29513-3-III

COURT OF APPEALS

DIVISION III

OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, RESPONDENT

v.

MERLE W. HARVEY, APPELLANT

APPEAL FROM THE SUPERIOR COURT

OF SPOKANE COUNTY

APPELLANT'S BRIEF

Janet G. Gemberling
Attorney for Appellant

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2. Witnesses' expressions of opinion as to the ultimate issue of guilt violated the defendant's right to a jury trial.

B. ISSUES

1. The State was permitted to present evidence that two days after being driven from the scene of a shooting, and again about a week later, the defendant was involved in the theft of two different motor vehicles and eluding an officer. The defendant claimed that he shot two individuals in self-defense. Did the court err in finding this evidence of these other crimes was admissible under ER 404(b) to show defendant's consciousness of guilt?

2. A defendant charged with two counts of murder claimed he acted in self-defense. Before trial, the court granted a defense motion prohibiting the use of the term "victim" to refer to the deceased individuals at trial. Three different police officers used the term during trial, even after the court sustained an objection by defense counsel. Did this

testimony violate the defendant's Sixth Amendment right to trial by jury?

C. STATEMENT OF THE CASE

A friend introduced Jack Lamere to Merle Harvey as "a tax man for the Hell's Angels and Gypsy Jokers." (RP 1062) During the summer of 2009, Mr. Harvey's girlfriend, Diane Richardson, warned him that Mr. Lamere had just got out of prison and it would be a good idea to "be careful of him because he tortured people and stuff." (RP 1067-69) Indeed, Mr. Lamere told Mr. Harvey the same thing, in even greater detail. (RP 1074) On one occasion, Mr. Lamere called Mr. Harvey and threatened to kill him. (RP 1069) On another occasion, Mr. Harvey was with a friend, Aaron Cunningham, when Mr. Lamere held a gun to Mr. Cunningham's head. (RP 1073)

In late July, 2009, Mr. Lamere brought a Cadillac to Mr. Harvey's home and suggested that Mr. Harvey should trade him a Chevy Blazer for it. (RP 1070) They agreed to test drive each other's vehicles, and during the "test drive" Mr. Lamere drove away with the Blazer and never returned it. (RP 842, 1071)

Although he repeatedly assured Mr. Harvey that he would return the Blazer, Mr. Lamere never did, and eventually he persuaded Mr.

Harvey that they should go through with the trade. (RP 1072, 1091) But after Mr. Harvey had agreed to the trade, Mr. Lamere then told him he would have to get the title to the Cadillac from a Rick Ziesmer. (RP 1073) Mr. Ziesmer refused to deliver the title. (RP 1073)

On September 26, Mr. Harvey and Ms. Richardson saw the Blazer in the parking area behind Mr. Lamere's apartment. (RP 1091) Although Mr. Harvey was somewhat intimidated by Mr. Lamere, they drove their truck into the alley, and Mr. Harvey asked Mr. Lamere to just trade the Blazer back. (RP 1091-93) Mr. Lamere told him to go get the Cadillac. (RP 1094) Mr. Harvey asked Ms. Richardson to make a phone call and have someone bring the Cadillac. (RP 1094)

Jacob Potter was also in the parking area. (RP 353) While Ms. Richardson was gone, Mr. Harvey was sitting in the truck and saw Mr. Lamere apparently getting angry and whispering something to Mr. Potter. (RP 1076-78, 1108) Mr. Harvey had seen Mr. Potter with Mr. Lamere once before, at Mr. Ziesmer's towing business. (RP 1105) Mr. Harvey was afraid that they were going to attack him, so he returned to his truck, and as he did so he thought he saw Mr. Potter pull a gun from his waistband. (RP 1078) At this point, although he was scared, he felt he couldn't leave without Ms. Richardson. (RP 1076-77, 1094) He got his rifle out and loaded it. (RP 1095)

When Ms. Richardson returned, Mr. Lamere was coming out of the apartment house, angry and yelling, demanding the return of the Cadillac. (RP 1076, 1095) Although Mr. Harvey was trying to explain that the Cadillac was being brought to them, Mr. Lamere continued yelling. (RP 1097)

