163 (1995); State v. Ladenburg, 67 Wn. App. 749, 754-55, 840 P.2d 228 (1992).

Although not mentioned in these cases, it seems a common sense fact which any reasonably prudent and disinterested observer would want to know is whether the defendant actually believes the court was actually prejudiced against him. Here, the defendant never alleged any actual prejudice by the judge against him. Instead, he only argued that the fact that the judge had attended the funeral caused an appearance of unfairness issue.

The court should presume that the trial court performs its functions regularly and properly, without bias or prejudice. Jones v. Halvorson-Berg, 69 Wn. App. 117, 127, 847 P.2d 945, review denied, 122 Wn.2d 1019, 863 P.2d 1353 (1993). As the court does not presume that prejudice exists, the party seeking recusal must support the claim with evidence of

the judge's actual or potential bias. State v. Dominguez, 81 Wn. App. 325, 328-29, 914 P.2d 141 (1996).

Decisions on whether to grant or deny recusal are reviewed for whether the trial court committed an abuse of discretion in that decision. In re Marriage of Farr, 87 Wn. App. 177, 188, 940 P.2d 679 (1997), review denied, 134 Wn.2d 1014, 958 P.2d 316 (1998).

In the federal system a federal judge is obliged to recuse himself if a person with knowledge of the relevant facts might reasonably question his impartiality. 28 U.S.C. § 455(a). The test is an objective one: a judge must disqualify himself whenever his "impartiality might reasonably be questioned. . . . disqualification is required if a reasonable factual basis exists for doubting the judge's impartiality. The inquiry is whether a reasonable person would have a reasonable basis for questioning the judge's impartiality, not whether the judge is in fact impartial." In re Beard, 811 F.2d 818, 827 (4th Cir. 1987) (quoting 28 U.S.C. § 455(a)).

A judge is not, however, required to recuse himself simply because of "unsupported, irrational or highly tenuous speculation." United States v. DeTemple, 162 F.3d 279, 287 (4th Cir. 1998) (internal quotation marks omitted). Put simply, "the proper test to be applied is whether another with knowledge of all of the circumstances might reasonably question the judge's impartiality." Beard, 811 F.2d at 827.

The Federal courts have held that a judge need not recuse himself simply because he possesses some tangential relationship to the proceedings. For example, in Beard, the Circuit Court decided that a bankruptcy judge was not required to disqualify himself because of statements he made during the course of Chapter 11 proceedings in his court. In those proceedings, the judge had indicated that he thought the president of the debtor corporation was a "fine man." *Id.* at 828.

In United States v. Cherry, 330 F.3d 658 (4th Cir. 2003), the judge was acquainted with the victim. The judge had written to the victim thanking him for support in obtaining his position as a Federal judge. The Circuit Court denied the appeal, upholding the District Judge remaining on the case. The Circuit Court noted:

[In] DeTemple, we held that a presiding judge was not required to recuse himself from a criminal prosecution arising out of bankruptcy fraud, even though the judge had previously represented victims of the fraud. 162 F.3d at 287-88. By the same token, in Cole, we affirmed the decision of a district judge to preside over a trial even though the judge had a personal relationship with a government witness. 293 F.3d at 164. The witness was the son of the judge's deceased godparents, but the judge had not had contact with the witness in over ten years. We decided that, because this relationship had become attenuated, a reasonable observer would not question the judge's impartiality.

Applying these principles here, we are unable to conclude that the presiding judge abused his discretion in declining to recuse himself. The judge had less than a dozen personal

contacts with McConnell during the course of McConnell's life. The 1991 letter, which formed the sole basis for Cherry's recusal motion, represents no more than a perfunctory letter of appreciation. It is common and perfectly appropriate for citizens to lend support to judicial nominees, and it is also proper for nominees to acknowledge such support with letters of appreciation. As we have previously acknowledged, "the more common a potentially biasing circumstance and the less easily avoidable it seems, the less that circumstance will appear to a knowledgeable observer as a sign of partiality." DeTemple, 162 F.3d at 287 (internal quotation marks omitted). Furthermore, even if the judge had maintained a close friendship with McConnell, McConnell has only a tangential relationship to this case. Cherry's criminal activities victimized the beneficiary of McConnell's estate, Waynesburg College, rather than McConnell himself. In these circumstances, we are unable to say that a reasonable observer would question the presiding judge's impartiality. The judge was thus within his discretion in declining to recuse himself.

United States v. Cherry, 330 F.3d 658, 665-666 (4th Cir. 2003).

