

NO. 47003-9-II

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

STATE OF WASHINGTON, Respondent

v.

JAMES DILLARD APPLGATE, Appellant

FROM THE SUPERIOR COURT FOR CLARK COUNTY
CLARK COUNTY SUPERIOR COURT CAUSE NO.13-1-02329-6

BRIEF OF RESPONDENT

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A. RESPONSE TO ASSIGNMENTS OF ERROR

- I. The trial court properly admitted the contested evidence in this case because Debbie Applegate's initial statements were excited utterances, her written statement was admissible as a recorded recollection under ER 803(a)(5) and/or was admissible as a *Smith* affidavit under ER 801(d)(1), and Officer Bachelder's testimony was proper testimony that would be helpful for the jury.
- II. Mr. Applegate waived his challenge to the imposition of legal financial obligations because did he not object at the trial level.

B. STATEMENT OF THE CASE

I. Procedural History

James Applegate was charged by information with Assault in the Second Degree with a special allegation of domestic violence for an incident on December 6, 2013. CP 1-2. The case proceeded to trial before The Honorable David Gregerson, which commenced on November 3, 2014 and concluded on November 5, 2014 with the jury's verdict. CP 38-39; RP 7-464.

The jury found Applegate guilty as charged and the trial court sentenced him to a standard range sentence of 135 days. CP 40-49; RP 479. Applegate filed a timely notice of appeal. CP 52.

II. Statement of Facts

In 2013, Applegate and his sister, Debbie, lived with their mother Katherine.¹ RP 139. On December 6, 2013, Applegate had been drinking when he walked into Debbie's bedroom doorway while smoking. RP 170, 186-87, 198, 352. His arrival with the cigarette caused the siblings to argue, which in turn led to Applegate calling Debbie a "fucking fat bitch" and telling her to "shut the fuck up." RP 170, 186-87; Ex. 28. Upset, she got off of her bed to confront Applegate and to get him to leave her bedroom. RP 170, 186-87.

At this point, Applegate grabbed Debbie, started pushing her onto the bed, and then took her to the ground before flipping her onto her back and getting on top of her. RP 171, 187-88, 295, 298; Ex. 28. Once he was on top of Debbie, he began to strike her in the head and face. RP 188, 295; Ex. 28. After striking her a couple of times, he grabbed her around the neck and strangled her for about 20 seconds. RP 188, 293, 295, 298-99; Ex. 28. During the time she was being strangled, she could not breathe, began seeing spots, and involuntarily urinated. RP 188, 293, 298-99, 317-18; Ex. 28.

Debbie started punching Applegate to get him off of her and hit him multiple times in the nose causing it to bleed. RP 188, 299; Ex. 28. Applegate then stopped strangling her and she got up and ran upstairs to

¹ For clarity, first names are used to identify the Applegate women.

call 911, but could not find the phone. RP 188-89, 300. However, Applegate called 911 and reported that his sister was out of control. RP 272-76. During the 911 call, Applegate laughed and told the dispatcher that he had been drinking. RP 352.

Officer David Krebs of the Vancouver Police Department responded to the 911 call. RP 165-66. Upon arriving, he saw Applegate exit the house and met him halfway up the driveway. RP 166, 278-79. Applegate immediately put his hands up and said, "I did it. Take me in." RP 167, 280. When Officer Krebs responded by asking, "Did what?" Applegate responded, "I did it. Take me in." RP 167, 280. Because he wanted to figure out what was going on, Officer Krebs had Applegate take a seat and he proceeded inside the house. RP 167.

Once inside, Officer Krebs saw Debbie. RP 167. Officer Krebs instantly noticed that she had injuries to her face, including blood on her forehead, swelling over her eye, an abrasion with some blood on her chin and some blood around her lips. RP 167-68, 283, 288. She was agitated, emotional, and holding onto the top of her head and complaining of pain. RP 168, 290, 316-17. Next, Debbie said to Officer Krebs "Let me show you what he did" and led the officer downstairs to her bedroom. RP 168, 282-84. She then showed Officer Krebs a rack of CDs at the doorway to her bedroom that had been scattered on the floor, as well as a cigarette butt

on the floor. RP 169, 282-84, 286, 288. Officer Krebs took photographs of CDs, the cigarette butt on the floor, and Debbie's room. RP 169, 285-88.

