

NO. 41588-7-II

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

STATE OF WASHINGTON, Respondent

v.

SHERYL JEAN MARTIN, Appellant

FROM THE SUPERIOR COURT FOR CLARK COUNTY
CLARK COUNTY SUPERIOR COURT CAUSE NO.07-1-01592-2

BRIEF OF RESPONDENT

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A. RESPONSE TO ASSIGNMENTS OF ERROR

- I. THE TRIAL COURT PROPERLY REFUSED TO SUPPRESS THE EVIDENCE OBTAINED DURING THE SEARCH OF THE HOME PURSUANT TO THE WARRANT.
- II. THE TRIAL COURT PROPERLY EXCLUDED EVIDENCE OF BETRAYAL TRAUMA THEORY, AS IT DID NOT MEET THE STANDARD FOR ADMISSIBILITY UNDER *FRYE* OR UNDER ER 702 AND THE DEFENDANT'S RIGHT TO PRESENT A DEFENSE WAS NOT IMPAIRED.
- III. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN LIMITING THE ADMISSION OF EVIDENCE ABOUT THE MISCONDUCT OF THE VICTIM BECAUSE IT WAS NOT RELEVANT TO HER DIMINISHED CAPACITY DEFENSE.

B. STATEMENT OF THE CASE

I. PROCEDURAL FACTS

Defendant Sheryl Martin was charged with attempted murder in the first degree. CP 7. At trial she asserted the defense of diminished capacity. Verbatim Report of Proceedings, Vols. 18 and 21. The jury rejected her claim of diminished capacity and found her guilty of attempted murder in the first degree. CP 820. She was given a standard range sentence of 240 months. CP 924. This timely appeal followed. 933.

II. SUMMARY OF SUBSTANTIVE FACTS

The defendant and her husband, Ed Martin spent the evening of September 7, 2007 drinking, smoking marijuana and playing darts in the

large shop on their property. RP Vol. 20, p. 917-20. At some point during the evening the defendant went to the house to go to bed. Id. at 921-22. After changing into her pajamas, she looked out the window and saw Mr. Martin go to his truck and retrieve his cell phone. Having long suspected her husband was having an affair, the defendant became angry and returned to the shop to confront her husband. RP Vol. 20, p. 930, Vol. 22, p. 1206. An argument ensued in which the defendant began violently tearing up the shop in search of the cell phone, all the while accusing her husband of infidelity. RP Vol. 20, p. 931-34. At some point Mr. Martin admitted to the affair. Id. at 931. The subject of divorce came up. Id. at 935. Eventually the defendant retreated to the house and Mr. Martin decided to sleep in a camper on the property. Id. at 936. He locked the door to the camper and the shop and retained both sets of keys. Id. at 937-38. After falling asleep he heard a knock on the door to the camper and opened the door. Id. at 938. When he did, the defendant reached inside and grabbed one of the two sets of keys. Id.

Upon her retreat to the house after learning of Mr. Martin's infidelity, the defendant retrieved a 12 gauge shotgun from underneath her bed and tried to load it. RP Vol 21, p. 1131. Unsuccessful in that endeavor, she went to the camper to get the keys to the shop. RP Vol. 21, 1134. Vol. 22, p. 1217. Once in the shop, she located a 16 gauge shotgun

that she and her husband had recently taken on a camping trip and loaded it. RP Vol. 22, p. 1217. Mr. Martin did not re-lock the camper after the defendant retrieved the keys. RP Vol. 20, p. 938-39. The defendant returned to the camper and shot her husband twice with the 16 gauge shotgun. Id. at p. 939-40. Mr. Martin screamed in pain and begged the defendant to call 911. Id. at 941. She then returned to the shop where she reloaded the shotgun. RP Vol. 22, p. 1217. After reloading, she returned to the camper and shot her husband twice more. RP Vol. 20, p. 941, Vol. 22, p. 1217. At some point during the shootings the defendant said "If I can't have you, nobody can." RP Vol. 20, p. 940. At that point Mr. Martin felt that he would not be saved and his dead body would be found in the morning. Id. at p. 944, 972. He did not scream or beg after the second shooting. Id.

The defendant called 911 and told the dispatcher that she had just shot her husband. RP Vol. 20, p. 806. The officers who responded to the 911 call took the defendant into custody and provided aid to Mr. Martin. RP Vol. 20, p. 833, 839-860. When he arrived at the scene, Officer Foster of the Ridgefield Police Department heard someone in the camper saying "help me," and he located Mr. Martin inside. RP Vol. 20, p. 842. In looking inside the camper to locate the victim Deputy Koch saw a man with "blood all over him, and blood all over the ceiling. RP Vol. 20, p.

8854. He also saw wadding from a shotgun shell. RP Vol. 20, p. 855.

Detectives searched the house pursuant to a search warrant. The search warrant was redacted following a suppression hearing. CP 210-11.

The search of the house pursuant to the warrant revealed two shotguns located inside the home: a 12 gauge shotgun and a 16 gauge shotgun. RP Vol. 21, p. 1016, 1020.

The remainder of the Statement of the Case is broken into three sections to address each issue raised in this appeal by the defendant:

1. *Nexus requirement for search warrant.*

The defendant complains that the affidavit for search warrant, in its final form, failed to establish a nexus between the evidence sought and two of the places to be searched: the house and the shop (called "curtilage" in the affidavit for search warrant.) The redacted affidavit for search warrant, prepared by Deputy O'Mara, said in the first paragraph: "I, Detective John O'Mara, of the Clark County Sheriff's Department Major Crimes Unit, being first duly sworn upon oath, hereby deposes and says, that I have good and sufficient reason to believe that the following described goods to wit: Other items that are evidence of the crime of assault I, RCW 9A.36.011 (1) (a). And I am aware of the same based on the following..." The warrant then related the facts as sworn by Detective O'Mara:

Upon my arrival at the residence [previously noted in the affidavit as 29305 NW 51st Avenue in Ridgefield, Washington] I met with Deputy Jeremy Koch #4263 who told me the following: That he was dispatched with other units to the listed address due to a 911 call from a person later identified as suspect/defendant Sheryl J. Martin, who told 911 dispatch that she (Sheryl Martin) had just shot her husband. Responding units arrived, taking Sheryl Martin into custody, at which time she was read her rights under Miranda and verbally acknowledged that she understood the rights read to her. Deputy Koch, along with other officers, could hear someone yelling from inside a camper that was attached to a white pick up that was parked on the property in front of a shop with two overhead garage doors. The (the word "camper" is crossed out at this point) had WA. Lic.# A66337Z on the front and the camper WA. Lic. #7704TC on the back, upon entering the camper, Deputy Koch told me he saw a shotgun "wad" about 2-3 ft inside the camper door and just to the right of the door he saw what appeared to be a piece of buckshot, (illegible) [as]¹ if it had struck something. Deputy Koch said he yelled something like "You in here" or "Are you OK"? A male, later identified as the victim Eddie E. Martin, DOB 4-17-1956, answered "yes," when asked what (illegible) Eddie Martin replied "my wife shot me." Deputy Koch told me he could see Eddie Martin in the bed portion of the camper that is located (illegible) over the cab of the pick up truck. Martin's feet were closest to Deputy Koch, which would be North, and Martin's head was near the end of the camper, which would be South. Deputy Koch stated he could see what [looked] like blood on Martin's right shin. In addition Martin's left elbow (illegible) to be "blown to pieces and looked like pieces of towel or blanket or pillow case were embedded in the wound."

See Appendix A. The trial court entered findings of fact and conclusions of law denying Ms. Martin's motion to suppress. CP 207-212.

¹ The copy of the search warrant contained in the court file is poor. Although the word "as" was excised by a punch hole, the State avers that the context clearly points to the word being "as."

