69527-4 69527-4

No. 69527-4-I

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION ONE

STATE OF WASHINGTON,

Respondent,

v.

GARY WADE,

Appellant.

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

The Honorable Mary I. Yu

BRIEF OF APPELLANT

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11. The trial court erred in failing to declare a mistrial when the investigating officer referenced Mr. Wade's booking photo while testifying before the jury.

12. The cumulative effect of the multiple errors requires reversal.

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. The Confrontation Clause requires the prosecution offer an accused person the opportunity to cross-examine a witness who created testimonial evidence. Here, the prosecution did not call the person who researched and collected the banking records for the victim, but instead relied on a substitute witness who related what the investigator told her regarding the investigation. Was Mr. Wade denied his right to confront the witnesses against him?

2. A defendant's right to present a defense is a fundamental right guaranteed by the United States and Washington Constitutions. The right to present a defense encompasses the defendant's right to have the jury instructed on any lesser included offenses of the charged offenses. Mr. Wade proposed lesser included instructions for first and second degree manslaughter, which are lesser included offenses of second degree murder. Where the evidence established Mr. Wade may have killed Ms. Thornton but the evidence failed to prove how or why other than that Ms. Thornton died from being strangled, did the trial court err in failing to instruct the jury on first and degree manslaughter?

3. Prior out-of-state convictions may be included in the offender score if they are found to be comparable to Washington offenses. The court must determine whether the offenses are legally comparable by examining the elements, and if not legally comparable, whether they are factually comparable by looking at the facts underlying the foreign conviction that have been admitted to, stipulated to, or proven beyond a reasonable doubt. The court here found Mr. Wade's Utah conviction for attempted distribution of a controlled substance comparable despite the fact the State conceded the Utah offense was broader than similar Washington offenses. In addition, the

State failed to prove any facts admitted or stipulated to by Mr. Wade or found by a jury to establish his conduct was sufficient for comparability. Did the trial court err in finding the Utah conviction comparable thus requiring reversal of Mr. Wade's sentence?

4. As a part of the right to present a defense under the Sixth and Fourteenth Amendments to the United States Constitution, the defendant has the right to present relevant, admissible evidence on his behalf. Here, the trial court excluded evidence that Georgios Broutzakis was another suspect in Ms. Thornton's murder, finding Mr. Wade failed to establish a nexus between Mr. Broutzakis and the murder. Did the trial court's exclusion order prevent Mr. Wade from presenting a defense, thus entitling him to reversal of his conviction?

5. A trial court must grant a mistrial where a trial irregularity so prejudiced the jury that it denied the defendant a fair trial. Here the court entered an *in limine* order prohibiting any of the police officers from referencing Mr. Wade's booking photo. During the trial one of the officers violated the *in limine* order. Did the trial court abuse its discretion in failing to declare a mistrial mandating reversal of Mr. Wade's conviction?

6. Under the cumulative errors doctrine, the cumulative effect of multiple errors that would not necessarily require reversal on their own may deny a defendant a fair trial. Does the cumulative effect of the multiple errors in Mr. Wade's trial require reversal of his conviction?

C. STATEMENT OF THE CASE

On January 6, 2011, in response to a missing persons report, Seattle Police detectives found Michelle Thornton dead in her apartment. 8/28/2012RP 46-62. Ms. Thornton had been strangled, but it was unclear whether the strangulation was done by ligature or manually. 9/5/2012RP 138-48. Based upon a review of Ms. Thornton's activities prior to her death and an investigation of her computer and bank records, the police determined she was likely killed in the early morning hours of December 30, 2010. 8/28/2012RP 106; 9/10/2012RP 48-50.

The apartment in which Ms. Thornton lived was a secure building with surveillance cameras capturing the images of all who entered or exited the main entry door. 8/28/2012RP 198-204. Based upon interviews of Ms. Thornton's friends and a review of the surveillance photos, the police focused their investigation on appellant,

Gary Wade. 9/5/2012RP 178-79; 9/12/2012RP 81-96, 152-58. Fingerprints and DNA evidence of Mr. Wade were discovered in Ms. Thornton's apartment and on her body. 9/4/2012RP 32, 53-55; 9/5/2012RP 28-33.

