IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent, v. TRACY JOHN FLOREN, Appellant.	)	DIVISION ONE No. 64927-2-I UNPUBLISHED OPINION FILED: December 19, 2011

Dwyer, C.J. — Tracy Floren was convicted of murder in the first degree while armed with a firearm arising from the shooting death of his wife, Nancy. At trial, the prosecution argued that Floren had staged the scene to convince authorities that a burglar had killed Nancy. Consistent with this theory of the case, a bloodstain pattern analysis expert for the State testified that Nancy was already dead when the home's security alarm was activated. Floren contends that the trial court erred by allowing this testimony without first conducting a Frye hearing.[1] However, because it cannot be reasonably disputed that both the underlying theory and the technique relied upon by the bloodstain pattern analysis expert are generally accepted in the relevant scientific community, a

[1] Frye v. United States, 293 F. 1013 (D.C. Cir. 1923).

Frye hearing was not required in order to determine the admissibility of the expert's testimony. Floren's other contentions are similarly without merit. Accordingly, we affirm.

I

On September 2, 2007, at 5:52 a.m., ADT Security Services received a "hold-up alarm" from the residence of Tracy and Nancy Floren. King County sheriff deputies arrived at the home at approximately 6:15 a.m. Receiving no response when they knocked at the front door, the officers proceeded to the back of the house, where they found the rear door to the garage to be slightly ajar. The officers entered the garage and then the house through a second door that was closed but unlocked.

Inside the house, in the hallway to the garage, the officers discovered the body of Nancy Floren. She was dressed in a bathrobe, lying on her back, and had been shot twice in the head. A .38 caliber revolver lay on the floor near her right hand. A large pool of blood had formed around her head, which was tilted slightly to the right. A medical aid unit arrived at 6:32 a.m. and immediately pronounced Nancy dead. An officer began photographing the scene shortly after the medics departed.

Tracy Floren, who was not in the house when police arrived, returned to the residence at 7:50 a.m. He explained that he had been attending an Alcoholics Anonymous meeting that was scheduled from 6:30 a.m. to 7:30 a.m.

He produced a sign-in record from the meeting, as well as a store receipt for a coffee and a muffin that was time-stamped at 5:24 a.m.[2] The police, maintaining that Nancy was still alive and at the hospital, interviewed Floren for approximately three hours before telling him that his wife was dead and that he was suspected in her murder. However, it was not until March 7, 2008, approximately six months later, that Floren was arrested. He was charged with murder in the first degree while armed with a firearm.

At trial, the prosecution argued that Floren had staged the murder scene to make authorities believe that a burglar had killed Nancy. Relying on the testimony of Ross Gardner, a bloodstain pattern analysis expert, the State sought to establish that Nancy was already dead when the security alarm was activated at 5:52 a.m. Utilizing photographs taken between 6:30 a.m. and 6:42 a.m., Gardner testified that the extent of coagulation in Nancy's hair and the amount of serum separation in the pool of blood around her head indicated that she had been dead for at least an hour when the photographs were taken. Gardner noted that, although the onset of serum separation can occur as soon as thirty minutes after bloodshed, photographs taken several hours later in the day did not show dramatically more serum separation than was shown in the early morning photographs. To him, this indicated that the blood pool was already in an "advanced stage of serum separation and retraction" when the

[2] Witnesses later confirmed Floren's presence at the Alcoholics Anonymous meeting and outside a Starbucks coffee shop across the street from the store where the coffee and muffin were purchased.

officers arrived at the scene. Gardner further testified that a trail of blood running from the gunshot wound at Nancy's right temple, across her forehead, and accumulating in the hair near her left temple, demonstrated that she had originally lain with her head to the left before she was subsequently repositioned and shot again. Based on the amount of clotting observed near Nancy's left temple, Gardner opined that between five and twenty minutes passed between the first and second gunshots.

The defense presented expert testimony from forensic scientist Kay Sweeny to rebut Gardner's opinions. Sweeny testified that there is no reliable basis for determining the timing of an injury based upon the extent of serum separation or blood clotting. However, Sweeny agreed that serum separation may take an hour or more to initiate and that, in a clinical setting, blood clotting typically occurs within three to fifteen minutes.

Several witnesses testified regarding Floren's lack of emotion following his wife's death. Additional witnesses testified that Nancy had expressed frustration about Floren's alcohol abuse and its effect on the couple's marriage.

The jury convicted Floren as charged. His motion for a new trial was denied. Floren was sentenced to 360 months of confinement.

Floren appeals.

II

Floren first contends that the trial court erred by declining to conduct a

Frye hearing prior to admitting expert testimony regarding blood clotting and serum separation.[3] We disagree.

