

NO. 35844-1

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**COURT OF APPEALS, DIVISION II  
STATE OF WASHINGTON**

STATE OF WASHINGTON, RESPONDENT

v.

VICTOR E. MARTINEZ, APPELLANT

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COURT OF APPEALS  
DIVISION II  
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STATE OF WASHINGTON  
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Appeal from the Superior Court of Pierce County  
The Honorable Beverly G. Grant

No. 06-1-01515-2

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**BRIEF OF RESPONDENT**

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A. ISSUES PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR.

1. Was there sufficient evidence to convict defendant of second degree murder where the State produced evidence that defendant and victim were arguing for some time before the shooting; defendant threatened to kill the victim during the argument; defendant armed himself with a gun and shot the victim from a distance of less than one inch; and defendant admitted to police he had shot the victim?

2. Did the trial court properly exclude defendant's statements to the paramedics where defendant cannot show the statements fall under an exception to the hearsay rule?

B. STATEMENT OF THE CASE.

1. Procedure

On April 4, 2006, the State charged Victor Elroy Martinez with second degree intentional murder with a firearm enhancement. CP 1. On November 6, 2006, the State filed an amended information adding a count

of second degree felony murder with a firearm enhancement. CP 4-5; 1RP 63-64.<sup>1</sup>

The parties appeared for trial before the Honorable Beverly G. Grant on November 6, 2006. 1RP 4. A 3.5 hearing was held, and the court found that all of defendant's statements were admissible. 1RP 57. On December 6, 2006, a jury convicted defendant as charged. CP 76-79; 8RP 787-88. On January 26, 2007, a sentencing hearing was held. SRP 4-42. The court sentenced defendant to 220 months for second degree intentional murder, and 60 months flat time for the firearm enhancement. CP 89-101; SRP 39. The sentencing court vacated and dismissed defendant's second degree felony murder. SRP 23-25, 41-42.

This timely appeal followed.

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<sup>1</sup> The verbatim report of proceedings consists of 10 volumes, which will be referred to as follows:

the eight chronologically paginated volumes are referred to as 1RP, 2RP, 3RP, 4RP, 5RP, 6RP, 7RP, and 8RP. There are two volume 8 of 8 of the verbatim record of proceedings; however, the one dated December 6, 2006, appears to be a duplicate of volume 1 of 8. The sentencing on January 26, 2007, is referred to as SRP.

## 2. Facts

On April 2, 2006, Desaundra Dixon's<sup>2</sup> son, Bell came home from a basketball tournament. 2RP 16. He went to his mother's and her boyfriend's room to show them the trophy. 2RP 16. Defendant is Ms. Dixon's boyfriend. 2RP 14. After showing them the trophy, Bell went to his room and fell asleep. 2RP 17. Bell woke up around midnight and heard his mother and defendant arguing. 2RP 17. He could hear his mother yelling at defendant and defendant yelling back. 2RP 18. The argument stopped for a while and Bell went upstairs and saw his mother sitting on the bed crying. 2RP 18. After Bell went back downstairs, the argument began again and this time is sounded like a physical altercation. 2RP 19. Bell heard his mother and defendant yelling at each other and heard "bumping on the walls and the floor and stuff." 2RP 20. Bell went outside and called up to his mother through her open bedroom window. 2RP 20, 21. Ms. Dixon told Bell to go back inside. 2RP 20. Before going back inside the house, Bell heard defendant tell Ms. Dixon to "...shut up bitch, I will kill you or something like that...." 2RP 21. The argument continued for 15 or 20 minutes before Bell heard somebody fall to the

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<sup>2</sup> Throughout the VRP the victim's name is spelled "Deshondra", however, the charging document spells her name "Desaundra". 2RP 13; CP 1, 4-5. I have used the spelling in the charging document in my brief. It should also be noted, the victim went by the name "Dee Dee" and is referred to as such in the VRP. 2RP 14

ground. 2RP 22. Defendant came downstairs with a gun in his hand and pointed it at Bell for a few seconds. 2RP 27. Defendant gave Bell some money and told him to take care of the kids. 2RP 46. Bell heard sirens and people came in the house. 2RP 27. Defendant walked back upstairs and sat on the stairs. 2RP 27.