In United States v. DeTemple, 162 F.3d 279, 286-287 (4th Cir. 1998), the Federal District Judge was presiding over a bankruptcy and mail fraud trial of DeTemple. The judge had previously been in private practice. While in private practice, the judge represented one of the victims of the fraud. The judge had sent dunning letters to DeTemple. He left the firm to become a judge and left the matter to other lawyers in his private practice. The judge denied recusal. On appeal, the Circuit Court held:

[The] objective standard asks whether the judge's impartiality might be questioned by a reasonable, well-informed observer who assesses "all the facts and circumstances." [United States v. Sellers, 566 F.2d 884, 887 (4th Cir. 1977)] (quoting H.R. Rep. No. 93-1453 (1974), reprinted in 1974 U.S.C.C.A.N. 6351, 6355).

This standard abolishes the rule that courts should resolve close questions of disqualification in favor of a judge's so-called "duty to sit," see H.R. Rep. 93-1453 (1974), reprinted in 1974 U.S.C.C.A.N. 6351, 6355, but it does not require a judge to recuse himself because of "unsupported, irrational, or highly tenuous speculation," In re United States, 666 F.2d 690, 694 (1st Cir. 1981). To disqualify oneself in such circumstances would be to set "the price of maintaining the purity of appearance" too high -- it would allow litigants "to exercise a negative veto over the assignment of judges." *Id.* Congress never intended the disqualification statute to yield this result. See H.R. Rep. No. 93-1453 (1974), reprinted in 1974 U.S.C.C.A.N. 6351, 6355 ("Litigants ought not to have to face a judge where there is a reasonable question of impartiality, but they are not entitled to judges of their own choice.").

Application of the objective standard thus requires a nuanced approach. On the one hand, we must keep in mind that the hypothetical reasonable observer is not the judge himself or a judicial colleague but a person outside the judicial system. Judges, accustomed to the process of dispassionate decision-making and keenly aware of their Constitutional and ethical obligations to decide matters solely on the merits, may regard asserted conflicts to be more innocuous than an outsider would. On the other hand, a reasonable outside observer is not a person unduly suspicious or concerned about a trivial risk that a judge may be biased. There is always some risk of bias; to constitute grounds for disqualification, the probability that a judge will decide a case on a basis other than the merits must be more than "trivial." In the Matter of Mason, 916 F.2d 384, 386 (7th Cir. 1990).

We believe that a reasonable outside observer, aware of all the facts and circumstances of this case, would not question Judge Stamp's impartiality. To be sure, DeTemple has amassed quite a list of allegedly disqualifying conflicts. But an observer, cognizant of all relevant information, would know that these multiple contentions not only lack a factual basis demonstrating impropriety, but also fail to create even the appearance of bias.

United States v. DeTemple, 162 F.3d 279, 286-287 (4th Cir. 1998).

Judges are allowed to participate in civic activities where they are not indicating their predisposition to rule in a case. Washington Judicial Ethic's Advisory Committee recognizes that judges are called upon to participate in civic activities and they can still remain impartial in a case.

In the Judicial Ethics Advisory Committee Opinion 96-16, the Committee agreed that a judge may participate in remembrance ceremonies to honor victims of domestic violence. That ceremony was to raise awareness of the issue of domestic violence.

The Committee believed that a judge was authorized to attend the ceremony and allowed to speak at the ceremony, provided the judge did not let his or her mannerisms, actions or speech during the event as to cast doubt on his impartiality.

In the present case, there is no genuine dispute that the funeral of Deputy Crawford was a large public event. As outlined in the Opinion from Judge Harris, the matter was extensively covered in the news, on television and on radio. The freeways of Clark County and Portland,

Oregon, were closed during a funeral procession which extended for a great distance as police, sheriff, fire, paramedics, probation officers and others progressed to the services in Portland. Judge Harris rode in a car to the service. He was appearing solely in his role as a representative of the elected judges of Clark County, and indeed as the most senior judge in Washington State. He did not speak, he did not discuss the case with anyone and no one sought to discuss the matter with him. Judge Harris did not speak to the Crawford family at the funeral and does not recall ever speaking to Sergeant Crawford before.

By applying the proper standard, that is, would a reasonable person with knowledge of all of the circumstances reasonably question the judge's impartiality, it is clear that Judge Harris did not give cause to be recused from the case. He attended a public funeral as an elected official, not as a personal friend of Sergeant Crawford or his family. His role as an elected representative at a public event, without far more, is not sufficient for him to be removed from the case. His role fell far short of that of DeTemple, where the judge had previously represented the victims, or Cherry, where the judge had a personal relationship with a witness.

