NO. 31385-9-III
Consolidated with No. 31398-1

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

STATE OF WASHINGTON,

Respondent,

v.

DANIEL DODD,

Appellant.

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

The Honorable Donald Schacht, Judge

BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. The trial court violated appellant's constitutional due process right to present a defense by prohibiting other suspect evidence.

2. The trial court commented on the evidence in violation of the Washington Constitution.

Issues Pertaining to Assignments of Error

1. Identity was the main issue at appellant's trial for first-degree murder. No eyewitnesses placed appellant at the shooting scene and no physical evidence tied appellant to the gun allegedly used. Appellant sought to introduce testimony that two other individuals were responsible for the complaining witnesses' death. The other suspect evidence was specific, consistent with other defense evidence, and critical to the defense case. Did the trial court violate appellant's constitutional due process right to present a defense by precluding him from presenting evidence that another person committed the murder?

2. In overruling a State objection during cross-examination, the trial judge noted that earlier police officer "testimony establish[ed]" a person who previously threatened the complaining witness "was in custody in another county at the time of this incident." The trial court therefore deemed defense counsel's line of questioning on cross-examination "irrelevant." Did the trial judge's opinion about the evidence

constitute an unconstitutional judicial comment requiring reversal on all counts?

B. STATEMENT OF THE CASE

1. Trial Testimony

Kevin Myrick was a confidential informant for the Walla Walla police department. RP 326, 358, 380, 397-98. Myrick participated in controlled drug buys so he could earn money and have his own pending robbery charge dismissed. RP 380-82, 397-99, 407. Over six months, Myrick participated in 18 controlled buys, involving 13 separate people, causing six criminal charges to be filed. RP 327, 403, 407.

Tina Taylor was one of the people charged as a result of Myrick's undercover buys. RP 328. Taylor was in a relationship with appellant Daniel Dodd. RP 329-30. After Taylor's arrest, police monitored telephone calls between her and Dodd. As Taylor's case progressed to trial, she became increasingly "frantic" in her phone conversations with Dodd. RP 329-30. Taylor's scheduled plea hearing on June 10, 2011 was continued when she decided to go to trial instead. RP 331.

On June 12, 2011, Myrick was shot outside his house. RP 101. Myrick's girlfriend, Kristina Devaney, asked him to look at her car when it failed to start. RP 157-58. Devaney got inside the car and closed the doors while Myrick looked under the hood. RP 158, 161. Shortly

thereafter, Devaney saw a person dressed in black jump from the passenger side of the car and saw Myrick fall to the ground. RP 158-60, 167-68. Devaney did not hear a gunshot. RP 166. She did not see a gun or see anyone shoot Myrick. RP 158, 167.

As Devaney got out of the car, she saw someone run and jump over a fence into the neighbor's yard. RP 158-59. She did not see the person's face. RP 160, 167. Devaney called 911 believing Myrick had been hit with a tool. RP 159, 167.

Manuel Ramirez was walking to meet his girlfriend at a park when he heard a loud "boom" noise. RP 187-88. About ten seconds later, Ramirez saw someone run out of a nearby alley and up the street. RP 188-89, 198-99. The person had long hair and was wearing a black sweater. RP 190. Ramirez did not see the person's skin color. RP 189. The person fidgeted with his hands as though he was trying to put something away. RP 191.

Ramirez then heard a woman scream and walked toward the sound. RP 159, 195. When he arrived he saw Devaney on the phone and Myrick walking toward him pointing to his mouth. Myrick was unable to talk. RP 195-96.

Police arrived at Myrick's house shortly thereafter. RP 201. Myrick was conscious and bleeding heavily from his face and head. He

could not talk. RP 202-04. Myrick continued to lose blood and died the following day. RP 319-20, 323.

An autopsy showed a single bullet passed through Myrick's mouth and severed an artery in his neck. RP 222-23. The bullet did not pass through Myrick's skull. RP 230. Bullet fragments were found in Myrick's stomach. RP 224, 229. A medical examiner estimated the bullet that killed Myrick was fired from "close range." RP 225-26.

Meanwhile, police began investigating the shooting. Officers found blood and a shoe print at Myrick's house and a can converted into a smoking device in the alley. RP 104, 111, 116, 131, 173-74. No fingerprints were found. RP 183. Dodd's DNA was not found anywhere at the shooting scene, including on the car, fence, or converted can. RP 489-91, 494. The shoe print did not match any of Dodd's shoes. RP 177, 677.

