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 STATE OF WASHINGTON
 COURT OF APPEALS

STATEMENT OF ADDITIONAL
 GROUNDS FOR REVIEW

STATE OF WASHINGTON)

Respondent,)

v.)

Erick Walker
 (your name))

Appellant)

No. 73440-7-1

STATEMENT OF ADDITIONAL
 GROUNDS FOR REVIEW

I, Erick Walker, have received and reviewed the opening brief prepared by my attorney. Summarized below are the additional grounds for review that are not addressed in that brief. I understand the Court will review this Statement of Additional Grounds for Review when my appeal is considered on the merits.

Additional Ground 1

The Court erred when it refused to allow Appellant to cross-examine the State's witness Michael Cavanaugh regarding exculpatory statements he made to police investigators. The Court's discretion relied upon a misapplication of current state law.

Additional Ground 2

The State erred when it suppressed Brady material relevant to Appellant's defense. The evidence was destroyed during the investigation and both the defense and police investigators wished to view the material.

If there are additional grounds, a brief summary is attached to this statement.

Date: 1/6/16

Signature: Erick Walker

Additional Ground 3

Defendant's Sixth Amendment Constitutional rights were not protected after he invoked a request for counsel. Suppression of his custodial statements is the required cure.

Additional Ground 4

In regards to my attorney's opening brief Assignment of Error No. 1 [The Court erred when it refused to allow the defense to cross-examine the State's criminalist regarding errors he had previously committed in the crime lab], I wish to supplement argument with additional case law.

Additional Ground 5

In regards to my attorney's opening brief Assignment of Error No. 2 [The Court erred when it permitted the State to introduce the testimony of Detective Wells regarding his opinion on the position of the person who shot M.C., and the admission of images of a re-enactment created on August 14, 2013], I wish to supplement argument with additional case law.

Additional Ground 6

In regards to my attorney's opening brief Assignment of Error No. 5 [The Court erred when it denied Appellant's motions to suppress the evidence obtained by the State during the execution of various search warrants], I wish to supplement argument with additional case law.

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Additional Grounds

1. In a pretrial Motion in Limine, the State moved to exclude evidence that someone else committed the crime (Pretrial hearing November 21 and 25, 2014; page 34) under the authority of ER 402, 403, State vs. Franklin, and State vs. Downs. Judge Wynne eventually granted the motion applying State vs. Downs and State vs. Kwan (ibid. page 77).

Defense contends that this is a misapplication of state law, and that Mr. Cavanaugh's testimony is relevant to the case. A defendant has a right to meet and neutralize evidence of the prosecution by evidence of the same nature; Leonard v. Territory, 2 Wash. Terr. 381, at 396, 7 P. 872 (1885 Washington Territory). In Jones v. Wood (CA 9 (Wash.) 2000) 207 F.3d 557 at 563 the court held: "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." See also State v. Clark, 78 Wn. App. 471, at 479, 898 P.2d 854.

Mr. Cavanaugh was harassed previously before the incident on the morning of June 2, 2013. The individuals arrived unannounced, and brandished a weapon in an attempt to collect a debt from one of Cavanaugh's prior roommates (Pretrial hearing November 21 and 25, 2014; pages 35-37; also GP 76). The individuals involved show a motive, opportunity, and ability to commit the crime. He included the prior incident in his statement to police June 2, 2013.

Because the Defendant was prevented from presenting this evidence, he was prevented any alternative to present a complete defense. Due process includes a right to, "[A] meaningful opportunity to present a complete defense." Crane v. Kentucky, 476 U.S. 683, 690, 106 S.Ct. 2142 (1984).

An accused does not have an "unfettered right" to present any evidence he wishes, however, depending on the facts and circumstances of the case at times a state's rules of evidence cannot be mechanistically applied and must yield in favor of due process and the right to a fair trial, Chambers v. Mississippi, 410 U.S. at 302, 93 S.Ct. 1038.

2. For weeks before trial, defense attorney Mark Mestel had been requesting the State to produce a sketch by Detective Thomas when he interviewed Ms. Herring (RP 1006). Ms. Herring's description of the car she saw is highly contested and crucial to the homicide case (RP 998-999, 1037-1039, 1048). The prosecution and Detective Thomas' superiors both wished to see the sketch (RP 1009, 1763). Det. Thomas testified to destroying the sketch (RP 1353).

A Brady violation occurs when the government fails to disclose evidence materially favorable to the accused, (Brady v. Maryland) and the Supreme Court has held that Brady duty extends to impeachment evidence as well as exculpatory evidence, United States v. Bagley, 473 U.S. 667, at 676, 105 S.Ct. 3375, 87 L.Ed. 2d. 481 (1985). Brady suppression occurs when the government fails to turn over evidence that is, "known only to police investigators and not to the prosecutor." Younablood v. W. Virginia, 547 U.S.

867, 165 L. Ed. 2d. 269, at 272-273, 126 S.Ct. 2188 (2006); quoting Kyles v. Whitley, 514 U.S. 430, 438, 115 S.Ct. 1555, 131 L.Ed. 2d. 490.

This sketch could have been used to impeach or support the testimonies of Ms. Herring and Detective Thomas, and it also could have proved to be inculpatory or exculpatory identification evidence. Such evidence is material if there is a reasonable probability that had the evidence been disclosed the result of the trial would be different (Kyles at 434), and a showing of materiality is not demonstrated by preponderance in an acquittal. The reversal of a conviction is required upon, "A showing that the favorable evidence could reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict." Kyles at 435. Evidence that is withheld from a criminal defendant that is material to his guilt or punishment violates his right to due process in violation of the Fourteenth Amendment. (Brady, 373 U.S. at 37).

