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NO. 100142-8

IN THE SUPREME COURT OF THE
STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

MEHMET WHICKER,

Petitioner.

RESPONDENT'S CROSS-PETITION FOR REVIEW

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A. IDENTITY OF RESPONDENT

The State of Washington is the Respondent in this case.

B. COURT OF APPEALS DECISION

The Court of Appeals decision at issue is State v.

Whicker, No. 80869-9-I (Unpublished).

C. ISSUE PRESENTED FOR REVIEW

If this Court grants Whicker's petition, it should also accept review of the following issue decided adversely to the State:

Is a victim's precise BAC measurement irrelevant to a slayer's self-defense claim when the two were strangers and there was no evidence regarding how the victim reacted to alcohol?

D. STATEMENT OF THE CASE

1. FACTS OF THE OFFENSE.

Daniel Grise frequented the Tukwila Transit Center for his daily commute. RP 164 (10/21/2019). On the evening of October 2, 2016, Grise was waiting for his bus home when he

heard a “loud disagreement” between Whicker and Goncalves. RP 164-65, 169 (10/21/2019). Grise saw Goncalves trying to walk away from Whicker, but Whicker was following him and “trying to get his attention...forceful[ly]...” RP 170 (10/21/2019). Grise lost sight of both men for a short time, but then saw Goncalves “clutching his side” as Whicker walked away. RP 172-73 (10/21/2019).

A security guard found Goncalves bleeding profusely through his shirt. RP 135 (10/21/2019). Goncalves “sat down for a moment and then collapsed onto the ground.” RP 176-77 (10/21/2019). The security guard began rendering first aid and called 911. RP 135-37 (10/21/2019). Goncalves began losing consciousness before paramedics arrived and was unable to make any statements of significance. RP 136, 156-57 (10/21/2019). Goncalves was taken to the hospital where he later died of his injuries. RP 138 (10/21/2019); RP 372 (10/22/2019). No weapons were found on or near Goncalves. RP 150-51, 178, 259 (10/21/2019); RP 331 (10/22/2019).

An autopsy found that Goncalves had suffered multiple stab wounds to his chest, abdomen, back, and elbow. RP 375-82 (10/22/2019). One injury had penetrated Goncalves' heart and lungs, causing death within minutes from massive hemorrhaging. RP 378-79 (10/22/2019).

Responding officers found Whicker a few blocks from the scene. RP 216 (10/21/2019); RP 349 (10/22/2019). There was blood on Whicker's hands, which he claimed resulted from an earlier accidental fall. RP 218, 221-23, 241 (10/21/2019). Grise identified Whicker as the man he saw confronting Goncalves. RP 180, 197-98 (10/21/2019). Investigators were unable to locate Whicker's knife despite repeated search attempts. RP 224-26 (10/21/2019); RP 331 (10/22/2019).

Detectives quickly gathered surveillance video from the transit center. RP 299 (10/22/2019). Whicker and Goncalves can be seen getting into a confrontation, but the camera is too far away to tell who the initial aggressor was. Ex. 59 (Cam 10 at 8:31:40). After a brief scuffle, however, Goncalves can be

seen walking away from Whicker, who follows him. Ex. 59 (Cam 10 at 8:32:10).

Goncalves charged at Whicker when he saw he was being followed but stopped short of making physical contact. Ex. 59 (Cam 10 at 8:32:25). When Whicker briefly retreated, Goncalves again turned and walked away. Ex. 59 (Cam 10 at 8:32:36). Whicker continued to follow Goncalves, who then turned and exchanged words with Whicker. Id. Goncalves again disengaged after a brief conversation, but Whicker continued following him. Ex. 59 (Cam 10 at 8:33:50).

Whicker stabbed Goncalves when Goncalves turned back towards him. Ex. 59 (Cam 10 at 8:34:10). After being stabbed by Whicker, Goncalves again walked away. Id. Another camera then showed Whicker chasing and stabbing Goncalves as he fled. Ex. 59 (Cam 8 at 8:34:30). Goncalves was eventually able to grab Whicker and throw him to the ground, after which he continued running away. Ex. 59 (Cam 5 at 8:34:35). Whicker

briefly ran after Goncalves before jogging off in the opposite direction. Id.