Mr. Wade was arrested and charged with second degree murder based upon the alternatives of intentional murder and felony murder - that the murder occurred in the course of the commission of second degree assault. CP 1; 9/10/2012RP 78. Following a jury trial, Mr. Wade was convicted as charged. CP 142. Mr. Wade appeals from that verdict and the sentence imposed. CP 250.

D. ARGUMENT

1. MR. WADE WAS DENIED HIS RIGHT TO CONFRONT THE WITNESSES AGAINST HIM WHEN THE PERSON WHO INVESTIGATED AND OBTAINED CRITICAL BANK RECORDS OF THE VICTIM DID NOT TESTIFY AT TRIAL

Janet McGinness, a financial crime investigator for Key Bank, testified regarding activity on Ms. Thornton's Key Bank debit card around the time she disappeared. 8/28/2012RP 103-06. Ms. McGinnis testified the last activity on the debit card was an Automated Teller Machine (ATM) withdrawal on December 29, 2010. 8/28/2012RP 106. Ms. McGinnis subsequently disclosed that a credit purchase at

Belltown Market was posted on December 31, 2010. 8/28/2012RP 113-14. Ms. McGinnis could not opine when that transaction actually occurred. 8/28/2012RP 132. Ms. McGinnis did opine that this transaction most likely occurred before the December 29, 2010, transaction. 8/28/2012RP 114.

On cross-examination, Ms. McGinnis disclosed that the information regarding the fact the December 31, 2010, posting was a transaction that occurred before the December 29, 2010, transaction came from someone else; it was not the result of her own investigation. 8/28/2010RP 133. Ms. McGinnis testified she received this information over the telephone from another Key Bank employee. *Id.* Ms. McGinnis stated that the information came from an investigator who dealt only with debit card cases. 8/28/2012RP 135.

> Q: Your belief that that was her [the victim's] final transaction was based upon your conversation with Sarah [Anderson], correct, and her informing you when she thought the Belltown Market transaction occurred.
>
> A: It was based on two things. It was based on me seeing this ATM transaction and knowing what time and what date that happened, and then confirming with Sarah Anderson that the Belltown Market merchant transaction happened prior to that date and time.

8/28/2012RP 138.

Based on this disclosure, Mr. Wade moved to strike Ms. McGinnis' opinion that the December 29, 2010, transaction was Ms. Thornton's last transaction and the December 31, 2010, transaction occurred prior to that transaction, on among other grounds, that the opinion violated Mr. Wade's constitutionally protected right to confrontation. 8/28/2010RP 139, 141. The trial court denied the motion to strike, finding the evidence provided by the witness reliable. 8/28/2012RP 153 ("And so frankly, when I look at the analysis, it does come down to how reliable is it. And while not perfect, this court is going to come to the conclusion and treat it much like a business record").

a. The Confrontation Clause prohibits the prosecution from relying on results of an investigation without calling the person who performed the investigation as a witness. The Sixth Amendment to the United States Constitution and article I, section 22 of the Washington Constitution guarantee criminal defendants the right to confront and cross-examine witnesses. The Confrontation Clause "applies to 'witnesses' against the accused - in other words, those who 'bear testimony.'" *Crawford v. Washington,* 541 U.S. 36, 51, 124 S.Ct. 1354, 158 L.Ed.2d 177 (2004) (citation omitted). It also "bars

'admission of testimonial statements of a witness who did not appear at trial unless [the declarant] was unavailable to testify, and the defendant had had a prior opportunity for cross-examination.'" *Davis v. Washington,* 547 U.S. 813, 821, 126 S.Ct. 2266, 165 L.Ed.2d 224 (2006), *quoting Crawford,* 541 U.S. at 53-54.