2. *Admissibility of betrayal trauma theory and Ms. Martin's ability to present a defense.*

The defendant sought to introduce testimony from Jennifer Freyd, a professor of psychology at the University of Oregon. RP Vol. 15, p. 324-26. Dr. Freyd developed a theory in 1990-91 called betrayal trauma theory. RP Vol. 15, p. 348-49. A pretrial hearing was conducted to determine the admissibility of this theory at trial. See Report of Proceedings, Volume 15. The theory originated as a way to explain the phenomena of repressed memory and delayed recall. RP Vol. 15, p. 349-356. In the last few years, Dr. Freyd began to look beyond the question of how betrayal affects memory and to study the overall harmfulness of betrayal on people. RP Vol. 15, p. 357-58. She developed an instrument called the Betrayal Trauma Survey to study betrayal trauma to assess trauma in both adulthood and childhood. RP Vol. 15, p. 378. She did not, however, use this instrument on the defendant. Her review of the defendant's case consisted of listening to the audio tape of an interview of the defendant conducted by Dr. Marilyn Ronnei, an expert witness for the State, and reading the transcript of that interview, as well as reviewing the police reports. RP Vol. 15, p. 382-83. Dr. Freyd is not a clinical psychologist. RP Vol. 15, p. 383. She does not treat patients. Rather, she is a "researcher, educator, and academic." RP Vol. 15, p. 383. Regarding the

DSM-IV. Dr. Freyd disagreed that it reflected a consensus of opinion among psychologists about differential diagnoses for the majority of recognized psychological disorders. RP Vol. 15, p. 407. She characterized it as “the manual that’s used by everybody who would like to bill insurance for treating individuals with psychological distress, and it’s necessary in order to be able to bill insurance to form a diagnosis.” Id.

Betrayal trauma is not recognized by the DSM-IV. RP Vol. 15, p. 409, 418. Dr. Freyd did not actually diagnose the defendant as suffering from betrayal trauma because betrayal trauma is not a diagnosis but an “experience.” RP Vol. 15, p. 418. Dr. Freyd did not diagnose the defendant as suffering from any recognized disorder in the DSM-IV at the time of the shooting. RP Vol. 15, p. 418. The dominant publishers of articles on betrayal trauma theory have been published either by Dr. Freyd or people working with her in her lab at the University of Oregon. RP Vol. 15, p. 419.

Dr. Richard Packer is a clinical psychologist and certified sex offender treatment provider. RP Vol. 15, p. 475. He works in private practice and provides consultation where there is interface with psychology and the law. RP Vol. 15, p. 476-77. Among many other areas, he has done research in the area of posttraumatic stress disorder and dissociation as a component of posttraumatic stress. RP Vol. 15, p. 482.

He has testified as a psychological expert in court many times, perhaps as many as two or three hundred times. RP Vol. 15, p. 483. Dr. Packer was hired by the State to research the following question: Is betrayal trauma theory generally accepted within the relevant scientific community? RP Vol. 15, p. 484. The question of whether a theory or methodology is generally accepted within the relevant scientific community is a question Dr. Packer has consulted on before. RP Vol. 15, p. 485. He personally had no recollection of ever hearing of betrayal trauma theory. RP Vol. 15, p.488.

The first thing Dr. Packer did was consult the abstracting service administered by the American Psychological Association, PsychINFO. RP Vol. 15, p. 485. He described it as “the world’s single largest reference source for psychological literature, as well as related fields...Almost all journals, as well as books, conferences, a variety of other reference materials are abstracted within PsychINFO.” RP Vol. 15, p. 485-86. He conducted a term search on betrayal trauma theory. Id. He retrieved 60 or 70 documents and then reviewed each of them manually to determine their relevance to the question at hand. RP Vol. 15, p. 487. He culled it down to 30 articles that were clearly relevant to the acceptance (or non-acceptance) of betrayal trauma theory. RP Vol. 15, p. 489. He testified “One of the parts that you're looking for, and this is not unusual when looking at

scientific theory, is you want to see how much of this has been picked up and validated or replicated by others, not just the original person." RP Vol. 15, p. 489. What he found was that sixteen of those thirty articles were authored or co-authored by Dr. Freyd herself. RP Vol. 15, p. 490. Another five articles were written by associates or students of Dr. Freyd. Id. Of the remaining nine articles, two were general discussion articles which do not factor into the question of the scientific acceptability of betrayal trauma theory because they lack empirical findings. RP Vol. 15, p. 491. Of the remaining seven articles, six were unsupportive of betrayal trauma theory or found problems with the results propounded by the theory. RP Vol. 15, p. 492. The primary problem with Dr. Freyd's theory is that other researchers have been unable to replicate her findings in a convincing way. RP Vol. 15, p. 499-500. Replication of the primary theorist's data is a "critical component" in scientific method. RP Vol. 15, p. 499. There is an inherent difficulty in conducting research in this area, according to Dr. Packard, because the research methodologies are dependent on two means of research:

One is by eliciting information from the natural world of people who have had the experience or who say they've had the experience. The second is a laboratory study in which you try to make the experience occur, whatever it is you're trying to study. You're trying to repeat that experience in a controlled setting. The laboratory has the distinct advantage in that you know what the ground truth

is because the researcher has applied it, so you know what has occurred and what has not.

RP Vol. 15, p. 496. Dr. Packard went on to explain that the primary problem with conducting research from participants in the natural world is that the research is dependent upon self-reporting. These reports typically cannot be corroborated and you simply cannot validate their claim of what occurred. RP Vol. 15, p. 496.

As a clinical psychologist, Dr. Packard also inquired of his colleagues to determine whether any of them had heard of or were employing betrayal trauma theory in their practice. He attended a conference, in fact, shortly after being engaged by the State to research to scientific acceptance of betrayal trauma theory and questioned a number of other forensic psychologists who are also members of the American Psychology Law Society and, like Dr. Packard, work in the legal realm. RP Vol. 15, p. 501-02. Only one of the psychologists could recall even hearing the term, and the remaining psychologists had never heard of betrayal trauma theory. RP Vol. 15, p. 502.

Dr. Packard was asked "based on the research that you've engaged in, have you been able to form an opinion as to whether you believe betrayal trauma theory is accepted in the general psychological community?" Dr. Packard answered:

As a thought process, it goes like this: General acceptance in a scientific field, in this case psychology, to me equates to are the findings powerful enough, strong enough, reliable enough, measurable enough, such that we can say with a high degree of confidence this is the way nature is. This is the way the world works. And we certainly have seen and have many theories in psychology where, you know, the answer to that is evident because the research has accrued and there's really no discussion about that anymore. It's evident. It's there. There are many theories, a vast number of theories, that have interesting observations where there is at least some evidence that this might be—might be the way nature is, but yet it has not yet been established that that is the way nature is. And I would put Professor Freyd's theory in that category. Some interesting observations, some specific methodological problems, some of them very difficult to resolve. And this might be the way nature is, but I cannot say that it is the way nature is.

He then stated that he did not believe that betrayal trauma theory is generally accepted within the psychological community. RP Vol. 15, p. 504. When a scientific theory enjoys general acceptance, he would expect to find, in a PsychINFO search, "thousands of citations, not 20, 30, 50, 70." and he would expect to find the evidence documented and reviewed in "major texts, like the Annual Review of Psychology, and that the findings are clearly supportive without much debate left anymore. So it doesn't meet those criteria to me either yet." RP Vol. 15, p. 504. Last, Dr. Packard confirmed that betrayal trauma theory is not recognized in the DSM-IV-TR ("TR" stands for text revision), which was issued in 2004, nor was it going to be included in the DSM-V, currently under

construction. RP Vol. 15, p. 507-08. Dr. Packard spent approximately 50 hours researching this question for the State. RP Vol. 15, p. 508.