In order to determine the admissibility of expert testimony based upon novel scientific theories or methods, we have long utilized the "general acceptance" standard set forth in Frye v. United States, 293 F. 1013 (D.C. Cir. 1923).[4] See, e.g., State v. Copeland, 130 Wn.2d 244, 922 P.2d 1304 (1996); State v. Riker, 123 Wn.2d 351, 869 P.2d 43 (1994). "Both the scientific theory underlying the evidence and the technique or methodology used to implement it must be generally accepted in the scientific community for evidence to be admissible under Frye." State v. Gregory, 158 Wn.2d 759, 829, 147 P.3d 1201 (2006). "'If there is a *significant* dispute among *qualified* scientists in the relevant scientific community, then the evidence may not be admitted.'" Gregory, 158 Wn.2d at 829 (quoting State v. Gore, 143 Wn.2d 288, 302, 21 P.3d 262 (2001)). However, "[o]nce a methodology is accepted in the scientific community, then application of the science to a particular case is a matter of weight and admissibility under ER 702, which allows qualified expert witnesses to testify if scientific, technical, or other specialized knowledge will assist the trier or fact."

[3] We review de novo questions of admissibility under Frye. State v. Copeland, 130 Wn.2d 244, 255, 922 P.2d 1304 (1996).

[4] In Frye, the court explained:

> Just when a scientific principle or discovery crosses the line between the experimental and demonstrable stages is difficult to define. Somewhere in this twilight zone the evidential force of the principle must be recognized, and while courts will go a long way in admitting expert testimony deduced from a well-recognized scientific principle or discovery, the thing from which the deduction is made must be sufficiently established to have gained general acceptance in the particular field in which it belongs.
> 293 F. at 1014.

Gregory, 158 Wn.2d at 829-30; see also Anderson v. Akzo Nobel Coatings, Inc., __ Wn.2d __, 260 P.3d 857, 868 (2011) ("[T]he Frye test is not implicated if the theory and the methodology relied upon and used by the expert to reach an opinion on causation is generally accepted by the relevant scientific community.").

Whether a theory or technique has been generally accepted in the scientific community may be determined by several methods. "General acceptance may be found from testimony that asserts it, from articles and publications, from widespread use in the community, or from the holdings of other courts." State v. Kunze, 97 Wn. App. 832, 853, 988 P.2d 977 (1999) (footnotes omitted). Where reasonable dispute exists regarding general acceptance, such acceptance must be established by a preponderance of the evidence at a hearing held pursuant to ER 104(a). Kunze, 97 Wn. App. at 853. However, where general acceptance is not reasonably disputed, no hearing is necessary. Kunze, 97 Wn. App. at 853-54. Where a particular theory or principle has been approved by appellate courts in the past, a hearing is generally unnecessary in later cases, so long as the particular theory or principle at issue is the same as the one previously approved. See, e.g., In re Det. of Thorell, 149 Wn.2d 724, 756, 72 P.3d 708 (2003).

Here, Ross Gardner, the State's bloodstain pattern analysis expert, testified that, in his opinion, Nancy Floren had been shot more than an hour

before her body was photographed at approximately 6:40 a.m. Gardner based his opinion upon the extent of serum separation in the large pool of blood around Nancy's head and the degree of clotting present in the hair near her left temple. Floren contends that the methodology employed by Gardner does not allow for accurate and reliable predictions and is not generally accepted in the scientific community. Thus, he asserts, the trial court erred by declining to hold a Frye hearing in order to determine the admissibility of Gardner's testimony.[5]

As an initial matter, Floren does not dispute the general acceptance of the scientific theory underlying Gardner's testimony. The mechanisms of blood clotting and serum separation are well-documented in the scientific literature. See, e.g., Stuart H. James, Paul E. Kish & T. Paulette Sutton, Principles of Bloodstain Pattern Analysis: Theory and Practice 188-89 (2005); Tom Bevel & Ross M. Gardner, Bloodstain Pattern Analysis: With an Introduction to Crime Scene Reconstruction 246 (2d ed. 2001).[6] Instead, Floren asserts that the

[5] Floren initially requested a Frye hearing regarding the admissibility of certain experiments performed by Gardner to ascertain the length of time required for formation of the clotting observed near Nancy's left temple. The trial court agreed to hold such a hearing and, in fact, heard testimony from two bloodstain pattern analysis experts regarding whether Gardner's experimental methods were generally accepted in the scientific community. However, before the trial court ruled on this issue, the State informed the court that it no longer intended to present any testimony based upon the experiments. Thereafter, Floren moved for a Frye hearing to determine whether Gardner's remaining opinions regarding the timing of Nancy's death were based on generally accepted scientific principles and techniques. The court determined that a hearing on this subject was unnecessary and permitted Gardner's testimony.

