No. 90963-6
Court of Appeals No. 69206-2-I

THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

MAURICE L. JORDAN,

Petitioner.

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

PETITION FOR REVIEW

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A. IDENTITY OF PETITIONER

Maurice L. Jordan, petitioner here and appellant below, requests this Court grant review of the decision designated in Part B of the petition.

B. COURT OF APPEALS DECISION

Pursuant to RAP 13.4, Mr. Jordan requests this Court grant review of the decision of the Court of Appeals, No. 69206-2-I (September 15, 2014). A copy of the decision is attached as Appendix A.

C. ISSUE PRESENTED FOR REVIEW

Maurice Jordan's[1] father, Miller Jordan, with whom he had a strained relationship, witnessed the latter part of the incident that led to the instant charges. The trial court admitted three letters written by Maurice to his father, while Maurice was incarcerated pending trial, in which he expressed anger and sadness, he used profanity, and he disputed his father's version of events, but he insisted his father appear at trial and testify truthfully. The trial court admitted the letters as consciousness of guilt, pursuant to ER 404(b). The Court of Appeals ruled the letters were properly admitted as consciousness of guilt, on the grounds the letters requested his father to change his mind about Maurice's guilt. Does the Court's ruling conflict with other decisions by the Court of Appeals

[1]Because Maurice Jordan and his father, Miller Jordan, share the same last name, the defendant will be referred to by his first name only for the sake of clarity. No disrespect is intended.

regarding relevance and "consciousness of guilt" and involve an issue of substantial public interest that should be determined by this Court, pursuant to RAP 13.4(b)(2) and (4)?

D. STATEMENT OF THE CASE

Maurice and his friend, Earl Howard, went to Miller Jordan's house to cook food that Howard purchased with food stamps. 7/17/12 RP 13-14, 62, 125. Maurice and his father had a strained relationship, so Therefore, Miller Jordan stayed inside his house while Maurice and Howard used a barbecue in the backyard. 7/17/12 RP 13-14, 62, 125, 127; 7/18/12 RP 27.

While they were cooking, Maurice and Howard started to quarrel and Miller Jordan came outside and told them to leave. 7/17/12 RP 127, 129; 7/18/12 28-29, 35-36; 7/19/12 RP 76-77. The food was not fully cooked, so Miller Jordan gave Howard $35 to compensate him for the food, and went back inside. 7/17/12 RP 16, 129-30; 7/18/12 RP 35-36; 7/19/12 RP 79.

Maurice was offended that Howard accepted the money from Miller Jordan when he was a guest at the house and had purchased the food with food stamps. 7/17/12 RP 16-17, 66-67; 7/19/12 RP 78-79. According to Howard, Maurice struck him from behind, wrestled with him, grabbed the money from his hand, and left the area. 7/17/12 RP 17-

18, 26-28, 30-31, 32-33, 68, 72-73, 131-33. According to Maurice, the fight was mutual. 7/19/12 RP 80. Miller Jordan heard the disturbance and returned outside where he saw the men grappling and he called the police. 7/17/12 30, 133, 134; 7/18/12 RP 37-38, 44, 47, 127-28.

Maurice was charged, *inter alia*, with robbery in the second degree and assault in the fourth degree. CP 438-39. While the charges were pending, Maurice sent three letters to his father who observed only the latter part of the altercation between Maurice and Howard and was a witness for the State. The first letter was a general reflection on fate and chance, and did not refer to the pending case at all. Ex. 9. In the second letter, Maurice used profanity to express his anger and generalized disagreement with his father's witness statement and urged his father to appear at trial and testify truthfully. Ex. 10. In the third letter, Maurice used profanity to express his anger that his father talked to other people about the case, when his father denied doing so. Ex. 11.

Over defense objections, the court admitted the letters as evidence of Maurice's consciousness of guilt. 7/11/12 RP 70-72. At trial, Miller Jordan testified that he gave the letters to the prosecuting attorney "[b]ecause they were insulting type of things, things you wouldn't say to your father." 7/17/12 RP 137.

Maurice was convicted. CP 467, 468.

On appeal, Maurice argued the letters were irrelevant, inflammatory, and showed consciousness of the charges, but not consciousness of guilt. The Court of Appeals disagreed and ruled the letters were could "be reasonably interpreted as requesting [Miller Jordan] to change his mind about Jordan's guilt." Opinion at 5.

E. ARGUMENT

The Court of Appeals' ruling that letters written by a defendant to a witness revealed consciousness of guilt, when the letters characterized the witness's version of events as a lie and encouraged the witness to appear in court and tell the truth is in conflict with other decisions of the Court of Appeals and involves an issue of substantial public interest.