Using the Washington standard for recusal of trial judges, that is, the abuse of discretion standard, *supra*, the appellant does not present an argument that the trial judge abused its discretion by remaining in the

case. The Standard for abuse of discretion is such that an abuse of discretion occurs only “when no reasonable judge would have reached the same conclusion.” Sofie v. Fibreboard Corp., 112 Wn.2d 636, 667, 771 P.2d 711, 780 P.2d 260 (1989). State v. Pete, 152 Wn.2d 546, 552, 98 P.3d 803 (2004); see also State v. Woods, 143 Wn.2d 561, 595-597, 23 P.3d 1046 (2001); State v. Strauss, 119 Wn.2d 401, 417, 832 P.2d 78 (1992); State v. Ohlson, No. 78238-5, 2007 Wash. LEXIS 791 (October 17, 2007).

In the instant case, the lack of abuse of discretion is evident not only from the true facts, but from the fact that another reasonable judge, this time sitting as Commissioner for Division II of the Court of Appeals, has already heard this issue and determined that recusal would not have been required and that Judge Harris did not abuse his discretion by remaining in the case.

The refusal of Judge Harris to recuse himself from the matter had previously been subject to a Motion for Discretionary Review at the Court of Appeals under Court of Appeals Number 33849-1-II. These same facts have been presented previously in conjunction with the motion. After full review, the Court of Appeals Commissioner held no abuse of discretion occurred by the trial court’s denial of the request to recuse himself.

Thus, it is apparent that at least one other reasonable judge would not have recused himself given the full facts of the matter. Accordingly, no abuse of discretion occurred and the trial judge did not commit error by remaining in the case.

III. RESPONSE TO ASSIGNMENT OF ERROR NO. 2

The second assignment of error brought by the defendant is a claim that the court unreasonably restricted the defense from cross-examining one of the police officers. Specifically, the claim is that he was denied the right to adequate cross-examination of Vancouver Police Corporal Duane Boynton as it related to Corporal Boynton seeking professional help to deal with the trauma of the death of Sergeant Crawford. The defense attorney argued that Corporal Boynton was a key witness and the affects of the trauma he experienced had an impact on his ability to observe and recall and may be relevant to his credibility as a witness.

On March 9, 2006, the defense filed a Motion to Direct Police Witnesses to Discuss “Peer Support” Counseling (CP 100) and a Motion to Compel Production of Psychological/Counseling Records of Corporal Duane Boynton (CP 101). Concerning the Motion to Direct Police Witnesses to Discuss “Peer Support” Counseling, the defense attorney at trial indicated that statements given in these counseling sessions were not privileged and therefore discoverable by the defendant. Concerning the

Motion to Compel Production of Psychological/Counseling Records of Corporal Duane Boynton, the defense attorney maintained "it is submitted that the trauma he suffered has caused Corporal Boynton's memory to be affected and the defense should be allowed to inquire as to not only how his memory has been affected, but also how his memory and testimony on the stand has been affected." (CP 101, page 1).

After discussion of this matter, Judge Harris entered a Memorandum of Opinion Order (CP 126) which was filed on May 2, 2006. In that Memorandum of Opinion, Judge Harris determined that he could not really tell the nature of the contacts between Corporal Boynton and a therapist and therefore was asking for in-camera review of the various notes and documents. He indicated that after review of those notes, the court would then apprise the parties as to what would be allowed.

After that review, the court substantially limited the defense attorneys as to what they could do at the time of trial concerning these records. The court determined that Corporal Boynton could assert the psychologist-client privilege on cross-examination. (2 RP 235; 3 RP 415). Further, the court limited the answers to whether or not he had seen a psychologist but would not permit the defense to elicit the name of the treatment provider or whether or not the expert had arrived at some type of

diagnosis. (5 RP 1034-1035, 1041). The trial court further indicated that the ruling precluding the defense from exploring this information would be part of sealed documents that would be sealed for the Court of Appeals and made available for them.

Although the defense claims that there is no privilege, in fact, there is one. RCW 5.60.060(6)(a) provides as follows:

A peer support group counselor shall not, without consent of the law enforcement officer making the communication, be compelled to testify about any communication made to the counselor by the officer while receiving counseling. The counselor must be designated as such by the sheriff, police chief, or chief of the Washington State Patrol, prior to the incident that results in counseling. The privilege only applies when the communication was made to the counselor while acting in his or her capacity as a peer support group counselor. The privilege does not apply if the counselor was an initial responding officer, a witness, or a party to the incident which prompted the delivery of peer support group counseling services to the law enforcement officer.

This statute was enacted in 1995 and added to the list of other long recognized privileges against testifying, including the husband-wife, attorney-client, clergy-penitent and physician-patient privileges.

The Senate Bill Report on HB 1425, which became enacted as RCW 5.60.060(6), clearly states the basis for the legislation:

Some law enforcement agencies have peer support group counselors who counsel officers who have been involved in a traumatic incident while on duty, such as a shooting. Law enforcement has concerns that the lack of a privilege

protecting communications between peer support group counselors and law enforcement officers may discourage officers from full participation in these programs.