Detarraice Dixon, who was 12 years old at the time of the trial, is also Ms. Dixon's son. 2RP 51. On April 2, 2006, Detarraice Dixon was sleeping when he was awakened by the sounds of an argument between his mother and defendant. 2RP 54. Detarraice Dixon wanted to go upstairs where his mother was, but Bell told him not to. 2RP 54. Detarraice went into the living room and fell back asleep on the couch. 2RP 54-55. Defendant woke Detarraice up and told him to go into another room. 2RP 55. Defendant seemed mad and aggressive and Detarraice noted that defendant was wet. 2RP 55, 58, 59. After a while, the firefighters came. 2RP 56.

Firefighter Matthew Carlisle and Lieutenant William Schleicher were dispatched at 2:10 am on April 3, 2006, to Ms. Dixon's and defendant's residence for a shortness of breath call. 2RP 63, 92. They arrived on the scene at 2:15 am where defendant answered the door and directed them upstairs. 2RP 63, 92, 96. Carlisle noticed blood splatter on the wall and then noticed the blood on Ms. Dixon's arms, chest and face. 2RP 63, 66. Carlisle checked Ms. Dixon's pulse, but didn't get one. 2RP 66. Ms. Dixon's chest was not rising and falling and she had a wound

consistent with a gunshot wound in her chest. 2RP 66-67. Ms. Dixon was pronounced dead at the scene. 2RP 71.

Carlisle noted that defendant's demeanor was unusual. 2RP 66. Instead of being frantic, defendant was very calm and quiet. 2RP 63. Lieutenant Schleicher noted defendant was very timid, almost secretive when he opened the door. 2RP 98, 99.

Denise Severson testified that a 911 hang up call was made from 253-476-1049 at 2:08 am on April 3, 2006. 2RP 140. This telephone call originated from defendant's and Ms. Dixon's bedroom. 2RP 49-50. Communications immediately called back and someone asked for an ambulance. 2RP 141. A second call came in from 253-476-1049 asking for an ambulance. 2RP 141. Police were dispatched to the residence at 2:19 am on April 3, 2006, at the paramedic's request. 2RP 142.

Officer Robert Denually was dispatched to a shooting slightly after 2:00 am on April 3, 2006. 2RP 127-28. When Officer Denually arrived, defendant was seated at the top of the stairs with blood on his hands, arms, and pants. 2RP 130, 131. Officer Denually detained defendant and placed him in the back of his patrol car. 2RP 131-32. Officer Denually testified that defendant started crying on the way to jail. 2RP 135.

Detective Jerry Reidburn executed a search warrant on defendant's and Ms. Dixon's residence. 2RP 153. Detective Reidburn located an empty holster in one of the upstairs' rooms. 2RP 173. He also located a silver .380 handgun hidden underneath some insulation in the attic crawl

space. 2RP 175-76, 184, 276. The gun appeared to fit inside the empty holster. 2RP 183. A single bullet was located in one of the upstairs' bedroom wall and a bullet casing was found inside a lower dresser drawer. 2RP 176-77, 179, 180, 279, 283.

Terry Franklin, a forensic scientist at the Washington State Patrol Crime Laboratory, examined evidence seized during the execution of the search warrant. 2RP 348, 354-55. Franklin performed function and reliability tests on the silver handgun. 6RP 357-58. The gun was a Jennings Brico .380 semiautomatic pistol. 2RP 354, 357-58. Franklin determined that a person would have to exert 6.25 pounds of pressure on the trigger to fire the gun. 6RP 361, 366. The trigger pull on the handgun was average: not light and not heavy. 6RP 366. Franklin fired the gun 11 times and beat the gun 15 times with three different hammers and did not find anything wrong with the gun. 6RP 427, 437. He was unable to make the gun fire without pulling the trigger. 6RP 437.

Franklin examined the bullet seized from the scene to determine if it was fired from the seized Jennings .380 semiautomatic. 6RP 380. Franklin determined the bullet recovered from the wall came from the silver Jennings semiautomatic handgun that was discovered hidden in the attic. 2RP 175-76, 184, 276; 6RP 381.

Finally, Franklin examined the T-shirt that was recovered from the scene. He observed an entrance and exit hole in the shirt, and determined that Ms. Dixon was wearing the T-shirt when she was shot. 6RP 409-10.

Based upon the dense pattern of soot, the tearing of the fabric, the lack of unburned gunpowder particles, he determined that the shot was a contact or near contact shot. 6RP 399. In a contact or near contact shot, the gun was less than one inch away when it was fired. 6RP 401, 434. Franklin noted the collar to the shirt was torn and it appeared that the shirt was having some kind of action taken upon it. 6RP 402, 405,406, 430.