The United States Supreme Court has ruled that a lab technician's certification prepared in connection with a criminal prosecution was "testimonial" and its admission at trial violated the Confrontation Clause. *Melendez-Diaz v. Massachusetts,* 557 U.S. 305, 319-24, 129 S.Ct. 2527, 174 L.Ed.2d 314 (2009). "A document created solely for 'an evidentiary purpose,' made in aid of a police investigation ranks as testimonial." *Bullcoming v. New Mexico,* ___ U.S. ___, 131 S.Ct. 2705, 2717, 180 L.Ed.2d 610 (2011), *quoting Melendez-Diaz*, 557 U.S. at 317-20.

When a forensic analyst tests evidence and prepares a report for use in a criminal investigation, the substance of that report is "'testimonial,' and therefore within the compass of the Confrontation Clause." *Id.* at 2714, *quoting Melendez-Diaz*, 557 U.S. at 317-21. The Confrontation Clause guarantees the defendant the opportunity to test through cross-examination the "honesty, proficiency, and

methodology" of the analyst who actually performed the forensic analysis. *Melendez-Diaz*, 557 U.S. at 317-20. Accordingly, an analyst's report may not be introduced into evidence by another witness who did not personally observe the testing of the substance. *Bullcoming*, 131 S.Ct. at 2717.

In *Bullcoming*, another scientist employed by the same crime laboratory testified because the scientist who analyzed the blood alcohol sample at issue had taken a leave of absence. The state court ruled that this surrograte testimony satisifed the Sixth Amendment because the accused had the opportunity to cross-examine a live witness from the same laboratory about the procedures used to obtain relatively straightforward machine-generated results. *Id.* at 2714-15. The United States Supreme Court reversed and held that the "opportunity to confront a substitute witness" does not satisfy the constitutional right to confrontation. *Id.* at 2716.

The *Bullcoming* Court explained that the Confrontation Clause does not tolerate dispensing with confrontation simply because the court believes that questioning one witness about another's testimonial statements provides a fair enough opportunity for cross-examination. *Id.* Furthermore, substituting a witness who can comment on work

done by someone else but who did not personally test the substance or observe the testing as it occurred does not serve the purpose of confrontation. *Id.* Surrogate testimony cannot convey what the analyst knew or observed about the events her report concerned, and cannot "expose any lapse or lies" by the analyst. *Id.* at 2715.

In an analogous scenario, our Supreme Court recently reaffirmed the testimonial significance of reports generated out of court and "the need to cross-examine the government agents who prepare them." *State v. Jasper*, 174 Wn.2d 96, 116, 271 P.3d 876 (2012), *citing Bullcoming*, 131 S.Ct. at 2715. Even when written reports are obviously reliable, the Confrontation Clause dictates that the accused person must have the right "to raise before a jury questions concerning [the scientist's] proficiency, the care he took in performing his work, and his veracity." *Id.*, *quoting Bullcoming*, 131 S.Ct. at 2715 n.7.

b. Sarah Anderson's investigation of Ms. Thornton's bank records and disclosure to Ms. McGinnis was testimonial. A surrogate witness from Key Bank, Ms. McGinnis, testified about what Sarah Anderson discovered when she searched Ms. Thornton's debit card transactions at the police detective's request, even though Ms. McGinnis did not observe Ms. Anderson take these steps.

8/28/2012RP 113-14, 132-34, 138. Ms. Anderson claimed that the December 31, 2010, transaction actually occurred prior to December 29, 2010, making the latter the last transaction by Ms. Thornton. *Id.* Ms. McGinnis did not engage in this search, but had Ms. Anderson decribe her search and opinion based on that search over the telephone. *Id.* Ms. Anderson had conducted this search after a request by the Seattle Police Department as part of the investigation of Ms. Thornton's murder. 8/28/2012RP 135-37.