Whicker agreed to speak with detectives after his arrest. Whicker initially repeated his claim that he was bloodied from an earlier fall. Ex. 62 at 3-4. When asked what happened at the transit center, Whicker suggested detectives might “hack out what happened” if they found surveillance footage. Ex. 62 at 22. Whicker then explained that he had been attacked by an unknown individual. Ex. 62 at 24. Although the man had walked away, Whicker followed him “to figure out why [he] hit me.” Ex. 62 at 28-29. After a brief nonsensical exchange, Whicker claimed the man simply “went somewhere...he left. I left. Next thing I’m here with you.” Ex. 62 at 31.

Whicker then admitted he had lied about falling and that the blood on his hands was from the attack. Ex. 62 at 32. Still, Whicker denied having a weapon and insisted that he never struck Goncalves. Ex. 62 at 33, 36. The detective then told Whicker the surveillance video showed him lunging at

Goncalves with a knife. Ex. 62 at 45. Whicker quickly became flustered and told the detective “I know I’m goin’ to jail. I know I’m fucked now man. But all I ask is that you take it easy man. When... you go to court, just...take it easy man.” Ex. 62 at 47.

When he testified at trial, Whicker acknowledged that Goncalves turned and walked away when he brandished his knife. RP 471 (10/23/2019). Whicker stated he followed Goncalves to ask why he hit him and because “[i]f [Goncalves] leaves, he can come back.” RP 473, 491-92 (10/23/2019). Although Whicker had a cell phone, he said he did not call 911 because he did not think he could adequately describe Goncalves. RP 492-93 (10/23/2019). Whicker said he did not shout for help because he thought doing so might cause Goncalves to run away. RP 493 (10/23/2019).

Whicker claimed he was trying to keep Goncalves in the area so that they might be found by security guards when Goncalves suddenly hit him again. RP 474 (10/23/2019).

Whicker stabbed Goncalves in response. RP 474-76 (10/23/2019). Whicker said he was convinced that Goncalves was part of a “plot” against him and had “probably [been] watching me for a little while.” RP 475-76 (10/23/2019). Whicker “felt like I can’t let him out of my sight” because Goncalves could then return to assault him later. RP 476 (10/23/2019).

Whicker testified that he continued following Goncalves and admitted stabbing him again when Goncalves allegedly “came forward to hit me...” RP 477 (10/23/2019). Whicker believed that Goncalves “was always, always, always going to be a threat...[s]o I swung the knife some more.” RP 477-78 (10/23/2019). Goncalves backed away, but Whicker decided that “instead of giving him the opportunity [to attack again], I struck first.” RP 478-79 (10/23/2019). Whicker was convinced that “retaliation is going to be absolute...so...no, I’m not going to let [Goncalves] go back to where [he] came from.” RP 500 (10/23/2019).

Whicker left the transit center after stabbing Goncalves several times. RP 480 (10/23/2019). He claimed he lost his knife while walking away. RP 480-81 (10/23/2019).

2. FACTS REGARDING GONCALVES' ALCOHOL USE.

An autopsy showed that Goncalves' BAC was .24 at the time of his death. Defense counsel moved *in limine* to admit Goncalves' BAC. RP 50, 61 (10/3/2019). He claimed it corroborated Whicker's anticipated testimony that Goncalves appeared drunk, and argued the jury could infer that an intoxicated person was more likely to fight than someone who was sober. RP 63 (10/3/2019).

The prosecutor argued that Goncalves' precise BAC was irrelevant:

There's no expert proffered to talk about how somebody might behave with a blood alcohol of this amount; there's no evidence about any sort of...tolerance or that...this might make somebody violent, this might make somebody passive, this might make somebody unsteady. There's no evidence about that. It's just a number without any significance.

RP 62 (10/3/2019).

The court agreed with the State and excluded Goncalves' exact BAC measurement as irrelevant:

We don't know if he was a conditioned drinker; we don't know if he became violent or threatening when drunk...I don't doubt that the results are accurate, but we don't have anything other than he consumed this amount of alcohol at some point...