Pierce County Medical Examiner Dr. Roberto Ramosa performed an autopsy on Ms. Dixon. 6RP 443-44, 446. The autopsy consisted of both an internal and external examination of Ms. Dixon's body. 6RP 449, 450. Ms. Dixon had a gunshot entrance wound on the front right side of her chest and an exit wound on the left side of her back. 6RP 451, 452, 459, 460. The entrance and exit wounds are pretty level, each approximately 55 inches from the floor. 6RP 469. She also had a superficial cut on the tip of the right third and fourth fingers, a cut on the palm of the right hand, a minor abrasion on the back of the right thumb, and a small bruise on the lower lip. 6RP 451-52. Ms. Dixon sustained these injuries near the time of her death. 6RP 454, 455. Ms. Dixon died from a single gun shot wound to the chest. 6RP 471.

Defendant testified that he and Ms. Dixon had been drinking at a bar on the evening on April 2, 2006. 7RP 545. Defendant told Ms. Dixon that he was going to leave her. 7RP 545. They walked home from the bar. 7RP 546. At the house, they argued as he gathered his clothes. 7RP 550-51, 576. The argument included some pushing and pulling on his

clothes. 7RP 550-51. As he got ready to go, defendant grabbed his gun from under the bed and put it in his pocket. 7RP 549, 550. The gun felt cold to him and he put the gun by Ms. Dixon's chest so she could feel how cold it was. 7RP 550. Ms. Dixon hit the gun away from her and it went off and shot her in the chest. 7RP 550, 552. In the 30 minutes between the time he shot Ms. Dixon and the paramedics arrived, defendant hid the gun in the closet and gave Bell some money. 7RP 615, 616. When the paramedics did arrive, defendant told them someone else had shot Ms. Dixon and had taken off with the gun. 7RP 621, 622. He later told paramedics that he was playing with the gun and it accidentally went off. 7RP 622. Defendant did not tell the paramedics that he was holding the gun to her chest to show her how cold it was. 7RP 662.

When the police arrived and Officer Denully detained defendant, defendant told Officer Denully "shit man I did it" "what else do they need" and "I did it." 7RP 623. During his interview with Detective Devault, defendant said he was playing with the gun when it accidentally fired. 7RP 625.

C. ARGUMENT.

1. THERE WAS SUFFICIENT EVIDENCE TO CONVICT DEFENDANT OF SECOND DEGREE MURDER WHERE THE STATE PRODUCED EVIDENCE THAT DEFENDANT AND VICTIM WERE ARGUING FOR SOME TIME BEFORE THE SHOOTING; DEFENDANT THREATENED TO KILL THE VICTIM DURING THE ARGUMENT; DEFENDANT ARMED HIMSELF WITH A GUN AND SHOT THE VICTIM FROM A DISTANCE OF LESS THAN ONE INCH AWAY; AND DEFENDANT ADMITTED TO POLICE HE HAD SHOT THE VICTIM.

Evidence is sufficient to support a conviction if, when viewed in the light most favorable to the State, it permits a rational trier of fact to find the essential elements of the crime beyond a reasonable doubt. State v. Tilton, 149 Wn.2d 775, 786, 72 P.3d 735 (2003). When a defendant challenges the sufficiency of the evidence in a criminal case, all reasonable inferences from the evidence must be drawn in favor of the State and interpreted most strongly against the defendant. State v. Partin, 88 Wn.2d 899, 906-07, 567 P.2d 1136 (1977). Circumstantial evidence is just as reliable as direct evidence. State v. Delmarter, 94 Wn.2d 634, 638, 618 P.2d 99 (1980). An appellate court defers to the trier of fact regarding issues of conflicting testimony, credibility of witnesses, and the persuasiveness of the evidence. State v. Carmarillo, 115 Wn.2d 60, 71, 794 P.2d 850 (1990), citing State v. Cord, 103 Wn.2d 361, 367, 693 P.2d 81 (1985).

The essential elements of second degree murder are 1) defendant acted with the intent to cause the death of another; 2) that person died as a result of defendant's acts. RCW 9A.32.050(1)(a).

In the present case, the state produced evidence that the defendant and Ms. Dixon were arguing the night of the shooting. 2RP 17, 18, 19, 20, 21, 22, 54; 7RP 550-51, 576. Defendant told Ms. Dixon that he was leaving her and was packing his belongings to leave. 7RP 545, 550-51. During the argument Ms. Dixon's son, Bell, heard defendant tell Ms. Dixon "shut up bitch" "I will kill you" 2RP 21. After about 15 to 20 minutes, Bell heard somebody fall to the ground. 2RP 22. When paramedics arrived on the scene, they discovered that Ms. Dixon had been shot in the chest and had died. 2RP 66-67, 71. Defendant initially told the paramedics that someone else shot Ms. Dixon and then fled with the gun, he later told them that he was playing with the gun when it accidentally went off. 7RP 621, 622.