Later, police found a bullet about 15 feet from where the shooting happened. RP 123-24, 384-85, 408-09. Myrick's DNA was found on the bullet. Dodd's DNA was not. RP 104, 111, 116, 131.

Police arrested Dodd four days after the shooting on an outstanding warrant. RP 172-73, 331-33, 626. After the arrest, police searched Dodd's cell phone. RP 172-73, 637. The phone contained a missed call, processed by a cell tower face that was 4,090 feet from Myrick's house.

RP 285, 649, 664. The cell tower had a maximum range of about 18 miles, and a general coverage area of about two miles. RP 292, 301, 312. Police could not determine an exact location for Dodd's cell phone when the call was missed. RP 311, 679.

Dodd spoke with police and denied shooting Myrick. RP 334, 340-41. Dodd explained he had been at home resting after injuring his back the day before the shooting. Dodd explained he would have had possession of the cell phone although someone else may have used it to make a call on June 10th. RP 623-26.

About a month after his arrest, Dodd left a jail van while on work crew duty. RP 548-51. Dodd was found behind propane tanks about 100 yards from where he had left. RP 555. Shortly after the jail incident, Dodd asked to speak with police again. RP 627. During the second interview, Dodd requested a copy of the police report about the shooting. Dodd explained he wanted to read the report so he could confess to the murder so Taylor could get a reduced sentence on her pending criminal charge. RP 626-29.

Based on this evidence, the state charged Dodd with one count each of first-degree premeditated murder and unlawful possession of a firearm. CP 8-9, 44-46.

Several months after the incident, Donald Cummings told police where they could find a .357 magnum handgun in the Snake River. RP 341, 435. At trial, Cummings explained he had been given two .357's by Clayton Sibbett as payment for a car Cummings sold Sibbett. RP 431-33, 456. Sibbett initially denied to Cummings that the guns were "hot." RP 433. Several days later however, Sibbett advised Cummings to get rid of one of the .357's. RP 433, 457. Believing the gun was stolen, Cummings threw it into the Snake River. RP 433-34, 436-37, 457. The guns were not loaded when Cummings received them from Sibbett in late summer or early fall of 2011. RP 456.

Sibbett acknowledged giving Cummings a .357 as payment on June 14th. RP 585, 595. He denied giving Cummings more than one gun however. RP 592. Sibbett said Dodd had previously asked to borrow the .357 on June 11, 2011. RP 581, 594. Sibbett claimed Dodd told him "he wanted to take this guy out." RP 582. Sibbett also testified the gun was loaded with full metal jacket .357 ammunition when he gave it to Dodd. RP 593-94. Sibbett claimed to be in Pasco selling drugs the evening of the shooting. RP 595-96.

Dodd returned the gun on June 14th, explaining "it is a done deal." RP 583-84. After Dodd's statements, Sibbett told Cummings to get rid of the gun. RP 586-87. Sibbett testified he and Dodd watched Cummings

throw the gun into the river on June 14th. RP 587, 593. Dodd's DNA was not found on the recovered gun. RP 494-95.

Contrary to the testimony of Sibbett and Cumming, Taylor's brother, Michael Avery, did not believe the gun recovered from the river was the same gun displayed by Dodd the day before the shooting. RP 562, 569. Avery explained he and Dodd smoked methamphetamine together the day before the shooting. RP 564-65, 573. At one point, Dodd pulled a gun out of his backpack and asked Avery whether he thought it would make a loud noise in town. RP 565-66, 570. Dodd did not say what he was going to do with the gun. RP 566. Avery said the gun displayed by Dodd had different hand grips then the one recovered from the river. RP 569.

Forensic scientist Glenn Davis could neither identify nor eliminate the recovered bullet as having been fired from the recovered .357 caliber gun. RP 514, 519, 534. Davis opined the bullet was in the .38 caliber class and could have been fired from either .38 special or .357 magnum caliber handguns. He believed the bullet was too heavy to have been fired from a .380 automatic caliber handgun. RP 515-16, 527, 538.

Walla Walla police officers, Gary Bolster and Steve Potter, offered similar opinions that the recovered bullet could have been fired from either a .38 or .357 caliber handgun. RP 133, 412, 415. Bolster did not

believe the bullet could have been fired from a .380 automatic caliber handgun. RP 413.