Mr. Lamere got into the Blazer, saying he was going to drive it away. (RP 1103) Ms. Richardson, who was driving the truck, pulled forward to block him. (RP 1097) Mr. Harvey got out of the truck, but when he saw Mr. Lamere in a huddle with Mr. Potter and the other man he returned to the truck. (RP 1098-99) As he did so Mr. Harvey saw that Mr. Lamere and Mr. Potter appeared to be armed. (RP 1100, 1106)

Fearing that he and his girlfriend were about to be shot, Mr. Harvey grabbed his hunting rifle from the truck and fired shots in their direction. (RP 1079, 1110) Then he saw other people coming from the apartment house, and one appeared to be carrying a baseball bat. (RP 1080) Mr. Harvey grabbed his other rifle, fired some warning shots, and fled. (RP 1080-82)

Two weeks later, Kennewick police officers arrested Mr. Harvey and Ms. Richardson walking in a wheat field near Kennewick, Washington. (RP 569-70) The State charged Mr. Harvey with two counts

of first degree murder while armed with a firearm and two counts of unlawful possession of a firearm. (CP 51-52)

Before trial, defense counsel moved to exclude evidence of Mr. Harvey's conduct following the shooting: in particular, evidence of flight and evidence that he was involved in the theft of two vehicles during the two weeks before his arrest. (CP 8-12; RP 52)

The Court initially ruled that the State could introduce evidence that, prior to his arrest, Mr. Harvey had been in two different stolen vehicles. (RP 80) The evidence would be admissible, with a limiting instruction, to "show the effort he put into the flight." (RP 78) Shortly before trial, following the hearing on the admissibility of Mr. Harvey's statements to the police, the court ruled that his admission to having stolen the vehicles would be admissible as part of the *res gestae*. (RP 190-92)

The Court granted a pre-trial motion to exclude any reference to Mr. Potter and Mr. Harvey as victims. (RP 210)

Lori Averill was in the parking lot during part of the confrontation between Mr. Harvey, Mr. Lamere and Mr. Potter. (RP 343) Ms. Averill told the jury that she overheard some conversation between Mr. Lamere and the woman driving the truck (later identified as Ms. Richardson) involving trading two vehicles and that the Cadillac hadn't shown up. (RP 347) The woman left the area to go make a phone call. (RP 348)

According to Ms. Averill, Ms. Richardson returned after about two minutes. (RP 350)

Ms. Averill told the jury she saw Mr. Lamere go inside the building and return with a little gun. (RP 350-51) According to Ms. Averill, at that point Mr. Harvey got out of the truck and began arguing with Mr. Lamere and accused him of "ripping people off." (RP 352) She saw Mr. Harvey remove a gun from the truck and fire shots towards Mr. Lamere. (RP 352)

According to Ms. Averill, Mr. Potter was standing near or in his own truck when the shooting began and then was trying to run away. (RP 356)

Kennewick Police Officer Reynolds described for the jury a high speed chase in which he pursued two people in a red Jeep Cherokee on the afternoon of October 9. (RP 557-58) He saw the Jeep strike another vehicle and abandoned the chase to assist the occupants of the other vehicle. (RP 558) The Jeep was later found abandoned. (RP 558)

Kennewick police detective Joshua Kuhn told the jury that the Jeep had been stolen. (RP 580, 582) He testified that food, blankets and camping equipment were found during a search of the Jeep. (RP 581)

Kennewick Police Sergeant Kirk Isakson described finding and arresting Mr. Harvey and Ms. Richardson on the afternoon of October 10 in a wheat field near Kennewick. (RP 569)

Spokane Police Detective Chet Gilmore testified that he interviewed Mr. Harvey after his arrest. (RP 839) The deputy prosecutor asked the detective whether Mr. Harvey had admitted to going to any houses in Spokane, and Detective Gilmore told the jury that Mr. Harvey had denied doing so. (RP 856) The deputy prosecutor then asked about a specific address in Spokane and Detective Gilmore then told the jury he had information that Mr. Harvey had in fact gone to that address and obtained a small quantity of marijuana and a sweatshirt. (RP 856) Upon defense counsel's objection, the court ordered the jury to ignore that testimony. (RP 857)

He testified that Mr. Harvey admitted to stealing a pickup truck in North Spokane the day after the shooting and also to stealing the Jeep Cherokee in Idaho a few days before his arrest. (RP 855-56) The detective then told the jury that after additional investigation he determined that a pickup truck like the one Mr. Harvey admitted stealing had been reported stolen two days after the shooting. (RP 864, 866)

The jury found Mr. Harvey guilty of first degree murder in the shooting of Mr. Lamere and second-degree murder in the shooting of Mr.