Only relevant evidence is admissible. ER 402. "'Relevant evidence' means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." ER 401. Thus, "relevant" evidence must 1) tend to prove or disprove a fact, and 2) that fact must be of consequence to the outcome of the case, including any fact that provides direct or circumstantial evidence of any element of the charge or the defense. *State v. Weaville*, 162 Wn. App. 801, 818, 256 P.3d 426 (2011) (citing *Davidson v. Municipality of Metropolitan Seattle*, 43 Wn. App. 569, 573, 719 P.2d 569 (1986)).

The letters were irrelevant to any fact of consequence. None of the letters discuss details of the pending case, other than to characterize Miller Jordan's version of the incident as "a fucking lie." As Miller Jordan noted, the letters were "inappropriate to write – a son writing his father that," but they "didn't mean anything, because they didn't even make sense." 7/18/12 RP 16. Although the letters amply demonstrated the strained father-son relationship, they had no bearing whatsoever on whether Maurice committed robbery or assault. Accordingly, the letters were inadmissible pursuant to ER 401 and ER 402.

The Court of Appeals did not address the relevance of the letters but, instead, ruled the letters were admissible as evidence of consciousness of guilt, pursuant to ER 404(b). Opinion at 6. Evidence of a defendant's other conduct or character is not admissible unless it is relevant to the crime charged and its probative value is substantially outweighed by its potential for unfair prejudice. ER 403; ER 404(b); *State v. Thang*, 145 Wn.2d 630, 642, 41 P.3d 1159 (2002). Doubtful cases should be resolved in favor of the defendant. *State v. Smith*, 106 Wn.2d 772, 776, 725 P.2d 951 (1986).

The Court of Appeals ruled the letters revealed consciousness of guilt because they "can reasonably be interpreted as requesting [Miller Jordan] to change his mind about Jordan's guilt." Opinion at 5. This ruling

presupposes Maurice's guilt. But Maurice knew his father did not witness the entire altercation and he encouraged his father to appear in court and tell the truth, which actually revealed "consciousness of innocence."

The court cited *State v. Moran*, in which the trial court admitted a letter written by the defendant to a friend, while the defendant was incarcerated pending trial for first degree manslaughter. 119 Wn. App. 197, 199, 217-18, 81 P.3d 122 (2003). In the letter, the defendant asked the friend to speak with a witness who changed her mind about giving favorable testimony. The letter read in part, "Jesse is being a bitch. she's telling my attourney that she thinks that I killed Steve now. Can you talk to the bitch. In her statement to the cop's she was behind me all the way now she's being a cunt." *Id.* at 217-18 (spelling and punctuation errors in original). The letter was signed, "Your homie Jeramie." *Id.* at 218. The trial court ruled the letter was probative because it "shows the defendant's propensity to try to influence people so that they will be cooperative and more favorable to him." *Id.* On appeal, the court affirmed, and stated:

> Evidence that a defendant threatened a witness is relevant because it reveals a consciousness of guilt. Its probative value outweighs the possibility of unfair prejudice. Likewise, evidence that the defendant, or a person acting on behalf of the defendant, tried to prevent a witness from appearing and testifying at trial is relevant because it is evidence of the defendant's guilt.
>
> Although not a threat, Moran's letter to Johnson can be reasonably interpreted as a request that Johnson try to get

> Burch to change her mind about Moran's guilt and return to her initial favorable statement. While the word "homie" may have gang connotations and the use of offensive language in the letter may have been prejudicial, the trial court's decision that the probative value outweighed the prejudicial effect was not an abuse of discretion.

Id. at 218-19 (citing *State v. McGhee*, 57 Wn. App. 457, 788 P.2d 603 (1990) and *State v. Kosanke*, 23 Wn.2d 211, 160 P.2d 541 (1945)). Significantly, although the court cited consciousness of guilt cases, the court never ruled that Moran's letters revealed consciousness of guilt. Therefore, the Court of Appeals misconstrued *Moran* and its reliance was misplaced.

Even if the letters were marginally relevant, they were laced with profanity, inflammatory, and more prejudicial than probative of any fact of consequence.

> In many situations, the inference of consciousness of guilt of the particular crime is so uncertain and ambiguous and the evidence so prejudicial that one if forced to wonder whether the evidence in not directed to punish the 'wicked' generally rather than resolving the issue of guilt of the offense charged.

C. McCormick, *Evidence* (4th ed. 1992) p. 182. As the court has cautioned in the context of flight as evidence of guilt:

> [W]hile 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.

State v. Freeburg, 105 Wn. App. 492, 498, 20 P.3d 984 (2001).