3. On November 14, 2013, a CrR 3.5 presided over by Judge Fair concluded that after hearing his Miranda rights, Mr. Walker asked detectives, "Is there an attorney present/here?" (3SRP 30, 50). Defense contends that at this point questioning should have ceased as this was an unequivocal request for counsel.

A request for counsel need not be stated as a model of eloquence and clarity in order to qualify as an unequivocal invocation of the right to counsel, Alvarez v. Gomez, 185 F.3d 995 (CA 9 1999) at 997-998. Cases when the accused made a statement similar to Walker's invocation include:

People v. Duran, 140 Cal. App. 3d 485, 189 Cal. Rptr. 595, where the court after reviewing the statement, "Have you got an attorney right here...?" held that ambiguous statements are to be construed as invocations; and Harris v. State (1981, Fla. App. 4) 346 So. 2d. 1180, where the Court determined that the accused's constitutional rights were not protected after he made the statement, "Uh, is I want an attorney. Could I have one now?" See also People v. Lewis (1973), 47 Mich. App. 450, 209 NW 2d. 450, where the Court held that, "[i]t's] readily apparent that the accused, by inquiring as to whether it was possible to obtain an attorney at that early hour, sufficiently indicated a desire to consult an attorney before speaking," and, "[f]hat under the circumstances the accused's statement to 'forget it' did not constitute a voluntary, knowing, and intelligent waiver of the right to counsel." The statement is involuntary.

Whether a defendant's invocation of his right to counsel is equivocal is a question of law to be decided de novo on appeal. (State v. Arnault, 97 Wn. App. 302, 307, 994 P.2d. 248.) Even if Walker's invocation of his rights is considered equivocal, police interrogation should be limited to clarifying an ambiguous or equivocal statement, U.S. v. Rodriguez, 518 F.3d 1072, at 1076-1079. In her findings of fact, Judge Fair concluded that, "The detectives did not clarify whether Mr. Walker wanted an attorney." (35RP 67)

Mr. Walker's right to be represented were violated, and the Motion to Suppress his custodial statements should have been granted.

4. In support of my attorney's opening brief Assignment of Error No. 1 (opening brief pages 9-13), I offer the argument that impeachment evidence can show a witness' motive to lie or fabricate testimony under similar circumstances; Redmond v. Kingston, 240 F.3d 590 (CA 7 2001) at pages 591-592; Helly v. Tarborough, 568 F.3d 1091 (CA 9 2009) at p. 1098. A similar circumstance occurs in Lindh v. Murphy, 124 F.3d 899, at 901, 902 (CA 7 1997), where an expert witness was presented as integral by the prosecution, and the defense was prevented from cross-examining with non-relevant impeachment evidence concerning the expert's abuse of patients and pending loss of his license to practice medicine. The District Court in Lindh held that the denial of cross-examination was not a harmless error.

By denying cross-examination the defendant was denied the right to confrontation under the Sixth Amendment.

5. In support of my attorney's opening brief Assignment of Error No. 2 (opening brief pages 14-25) I offer the argument that Detective Wells' opinion testimony is not based on any fact nor personal knowledge of the incident. Detective Wells' facts only determine the direction of the bullet based on the victim's wound (1733-1735). In Motion of Limine (RP 8-12) Defense Counsel Mark Mestel argued that witnesses did not describe Walker's car as the suspect vehicle, witnesses did not describe a gun, and witnesses could not describe what direction or position M.C. was in at the time she was shot.

Detective Wells testified to at least 472 black cars in Lake Stevens (RP 970). There is testimony of a second individual in the suspect vehicle (RP 1761). There is also testimony that suggests that the firearm used in the M.C. shooting was of a type not in Mr. Walker's possession (RP 1710). Detective Wells' opinion testimony and re-enactment do not reflect these facts.

Every opinion must be based on knowledge. Proper lay opinion is based on personal knowledge, and proper expert opinion is based on scientific, technical, or specialized knowledge. State v. Dolan, 118 Wn. App. 323, 329, 73 P.3d 1011.

By using Walker's vehicle and firearm to illustrate his testimony, Detective Wells infers to the defendant's guilt. A witness may not give, directly or by inference, an opinion on a defendant's guilt. To do so is to violate the defendant's constitutional right to a jury trial, and invades the fact-finding province of the jury. Dolan at 329. "Particularly where such an opinion is expressed by a government official, such as a sheriff or police officer, the opinion may influence the fact finder and thereby deny the defendant of a fair and impartial trial." Ibid.

This error is not harmless beyond a reasonable doubt and cannot be cured by the Court's limiting instruction (RP 1742).

6. In support of my attorney's opening brief Assignment of error No. 5 (opening brief pages 33-48) I offer the argument that in the affidavits to support probable cause, the conclusory statement that Walker's cell phone

would contain data of his location during times relevant to the crimes has no factual support, for such data could also establish he did not commit the crimes; State v. Nordlund, 113 Wn. App. 171, 183, 53 P.3d 520. The search of Walker's phone and phone records are not justified.

Table of Authorities

Washington Cases

Leonard v. Territory, 2 Wash. Terr. 381, 396, 7 P. 872

State v. Aronhalt, 99 Wn. App. 302, 307, 994 P.2d 248

State v. Clark, 78 Wn. App. 471, 479, 898 P.2d 854

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Federal Cases

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