SUPREME COURT NO. 102523-8

NO. 84016-9-I

SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

DAVID NIEUWENHUIS,

Petitioner.

ON APPEAL FROM THE SUPERIOR COURT OF THE STATE OF WASHINGTON FOR SNOHOMISH COUNTY

The Honorable Millie Judge, Judge

PETITION FOR REVIEW

DANA M. NELSON
Attorney for Petitioner
NIELSEN KOCH & GRANNIS, PLLC
The Denny Building
2200 Sixth Avenue, Suite 1250
Seattle, Washington 98121
206-623-2373

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RULES, STATUTES AND OTHER AUTHORITIES

A. IDENTITY OF PETITIONER

Petitioner David Nieuwenhuis asks this Court to review the decision of the court of appeals referred to in section B.

B. COURT OF APPEALS DECISION

Petitioner seeks review of State v. David Nieuwenhuis, COA No. 84016-9-I, filed on October 2, 2023, attached as appendix.

C. ISSUES PRESENTED FOR REVIEW

1. Where Nieuwenhuis asserted he acted in self defense in using lethal force against Candice Black (who was small statured), did the court abuse its discretion and violate Nieuwenhuis' right to present a defense when it excluded expert testimony by Dr. Granville story about the effects of methamphetamine/heroin (which Black had recently ingested) – including fight or flight response, unusual strength and aggression – and that Black had all the risk factors for meth use causing such behavior,

based on Storey's review of discovery and his witness interviews?

2. Whether this constitutes a significant question of law under the state and federal constitutions that should be reviewed by this Court? RAP 13.4(b)(3)?

D. STATEMENT OF THE CASE

The state charged David Nieuwenhuis with first degree premeditated murder for the bludgeoning death of Candice Black. CP 251, 258-59. Although Black was slight in stature (RP 71), Nieuwenhuis told police Black started the assault by hitting him with an iPad and overpowering him. CP 199, 211; 778. Feeling he was in the fight of his life, Nieuwenhuis grabbed the stick (a large stick with screws embedded at its end) he routinely kept behind the front door for protection and hit Black several times, causing her death. CP 211; RP 701, 714, 717, 732, 745.

The state's evidence showed Black had recently ingested methamphetamine and heroin. RP 737-39. In a pretrial offer of proof, Nieuwenhuis presented the expert testimony of PhD Granville Storey who testified about certain well-known effects of recent methamphetamine and heroin use – which are generally accepted within the scientific community of neuroscience and include a fight or flight response, unusual strength and aggression. CP 166-174. There are risk factors that increase the likelihood of such behavior brought on by meth consumption. CP 239; 2RP 78. Storey reviewed the evidence for Nieuwenhuis' case and testified Black had all the risk factors to behave violently on the night of the altercation. CP 239.

Nieuwenhuis argued Storey's proffered testimony was relevant and admissible to corroborate his self defense claim. CP 166-174; 2RP 101.

Nieuwenhuis argued the circumstances and offer of proof in his case were different from those in State v. Jennings, 199 Wn.2d 53, 502 P.3d 1255 (2022), in which this Court upheld the exclusion of the deceased's toxicology results indicating methamphetamine use. CP 166-174.

The state argued Storey's proffered testimony was irrelevant and misleading because Storey could not opine definitively on how Black's drug usage on the day in question affected her. CP 171. The court sided with the state and excluded the evidence. 2RP 113-117. Nieuwenhuis was convicted of second degree murder. CP 9.

On appeal, Nieuwenhuis argued the trial court abused its discretion and violated his right to present a defense in excluding Storey's testimony. Brief of Appellant (BOA) at 22-34; Reply Brief of Appellant (RB) at 1-14. The court of appeals disagreed. Appendix.

The appellate court held that because Storey could not "say what effects of methamphetamine, if any, Ms. Black was exhibiting at the time of her death," the court did not abuse its discretion. Appendix at 3 (citing Jennings, 199 Wn.2d 53 (2022) and State v. Lewis, 141 Wn. App. 367, 166 P.3d 1255 (2022)). The court similarly held there was no constitutional violation, concluding "Dr. Storey's testimony has little if any probative value whereas the state has a substantial interest in limiting the prejudicial effects of Dr. Storey's testimony." Appendix at 4.