In contrast, forensic scientist Gaylan Warren, opined the recovered bullet was the correct diameter to have been fired from either a .380 semiautomatic, .38, or .357 caliber handgun. RP 747, 769-70, 777. Warren's opinion was based on his review of crime lab and police reports, photographs, and police officer notes. Warren explained he did not conduct an independent examination of the gun, bullet, or bullet fragments because such an examination had already been completed and recorded. RP 760-61.

Taylor and Avery's mother, Rose Elmore, owned a .380 pistol she kept in a safe in her home. RP 598, 615. Several people lived at her house at the time of the shooting. RP 614. Dodd would occasionally stop by her house to visit. RP 602. Elmore testified Dodd seemed surprised when she told him of Myrick's death. RP 616.

Elmore's other son, Rick Avery, and his girlfriend, Jennifer Perkins left for Arizona the day of the shooting. RP 364, 370, 375, 575-76, 598. Perkins explained they left because police though Rick had shot Myrick and were about to arrest him. RP 375. Perkins had previously written a note explaining Rick would not be held responsible for Dodd's "shit." RP 370-71. Perkins wrote the note because she believed Dodd

was trying to set Rick up. RP 371. However, Perkins admitted she had "no idea" who shot Myrick. RP 374-76.

Dodd denied shooting Myrick. RP 729. Dodd also denied that Sibbett had lent him a gun, explaining he did not have a gun in his possession in the days before, during, or after the shooting. RP 716-17. Dodd did not know Myrick or where he lived before the incident. RP 720, 735. Dodd explained he did not even know Myrick was expected to testify at Taylor's trial. RP 721, 738.

Dodd explained Elmore gave him a cell phone after Taylor was arrested so he and Taylor could talk. RP 720, 723. Because Dodd had no cell reception at his house he had to drive 40 minutes each way to Walla Walla to speak with Taylor. RP 732-33. On the night of the shooting, Dodd was at his house recovering from a back injury. RP 724. Dodd kept the phone in his unlocked car. RP 724-26, 732.

After hearing the above, a Walla Walla County jury found Dodd guilty as charged. The jury also found Dodd was armed with a firearm during the murder. RP 850; CP 84-87. The trial court sentenced Dodd to standard range concurrent prison sentences of 361 months for the murder and 41 months for the unlawful possession. The court also imposed a consecutive 60-month firearm enhancement. RP 924-28; CP 158-67. Dodd timely appeals. CP 170-183.

2. Other Suspect Evidence

After his arrest, Dodd was housed next to Sheyne Thrall in jail. Thrall and Dodd were previously acquainted during high school. RP 693. After Thrall was released, he prepared a declaration indicating that the person who killed Myrick confessed to him and provided details. His declaration stated, "Daniel Dodd, the defendant, did not kill Kevin Myrick." CP 42-43.

During a September 2012 interview, Thrall said Clifford Fauver had confessed to him to shooting Myrick. Supp. CP ___ (State's Motion In Limine, dated 11/2/12, at 2-3); Supp. CP __ (Defendant's Motion for A New Trial and Statement of Counsel, dated 11/19/12, at 5-17). Thrall explained how a month after the shooting, he and Fauver walked by Myrick's house where the shooting occurred. Thrall said Fauver, who was high on drugs at the time, told him he shot Myrick at the request of Sibbett in order to clear a debt of $2,500 owed by Fauver to Sibbett. Supp. CP ___ (State's Motion In Limine, dated 11/2/12, at 2-3). Based on this information, Dodd included Thrall in his list of witnesses to be called to testify at trial. Supp. CP ___ (Defendant's Witness List, dated 11/1/12, at 1).

The State objected to Thrall's anticipated testimony. The State argued Thrall's testimony should be excluded for several reasons: it would

constitute hearsay, his disclosure was made after being housed next to Dodd, and Thrall's statement was made shortly before his own trial for a drug offense. The State also claimed Fauver did not match the physical description of the shooter given by Devaney and Ramirez and no evidence established a motive for Sibbett to contract Myrick's death. Supp. CP ___ (State's Motion In Limine, dated 11/2/12, at 1-8).

Defense counsel argued the State's motion should be denied. He noted the seriousness of the charges, circumstantial nature of the State's evidence, and Dodd's right to present a defense. Defense counsel also noted the .380 automatic weapon alleged to be the murder weapon by Thrall matched the bullet found at the scene. RP 86-88, 694-95.