Dr. Marilyn Ronnei also testified on behalf of the State. Dr. Ronnei is a forensic psychologist with Western State Hospital. RP Vol. 15, p. 432. She works in the Center for Forensic Services and conducts evaluations for competency, diminished capacity and insanity. RP Vol. 15, p. 432-33. About one quarter of her evaluations are for diminished capacity. RP Vol. 15, p. 433. Dr. Ronnei conducted an evaluation of Sheryl Martin on May 11, 2009 to determine whether her capacity was diminished at the time she shot her husband. RP Vol. 15, p. 440. Dr. Ronnei testified at trial on the question of the defendant's capacity, but at the pretrial hearing she offered testimony concurring with Dr. Packard on the question of the scientific acceptance of betrayal trauma theory. RP Vol. 15, p. 450. She testified that betrayal trauma theory "had not been presented as part of defense strategy in any of the cases that I had worked on up to that point. And beyond that, I had no experience. I had not heard of it before." RP Vol. 15, p. 450. After learning that Ms. Martin sought to rely on betrayal trauma theory to support her contention of diminished capacity Dr. Ronnei sought out information on betrayal trauma theory. RP Vol. 15, p. 450. She questioned her fellow forensic examiners and asked if they had any experience with betrayal trauma theory and they had never seen it used in court or had

even heard of it. RP Vol. 15, p. 450-51. She questioned several psychiatrists as well and they had not heard of it. RP Vol. 15, p. 451. Dr. Ronnei did a search of betrayal trauma theory on Google Scholar and on the University of Washington's online medical and psychological database and found approximately 75 articles on it. RP Vol. 15, p. 451-52. She found several articles that could be characterized as back and forth between Professor Freyd and Richard McNally, a critic of the theory. RP Vol. 15, p. 452. Dr. Ronnei was asked whether betrayal trauma theory is generally accepted in the psychological community and she said she was only comfortable opining on its acceptance with the forensic psychology community. RP Vol. 15, p. 455. Within that community, betrayal trauma theory is not generally accepted. RP Vol. 15, p. 455-56.

The trial court concluded in a thirteen page memorandum opinion that betrayal trauma theory is not a theory that is generally accepted within the scientific community and ruled that it would not be admitted at trial. CP 401-413. The court ruled that it did not meet the *Frye* standard for admissibility, nor did it meet the standard for admissibility under ER 401, 402 or 702. CP 410, 412. With regard to the *Frye* standard, the court relied on the opinion of Dr. Packard that betrayal trauma theory is not generally accepted within the scientific community. CP 410. The court ruled that betrayal trauma theory (BTT) did not meet the *Frye* standard either for the

original subject on which it was created to address, delayed reporting of child sexual abuse, or for the subject at issue in this case, adult domestic violence. CP 410. The court said that if this case involved delayed reporting of child abuse the theory would be "relevant and therefore potentially helpful to the jury," but that it still did not meet the *Frye* standard. See CP 411, first paragraph. The court concluded by saying that under ER 401, 402 and 702, BTT did not meet the test for admissibility in a case involving adult domestic violence. CP 412.

Ms. Martin was nevertheless able to raise the defense of diminished capacity through Dr. Laura Brown. Dr. Laura Brown is a psychologist with 30 years of experience. RP Vol. 21, p. 1066-67. She has a psychotherapy practice, she supervises a low-fee training clinic where she trains graduate students in clinical psychology, and she does forensic psychology. *Id.* In the late 1990s she was disciplined by the state licensing board for unprofessional conduct. RP Vol. 21, p. 1145-46. She testified that she accepted a "settlement" for the lowest level of discipline but only to avoid putting her client through a hearing. RP Vol. 21, p. 1068. She claimed that the disciplinary action was actually the fault of one of her colleagues, not her. *Id.*

Dr. Brown evaluated Ms. Martin and diagnosed her with major depressive disorder, dysthymic disorder (which is a type of depression)

and histrionic personality disorder. RP Vol. 21, p. 1080. She testified the convergence of these disorders made Ms. Martin increasingly vulnerable to external stressors. RP Vol. 21, p. 1087. Dr. Brown testified that Ms. Martin told her that she had been depressed and suicidal for a number of years; that her physical health was very poor; that her marriage was a hard marriage to be in; that her husband was extremely unromantic and sometimes cruel; that her husband did things that frightened her and he did so intentionally; that her husband would demand things from her that made her uncomfortable; that she did her best to give him what he wanted because being married to him was very important to her; and she was particularly fearful that her husband was cheating on her. RP Vol. 21, p. 1097-98. Ms. Martin told her that her husband would go to strip clubs, which was very distressing to her; and that she felt dependent on him financially. *Id.* Ms. Martin said that her husband made all the money, however, Ms. Martin has held a job outside the home throughout most of the marriage. RP Vol. 21, p. 1098. Ms. Martin described herself as a woman who worked very hard to make her home beautiful and cook "exactly the foods he wanted." and she wanted to be a good and submissive wife. RP Vol. 21, p. 1098-99. She described suffering emotional abuse in her marriage. RP Vol. 21, p. 1123.

Regarding the evening in question, Dr. Brown was permitted to relate the following facts as told to her by Ms. Martin:

Ms. Martin and her husband were drinking, smoking marijuana and playing darts in their shop on their property. After going to the house to go to bed Ms. Martin looked outside and saw her husband talking on his cell phone. Because she believed he was having an affair, she got dressed and went back to the shop to confront him. After some time he finally admitted to her that he was, in fact, having an affair and told her he wanted out of the marriage. At one point Ms. Martin grabbed a knife and threatened her husband with it, but he got the knife away from her and dragged her out of the shop. She felt humiliated and suicidal. Ms. Martin began to dissociate and began searching for a 12 gauge shotgun. She found it but couldn't load it. She then recalls going to the shop and locating a 16 gauge shotgun, loading it, and planning to kill herself. Instead, she decided to confront her husband and ask him why he was throwing her away. She couldn't remember shooting her husband, however. RP Vol. 21, pgs. 1128-35.

Dr. Brown opined that Ms. Martin was in a dissociative state on the night she shot her husband. RP Vol. 21, p. 1127. She further opined that Ms. Martin could not form the intent to commit murder during this dissociative state. RP Vol. 21, p. 1140.

Dr. Ronnei from Western State Hospital evaluated Ms. Martin for diminished capacity. RP Vol. 22, p. 1192-95. She diagnosed Ms. Martin with major depressive disorder, post-traumatic stress disorder, cannabis abuse and alcohol abuse. RP Vol. 22, p. 1203. The post-traumatic stress disorder was not present at the time of the shooting, but rather developed in response to the shooting. RP Vol. 22, p. 1204. Dr. Ronnei did not diagnose histrionic personality disorder. RP Vol. 22, p. 1223.

Dr. Ronnei testified to the following facts related to her by Ms. Martin:

On the night of the shooting the defendant and her husband had dinner together then went out to the shop to drink and smoke marijuana. Her husband was being very mean to her at that time. After going back to the house to go to bed, she looked outside and saw her husband "sneaking" out to his truck to get his cell phone. She went out to the shop and demanded to know who he was talking to. She interrogated her husband about who he was having an affair with and he laughed at her. After arguing for a period of time Mr. Martin admitted to her that he had been having an affair for the past two years. Mr. Martin told the defendant "She's not as crazy as you are." He told her she was nothing, and she felt like "a piece of shit." and that she was nothing. He told her he was going to take everything from her, including her (adult) sons, and was going to

leave her with nothing. She told Dr. Ronnei "I felt like I had nothing to live for and he was shaking me like a rag doll." At one point he dragged her out of the shop. He told her he wanted a divorce. She went back to the house and searched for a gun. She found a gun but couldn't load it. At that point she remembered the gun in the shop. She went to the shop, retrieved the gun and loaded it. She remembered going to the camper, knocking on the door, putting up the gun and firing twice. She left to call 911 but didn't go back out to help her husband because she was frightened of him. She heard her husband screaming. The next thing she remembered was the arrival of the police. RP Vol. 22, pgs. 1205-10.