E. REASONS WHY REVIEW SHOULD BE ACCEPTED AND ARGUMENT

THIS COURT SHOULD ACCEPT REVIEW OF NIEUWENHUIS' RIGHT TO PRESENT A DEFENSE CLAIM BECAUSE IT PRESENTS A SIGNIFICANT QUESTION OF LAW UNDER THE STATE AND FEDERAL CONSTITUTIONS.

The Sixth and Fourteenth Amendments, as well as article 1, § 2 of the Washington Constitution, guarantee

the right to trial by jury and to defend against the state's allegations. These guarantees provide criminal defendants a meaningful opportunity to present a complete defense, a fundamental element of due process. Chambers v. Mississippi, 410 U.S. 284, 294, 93 S. Ct. 1038, 35 L. Ed. 2d 297 (1973); Washington v. Texas, 388 U.S. 14, 19, 87 S. Ct. 1920, 18 L. Ed. 2d 1019 (1967).

Absent a compelling justification, excluding exculpatory evidence deprives a defendant of the fundamental right to put the prosecutor's case to the crucible of meaningful adversarial testing. Crane v. Kentucky, 476 U.S. 683, 689- 690, 106 S. Ct. 2142, 90 L. Ed. 2d 636 (1986) (quoting United States v. Cronic, 466 U.S. 648, 656, 104 S. Ct. 2039, 80 L. Ed. 2d 657 (1984)).

In Washington, State v. Hudlow, 99 Wn.2d 1, 659 P.2d 514 (1983) and State v. Darden, 145 Wn.2d 612, 41 P.3d 1189 (2002), define the scope of a criminal

defendant's right to present evidence in his defense. A defendant must be permitted to present even minimally relevant evidence unless the state can demonstrate a compelling interest for its exclusion. No state interest is sufficiently compelling to preclude evidence of high probative value. Darden, 145 Wn. 2d at 621-22; Hudlow, 99 Wn.2d at 16; State v. Reed, 101 Wn. App. 704, 714-15, 6 P.3d 43 (2000).

The defense in this case was that Nieuwenhuis was guilty of manslaughter not murder. He reasonably feared for his safety but used too much force. He told police that Black – despite her small stature – overwhelmed him to the point he felt he was in the fight of his life.

Dr. Storey's testimony was relevant to Nieuwenhuis' reasonable fear. It was not disputed Black had ingested heroin and methamphetamine that day. In fact, she got high again on the bus on the way to Nieuwenhuis' residence. RP 360-61. In the offer of proof, Storey

testified there are certain well-known effects of methamphetamine that are based on science and can include aggression, fight or flight response and unusual strength – the last of which is key here. CP 239.

Storey had reviewed discovery in Nieuwenhuis' case, he had interviewed witnesses close to Black. Storey was expected to testify that Black had all the risk factors for behaving aggressively on the night of the assault: (1) prolonged drug use; (2) poly drug use; and (3) exposure to a traumatic event. CP 239. These factors made her more likely to behave aggressive and with unusual strength as a result of her meth use.

Contrary to the court of appeals decision, Storey's testimony would have been helpful to the jury. Unlike the circumstances in Jennings and Lewis, Dr. Storey was expected to give testimony specific to the decedent, not just testify generally about the effects of methamphetamine. His testimony therefore was not

speculation or misleading as in Jennings and Lewis. For these reasons, the trial court abused its discretion in excluding this relevant defense evidence. BOA at 25-30; In re Marriage of Littlefield, 133 Wn.2d 39, 46-47, 940 P.2d 1362 (1997).

More importantly, the court's ruling violated Nieuwenhuis' right to present a defense. Because the evidence was specific to Black, it was relevant and not speculative. Because it explained how she could have been acting with unusual strength, it went to the heart of the defense case – the reasonableness of Nieuwenhuis' fear. Contrary to the court of appeals, Storey's testimony was highly relevant. State v. Jones, 168 Wn.2d 713, 720, 230 P.3d 576 (2010). There is no state interest compelling enough to justify the exclusion of highly probative defense evidence. Hudlow, 99 Wn.2d at 16.

The state's interest here, if any, was slight. The only countervailing interest posed by the government is

the assertion that the effects of methamphetamine are too generalized to be helpful. Brief of Respondent (BOR) at 61. But Storey's anticipated testimony was specific to the decedent. Accordingly, there was no danger of unfair prejudice, as in Jennings and Lewis.