Potter. (CP 307, 309) The jury found Mr. Harvey was armed with a firearm at the time of the offenses. (CP 308, 310) The jury also convicted Mr. Harvey of two counts of unlawful possession of a firearm. (CP 311-12)

D. ARGUMENT

1. ADMITTING EVIDENCE OF IRRELEVANT MISCONDUCT RELATING TO FLIGHT WAS PREJUDICIAL ERROR.

The irrelevant evidence of Mr. Harvey's alleged flight and, more especially his involvement in vehicle thefts in the days following the shooting, was highly prejudicial; its admission was an abuse of the court's discretion. *See State v. Lane*, 125 Wn.2d 825, 831, 889 P.2d 929 (1995).

Evidence of misconduct is not admissible to show that a defendant is a "criminal type," and has a propensity to commit criminal acts. ER 404(b), *State v. Everybodytalksabout*, 145 Wn.2d 456, 466, 39 P.3d 294 (2002); *State v. Lough,* 125 Wn.2d 847, 853, 889 P.2d 487 (1995); *see State v. Fisher*, 165 Wn.2d 727, 202 P.3d 937 (2009). ER 404(b) allows evidence of misconduct that has "some additional relevancy beyond mere propensity" "such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or

accident." *State v. Holmes,* 43 Wn. App. 397, 400-01, 717 P.2d 766 (1986); *Lough,* 125 Wn.2d at 853.

The Supreme Court recently reiterated the trial court's duties with respect to the admission of evidence of misconduct:

> Before admitting ER 404(b) evidence, a trial court "must (1) find by a preponderance of the evidence that the misconduct occurred, (2) identify the purpose for which the evidence is sought to be introduced, (3) determine whether the evidence is relevant to prove an element of the crime charged, and (4) weigh the probative value against the prejudicial effect." This analysis must be conducted on the record. If the evidence is admitted, a limiting instruction must be given to the jury.

State v. Foxhoven, 161 Wn.2d 168, 174-75, 163 P.3d 786 (2007) (citations omitted)

"Evidence of flight is admissible if it creates 'a reasonable and substantive inference that defendant's departure from the scene was an instinctive or impulsive reaction to a consciousness of guilt or was a deliberate effort to evade arrest and prosecution.'" *State v. Freeburg*, 105 Wn. App. 492, 497, 20 P.3d 984 (2001) *quoting State v. Nichols*, 5 Wn. App. 657, 660, 491 P.2d 677 (1971).

When evidence of flight is admissible, it tends to be only marginally probative to the ultimate issue of guilt or innocence. *Freeburg*, 105 Wn. App. at 498. The "range of circumstances that may be shown as evidence of flight is broad, the circumstance or inference of consciousness

of guilt must be substantial and real, not speculative, conjectural, or fanciful." *Freeburg*, 105 Wn. App. at 498. "The probative value of evidence of flight as circumstantial evidence of guilt depends on the degree of confidence with which four inferences can be drawn: (1) from the *defendant's behavior* to flight; (2) from flight to consciousness of guilt; (3) from consciousness of guilt to consciousness of guilt *concerning the crime charged*; and (4) from consciousness of guilt concerning the crime charged to actual guilt of the crime charged." *Freeburg*, 105 Wn. App. at 498 (emphasis added).

The State's evidence that Mr. Harvey immediately fled the scene of the shooting fails at the first inference. Ms. Richardson was driving the truck when the couple left the scene of the shooting. (RP 379, 404, 417) No one testified that Mr. Harvey instructed her to drive away. Evidence that Mr. Harvey was a passenger in a truck that was driven away from the scene of the crime does not support the inference that he sought to flee.