Dr. Ronnei agreed with Dr. Brown that Ms. Martin may have had a dissociative episode on the night of the shooting. RP Vol. 22, p. 1225-1226. However, her opinion to a reasonable psychological certainty was that Ms. Martin had the capacity at the time of the shooting to act with intent and to act with premeditation. RP Vol. 22, p. 1218-19.

3. *Admissibility of specific acts of misconduct by the victim.*

Prior to trial, the defense sought to be able to introduce specific acts of misconduct by the victim against the defendant so that the jury could have "the full view, the res gestae if you will, of this event, they have to understand the underlying disorders in order to believe that she actually went into this dissociative state, and the depth of it that she went

into.” RP Vol. 19, p. 739. Defense counsel asserted that this information was critical to Dr. Brown’s diagnoses, and the jury needed to hear about all of this negative information so that they could “believe” Dr. Brown, and so they could believe that hearing she was going to get a divorce was a strong enough “triggering event” for her to go into a dissociative state. RP Vol. 19, p. 739-40.

The State expressed concern that this was an attempt by the defense to introduce damaging evidence about the victim in order to demonize him and engender sympathy for Ms. Martin. RP Vol. 20, p. 736. The court observed that “we’re really not talking so much about causation of diagnosis. What we’re talking about is diagnosis and then the impact on dissociative state and then ability to form intent.” RP Vol. 20, p. 741. Regarding Dr. Brown, the court said she didn’t believe either her report or her pretrial testimony indicated that she thought conduct caused Ms. Martin’s mental disorders, or that her marital relationship caused her histrionic personality disorder. RP Vol. 20, p. 742. As such, the relevance would be marginal. *Id.* The court ruled, however:

I don’t think we could try this case without having some reference to the relationship itself. Obviously, this was a domestic situation. But at this point, the Court would allow references to the marriage as generally volatile, as Ms. Martin being unhappy in the relationship...

However, at such time where it appears to be going into detail about particular actions or activities or conduct of Mr. Martin prior to the incident in question is getting into the subject of other acts and character of the victim, which is not allowed within the exception, and the case law supports the conclusion that evidence of the victim's character is generally admissible only in cases in which the defense is self-defense...

[G]oing into great detail and stepping over into the category of commenting on the character of the victim in the case would not be something that has been found to be acceptable within the rules of evidence and would not be relevant to the case herein.

RP Vol. 19, p. 744-46. In other words, the conduct of Mr. Martin on the night in question was admissible, but past incidents of misconduct were inadmissible because they were irrelevant to any fact in issue (because this case was not a self-defense case) and, moreover, they were irrelevant to Dr. Brown's diagnosis of Sheryl Martin's mental illness.

The jury rejected Ms. Martin's diminished capacity defense and found her guilty of attempted murder. CP 820.

C. ARGUMENT

I. THE TRIAL COURT PROPERLY REFUSED TO SUPPRESS THE EVIDENCE OBTAINED DURING THE SEARCH OF THE HOME PURSUANT TO THE WARRANT.

The defendant complains that the search warrant failed to establish a nexus between the evidence sought and the place to be searched, to wit:

the house and the shop. It is worth noting, preliminarily, that the defendant does not seek a remedy for the alleged violation of her constitutional rights. She doesn't say how the admission of the evidence found in the home prejudiced her, nor does she ask for a new trial. She simply states that the evidence "should have been suppressed." See Brief of Appellant at p. 20.

The evidence obtained from the search of the house includes a 12 gauge and a 16 gauge shotgun, as well as photographic evidence that the defendant used in her case in chief (see exhibits 132-141). Without this evidence, the remaining evidence was more than sufficient to sustain the jury's verdict of guilty to the charge of attempted murder in the first degree. The defendant called 911 and told the dispatcher she shot her husband. Deputy Koch arrived on scene and found Mr. Martin in the camper. He found that Mr. Martin had, in fact, been shot. Mr. Martin told him that his wife shot him. While responding to the plaintive wails of Mr. Martin, Deputy Koch saw a shotgun "wad" in the camper. Last, Ms. Martin's defense at trial was that she shot her husband while in a dissociated state and lacked the capacity to form intent, not that someone else shot her husband.

It is a truism that jurors value physical evidence. They want to see the implements of the crime. However, it was wholly unnecessary for the

State to introduce this evidence. That Mrs. Martin shot Mr. Martin with a shotgun was undisputed. The only disputed issue in the case was whether the defendant acted with the requisite mental state to be culpable for the crime for which she was charged. The defendant suffered no prejudice from the admission of this evidence, and in fact utilized photographs that were taken inside the residence by detectives to support her theory of diminished capacity. Further, the jury heard that Deputy Koch saw a shotgun wad in the camper. The suppression of the evidence obtained in the search of the house pursuant to the search warrant would not change the jury's verdict in this case and any error in admitting evidence of the two shotguns was harmless.

The lack of prejudice to the defendant notwithstanding, the search warrant application contained a sufficient nexus between the evidence sought and the place to be searched. A search warrant may be issued only upon a finding of probable cause. *State v. Thein*, 138 Wn.2d 133, 140, 977 P.2d 582 (1999). Probable cause exists when the affidavit in support of the warrant contains facts and circumstances from which a reasonable person could infer that criminal activity is probably occurring and that evidence of such activity can be found at the place to be searched. *Id.* Probable cause requires (1) a nexus between criminal activity and the item to be seized, and (2) a nexus between the item to be seized and the place to be

searched. *Id.* The burden of proof to show lack of probable cause is on the defendant moving for suppression. *State v. Anderson*, 105 Wn.App. 223, 229, 19 P.3d 1094 (2001). This Court reviews the trial court's determination of probable cause for an abuse of discretion and gives great deference to that decision. *State v. Jackson*, 150 Wn.2d 251, 265, 76 P.3d 217 (2003). Moreover:

In determining whether probable cause exists, a magistrate is entitled to draw reasonable inferences from the facts and circumstances set forth in the supporting affidavit. *State v. Maffeo*, 31 Wn. App. 198, 200, 642 P.2d 404 (1982). The question of whether probable cause justifies the issuance of a search warrant should not be viewed in a hypertechnical manner. *State v. Partin*, 88 Wn.2d 899, 904, 567 P.2d 1136 (1977); *State v. Matlock*, 27 Wn. App. 152, 155, 616 P.2d 684 (1980). Reasonableness is the key and common sense must be the ultimate yardstick. *State v. Patterson*, 83 Wn.2d 49, 52, 515 P.2d 496 (1973). Considering all the facts and circumstances sworn to by the person seeking the warrant, the magistrate must have good reason to believe criminal activity occurred. *State v. Smith*, 93 Wn.2d 329, 352, 610 P.2d 869 (1980).

State v. Riley, 34 Wn.App. 529, 531, 663 P.2d 145 (1983).