(March 16, 1995, Senate Bill Report, HB 1425, Page 1)

Although the State is unaware of the identity of the psychologist seen by Officer Boynton, statements to the psychologist are similarly protected and privileged. RCW 18.83.110 provides that the confidential communications between a patient and psychologist are confidential to the same extent as those of an attorney and client.

The trial court in our situation was being extremely generous to the defense by ordering an in-camera review based on the limited nature of the allegations supplied in the defense motions. There was absolutely nothing to support the claim by the defense that Corporal Boynton's ability to recall or observe had in some way been affected by the events that evening to such an extent that he could not recall accurately what he had seen and done. Nevertheless, the trial court allowed the gathering of the documentation and conducted an in-camera review. It is obvious from the results of the in-camera review that there was nothing there to support the allegations made by the defense. Even then, the trial court allowed certain questions to be asked but extremely limited in nature and scope.

The discovery of these privileged documents is very similar to the privilege as it relates to medical records dealing with the physician-patient

privilege which is codified in RCW 5.60.060(4). Discovery of medical records is neither automatic nor absolute. Medical or hospital records that contain communications from a patient to a physician are privileged pursuant to the above-noted codification. State v. Mines, 35 Wn. App. 932, 937-938, 671 P.2d 273 (1983). The privilege is not absolute. Before allowing discovery of health care records in a criminal case, the court must engage in a careful balancing of the benefits of the privilege against the public interest in disclosure of the facts contained therein. State v. Smith, 84 Wn. App. 813, 820, 929 P.2d 1191 (1997). The scope of discovery of these privileged records is a matter within the sound discretion of the trial court. Mines, 35 Wn. App. at 938.

An in-camera review is a proper mechanism for the trial court to determine whether discovery of privileged records is warranted. Mines, 35 Wn. App. at 938-939. However, more than a bare request for medical records is needed to warrant an in-camera review. A criminal defendant must make a particularized showing that the records are likely to contain evidence material to the defense. State v. Kalakosky, 121 Wn.2d 525, 550, 852 P.2d 1064 (1993); State v. Diemel, 81 Wn.2d 464, 914 P.2d 779 (1996). Evidence is material if there is a reasonable probability that the evidence would change the outcome of the proceedings. State v. Knutson, 121 Wn.2d 766, 772, 854 P.2d 617 (1993).

The mechanism for in-camera review of proceedings is found at CrR 4.7(h) which provides as follows:

(6) In Camera Proceedings – Upon request of any person, the court may permit any showing of cause for denial or regulation of disclosure, or portion of such showing, to be made in camera. A record shall be made of such proceedings. If the court enters an order granting relief following a showing in camera, the entire record of such showing shall be sealed and preserved in the records of the court, to be made available to the appellate court in the event of an appeal.

Use of the in-camera review as it relates to dependency files and counseling records has recently been addressed in State v. Gregory, 158 Wn.2d 759, 147 P.3d 1201 (2006). The court in Gregory felt it incumbent on the defense to establish “a basis for his claim that it (the records) contains material evidence.” “There must be a plausible showing that the information will be both material and favorable to the defense. . . . Evidence is material only if there is a reasonable probability that it would impact the outcome of the trial. . . . The decision whether to conduct an in-camera review of privileged records is subject to abuse of discretion review.” Gregory, 158 Wn.2d at 791-792.

It has long been the rule in the State of Washington that a trial court retains broad discretion regarding the admission or exclusion of evidence. State v. Swan, 114 Wn.2d 613, 658, 790 P.2d 610 (1990). Further, the appellate courts do not reverse a trial court’s rulings on the

scope of cross-examination absent a manifest abuse of discretion. State v. Campbell, 103 Wn.2d 1, 20, 691 P.2d 929 (1984). This is not inconsistent with the other firmly established rule that wide latitude is afforded defendants in criminal trials to explore fundamental elements such as motive, bias, and credibility of the State's key witnesses. State v. Darden, 145 Wn.2d 612, 619, 41 P.3d 1189 (2002). Thus, the trial court, in our situation, properly did an in-camera review of the documents and determined that the privileged matter could only be addressed in a very limited fashion. The trial court reviewed the documents and limited the nature and scope of cross-examination. This is consistent with the rule of cross-examination. The scope of cross-examination is within the providence of the trial court and that the trial court is granted broad discretion regarding the admission or exclusion of evidence. Swan, 114 Wn.2d at 658. An abuse of discretion occurs only when the trial court bases its decision on untenable grounds or reasons. State v. Powell, 126 Wn.2d 244, 258, 893 P.2d 615 (1995). The State submits that there has been absolutely no showing by the defense that the trial court abused its discretion or based any decisions limiting the cross-examination of the Corporal on some basis other than sound logic after review of the documentation that had been supplied.