In *State v. McGhee*, the State introduced evidence that the defendant accused a State witness of signing a statement against him, called him a "snitch," and drew his hand across his throat in a threatening manner. 57 Wn. App. at 459. On appeal, the court ruled the evidence was admissible pursuant to ER 404(b), on the grounds that evidence of threats against a witness was probative of guilty knowledge. *Id.* at 460-62. By contrast here, however, Maurice did not threaten his father at all. He simply used profane and pejorative language to characterize his father's witness statement as a lie.

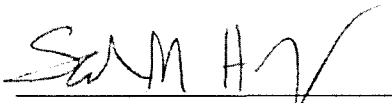
Citing *McGhee*, the Court of Appeals concluded the probative value of evidence of consciousness of guilt is "rarely, if ever outweighed by unfair prejudice." Opinion at 6. However, the *McGhee* court did not make such a broad generalization. Rather, the court ruled that the probative value of evidence of consciousness of guilt was outweighed by unfair prejudice in that case. 57 Wn. App. at 462. Therefore again, the Court of Appeals misconstrued *McGhee* and its reliance was misplaced.

F. CONCLUSION

The Court of Appeals decision in the present case is in conflict with *McGhee* and *Moran*, and involves an issue of substantial public interest that should be determined by this Court. Pursuant to RAP 13.4(b)(2) and (4), this Court should accept review.

DATED this 13th day of October 2014.

Respectfully submitted,



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DECLARATION OF FILING AND MAILING OR DELIVERY

The undersigned certifies under penalty of perjury under the laws of the State of Washington that on the below date, the original document **Petition for Review to the Supreme Court** to which this declaration is affixed/attached, was filed in the **Court of Appeals** under **Case No. 69206-2-I**, and a true copy was mailed with first-class postage prepaid or otherwise caused to be delivered to the following attorney(s) or party/parties of record at their regular office or residence address as listed on ACORDS:

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Date: October 13, 2014

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent, v. MAURICE LEON JORDAN, Appellant.	No. 69206-2-I DIVISION ONE UNPUBLISHED OPINION FILED: September 15, 2014

BECKER, J. — Facing robbery and assault charges for beating up and taking cash from a friend at a backyard barbeque, appellant Maurice Jordan wrote three letters to his father, who witnessed the robbery. The letters bitterly and profanely attacked his father for cooperating with the police. We conclude the letters were properly admitted as evidence of the appellant's consciousness of guilt.

The robbery occurred at Jordan's father's home on April 30, 2011. Jordan and his friend Earl Howard were barbequing outside when they got into a heated argument. Jordan's father heard yelling, came out, and asked them to stop arguing or leave. He offered Howard cash to reimburse him for the food he brought. When Howard accepted the cash, Jordan became angry and struck Howard. The two wrestled until Jordan was able to remove the cash from Howard's right front pocket. Thereafter, Jordan fled.

According to testimony at trial, Jordan kept fighting even after his father told him he was going to call the police. Because the assault continued and left Howard with blood running down his face, Jordan's father called 911. After being transported to Harborview Medical Center by ambulance, Howard received four stitches as treatment for the lacerations sustained during his assault.

At Harborview, Howard said he had been assaulted by a friend over money. Hospital personnel called the police. An officer responded, and Howard made the same statement to the officer. Jordan was subsequently arrested. The State charged him with second degree robbery and fourth degree assault for the fight. The State also charged him with intimidating a witness based on communications he later had with Howard.

Prior to trial, Seattle Police Department Detective Dave Clement contacted Jordan's father to speak with him about the assault. During that interview, Jordan's father said that Jordan assaulted and robbed Howard. He also confirmed Howard's recitation of events regarding the assault. While in custody, Jordan received a copy of the statement his father made to law enforcement and sent his father three letters. Two of the letters expressed Jordan's anger towards his father for assisting the State in its prosecution. In one of the letters, Jordan characterized the statements his father gave to police as "a fucking lie." Jordan also claimed that his father did not "know shit about what happened" and was therefore a "lying piece of shit" and a "lying son of a bitch."

The State obtained the letters and offered them at trial. Jordan objected on the basis that the letters were irrelevant and unduly prejudicial, and he

claimed they did not establish a consciousness of guilt. When ruling on Jordan's objection, the court noted that "a jury might look at" the letters "and say this is a letter written by somebody who knew he was guilty, which they're permitted to do." Based on that interpretation of the letters Jordan wrote to his father and our opinion in State v. Moran, 119 Wn. App. 197, 217-18, 81 P.3d 122 (2003), review denied, 151 Wn.2d 1032 (2004), the trial court concluded that the letters were admissible under ER 404(b).