After argument, the court granted the State's motion to prohibit Thrall's testimony. RP 88. The Court explained, "I don't think there has been foundation evidence presented other than Mr. Thrall's statement that somebody told him he committed the crime." RP 88. The Court found that "point[ing] the finger at somebody else" was not sufficient other suspect evidence. RP 89.

Following the State's case-in-chief, defense counsel asked the court to reconsider its prior ruling prohibiting Thrall's testimony. RP 690-92. Defense counsel noted that:

> Based on the testimony of Mr. Thrall, the killer can be definitely identified; that the weapon that was used matches the ballistics here and that can be definitely identified; and that the route of travel taken by the killer on the night of June 12, 2011, after shooting Mr. Myrick, can be described in detail, and that there were certain purposes described by the killer to Mr. Thrall as to why and how he did it.

RP 693.

Counsel further noted Thrall had seen no documents pertaining to the case and was promised nothing in exchange for his testimony. RP 694.

The State again objected, arguing the same points made previously. RP 695-98. The State also noted Thrall's anticipated testimony could not be corroborated by other witnesses. RP 696.

The Court denied the motion to allow Thrall's testimony stating, "it is my opinion that there has not been corroborative evidence established to connect Mr. Fauver or anyone else with this homicide." RP 698-700. The court acknowledging a letter received from Thrall describing his willingness to be a witness. RP 699; CP 47-48. However, the court believed Thrall's late disclosure and wavering on whether he was cooperating with police or defense counsel was suspect of his true intentions in testifying. RP 699. The court concluded a sufficient nexus had not been established between Thrall's anticipated testimony and Fauver's alleged involvement in the case. RP 698-700.

3. Judicial Comment

A few weeks before the shooting, Myrick's home was firebombed. RP 171, 357. Myrick feared for his safety because of his confidential informant status. RP 359. Charles Wilson was a suspect in the firebombing and had previously threatened to kill Myrick. RP 211-12, 358, 404. At trial, Detective Christina Ruchert testified that police "were able to call Benton County and confirm that he [Wilson] was in jail," in the days leading up Myrick's shooting. RP 212.

During cross-examination of Detective Chris Buttice, defense counsel questioned whether police knew Myrick was involved in controlled buys from Wilson's mother. RP 355. The State objected, arguing that because Wilson was known to be in jail, he could not have shot Myrick, and therefore his motive was irrelevant. RP 356. Defense counsel responded, "I don't think simply because Mr. Wilson himself was in jail and didn't pull the trigger that he could not have been responsible for the homicide." RP 357. Defense counsel noted that evidence Wilson intended to harm Myrick would be established through Avery. RP 356. The trial court sustained the prosecutor's objection stating:

> Well, I think in order to speculate that somebody else did it, as Mr. Acosta has argued ad explained in his memorandum, you have to have some additional tying in or other evidence that would connect that. And unless you have got that, I

> think the objection is well taken. I'll let you revisit this if you can tie that in at some point.

RP 357.

Several witnesses later, defense counsel established through cross-examination of Bolster that one of the people charged as a result of Myrick's undercover buys was Charlie Wilson's mother. As a result, Wilson threatened Myrick. RP 404. Defense counsel then asked Bolster how successful Myrick had been as a confidential informant. RP 405.

The State objected to the question as irrelevant. Defense counsel noted, the question "has to do with the exposure of Mr. Myrick to other individuals, who threatened him." RP 406. The trial judge overruled the objection, but then stated:

> But for instance, the question about Charles Wilson threatening Mr. Myrcik, there has been testimony establishing that Charles Wilson was in custody in another county at the time of this incident. So whether or not he – There wasn't an objection made, but whether or not he threatened him seems to me, unless you can tie that in to some other evidence is irrelevant.

RP 406.

Defense counsel did not object to the comments nor request that the jury be instructed to disregard them.

C. ARGUMENT

1. THE TRIAL COURT VIOLATED DODD'S RIGHT TO PRESENT A DEFENSE BY PROHIBITING OTHER SUSPECT EVIDENCE.

The Sixth[1] and Fourteenth[2] Amendments, as well as article 1, § 21[3] 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); State v. Burri, 87 Wn.2d 175, 181, 550 P.2d 507 (1976).

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[1] The Sixth Amendment provides:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed . . . and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

[2] The Fourteenth Amendment provides, in pertinent part, "[N]or shall any State deprive any person of life, liberty, or property, without due process of law."

[3] Article 1, § 21 provides, "The right of trial by jury shall remain inviolate[.]"