This entire discussion is similar to a discussion which was held in State v. Blackwell, 120 Wn.2d 822, 845 P.2d 1017 (1993). In the Blackwell case, defendants were arrested by two police officers and charged with assault and trespass. Defense counsel requested personnel files of the officers based upon a belief that the arrests may have been racially motivated. The State was unable to obtain the files because they were in the possession of the police department and the trial court dismissed the State's case. The Supreme Court reversed and remanded this matter back holding that the trial court abused its discretion in ordering discovery of such files where the defense had failed to substantiate with even an affidavit its claim that the documents contained information material to the defense. The discussion was as follows:

As we stated in Mak (State v. Mak, 105 Wn.2d 692, 704, 718 P.2d 407, cert. denied, 479 U.S. 995 (1986))

"The mere possibility that an item of undisclosed evidence might have helped the defense or might have affected the outcome of the trial . . . does not establish 'materiality' in the constitutional sense." Mak, at 704-05; accord, State v. Bebb, 108 Wn.2d 515, 523, 740 P.2d 829 (1987).

Assuming arguendo that the documents were in the possession and control of the prosecutor, we review the record to determine whether the defendants established that the requested documents contained information material to their defense.

The trial court ordered the prosecutor to produce the officers' service records based solely on defense counsel

LaDue's suggestion that the arrests of Blackwell and Sabb might have been racially motivated. Neither defense counsel established any factual predicate to demonstrate that the officers' service records contained information material to their clients' defense to this particular assault charge. No misconduct by either officer has been alleged. Although Ms. LaDue believed that Officer Berger is racist, she offered no affidavit, no statement that indicated he acted as such or was so motivated during this incident at the Tacoma church. Defense counsel offered nothing regarding Officer Durocher's bias -- other than the allegation that since he was Berger's partner there might be a "close association of behavior". At a minimum, defense counsel should have provided an affidavit or representation to the court asserting the factual basis for believing the arrest of their clients was racially motivated.

Defense counsel instead argued that the service records/personnel files are material because they could lead to exculpatory evidence of improper police conduct and/or arrests based on race and excessive force that might rebut the officers' claim of proper police conduct. This reasoning was persuasive to the trial court, which apparently relied on the broad discovery language of CR 26(b) as a basis for its order. We reject this rationale. See State v. Gonzalez, 110 Wn.2d 738, 744-45, 757 P.2d 925 (1988) (CR 26 is inapplicable to criminal cases).

Defense counsels' broad, unsupported claim that the police officers' personnel files may lead to material information does not justify automatic disclosure of the documents. See State v. Kaszubinski, 177 N.J. Super. 136, 140-41, 425 A.2d 711 (1980) (defendant not entitled to even an in camera inspection of police officer's personnel file without a showing that the file contained material information that might bear on the officer's credibility); People v. Gissendanner, 48 N.Y.2d 543, 399 N.E.2d 924, 423 N.Y.S.2d 893 (1979) (defendant made no factual showing that it was reasonably likely the police officer's personnel file contained relevant and material information); People v. Condley, 69 Cal. App. 3d 999, 138 Cal. Rptr. 515

(defendant made no showing of good cause or plausible justification for inspection), cert. denied, 434 U.S. 988 (1977); State ex rel. Johnson v. Schwartz, 26 Or. App. 279, 552 P.2d 571 (1976) (that defendant's attorney "heard" of another similar incident is not a sufficient showing); State v. Sagner, 18 Or. App. 464, 525 P.2d 1073 (1974) (whether the information exists is purely conjecture).

A defendant must advance some factual predicate which makes it reasonably likely the requested file will bear information material to his or her defense. A bare assertion that a document "might" bear such fruit is insufficient. Our review of the record indicates that no such showing of materiality was made in this case.

State v. Blackwell, 120 Wn.2d 822, 828-829, 845 P.2d 1017 (1993).

The State submits that there has been absolutely no showing of any abuse of discretion by the trial court in limiting the nature and use of the information concerning peer group support counseling under RCW 5.60.060(6), or his medical-psychiatric privilege under RCW 5.60.060 and 18.83.110.

IV. RESPONSE TO ASSIGNMENT OF ERROR NO. 3

A. The trial court properly excluded evidence related to eyewitness identification.

The admission or exclusion of expert testimony is a matter left to the trial court's discretion. ER 702 states:

If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise.

For expert testimony to be admissible under ER 702, (1) the witness must qualify as an expert, (2) the expert's theory must be based upon an explanatory theory generally accepted in the scientific community, and (3) the expert testimony would be helpful to the trier of fact. State v. Allery, 101 Wn.2d 591, 596, 682 P.2d 312 (1984); ER 702.