Officer Krebs then asked her about her injuries and she told him about Applegate attacking her. RP 170-81, 188-90, 288-89. During Officer Krebs' entire contact with her, she was very emotional and extremely worked up. RP 181, 185-86, 288, 316. However, he did not suspect that she was intoxicated or under the influence of drugs or alcohol. RP 197-99, 291. Upon further examination, Officer Krebs saw redness and bruising along both sides of her neck, bleeding in her mouth, and what looked like blood on her clothes in addition to the other injuries he had already observed. RP 189, 191-93, 292-93, 324-25.² Photographs of the injuries were provided to the jury. RP 190.

When Officer Krebs spoke again with Applegate, he noticed that there was redness and swelling around Applegate's nose and mouth, and red marks on his forehead. RP 196, 279, 312. Officer Krebs asked him what happened and he said that he was playing poker on the computer when Debbie stormed into his room and "busted" him in the nose. RP 196, 311. During the interview, Applegate was consistently giggling and had a smile on his face. RP 197, 311, 313, 326.

² Five days later another officer visited Debbie and noticed that injuries to her eye and chin remained. RP 237-38. The injuries were photographed and introduced into evidence. RP 237.

Officer Krebs confronted Applegate about his initial declaration that “[he] did it,” which Applegate explained was just him being a real man and taking the blame. RP 197, 311. When asked about Debbie’s injuries, Applegate claimed to have seen them but stated he had no idea how she sustained them and denied hitting or strangling her. RP 196-97.

Before leaving the scene with Applegate in his car, Officer Krebs provided a written statement form to Debbie and explained the content of the form and the process. RP 199-01. Another officer stayed with her and witnessed her fill out the form and write her statement. The written statement was admitted into evidence. RP 267-68; Ex. 28.

At trial, the Applegates’ stories had changed. Debbie claimed to have had so much alcohol to drink that night that she did not remember the night clearly, did not remember an argument with her brother that got physical, and did not remember talking with the police. RP 117-18, 123-24, 127-29. She also did not remember having any injuries the next day, talking with a detective five days after the incident, or still having any injuries five days later. RP 120-22. However, when presented with pictures of herself with injuries, she admitted they were pictures of her. RP 121-22. When asked by the State if she wanted her brother to come home, she answered, “Yeah, I do” and when asked if she wished what happened on December 6th did not happen, she responded, “That’s true.” RP 132.

Debbie and Applegate's mother, Katherine, who was home on December 6th, testified that she remembered seeing Debbie upset on that night but did not remember personally talking with an officer, and when shown pictures of Debbie's injuries, denied seeing the injuries on her face. RP 139-42. She did, however, remember Debbie sitting at the table with an officer and writing and/or signing on a form, and asking the officer how to spell "choking." RP 143-48, 156-62. When asked if what she wanted most right now was for Applegate to come home, Katherine responded "Oh, yeah. I've got to have some help." RP 142.

Applegate testified at trial. RP 339-61. He told the jury that on December 6, 2013, he saw Debbie outside smoking a cigarette and that she had a bloody nose. RP 341-42. He asked her about the bloody nose, but she did not respond. RP 342. He then went inside to his room and got on his computer and went online with some friends. RP 342-43. About thirty minutes later, Debbie came running into his room and started yelling and hitting him, and then just yelled some more and took off back to her bedroom. RP 343-45.

Applegate testified that he followed Debbie into her bedroom because he wanted to know why she did that to him, and when he got to the room he saw Debbie sitting on her bed and her friend Gloria in the doorway. RP 345. Mr. Applegate said that he did have a cigarette in his

hand and that this caused Debbie to get angry and jump on top of him. RP 345-46. At this point, Gloria ran away and Debbie and Mr. Applegate fell to the ground. RP 345-46.

Mr. Applegate then testified that he went and put out his cigarette in his room and went upstairs to check on his mother, while Debbie continued to yell and hit him all the way up the stairs. RP 345-56. According to Applegate, Katherine came out of her bedroom and he told her to make Debbie stop or he was going to call the police. RP 346. He also claimed Katherine saw Debbie lunging at him in the kitchen. RP 357. Applegate testified that he decided to call the police, and in response, Katherine scolded him so he went outside to wait for the police. RP 347.