The defendant's complaint about the trial court's ruling rests on the premise that the trial court used information gleaned at the suppression hearing to find the required nexus between the evidence sought and the place to be searched. For this claim, the defendant cites to the ninth volume of the verbatim report of proceedings at page 270, and to clerk's paper 211. The defendant misconstrues the record. At page 270 of volume

nine of the verbatim report of proceedings, the trial judge had not yet made a final ruling on the validity of the search warrant. Defense counsel raised the issue of nexus and the parties contemplated submitting additional briefing prior to a final ruling by the court. RP at p. 271-73. The portion relied upon by the defendant amounts to the musings of the trial judge, not a finding of fact or conclusion of law. Likewise, CP 211 contains no finding or conclusion by the trial court that the nexus requirement was satisfied by information gleaned from the suppression hearing. CP 211 is the last page of the trial court's findings of fact and conclusions of law on the CrR 3.6 hearing. This page contains three conclusions of law, none of which make any reference to facts not contained in the warrant application. CP 211. Moreover, nothing within this entire document supports the defendant's assertion that the trial court relied upon improper fact finding to conclude that there was a nexus between the crime, the evidence sought and the place to be searched.

Martin relies on *Thein*, supra, for her claim that the search warrant affidavit failed to establish a nexus between the crime, the evidence sought, and the residence. But *Thein* does not support her position. In *Thein*, the Supreme Court held that simply establishing that a suspect is a drug dealer (or probably a drug dealer) will not automatically lead to an inference that the fruits of his crimes can be found where he resides: the

State must produce independent facts linking a drug dealer's residence to his criminal activity. *Thein* at 141, 146-47. The Court said: "Although common sense and experience inform the inferences reasonably to be drawn from the facts, broad generalizations do not alone establish probable cause." *Thein* at 148-49.

In *State v. McReynolds*, 104 Wn.App. 560, 569, 17 P.3d 608 (2000), a possession of stolen property case, the Court of Appeals distinguished *Thein*:

However, the *Thein* court observed that "the existence of probable cause is to be evaluated on a case-by-case basis." *Thein*, 138 Wn.2d at 149. In a footnote, the court noted that "under specific circumstances it may be reasonable to infer such items will likely be kept where the person lives." *Id.* at 149 n.4 (citing WAYNE R. LaFAVE, SEARCH AND SEIZURE § 3.7(d), at 381-85 (3d ed. 1996)).

Here, the request to search the residence was not based on generalizations or blanket assumptions about a particular class of people. The affidavit demonstrates that the officers were dispatched to the residence at 29305 NW 51st Avenue in Ridgefield because a woman had just shot her husband. Upon arrival the officers could hear someone yelling for help from a camper on the property. Upon entering the camper, Deputy Koch saw a shotgun wad and a piece of buckshot but made no mention of seeing a shotgun. Thus, the shotgun was elsewhere. Deputy

Koch also saw the victim and saw that he had, in fact, been shot. There was probable cause to believe that the evidence of this crime could be found in the shop or the residence based on this information. Under Ms. Martin's proposed reading of the affidavit, the only area that lawfully could have been searched was the camper, even though the implement of the crime was not there. *Thein* does not compel such a narrow reading.

Martin has failed in her burden of proving that the search warrant lacked probable cause. The trial court did not err in upholding the search warrant.

II. THE TRIAL COURT PROPERLY EXCLUDED EVIDENCE OF BETRAYAL TRAUMA THEORY, AS IT DID NOT MEET THE STANDARD FOR ADMISSIBILITY UNDER *FRYE* OR UNDER ER 702 AND THE DEFENDANT'S RIGHT TO PRESENT A DEFENSE WAS NOT IMPAIRED.

Defendant claims that her right to present a defense was significantly impaired by the court's exclusion of betrayal trauma theory (BTT) at trial. This claim lacks merit.

The admissibility of new scientific evidence is determined using a two-part inquiry. First, the proposed testimony must meet the *Frye* standard for admissibility. *State v. Greene*, 139 Wn.2d 64, 70, 984 P.2d 1024 (1999); *State v. James*, 121 Wn.2d 220, 232, 850 P.2d 495 (1993). See *Frye v. United States*, 54 App.D.C. 46, 293 F.1013 (1923). Second,

the testimony must be admissible under ER 702. *Greene* at 70; *Janes* at 232; *State v. Copeland*, 130 Wn.2d 244, 255, 922 P.2d 1304 (1996).

Under the *Frye* standard, novel scientific evidence is admissible if (1) the scientific theory or principle upon which the evidence is based has gained general acceptance in the relevant scientific community of which it is a part; and (2) there are generally accepted methods of applying the theory or principle in a manner capable of producing reliable results. *State v. Riker*, 123 Wn.2d 351, 359, 869 P.2d 43 (1994).

Greene at 70. “The *Frye* standard recognizes that ‘judges do not have the expertise required to decide whether a challenged scientific theory is correct,’ and therefore courts ‘defer this judgment to scientists.’”

Copeland at 255; citing *State v. Cauthron*, 120 Wn.2d 879, 887, 846 P.2d 502 (1993). The trial court does not assess the reliability of the evidence.

Id. Although unanimity is not required, a significant dispute among qualified scientists in the relevant scientific community compels the exclusion of the evidence. *State v. Gore*, 143 Wn.2d 288, 302, 21 P.3d 262 (2001); *Copeland* at 270; *State v. Gentry*, 125 Wn.2d 570, 585-86, 888 P.2d 1105 (1995). Review of admissibility under *Frye* is a mixed question of law and fact, and review is de novo. *Carlton v. Vancouver Care, LLC*, 155 Wn.App. 151, 161, 231 P.3d 1241 (2010). In contrast, review of a trial court’s ruling under ER 702 is for abuse of discretion. *Id.*; *Greene* at 70. If the *Frye* standard is satisfied, the trial court then must determine whether

the evidence should be admitted under the two-part test of ER 702.

Cauthron at 889-90.

To address this assignment of error, Ms. Martin's various complaints must be categorized. First, she complains that the relevant scientific community is not the community of psychology, but of the relatively small community of trauma psychology—without citing to any authority on point. Because Professor Freyd and Dr. Laura Brown work within that small community, Ms. Martin reasons that only their opinions would be relevant to the question of whether BTT is generally accepted within the scientific community. Ms. Martin cites to *State v. Greene*, 139 Wn.2d 64, 70, 984 P.2d 1024 (1999) as authority for this proposition. However, *Greene* does not support this contention. It is true that in *Greene*, the Supreme Court used the terminology "relevant scientific community" when discussing the acceptance of dissociative identity disorder. *Greene* at 71-72. However, the question before the Supreme Court was not how to determine what is the relevant scientific community. Indeed, all cases involving *Frye* would be expected to use the term "relevant scientific community" because the *Frye* standard requires it. See *State v. Gore, supra* at 302. *Greene* does not support Ms. Martin's claim that the trial court was required to limit her consideration to the trauma psychology community as opposed to the psychology community at large.

When the *Greene* Court used the term “relevant” scientific community or “appropriate” scientific community it could just as easily have been referring to the fact that general acceptance within the entire field of therapeutic science (which would include psychiatry) is not required, nor would general acceptance among medical doctors be required. In *Eakins v. Huber*, 154 Wn.App. 592, 225 P.3d 1041 (2010), a medical malpractice case, the relevant scientific community was the medical community. In *Moore v. Harley-Davidson*, 158 Wn.App. 407, 418, 241 P.3d 808 (2010), the relevant scientific community was the field of engineering. Ms. Martin’s blanket assertion that “[t]he relevant scientific community in this case is the trauma psychology community,” without citation to authority, should be rejected by this Court. See Brief of Appellant at p. 34.