[6] Stuart James, a bloodstain pattern analysis expert for the defense, describes the mechanisms of blood clotting and serum separation as follows:

> A blood clot is formed by a complex mechanism involving the plasma protein fibrinogen, platelets, and other clotting factors. . . . [F]ibrin is integral to clotting. For fibrin to be available whenever an injury occurs, it is constantly being transported through the body by the circulating blood. Fibrin must be in a soluble form (called fibrinogen) when it is circulating in the blood, but it must change into an insoluble form whenever clotting becomes necessary.

technique utilized by Gardner to reach his conclusions is not generally accepted. However, because blood clotting and serum separation are generally accepted as relevant factors for determining the timing of events at a crime scene, application of the science was properly addressed by the trial court not under Frye but, rather, as a matter of weight and admissibility pursuant to ER 702.

Our Supreme Court has held that blood spatter analysis "hardly qualifies as a novel scientific technique," and that "there is little doubt such testimony is now generally accepted in the scientific community." State v. Roberts, 142 Wn.2d 471, 520-21, 14 P.3d 713 (2000). Although the court's holding in Roberts pertained to an expert's analysis of the spatial distribution of blood, 142 Wn.2d at 481, other jurisdictions have permitted experts to testify regarding the timing of events based on the presence or absence of clotting. See, e.g., State v. Brock, 327 S.W.3d 645, 666 (Tenn. App. 2009) (expert testified about time of injury based on average clotting times), cert. denied, 131 S. Ct. 101 (2010); Moore v. Morales, 445 F. Supp. 2d 1000, 1009 (N.D.Ill. 2006) (expert testified that absence of adherent blood clotting indicated that laceration occurred close to time of death); State v. Faulkner, 154 S.W.3d 48, 53 (Tenn. 2005) (expert testified that assault lasted at least six minutes because blood had clotted before the end of the attack).[7] Moreover, Floren's own bloodstain pattern analysis

> Subsequently, the blood clot begins to retract, causing a separation of the remaining liquid portion, which is referred to as serum.

James, supra, at 188.

[7] Although few appellate cases have addressed the use of serum separation in bloodstain pattern analysis, this methodology also appears to be well-established in the scientific literature. See, e.g., Anita Y. Wonder, Bloodstain Pattern Evidence: Objective Approaches and Case

expert, Stuart James, testified that blood coagulation and serum separation are relevant factors in bloodstain pattern analysis, that clotting can provide probative information regarding the minimum length of time since exposure, and that he himself had testified to time ranges based on the presence and extent of blood clotting.[8] As this methodology is well-established in the field, the trial court did not err by concluding that no Frye hearing was required as a predicate to Gardner's testimony.

Viewed correctly, Floren's contention that Gardner's testimony went "far beyond what can be supported"[9] by the science of bloodstain pattern analysis implicates questions of weight and admissibility properly determined pursuant to other evidentiary requirements, not by application of the Frye standard. As our Supreme Court has recently explained, "Frye does not require every deduction drawn from generally accepted theories to be generally accepted. Other evidentiary requirements provide additional protections from deductions that are mere speculation." Akzo, 260 P.3d at 866. For example, evidence must be probative, relevant, and not unduly prejudicial. ER 401, 402, 403. Moreover,

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Applications 176 (2007) ("Complete clotting with clot retraction and extrusion of clear serum require an hour with normal victims and relatively clean wounds."); James, supra, at 188-89 ("[S]erum separation resulting from clot formation and retraction may take an hour or more depending on the original blood volume, the surface or substrate where the blood is present, and environmental factors such as temperature and humidity."); Bevel & Gardner, supra, at 246 ("Clot retraction . . . begins anywhere from 30 min to 1.5 h after bloodshed. . . . [T]ime is affected by temperature, humidity, and the surface on which the blood was shed.").

[8] James's book notes that "[b]lood clots and serum stains surrounding them as well as the degree of observed drying of blood should be recognized as important information at crime scenes." James, supra, at 189. Like Gardner, James testified that serum separation could occur in as little as 30 minutes but would likely take an hour.

[9] Br. of Appellant at 35.

evidence is further tested by the "adversarial process within the crucible of cross-examination." Akzo, 260 P.3d at 864. Before expert opinion is admitted, ER 702 requires that the witness be qualified as an expert by knowledge, skill, experience, training or education and that the testimony be helpful to the trier of fact. Indeed, given the time-consuming, expensive nature of Frye hearings, "courts should analyze scientific evidence under ER 702 whenever possible." Gregory, 158 Wn.2d at 830.