Upon questioning, Applegate admitted on the stand to making the “take me to jail” statements, admitted that he did not try to tell the officers what happened, and admitted he left out a lot of details. RP 348, 354, 356-57. Applegate testified that he did not tell the police that Katherine and Gloria saw Debbie assaulting him because “it was irrelevant.” RP 357. Finally, he admitted that when he and Debbie went to the ground in her room, there was one point where he was on top of her. RP 359. Applegate continued to deny assaulting Debbie and claimed to have no idea how she was injured. RP 356. Officer Krebs was recalled to impeach Applegate on

the differences between what he said on the scene and what he said on the stand. RP 363-64

C. ARGUMENT

- I. The trial court properly admitted the contested evidence in this case because Debbie Applegate's initial statements were excited utterances, her written statement was admissible as a recorded recollection under ER 803(a)(5) and/or was admissible as a *Smith* affidavit under ER 801(d)(1), and Officer Bachelder's testimony was proper testimony that would be helpful for the jury.

- a. Standard of Review

“Questions of relevancy and the admissibility of testimonial evidence are within the discretion of the trial court, and we review them only for manifest abuse of discretion.” *State v. Aguirre*, 168 Wn.2d 350, 361, 229 P.3d 669 (2010); *State v. Martin*, 169 Wn.App. 620, 628, 281 P.3d 315 (2012) (“The admissibility of evidence is within the sound discretion of the trial court and an appellate court will not disturb that decision unless no reasonable person would adopt the trial court's view.”) (citations omitted). When a trial court's ruling on such matters of evidence is in error, reversal will only be required “if there is a reasonable possibility that the testimony would have changed the outcome of trial.” *Aguirre*, 168 Wn.2d at 361 (citing *State v. Fankhouser*, 133 Wn.App. 689, 695, 138 P.3d 140 (2006)). Moreover, appellate courts “may affirm the trial

court's ruling on any grounds the record supports, including those the trial court did not explicitly articulate.” *State v. Moore*, 178 Wn.App. 489, 498, 314 P.3d 1137 (2013) (citing *State v. Ginn*, 128 Wn.App. 872, 884 n. 9, 117 P.3d 1155 (2005)).

- b. Debbie Applegate’s initial statements to Officer David Krebs were properly admitted as excited utterances because she made the statements about the startling event while still under the stress of excitement caused by that event.

Pursuant to ER 803(a)(2) an excited utterance is a statement relating to a startling event, made while the declarant was under the stress or the excitement caused by that event. An excited utterance is not objectionable as hearsay and is admissible as substantive evidence. *State v. Chapin*, 118 Wn.2d 681, 686, 826 P.2d 194 (1992); ER 803(a)(2). The proponent of the excited utterance evidence must show 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. Ohlson*, 162 Wn.2d 1, 9, 168 P.3d 1273 (2007) (citing *State v. Woods*, 143 Wn.2d 561, 597, 23 P.3d 1046 (2001)).

Moreover, a statement may be admitted as an excited utterance “even if the declarant recants or testifies at trial that the event never occurred.” *Id.* at 8-9; (citing *State v. Williamson*, 100 Wn.App. 248, 258-

59, 996 P.2d 1097 (2000) (statements by victim describing her kidnapping and attempted murder held admissible as excited utterances, even though victim later recanted and refused to testify against defendant); *State v. Briscoeray*, 95 Wn.App. 167, 173-74, 974 P.2d 912 (1999) (victim's statement describing assault by boyfriend held admissible as excited utterance, even though victim testified at trial that assault never occurred). Notably, the proponent of the excited utterance evidence need not “prove the *exact content* of an excited utterance for the statement to be admissible.” *State v. Young*, 160 Wn.2d 799, 820, 161 P.3d 967 (2007) (emphasis added).