Even if the relevant scientific community were deemed to be the trauma psychology community in which Professor Freyd conducts her research, the trial court was nevertheless correct in holding that BTT is not generally accepted in the relevant scientific community. Dr. Packard, on whose opinion the trial court afforded the greatest weight, did not testify, for example, that BTT is generally accepted within the trauma psychology community but not the general psychology community. Rather, he researched the question of whether BTT enjoys general acceptance in any community and found that the only community in which BTT enjoys

general acceptance is the community dominated by Professor Freyd and her associates and students. This can certainly not be the "relevant community" for purposes of passing the *Frye* standard. The trial court correctly analyzed this evidence for acceptance within the relevant scientific community.

The second complaint lodged by Ms. Martin is that the trial court was not entitled to exclude this evidence on the basis that it had no recognized forensic application in adult domestic violence cases. Ms. Martin is incorrect. Her claim appears premised upon the idea that the trial court found BTT to meet the *Frye* standard for cases involving repressed memory in child abuse cases but not to meet the *Frye* standard for the question of diminished capacity in adult domestic violence. That is not what the trial court held. The trial court found that BTT didn't meet the standard for admissibility under *Frye*—period. See CP 410 ("...[T]he court has concluded *even if* BTT were found to meet the *Frye* test with respect to the subject of delayed reporting of child sexual abuse, it has not been researched and established to any degree with respect to adult domestic violence.") CP 410 (emphasis added.) Later, the court stated "If this court were considering the proposed admission of evidence of BTT in a case involving delayed reporting of child abuse, the theory would be relevant and therefore potentially helpful to the jury, *setting aside the issue*

of meeting the Frye standard." CP 411 (emphasis added). It is clear from this sentence that the trial court was referring to the test for admissibility under ER 702, not *Frye*.

Ms. Martin summarizes the Supreme Court's holding in *Greene* as holding that the *Frye* inquiry focuses solely on the general consensus within the relevant scientific community rather on the forensic application of the scientific theory to a particular case. Application to a particular case is governed by ER 702. The premise of Martin's argument is faulty, however, because as noted above, the trial court did not find that BTT meets *Frye* for one application but not another; rather, the court ruled that BTT does not meet the *Frye* standard at all. Although the trial court talked at length in the memorandum opinion about the possible relevance BTT might have to a case involving repressed memory in child sexual abuse, this observation did not alter the court's central ruling—that BTT does not enjoy general acceptance within the relevant scientific community. A fair reading of the memorandum opinion points to the conclusion that the trial court was discussing relevance and helpfulness under ER 702 during this portion of the opinion, not *Frye*.

Notwithstanding Martin's misreading of the trial court's ruling, she is incorrect insofar as she asserts that general acceptance of a scientific theory will allow for its blanket application to any scientific question. As

the trial court noted, scientific evidence may be valid for one theory but not for another. See Memorandum Opinion at page 10, CP 410. The trial court cited to *State v. Riker*, 123 Wn.2d 351, 869 P.2d 43 (1994). In *Riker*, the defendant sought to use battered woman's syndrome to support her duress defense in her trial for delivery of a controlled substance. The Supreme Court noted that the theory for which Ms. Riker sought to use this evidence was not a theory for which it had been previously used. In affirming the trial court's rejection of the evidence, the Court said:

We have previously admitted expert testimony on the battered person syndrome to show how severe abuse within the context of a battering relationship affects the battered person's perceptions and reactions in ways not immediately understandable to the average juror. See *Janes*, at 236; *State v. Ciskie*, 110 Wn.2d 263, 271-74, 751 P.2d 1165 (1988); *State v. Allery*, 101 Wn.2d 591, 596-98, 682 P.2d 312 (1984). The battered person syndrome is admitted in self-defense cases to illustrate and explain the "reasonableness" of the defendant's actions. *Allery*, at 596-98. The admissibility of expert testimony on the battered person syndrome to explain the defendant's actions outside of a battering relationship is a matter of first impression in this jurisdiction. Given the current state of scientific acceptance, we hold that the testimony was properly rejected.

Riker at 359. The Court went on to explain that while battered person syndrome clearly met the first prong of *Frye*—that battered person syndrome enjoys general acceptance in the scientific community—it did not meet the second prong of the *Frye* test, namely whether there are

techniques, experiments, or studies utilizing that theory which are capable of producing reliable results and are generally accepted in the scientific community. *Riker* at 359. The Court reiterated, citing to *Cauthron*, supra, at 889: “The core concern of *Frye* is only whether the evidence being offered is based on established scientific methodology. This involves both an accepted theory and a valid technique to implement that theory.” *Riker* at 359. The relationship which Ms. Riker asserted caused the duress which compelled her to deliver drugs was not an intimate relationship. Citing *Daubert v. Merrell Dow Pharmaceuticals*, 509 U.S. 579, 133 S.Ct. 2786 (1993), the Court held scientific validity for one purpose is not necessarily scientifically valid for another, unrelated purpose. *Riker* at 360.

Greene, supra, does not conflict with the holding in *Riker* because the error in *Greene* arose when the trial court found that dissociative identity disorder’s lack of relevance and helpfulness to the jury on the insanity defense proffered in that case rendered it inadmissible under *Frye*. Thus, the *Greene* Court held that while the trial court had misapplied the *Frye* test, it had nevertheless correctly excluded the evidence because it failed to meet the standard for admissibility under ER 702. *Greene* at 71-74.

The trial court correctly concluded that BTT does not meet the standard for admissibility under *Frye*. First, it is not generally accepted in

the relevant scientific community. Professor Freyd, who, as the pioneer of BTT, has a substantial pecuniary interest in getting trial courts to admit evidence of her theory, conceded that BTT is not a diagnosis but rather an "experience." This case involved more than just significant dispute between qualified scientists; almost the entire body of published empirical work on this theory came from Professor Freyd or her associates or students. Of the remaining empirical articles discussing BTT, six out of seven were unfavorable to the legitimacy of BTT. Dr. Packard, a clinical psychologist who is an expert on psychological issues as they intersect with the law, had never even heard of BTT, nor had Dr. Ronnei, a forensic psychologist with Western State Hospital. Even more troubling, both Dr. Packard and Dr. Ronnei consulted a large number of their colleagues and none of those colleagues, save for one, had ever heard of BTT. How can a theory enjoy general acceptance in the psychological community when almost none of the scientists who would be expected know about it have even heard of it? Professor Freyd testified that with the exception of one federal case in which she offered testimony, she was unaware of any court that had admitted BTT. RP Vol. 15, p. 389, 428. Further, she would know if any court had admitted this evidence because she is the person who would be expected to offer (and be paid for) this testimony. Dr. Packard, who was specifically engaged by the State to research whether BTT is

generally accepted within the relevant scientific community, testified that he would expect to find thousands of citations on BTT. “not 20, 30, 50, 70,” and said he would expect to find the evidence documented and reviewed in “major texts, like the Annual Review of Psychology, and that the findings are clearly supportive without much debate left anymore.” Dr. Packard opined that BTT was not generally accepted within the scientific community, and the trial court was entitled to give weight to that opinion. In fact, that is precisely what the *Frye* test requires: Deference by the trial court to the opinions of scientists. The trial court did not err in finding that the first prong of the *Frye* test was not met.

The trial court also correctly held that BTT’s application to adult domestic violence, as opposed to repressed memory in child abuse, rendered it inadmissible under the second prong of *Frye*. The trial court correctly observed that BTT “has not been researched and established to any degree with respect to adult domestic violence.” CP 410. The court further noted that “none of the articles which were admitted into evidence indicate any study or research on the study of adult domestic violence. The focus of the research to date has been on childhood abuse, and dissociation and memory as a result of that abuse over a number of years. None of the research presented to the court involves dissociation as an immediate result of events such as those presented in this case.” CP 411. Applying the

holding of *Riker*, supra, even if BTT enjoyed general acceptance within the scientific community for its original application (repressed memory), its application to diminished capacity in a case of adult domestic violence would have been improper under *Frye*.