I think...Mr. Whicker could testify as to his impression of Mr. Goncalves and whether or not...he appeared drunk...but we don't have that other information about Mr. Goncalves and how alcohol affected him...the .24 reading is meaningless in this context without any other information.

RP 66-67 (10/3/2019).

However, the court admitted Whicker's personal observation that Goncalves seemed intoxicated, and Whicker later testified that Goncalves smelled of alcohol and appeared to be drunk. RP 67 (10/3/2019); RP 474, 479 (10/23/2019). The court also allowed Whicker to corroborate this testimony by presenting forensic evidence showing that Goncalves had consumed alcohol. RP 68-69 (10/3/2019). Whicker ultimately

called a toxicologist at trial who testified to the presence of alcohol in Goncalves' blood. RP 555 (10/23/2019).

E. ARGUMENT

RAP 13.4(b) permits review by this Court only: “(1) If the decision...is in conflict with a decision of the Supreme Court; or (2) If the decision...is in conflict with a published decision of the Court of Appeals; or (3) If a significant question of law under the Constitution...is involved; or (4) If the petition involves an issue of substantial public interest.”

The issues raised in Whicker's petition do not merit review under these standards. The Court of Appeals properly applied the constitutional harmless error standard when it found “beyond a reasonable doubt that any reasonable jury would have reached the same result absent the error.” Whicker, No. 80869-9 at 6.

Contrary to Whicker's argument, the jury was properly instructed on the law of self-defense using well-established pattern instructions. Id. at 8. Washington case law also supports

the trial court's discretionary decision to issue a supplemental instruction and allow additional argument. Id. at 10. Finally, the Court of Appeals' holding that Whicker had the burden of establishing same criminal conduct is consistent with this Court's opinion in State v. Aldana Graciano, 176 Wn.2d 531, 540, 295 P.3d 219 (2013). Whicker, No. 80869-9 at 14.

While the trial court's advisement on the death penalty was incorrect under State v. Pierce, 195 Wn.2d 230, 455 P.3d 647 (2020), the Court of Appeals correctly concluded that Pierce did not require reversal under these circumstances. Whicker, No. 80869-9 at 13. Notably, Whicker's trial occurred before Pierce was published, and thus guidance to future courts is unnecessary.

Should this Court grant review of Whicker's petition, however, it should also review the Court of Appeals' holding that Goncalves' BAC was improperly excluded, which implicates prongs (1) and (2) of RAP 13.4(b).

**1. THE COURT OF APPEALS' DECISION
CONFLICTS WITH THIS COURT'S
OPINION IN GERLACH v. COVE
APARTMENTS LLC, 196 Wn.2d 111, 471 P.3d
181 (2020) AND WITH DIVISION ONE'S
PUBLISHED OPINION IN STATE v. LEWIS,
141 Wn. App. 367, 166 P.3d 786 (2007).**

Both Gerlach and Lewis held that a specific measurement of intoxicants in a victim's bloodstream is not relevant to determine whether they acted in a particular manner unless the defense can establish a non-speculative nexus between the test results and the behavior. Review is merited in this case because the Court of Appeals' opinion conflicts with these holdings.

The plaintiff in Gerlach, 196 Wn.2d at 116-18, was injured when a faulty railing gave out, causing her to fall from a balcony. Gerlach later sued the apartment complex, arguing it was negligent for "fail[ing] to repair the decayed railing." Id.

A blood test at the hospital showed Gerlach's BAC was .219 shortly after the accident. Id. at 117. Cove asserted that Gerlach's intoxication, not the faulty railing, was the proximate cause of her injuries, and claimed Gerlach "likely fell while

trying to climb over the railing onto the balcony.” Id. However, the trial court excluded Gerlach’s exact BAC after she stipulated to being intoxicated in general. Id. at 117-18.

Cove argued on appeal that the excluded BAC evidence was “central to its affirmative defense.” Id. at 120. It proffered an expert opinion that “essentially everybody” would be impaired with a BAC of .219, and that Gerlach’s balance was “probably” significantly impacted. Id.