Where the jurors are as competent as an expert to reach a decision on the facts presented without an expert's opinion, the expert's opinion is not helpful because it "does not offer the jurors any insight that they would not otherwise have." 5A K. Tegland, Wash. Prac., Evidence sec. 292, at 397 (3rd ed.1989), citing State v. Smissaert, 41 Wn. App. 813, 815 706 P.2d 647 (1985) ("If the issue involves a matter of common knowledge about which inexperienced persons are capable of forming a correct judgment, there is no need for expert testimony.").

Where, however, expert testimony on an issue is counterintuitive and difficult for the average juror to understand, the testimony may be admitted on the ground that it is helpful to the trier of fact. State v. Ciskie, 110 Wn.2d 263, 271, 751 P.2d 1165 (1988) (finding it counterintuitive and difficult for average juror to understand why a battered woman remains in an abusive relationship rather than leave the batterer).

The Appellate Courts have routinely dealt with the admissibility of expert testimony on the reliability of eyewitness identifications¹. Each case must be evaluated by the factors it presents. Excluding expert testimony on eyewitness identification for the reason that it would not be helpful to the trier of fact is a proper exercise of discretion “in the great majority of cases.” State v. Johnson, 49 Wn. App. 432, 439, 743 P.2d 290 (1987) quoting from State v. Chapple, 135 Ariz. 281, 660 P.2d 1208, 1220 (1983). Admissibility of evidence lies within the sound discretion of the

¹ Trial court exclusion of expert testimony on eyewitness identification upheld: State v. Coe, 109 Wn.2d 832, 750 P.2d 208 (1988) (rape case); State v. Mak, 105 Wn.2d 692, 718 P.2d 407, cert. denied, 479 U.S. 995, 93 L. Ed. 2d 599, 107 S. Ct. 599 (1986); State v. Guloy, 104 Wn.2d 412, 705 P.2d 1182 (1985), cert. denied, 475 U.S. 1020, 89 L. Ed. 2d 321, 106 S. Ct. 1208 (1986), State v. Laureano, 101 Wn.2d 745, 682 P.2d 889 (1984), overruled on other grounds by State v. Brown, 111 Wn.2d 124, 761 P.2d 568 (1988); State v. Barker, 103 Wn. App. 893, 14 P.3d 863 (2000), review denied, 143 Wn.2d 1021 (2001); State v. Hernandez, 58 Wn. App. 793, 794 P.2d 1327 (Division II 1990), review denied, 117 Wn.2d 1011 (1991); State v. Ward, 55 Wn. App. 382, 777 P.2d 1066, review denied, 113 Wn.2d 1029 (1989); State v. Briggs, 55 Wn. App. 44, 776 P.2d 1347 (1989); State v. Moon, 48 Wn. App. 647, 739 P.2d 1157, review denied, 108 Wn.2d 1029 (1987); State v. Jordan, 39 Wn. App. 530, 694 P.2d 47 (1985), review denied, 106 Wn.2d 1011 (1986), cert. denied, 479 U.S. 1039, 93 L. Ed. 2d 847, 107 S. Ct. 895 (1997); State v. Barry, 25 Wn. App. 751, 611 P.2d 1262 (1980); State v. Brown, 17 Wn. App. 587, 564 P.2d 342 (1977). Trial court refusal to authorize money for an indigent defendant who wanted an expert witness on eyewitness identification upheld: State v. O'Dell, 70 Wn. App. 560, 854 P.2d 1096 (1993), cert. denied, 510 U.S. 1201, 127 L. Ed. 2d 666, 114 S. Ct. 1316 (1994); State v. Hernandez, 54 Wn. App. 323, 773 P.2d 857 (1989), sentence reversed by State v. Batista, 116 Wn.2d 777, 808 P.2d 1141 (1991). Trial court admitted expert testimony on eyewitness identification with limitations on subject matter: State v. Bell, 57 Wn. App. 447, 788 P.2d 1109 (1993); State v. Johnson, 49 Wn. App. 432, 743 P.2d 290 (1987), review denied, 110 Wn.2d 1005 (1988); State v. Cook, 31 Wn. App. 165, 639 P.2d 863, review denied, 97 Wn.2d 1018 (1982). Trial court exclusion of expert testimony on eyewitness identification reversed: State v. Taylor, 50 Wn. App. 481, 749 P.2d 181 (1988); State v. Moon, 45 Wn. App. 692, 726 P.2d 1263 (1986) (but see Moon, supra (48 Wn. App. 647) (exclusion of expert testimony at retrial upheld).

trial court and will not be reversed absent an abuse of that discretion. State v. Ellis, 136 Wn.2d 498, 523, 963 P.2d 843 (1998). Where the trial court's reasons for admitting or excluding opinion evidence are "fairly debatable," exercise of that discretion will not be reversed on appeal. State v. Ward, 55 Wn. App. 382, 386, 777 P.2d 1066 (1989).