The importance of Storey's testimony cannot be underestimated. Without it, Nieuwenhuis' self defense claim made little sense. If not this case, when will an expert ever be permitted to testify about the effects of methamphetamine on the decedent in a self defense case? This Court should accept review of this important constitutional question.

F. CONCLUSION

For the reasons stated above, this Court should accept review. RAP 13.4(b)(3).

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Dated this 30th day of October, 2023.

Respectfully submitted,

NIELSEN KOCH & GRANNIS, PLLC

DANA M. NELSON, WSBA 28239
Office ID No. 91051
Attorneys for Petitioner

APPENDIX

FILED
10/2/2023
Court of Appeals
Division I
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IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent, v. DAVID LATHEN NIEUWENHUIS, Appellant.	No. 84016-9-I DIVISION ONE UNPUBLISHED OPINION

FELDMAN, J. — A jury convicted David Nieuwenhuis of second-degree murder for the killing of Candice Black. Nieuwenhuis asserted at trial that Black attacked him while she was high on methamphetamine and heroin, she was "incredibly strong" and "overpowering," and he killed her in self-defense. The jury rejected that defense. Nieuwenhuis argues on appeal that he was denied the right to present a defense when the trial court excluded the testimony of his expert witness, Dr. Granville Storey, that the drugs in Black's system could lead to a "rush of adrenaline" or "extra strength." We disagree.

To determine whether Nieuwenhuis was denied the right to present a defense, we apply the two-part test from *State v. Jennings*, 199 Wn.2d 53, 502 P.3d 1255 (2022). The first part of this test requires us to determine whether the trial court abused its discretion when it excluded Dr. Storey's testimony. *Id.* at

57-58. Addressing this issue in *Jennings*, the court held that the trial court did not abuse its discretion by excluding under ER 403[1] a toxicology report showing the victim had methamphetamine in his system at the time of his death. *Id.* at 63. The court reasoned that because the defendant did not know how the methamphetamine was affecting the victim, and the defendant offered no witness to testify as to the potential effects of methamphetamine on the victim, "the toxicology report was speculative and might confuse the jury." *Id.* at 62-63.

In *State v. Lewis*, 141 Wn. App. 367, 166 P.3d 786 (2007), this court likewise held that the trial court did not abuse its discretion by excluding a medical examiner's testimony that methamphetamine can cause some users to experience "paranoia, irritability, or irrational behavior, and that some can become violent." *Id.* at 379 (internal quotation marks omitted). Similar to *Jennings*, the court reasoned that the medical examiner's testimony would not be helpful to the jury under ER 702[2] "[b]ecause of the wide range of effects of various quantities of methamphetamine on diverse individuals, and because [the medical examiner] had never observed [the victim] alive, with or without methamphetamine in his system, [the medical examiner] had no idea how the methamphetamine might have affected [the victim]." *Id.* at 389.

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[1] ER 403 states, "Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence."

[2] ER 702 states, "[I]f scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise."

Nieuwenhuis argues that "[t]he circumstances here are the exact opposite of *Jennings* — Nieuwenhuis had an expert testify as to the potential effects on [Black]." To distinguish both *Jennings* and *Lewis*, Nieuwenhuis emphasizes Dr. Storey's testimony that Black had several risk factors that "are associated with an increased risk for some sort of irrational or violent behavior." While Dr. Storey was able to identify these potential risk factors, he repeatedly conceded that he could not say whether Black acted more aggressively while on methamphetamine. Dr. Storey was asked, "Can you say whether or not Ms. Black acted violently because of methamphetamine consumption at the time of her death?" Dr. Storey answered: "There's no scientific evidence that would— to a direct cause. It could be correlatory but not a direct cause." Dr. Storey ultimately agreed with the prosecution that he could not "say what effects of methamphetamine, if any, Ms. Black was exhibiting at the time of her death."

Dr. Storey's written report also conceded these issues. There, Dr. Storey conceded that "[i]t is impossible to know exactly how this combination [of methamphetamine and heroin] was affecting Ms. Black." He stated that "[i]t would be important to know if her baseline behavior exhibited paranoid thoughts, ill-tempered mood swings, or more aggressive behavior when high," but he conceded that he never personally observed Black's baseline behavior off methamphetamine or Black's behavior on methamphetamine. On this record, the trial court did not abuse its discretion when it excluded Dr. Storey's testimony under ER 403 and ER 702 in accordance with both *Jennings* and *Lewis*.