The State introduced Jordan's letters through his father. When discussing the content of the letters on direct examination, Jordan's father recognized that "they were insulting type things, things you wouldn't say to your father" and confirmed that the letters related to his cooperation with the police. At the behest of the State, Jordan's father read each of the letters aloud to the jury.

Jordan, who was representing himself pro se, cross-examined his father extensively about the letters at issue. The following colloquy is illustrative:

> Q. Do you remember [the prosecutor] asking you what the letters meant to you, and you saying, replying, "they didn't mean anything"?
> A. They really didn't. If you asked me that, no, they didn't mean anything, because they didn't even make any sense.
> Q. So you didn't understand any meaning behind the letters at all? What was it was? I was just babbling?
> A. You were just babbling because you already know what the truth was. You know the incidents happened. So what you was doing is challenge me to change my story. It was no changing the story. Remember, I'm the one who did all the calling 911.
> . . . .
> Q. . . . So, when you read that in the letter that I said that I wanted you to come and tell the truth, did you believe that I was trying to alter your testimony by telling you to come and tell the truth, yes or no?
> A. Yes.
> . . . .

Q. So I guess telling you nothing would have been better, right?
A. That would have been appropriate.

Jordan presented lengthy testimony on direct examination of himself, but he did not address or make reference to the letters.

In closing argument, the State characterized the letters as "tragic" and argued that they helped to establish Jordan's guilt. Most of the State's closing argument was predicated upon other evidence such as the testimony of firemen, police officers, hospital workers, and Howard. Jordan's closing argument described the letters as a product of a tumultuous relationship between father and son.

The jury acquitted Jordan on the charge of intimidating a witness but convicted him on the second degree robbery and fourth degree assault charges. The court ruled at sentencing that the robbery merged with the assault.

On appeal, Jordan claims the letters were irrelevant because they only establish he and his father shared a dysfunctional relationship. He argues that they were unduly inflammatory because they were laced with profanity and displayed his antagonism toward his father. He contends they were not indicative of a guilty conscience and therefore had no bearing on whether or not he committed robbery.

This court reviews evidentiary rulings for an abuse of discretion. State v. Finch, 137 Wn.2d 792, 810, 975 P.2d 967, cert. denied, 528 U.S. 922 (1999). A court is said to have abused its discretion when it misapplies the law or predicates its decision on incorrect legal principles. State v. Powell, 126 Wn.2d 244, 258, 893 P.2d 615 (1995).

Evidence of other crimes or bad acts is not admissible to prove a person's character, but may be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, or absence of mistake or accident. ER 404(b). Under ER 404(b), evidence regarding attempts to influence or prevent testimony is admissible because it tends to show consciousness of guilt. See Moran, 119 Wn. App. at 217-18; State v. McGhee, 57 Wn. App. 457, 459-61, 788 P.2d 603, review denied, 115 Wn.2d 1013 (1990). To admit such evidence under ER 404(b), the trial court must (1) find by a preponderance of the evidence that the uncharged acts occurred, (2) identify the purpose for admission, (3) determine that the evidence is materially relevant to that purpose, and (4) balance the probative value of the evidence against any unfair prejudicial effect. State v. Kilgore, 147 Wn.2d 288, 292, 53 P.3d 974 (2002).

The trial court admitted the letters for the purpose of proving Jordan's consciousness of guilt. Jordan contends they do not show consciousness of guilt because he did not threaten his father, did not urge him to commit perjury, and did not directly ask him not to testify. He characterizes the letters as intended to encourage his father "to show up and tell the truth."

A request communicated by a defendant that a witness change his testimony or opinion about the defendant's guilt may reveal a defendant's consciousness of guilt, even if not phrased in threatening terms. Although not a threat, Jordan's letter to his father can be reasonably interpreted as requesting him to change his mind about Jordan's guilt. Moran, 119 Wn. App. at 219; see

also McGhee, 57 Wn. App. at 462. The content of Jordan's letters supports a substantial inference that Jordan wanted to persuade his father to change his mind about Jordan's guilt. The letters harshly criticized Jordan's father for cooperating with the police in the investigation of the robbery and suggested in no uncertain terms that his father was giving the police an inaccurate version of the incident. Jordan's father confirmed that he believed Jordan was trying to alter his testimony. The probative value of evidence establishing a consciousness of guilt is rarely, if ever, outweighed by unfair prejudice. McGhee, 57 Wn. App. at 462.

We conclude the trial court did not abuse its discretion by admitting the letters.

Affirmed.

Becker, J.

WE CONCUR: