

**NO. 47273-2**

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

STATE OF WASHINGTON, RESPONDENT

v.

WILLIAM BARRY SELLEY, APPELLANT

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Appeal from the Superior Court of Pierce County  
The Honorable Edmund Murphy, Judge

No. 12-1-03671-5

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**BRIEF OF RESPONDENT**

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

1. Did the court correctly admit pertinent instances of alcohol consumed by defendant's murder victim while keeping him from baselessly portraying her corroborated reports of his abuse as the hysterical ravings of a chronic alcoholic?
2. Did the prosecutor appropriately prove defendant beat his girlfriend to death instead of surrendering that truth to his untenable theory she accidentally killed herself by tumbling over things around the house?
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B. STATEMENT OF THE CASE.

1. Procedure

Defendant proceeded to jury trial charged with aggravated felony murder for killing his girlfriend Kate<sup>1</sup> in a final act of ongoing domestic violence. CP 9-10; 2RP 126. The court excluded what defendant calls her history of "chronic alcoholism" because he failed to connect it to her credibility or injuries.<sup>2</sup> Proof of incident-specific drinking was allowed.<sup>3</sup> Evidence defendant characterizes as inadequate to support his conviction was adduced over the course of a two month trial where 109 exhibits were admitted through 41 witnesses. CP 402, 427.<sup>4</sup>

Defendant was convicted as charged by an accurately instructed jury that did not receive his Instruction No. 9.<sup>5</sup> The trial court denied his post-verdict motion for a new trial, finding sufficient evidence to support the verdict and the absence of misconduct on the part of the prosecutor. CP 396.<sup>6</sup> A 480 month exceptional sentence was imposed, the justice of which was carefully explained by the sentencing court:

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<sup>1</sup> The brief will refer to the Southwards by their first names for clarity and Kathryn Southward as "Kate" for clarity since that is how she is most often referred to in the record. No disrespect is intended.

<sup>2</sup> It appears defendant did not provide a transcript of the proceeding. App.Br. at 3 (citing 3RP 365-66 for this issue). The ruling was repeatedly readdressed at trial. *E.g.* 3RP 413-18; 7RP 878-80; 12RP 1834-46; 13RP 1968-71; 15RP 2185-90; 16RP2450-56; 19RP 2675-77.

<sup>3</sup> *Id.*; 7RP 993; 19RP 2725-33; 22RP 3191-92, 3195, 3218, 3241, 3242.

<sup>4</sup> CP above 401 reflect the State's estimate of supplemental designations.

<sup>5</sup> CP 183, 209-33; 22RP 3291-93.

<sup>6</sup> It does not appear defendant provided a transcript of the related proceeding, for it is not contained in VRP 22 or 24, and there is no VRP 23. Similar motions were made and denied prior to the imposition of sentence. RP (2/6/15) 3304-28, 3364-67.

The severity of the injuries ... is almost unfathomable. ... Mr. Selley has his point of view. But you have to look at the pattern of his history of domestic violence. Medical aid was never called for her before by Mr. Selley. She always came back to him. She wasn't telling people about what happened. I strongly believe ... the evidence shows ... he thought ... he could ride this out and it would be like it had been before. And that fits into this whole pattern of what had been going on in this relationship where there was domestic violence.... Ms. Corey argued ... Mr. Selley looked out for Kate. I think the evidence is strongly to the contrary....

I listened very closely when you spoke to me ... Mr. Selley, ... what I heard and saw were fingers ... pointed at everyone ... but yourself. And if you want to look for what happened to Kate ..., you need to look in the mirror, because the evidence was strong ... to show ... you were the person that inflicted these injuries upon her.<sup>7</sup>

Defendant's notice of appeal was timely filed. CP 378.

## 2. Facts

At the time of Kate's death, defendant was a forty one year old, 6 foot, 208 pound former athlete who "like[d] to drink" his 16 ounce glasses of Crown and Coke "ice cold."<sup>8</sup> Kate was twenty nine. 2RP 210. She was blond, tall and thin.<sup>9</sup> Defendant said she drank a lot. 19RP 2729-30. Maybe, but he coupled his drinking with violence that culminated in her death. Sometime in December, 2010, Kate left him for striking her in the chest two weeks before. She was apprehensive when her bruises were

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<sup>7</sup> RP (2/6/15) 3366-68; CP 371, 392-95.

<sup>8</sup> 2RP 210; 7RP 951; 12RP 1828; 19RP 2728, 2752; 21RP 3020.

<sup>9</sup> 8RP 1141; 10RP 1495; 11RP 1739, 1743; 19RP 3020-21.

photographed.<sup>10</sup> Sisters took her to a DV center, then a hospital.<sup>11</sup> Pain radiated from her sternum.<sup>12</sup> She thought her ribs were broken.<sup>13</sup> Still, she would not call police—behavior typical of DV victims.<sup>14</sup>

She resumed living with defendant by July, 2011. 12RP 1853-54. Around midnight, in August, 2011, the Larrivas found Kate at their door. She was worried. Her eyes were wet and red. Blood ran from her swollen nose down her face to clothes littered with pine needles from the woods where she had been hiding.<sup>15</sup> There was a cut on the left side of her swelling face. 10RP 1531. She "*apologized*" for hiding in their woods to escape defendant after he hit her because of attention she received at a bar.<sup>16</sup> Still, Kate refused to call police.<sup>17</sup> The Larrivas perceived her to be sober, contradicting defendant's claim she stormed out of their house in drunken protest over his unwillingness to drink.<sup>18</sup> Distraught, with a broken voice, Kate called her brother Robert for help. 11RP 1680. He took her to their parents' home, but Kate quickly returned to defendant.<sup>19</sup>

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<sup>10</sup> 11RP 1651-52, 1656-57, 1660-60, 1666, 1669, 1686, 1708; 12RP 1830-32, 1848-49, 1851, 1867-69, 1874.

<sup>11</sup> 11RP 1649, 1651, 1728; 12RP 1832, 1849, 1851-52.

<sup>12</sup> 11RP 1651, 1653. 1661-62, 1664-65.

<sup>13</sup> 12RP 1850-51, 1870-71.

<sup>14</sup> 3RP 389-99; 11RP 1655, 1663, 1672, 1688, 1701-2, 1707-09, 1719, 1726; 12RP 1880; Ex. 179-81.

<sup>15</sup> 10RP 1492-96, 1498-1500, 1510, 1525, 1527, 1530.

<sup>16</sup> 10RP 1497-99, 1514, 1518, 1520-21, 1533-34; 11RP 1679-83; Ex. 177.

<sup>17</sup> 10RP 1499, 1510-11, 1532; 11RP 1708.

<sup>18</sup> 10RP 1501; 1503-04, 1529-30; 19RP 2725-33, 1529-30.

<sup>19</sup> 11RP 1685, 1713-14.

Sometime near October, 2011, defendant admitted to beating Kate while asking a friend for help with the cover-up.<sup>20</sup> In a prelude to the fatal beating to come, defendant revealed he hit her several times, then grew concerned she wouldn't survive as she "wasn't moving, eating, [or using the] restroom." "[S]he had ... dark ... blood or stuff coming out of her system ...."<sup>21</sup> She complained of "massive pain" in her abdomen as she languished on the couch under his mother's care for several days.<sup>22</sup> When the friend relayed this account at trial he was unaware Kate likewise languished on the couch for days after the September, 2012, attack that killed her. 8RP 1116. Kate left defendant only to return. 8RP 1109-10.

On September 23, 2012, Kate found herself caught in his cycle of violence again; this time she would not survive. The evening began at a bar with his friend Todd McIntosh.<sup>23</sup> Defendant engaged bartender Tia Matthews in flirtatious conversation as Kate "solemn[ly]" sat beside him. 7RP 1022-23. Defendant, Kate and McIntosh became intoxicated. 7RP 1027, 1032. Kate fell to "her bottom." <sup>24</sup> Defendant laughed. 7RP 1033. She recovered without injury. 7RP 1026, 1031. At trial, McIntosh claimed Kate struck her head, then required assistance to leave. 7RP 986, 994. A

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<sup>20</sup> 8RP 1098, 1102-04.

<sup>21</sup> 8RP 1098, 1102-04.

<sup>22</sup> 8RP 1095, 1098, 1100-03.

<sup>23</sup> 7RP 1005-06, 1019.

<sup>24</sup> 7RP 1024-26, 1030.

proffer revealed he asked Matthews to tell the same story. 7RP 1035-36. It was the story defendant told. 19RP 2812-15. Matthews was adamant Kate "was fine" and walked out normally without visible injuries.<sup>25</sup>

Kate and defendant pulled into the driveway of their Gig Harbor home. 19RP 2816-17. Several neighbors awoke to the sounds of the argument that followed. The yelling and screaming began around 1:30 A.M.<sup>26</sup> Kate's inability to find her keys triggered defendant's rage. 8RP 1144, 1157. He started yelling for the keys, six or seven times he yelled: "where are the keys" "where are the fucking keys."<sup>27</sup> He grew "louder and louder and louder" and irate over her inability to give him what he wanted.<sup>28</sup> In a "tired" voice, she pleaded with him to leave her alone, to "stop it" to "stop" because she did not know where they were.<sup>29</sup> She called out for "help."<sup>30</sup> She screamed: "He's going to kill me."<sup>31</sup> There was a loud "crash." 8RP 1146, 1150. Then more screaming. 8RP 1146. He yelled: "Get the fuck out of my house, loudly and repeatedly ... punctuated by ... a thudding" sound.<sup>32</sup> Kate said something inaudible; there was a boom ... then[:] I'm sorry. I'm, I'm Sorry." *Id.*; 7RP 960-61. Regrettably, no one called for help. 8RP 1177-78.

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<sup>25</sup> 7RP 1033-34, 1039-40, 1063.

<sup>26</sup> 8RP 1143, 1144, 1155, 1188.

<sup>27</sup> 8RP 1146, 1157, 1189.

<sup>28</sup> 8RP 1144, 1147-48.

<sup>29</sup> 7RP 956; 8RP 1145, 1152, 1157-58, 1160.

<sup>30</sup> 8RP 1145, 1150, 1166-67.

<sup>31</sup> 8RP 1190-91, 1205, 1208-09.

<sup>32</sup> *Id.*; 7RP 954, 960, 971-72.

Kate "languished at home" "with no medical treatment" for three days.<sup>33</sup> Based on her injuries, it would have been "highly unlikely" she could have walked, talked, drank or ate as defendant alleged.<sup>34</sup> It would have been hard for her to do "much of anything other than groan in pain." 13RP 1967. When her condition declined, defendant called his mother to help.<sup>35</sup> Allegedly wanting to get Kate a doctor, he chose a 10 mile trip to get his mother over 911 and a physician brother-in-law who lived closer.<sup>36</sup> Defendant's mother urged him to call 911.<sup>37</sup> Emergency responders arrived around 2:00 A.M., September 27, 2012, to render aid for a fall.<sup>38</sup> Defendant approached as they prepared to enter.<sup>39</sup> He delayed them to repetitiously explain he and Kate drank three nights before, she fell, several times onto ladders, at one point adding: "It looks like I beat the shit out of her."<sup>40</sup> But there were no ladders in the driveway within hours of the incident.<sup>41</sup> There were aluminum cans near a kicked over trash bin.<sup>42</sup>

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<sup>33</sup> 5RP 621; 6RP 847; 14RP 2065, 2067-68, 2074, 2079, 2091, 2100, 2134-35; 15RP 2215-16.

<sup>34</sup> 9RP 1321-22; 12RP 1900-01; 13RP 1967, 1976; 14RP 2095, 2097; 15RP 2272-74; 17RP 2506; 19RP 2897-47.

<sup>35</sup> *Id.*; 9RP 1413-14; 19RP 2950; 21RP 3026-30.

<sup>36</sup> 20RP 2951; 21RP 3026-30, 3068-69.

<sup>37</sup> 5RP 621; 6RP 847; 9RP 1413-14; 14RP 2065, 2067-68, 2074, 2079, 2091, 2100, 2134-35; 15RP 2215-16.

<sup>38</sup> 2RP 190, 194-96; 3RP 339-46, 371-73; 5RP 799; 6RP 815; 7RP 884, 889; Ex. 244-45.

<sup>39</sup> 2RP 199-200, 211-12; 5RP 746-47; 6RP 816-17; 7RP 891-92.

<sup>40</sup> 2RP 214-15, 217; 3RP 305, 307; 5RP 661-62, 747-48, 750, 753; 6RP 817-18, 820, 848, 851-53; 7RP 892-93.

<sup>41</sup> 7RP 963, 977; 8RP 1180-81.

Defendant never told first responders Kate fell down the carpeted stairs in the house, which undermined his effort to attribute her condition to that event at trial.<sup>43</sup> He did tell them she struck her head on a TV stand during a subsequent fall, but the stand lacked trace evidence of such an event and it did not match her bruises.<sup>44</sup> Defendant told responders Kate "vomit[ed] ... dark fluid," but neglected to tell them where to find her. 5RP 748-50; 9RP 1413. Streetlights provided average visibility as they walked the short distance to the house without incident.<sup>45</sup> There were no trip hazards.<sup>46</sup> There were forced entry marks on the door. 5RP 620. Defendant's mother was sitting at the kitchen table.<sup>47</sup> They found Kate lying motionless on a couch "mumbling" in a dimly lit room.<sup>48</sup> Her eyes were nearly swollen shut.<sup>49</sup> She struggled to breathe. 2RP 222.

She was nonresponsive; silence progressed to "moan[ing]" and incoherent speech.<sup>50</sup> She was removed on a backboard. 2RP 225; 5RP 755. Defendant did not ask to accompany her. 6RP 829-30, 868. An infusion of oxygen and fluids enabled Kate to vocalize her pain.<sup>51</sup> She said "I don't

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<sup>42</sup> 8RP 1151, 1161-62, 1664-65, 1180-81, 1204.

<sup>43</sup> 3RP 307, 325-26; 5RP 750-51; 7RP 1075-77; 9RP 1294, 1412-13, 1415; 12RP 1788; 15RP 2281, 2287, 2297-99; 18RP 2619; 19RP 2931-36; 21RP 3043; Ex. 292.

<sup>44</sup> 5RP 748; 6RP 852-53; 7RP 913, 931, 1075-76; 9RP 1413; 12RP 1798; 15RP 2236-37, 2295-96.

<sup>45</sup> 2RP 198, 218; 3RP 402-03; 5RP 746, 749-50, 752; 8RP 817.

<sup>46</sup> 2RP 218; 4RP 486; 5RP 751; 9RP 1418-19; 10RP 1552; Ex. 233-34, 236, 256-557.

<sup>47</sup> 6RP 822-23; 7RP 896; 9RP 1410.

<sup>48</sup> 2RP 219; 5RP 753-54; 6RP 823-24, 829; 9RP 1409.

<sup>49</sup> 2RP 219, 277, 282; 5RP 755-56; 6RP 796-97; Ex. 185.

<sup>50</sup> 2RP 222-23, 228, 236.

<sup>51</sup> 2RP 289, 321-22; 7RP 911.

know" when asked about the cause of her injuries.<sup>52</sup> Extreme anxiety accompanied her return to consciousness. 6RP 835-36. Her initial inability to speak was caused by blood pressure too low to oxygenate her brain. 3RP 322. A condition that showed in the absence of a radial pulse.<sup>53</sup> Examination revealed point-pressure bruises "[a]ll over ... [her] chest, arms, legs [and] abdomen."<sup>54</sup> It was "punctated" like an "irregular shaped object" such as a fist or shoe-covered foot; they were not broad-homogenous bruises indicative of falls on floors or stairs.<sup>55</sup> Kate was also without palm injuries typical of falls.<sup>56</sup> There were grab marks. 2RP 232.

Air audibly leaked from the punctured covering of her right lung.<sup>57</sup> Deformity, and the grinding of displaced bone edges, alerted responders to several broken ribs on her right side, indicative of high energy trauma.<sup>58</sup> There was a high probability she would not survive transport. 6RP 832, 339; 7RP 910. Shock set in by the time they reached the ER.<sup>59</sup> A trauma nurse immediately recognized Kate's peril. 8RP 1211; 9RP 1245. Kate "was bruised from head to toe back and front" with "yellow, green, grey [and] brown bruises all over her face and forehead, all over her chest, her

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<sup>52</sup> 3RP 311; 6RP 834-35, 861.

<sup>53</sup> 2RP 228, 232, 234; 3RP 322-24; 6RP 826.

<sup>54</sup> 2RP 227, 229, 231, 234-35, 284-86, 288-89; 5RP 758; 6RP 832-33; 7RP 912, 920; 14RP 2055-56; Ex. 181, 183-88, 191-92.

<sup>55</sup> 14RP 2098-99, 2126, 2127-29.

<sup>56</sup> 4RP 445, 586; 14RP 2056.

<sup>57</sup> 2RP 228-29; 15RP 2238.

<sup>58</sup> 2RP 230; 5RP 757-58; 14RP 2050, 2151; 15RP 2238-39; 16RP 2404-05.

<sup>59</sup> 2RP 275; 9RP 1241, 1246.

abdomen, arms and several on her legs and on her back."<sup>60</sup> Her breathing was "low and shallow" from a collapsed right lung, which was a rare blunt force trauma injury.<sup>61</sup> Cranial bleeding from a severe head injury pressed around her brain.<sup>62</sup> Gastro-intestinal bleeding showed in reddish brown staining on her mouth.<sup>63</sup> Her kidneys failed. 9RP 1251, 1337. Her liver would soon follow. 9RP 1272.

Kate remained strangely "stoic" once restored to consciousness.<sup>64</sup> She maintained no one hurt her; that it was safe at home, and said she could not recall what happened.<sup>65</sup> When a nurse confronted Kate with the notion someone hurt her, Kate became uncomfortable, then said: "I don't want to get anybody in trouble."<sup>66</sup> Her injuries did not match the falls defendant described to responders, or the stair fall subsequently alleged.<sup>67</sup> Those mechanisms of injury were "outside the realm of reality."<sup>68</sup> The falls he described were "very minor mechanical ground level fall[s]" from a standing position that would cause superficial injuries in someone like Kate. Death from falls can come from head injuries more severe than

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<sup>60</sup> 9RP 1253; 3RP 425; 11RP 1737-38; Ex. 206-07.

<sup>61</sup> 9RP 1248-49, 1273; 14RP 2050.