While the spontaneity of the declarant’s statements is a key indicator as to whether the “declarant made the statement while under the stress of excitement of the startling event or condition,” complete spontaneity is not required and, thus “responses to questions may be admitted” as excited utterances. *State v. Downey*, 27 Wash.App. 857, 861, 620 P.2d 539 (1980) (citation omitted); *Williamson*, 100 Wn.App. at 258 (citing *Johnston v. Ohls*, 76 Wn.2d 398, 406, 457 P.2d 194 (1969)). The passage of time between the startling event and the statement is another relevant, but not determinative, factor in assessing whether a statement was made while under the stress of the event. *State v. Strauss*, 119 Wn.2d 401, 416-17, 832 P.2d 78 (1992). In fact, our courts have allowed

statements to be admitted as excited utterances even when a number of hours had passed between an event and the statements where the proponent of the statements was able to lay a sufficient foundation to show that the declarant was still under the stress of the event. *See State v. Guzizzotti*, 60 Wn.App. 289, 803 P.2d 808 (1991) (holding that a victim's statement to police was properly admitted as an excited utterance when, following a rape, the victim hid under a tarp for 7 hours before calling the police); *State v. Fleming*, 27 Wn.App. 952, 621 P.2d 779 (1980) (holding that a victim's statements to a friend three hours after the startling event and to the police three to six hours after the event were properly admitted as excited utterances).

A sufficient foundation to show that declarant was still under the stress of the event at the time of the statement can include evidence that the declarant was upset, distraught, shaken up, or excited. *Ohlson*, 162 Wn.2d at 9; *Woods*, 143 Wn.2d at 599. Thus, in *Woods*, our Supreme Court found it "significant that *only* about 45 minutes had elapsed" between when defendant fled and the victim made her statement because that was "by no means a prolonged time frame between the event and the time of the statement." *Id.* (emphasis added). Moreover, because the record established that at the time of the statement the victim was "very emotional, very distraught, clearly upset and in a lot of pain," the trial

court properly admitted the statements as excited utterances. *Id.* Similarly, in *Ohlson*, our Supreme Court held that the victims' statements were properly admitted as excited utterances where the victims spoke to an officer and were "pretty upset and pretty shaken up." *Ohlson*, 162 Wn.2d at 9. *See also State v. Hardy*, 133 Wn.2d 701, 714, 946 P.2d 1175 (1997) (finding that victims were still under the stress of the event at the time of their statements because record showed that they were "visibly shaken and excited" at the time).

Here, Officer Krebs arrived nine minutes after the 911 call was placed. RP 8-9. After quickly dealing with Applegate, Officer Krebs moved inside and spent about twenty minutes with Debbie. RP 15, 33. Officer Krebs described Debbie as extremely agitated, in shock, moving quickly, ranting, talking repeatedly and loudly, and really emotional. RP 11-14, 24, 26, 39, 47-48, 181, 185, 283, 288, 290, 316. Debbie was especially emotional when talking about being strangled and involuntarily urinating on herself. RP 47-48. Though Debbie was able to calm down some when speaking with Officer Krebs, he described her as agitated and emotional the entire time and that she went from so emotional that no conversation was possible to still very emotional, but able to speak to someone. RP 14, 29-30, 39-40, 47, 181, 185-86, 288, 316. During this

twenty minute time period, Debbie told Officer Krebs how Applegate attacked her. RP 7-48, RP 167-71, 188-89.

The time between the starting event and Debbie's statement was minimal, and Debbie's emotional state as described by Officer Krebs is sufficient under the case law to establish that she was still under the stress of the event when telling Officer Krebs what had happened. Furthermore, that Officer Krebs was unable to relay Debbie's entire statement in verbatim to the jury is of no matter since "the proponent of the excited utterance evidence need not "prove the exact content of an excited utterance for the statement to be admissible." *Young*, 160 Wn.2d at 820. Instead, the inability of a witness to recount the exact words a declarant uses goes to the weight the evidence. *Id.*

Applegate contends that this case is similar to *State v. Dixon*, but *Dixon* presented facts substantially different than those at issue here and is so dissimilar that it provides no guidance as to the resolution of the excited utterance evidence at issue. *State v. Dixon*, 37 Wn.App. 867, 684 P.2d 725 (1984)³; Br. of App. at 13. Based on the above foundation, the trial court

³ In *Dixon*, officers spent approximately two hours with the victim in that case at which time she completed a four page statement fully detailing the incident from the arrival of the defendant at her front door to her escape. *Id.* at 869, 873. Her statement also included several lines of additional detail that were added with the explanation that she remembered those details after completing the first three and one-half pages of her statement. *Id.* at 873. As *Dixon* opined, because of its length and completeness, the written statement was impossible to distinguish from the normal, formal statement

did not abuse its discretion when it ruled that the statements Debbie made to Officer Krebs were admissible as excited utterances. RP 63-65.