Here, the trial court correctly determined that the admissibility of Gardner's testimony should be addressed pursuant to ER 702.[10] Because it cannot be reasonably disputed that both the underlying theory and the technique relied upon by Gardner are generally accepted within the relevant field of bloodstain pattern analysis, the trial court did not err by admitting this testimony without first conducting a Frye hearing.

III

Floren next contends that the trial court impermissibly commented on the evidence in the course of overruling a defense objection. We disagree.

Pursuant to article IV, section 16 of our state's constitution, a judge is prohibited from conveying to the jury his personal opinion about the merits of the case or from instructing the jury that a fact at issue has been established.[11] State v. Levy, 156 Wn.2d 709, 721, 132 P.3d 1076 (2006). A trial court's

[10] Floren assigns no error to the court's conclusions that Gardner was qualified as an expert and that his testimony would be helpful to the jury.
[11] "Judges shall not charge juries with respect to matters of fact, nor comment thereon, but shall declare the law." Wash. Const. art. IV, § 16.

statements are impermissible where "'the court's attitude toward the merits of the cause are reasonably inferable from the nature or manner of the court's statements.'" State v. Elmore, 139 Wn.2d 250, 276, 985 P.2d 289 (1999) (quoting State v. Carothers, 84 Wn.2d 256, 267, 525 P.2d 731 (1974)); see also State v. Ciskie, 110 Wn.2d 263, 283, 751 P.2d 1165 (1988). However, our Supreme Court has long held that a trial court does not comment on the evidence simply by expressing its reasons for an evidentiary ruling.[12] State v. Cerny, 78 Wn.2d 845, 855-56, 480 P.2d 199 (1971); State v. Elder, 130 Wash. 612, 617, 228 P. 1016 (1924); State v. Surry, 23 Wash. 655, 660, 63 P. 557 (1900).

Here, Floren asserts that the trial court improperly commented on the evidence during the prosecution's redirect examination of Gardner. The following exchange occurred:

> [Prosecutor]: Mr. Gardner, I understand you have rendered an opinion that you believe that if you look at the evidence in this case, based on your analysis, and based upon some information that was provided to you, that Ms. Floren could not have been alive to trigger the alarm at 5:52?
> [Witness]: Correct.
> [Defense Counsel]: Your Honor, that is a leading question.
> The Court: I will overrule the objection. I think it's part of the background that has been established by the evidence.
> [Defense Counsel]: Okay.

[12] Of course, not all statements made as explanations for evidentiary rulings are permissible. For example, in State v. Lampshire, 74 Wn.2d 888, 891, 447 P.2d 727 (1968), the trial court's statement in response to an objection following an overlong examination that "[w]e have been from bowel obstruction to sister Betsy, and I don't see the materiality, counsel," constituted an impermissible expression as to the value of the prior testimony. Nevertheless, trial courts are afforded significant latitude to explain their evidentiary rulings. See, e.g., In re Det. of Pouncy, 144 Wn. App. 609, 622, 184 P.3d 651 (2008), aff'd, 168 Wn.2d 382, 229 P.3d 678 (2010); State v. Dykstra, 127 Wn. App. 1, 8-9, 110 P.3d 758 (2005).

Report of Proceedings (RP) (Nov. 24, 2009) at 1686.

Floren does not dispute that the statement by the trial court was made as an explanation for its evidentiary ruling. Nor does he contend that the trial court's ruling was incorrect. Instead, he asserts that the trial court's explanation of its ruling signaled to the jury that the court believed that the prosecution had established that Nancy was not alive to trigger the alarm at 5:52 a.m.

However, this statement by the trial court cannot reasonably be construed to reveal the court's attitude toward the merits of the case. In responding to the objection, the trial court merely noted that the question contained background information to which the witness had already testified and, thus, was not improperly leading. The court's statement could not reasonably be interpreted as an endorsement of Gardner's opinion. Moreover, the trial court repeatedly instructed the jury on the impropriety of impermissible comments on the evidence and directed the jury to disregard any indication of the court's personal opinion about the value of testimony or other evidence.[13] Particularly in the context of an evidentiary ruling—where a trial court is afforded wide latitude to explain its decisions—the trial court's statement does not constitute an

[13] The trial court instructed the jury prior to the presentation of evidence as follows: "The law does not permit me to comment on the evidence in any way, and I will not intentionally do so. By a comment on the evidence, I mean some expression or indication from me as to my opinion on the value of the evidence or the weight of it. If it appears to you that I do comment on the evidence, you are to disregard such apparent comment entirely." RP (Nov. 2, 2009) at 41. The court reiterated these admonishments in its final instructions to the jury. The jury is presumed to have followed the court's instructions. See, e.g., Cerny, 78 Wn.2d at 856; State v. Willis, 67 Wn.2d 681, 686, 409 P.2d 669 (1966).

impermissible comment on the evidence. There was no error.