The evidence fails the second requirement as well. Ms. Richardson's state of mind is not relevant to Mr. Harvey's consciousness of guilt. Mr. Harvey not only may have believed he had justifiably acted in self-defense, he also later testified that at the time they left the scene he was not sure he had hit anyone and did not realize that anyone had been killed.

Even if Mr. Harvey sought to flee the scene of the shooting, this would not be evidence of guilt. It is not disputed that Mr. Lamere was armed at the time of the shooting. Ms. Richardson's act of immediately driving away is equally consistent with her belief that she and Mr. Harvey were in mortal danger if they remained at the scene. Mr. Harvey likely shared that belief. Mr. Harvey's "consciousness of guilt" cannot be inferred from this evidence with any degree of confidence. *See Freeburg,* 105 Wn. App. at 498.

The evidence of the couple's abrupt departure was thus not probative as to actual guilt.

Evidence that the driver of the jeep was eluding the police officer in Kennewick was similarly irrelevant. Officer Reynolds testified that the driver was probably female. (RP 567) The State's evidence failed to show that, as a passenger in the Jeep, Mr. Harvey engaged in any conduct constituting flight.

Ms. Richardson's conduct, even if it was at Mr. Harvey's behest, does not support an inference of his consciousness of guilt "concerning the crime charged." *See Freeburg,* 105 Wn. App. at 498. The State presented evidence the Jeep had been stolen and Mr. Harvey later allegedly admitted to the theft. Ms. Richardson's conduct likely reflected her consciousness of guilt as to the theft of the vehicle and, arguably, Mr. Harvey's

consciousness of guilt as to the theft. *See State v. Hagler,* 74 Wn. App. 232, 234, 236, 872 P.2d 85 (1994) (defendant's flight from officer during traffic stop not consciousness of guilt where State failed to show which of two possible crimes defendant felt guilty about).

Evidence of Mr. Harvey's involvement in the theft of two vehicles is similarly irrelevant.

The court identified the purpose for which the evidence was admitted, namely, "the effort" Mr. Harvey "put into the flight." Nothing in the court's comments, however, explains why the amount of effort Mr. Harvey expended had any relevance to his consciousness of guilt.

Assuming, *arguendo*, that Mr. Harvey did indeed steal two cars, the effort he put forth to effect flight adds nothing to the inference of consciousness of guilt, if any, that may be drawn from the fact of flight itself.

The relevance of the evidence of flight depends on whether the four inferences that link defendant's conduct to actual guilt can be drawn with any degree of confidence. *Foxhoven.* As to each item of evidence, one or more of those inferences involves speculation, conjecture or sheer fancy. The probative value of the evidence is thus minimal.

The prejudicial effect of "other misconduct" evidence lies in the inference that any criminal behavior shows that the defendant has a

propensity for criminal conduct such as the crime with which he is charged. *See State v. Everybodytalksabout*, 145 Wn.2d at 466. Such inferences of criminal propensity would be particularly prejudicial under the facts of this case.

The State presented substantial, perhaps overwhelming, evidence that Mr. Lamere and Mr. Potter died from gunshot wounds inflicted by Mr. Harvery. The central issue for the jury was whether Mr. Harvey was acting out of fear or anger – that is, whether he fired the shots in self-defense. "The proper inquiry in a self-defense claim focuses on the reasonableness of defendant's belief as to the apparent necessity for, and reasonableness of, the force used to repel an attack upon his person." *State v. Irby*, 113 N.C.App. 427, 437, 439 S.E.2d 226, 233 (N.C.App., 1994). Evidence of criminal propensity seriously undermined Mr. Harvey's defense.

The record does not disclose the court having given any consideration to the potential prejudice that could result from the introduction of the evidence. Nor does it appear that the court recognized the speculative nature of the inference of actual guilt from the evidence of Mr. Harvey's conduct. The prejudicial effect of the evidence outweighed any slight probative value it may have had, and its admission at trial was an abuse of discretion.