- c. The trial court properly admitted Debbie's written statement under ER 803(a)(5) as a recorded recollection and under ER 801(d)(1) as a Smith affidavit.

As a threshold matter, Applegate does not assign error to the trial court's ruling that Debbie's written statement was admissible under ER 803(a)(5). *See* Br. of App. Instead, Applegate chose to assert via one sentence in a footnote that the statement could not have been admitted under ER 803(a)(5). Br. of App. at 16 FN 11. Our appellate courts "have repeatedly told parties to make their argument in the body of their brief, not their footnotes." *Tamosaitis v. Bechtel Nat., Inc.* 182 Wn.App. 241, 248 FN 2, 327 P.3d 1309 (2014) (citing cases). This exhortation is not merely perfunctory, however, as arguments in footnotes are inadequate and need not be considered by reviewing courts. *State v. Harris*, 164 Wn.App. 377, 389 FN 7, 263 P.3d 12 (2011); *State v. N.E.*, 70 Wn.App. 602, 606 FN 3, 854 P.2d 672 (1993) (declining to consider appellant's argument made in a footnote); *State v. Johnson*, 69 Wn.App. 189 194 FN 4, 847 P.2d 960 (1993) (same). This court should decline to review the admissibility of Debbie's statement under ER 803(a)(5) because of Mr.

provided by victims to the police and should not have been admitted as an excited utterance. *Id.*

Applegate's failure to assign error to the trial court's ruling and failure to adequately present the issue to this court. Consequently, even if this court agrees with Mr. Applegate's contention that Debbie's statement was inadmissible under *Smith* and ER 801(d)(1), because there is an unchallenged basis of admissibility that error cannot result in the exclusion of the evidence.

1. *ER 803(a)(5) – Recorded Recollection*

The party offering evidence “must establish the elements of a required foundation by a preponderance of the evidence.” *State v. Nava*, 177 Wn.App 272, 289-90, 311 P.3d 83 (2013) (citing *State v. Benn*, 120 Wn.2d 631, 653, 845 P.2d 289 (1993)). A recorded recollection can be admitted as substantive evidence “when the proponent of the evidence demonstrates that (1) the record pertains to a matter about which the witness once had knowledge, (2) the witness has an insufficient recollection of the matter to provide truthful and accurate trial testimony, (3) the record was made or adopted by the witness when the matter was fresh in the witness's memory, and (4) the record reflects the witness's prior knowledge accurately.” *Nava*, 177 Wn.App at 290; ER 803(a)(5).

The fourth element of the foundation for the admission of a recorded recollection “may be satisfied without the witness' direct

avermment of accuracy at trial” and even in the face of a witness’ disavowal of the record. *State v. Alvarado*, 89 Wn.App. 543, 551, 949 P.2d 831 (1998); *Nava*, 177 Wn.App. at 291-95.⁴ This is unsurprising since “other evidence establishing the accuracy of [a recorded recollection] could be just as credible as, if not more so, than the declarant’s testimony at trial that the statement was accurate when made.” *Nava*, 177 Wn.App. at 294 (quoting *State v. Derouin*, 116 Wn.App. 38, 46, 64 P.3d 35 (2003)).

The logic behind recognizing that other evidence may be more credible than the declarant’s testimony about the accuracy of the statement at issue has additional force “in cases of domestic violence, since the victim may have a stronger motive to forget the past statement than to remember it.” *Derouin*, 116 Wn.App. at 46. As a result, a statement given to the police may be admissible as a recorded recollection even if the declarant claims that he or she does not remember giving the statement to the police. *Id.* at 44-47. Instead, to determine whether the record reflects the witness’s prior knowledge accurately “[t]he court must examine the totality of the circumstances, including (1) whether the witness disavows accuracy; (2) whether the witness averred accuracy at the time of making

⁴ “[T]he language of ER 803(a)(5) providing the basis for the fourth element of the foundation—its requirement that the memorandum or record “reflect [the witness’s former] knowledge correctly”—provides no textual basis for requiring that the witness personally vouch for the accuracy of the recorded statement.” *Nava*, 177 Wn.App. at 293.

the statement; (3) whether the recording process is reliable; and (4) whether other indicia of reliability establish the trustworthiness of the statement.” *Alvarado*, 89 Wn.App. at 551–52; *Nava*, 177 Wn.App at 291-93.