IV

Floren next contends that the testimony of several witnesses regarding his demeanor after Nancy's death constituted improper opinion testimony and that the trial court therefore erred by permitting the jury to consider it.[14] We disagree.

We review a trial court's evidentiary rulings for abuse of discretion. State v. Stenson, 132 Wn.2d 668, 701, 940 P.2d 1239 (1997). "When a trial court's exercise of its discretion is manifestly unreasonable or based upon untenable grounds or reasons, an abuse of discretion exists." State v. Powell, 126 Wn.2d 244, 258, 893 P.2d 615 (1995).

As a threshold matter, Floren did not object at trial to the testimony of six of the eight witnesses whose statements he challenges on appeal.[15] We ordinarily will not consider an issue that the trial court has had no opportunity to address. RAP 2.5. Although an exception exists where the claimed error is a "manifest error affecting a constitutional right," RAP 2.5(a)(3), the admission of allegedly unconstitutional opinion testimony is not automatically reviewable as a "manifest" constitutional error.[16] State v.Kirkman, 159 Wn.2d 918, 926, 155 P.3d

[14] Specifically, Floren assigns error to the trial court's admission of testimony by Sergeant James Corey, Deputy Paul Saulet, Sandra Wilson, Alan Lynden, Michael Stroebel, Marcia Ashley, Jeannine Dowley, and Cheryl Lindberg.
[15] Floren objected at trial only to the testimony of Sandra Wilson and Jeannine Dowley.
[16] In order to qualify as a "manifest constitutional error," the error must be of constitutional magnitude, cause actual prejudice, and be "'so obvious on the record that the error warrants appellate review.'" State v. Gordon, ___ Wn.2d ___, 260 P.3d 884, 886 n.2 (2011) (quoting State v. O'Hara, 167 Wn.2d 91, 100, 217 P.3d 756 (2009)).

125 (2007). Instead, a manifest error requires a nearly explicit statement by the witness regarding an ultimate issue of fact. Kirkman, 159 Wn.2d 936. Here, Floren points to no explicit statement by any of these witnesses regarding the ultimate issue of his guilt. Nor does he otherwise attempt to demonstrate that the admission of this testimony constitutes manifest constitutional error. Accordingly, as to these six witnesses, Floren cannot raise the issue of impermissible opinion testimony for the first time on appeal.

As to the testimony of the other witnesses, the law is well established. "No witness, lay or expert, may testify to his opinion as to the guilt of a defendant, whether by direct statement or inference." State v. Black, 109 Wn.2d 336, 348, 745 P.2d 12 (1987). However, testimony that does not directly comment on the defendant's guilt, is otherwise helpful to the trier of fact, and is based on inferences from the evidence is not improper opinion testimony. City of Seattle v. Heatley, 70 Wn. App. 573, 578, 854 P.2d 658 (1993). Our courts have repeatedly held that testimony describing personal observations of a defendant's reaction to emotional news is admissible evidence. See, e.g., Stenson, 132 Wn.2d at 724; State v. Day, 51 Wn. App. 544, 552, 754 P.2d 1021 (1988); State v. Allen, 50 Wn. App. 412, 417, 749 P.2d 702 (1988). Moreover, opinion testimony characterizing a defendant's reaction is also admissible if it is prefaced with a proper foundation—so long as the opinion is based upon personal observations of the defendant's conduct, is factually recounted, and is

directly and logically supported by those observations, it is admissible. Day, 51 Wn. App. at 552.

Here, Floren contends that the trial court erred by permitting two witnesses to testify regarding their impressions of Floren's demeanor following Nancy's murder. Sandra Wilson—a neighbor who spoke to Floren one day after the murder—testified that she was "shocked" that Floren "raved about the police and what they had done to him" but expressed no concern about his wife. RP (Nov. 3, 2009) at 239. This testimony was properly admitted over Floren's objection. Wilson's descriptions of Floren's statements and demeanor were based on her personal observations. Moreover, given Wilson's natural expectation that Floren would be grieving in the aftermath of his wife's death, her expression of surprise at his behavior was a logical reaction based upon her observations. See, e.g., Day, 51 Wn. App. at 552. Her shock does not indicate that Wilson was of the opinion that Floren killed his wife. The trial court did not err by allowing Wilson to testify.