Ms. Anderson's information was testimonial. Her investigation was solely on the request of the police and had no other purpose than the preparation for and introduction at trial. Ms. Anderson was asked to search the Key Bank database for any debit card transactions by Ms. Thornton during the last weeks of December 2010, then opine, based on that investigation, that the December 31, 2010, transaction actually occurred before the December 29, 2010, ATM transaction.

The Confrontation Clause does not allow the prosecution to present one person's testimonial statements through the trial testimony of another. *Crawford*, 541 U.S. at 68. So long as the investigator's testimonial statements were presented for their truth, regardless of the conduit, the investigator became a witness that Mr. Wade had a right to

confront. *Bullcoming*, 131 S. Ct. 2716. Mr. Wade was denied his right to confront the person who engaged in the research of the bank records on which the prosecution relied to show the December 29, 2010, transaction was Ms. Thornton's last one.

c. The violation of Mr. Wade's right to confront witnesses against him requires reversal. The State has the burden of demonstrating beyond a reasonable doubt that a confrontation violation did not contribute to the verdict. *Chapman v. California*, 386 U.S. 18, 23-24, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967); *see also Delaware v. Van Arsdall*, 475 U.S. 673, 684, 106 S.Ct. 1431, 89 L.Ed.2d 674 (1986) ("The correct inquiry is whether, assuming that the damaging potential of the cross-examination were fully realized, a reviewing court might nonetheless say that the error was harmless beyond a reasonable doubt"); *United States v. Alvarado-Valdez*, 521 F.3d 337, 342 (5th Cir. 2008) (harmless error analysis following confrontation violation requires court to assess whether jury possibly relied on testimonial statement when reaching verdict); *Fields v. United States*, 952 A.2d 859 (D.C. 2008) (finding improperly admitted drug analysis not harmless when government could not prove it did not contribute to the verdict obtained).

The time of Ms. Thornton's death was critical to the State's theory that she was killed between December 29, 2010, and December 30, 2010. This time period allowed for Mr. Wade to be considered the prime suspect. Without this bank evidence, the State's theory weakened and a number of other people suddenly became potential suspects.

Based on its importance to the prosecution's case, the Key Bank investigation evidence was admitted in violation of the Confrontation Clause and requires reversal. *Id.*

2. THE TRIAL COURT ERRED IN FAILING TO INSTRUCT THE JURY ON THE LESSER INCLUDED OFFENSES OF FIRST AND SECOND DEGREE MANSLAUGHTER

Mr. Wade proposed jury instructions for lesser included offenses of first and second degree manslaughter. CP 106, 110-14. The trial court refused to instruct the jury on the lesser included instructions ruling that either Mr. Wade was guilty of the murder or he was not. 9/17/2012RP 46. Mr. Wade excepted to the court's failure to give the lesser included instructions. 9/17/2012RP 59.

a. A defendant is entitled to have the jury instructed on a lesser included offense where authorized. The Sixth Amendment and the Due Process Clause of the Fourteenth Amendment guarantee a defendant's right to a trial by jury and right to be afforded a meaningful opportunity to present a complete defense. *Sullivan v. Louisiana*, 508 U.S. 275, 277, 113 S.Ct. 2078, 124 L.Ed.2d 182 (1993) (the Sixth Amendment protects the defendant's right to trial by an impartial jury, which includes "as its most important element, the right to have the jury, rather than the judge, reach the requisite finding of 'guilty.'"); *California v. Trombetta*, 467 U.S. 479, 485, 104 S.Ct. 2528, 81 L.Ed.2d 413 (1984). As such, a court's failure to instruct the jury on a lesser included offense which is the basis of the defendant's theory of the case may violate the Sixth and Fourteenth Amendments to the United States Constitution. *Beck v. Alabama,* 447 U.S. 625, 633, 100 S.Ct. 2382, 65 L.Ed.2d 392 (1980); *Conde v. Henry*, 198 F.3d 734, 739-40 (9th Cir. 1999).