<sup>62</sup> 14RP 2053-55; 15RP 2227, 2246-48; 17RP 2494.

<sup>63</sup> 9RP 1249-50, 1257, 1273.

<sup>64</sup> 9RP 1264; 11RP 1738-40.

<sup>65</sup> 9RP 1262-63, 1270-73, 1307; 11RP 1740.

<sup>66</sup> 9RP 1269-70, 1308-10.

<sup>67</sup> 6RP 797-98, 818-19, 827-28; 9RP 1251, 1265-67, 1269, 1279-81, 1283-84, 1290-91, 1295-96, 1298, 1313-16, 1318-20; 13RP 2010-11; 14RP 2124, 2151; 15RP 2287; 16RP 2433-34.

<sup>68</sup> 9RP 1284, 1317; 16RP 2430. 2436-39.

Kate's or spinal injuries she did not have. 15RP 2302-03.<sup>69</sup> Whereas Kate's "catastroph[ic]" injuries matched high energy blunt force trauma from building collapses, falls "from [a] significant height" or down "flights of stairs," "high speed" "rollover" car crashes, or attacks with fists or feet.<sup>70</sup> All different from defendant's story. 6RP 827-28.

A detective noted his lack of expressed concern about Kate's welfare after her departure.<sup>71</sup> As part of a ruse, defendant was told Kate reported him. 4RP 447. Prior to the ruse, he detailed events surrounding her injuries and denied assaulting her. 5RP 671-72. After the ruse, he cried; then shifted his account to an inability to remember assaulting Kate.<sup>72</sup> Scabs adorned knuckles on his left hand.<sup>73</sup> As the ruse became more detailed, defendant grew confident enough to call the "bluff []." 5RP 671. That confidence was justified. Kate teared up when an interview was suggested.<sup>74</sup> She did not want charges filed and "refused" to have her injuries photographed—manifesting textbook DV behavior once again.<sup>75</sup> Consent for photographs came from family when she became comatose.<sup>76</sup>

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<sup>69</sup> 5RP 734, 737; 6RP 818-20, 827-28; 9RP 1252, 1266-67, 1287-88; 14RP 2061-62; 15RP 2297.

<sup>70</sup> 5RP 735-37; 9RP 1252, 1283; 13RP 1967, 1974; 14RP 2057-58, 2061-62, 2064, 2092-93, 2124-25, 2153-54, 2158; 15RP 2275-76; 16RP 2424

<sup>71</sup> 3RP 390, 404; 4RP 445-46.

<sup>72</sup> 4RP 447, 461-63; 5RP 671-73, 699-700.

<sup>73</sup> 4RP 466-67, 583; 7RP 1078-79; 9RP 1415, 1441-43; Ex. 194-96.

<sup>74</sup> 4RP 441-42, 550.

<sup>75</sup> 3RP 389; 4RP 441-42; 5RP 678-79; 9RP 1370; 10RP 1568-69, 1584.

<sup>76</sup> 3RP 427-30; 4RP 569; 10RP 1570, 1585; 11RP 1741; Ex. 190.

Kate's condition declined.<sup>77</sup> There were acute fractures in ribs 7 through 11 of her right side.<sup>78</sup> She could not breathe on her own.<sup>79</sup> Organ failure set in.<sup>80</sup> 14RP 2056. Her kidneys and twice lacerated blood filled liver failed, causing neurologically disruptive toxins to accumulate in her blood.<sup>81</sup> The liver damage was "mainly" caused by "high velocity impacts." 14RP 2173. To a reasonable degree of medical certainty it was lacerated by force transferred from a substantial chest impact.<sup>82</sup> A ruptured colon spilled sepsis causing bacteria into Kate's abdomen as it distended with "peritonitis."<sup>83</sup> Such ruptures are extremely rare, for they require considerable force, like a car accident, or "kic[k] [from] a horse...."<sup>84</sup> "Necrosis" emerged on her colon, bowel and gallbladder.<sup>85</sup> An outcome so unusual the finding was peer reviewed. 14RP 2178. Surgical intervention could not save her.<sup>86</sup>

Kate gained 50 pounds as life-sustaining fluids seeped into her tissues. 13RP 1954; 15RP 2293. "[H]ypotensive cardiac shock" followed when her low blood pressure could no longer force oxygen to peripheral

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<sup>77</sup> 11RP 1742; 13RP 1981; 15RP 2252; 17RP 2497.

<sup>78</sup> 14RP 2057; 15RP 2238-39.

<sup>79</sup> 11RP 1743; 13RP 1982; 15RP 2253.

<sup>80</sup> 12RP 1890, 1996-97; 16 RP 2428-29.

<sup>81</sup> 12RP 1890-92, 1898, 1908; 13RP 1975, 1985-86, 1994; 14RP 2048-49, 2089; 15RP 2239, 2259; 16RP 2808-09, 2427; 17RP 2494.

<sup>82</sup> 14RP 2173; 15RP 2241-43; 16RP 2471

<sup>83</sup> 12RP 1898; 13RP 1974, 1982-84, 1986, 1989; 14RP 2078, 2083, 2084; 16RP 2428.

<sup>84</sup> 14RP 2170-73; 15RP 2276; 16RP 2424.

<sup>85</sup> 13RP 1989, 1994, 1996; 14RP 2070-74.

<sup>86</sup> 13RP 1990-92; 14RP 2079, 2090-91, 2096; 15RP 2255-56, 2269.

systems, then her skin "just sluffed off ...."<sup>87</sup> Blisters emerged across her body.<sup>88</sup> "[N]ecrotic" skin turned ... solid shades of dark blue ..." as her body "rot[ted] [] from ... inside out."<sup>89</sup> Kate "turned black before she passed away"<sup>90</sup> from injuries consistent with assault.<sup>91</sup> Family members remained at her bedside as treatment options were exhausted.<sup>92</sup> They were called upon to remove life support when Kate fell into a ventilation-dependent coma.<sup>93</sup> Death quickly followed.<sup>94</sup>

Kate's autopsy was performed by Pierce County Medical Examiner Michael Clark. 15RP 2386-89. Clark concluded:

"the bowel injury was caused by a large amount of force delivered over a relatively small area[;]" the type of force delivered by "a small blunt object ... traveling at a high rate of speed."

16RP 2429-30. There was no explanation besides blunt force injury. 16RP 2468. "It could have been delivered by a fist or a foot ... but exceed[ed] a reasonably probability of having been inflicted accidentally...." 16RP 2431. Clark refuted defendant's theory of death from an elaborate series of tumbles down stairs or into a ladder. 16RP 2433-34. The certified cause of

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<sup>87</sup> 11RP 1743; 12RP 1890-92.

<sup>88</sup> 11RP 1743; 13RP 1956.

<sup>89</sup> 4RP 505; 11RP 1742; 13RP 1955-57, 1994, 1989; 14RP 2085-86; 15RP 2259-62.

<sup>90</sup> 11RP 1743; 13RP 1955-57; 15RP 2268-69; Ex. 298, 301-02, 304.

<sup>91</sup> 6RP 797-98, 818-19, 827-28; 9RP 1251, 1265-67, 1269, 1279-81, 1283-84, 1290-91, 1295-96, 1298, 1313-16, 1318-20; 13RP 2010-12.

<sup>92</sup> 12RP 1854-55, 1863-66, 1901; 15RP 2255-56, 2259-60, 2262.

<sup>93</sup> 12RP 1864, 1866; 15RP 2257, 2267-68.

<sup>94</sup> 12RP 1866-67; 14RP 2095-96; 15RP 2270; Ex. 271.

death was homicide from "blunt force injury to the chest and abdomen."<sup>95</sup>

C. ARGUMENT.

1. THE TRIAL COURT CORRECTLY ADMITTED PERTINENT INSTANCES OF THE VICTIM'S DRINKING WHILE KEEPING DEFENDANT FROM BASELESSLY PORTRAYING HER CORROBORATED REPORTS OF HIS ABUSE AS THE HYSTERICAL RAVINGS OF A CHRONIC ALCOHOLIC.

A defendant's right to present a defense yields to rules of evidence to assure reliability in the ascertainment of guilt. *State v. Donald*, 178 Wn. App. 250, 266, 316 P.3d 1081 (2013)(citing *United States v. Scheffer*, 523 U.S. 303, 308, 118 S. Ct. 1261(1998)); *State v. Finch*, 137 Wn.2d 792, 825, 975 P.2d 967 (1999)); *State v. Acosta*, 123 Wn. App. 424, 441, 98 P.3d 503 (2004); *State v. Rehak*, 67 Wn. App. 157, 162, 834 P.2d 651 (1992). Exclusion of evidence will be affirmed absent a manifest abuse of discretion. *Rehak*, 67 Wn. App. at 162; *State v. Thomas*, 150 Wn.2d 821, 856, 83 P.3d 970 (2004).

Defendant apparently neglected to produce a record of the pretrial hearing where this issue was first addressed. The omission may shield necessary information from review. The issue was again addressed when the pretrial ruling was ratified. 3RP 413-18. Defense argument in support of reconsideration was described by the court as a "backdoor attempt to go

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<sup>95</sup> 16RP 2436-39, 2469, 2472.

around ... previous rulings." 3RP 418. Defendant expressed appreciation for a decision excluding the alleged "chronic alcoholism" under ER 404, then argued it was admissible to prove Kate was injured on account of being "falling down drunk" consistent with prior behavior and suffered from withdrawals. 3RP 413-15. The court reminded defendant the ruling enabled him to present his theory of the case:

How are you prohibited from putting on your case when your client, his version is that they both came home intoxicated, she fell on everything and injured herself [?] That's something that comes in. You want to bring in ... these other occasions which aren't related to this situation to try to show either, as you say habit, which I don't think that it falls under ... or under ER 404(b), which the court ... already ruled on. So I don't see what has been testified to would cause the Court to reconsider its prior ruling.

There was no evidence of withdrawals. 3RP 416. Defendant conceded his lack of supporting medical testimony. 3RP 418. The court invited him to lay the requisite foundation outside the jury's presence. 3RP 418-19; 13RP 1968-71. He never did. But nevertheless repeatedly urged reconsideration.

The court responded to the second request by reminding him:

There has been no testimony that [Kate's] vitals are in any way related to alcoholism. I have allowed inquiry on alcohol consumption on the night in question. To classify it as withdrawal from alcoholism or chronic alcoholism is what the Court has sustained objections on .... I haven't heard anything that is ... related in any way to any of the physical symptoms, or vital signs that she had, and the Court's ruling continues to stand.

7RP 879. He then urged reconsideration, claiming alcoholism was linked to Kate's damaged organs, conceding the absence of corroborating medical evidence. 12RP 1836-41. Indeed, evidence was to the contrary. Defendant nevertheless sought to expose the jury to the concept through cross-examination, arguing it was admissible to impeach Kate's hearsay statements under ER 806.<sup>96</sup> To which the court responded:

[I] haven't prohibited you from doing that if you have some indication that somebody has been drinking at the time the statements are made. And so, we are tying this back to the ... motions ... made at the beginning of the trial in regard to ... how she was chronically drunk which the Court ... excluded. I haven't heard anything that would indicate ... there is medical testimony ... that would say ... [Kate's] consumption of alcohol ... would have resulted in some of these injuries or the observations ... made medically....

I have heard a lot of hypotheticals ... the defense wants to bring in, which is a backdoor of getting back to where we were originally with the motion ... granted ...excluding this ....

12RP 1843-47. Nearly identical responses followed reassertions of the same unsupported arguments:<sup>97</sup>

[] We have a circular argument that's going on here, and I don't understand what the issue or problem you are having with my ruling, other than disagreeing with it....

19RP 2676-77, 2681; RP (2/6/15) 3328.

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<sup>96</sup> 3RP 335-36; 12RP 1839, 1841-43; 13RP 1968-71; 15RP 2186; 16RP 2452-53.

<sup>97</sup> 15RP 2186-89; 16RP 2450-56; 19RP 2673-2681.

- a. It was not a manifest abuse of discretion to limit evidence of the victim's alcohol use.

The prejudicial fact of chronic alcoholism is not admissible to impeach veracity absent medical proof connecting it to credibility. *See State v. Renneberg*, 83 Wn.2d 735, 737, 522 P.2d 835, 836 (1974); ER 401-404, 608; McCormick on Evidence § 45, p. 105-06 (3d ed. 1984); *see also* § 6097 Bases For Attacking Credibility—Capacity, 27 Fed. Prac. & Proc. Evid. § 6097 (2d ed.); *Lagrone v. Texas*, 942 S.W.2d 602, 612-13 (1997); *Edwards v. State*, 548 So. 2d 656, 658 (1989). Proof of alcohol use can be used to impeach a declarant's perceptual capacity; provided, there is a showing of use or influence when relevant observations were made. *State v. Russell*, 125 Wn.2d 24, 83, 882 P.2d 747 (1994); ER 806.

Nothing in the rulings prevented defendant from impeaching statements attributed to Kate with proof of intoxication in accordance with ER 806.<sup>98</sup> He portrayed her August, 2011, escape into the woods as an alcohol-fueled overreaction to an effort to curb her drinking.<sup>99</sup> He likewise attributed her fatal injuries to drinking, exceeding the court's limitation by adducing that she "drinks vodka a lot," and quickly. 19RP 2729-30, 2812-15. A sizable portion of his closing was devoted to attributing every bad

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<sup>98</sup> 12RP 1843-47; 19RP 2676-77, 2681.

<sup>99</sup> 10RP 1501; 1503-04, 1529-30; 19RP 2724-33, 1529-30.

thing that befell Kate to drinking.<sup>100</sup> Still, he maintains it was error to prevent him from casting her as a "chronic alcoholic" despite his failure to medically link the condition to her credibility. There was and is only his unsubstantiated theory her "memory was clouded by ... alcoholism ...." App.Br. at 37. But baseless supposition is not a recognized substitute for proof. 16RP 2452.

- b. It was not error to prevent him from inviting the jury to speculate about links between Kate's injuries and alcoholism.

Medical information is irrelevant unless tied to material medical facts through foundation that makes them more or less probable. *See* 5A Wash. Prac. § 611.5 (4th ed.1999); *State v. Swan*, 114 Wn.2d 613, 659, 790 P.2d 610 (1990); ER 401, 402. The requisite foundation must be supplied through expert testimony unless it consists of facts describable without medical training. *State v. Bottrell*, 103 Wn. App. 706, 717-18, 14 P.3d 164, 170 (2000); *Reese v. Stroh*, 128 Wn.2d 300, 308-09, 907 P.2d 282, 286-87 (1995); *Harris v. Groth, M.D., Inc., P.S.*, 99 Wn.2d 438, 449, 663 P.2d 113 (1983); *State v. Ciskie*, 110 Wn.2d 263, 274, 751 P.2d 1165 (1988); ER 701, 702.

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<sup>100</sup> *E.g.* 22RP 3191-92, 3194, 3196-97, 3218, 3241-43.

**i. This claim should not be reviewed.**

Arguments unsupported by authority and analysis should not be considered. *Cowiche Canyon Conservancy v. Bosley*, 118 Wn.2d 801, 809, 828 P.2d 549 (1992); *State v. Elliott*, 114 Wn.2d 6, 15, 785 P.2d 440 (1990); *Saunders v. Lloyd's of London*, 113 Wn.2d 330, 345, 779 P.2d 249 (1989); *In re Disciplinary Proceeding against Whitney*, 155 Wn.2d 451, 467, 120 P.3d 550 (2005)(citing *Matter of Estate of Lint*, 135 Wn.2d 518, 532, 957 P.2d 755 (1998)(declining to scour the record to construct arguments for a litigant); RAP 10.3(a).

Assignment of error No. 2 claims evidentiary error grounded in defendant's inability to portray Kate's alleged "chronic alcoholism" as a cause of her injuries. It should be summarily rejected since he did not address it in the body of his opening brief.

**ii. The claim also fails on the merits.**

Chronic alcoholism's capacity to cause bleeding or contribute to organ failure is beyond common understanding. See *State v. Jones*, 59 Wn. App. 744, 751, 801 P.2d 263, 267 (1990); *In re Morris*, 189 Wn. App. 484, 494, 355 P.3d 355, 360 (2015). Evidence of causal relationships must come from experts capable of putting associated medical information into a case specific context that accounts for pertinent variables to avoid errors of associative reasoning. See *Walker v. State*, 121 Wn.2d 214, 218,

848 P.2d 721 (1993); *Renneberg*, 83 Wn.2d at 737; *Stroh*, 128 Wn.2d at 308-09. *State v. Mee Hui Kim*, 134 Wn. App. 27, 41, 139 P.3d 354 (2006); *Bottrell*, 103 Wn. App. at 717-18; ER 702, 703. Errors that exacerbate the tendency of scientific evidence to mislead jurors. *See Reese v. Stroh*, 74 Wn. App. 550, 558, 874 P.2d 200 (1994) *aff'd*, 128 Wn.2d at 300. A problem compounded when rhetoric replaces reason.

Defendant sought to argue alcoholism may have contributed to Kate's injuries without supporting medical evidence. Alcohol withdrawals were ruled out by a treating paramedic and physician. There was no evidence of alcohol abuse detected during Kate's autopsy.<sup>101</sup> The absence of a medical link between alcohol abuse and her injuries prevents the challenged exclusion from being an abuse of discretion. 16RP 2455; ER 401-03; *State v. Markle*, 118 Wn.2d 424, 438, 823 P.2d 1101 (1992). The ruling was harmless if error, as proof of alcoholism could not have legitimately influenced the verdicts. *State v. Bourgeois*, 133 Wn.2d 389, 403, 945 P.2d 1120, 1127 (1997).

2. THE PROSECUTOR CORRECTLY PROVED DEFENDANT BEAT HIS GIRLFRIEND TO DEATH INSTEAD OF SURRENDERING THAT TRUTH TO HIS THEORY OF ACCIDENT.

Trial court rulings on allegations of misconduct are reviewed for an abuse of discretion. *State v. Stenson*, 132 Wn.2d 668, 718, 940 P.2d

1239 (1997); *State v. Brett*, 126 Wn.2d 136, 174, 892 P.2d 29 (1995); *State v. Lord*, 117 Wn.2d 829, 887, 822 P.2d 177 (1991). Reversal requires proven error with a substantial likelihood of affecting the verdict. *Id.*; *State v. Mak*, 105 Wn.2d 692, 726, 718 P.2d 407 (1986). Failure to object waives the claim, unless incurable prejudice resulted from flagrant and ill-intentioned error. *Id.*; *State v. Gentry*, 125 Wn.2d 570, 596, 888 P.2d 1105 (1995). Denial of a mistrial for alleged error receives great deference since trial courts are better positioned to assess its affect. *Id.*; *State v. Luvene*, 127 Wn.2d 6909, 701, 903 P.2d 960 (1995).