Similarly, the testimony of Jeannine Dowley, a longtime friend of the Florens, was properly admitted. The majority of Dowley's testimony concerned her personal observations of Floren's demeanor and behavior. This testimony was unobjectionable. On cross-examination, defense counsel asked Dowley whether she had previously stated that she "couldn't imagine any situation where Tracy would hurt Nancy and not kill himself as well." RP (Nov. 17, 2009) at

1043. Dowley admitted having made this statement. On redirect examination, the prosecutor asked, "[W]hen this first happened, you couldn't imagine the defendant harming Nancy. Has that changed?" Dowley answered "yes." RP (Nov. 17, 2009) at 1045.

Floren contends that the trial court erred by declining to instruct the jury to disregard this answer. However, although Floren is correct that Dowley's statement may have constituted an opinion on the ultimate issue of his guilt, because the defense opened the door to the inquiry, the trial court did not err by overruling Floren's objection. As our Supreme Court has explained, the prosecution may elicit testimony that would otherwise be inadmissible if the defense opens the door to such testimony. State v. Jones, 111 Wn.2d 239, 248-49,759 P.2d 1183 (1988). Under this well-established doctrine, the trial court has discretion to admit otherwise inadmissible evidence when a party raises a material issue and the evidence in question bears directly on that issue. State v. Berg, 147 Wn. App. 923, 939, 198 P.3d 529 (2008). The doctrine of "opening the door" allows one party to introduce evidence on the same issue to rebut any false impression created by another party. Berg, 147 Wn. App. at 939. Here, defense counsel's question during cross-examination was intended to elicit Dowley's past opinion regarding Floren's capacity to commit the murder. Floren was the first to raise this subject at trial, and, because Dowley's answer was likely to create a false impression concerning her views on the subject, the trial

court did not abuse its discretion by permitting the prosecution to question Dowley regarding whether her opinion had changed. As noted by our Supreme Court, "[i]t would be a curious rule of evidence which allowed one party to bring up a subject, drop it at a point where it might appear advantageous to him, and then bar the other party from all further inquiries about it." State v. Gefeller, 76 Wn.2d 449, 455, 458 P.2d 17 (1969). There was no error.

V

Floren next contends, in his statement of additional grounds, that the trial court erred by admitting several statements made by Nancy. We disagree.

ER 801(c) defines hearsay as "a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." Such statements are generally inadmissible. ER 802. However, "[w]hether a statement is hearsay depends upon the purpose for which the statement is offered. Statements not offered to prove the truth of the matter asserted, but rather as a basis for inferring something else, are not hearsay." State v. Crowder, 103 Wn. App. 20, 26, 11 P.3d 828 (2000).

Here, Nancy's statements were offered to prove Floren's motive to commit murder.[17] Evidence of a defendant's motive is relevant in a homicide prosecution.[18] See, e.g., Stenson, 132 Wn. 2d at 701-702; State v. Pirtle, 127

[17] The trial court noted that Nancy's statements "relate directly to the issue of motive, particularly her frustration, which is an important part of this circumstantial case." RP (Oct. 14, 2009) at 11. Although the trial court discussed its ruling with reference to the "state of mind" exception to the hearsay rule, ER 803(a)(3), the court's discussion of motive indicates its understanding of the purpose for which the evidence was offered.

[18] ER 401 defines relevant evidence as evidence having a tendency to make the existence of

Wn.2d 628, 644, 904 P.2d 245 (1995). "Although motive is not an element of murder, it is often necessary when only circumstantial evidence is available." State v. Athan, 160 Wn.2d 354, 382, 158 P.3d 27 (2007). "Evidence of previous quarrels and ill-feeling is admissible to show motive." State v. Hoyer, 105 Wash. 160, 163, 177 P. 683 (1919). Where evidence tends to establish a hostile relationship between a defendant and his wife, such evidence is admissible to show his motive for her murder. Powell, 126 Wn.2d at 260.

Here, the trial court permitted Marcia Ashley to testify that Nancy had stated that Floren had received treatment for alcoholism on several occasions, that he had relapsed in February of 2007, and that this "was his last chance." RP (Nov. 5, 2009) at 504. Similarly, Denise Warner was allowed to testify that Nancy had reported that Floren had "fallen off the wagon," that Nancy was "frustrated" by his drinking, and that Nancy had told Floren that he was "ruining our lives." RP (Nov. 9, 2009) at 620-22. Warner also testified that Nancy had described to her an incident in which, after finding empty alcohol bottles in the garbage, Nancy arranged the empty bottles in a row and left a note stating, "Do you still think that there is a problem?" RP (Nov. 9, 2009) at 622.