Because BTT does not meet the standard for admissibility under *Frye*, it was unnecessary for the trial court to consider its admissibility under ER 702. However, even if the trial court committed error in excluding BTT under *Frye*, exclusion of the theory under ER 702 was nevertheless proper. “ER 702 allows qualified experts to testify regarding ‘scientific, technical, or other specialized knowledge’ if the testimony ‘will assist the trier of fact to understand the evidence or to determine a fact in issue.’” *Carlton v. Vancouver Care* at 161; *State v. Thomas*, 123 Wn.App. 771, 778, 98 P.3d 1258 (2004); *State v. Farr-Lenizini*, 93 Wn.App. 453, 461, 970 P.2d 313 (1999). This Court reviews a trial court’s ER 702 ruling under the abuse of discretion standard. *Carlton v. Vancouver Care* at 162; *Greene* at 70. Discretion is abused when the decision in question is manifestly unreasonable, or exercised on untenable grounds, or for untenable reasons. *State ex.rel. Carroll v. Junker*, 79 Wn.2d 12, 26, 482 P.2d 775 (1971).

Here, Ms. Martin claimed that her capacity to form intent was diminished because she experienced a dissociative episode after finding

out that her husband cheated on her and wanted a divorce. Dr. Laura Brown was permitted to testify about Ms. Martin's dissociative episode and its effect on her ability to form intent. In fact, the State's expert, Dr. Ronnei, agreed that Ms. Martin most likely experienced a dissociative episode, she merely disagreed that Ms. Martin's ability to form intent was impaired. However, Ms. Martin sought to admit Professor Freyd's betrayal trauma theory to bolster her case of diminished capacity. In light of BTT's failure to have gained, as of yet, general acceptance in the scientific community, and the fact that Ms. Martin was nevertheless fully able to present her defense of diminished capacity (a defense that was bolstered, in part, by Dr. Ronnei in that Dr. Ronnei agreed that Ms. Martin experienced a dissociative episode on the night of the shooting), Professor Freyd's testimony would not have helped the jury to understand the evidence or determine a fact in issue. Because Professor Freyd would have had to relate incidents of marital strife between Mr. and Mrs. Martin in order to support her opinion, the admission of betrayal trauma theory would have served the primary purpose of demonizing the victim, Ed Martin, and creating sympathy for the defendant. The very name of the theory implies that the victim was the bad actor and the defendant was the innocent party.

The trial court did not abuse its discretion in excluding BTT under ER 702 and Ms. Martin was not impaired in her right to present a defense. Although Ms. Martin couches her claim as the denial of a right, she undertakes no constitutional analysis about how that right was denied in this case. Because Martin fails to develop this argument in her brief in support of this claim this Court should decline to address it. An appellant must provide “argument in support of the issues presented for review, together with citations to legal authority and references to relevant parts of the record.” RAP 10.3(a)(6).

III. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN LIMITING THE ADMISSION OF EVIDENCE ABOUT THE MISCONDUCT OF THE VICTIM BECAUSE IT WAS NOT RELEVANT TO HER DIMINSHED CAPACITY DEFENSE.

Martin argues, as she did in the trial court, that the admission of evidence about her husband’s mistreatment of her was necessary to her defense of diminished capacity. However, as noted in part II, supra, Dr. Brown did not testify or assert that Mr. Martin’s alleged mistreatment of the defendant *caused* the various mental disorders from which she suffered. Defense counsel’s assertion that the jury needed to hear about the awful treatment the defendant supposedly received at the hands of her husband so that they could *believe* Dr. Brown was specious, at best. Martin sought to admit this testimony so that she could malign her

husband and garner sympathy for herself. The trial court recognized this and painstakingly sought to balance the defendant's right to present her defense with the State's right to a fair trial.

The trial court's decision to admit evidence is reviewed for abuse of discretion. The trial court's decision to admit evidence lies within its wide discretion, and is reviewed for abuse of discretion. *State v. Neal*, 144 Wn.2d 600, 609, 30 P.3d 1255 (2001). The trial court abuses its discretion when its decision is manifestly unreasonable or based on untenable grounds. *Id.*

Here, no abuse of discretion occurred. The trial court carefully balanced the rights of both parties and held that Ms. Martin would be permitted to introduce evidence of her husband's shameful behavior on the night of the shooting. If Ms. Martin sought to malign her husband, she had plenty of material to work with based on his actions that night alone. Further, Martin fails to cite to a single on-point authority for her claim that the trial court should have admitted evidence of a victim's past misconduct so that it could bolster the credibility of her psychological expert, particularly where the expert did not rely on the misconduct to reach her diagnosis. She cites to *State v. Grant*, 83 Wn.App. 98, 920 P.2d 609 (1996), however *Grant* is wholly inapplicable to this case. In *Grant*, the Court of Appeals held that the prior misconduct of the defendant could

be admitted under ER 404 (b) to explain the victim's statements and conduct which might appear inconsistent with her trial testimony. *Grant* at 106-07. Here, there was no such inconsistency to be explained. Martin also cites *State v. Lopez*, 142 Wn.App. 341, 355, 174 P.3d 1216 (2007) because the Court of Appeals held that the admission of the defendant's prior bad acts was properly admitted to show the victim's state of mind and not to demonstrate criminal propensity. *Lopez*, like *Grant*, does not support Martin's claim. Here, Martin ostensibly sought to have this evidence admitted so that it would enhance the credibility of her expert witness. But the true purpose of this testimony was to show that anyone in Ms. Martin's shoes would have been angry because her husband was a cruel man. The probative value of this evidence was negligible and completely outweighed by its prejudicial effect. Even if the trial court erred in excluding this evidence, the error was harmless.

An error in admitting evidence that does not result in prejudice to the defendant is not grounds for reversal. *State v. Bourgeois*, 133 Wn.2d 389, 403, 945 P. 2d 1120 (1997). Where the error arises from a violation of an evidentiary rule, that error is not prejudicial unless, within reasonable probabilities, the outcome of the trial would have been materially affected had the error not occurred. *State v. Halstien*, 122 Wn.2d 109, 127, 857 P.2d 270 (1993). This Court need not find that it is

harmless “beyond a reasonable doubt.” *Bourgeois* at 403; *State v. Cunningham*, 93 Wn.2d 823, 831, 613 P.2d 1139 (1980); *State v. Tharp*, 96 Wn.2d 591, 599, 637 P.2d 961 (1981). The improper admission of evidence is harmless error if the evidence is of minor significance in reference to the overall, overwhelming evidence as a whole. *Thieu Lenh Ngiem v. State*, 73 Wn. App. 405, 413, 869 P.2d 1086 (1994).

The exclusion of this evidence, even if in error, did not prejudice Ms. Martin where the jury heard a large amount of information about the victim’s poor treatment of her on the night of the shooting. Indeed, the jury heard that Mr. Martin treated Ms. Martin with abject cruelty on that evening. Nevertheless, the jury followed the law and did not excuse her intentional conduct simply because her husband was portrayed as a cruel, heartless man.

Here, Martin is not clear on what she believes to be the standard of review. She acknowledges that this error, if it occurred, would be reviewed for an abuse of discretion (see Brief of Appellant, p. 44), but then asserts that by excluding this evidence the trial court denied her the constitutional right to present a defense. She once again cites no authority in support of this assertion (which is to say, she doesn’t make an *argument*) and this Court should decline to review this constitutional claim, to the extent it has even been raised. In discussing the standard of

review, she cites to *State v. Maupin* 128 Wn.2d 918, 924, 9913 P.2d 808 (1996) and claims that this error must be demonstrated to be harmless beyond a reasonable doubt with the State bearing the burden of proof. Martin fails to develop this argument at all, and merely citing to a case which accurately recites the standard of review for constitutional error should not be enough. This error, if any, is nonconstitutional error and the standard of review is for an abuse of discretion. The trial court did not abuse its discretion and Ms. Martin's conviction should be affirmed.