This Court disagreed, finding Gerlach’s BAC “only minimally probative” because Cove’s expert could not establish the effect alcohol had on Gerlach as an individual. Id. at 123. Because Cove was unable to “link Gerlach’s intoxication to any actual behavior,” its proffered testimony was speculative, and thus properly excluded. Id.

The Court of Appeals found that Goncalves’ BAC was material in part because it made Whicker’s self-defense theory “more likely.” Wicker, 80869-9 at 5-6. Implicit in this reasoning is the assumption that an intoxicated person is more

likely to be aggressive. But Gerlach rejected this type of inference:

But the BAC results are not relevant to questions of causation and fault because these questions turn on evidence of a plaintiff's behavior, not intoxication status. While being intoxicated can certainly influence a person's behavior, the fact of intoxication does not prove a person was acting in any particular way. **Whether and to what degree a person is at fault depends on how that person acted or failed to act, not their precise degree of intoxication.**

Gerlach, 196 Wn.2d at 125-26.¹

Whicker's theory that Goncalves' BAC made it more likely he was confrontational is analogous to Cove's erroneous argument "that Gerlach was so drunk *she must have been* impaired and making risky decisions." Id. at 124 (emphasis original). But "without other evidence...that could connect

¹ Gerlach was a civil case, and thus did not discuss the Sixth Amendment right to present a defense. But the ultimate question here is one of relevance, and defendants have "no constitutional right to present irrelevant evidence." State v. Jones, 168 Wn.2d 713, 720, 230 P.3d 576 (2010).

Gerlach's BAC results to behavior that caused her fall, the BAC results were not relevant..." Id. at 126.

Likewise, Goncalves' precise BAC was irrelevant because Whicker did not know this information at the time of the murder. Nor did Whicker know how alcohol affected Goncalves, and thus he could not connect Goncalves' BAC to any alleged aggressiveness. Id. at 126. Nor was there any basis to conclude that a high BAC makes a *retreating* person more dangerous than a similarly situated sober individual.

The key issue at trial was whether Whicker acted in self-defense when he stabbed Goncalves. The prosecution's case was based largely on surveillance footage showing Whicker pursuing Goncalves with the knife. Goncalves' BAC was not relevant to whether he was trying to escape from Whicker. Whicker thus conflicts with Gerlach.

The Court of Appeals’ reasoning also conflicts with its prior published decision in State v. Lewis, 141 Wn. App. 367, 166 P.3d 786 (2007). Lewis was charged with killing another man over drug money. Id. at 374. He successfully introduced evidence that the victim’s blood contained methamphetamine at the time of his death. Id. at 378. Lewis attempted to elicit expert testimony that methamphetamine can cause aggressive or irrational behavior, which he argued supported his self-defense claim. Id. at 378-79, 388.

Like Whicker, Lewis argued this information “was vital to his defense because it corroborated the notion that [the victim] was the aggressor...” Id. at 379. However, the trial court excluded the evidence because “methamphetamine’s effects on some users was irrelevant and speculative as to its effect on [the victim]...” Id. at 379.

Division One affirmed, agreeing that the expert’s opinion was irrelevant because they could not establish a nexus between the victim’s methamphetamine use and his allegedly aggressive behavior. Id. at 389. Methamphetamine, like alcohol, can have a “wide range of effects...on diverse individuals.” Id. at 389. As in Lewis, there was no evidence linking Goncalves’ BAC with his alleged aggressive behavior. Id. at 389. Like the expert witness in Lewis, Whicker could only speculate as to whether Goncalves’ BAC had “caused [him] to act violently.” Id. at 389.

The Court of Appeals analysis in Whicker is incompatible with its previous holding in Lewis.

F. CONCLUSION

The State respectfully requests that Whicker’s petition for review be denied. However, if the petition is granted, the Court should also review the issue identified in Section C, *supra*.²


² If Whicker’s petition for review is denied in its entirety, the State is not requesting review of this issue in isolation.

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DATED this 7 day of September, 2021.

Respectfully submitted,

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