Defendant testified that after he shot Ms. Dixon, he hid the gun in the attic underneath insulation and gave Bell some money to take care of the kids. 7RP 615, 616.

Franklin, the State's forensic scientist, determined the bullet that killed Ms. Dixon came from the gun defendant had hidden in the attic under the insulation. 2RP 175-76, 184, 276; 6RP 381. Franklin tested the gun to determine if he could make it fire without pulling the trigger. 6RP 437. In doing so, he struck it approximately 15 times with three different

types of hammers. 6RP 427, 437. He was unable to make the gun fire without pulling the trigger. 6RP 437. To fire the gun, a person must exert 6.25 pounds of pressure on the trigger. 6RP 361, 366, 7RP 623.

Defendant told police “shit man, I did it.” “I did it.” When defendant testified, he admitted he intended to hold the gun to Ms. Dixon’s chest. 7RP 550. Defendant admitted he hid the gun after he shot Ms. Dixon and lied to paramedics when they first arrived by telling them someone else shot Ms. Dixon and ran away with the gun. 7RP 615, 616, 621, 622.

Defendant told the jury that he held the gun to Ms. Dixon’s chest to show her how cold the gun was. 7RP 550. The jury clearly disbelieved defendant’s account of the incident.

When the above evidence is viewed in the light most favorable to the State, a reasonable jury could find the essential elements of the second degree intentional murder beyond a reasonable doubt.

Defendant’s sufficiency of the evidence argument is without merit.

- i. There is no evidence to support defendant’s argument that the killing of Ms. Dixon was excusable.

A homicide is excusable when committed by accident or misfortune in doing any lawful act by lawful means, without criminal negligence, or without any unlawful intent. RCW 9A.16.030. The evidence in the present case is that defendant places a loaded gun to his

girlfriend's chest during an argument. 7RP 550. Defendant claims that this is the same gun that accidentally fired when he held it a year ago. 7RP 588,-92. At best, this is evidence that defendant's actions were negligent, and therefore cannot be excusable. In fact, as argued above, defendant's killing of Ms. Dixon was intentional, and the jury's verdict of intentional second degree murder is supported by substantial evidence. Defendant's argument is without merit and must fail.

2. THE TRIAL COURT PROPERLY EXCLUDED  
DEFENDANT'S STATEMENTS TO THE RESPONDING  
PARAMEDICS BECAUSE THE STATEMENTS DID  
NOT FALL UNDER AN EXCEPTION TO THE  
HEARSAY RULE

Hearsay is "a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." ER 801(c). The hearsay rule excludes statements from being admitted as evidence except as specifically provided by the Rule of Evidence, court rules, or statute. ER 802. The theory underlying "the hearsay rule is that the cross examination is the best way to reveal whatever untrustworthiness lies beneath the assertions of a witness." State v. Chapin, 118 Wn.2d 681, 685, 826 P.2d 194 (1992), citing 5 J. Wigmore, Evidence, section 1362, at 3 (1974).

There are numerous exceptions to the hearsay rule, including the excited utterance exception. ER 803(a)(2). The excited utterance exception provides as follows:

(a) Specific Exceptions. The following are not excluded by the hearsay rule, even though the declarant is available as a witness.

...

(2) Excited Utterance. A statement relating to a startling event or condition made while the declarant was under the stress of excitement cause by the event or condition.

ER 803(a)(2). The proponent of excited utterance evidence must satisfy three “closely connected requirements” that (1) a startling event or condition occurred, (2) the declarant made the statement while under the stress of excitement of the startling event or condition, and (3) the statement related to the startling event or condition. State v. Woods, 143 Wn.2d 561, 597, 23 P.3d 1046 (2001); Chapin, 118 Wn.2d at 686.

A trial court’s decision to admit or exclude evidence is reviewed for an abuse of discretion. State v. John Doe, 105 Wn.2d 889, 893, 719 P.2d 554 (1986). A trial court abuses its discretion when its decision is manifestly unreasonable or based upon untenable grounds. State v. Michielli, 132 Wn.2d 229, 240, 937 P.2d 587 (1997).