Having concluded that the trial court did not abuse its discretion when it excluded Dr. Storey's testimony, we turn to the second part of the *Jennings* test, which requires us to apply the balancing test from *State v. Hudlow*, 99 Wn.2d 1, 659 P.2d 514 (1983). Under *Hudlow*, we "balance[] the defendant's right to produce relevant evidence versus the state's interest in limiting the prejudicial effects of that evidence." *Id.* at 16. Here, Dr. Storey's testimony has little if any probative value whereas the state has a substantial interest in limiting the prejudicial effects of Dr. Storey's testimony. Similar to *Jennings* and *Lewis*, if Dr. Storey was able to testify about the *general* effects of methamphetamine and heroin, the jury would have been left to speculate as to whether the methamphetamine and heroin in *Black's* system caused *Black* to be "incredibly strong" and "overpower[]" Nieuwenhuis as he claimed at trial.

Our recent opinion in *State v. Ritchie*, 24 Wn. App. 2d 618, 520 P.3d 1105 (2022), is also instructive here. We explained in *Ritchie* that the "pertinent concern" when evaluating a defendant's right to present a defense is "whether both parties receive a fair trial." *Id.* at 634 (citing *State v. Darden*, 145 Wn.2d 612, 622, 41 P.3d 1189 (2002)). We noted that this concern "is heightened when a new or antiquated rule appears to threaten the defendant's right to a fair trial." *Id.* But when the rule being applied is a "well-established, commonly utilized rule that has been applied time and again without any demonstrated detriment to the fairness of proceedings," the concern is not paramount. *Id.* We also held that "'[t]he ability of the defendant to achieve through other means the effect that the excluded examination allegedly would have produced is a factor indicating that

[the defendant's] right to'" present a defense is not violated. *Id.* at 635 (quoting *United States v. Drapeau*, 414 F.3d 869, 875 (8th Cir. 2005)).

Similar to *Ritchie*, the trial court in this case excluded Dr. Storey's testimony under ER 403 and 702. These are "well-established, commonly utilized rule[s] that ha[ve] been applied time and again without any demonstrated detriment to the fairness of proceedings." *Id.* at 634-35. Also, contrary to Nieuwenhuis' argument, he had other means to show that he was in a fight for his life and killed Black in self-defense. The jury heard lengthy recordings of Niewenhuis' detailed statements to the police shortly after Niewenhuis killed Black. In the recordings, Nieuwenhuis explained that when Black arrived at his home, he threatened to tell police that she was dealing drugs, and that Black "all of a sudden hit [Nieuwenhuis] with [her] iPad." And after she hit him with the iPad, Black hit Nieuwenhuis with her hands in the "[c]hest area" and "[t]owards [the] throat." Nieuwenhuis explained: "I was trying to get her off of me. She's just incredibly strong. She's not that big, I couldn't get her off me." And finally, he stated that "I was fighting for, I thought was my life."

Nieuwenhuis also presented evidence showing that Black's DNA was found on the handle of the murder weapon. Nieuwenhuis' attorney pointed to this evidence in closing argument to bolster Nieuwenhuis' defense that he was "in the fight for his life." Further, Nieuwenhuis presented as evidence a text message that he sent his mother immediately following the killing stating: "She attacked me. Hit me in the head with her iPad. I could not get her off me. I had to grab my stick from behind the door." Because Nieuwenhuis was able to

support his self-defense argument in all of these ways, "the evidence excluded was not highly probative evidence, the exclusion of which could give rise to a constitutional violation. Rather, the trial court's ruling was nothing more than a standard application of ER 403." *Ritchie*, 24 Wn. App. 2d at 638. We therefore hold, as we did in *Ritchie*, that "[t]he trial court's evidentiary ruling did not violate [Nieuwenhuis'] rights under ER 403, the Sixth Amendment, or article I, section 22." *Id.*[3]

We affirm.

Feldman, J.

WE CONCUR:

Birk, J.

Chung, J.

[3] Nieuwenhuis also argued in his opening brief that that the trial court erred in calculating his offender score, but he abandoned this argument his reply brief. We accept this concession and conclude that the trial court correctly calculated his offender score.

NIELSEN KOCH & GRANNIS P.L.L.C.

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