Defendant made a post-verdict motion for new trial, accusing the prosecutor of the impropriety alleged on appeal.<sup>102</sup> It was denied. The trial court was "troubled" by mischaracterizations defendant was "throwing around" to obtain relief. *Id.* at 3327-28. In a written order, the court found:

"[T]he prosecutor did not commit misconduct in the presentation of its case."

CP 396. That unchallenged and accurate ruling should be affirmed.

- a. The prosecutor did not misrepresent the interpretation medical responders gave to defendant's account of Kate's injuries.

Claims of prosecutorial error must be considered with regard for the entire record. *State v. Warren*, 165 Wn.2d 17, 26, 195 P.3d 940 (2008). After a hearing defendant apparently failed to transcribe, the trial

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<sup>101</sup> 3RP 335-36; 15PR 2186; 16RP 2452-55.

court seemingly allowed use of "ground falls" to describe the mechanism of injury defendant described to medical responders. RP (2/6/15) 3327. At trial, a treating paramedic characterized defendant's description of Kate's mechanism of injury as "several ground falls." 2RP 245-46.<sup>103</sup> That paramedic's lieutenant similarly interpreted defendant's account. 6RP 818-20. The account was relayed to the hospital.<sup>104</sup> In each instance, treatment providers recognized Kate's injuries could not be reconciled with defendant's story. *Id.* The same was true of the alleged stairway fall he shifted focus to at trial. 16RP 2433-34.

**i. Defendant's claim should be rejected.**

A trial court ought to be affirmed where an appealing defendant failed to produce an adequate record to review. *In re Det. of Halgren*, 156 Wn.2d 795, 804, 132 P.3d 714, 718 (2006) (citing *City of Spokane v. Neff*, 152 Wn.2d 85, 91, 93 P.3d 158 (2004); *State v. Tracy*, 128 Wn. App. 388, 394-95, 115 P.3d 381 (2005)). At the post-verdict motion for new trial based on procedural irregularities, including misconduct, the trial court declined to *readdress* the "ground fall" testimony as it had already

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<sup>102</sup> RP (2/06/15) 3308-14, 3321-26.

<sup>103</sup> Paramedic Hughes used "the caller" to refer to defendant because he was not able to identify the man who approached him outside defendant's residence when Hughes responded to the 911 dispatch for Kate on September 27, 2012. Defendant's identity as "the caller" Hughes referred to was established by other witnesses. 2RP 199-200, 211-12, 214-15, 217; 3RP 305, 307; 5RP 661-62, 746-48, 750, 753; 6RP 816-18, 848, 851-53; 7RP 891-93. Hughes consequently attributed the description of the injury causing events to defendant directly and not information received from dispatch.

<sup>104</sup> 9RP 1252, 1266-67, 1283-84, 1320-21; *see also* 13RP 2010-12.

been "extensively" addressed. RP (2/6/15) 3328. There does not appear to be a transcript of that proceeding. The omission should preclude review.

**ii. Defendant falsely claims the prosecutor introduced the concept of "ground falls," then misused it to defendant's detriment.**

The claim is predicated on a mischaracterization of the record. "Ground fall" was a medical term of art treating medical responders first applied to the story defendant told them to account for Kate's injuries. There was nothing improper about eliciting their testimony or arguing reasonable inferences from it at trial. *E.g.*, *State v. Copeland*, 130 Wn.2d 244, 290-92, 922 P.2d 1304 (1996); *State v. Jefferson*, 11 Wn. App. 556, 524 P.2d 248 (1974). There is likewise no truth to defendant's claim the jury was deprived an ability to compare his account of Kate's injuries to "complex falls," which were introduced by the prosecutor through direct examination. 6RP 810. Defendant made argument about the appropriate application of those concepts in closing. 22RP 3227-28. But neither those arguments nor the reassertion of them on appeal alter the irrefutable fact that two firefighters interpreted his description of Kate's mechanism of injury as superficial ground level falls. 2RP 245-46; 6RP 819. The jury was nonetheless empowered to decide the matter for itself.

- b. The prosecutor did not express an improper opinion about defendant's lack of credibility by objecting to an argumentative-compound question that implied his veracity.

A question is objectionable as argumentative if it seeks agreement with the examiner's inferences or assumptions. 5D Wash. Prac., Handbook Wash. Evid. OBJ 1 ER 611 (2015-16 ed.); *Crippen v. Pulliam*, 61 Wn.2d 725, 735, 380 P.2d 475 (1963). An argumentative question may take the form of a hypothetical. *State v. Lathrop*, 112 Wash. 560, 562, 192 P. 950 (1920). A question is objectionable as compound when it requires several answers. 5D Wash. Prac., *supra* at § 611.3, p. 297. Objections must be framed in terms of a "specific ground," if not clear from context. ER 103. Speaking objections are not prohibited. *Id.* at §103:5, p. 119.

Defendant posed the following argumentative-compound question:

And had you asked and known from Mr. Selley what bar they had been at on the 27<sup>th</sup>, then on that day, or the 28<sup>th</sup> you could have gone to Johnny's Bar –

4RP 587. The prosecutor responded:

Objection, Your Honor; calls for speculation that he would have received the correct answer, and truthful answer about what bar it was and where to go.

4RP 587. The objection was sustained. 4RP 587. Defendant rephrased the question by dividing it in two:

**DEFENDANT:** Assuming that you had learned that they had been at Johnny's Bar in Puyallup, you would have been able to go there, correct?

**WITNESS:** Yes.

**DEFENDANT:** And you would have been able to obtain the tape?"

**WITNESS:** Yes.

4RP 587. Defendant did not timely object to the State's objection. ER 103. Instead, he moved for a mistrial the next day. 5RP 597-601, 603-05. The court took exception to defendant tactically using "gratuitous" "threat[s]" of reversible error to sway its decision, then reaffirmed its ruling. 5RP 605-08. The objection was not perceived to comment on credibility, for it did not describe anything defendant said as untruthful by remarking upon the speculative presupposition of the question. 5RP 607-08.

This assignment of error wrongly presupposes the jury violated its instructions to substantively weigh the challenged objection. CP 211; *State v. Grisby*, 97 Wn.2d 493, 499, 647 P.2d 6 (1982). That issue aside, defendant's question was objectionable as compound because it called for three answers: (1) that he would have answered; (2) his answer would be truthful; and (3) the detective could have acted in response. The question was argumentative as sought tacit agreement defendant would have been forthcoming and truthful. The follow up questions cured those flaws by eliminating the implied assumptions and separating the question about awareness from the one about action.

Attorneys do not comment on credibility by explaining objections that may not be obvious in context and cannot be clarified through simple reference to a citable rule. See *State v. Knapp*, 14 Wn. App. 101, 113, 540

P.2d 898 (1975); *compare* ER 401 with ER 611. Proper explanations are phrased in legal terms directed at the court; improper comments are couched in terms of believability and are typically directed at witnesses or jurors. *Id.* The challenged objection had proper form: it was directed at the court and legally framed in terms "speculation," which invoked ER 401's relevance requirement. Defendant illogically asserts it implied his absence of credibility by opposing its presumed presence. If anything, the objection restored equilibrium by neutralizing a positive assumption without adding a negative one, *i.e.*: the statement "X could have been false," does not assert "X would have been false," for the statement leaves it equally probable "X could have been true." Defendant failed to prove the objection was improper or capable of prejudicing the verdict.

c. Defendant confuses rebuttal with improper vouching and denigration.

"The rule against misconduct is not ... to hamper a prosecutor's effectiveness in rebuttal." *State v. Stith*, 71 Wn. App. 14, 21, 856 P.2d 415 (1993). It is not misconduct to make factually supported argument against a defendant's theory of the case. *State v. Russell*, 125 Wn.2d 24, 87, 882 P.2d 747 (1994). Remarks made in rebuttal are not misconduct if invited, provoked or occasioned by defense counsel's argument, so long as they do not exceed a fair reply. *State v. LaPorte*, 58 Wn.2d 816, 822, 365 P.2d 24 (1961). A prosecutor's remarks are reviewed in the context of the entire case. *State v. Yates*, 161 Wn.2d 714, 774, 168 P.3d 359 (2007).

The State's closing argued evidence of defendant's guilt from the instructions,<sup>105</sup> explained how credible facts impeached his version of events and recalled the jury to the State's burden of proof.<sup>106</sup> Defense argument rejected inferences of guilt, portraying Kate's fatal injuries as the accidental byproduct of excessive drinking, clumsiness, bad decisions and a refusal of offered medical care.<sup>107</sup> All of which depended on accepting as credible the most defense-friendly synthesis of defendant's inconsistent accounts of the incident.<sup>108</sup>

The prosecutor's reply was framed as "*rebuttal to ... defense argument.*" 22RP 3250 (emphasis added). She said:

There are a couple of areas I wanted to hit, and one of those is the red herring that she fell down the stairs. What do we know about that? And I must have sat through a completely different trial than defense. ....