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).

As the Ninth Circuit has recognized, there is a broad due process right to present all evidence tending to implicate another suspect:

> Even if the defense theory [were] purely speculative . . . the evidence would be relevant. In the past, our decisions have been guided by the words of Professor Wigmore: "[I]f the evidence [that someone else committed the crime] is in truth calculated to cause the jury to doubt, the court should not attempt to decide for the jury that this doubt is purely speculative and fantastic but should afford the accused every opportunity to create that doubt."

Thomas v. Hubbard, 273 F.3d 1164, 1177-78 (9th Cir. 2001) (quoting United States v. Vallejo, 237 F.3d 1008, 1023 (9th Cir. 2001) (quoting 1A John Henry Wigmore, Evidence in Trials at Common Law § 139 (Tillers rev. ed. 1983)), overruled on other grounds, Payton v. Woodford, 299 F.3d 815, 829 n.11 (9th Cir. 2002).

The United States Supreme Court has held that a defendant is denied the right to present a defense if evidence is excluded under rules that are arbitrary or disproportionate to the purposes they are designed to serve. Holmes v. South Carolina, 547 U.S. 319, 324-25, 126 S. Ct. 1727, 164 L. Ed. 2d 503 (2006) (citing United States v. Scheffer, 523 U.S. 303, 308, 118 S. Ct. 1261, 140 L. Ed. 2d 413 (1998)). Specifically, the Holmes Court stated that when the defense proffers evidence that someone other than the defendant committed the offense, a trial court may only exclude that evidence if it is repetitive or poses an undue risk of prejudice or confusion. Holmes, 547 U.S. at 326-27 (citing Crane, 476 U.S. at 689-90.

The rule in Washington governing the admission of evidence that someone else committed the crime ("other suspect" evidence) was articulated more than 70 years ago. Such evidence is admissible when "there is a train of facts or circumstances as tend clearly to point to someone besides the accused as the guilty party." State v. Downs, 168 Wash. 664, 667, 13 P.2d 1 (1932).

Under Downs, neither a third party's opportunity to commit the crime nor motive, will, by itself, satisfy this standard because it would invite speculation about whether an outsider committed the offense. State v. Maupin, 128 Wn.2d 918, 927, 913 P.2d 808 (1996); Downs, 168 Wash. at 667-68. Instead, there must be specific evidence tending to connect such outsider with the crime. Downs, 168 Wash. at 667 (quoting 16 C.J. § 1085). When Washington courts have properly excluded evidence under Downs, they have done so based on the absence of a specific connection between the proffered evidence and the charged crime. See Maupin, 128 Wn.2d at 927 (discussing cases).

The evidence provided by Thrall went far beyond motive or opportunity. Rather, the trial court heard specific evidence linking Clifford Fauver and Clayton Sibbett to Myrick's murder. Thrall was prepared to testify Sibbett had asked Fauver to shoot Myrick in order to clear a debt of $2,500 owed by Fauver to Sibbett. Additionally, Thrall had specific information about the shooter's movements before the shooting and escape route after, as well as the type of pistol used to shoot Myrick.

Standing alone, Thrall's information satisfied the standard for other suspect evidence under Downs and Maupin. The case for admission grows even stronger when the evidence is considered in context with other trial evidence. Sibbett was already connected with Myrick's death as the

person who allegedly loaned the gun to Dodd. In contrast to Sibbett's testimony that all he did was loan Dodd a gun before the shooting, Thrall's information demonstrated Sibbett was directly involved in Myrick's death.

Moreover, Thrall said the murder weapon was a .380 automatic pistol. His claim is consistent with the testimony of Michael Avery and forensic scientist Gaylan Warren. Contrary to what Sibbett and Cumming said, Avery did not believe the .357 pistol discarded in the river was the same gun displayed by Dodd the day before the shooting. Similarly, Warren opined the bullet that killed Myrick could have been fired from either a .357 or .380 semiautomatic pistol. In combination with the other evidence, Thrall's anticipated testimony would have provided further evidence that Dodd was not the shooter. Therefore, due process required its admission.

In short, the information Thrall was ready to present went further than establishing motive or opportunity. It was specific, it included information only the killers would know, it was consistent with other defense evidence, and it was critical to the defense case. The trial court erred when it ruled the evidence inadmissible.