These out-of-court statements are hearsay only if their relevance is dependent on their truth. ER 801(c). Thus, the inquiry in this case is as follows:

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any fact that is of consequence to the determination of the action more or less probable than it would be without the evidence. Relevant evidence is admissible, ER 402, but may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice. ER 403. A trial judge has wide discretion in balancing the probative value of evidence against its potentially prejudicial impact. State v. Rivers, 129 Wn.2d 697, 710, 921 P.2d 495 (1996).

If Nancy was being untruthful when she made the statements—if Floren had not "fallen off the wagon," if he had not returned to an alcohol treatment program in 2007, if Nancy had not, in fact, determined that this would be "his last chance"—would the statements still be relevant to prove Floren's motive for her murder? The answer is yes.

Simply by making these statements to her friends and neighbors, Nancy signaled her dissatisfaction with her marriage. Upon learning of Nancy's statements, Floren could logically have concluded that his wife was preparing to leave him—a possibility that is directly relevant to his motive to commit the murder.[19] His conclusion would not depend upon whether Nancy's statements were true. Even if Nancy's statements to Ashley and Warner were false, her negative portrayal of the marriage to outsiders would naturally tend to make Floren believe that Nancy was, in fact, unhappy with the relationship. It is not the truth of the statements but, rather, simply the fact that the statements were made that is relevant to Floren's motive. Because the relevance of Nancy's out-of-court statements does not depend on the veracity of those statements, the statements were not hearsay, and the trial court's decision to admit them was a proper exercise of its discretion.

VI

In his statement of additional grounds, Floren next contends that he was

[19] As Floren himself points out, "[t]he inevitable conclusion is that Mr. Floren shot and killed his wife because she was going to leave him." Statement of Additional Grounds at 17.

denied his constitutional right to present a complete defense when the trial court excluded evidence of other suspects in the Florens' neighborhood near the time of Nancy's murder. We disagree.

The alleged denial of a defendant's right under the Sixth Amendment to present a defense is reviewed de novo. State v. Jones, 168 Wn.2d 713, 719, 230 P.3d 576 (2010); State v. Strizheus, 163 Wn. App. 820, 262 P.3d 100, 105 (2011).

A criminal defendant has the right to present a defense under the Sixth Amendment of the United States Constitution and article I, section 22 of the Washington Constitution.[20] State v. Maupin, 128 Wn.2d 918, 924, 913 P.2d 808 (1996). The right to present a defense, however, is not absolute. Montana v. Egelhoff, 518 U.S. 37, 42, 116 S. Ct. 2013, 135 L. Ed. 2d 361 (1996); Maupin, 128 Wn.2d at 924-25. Rather, a defendant must establish an adequate foundation before evidence suggesting that another person committed the charged offense will be admitted. State v. Downs, 168 Wash. 664, 667, 13 P.2d 1 (1932). An adequate foundation requires a clear nexus between the person and the crime. State v. Condon, 72 Wn. App. 638, 647, 865 P.2d 521 (1993). Mere motive, ability, and opportunity to commit a crime alone are not sufficient. Maupin, 128 Wn.2d at 927. Instead, "'a train of facts or circumstances'" must

[20] The Sixth Amendment to the United States Constitution provides that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to have compulsory process for obtaining witnesses in his favor." U.S. Const. amend. VI. Similarly, article I, section 22 of the Washington Constitution guarantees that "[i]n criminal prosecutions the accused shall have the right . . . to have compulsory process to compel the attendance of witnesses in his own behalf." Wash. Const. art. 1, § 22.

clearly indicate that someone other than the defendant is the guilty party. Downs, 168 Wash. at 667 (quoting Greenfield v. People, 85 N.Y. 75, 89 (1881)).[21] It is the defendant's burden to demonstrate the admissibility of evidence of such other suspects. State v. Pacheco, 107 Wn.2d 59, 67, 726 P.2d 981 (1986).

Floren contends that it was erroneous for the trial court to exclude the testimony of several neighbors regarding a recent robbery in a nearby park and the presence of three suspicious males in the vicinity of the Florens' home on the morning of Nancy's murder.[22] However, this proposed evidence does not establish "a train of facts or circumstances" indicating that a different person was responsible for Nancy's murder. Downs, 168 Wash. at 667. The mere presence of unknown persons in the vicinity of the crime is insufficient to establish the necessary link between these individuals and the murder. Moreover, the occurrence of other crimes in the area does not clearly point to someone other than Floren as the guilty party. Floren points to no affirmative act or step taken by any individual that indicates an intention to commit the crime. Nor does he otherwise demonstrate a link between these other "suspects" and the murder by

[21] The Downs approach for evaluating "other suspect evidence" satisfies the requirements of the Compulsory Process Clause of the Sixth Amendment. See Holmes v. South Carolina, 547 U.S. 319, 327-28, 126 S. Ct. 1727, 164 L. Ed. 2d 503 (2006) (approving of "widely accepted" rule that before "'[other suspect] testimony can be received, there must be such proof of connection with it, such a train of facts or circumstances, as tends clearly to point out such other person as the guilty party'" (quoting State v. Gregory, 198 S.C. 98, 104-05, 16 S.E.2d 532 (1941))).