"In all other cases the defendant may be found guilty of an offense the commission of which is necessarily included within that with which he or she is charged in the indictment or information." RCW 10.61.006. The modern interpretation of RCW 10.61.006 is set

forth in *State v. Workman,* 90 Wn.2d 443, 584 P.2d 382 (1978). In *Workman,* the Supreme Court established a two-part test to serve as the basis for the lesser included analysis. First, each of the elements of the lesser offense must be a necessary element of the offense charged. Second, the evidence in the case must support an inference that the lesser crime was committed. *Workman,* 90 Wn.2d at 447-48. The first prong is referred to as the "legal prong" and the second prong as the "factual prong." *State v. Berlin,* 133 Wn.2d 541, 545-46, 947 P.2d 700 (1997). "Only when the lesser included offense analysis is applied to the offenses as charged and prosecuted, rather than to the offenses as they broadly appear in statute, can both the requirements of constitutional notice and the ability to argue a theory of the case be met." *Id.* at 548. In reviewing whether the evidence is sufficient to warrant the inferior degree instruction, this Court views the supporting evidence in the light most favorable to the party requesting the instruction. *State v. Fernandez-Medina,* 141 Wn.2d 448, 455-56, 6 P.3d 1150 (2000). Under this standard, a defendant is entitled to an inferior degree instruction where the evidence raises an inference that only the inferior degree offense was committed. *Id.* at 455.

First and second degree manslaughter are legally lesser included offenses of intentional murder, and such an instruction should be given to the jury when supported by the facts. *Berlin,* 133 Wn.2d at 543. Thus, the only issue was whether Mr. Wade fulfilled the factual prong of the test.

b. Taking the evidence in the light most favorable to Mr. Wade, the evidence established the factual prong for the lesser included instructions for first and/or second degree manslaughter. To determine whether the factual prong is satisfied, this Court must determine whether there was evidence affirmatively establishing Mr. Wade's guilt of the lesser offenses, first or second degree manslaughter. *Berlin,* 133 Wn.2d at 551; *State v. Perez-Cervantes,* 141 Wn.2d 468, 481, 6 P.3d 1160 (2000). "'It is not enough that the jury might simply disbelieve the State's evidence.'" *Perez-Cervantes,* 141 Wn.2d at 481, *quoting State v. Fowler,* 114 Wn.2d 59, 67, 785 P.2d 808 (1990). "If the evidence would permit a jury to rationally find a defendant guilty of the lesser offense and acquit him of the greater, a lesser included offense instruction should be given." *Berlin,* 133 Wn.2d at 551.

Here, the State conceded the case against Mr. Wade was entirely circumstantial. The State could not provide a motive or any reason

why Mr. Wade would have killed Ms. Thornton. The State also could not prove how she was killed other than that she was strangled; it could not prove whether the strangulation was done with the perpetrator's hands or a ligature. Thus, the strangulation could have just as well been done with criminal negligence or recklessness, constituting either second or first degree manslaughter.

The trial court erred in failing to instruct the jury on Mr. Wade's proposed lesser included instructions. Mr. Wade is entitled to reversal of his conviction and remand for a new trial.

3. THE TRIAL COURT ERRED IN RULING THAT MR. WADE'S UTAH PRIOR CONVICTION WAS COMPARABLE TO A WASHINGTON FELONY OFFENSE

The State sought to include Mr. Wade's Utah State prior conviction for attempted distributing of a controlled substance in his offender score. CP 15759; 10/26/2012RP 3-4. The State's offer of proof regarding the Utah prior failed to include anything which established Mr. Wade's conduct resulting in his conviction that was either found by the jury or admitted by Mr. Wade. CP 221-40. The State conceded at sentencing that the Utah statute was broader than the comparable Washington felony offense, and conceded it was not arguing the factual aspect of the Utah prior conviction. 10/26/2012RP

3-7. Nevertheless, the trial court found the Utah prior conviction to be comparable to a Washington felony offense and included it in Mr. Wade's offender score. 10/26/2012RP 8.