Dodd's murder conviction must be reversed because the state cannot show, as it must, that the violations of his constitutional rights were harmless beyond a reasonable doubt. State v. Guloy, 104 Wn.2d 412, 425,

705 P.2d 1182 (1985), cert. denied, 475 U.S. 1020 (1986) (constitutional error is presumed prejudicial and State bears burden to show otherwise).

The main issue at trial was the shooter's identity. The State's case was circumstantial and correspondingly weak in this respect. There was no physical evidence linking Dodd to the shooting. No witness identified Dodd as the person at the house during the shooting. The cell phone evidence could not pinpoint Dodd's exact location in comparison with Myrick's house. Further, the testimony of Sibbett, Cummings, and Avery was inconsistent regarding the type of gun involved, whether it held ammunition, and who was present when the gun was thrown into the river. Finally, the jury was aware both Sibbett[4] and Cummings received immunity from, or a reduction in, pending criminal charges in exchange for their trial testimony. RP 455, 460-61, 588-90, 592.

The State's motive theory was also weak. The State theorized Dodd shot Myrick to prevent him from testifying about buying drugs from Taylor at her upcoming trial. But police acknowledged Myrick was not a crucial witness because an audio recording of the drug transaction also existed. RP 355, 362. Taylor was aware of the recording. RP 725, 737.

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[4] In addition to having his wife's pending criminal charges reduced, Sibbett received immunity in this case in exchange for his testimony. RP 588-90, 592.

Indeed, although Myrick's death prevented his trial testimony, Taylor later pleaded guilty to the drug charges anyway. RP 351-54, 361, 382-83.

Where, as here, evidence of alleged guilt was largely circumstantial, Dodd was prejudiced by not being permitted to introduce evidence of the same character that identified Sibbett and Fauver as the perpetrators. State v. Clark,[5] is instructive in this regard.

Clark was accused of burning down his office to collect the insurance proceeds. Clark, 78 Wn. App. at 473. Clark was present in the office the night of the fire, and needed money to get out of debt. Clark, 78 Wn. App. at 475-76. At trial, Clark sought to present evidence his girlfriend's estranged husband, Arrington, could have committed the arson. Clark, 78 Wn. App. at 473. Arrington believed Clark had molested his daughter and was having an affair with his wife. In addition, some circumstantial evidence pointed to Arrington. Arrington had a note with phone numbers for both Clark and the fire marshal, and had represented himself as Clark to shut off Clark's office phone one day before the fire. Arrington's whereabouts at the time the fire started could not be established, and he had previously remarked it was "too bad" Clark was in jail for something he did not do. Clark, 78 Wn. App. at 474-76.

[5] 78 Wn. App. 471, 898 P.2d 854, rev. denied, 128 Wn.2d 1004 (1995).

The trial court excluded the Arrington evidence, believing it was precluded by Rehak and State v. Mak,[6] which concluded a defendant could not attempt to rebut the State's case with insufficient evidence that someone else committed the crime. Clark, 78 Wn. App. at 474, 477. The Court of Appeals in Clark disagreed. The Court distinguished Rehak, Mak, and Downs, noting that in those cases, evidence of the defendant's guilt was strong, whereas the evidence of another person's involvement was weak. Clark, 78 Wn. App. at 478. "By contrast, if the prosecution's case against the defendant is largely circumstantial, then the defendant may neutralize or overcome such evidence by presenting sufficient evidence of the same character tending to identify some other person as the perpetrator of the crime." Clark, 78 Wn. App. at 479. The Clark Court explained its ruling as follows:

> In Leonard,[7] a murder defendant laid proper foundation supporting his defense that someone else committed the crime. He showed that another person with a motive to kill the victim 'resided in the vicinity of the homicide' on the day in question, and had previously threatened the kill the victim. The prosecution's case against the defendant was circumstantial. The Supreme Court held that when faced with such evidence, the defendant may respond with similar circumstantial evidence that another person committed the crime.

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[6] 105 Wn.2d 692, 718 P.2d 407, cert. denied, 508 U.S. 995 (1986).

[7] Leonard v. Territory of Washington, 2 Wash. Terr. 381, 7 P. 872 (1885).

Clark, 78 Wn. App. at 479.

Like in Clark, the evidence against Dodd was circumstantial. Dodd was therefore entitled to present circumstantial evidence identifying Sibbett and Fauver as other suspects. Thrall's testimony identifying Sibbett and Fauver as those who planned and shot Myrick could have convinced one or more jurors that the prosecution had not proved its case beyond a reasonable doubt. On appeal, the state cannot show that precluding compelling evidence someone else committed the crimes was harmless beyond a reasonable doubt. For these reasons this Court should reverse the murder conviction.