22RP 3250. Defendant challenges this statement; the argument continued:

You are the sole takers [sic] of ... the facts ... and what you heard. What we argue is just our comments, and they are not what the evidence is. But I heard the evidence far differently than defense did, and I heard from Dr. Clark that her injuries were not consistent with a fall down the stairs. She would not have received that perforated colon. He also said that her injuries, the one [sic] that caused her death, were all in one area, all in that rib cage area, all protected by the rib cage. The cause of death, perforated colon, lacerated liver, peritonitis, all ... from ... one trauma area.

If this was from a fall down the stairs we would expect her

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<sup>105</sup> *E.g.*, 22RP 3146-52, 3182-86.

<sup>106</sup> 22RP 3158-72, 3186.

<sup>107</sup> 22RP 3191-93, 3201-03.

<sup>108</sup> *E.g.*, 22RP 3194-3200, 3208, 3215-49.

injuries to be more widely distributed, instead of that impact right there. He is not paying attention to ... bruising because the bruising [Objection] doesn't concern him....

22RP 3250-51.<sup>109</sup> The objection claimed this summary of testimony misstated counsel's argument. 22RP 3251. Another objection followed:

[ ] We have evidence, provided only by the Defendant, that she fell, was sitting at the base of the stairs. She told him she fell, and who do we get that from? The Defendant. It's not – [objection] Think about the credibility of those statements....

22RP 3252.<sup>110</sup> Another claimed this rebuttal misused Clark's opinion:

Think about credibility of those statements. There is no evidence of a significant fall down the stairs to cause these injuries. Dr. Clark examined Kate's body. He doesn't have to predict how a body is going to fall down the stairs because he examined her injuries. He examined what caused her death, and his conclusion isn't an accidental fall down the stairs. His conclusion – in which he told you, he is an interface between the legal community and the medical community – his conclusion is homicide. And you can't just disregard – [Objection...]

You are the sole judges of the credibility of each witness, including the expert witnesses and that includes Dr. Clark's credibility. You judge if his conclusions are credible. You can accept or reject them. I'm telling you that the man with 4,200 autopsies, 27 years of experience looked at Kate Southward's body after her death, examined it, and did not find this was from a fall down the stairs. He found that it was from her being beaten to death ...

22RP 3253-54.<sup>111</sup> This argument was objected to as an appeal to passion:

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<sup>109</sup> *E.g.*, 16RP 2430-31, 2433-2434, 2436, 2468.

<sup>110</sup> 3RP 307, 325-26; 5RP 750-51; 7RP 1075-77; 9RP 1294, 1412-13, 1415; 12RP 1788; 15RP 2199-2211, 2281, 2287, 2297; 18RP 2619; 19RP 2931-36; 21RP 3043; Ex. 292.

<sup>111</sup> *E.g.*, 16RP 2385-87, 2430-31, 2433-2434, 2436, 2468.

All the evidence ... you have heard about Kate not wanting health care, and not wanting to call the hospital ... comes from ... Defendant. You don't hear that from anybody else, .... It's completely contradictory from ... medical evidence, and that's why ... defendant's account is not reasonable.

You compare and contrast the medical evidence versus his account. That's what this case comes down to. That's it. The State has proven beyond a reasonable doubt based on the medical evidence that he is the one that caused the assault, and because of him, and him alone, she died.

You are going to have all the exhibits that were admitted during trial, but I submit to you that State's Exhibit No. 185, No. 188, No. 190, that's what getting the shit beat out of you looks like, and the Defendant is the one that did that to Kate [Objection].

22RP 3255. The prosecutor dialed it back when instructed to do so by the court. 22RP 3256-58. Defendant embellishes the record by characterizing her as parading gruesome photos while shouting. His uncorroborated, disputed description was alleged in a motion heard two months later.<sup>112</sup>

**i. It is not denigration to disagree.**

Prosecutors should not disparage the role or integrity of defense counsel before a jury. *State v. Warren*, 165 Wn.2d 17, 29, 195 P.3d 940, 946 (2008); *Yates*, 161 Wn.2d at 776. Counsel's misconduct, obduracy and unprofessionalism should be corrected by the courts through means that do not incentivize the behavior by advancing the defendant's cause. *See State v. Garrett*, 124 Wn.2d 504, 520-21, 881 P.2d 185 (1994).<sup>113</sup> As advocates,

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<sup>112</sup> RP (2/5/16) 3313, 3320, 3326-28; CP 396.

<sup>113</sup> 5RP 605-606, 681; 6RP 798, ln. 19; 19RP 2729-30, 2676-77, 2681; (2/6/15) 3327-28;

prosecutors are entitled to expose flaws in counsel's arguments. *State v. Gregory*, 158 Wn.2d 759, 863, 147 P.3d 1201, 1255 (2006); *Russell*, 125 Wn.2d at 87), *abrogated on other grounds*, *State v. W.R.*, 181 Wn.2d 757, 336 P.3d 1134 (2014). Disagreement is not denigration. See *Copeland*, 130 Wn.2d at 290 (citing *State v. Brett*, 126 Wn.2d 136, 175, 892 P.2d 29 (1995)). The testimony of criminal defendants is equally susceptible to challenge. *Id.*; *State v. Adams*, 76 Wn.2d 650, 660, 458 P.2d 558, *rev'd on other grounds*, 403 U.S. 947, 91 S. Ct. 2273 (1971)).

Defense counsel claims she was denigrated by the prosecutor's disagreement with her characterization of the evidence. She is mistaken. The prosecutor's rebuttal was explicitly directed at her "argument[s]"—not her intellect, credibility or role. 22RP 3250-51. Those arguments assumed as true the most favorable synthesis of defendant's versions of events. It then treated as corroboration witnesses' inability to exclude the theoretical possibility of a reality-defying hypothetical that portrayed Kate as the victim of elaborate multi-directional falls on increasing numbers of things around the house for three days.<sup>114</sup> The rebuttal placed comments made by both parties on an equal footing. It recalled the jury to its fact-finding role and identified evidence that refuted counsel's arguments. 22RP 3250-51. It was not improper, flagrant, ill-intentioned, or incurably prejudicial.

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Def.Br. 22, 24, 26.

<sup>114</sup> *E.g.*, 9RP 1317; 16RP 2434.

**ii. Clark's testimony was not misused.**

Prosecutors have wide latitude to argue reasonable inferences from the evidence. *Stenson*, 132 Wn.2d at 727-30. Yet they should not misstate evidence. *Id.* To the extent recollections or inferences stray too far, jurors are presumed to abide by the instruction to disregard them. *Id.*

The rebuttal was faithful to Dr. Clark's testimony. 22RP 3250-51. Defendant mischaracterizes his opinion as allowing for the possibility rib fractures from a stair fall caused Kate's *fatal* injuries. 16RP 2456. Clark's rejection of that theory of accident was accurately conveyed by the prosecutor.<sup>115</sup>

**iii. The prosecutor did not misstate the testimony about ground falls.**

Defendant accuses the prosecutor of improperly arguing injuries from falls would be more widely distributed than Kates, and would result in extremity fractures, head and spine injuries she did not have. 22RP 3250-51. He is mistaken. The rebuttal accurately paraphrased testimony given by Dr. Clark and Dr. Inouye.<sup>116</sup> There is nothing improper about a prosecutor focusing on witnesses that credibly support the State's case.

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<sup>115</sup> *E.g.*, 16RP 2385-87, 2430-31, 2433-2434, 2436-39, 2468.

<sup>116</sup> 15RP 2302-03; 16RP 2432-33; see also 14RP 2170-73.

**iv. The prosecutor correctly described defendant's testimony.**

Defendant is the only witness who testified that Kate said she fell down stairs after he discovered her sitting on a landing. 20RP 2931. So it was not a misstatement to attribute the account to him alone. 22RP 3252. The only other reference to a stair fall came from a doctor who apparently misunderstood incident history provided to him by the ambulance crew. But the existence of that reference did not make the rebuttal inaccurate, for the reference did not contain the details relayed by defendant, which were the rebuttal's focus. Neither error nor prejudice have been proven.<sup>117</sup>

**v. The prosecutor did not misuse the medical opinion on cause of death.**

Doctors customarily give expert testimony on a victim's medical cause of death. *State v. Adams*, 76 Wn.2d 650, 656, 458 P.2d 558, 563 (1969), *rev'd on other grounds*, 403 U.S. 947, 91 S. Ct. 2273 (1971); *State v. Jones*, 59 Wn. App. 744, 751, 801 P.2d 263 (1990)(citing *Bethea v. State*, 251 Ga. 328, 304 S.E.2d 713, 716 (1983)(properly admitted expert testimony that victim's death caused by a blow to abdomen, and not a fall down stairs); *State v. Cunningham*, 23 Wn. App. 826, 854, 598 P.2d 756, (1979) *rev'd on other grounds*, 93 Wn.2d. 2d 823, 613 P.2d 1139 (1980)); *Martini v. Post*, 178 Wn. App. 153, 162-63, 313 P.3d 473, 478-79 (2013);

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<sup>117</sup> 3RP 307, 325-26; 5RP 750-51; 7RP 1075-77; 9RP 1294, 1412-13, 1415; 12RP 1788;