a. The State was required to prove the Utah conviction was comparable to a Washington felony offense. To properly calculate a defendant's offender score, the Sentencing Reform Act (SRA) requires that sentencing courts determine a defendant's criminal history based on his prior convictions. *State v. Ross*, 152 Wn.2d 220, 229, 95 P.3d 1225 (2004). The criminal sentence is based upon the defendant's offender score and the seriousness level of the crime. *State v. Ford,* 137 Wn.2d 472, 479, 973 P.2d 452 (1999). "The offender score measures a defendant's criminal history and is calculated by totaling the defendant's prior convictions for felonies and certain juvenile offenses." *Id.*

When a defendant's criminal history includes out-of-state or federal convictions, the SRA requires classification "according to the comparable offense definitions and sentences provided by Washington law." RCW 9.94A.525(3). The State must prove the existence and comparability of a defendant's prior out-of-state conviction by a preponderance of the evidence. *Ross*, 152 Wn.2d at 230. This Court

reviews the classification of an out-of-state conviction *de novo*. *State v. Jackson*, 129 Wn.App. 95, 106, 117 P.3d 1182 (2005), *review denied*, 156 Wn.2d 1029 (2006).

Generally, when engaging in the comparability analysis, the sentencing court must compare the elements of the prior out-of-state offense with the elements of the potentially comparable current Washington offenses. *In re the Personal Restraint of Lavery,* 154 Wn.2d 249, 255, 111 P.3d 837 (2005); *State v. Morley,* 134 Wn.2d 588, 605-06, 952 P.2d 167 (1998). If the crimes are comparable, a sentencing court must treat the defendant's out-of-state conviction the same as a Washington conviction. *Lavery,* 154 Wn.2d at 254. If, on the other hand, the comparison reveals that the prior offense did not contain one or more elements of the current crime as of the date of the offense (legal comparability), it is then necessary to determine from the out-of-state record whether the out-of-state conviction encompassed each fact necessary to liability for the Washington crime (factual comparability). *Morley,* 134 Wn.2d at 605-06. "In making its factual comparison [this court] may rely on facts in the foreign record that are admitted, stipulated to, or proved beyond a reasonable doubt." *State v. Thiefault,* 160 Wn.2d 409, 415, 158 P.3d 580 (2007), *citing Lavery,*

154 Wn.2d at 258. *See also* RCW 9.94A.530(2) ("In determining any sentence other than a sentence above the standard range, the trial court may rely on no more information than is admitted by the plea agreement, or admitted, acknowledged, or proved in a trial or at the time of sentencing, or proven pursuant to RCW 9.94A.537").

Here, the State conceded that the Utah offense was broader than the closest comparable Washington felony offense. The trial court was then required to engage in the factual analysis and determine whether Mr. Wade's conduct would have violated a comparable Washington statute. *Morley,* 134 Wn.2d at 606. In additon, the State conceded it was not arguing the factual aspect and none of the information supplied by the State established the factual prong. There was nothing in the State's proffer that established Mr. Wade's conduct that was either found by the jury or admitted by Mr. Wade. Further, the trial court never engaged in the factual analysis, merely finding the Utah offense comparable:

> I did review all of the briefing, the documents. And frankly, when I looked at these questions I agreed with the State in its analysis in terms of the fact is it could constitute a crime in Washington State and one the State would recognize here.

10/26/2012RP 8.