2. THE TRIAL COURT'S COMMENT ON THE EVIDENCE VIOLATED ARTICLE 4, § 16 OF THE WASHINGTON CONSTITUTION AND DENIED DODD A FAIR TRIAL.

Article 4, § 16 of the Washington Constitution provides, "Judges shall not charge juries with respect to matters of fact, nor comment thereon, but shall declare the law." The purpose of this constitutional prohibition "is to prevent the jury from being influenced by knowledge conveyed to it by the court as to the court's opinion of the evidence submitted." State v. Lampshire, 74 Wn.2d 888, 892, 447 P.2d 727 (1968).

The prohibition is strictly applied. Seattle v. Arensmeyer, 6 Wn. App. 116, 120, 491 P.2d 1305 (1971). The court's opinion need not be

express to violate the prohibition; it can simply be implied. State v. Levy, 156 Wn.2d 709, 721, 132 P.3d 1076 (2006). "An impermissible comment is one which conveys to the jury a judge's personal attitudes toward the merits of the case or allows the jury to infer from what the judge said or did not say that the judge personally believed the testimony in question." State v. Swan, 114 Wn.2d 613, 657, 790 P.2d 610 (1990). "The touchstone of error in a trial court's comment on the evidence is whether the feeling of the trial court as to the truth value of the testimony of a witness has been communicated to the jury." State v. Lane, 125 Wn.2d 825, 838, 889 P.2d 929 (1995).

Judicial comments are manifest constitutional errors that may be raised for the first time on appeal. Levy, 156 Wn.2d at 719-20. The failure to object or move for mistrial at the trial level does not bar appellate review. Id.; State v. Becker, 132 Wn.2d 54, 64, 935 P.2d 1321 (1997); Lampshire, 74 Wn.2d at 893.

Here, the trial court's comment about the "testimony establishing," Wilson's location at the time of the murder unfairly undermined the defense theory and unfairly bolstered the credibility of police officers Bolster and Ruchert. The statements not only informed jurors that the judge believed the officer's testimony, but also that the judge did not believe Wilson was involved in Myrick's death. The Court further

undermined the credibility of defense counsel's theory that someone else was responsible for Myrick's death by labeling his line of questioning "irrelevant."

The court's comment in this case is similar to comments constituting improper judicial comments on the evidence in several other cases. In Lampshire, following an objection by the prosecutor to the materiality of the defendant's testimony, the judge stated, "Counsel's objection is well taken. We have been from bowel obstruction to sister Betsy, and I don't see the materiality, counsel." Lampshire, 74 Wn.2d at 891.

Though recognizing the remark was "inadvertent," the Court nonetheless concluded the judge's comment "implicitly conveyed to the jury his personal opinion concerning the worth of the defendant's testimony." Lampshire, 74 Wn.2d at 892. Because the comment undermined the credibility of the defendant's testimony, the Court concluded it was prejudicial. Id.

Similarly, in State v. James, 63 Wn.2d 71, 385 P.2d 558 (1963), the Court found the defendant was deprived of a fair trial when the trial court commented on the credibility of a witness. Two defendants, William James and Richard Topper, were charged with three separate crimes and tried together. During the course of the trial, Topper pled

guilty and became the State's key witness. The trial court informed the jury that Topper was being discharged from the trial to be a witness for the State "providing that he testify fully as to all material matters within his knowledge[.]" James, 63 Wn.2d at 74. The Court found the inferential statement by the trial court was significant to the jury:

> The die was cast when Topper left the courtroom; his counsel took no further part in the trial, and the court, in its final instructions, reiterated that Topper had been discharged. The jury could draw only one conclusion; the court was satisfied that Topper had testified fully as to all material matters within his knowledge. We conclude...that the court's remarks constituted a comment upon the evidence and an approval of the credibility of the witness[.]

James, 63 Wn.2d at 76.

In State v. Bogner,[8] defense counsel objected during the state's examination of a police officer regarding the details of the robbery Bogner was alleged to have committed. 62 Wn.2d at 249. The following colloquy between the court and defense counsel occurred after the objection:

> Court: Are you denying that there was a robbery at the housing project at that time on that date?
>
> Counsel: I don't know, you Honor. I think that is what we are here to determine.
>
> Court: We are here to determine, as I understand it, who did it, if anyone.
>
> Counsel: Of course, we have a twofold purpose. We are trying to determine whether or not there was a robbery and the second point is, who committed the robbery.