Here, the trial court properly admitted Debbie’s written statement as a recorded recollection. RP 224-29⁵, 259-60, 267-68. Despite Debbie’s claim at trial that she had no recollection of speaking with the police or writing a statement, the totality of the circumstances supported a finding that her written statement reflected Debbie’s prior knowledge accurately. Those circumstances include that (1) Debbie’s injuries corroborated her written statement; (2) Debbie’s initial statements to the police were consistent with her written statement; (3) Debbie testified that the handwriting on the written statement was hers, the signature on the form was hers, and that she understood what perjury meant; (4) Debbie testified that it was important to be truthful to the police and that if she would have talked to them on December 6th, she would have tried to tell them the truth; (5) Officer Krebs testified that he explained the full form, including the penalty of perjury section, to Debbie and she did not have questions about it nor express confusion; (6) Officer Krebs testified that Debbie not appear intoxicated; and (7) Katherine Applegate testified that she saw

⁵ The trial court explicitly relied on *Alvarado* in determining that Debbie’s statement was admissible under ER 803(a)(5).

Debbie sign the form and/or writing on the form and heard her ask the officer how to spell “choking.” RP 43-46, 49-50, 119-120, 122, 128, 148-61, 199-201, 214-19. In fact, this case is on all fours with *Derouin*, a domestic violence case, where a trial court erred by not admitting a written statement as a recorded recollection on the basis that the victim had no recollection of speaking to the police or writing her statement on the day in question, even though she admitted it was her signature on the statement, the officer told her she had to tell the truth when filing out the statement, photographs of physical evidence corroborated the content of the written statement, and other statements by the victim were consistent with the written statement. *Derouin*, 116 Wn.App at 41-47.

Derouin is not meaningfully distinguishable from the facts here. Moreover, when all of the above is combined with the fact that Debbie did not actually disavow the accuracy of the statement and the family context of the crime, it becomes straightforward that the trial court did not abuse its discretion when it found that the State presented a sufficient foundation to admit Debbie’s written statement as a recorded recollection under ER 803(a)(5).

2. ER 801(d)(1) - *Smith* Affidavit

Under *Smith*, a prior written statement by a person can be admitted as substantive evidence if they testify inconsistent with their written statement, the elements of ER 801(d)(1)(i) are satisfied, and after applying the *Smith* factors that the written statement is found to be reliable. *State v. Smith*, 87 Wn.2d 86, 863, 651 P.2d 207 (1982); *State v. Thach*, 126 Wn.App. 297, 307-308, 106 P.3d 782 (2005). Pursuant to 801(d)(1)(i) a statement of a witness is admissible when:

[t]he declarant testifies at the trial or hearing and is subject to cross examination concerning the statement, and the statement is (i) inconsistent with the declarant's testimony, and was given under oath subject to the penalty of perjury at a trial, hearing, or other proceeding, or in a deposition.

The *Smith* factors for assessing the reliability of the written statement are:

(1) whether the witness voluntarily made the statement; (2) whether there were minimal guaranties of truthfulness; (3) whether the statement was taken as standard procedure in one of the four legally permissible methods for determining the existence of probable cause; and (4) whether the witness was subject to cross examination when giving the subsequent inconsistent statement.

Thach, 126 Wn.App. at 308 (citing *Smith*, 97 Wn.2d at 861-63, 651 P.2d 207). In applying the *Smith* factors to assess reliability, courts should recognize that “[i]n many cases, the inconsistent statement is more likely to be true than the testimony at trial as it was made nearer in time to the matter to which it relates and is less likely to be influence by factors such

as fear or forgetfulness.” *Smith*, 97 Wn.2d at 861. Furthermore, the second *Smith* factor, whether there were minimal guaranties of truthfulness, is satisfied when a statement is made under oath and subject to perjury. *Thach*, 126 Wn.App. at 308; *State v. Nelson*, 74 Wn.App. 380, 390, 874 P.2d 170 (1994).