The courts in Washington have excluded testimony of Mr. Loftus related to eyewitness testimony before. In State v. Cheatam, 150 Wn.2d 626, 81 P.3d 830 (2003), the Supreme Court held that the trial court properly excluded Mr. Loftus' testimony, which was along the same lines as proposed in the present case. In that case, the defense sought to have Loftus testify about the effect of stress and violence, weapon focus, lighting and cross-racial identification on perception and memory.

At least as far as the effect of stress, violence and lighting conditions, these are the same subjects which Loftus would have testified to in this case. Such testimony was rejected not only by the Cheatam court, but similar testimony was also rejected in the case of State v. Hernandez, 58 Wn. App. 793, 794 P.2d 1327 (1990).

In Cheatam, the Supreme Court stated that as to lighting conditions, "the testimony offered on this point was within the common understanding of the jury."

Regarding the weapon, the court indicated that that witness did not focus on a weapon, and “Loftus’ testimony would have provided little help to the jury on that point.” As to other evidence such as the facial appearance of the suspect and whether or not he had facial hair, the court stated that whether Loftus’ testimony was even relevant and helpful “is debatable.”

Mr. Loftus proposed to educate the jury on how witness motivation, learning new evidence, and/or inferring information may consciously or unconsciously alter a witness’ memory. He believes that this is beyond the common sense of jurors. This is preposterous.

It is common sense that if a witness has a particular motivation for testifying that the motivation can and sometimes does color and shape their testimony. Any and all motivations may and should be brought out during testimony, so the jury may evaluate each witness’ credibility.

It is further common sense that witnesses’ memories may be altered by suggestive questions that interject new information or infer new information. This is the driving principle behind the requirement of using non-leading questions during direct examination. Everyone knows that memories of children as well as adults can be reshaped if they are fed new information or suggestions. This theory is not novel and does not require a Ph.D to explain. To even suggest that jurors do not understand these

concepts is beyond comprehension and would certainly be insulting to the average juror.

In addition, the Cheatam court went further than just upholding the exclusion of Mr. Loftus' testimony. It recognized that many states flat reject such proffered testimony, but others allow it, subject to an abuse of discretion and on a case by case basis.

After reviewing the history of such evidence, the Cheatam court reaffirmed the rule from State v. Coe, 109 Wn.2d 832, 750 P.2d 208 (1980),² that the admissibility of expert testimony relating to eye witness testimony is within the discretion of the trial court and will be reversed only for an abuse of discretion. "Discretion is abused only when no reasonable person would have decided the issue as the trial court did." State v. Russell, 125 Wn.2d 24, 882 P.2d 747 (1994); State v. Lord, 117 Wn.2d 829, 822 P.2d 177 (1991).

In Cheatam, the Court held that the proper test is whether or not the expert testimony would assist the jury in assessing the reliability of eye witness testimony. Mr. Loftus was prepared to testify that stress and violence render memory less accurate. The court found that this testimony may or may not be helpful depending on the facts of the case for which it

² The Coe case involved proposed testimony of Elizabeth Loftus, rather than that of Geoffrey Loftus.

is proffered. The Court concluded, “whether the expert testimony proffered here was both relevant and helpful is debatable and, therefore, hold that the trial court’s decision not to admit Dr. Loftus’ testimony . . . was a tenable exercise of discretion.” Cheatam, 150 Wn.2d at 652 (2003).

In the present case, this was not a case of one or two witnesses testifying to their observations of the defendant or their memory of the incident. This was testimony of many witnesses testifying to the same thing. They saw the Defendant accelerate his truck and turn into the parked patrol car and kill Sergeant Crawford. The common sense approach that the jury can understand the differences in observations from the many witnesses was appropriate. As such, the court did not abuse its discretion in excluding testimony of Geoffery Loftus.

- B. The Defense failed to preserve any error by failing to make an offer of proof as to Loftus’ qualifications or that his theories are generally accepted to the scientific community.

On appeal, the Defendant seeks reversal based on the failure of the trial court to allow Mr. Loftus to testify as an expert witness in the case. Defendant asserts there was no dispute as to whether Mr. Loftus is actually a qualified expert. Quite the contrary. The State did not concede Loftus was an expert or that he had the background or training necessary to be qualified as an expert. Rather, the State argued that expert testimony was not necessary for the issues. To preserve the matter for appeal, the

defense should have made an offer of proof under ER 103 to demonstrate not only that the expert testimony was necessary, but that Mr. Loftus actually possessed the expertise in the subject. The failure to preserve the issue for appeal precludes review. See RAP 2.5.