D. CONCLUSION

Ms. Martin's conviction should be affirmed.

DATED this 27 day of September, 2011.

Respectfully submitted:

ANTHONY F. GOLIK
Prosecuting Attorney
Clark County, Washington

By: [Signature]
ANNE M. CRUSER, WSBA #27944
Deputy Prosecuting Attorney

CLARK COUNTY PROSECUTOR

October 19, 2011 - 3:03 PM

Transmittal Letter

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Case Name: State v. Sheryl Jean Martin

Court of Appeals Case Number: 41588-7

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Supplemental Designation of Clerk's Papers

Statement of Arrangements

Motion: ____

Answer/Reply to Motion: ____

 Brief: Respondent's

Statement of Additional Authorities

Cost Bill

Objection to Cost Bill

Affidavit

Letter

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Personal Restraint Petition (PRP)

Response to Personal Restraint Petition

Reply to Response to Personal Restraint Petition

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Sender Name: Jennifer M Casey - Email: **jennifer.casey@clark.wa.gov**

A copy of this document has been emailed to the following addresses:

cathyglinski@wavecable.com

APPENDIX A

Affidavit for Search Warrant

IN THE DISTRICT COURT OF CLARK COUNTY
STATE OF WASHINGTON

STATE OF WASHINGTON
Plaintiff,

AFFIDAVIT FOR
SEARCH WARRANT

Vs.

~~SHERYL J. MARTEN~~
DOB 01-30-1956

STATE OF WASHINGTON)
COUNTY OF CLARK)ss

I, Detective John O'Mara, of the Clark County Sheriff's Department Major Crimes Unit, being first duly sworn upon oath, hereby deposes and say, that I have good and sufficient reason to believe that the following described goods to wit:

28 GAUGE SHOTGUN, SPENT AND LIVE SHOTGUN SHELLS, AN ADDITIONAL SHOTGUN AND OTHER ITEMS THAT ARE EVIDENCE OF THE CRIME OF ASSAULT I, RCW 9A.36.011(1)(a)

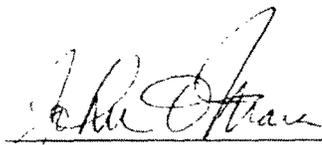
And I am aware of the same based upon the following:

I am a Detective with the Clark County Sheriff's Department Major Crimes Unit. I have been with Clark County for 8 years and have a total of 21 years Law Enforcement experience, including prior training in investigations to include Arson, Burglary, Theft, Homicide, and other crimes.

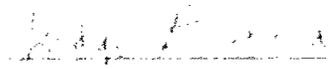
In this official capacity, I, Detective John O'Mara, was asked by Detective Sgt. David Trimble to assist with an investigation of a ASSAULT I 31
~~1222 E 21st Ave, Ridgefield~~, Clark County, Washington. Upon my arrival at the residence I met with DEPUTY JEREMY KOCH #4263 who told me the following THAT HE WAS DISPATCHED WITH OTHER UNITS TO THE LISTED ADDRESS DUE TO A 911 CALL FROM A PERSON LATER IDENTIFIED AS SUSPECT/DEFENDANT SHERYL J. MARTEN, WHO TOLD 911 DISPATCH THAT SHE (SHERYL MARTEN) HAD JUST SHOT HER HUSBAND. RESPONDING UNITS ARRIVED, TAKING SHERYL MARTEN INTO CUSTODY, AT WHICH TIME SHE WAS READ HER RIGHTS UNDER MIRANDA AND VERBALLY ACKNOWLEDGED THAT SHE UNDERSTOOD THE RIGHTS READ TO HER. DEPUTY KOCH, ALONG WITH OTHER OFFICERS, COULD HEAR SOMEONE YELLING FROM INSIDE A CAMPER THAT WAS ATTACHED TO A WAREHOUSE PICK UP THAT WAS PARKED IN THE DRIVEWAY.

THE ~~CAMPER~~ HAD WA. LIC. # A66337Z ON THE FRONT AND THE CAMPER
WA. LIC. # 7704TC ON THE BACK, UPON ENTERING THE CAMPER, DEPUTY K
TOLD ME HE SAW A SHOTGUN "WAD" ABOUT 2-3 FT INSIDE THE CAMPER DOOR AND
TO THE RIGHT OF THE DOOR HE SAW WHAT APPEARED TO BE A PIECE OF BULK SHOT, OR
IF IT HAD STRUCK SOMETHING. DEPUTY KOCH SAID HE YELLED SOMETHING LIKE
"YOU IN HERE" OR "ARE YOU OK"? A MALE, LATER IDENTIFIED AS THE VI.
EDDIE E. MARTEN, DOB 04-17-1956, ANSWERED "YES", WHEN ASKED WHAT AN
EDDIE MARTEN REPLIED "MY WIFE SHOT ME", DEPUTY KOCH TOLD ME HE COULD
SEE EDDIE MARTEN IN THE BED PORTION OF THE CAMPER THAT IS LOCATED DI
OVER THE CAB OF THE PICKUP TRUCK, MARTEN'S FEET WERE CLOSEST TO DEP
KOCH, WHICH WOULD BE NORTH, AND MARTEN'S HEAD WAS NEAR THE END OF
CAMPER, WHICH WOULD BE SOUTH. DEPUTY KOCH STATED HE COULD SEE WHAT LI
LIKE BLOOD ON MARTEN'S RIGHT SHIN. IN ADDITION MARTEN'S LEFT ELBOW AP
TO BE "BLOWN TO PIECES AND LOOKED LIKE PIECES OF TOWEL OR BLANKET OR
OILLOW CASE WERE EMBEDDED IN THE WOUND." A SEARCH FOR ANY ADDITION
PEOPLE OR SUSPECTS ON SCENE REVEALED A SHOTGUN LOCATED IN THE KITCH
OF THE MAIN RESIDENCE, LYING ON A CENTER ISLAND, WITH 2 LIVE SHOTS
SHELLS LYING NEXT TO IT. ANOTHER SHOTGUN WAS FOUND UPSTAIRS WITH TI
BREAK OPEN & A BOX OF SHELLS SITTING NEXT TO IT. IN ADDITION, DEPUTY K
SAID WHILE THE DEFENDANT WAS SEATED IN HIS CAR HE NOTICED HER HEAD WAS SLA
AND SHE SEEMED LETHARGIC. WHEN ASKED IF SHE HAD TAKEN ANYTHING SHE TOLD KOCH "I
HAD A VODKA & A BEER," KOCH SAID "I JUST ASKED BECAUSE YOU SEEM KIND OF OUT OF
"MERYL MARTEN REPLIED & THAT'S BECAUSE I JUST SHOT MY HUSBAND. I FOUND OUT HE'S BEEN HAVING

AND THE
LAST TWO YEARS. Based on the foregoing, I pray the court for the issuance of a search warrant for the afore
described residence and the two vehicles parked in the driveway, to include curtilage.


Detective John O'Mara
Clark County Sheriff's Office

Subscribed and sworn to me this ^{08TH} ~~10TH~~ day of ^{SEPTEMBER} ~~NOVEMBER~~ 2007


District Court Judge
Clark County
State of Washington

Time approved: 5 hrs 45 min
Clark County Sheriff's case #S07-13256

CLARK COUNTY PROSECUTOR

October 20, 2011 - 8:54 AM

Transmittal Letter

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Sender Name: Jennifer M Casey - Email: jennifer.casey@clark.wa.gov

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cathyglinski@wavecable.com