Applegate contends that Debbie’s written statement should not have been admitted because it did not meet the second and fourth *Smith* factors and because the statement was not given under oath subject to penalty of perjury under ER 801(d)(1)(i).

Here, Debbie’s statement was made under oath and subject to perjury, and, thus, the second *Smith* factor and ER 801(d)(1)(i) were satisfied. Officer Krebs testified that (1) he explained the form to Debbie; (2) he read the sworn statement part to her word for word; (3) Debbie was listening to him; (4) Debbie did not ask him any questions about what she was signing; and that (5) she said she understood it was under oath.⁶ RP 43-46, 49-50, 199-201, 214, 217-19. The form itself provides:

I have written, or had this statement written for me and this statement truly and accurately reflect [sic] my recollection of this incident. The police officer has explained to me I have to certify or declare, under penalty of perjury under the laws of the State of Washington, that the foregoing is true and correct.

⁶ The was a speculation objection sustained seemingly about the question that resulted in the first-hand knowledge answer Officer Krebs provided that Debbie said she understood the statement was under oath. RP 219.

Ex. 28.

Additionally, Katherine Applegate made clear that she observed Debbie sitting at a table with an officer, and that she was writing on the form, maybe signing the form, and that the officer assisted with spelling and showing Debbie where to sign. RP 148-61. Moreover, when reviewing the statement during her testimony, Debbie established that the handwriting on the written statement was hers, the signature on the form was hers, and that she understood what perjury meant. RP 119-20, 128. Importantly, she also testified that it was important to be truthful to the police and that if she would have talked to them on December 6th, she would have tried to tell them the truth. RP 122. Given the evidence provided and the necessary credibility determinations the court had to engage in to assess the reliability of the written statement, it did not abuse its discretion when it found that the statement met the minimal guaranties of truthfulness.

Furthermore, Debbie was subject to cross examination by Applegate after she gave her inconsistent statements about what had happened. *See* RP 117-36. Applegate cites no authority for his argument that the opportunity provided to him to cross examine Debbie is insufficient under the law for the purposes of *Smith*. Br. of App. at 21-22.

Instead, he cites *State v. Rohrich*, an inapposite Confrontation Clause case, and complains that “defense counsel had no incentive to question her about the content of the statement.” Br. of App. at 22. A lack of incentive to cross examine a witness, however, cannot mean the same thing as the witness not being subject to cross examination. Where no authorities are cited in support of a proposition, the court is not required to search out authorities, but may assume that counsel, after diligent search, has found none.” *State v. Young*, 89 Wn.2d 613, 625, 574 P.2d (1171) (1978) (quoting *DeHeer v. Seattle Post–Intelligencer*, 60 Wn.2d 122, 126, 372 P.2d 193 (1962)); *State v. Dow*, 162 Wn.App. 324, 331, 253 P.3d 476 (2011). Moreover, an appellate court need not consider issues unsupported by citation to authority. *State v. Lord*, 117 Wn.2d 829, 853, 822 P.2d 177 (1991). Because Debbie did testify, was cross examined by Applegate, and Applegate fails to support his contention with relevant authority that she was not subject to cross examination, this court should find that the trial court did not abuse its discretion when it admitted Debbie’s written statement under *Smith*.

Even if Debbie’s written statement was improperly admitted under *Smith* and ER 801(d)(1)(i), any error was harmless because there was an unchallenged alternative basis for the admission of the statement. Furthermore, Applegate cannot establish that there was a reasonable

probability that the result would have been different had the written statement not been admitted. Debbie's excited utterances to Officer Krebs were more detailed and compelling than what was provided in her written statement, which is extremely short. Moreover, her written statement was hampered by illegibility. Ex. 28. Her excited utterances to Officer Krebs were also consistent with her injuries, the physical evidence, and Applegate's statements that he "did it. Take me in," when initially confronted by the police. Thus, the verdict would not have been different absent the admission of Debbie's written statement.

- d. Officer Bachelder's Testimony was properly admitted because his testimony was helpful to the jury.