ER 702-704. It is not dispositive in a murder case, for criminal causation is decided by the trier of fact. *Id.*

Defendant claims rebuttal misused the opinion that Kate's death was physical-assault homicide. 22RP 3253-54. But that was the medical opinion derived from her autopsy.<sup>118</sup> Contrary to defendant's assertion, the opinion's role in establishing the official cause of death had no bearing on the jury's ability to consider it as evidence of murder in his case. So it was proper for the prosecutor to argue the opinion accordingly; and was not prejudicial, for testimony, instructions and rebuttal made it clear the jury was free to reject it in favor of defendant's theory of accident. *See Jones*, 59 Wn. App. at 751; RCW 70.58.170.<sup>119</sup>

**vi. Arguing credentials as evidence of credibility is not vouching.**

Prosecutors are entitled to argue a witness's testimony is credible based on training or experience in a pertinent field. *State v. Lewis*, 156 Wn. App. 230, 240, 233 P.3d 891 (2010)(citing *Warren*, 165 Wn.2d at 30 ("badge of truth" argument supported by evidence)); *Brett*, 126 Wn.2d 175-76. Rebuttal is not improper vouching unless it clearly expresses a personal opinion about credibility. *Id.* Defendant incorrectly claims the prosecutor vouched for Clark's credibility by recounting the number of

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15RP 2199-2211, 2281, 2287, 2297; 18RP 2619; 19RP 2931-36; 21RP 3043; Ex. 292.

<sup>118</sup> 16RP 2429, 2431-33, 2436-38, 2439-40, 2471.

<sup>119</sup> 16RP 2438-39; 22RP 3253-54; CP 215 (Inst.4).

autopsies he had performed and his 27 year medical career as a reason to rely on his opinions. It was a reasonably argued inference.<sup>120</sup>

**vii. Recalling jurors to relevant facts is not misconduct.**

"[T]ruth is not likely to emerge, if the prosecution is confined to such detached exposition as would be appropriate in a lecture...." *United States v. Wexler*, 79 F.2d 526, 530 (2d Cir. 1935)(L. Hand, CJ); *State v. Fleetwood*, 75 Wn.2d 80, 84, 448 P.2d 502 (1968). "[B]loody, brutal crime[s] cannot be explained ... in a lily-white manner ...." *Adams*, 76 Wn.2d at 655. They may be persuasively argued from photographs and testimony. *See Id.*; *State v. Hovig*, 149 Wn. App. 1, 13, 202 P.3d 318 (2009). "A prosecutor is not muted because the acts committed arouse ... indignation." *Fleetwood*, 75 Wn.2d at 84. Blunt, emphatic language may be used to memorably convey important information to the jury. *See Id.*; *State v. Brown*, 132 Wn.2d 529, 568, 940 P.2d 546 (1997). Only arguments that betray reason to emotion must be avoided. *Id.*

Defendant claims the prosecutor unfairly appealed to passion by publishing admitted photographs of the victim's injuries while stating: "that's what getting the shit beat out of you looks like ...." 22RP 3255. In doing so he omits relevant context, unfairly presents the phrase in all caps with emphatic punctuation and includes an uncorroborated description of the prosecutor's associated movements. The remark was part of a larger

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<sup>120</sup> 16RP 2385, 2387, 2433, 2436-38; 22RP 3253.

point comparing credible photographic and medical evidence of Kate's criminally inflicted injuries to the theory of accident argued in defendant's closing. It recalled jurors to a statement defendant made to emergency responders: "It looks like I beat the shit out of her."<sup>121</sup> The point being he was right, because the evidence proved he did. This was proper rebuttal that did not prejudice defendant's case.

3. DEFENDANT'S INSTRUCTION NO. 9 WAS RIGHTLY WITHHELD FOR IT MUDDLED THE DEFINITION OF INTENT WITH A MISPLACED DEFENSE TO UNCHARGED MISTREATMENT.

Trial courts have considerable discretion in wording instructions. *Rehak*, 67 Wn. App. at 165. Misleading instructions should not be given. *State v. Barnes*, 153 Wn.2d 378, 382, 103 P.3d 1219 (2005). Specific instructions are properly refused when general ones explain the law in a way that enables legitimate argument. *Id.*; *Brown*, 132 Wn.2d at 605. Instructions can be rejected when materially inaccurate. *Id.* at 612; *State v. Robinson*, 92 Wn.2d 357, 361, 597 P.2d 892 (1979).

Defendant was charged with felony murder predicated on assault. CP 4, 226 (Inst.15). Assault was accurately defined as intentional touching or striking that is harmful or offensive. CP 220 (Inst.9). The instructions did not permit conviction for failure to render aid as criminal mistreatment was not charged. RCW 9A.42.020. The issue of whether guilty conscience

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<sup>121</sup> 2RP 214-15, 217; 3RP 305, 307; 5RP 661-62, 747-48, 750, 753; 6RP 817-18, 848, 851-53; 7RP 892-93.

was revealed by defendant concealing Kate's injuries, or the same conduct showed respect for her wishes was a credibility call for the jury, not the subject of an "assault defense." *State v. Nordlund*, 113 Wn. App. 171, 187, 53 P.3d 520 (2002); *State v. Huddleston*, 298 Kan. 941, 957, 318 P.3d 140, 151 (2014); *People v. Jurado*, 38 Cal. 4th 72, 126, 131 P.3d 400 (2006). Yet he proposed WPIC 10.01's definition of intent muddled with a variant of the "assault defense" from *State v. Koch*, 157 Wn. App. 20, 237 P.2d 287, 295 (2010):

A person acts with intent or intentionally when acting with the objective or purpose to accomplish a result that constitutes a crime. However, a person has a right to privacy and to be free from bodily invasion and a defendant is not obliged to disregard another adult's wishes by forcing on him/her unwanted medical care.

CP 183.<sup>122</sup> Factually, it was illogical. Calling 911 for refusable aid did not require defendant to force unwanted medical care on Kate through harmful or offensive touching. The instruction is also legally unsound. Unlike second degree assault, criminal mistreatment is a crime of omission. RCW 9A.42.020. The "assault defense" addressed in *Koch* excuses the failure if one had to commit a touching punishable as assault to provide a dependent necessities of life. The "assault defense" cannot be applied to a crime of affirmative conduct like assault, for one does not assault another to avoid doing so. *Compare* CP 220 *with Koch*, at 27, 29, 33. Assaults must be justified by necessity or excused for frailty. *E.g.*, RCW 9A.16.020 (self-

defense); RCW 9A.12.010 (insanity). So the "assault defense" articulated in *Koch* was inapplicable to defendant's case.<sup>123</sup>

An objection with curative reiteration of assault's definition would have remedied argument that untimely summoned care could support conviction, but such argument was never made. Time Kate spent without care was relevant *res gestae* of her condition. As were her immediately debilitating injuries, which impeached defendant's description of their affect. 22RP 3162-63. He argued his theory of accident aggravated by bad decisions from the given instructions without impediment.<sup>124</sup> Prejudicial abuse of discretion has not been shown.

4. THE CONVICTIONS DEFENDANT RECEIVED FOR MURDERING HIS GIRLFRIEND AMID A PATTERN OF ABUSE SHOULD BE AFFIRMED AS HE IS SO CLEARLY GUILTY WHEN ALL REASONABLE INFERENCES ARE DRAWN IN SUPPORT OF THE VERDICTS.

Evidence is sufficient to support conviction if it would permit any jury to find the elements of crime or sentencing factor beyond a reasonable doubt. Circumstantial evidence is as reliable as direct evidence. *State v. Thomas*, 150 Wn.2d 821, 874, 83 P.3d 970 (2004); *State v. Notaro*, 161 Wn. App. 654, 670-71, 255 P.3d 774, 782 (2011). A claim of insufficiency admits the truth of the State's evidence with all reasonable inferences capable of being drawn. *Id.* Courts will not override a jury's judgment by

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<sup>122</sup> 21RP 3111-25; 22RP 3141-44.

<sup>123</sup> 22RP 3147-49, 3154, 3172-74.

reweighing evidence or marking credibility calls adverse to a verdict. *State v. Bencivenga*, 137 Wn.2d 703, 709, 974 P.2d 832 (1999). *State v. Green*, 94 Wn.2d 216, 221, 616 P.2d 628 (1980). *State v. Camarillo*, 115 Wn.2d 60, 71, 794 P.2d 850 (1990); *State v. Walton*, 64 Wn. App. 410, 415–16, 824 P.2d 533 (1992).

- a. Defendant's second degree murder conviction is well-supported by the evidence.

To convict defendant of second degree felony murder predicated on assault in the second degree, the jury was required to find:

(1) During the period between the 23<sup>rd</sup> day of September, 2012, and the 27<sup>th</sup> day of September, 2012, he committed the crime of second degree assault; (2) Caused Kate's death in the course or furtherance of such crime; (3) Kate was not a participant in said crime; and (4) Those acts occurred in Washington.

CP 4-6; 226 (Inst.15); RCW 9A.32.050(1)(b). Second degree assault was correctly defined to require harmful, intentional touching that recklessly inflicted substantial bodily harm. CP 319-22, (Inst. 8-11). The jury was further instructed on circumstantial evidence, proximate cause, its ability to reject expert opinions and consider whether defendant's earlier acts of abuse undermined his theory of mistake. CP 214-15, 217, 223-25 (Inst. 3, 4, 6, 12-14).