[22] The State also sought to exclude evidence of a police investigation that determined that a number of reported burglaries had occurred in the general vicinity of the Florens' home in the months before and after Nancy's murder. However, the trial court ruled that the defense was permitted to cross-examine law enforcement officers concerning the nature and extent of this investigation.

way of physical evidence, motive, or contact with the victim. Because there is no clear nexus between Floren's proposed evidence and Nancy's murder, the trial court did not err by excluding this evidence.

VII

Finally, Floren contends, in his statement of additional grounds, that the trial court erred by denying his motion to suppress, thus permitting the State to introduce records of his alcohol treatment at trial. We disagree.

A trial court's denial of a motion to suppress is reviewed to determine whether substantial evidence supports its factual findings and, if so, whether those findings support its conclusions of law. State v. Garvin, 166 Wn.2d 242, 249, 207 P.3d 1266 (2009). We review de novo the trial court's conclusions of law. Garvin, 166 Wn.2d at 249.

Both federal and state law protect the confidentiality of a patient's alcohol treatment records.[23] Here, the trial court weighed on the record the criteria required for disclosure pursuant to RCW 70.96A.150(1)(b), 42 U.S.C.A § 290dd-2, and 42 C.F.R § 2.65(b).[24] The court properly determined that Floren's

[23] The State asserted that federal law was inapplicable because the facilities where Floren received treatment were neither directly funded nor regulated by the federal government. Nevertheless, the trial court applied both state and federal law to determine whether disclosure of Floren's treatment records was proper.

[24] State law requires that "[t]he registration and other records of treatment programs shall remain confidential. Records may be disclosed . . . if authorized by an appropriate order of a court of competent jurisdiction granted after application showing good cause." RCW 70.96A.150(1)(b). Federal law stipulates that treatment records shall be confidential, but may be disclosed "[i]f authorized by an appropriate order of a court of competent jurisdiction granted after application showing good cause therefor . . . . In assessing good cause the court shall weigh the public interest and the need for disclosure against the injury to the patient, to the physician-patient relationship, and to the treatment services." 42 U.S.C.A. § 290dd-2(b)(2)(C). Moreover, pursuant to 42 C.F.R § 2.65, a court must not disclose treatment records for the purpose of

treatment records were obtained pursuant to a search warrant that was lawfully issued upon a showing of good cause, thus satisfying the criteria of RCW 70.96A.150(1)(b). Addressing the requirements of 42 C.F.R § 2.65(d), the court correctly concluded (1) that the crime involved was extremely serious, (2) that there was a reasonable likelihood that the records would disclose valuable evidence of Floren's motive, and (3) that disclosure of the records was the only realistic method of obtaining this information. Finally, the trial court determined that—in light of the serious nature of the charges against Floren—the public interest and need for disclosure outweighed any potential injury to the patient, to the physician-patient relationship, and to future treatment services.[25] 42 C.F.R § 2.65(d); 42 U.S.C.A. § 290dd-2. The court properly limited disclosure to those portions of the treatment records that related to the issue of motive. The trial court's conclusions of law were correct. There was no error.

Affirmed.

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conducting a criminal investigation unless (1) the crime involved is extremely serious, (2) there is a reasonable likelihood that the records will disclose information of substantial value in the investigation or prosecution, (3) other ways of obtaining the information are not available or would not be effective, (4) the potential injury to the patient, to the physician-patient relationship and to the ability of the program to provide services to other patients is outweighed by the public interest and the need for the disclosure, and (5) if the applicant is a person performing a law enforcement function, that the person holding the records has been afforded the opportunity to be represented by independent counsel.

[25] The trial court further noted that the remedy of suppression is typically reserved for violations of a defendant's constitutional rights. Here, the court explained, any improper disclosure of Floren's treatment records would violate only state and federal statutes, none of which specify suppression as a remedy. However, because the trial court correctly concluded that disclosure of the records was proper under both federal and state law, we need not address whether suppression is an appropriate remedy in instances where disclosure is improper.

Dwyer, C.J.

We concur:

Leach, A.C.J.

Ellington, J.