Expert testimony is admissible when the expert's "specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue. . ." ER 702. A witness can be "qualified as an expert by knowledge, skill, experience, training, or education, [and] may testify thereto in the form of an opinion or otherwise." *Id.*⁷ Training and experience gained as a police officer can qualify that person as an expert in certain areas. *Sanders*, 66 Wn.App at 386.

⁷ "Under ER 703 and 705, expert opinions can be admitted 'without foundation except for testimony establishing the expert's qualifications.'" *State v. Sanders*, 66 Wn.App. 380, 386, 832 P.2d 1326 (1992) (quoting 5A K. Tegland, Wash.Prac., Evidence § 311, at 482 (3d ed. 1989)).

Here, Officer Bachelder testified to his training and experience, and in particular, his experience as a domestic violence detective for five and a half years, his experience responding to complaints of strangulation, and his attendance at multiple trainings that covered strangulation. RP 233-35. Following that foundation, Officer Bachelder testified that based on his training and experience signs of strangulation can include red marks along the neck, petechiae, raspy voice, a hard time swallowing, breathing issues, involuntary urination, and ligature marks. RP 235-36. He further testified that some of these signs are more common and that one would not see each of these signs in every incident.

Based on Officer Bachelder's specific training and experience, he was properly allowed to assist the jury by informing them about what signs to look for when considering whether a person had been strangled. While helpful to assist the jury understand the evidence, however, Officer Bachelder's testimony did not bolster the State's case because the majority of the signs he described were not present in Debbie. In fact, Mr. Applegate used Officer Bachelder's expertise to his benefit by cross examining him about his observations of Debbie and the absence of signs of strangulation that were not present at the time he spoke with her. RP 238-40, 242-43.

Even if it was error for Officer Bachelder to testify to the signs of strangulation, there is not a reasonable possibility that the verdict would have been different had he not testified. Evidence in this case was extremely strong based on the victim's statements, the evidence of the victim's injuries, the physical evidence at the house, Mr. Applegate's initial statements to the police, and the non-credible testimony by the Applegates. The verdict did not hinge on Officer's Bachelder's testimony.

II. Mr. Applegate waived his challenge to the imposition of legal financial obligations because did he not object at the trial level.

A defendant who makes no objection to the imposition of discretionary LFOs (legal financial obligations) at sentencing is not automatically entitled to review" of that issue on appeal. *State v. Blazina*, 182 Wn.2d 827, 832, 344 P.3d 680 (2015). The defendant is not entitled to review because in Washington it is "well settled that an 'appellate court may refuse to review any claim of error which was not raised in the trial court.'" *Id.* (quoting RAP 2.5(a)). Thus, under *Blazina*, it remains the law that "[u]npreserved LFO errors do not command review as a matter of right." *Id.* Accordingly, *Blazina* held, regarding the consolidated cases on review, that "the Court of Appeals did not err in declining to reach the

merits” of the LFO issue, and instead, “properly declined discretionary review.” *Id.* at 830.

Moreover, this Division of the Court of Appeals has recently held that it will not consider a challenge to LFOs raised for the first time on appeal if the defendant’s sentencing occurred after this court issued its opinion in *State v. Blazina*, 174 Wn.App. 906, 301 P.3d 492 (2013). *State v. Lyle*, --- Wn.App. ---, --- P.3d --- (2015), 2015 WL 4156773. As *Lyle* explained, “because the sentencing hearing was after we issued our opinion in *Blazina*, counsel should have been aware that to preserve any issue related to the LFOs he was required to object.” *Id.*

Here, Applegate’s sentencing took place on November 7, 2014, which is well after this court issued its decision in *Blazina*. Applegate did not object to trial court’s imposition of LFOs. Thus, he finds himself in the exact position of the defendant in *Lyle*. This court should follow *Lyle* and decline to address his LFO challenge.

D. CONCLUSION

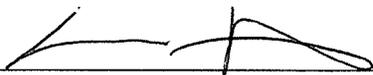
For the reasons argued above, Mr. Applegate’s convictions and sentence should be affirmed.

DATED this 14th day of September 2015.

Respectfully submitted:

ANTHONY F. GOLIK
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By:


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Deputy Prosecuting Attorney

CLARK COUNTY PROSECUTOR

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