[8] 62 Wn.2d 247, 382 P.2d 254 (1963).

> Court: Don't you think we are getting a little ridiculous, or aren't we?

Bogner, 62 Wn.2d at 249.

The Court found "the remarks of the trial court clearly violated the constitutional mandate." Bogner, 62 Wn.2d at 252. The Court concluded the trial judge's comments could only have had the effect of indicating to the jury that the judge believed it could not be denied a robbery had occurred, and that this essential element of the prosecution's case had been so well established that to suggest otherwise was 'getting a little ridiculous.' Bogner, 62 Wn.2d at 250.

Finally, in State v. Vaughn, 167 Wash. 420, 9 P.2d 355 (1932), the court held the defendant was deprived of a fair trial because the trial court commented on the credibility of a witness. William Vaughn and George Miller were each charged with grand larceny and tried jointly. During trial, Miller testified against Vaughn and received a suspended sentence. Vaughn suspected a secret agreement was made between the prosecuting attorney and Miller. Vaughn's counsel called the prosecuting attorney as a witness to prove the alleged secret agreement. The prosecutor, after he was examined by the Vaughn's counsel, stated:

> Prosecutor: "I will ask myself a question on cross examination."
> Court: "You needn't ask the question, [prosecutor] Foley."

> Vaughn's Counsel: "Just wait a minute. Ask yourself the question first."
>
> Prosecutor: "His Honor said I didn't need to."
>
> Vaughn's Counsel: "Well, he has got to ask his question if he wants to answer it. I want to know what he is going to state."
>
> Court: "It seems to be a senseless procedure, Mitchell [Vaughn's counsel], to ask yourself a question. I dare say [the prosecutor] wouldn't answer anything that he shouldn't"

Vaughn, 167 Wash. at 424.

The Court noted the trial judge had, in effect, vouched for the veracity and rectitude of the prosecutor. The Court concluded the judge's statement "was clearly a comment upon the weight of the testimony and the credibility of the witness," and hence a violation of the right to a fair trial. Vaughn, 167 Wash. at 426.

Here, as in Lampshire, Bogner, James, and Vaughn, the judge improperly commented on the evidence when he conveyed to the jury his personal opinion concerning what the evidence showed and the credibility of the officer's testimony about that evidence. The jury could draw but one conclusion from the trial court's comments: the court believed the testimony of the officers regarding Wilson's whereabouts the night of the shooting and that evidence was so well established that it was "irrelevant" to try and challenge the point further.

A comment in violation of article 4, § 16 is presumed prejudicial and the State bears the burden to show no prejudice resulted. Levy, 156 Wn.2d at 723-25. That jurors were instructed to disregard such comments is not determinative. Lampshire, 74 Wn.2d at 892 (instruction requiring jury to disregard comments of court and counsel incapable of curing prejudice). In deciding whether a comment on the evidence is harmless, courts look to whether it was directed at an important and disputed issue at trial. See Becker, 132 Wn.2d at 65 (comment addressed important and disputed issue; reversed); Levy, 156 Wn.2d at 726 (error harmless because subject of comment was not challenged).

Here, the jury was likely influenced by the trial court's comments regarding the trustworthiness and veracity of the evidence concerning Wilson. Identity was the main issue at Dodd's trial. No eyewitnesses placed Dodd at the shooting scene and no physical evidence tied him to the gun allegedly used. Thus, any evidence tending to show someone other than Dodd could have been the shooter was of critical importance. The trial court's comment unfairly undermined this defense theory while simultaneously bolstering the credibility of the police witnesses. The improper comment denied Dodd the right to a fair trial.

D. CONCLUSION

For the reasons discussed above, this Court should reverse Dodd's convictions and remand for a new trial.

DATED this 29th day of August, 2013.

Respectfully submitted,

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State v. Daniel Dodd

No. 31385-9-III

Certificate of Service by email

I Patrick Mayovsky, declare under penalty of perjury under the laws of the state of Washington that the following is true and correct:

That on the 30th day of August, 2013, I caused a true and correct copy of the **Brief of Appellant** to be served on the party / parties designated below by email per agreement of the parties pursuant to GR30(b)(4) and/or by depositing said document in the United States mail.

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X Patrick Mayovsky