2. POLICE OFFICER TESTIMONY REFLECTING AN OPINION AS TO THE DEFENDANT'S GUILT VIOLATED HIS RIGHT TO A JURY TRIAL.

No witness may testify to his opinion by a direct statement or by inference regarding the defendant's guilt. *State v. Black*, 109 Wn.2d 336, 348, 745 P.2d 12 (1987). "Such an opinion violates the defendant's Sixth Amendment right to a trial by an impartial jury and his right to have the jury make an independent evaluation of the facts." *State v. Barr*, 123 Wn. App. 373, 380, 98 P.3d 518 (2004).

A police officer's improper opinion testimony may be especially prejudicial because it carries a "special aura of reliability." *State v. Demery*, 144 Wn.2d 753, 765, 30 P.3d 1278 (2001).

The central issue here was whether Mr. Harvey was a murderer or an intended victim. By repeatedly referring to Mr. Lamere as the "victim," the police officers expressed their opinion that Mr. Lamere was the victim, and thus Mr. Harvey was a murderer.

The court recognized the implications of such testimony and granted the pre-trial defense motion to preclude such testimony. Yet the State's first witness, Detective Oien, referred to Mr. Lamere and Mr. Potter as "the victims." (RP 322) Later, Detective Timothy Madsen twice referred to Mr. Lamere and Mr. Potter as victims. (RP 732-33) Defense

counsel approached the bench and objected to the repeated references, and the Court instructed the deputy prosecutor to remind his witness of the prohibition. (RP 733) Shortly thereafter, Detective Gilmore again described Mr. Lamere and Mr. Potter as victims, and then referred to a witness as "the girlfriend of one of the victims, one of the persons who had been shot . . . ." (RP 831)

The police officers' repeated use of the term "victims" conveyed to the jury the overwhelming opinion of the police officers that these two men had been victims, and thus Mr. Harvey was a murderer. The law enforcement officers' expression of a collective opinion as to Mr. Harvey's guilt violated his right to a jury trial.

The remaining issue is whether the untainted evidence was so overwhelming that it necessarily leads to a finding of guilt. *State v. Guloy*, 104 Wn.2d 412, 426, 705 P.2d 1182 (1985), *cert. denied*, 475 U.S. 1020 (1986). If there is any reasonable possibility that the use of inadmissible evidence was necessary to reach a guilty verdict, the conviction must be reversed. *Id.*

Overwhelming evidence showed that Mr. Harvey shot Mr. Potter and Mr. Lamere. But, Mr. Harvey's testimony that Mr. Lamere was armed with a handgun was supported by both testimony and physical evidence. Mr. Harvey's claim that he was at first intimidated by Mr.

Lamere and eventually afraid for his life, was substantiated by witnesses who testified that several people had told Mr. Harvey that Mr. Lamere was extremely dangerous.

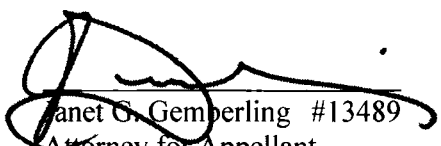
By framing the case in terms of murder victims at the outset, and repeating the insinuation throughout the trial, the State's witnesses effectively told the jury Mr. Harvey was guilty. Evidence that Mr. Harvey did not act in self-defense was circumstantial and far from overwhelming. It is thus quite possible that the officers' improper testimony was the dispositive factor in the jury's verdicts.

E. CONCLUSION

Mr. Harvey did not receive a fair jury trial. The State's case relied on improper, prejudicial evidence to persuade the jury that Mr. Harvey did not act in self-defense. His convictions should be reversed, and the case remanded for a new trial.

Dated this 5th day of July, 2011.

GEMBERLING & DOORIS, P.S.



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IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON,

DIVISION III

STATE OF WASHINGTON,	)	
	)	
Respondent,	)	No. 29513-3-III
	)	
vs.	)	CERTIFICATE
	)	OF MAILING
MERLE W. HARVEY,	)	
	)	
Appellant.	)	

I certify under penalty of perjury under the laws of the State of Washington that on July 5, 2011, I served a copy of the Appellant's Brief in this matter by email on the following party, receipt confirmed, pursuant to the parties' agreement:

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I certify under penalty of perjury under the laws of the State of Washington that on July 5, 2011, I mailed a copy of the Appellant's Brief in this matter to:

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Signed at Spokane, Washington on July 5, 2011.

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