In State v. Chapin, 118 Wn.2d 681, 683, Chapin was convicted of raping Orval Hillison, a patient in a convalescent home where Chapin worked as a nurse’s aide. Hillison, who suffered from Alzheimer’s

disease, was frequently confused and prone to wandering away. Id. at 683. One day, Jean Jeschke, another nurses aide working at the convalescent home observed Hillison throw a pitcher of water at Chapin as Chapin walked by Hillison's room. Hillison told Jeschke that he wanted Chapin kept away from him. Id. at 684. Whenever Hillison saw Chapin that day, Hillison had an angry outburst. During a visit by Hillison's wife, Hillison again became angry when Chapin came into his room. Id. at 684. Hillison began to cry and, in response to his wife's question of why he didn't like Chapin, Hillison responded "Raped me." Id. at 684. Jeschke inspected Hillison's rectal area and observed it to be "very red and irritated and swollen." Id. at 685-85. Jeschke had noted earlier in the day that Hillison was walking with a painful gait. Id. at 684.

At trial, the court admitted Hillison's statement "[r]aped me" as an excited utterance. Id. at 691. The Supreme Court held that Hillison's statement did not qualify as an excited utterance because the second prong of the three prong test was not satisfied. Id. The statement was not made while the declarant was in an excited state caused by the startling event. Id. at 689. In reaching its decision, the court noted that Hillison was unlikely to still be in an excited state caused by the alleged rape which had occurred "within a day or so" of Hillison's statement. Id. Additionally, Hillison had been calm at different points during the day and only became violently angry when he encountered Chapin. Id. Finally, the court noted that Hillison's statement was made after his wife had calmed him down

and asked why he disliked Chapin. Id. at 689-90. Because Hillison was not in an excited state caused by the startling event at the time he made the statement, the danger of fabrication was increased. Id. at 689.

In State v. Brown, 127 Wn.2d 749, 751, 903 P.2d 459 (1995), Brown appealed his conviction for second degree rape. Brown knocked on T.G.'s door, and T.G. agreed to go with Brown to his apartment and perform fellatio in exchange for money. Brown at 752. Once there, T.G. was grabbed by four men and raped for approximately two hours. Brown at 752. T.G. was able to escape by jumping out the window and onto a balcony. Brown at 752. T.G. returned to her apartment and told her boyfriend that she had been raped. Brown at 753. T.G.'s boyfriend urged her to call the police, but T.G. didn't think the police would believe her because she willingly went to Brown's apartment and the police knew she was a prostitute. Id. T.G.'s boyfriend told her to think of something. Id. T.G. then contacted the police and told them she had been abducted, raped, and that her assailant used a knife during the rape. Id.

At trial, T.G. testified that she had fabricated the story that she had been abducted and admitted she had not seen a knife during the rape. Id. at 753. The 911 tape was admitted as an excited utterance over defense's objection. Id. Like Chapin, the Supreme Court determined the second prong of the three prong test had not been met because T.G. "had the opportunity to, and did in fact, decide to fabricate a portion of her story prior to making the 911 call..." Id. at 759.

The present case is almost identical to Brown. Defendant shoots Ms. Dixon and kills her. Before the paramedics arrive, defendant hides the gun in the attic underneath the insulation and gives Bell some money to take care of the kids. When the paramedics arrive, defendant, like Brown, fabricates a story. Defendant tells the paramedics that the person who shot Ms. Dixon fled with the gun. Defendant, like Brown, had the opportunity to reflect and fabricate a story, which he told to paramedics when they arrived on the scene.

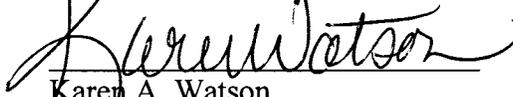
Like Chapin and Brown, defendant was not under the stress of the startling event. His statements were hearsay and the court properly excluded them.

D. CONCLUSION.

For the reasons stated above, the State respectfully requests this court to affirm defendant's convictions.

DATED: February 25, 2008.

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COURT OF APPEALS  
DIVISION II

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STATE OF WASHINGTON  
BY [Signature]  
DEPUTY

Certificate of Service:

The undersigned certifies that on this day she delivered by U.S. mail or ABC-LMI delivery to the attorney of record for the appellant and appellant c/o his attorney true and correct copies of the document to which this certificate is attached. This statement is certified to be true and correct under penalty of perjury of the laws of the State of Washington. Signed at Tacoma, Washington, on the date below.

2-25-08 [Signature]  
Date Signature