The challenge to defendant's conviction narrowly aims at medical evidence proving the death from assault element. Although itself sufficient

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<sup>124</sup> *E.g.*, 22RP 3143-44; 3191-94, 3199-3200, 3214-15.

to support that element, it is incorrectly portrayed as doing so in isolation. "Cause of death is a question ... for the jury to decide from all the facts ...." *State v. Engstrom*, 79 Wn.2d 469, 476, 487 P.2d 205 (1971). It was irrefutably shown defendant argued with Kate the morning of September 24, 2012, outside their Gig Harbor home, and he was the only person present when her injuries were sustained. *Supra* at 6-7. One of their neighbors heard Kate scream: "He's going to kill me." *Id.* Commotion followed, which was likely interpreted as the sounds of defendant cruelly inflicting the catastrophic injuries that proved the truth of her prophetic cry for help when her broken body finally gave out. *Supra* at 6-14. Injuries that revealed the truth of his crime despite his effort to conceal them until his mother urged the call to 911. Reasonable jurors might infer he did so thinking it better to risk assault charges given Kate's history of protecting him than the murder charge that would likely follow her death.

Medical professionals agreed Kate's internal injuries matched high energy blunt force trauma consistent with assault, or other extreme events Kate never experienced. The only forensic pathologist in that group went further, testifying "to a reasonable degree of medical certainty" that Kate died from physical-assault homicide.<sup>125</sup> Jurors could have found defendant got the scabs that striped the knuckles of his fist in the process. *Supra* at 12, 14. Another fact supporting their rejection of every self-serving word he uttered as a lie told to save himself at Kate's expense. Lies that

collectively betrayed as much about his guilt as Kate's sad unwillingness to discuss the cause of her injuries to protect him. *Supra* at 12. Obvious lies that combined with earlier domestic violence and the circumstances of Kate's death to reduce his theory of accident to an abject absurdity.

Defendant reiterates his rejected arguments, here advanced from an unrepresentative abridgment of complex testimony from first responders, trauma nurses, surgeons, nephrologists and one forensic pathologist. The totality of which must be construed in ways that support his conviction, not picked apart and reassembled in ways helpful to his theory of accident. His challenge to Dr. Clark's opinion on cause of death is similarly flawed. Clark's medical opinions were not stripped of probative value on account of their administrative role in establishing Kate's official cause of death. *Supra* at 34-35. Defendant's argument on this point reads like an untimely objection to foundation attending an expert opinion *already admitted* as evidence, which must here be accepted as true with a host of related facts that provide ample proof of the crime underlying his conviction.

- b. Kate tragically died in a final act of defendant's pattern of domestic violence.

The jury was correctly instructed to find the charged murder was an aggravated domestic violence offense if evidence proved defendant and Kate were in a household or dating relationship, and:

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<sup>125</sup> 16RP 2433-37, 2466-67, 2471; *supra* at 12-14.

the offense was part of an ongoing pattern of physical abuse of Kate manifested by multiple incidents over a prolonged period of time.

RCW 9.94A.535 (3)(h)(i); CP 233. Defendant challenges the sufficiency of evidence proving this aggravator against a meaning he mistakenly attributes to the terms "ongoing" and "pattern."

- c. An "ongoing pattern" of domestic violence is internally defined as multiple instances over a prolonged period of time.

Statutory interpretation is reviewed de novo. Plain meaning will be given effect as the expression of legislative intent. *State v. Jacobs*, 154 Wn.2d 596, 600, 115 P.3d 281 (2005). It is discerned from the language's ordinary usage, the statute's context and related provisions. *Id.* Legislative intent is apparent when language is unambiguous. *State v. J.P.*, 149 Wn.2d 444, 450, 69 P.3d 318 (2003). Nontechnical terms may be given their dictionary meaning. *State v. Fjermestad*, 114 Wn.2d 828, 835, 791 P.2d 897 (1990). Courts will not add or delete language, or interpret it in a way that renders terms superfluous. *State v. J.P.*, 149 Wn.2d 444, 450, 69 P.3d 318 (2003). Interpretations leading to absurd results are avoided. *State v. Eaton*, 168 Wn.2d 467, 480, 229 P.3d 704 (2010).

"RCW 9.94A.535(3)(h)(i) is not ambiguous," so its plain language controls. *State v. Sweat*, 180 Wn.2d 156, 160, 322 P.3d 1213 (2014). That plain language defines "ongoing pattern of physical abuse" as "multiple incidents over a prolonged period of time." RCW 9.94A.535 (3)(h)(i).

"Multiple" is not statutorily defined. It means "more than one." Webster's Third New International Dictionary 1485 (2002). This usage accords with the Legislature's intent that RCW 9.94.535(3)(h)(i) be broadly interpreted to capture incidents of relevant abuse. See *Sweat*, 180 Wn.2d at 160-62; *State v. Zatkovich*, 113 Wn. App. 70, 81, 52 P.3d 36 (2002)("repeated incidents"). Interpreting "pattern" to mean "more than one" also accords with RCW 9.94A.030(37) where it means "two or more."

Defendant's challenge misapplies a definition of "pattern" applied to the homicide by abuse statute in *State v. Russell*, 69 Wn. App. 237, 244, 848 P.2d 743 (1993). But unlike RCW 9.94.535(3)(h)(i), homicide by abuse does not explicitly define "pattern or practice" in terms of a number of incidents. RCW 9A.32.055. *Russell* decided the phrase *could* mean: "a regular, mainly unvarying way of acting or doing," but did "not determine precise and final meanings for those terms in all possible cases." *Id.* at 247. There is no reason to conclude *Russell* intended its admittedly under-inclusive definition of "pattern" to restrict RCW 9.94.535(3)(h)(i) beyond the meaning provided for by its own definition of "pattern."

- d. Ample evidence proved Kate's death was one of four acts of physical abuse.

The sufficiency of facts underlying an aggravating factor is tested according to the same standard of review applied to base offenses. *State v.*

*Yarbrough*, 151 Wn. App. 66, 96, 210 P.3d 1029 (2009). This includes reviewing evidence in a light most favorable to the verdict.

Evidence established Kate thought defendant hit her hard enough to break her ribs in December, 2010. *Supra* at 4. He punched her face in July, 2011. *Id.* In October, 2011, he admitted to violently beating her. *Id.* at 5. Defendant challenges the sufficiency of that evidence by claiming it did not meet his definition of "ongoing pattern," which he incorrectly imports from homicide by abuse jurisprudence. He specifically claims the July, 2011, abuse failed to meet that mismatched standard. But the State was not required to prove he regularly beat Kate in a mainly unvarying way as would be required under his definition of "ongoing pattern." RCW 9.94A.535(3)(h)(i)'s aggravator only required proof of multiple instances of physical abuse over a prolonged period of time, so defendant's jury had two more instances of relevant abuse than needed to support its finding on the aggravator.

Defendant wrongly questions the weight given to the December, 2010, abuse as it must be accepted as true. *State v. Camarillo*, 115 Wn.2d 60, 71, 794 P.2d 850 (1990). A similar error attends the claim that proof of his October, 2011, act of beating Kate violates *corpus delicti*. That rule of evidence governs the use of uncorroborated confessions to prove base offenses. *State v. Finch*, 137 Wn.2d 792, 838, 975 P.2d 967 (1999). It is inapplicable to aggravating factors or a review of evidence supporting

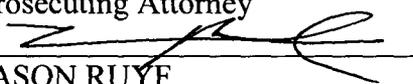
them. *Id.*; *State v. C.D.W.*, 76 Wn. App. 761, 763, 887 P.2d 911 (1995);  
*State v. Burnette*, 78 Wn. App. 952, 956- 57, 904 P.2d 776 (1995).

D. CONCLUSION.

Defendant's conviction and sentence should be affirmed. He was correctly allowed to introduce his murder victim's relevant drinking while prevented from gratuitously casting her as a "chronic alcoholic." There was no error in the refusal to give his Instruction No. 9, which muddled the definition of intent with an "assault defense" to uncharged criminal mistreatment. At the same time, each of the verdicts were well-supported by evidence appropriately presented by the prosecutor.

DATED: April 15, 2016.

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WSB # 38725

Certificate of Service:

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

4.15.14 Therun  
Date Signature

# PIERCE COUNTY PROSECUTOR

**April 15, 2016 - 11:14 AM**

## Transmittal Letter

Document Uploaded: 4-472732-Respondent's Brief.pdf

Case Name: State v. Selley

Court of Appeals Case Number: 47273-2

**Is this a Personal Restraint Petition?** Yes  No

### The document being Filed is:

Designation of Clerk's Papers 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

Copy of Verbatim Report of Proceedings - No. of Volumes: \_\_\_\_\_

Hearing Date(s): \_\_\_\_\_

Personal Restraint Petition (PRP)

Response to Personal Restraint Petition

Reply to Response to Personal Restraint Petition

Petition for Review (PRV)

Other: \_\_\_\_\_

### Comments:

No Comments were entered.

Sender Name: Therese M Kahn - Email: [tnichol@co.pierce.wa.us](mailto:tnichol@co.pierce.wa.us)

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

[barbara@bcoreylaw.com](mailto:barbara@bcoreylaw.com)