[I]t is the duty of a party to make clear to the trial court what it is that he offers in proof, and the reason why he deems the offer admissible over the objections of his opponent, so that the court may make an informed ruling. If the party fails to so aid the trial court, then the appellate court will not make assumptions in favor of the rejected offer. (Citing cases.) Tomlinson v. Bean, 26 Wn.2d 354, 361, 173 P.2d 972 (1964).

Smith v. Seibly, 72 Wn.2d 16, 18, 431 P.2d 719 (1967)

The State recognizes that the requirement for a formal offer of proof has been relaxed somewhat, see generally, State v. Ray, 116 Wn.2d 531, 806 P.2d 1220 (1991), but even the relaxed standards cannot be met when there is nothing put forth by the party seeking review to support the proposition.

An offer of proof serves three purposes: it informs the court of the legal theory under which the offered evidence is admissible; it informs the judge of the specific nature of the offered evidence so that the court can assess its admissibility; and it creates a record adequate for review. Mad River Orchard Co. v. Krack Corp., 89 Wn.2d 535, 537, 573 P.2d 796 (1978); State v. Negrin, 37 Wn. App. 516, 525, 681 P.2d 1287, review denied, 102 Wn.2d 1002 (1984). See also State v. Williams, 34 Wn.2d 367, 384, 386-87, 209 P.2d 331 (1949). The offer of proof allows the trial court to properly exercise its discretion when reviewing, "revaluating [sic]", and, if necessary, revising its

rulings. Cameron v. Boone, 62 Wn.2d 420, 425, 383 P.2d 277 (1963). It is the duty of a party offering evidence to make clear to the trial court what it is that he offers in proof, and the reason why he deems the offer admissible over the objections of his opponent, so that the court may make an informed ruling . . . Mad River Orchard Co. v. Krack Corp., 89 Wn.2d 535, 537, 573 P.2d 796 (1978) (quoting Tomlinson v. Bean, 26 Wn.2d 354, 361, 173 P.2d 972 (1946)). An offer of proof is not required, however, if the substance of the excluded evidence is apparent from the record. See Williams, at 384, 386; ER 103(a)(2). Federal courts, interpreting identical language in Fed. R. Evid. 103, have also concluded that if the substance of the excluded evidence is apparent either from the questions asked, the context in which the questions are asked, "or otherwise", then a formal offer of proof is not necessary. United States v. Nevitt, 563 F.2d 406, 409 (9th Cir. 1977); United States v. Sweiss, 814 F.2d 1208, 1211 (7th Cir. 1987); United States v. Gonzalez, 700 F.2d 196, 201 (5th Cir. 1983).

State v. Ray, 116 Wn.2d 531, 538-539, 806 P.2d 1220 (1991)

The defense did not put forth any offer of proof, or put forth other information which suggested that if expert testimony was required, that Mr. Loftus *actually* had the qualifications necessary to testify about the *specifics* in this case. Indeed, the State pointed out that there were numerous appellate cases in Washington where Loftus' proposed testimony was held inadmissible. See Memorandum in Support of Motion to Exclude Testimony of Geoffery Loftus, page 3 at footnote, CP 120.

Further, it is important to note that Mr. Loftus did not do anything to relate his proffered testimony to the facts of the case. Loftus' testimony would have included a discussion of, for example, the effects of lighting

conditions on a person's ability to recall events. While it is easily debatable whether this is a "memory" issue, or simply a reflection on the ability of the person to actually see the incident, the real issue is that Loftus made no effort to examine the conditions at the time of the incident so he could relate his testimony to the facts of the case. Loftus further would have testified about observation periods and effect of stress on a person's ability to recall the incident, yet he made no examination to determine the stress levels, or length of time the various witnesses had to see it.

Thus, it is the State's position that the Defendant has failed to preserve issues related to the admissibility of Loftus' testimony in this specific case both because it failed to make an offer of proof as to his qualifications and it failed to demonstrate that even if qualified as an expert on memory that his expertise was relevant to the facts of the case.

V. CONCLUSION

Clark County Superior Court Judge Robert Harris did not improperly decline to recuse himself during the trial of the Defendant Robin Schreiber. During that trial, Judge Harris was overly generous towards the Defendant in allowing the defendant to subpoena records of Officer Boynton for an in-camera review. After reviewing those records, Judge Harris appropriately exercised his discretion to limit testimony to

relevant matters pertaining to Officer Boynton's observations and counseling.

Finally, Judge Harris properly excluded testimony of Geoffery Loftus as there was no showing he was an expert in the field. Further, any such testimony would have been speculative within common sense of the jury and not genuinely expert type testimony.

Therefore, the trial court should be affirmed in all respects.

DATED this 11 day of January, 2008.

Respectfully submitted:

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