Since the State conceded the Utah statute was broader, thus establishing the statutes were not legally comparable, the State was required to prove, and the court was required to find, the facts as found by the jury or admitted by Mr. Wade established his conduct which would have demonstrated factual comparability. Since the State failed to prove this step, conceding it was not arguing the factual component, the State failed to prove the Utah prior conviction was either legally comparable or factually comparable. The trial court erred in including the Utah prior conviction in Mr. Wade's offender score.

b. Remand for resentencing without the foreign prior convictions is the remedy for the trial court's error. In *Ford,* the Supreme Court found that where "the evidence is insufficient to support the conclusion that the disputed convictions would be classified as felonies under Washington law" resentencing was required. 137 Wn.2d at 485. The Court stated, "In the normal case, where the disputed issues have been fully argued to the sentencing court, we would hold the State to the existing record, excise the unlawful portion of the sentence, and remand for resentencing without allowing further evidence to be adduced." *Id.*

The Court reiterated the *Ford* holding in *State v. Lopez,* 147 Wn.2d 515, 55 P.3d 609 (2002), where the Court held that "a remand for an evidentiary hearing is appropriate only when the defendant has failed to specifically object to the State's evidence of the existence or classification of a prior conviction." 147 Wn.2d at 520.

Here, Mr. Wade challenged the comparability of the Utah prior conviction. 10/26/2012RP 5-6. The State then failed in its burden of proving comparability. Since the issue was fully argued before the trial court, the State should be held to the existing record on remand. *Ford*, 137 Wn.2d at 485. Mr. Wade is entitled to remand for resentencing without the Utah prior included in his offender score.

4. THE EXCLUSION OF EVIDENCE OF ANOTHER SUSPECT VIOLATED MR. WADE'S CONSTITUTIONALLY PROTECTED RIGHT TO PRESENT A DEFENSE

Pretrial, Mr. Wade moved to introduce evidence that Georgios Broutzakis, a former boyfriend of Ms. Thornton, was another suspect in the death of Ms. Thornton. CP 32-34. Mr. Broutzakis previously had been convicted of assaulting Ms. Thornton by strangling her, the precise manner in which she was murdered. CP 33. Mr. Broutzakis had also attempted to destroy evidence of this assault in a manner

consistent with crime scene evidence at Ms. Thornton's apartment indicating an attempt to destroy evidence of the murder. CP 33.

In opposition, the State moved to exclude any evidence of other suspects, specifically Mr. Broutzakis. CP Supp __, Sub. No. 95 at 20-23. The State conceded the police initially focused on Mr. Broutzakis as the murderer. CP Supp ___, Sub No. 95 at 7. The State also conceded Broutzakis had a prior conviction of third degree assault for assaulting Ms. Thornton, and that there was currently an active no-contact order in place barring Broutzakis from contacting Ms. Thornton. *Id.* Finally, the State conceded that Ms. Thornton feared Mr. Broutzakis. *Id.* at 7-8. The State ignored the fact that this statement of fear was expressed by Ms. Thornton mere days before her disappearance. CP 33.

Despite this clear motive by Mr. Broutzakis, the State argued that Mr. Broutzakis had not been seen with Ms. Thornton after October 2010, and had not been observed on any of the surveillance videos at her apartment building during the month of December 2010. CP Supp __, Sub No. 95 at 8. From this, the State contended Mr. Wade had not met the burden of proof necessary to introduce evidence of Mr. Broutzakis as another suspect. *Id.* at 23.

The trial court agreed with the State and refused to allow evidence of Mr. Broutzakis as a suspect in Ms. Thornton's murder, finding Mr. Wade had not established the necessary nexus:

> If there was some evidence that Georgios Broutzakis was at the apartment during the relevant time period, I can assure you that this court would be coming to a different conclusion. Mr. Broutzakis may be a bad actor with a violent history involving Ms. Thornton, and in fact may have a motive to harm her, but the cases that I've read tells us that motive alone is not enough.
>
> The evidence proffered here is far too tenuous, and that's not a sufficient foundation of facts or circumstances that the other suspect evidence being offered should be allowed.

7/5/2012RP 6-7.

a. Mr. Wade was constitutionally entitled to present a defense which included admission of any relevant evidence which did not substantially prejudice the State. It is axiomatic that an accused person has the constitutional right to present a defense. U.S. Const. Amend. VI; *Holmes v. South Carolina,* 547 U.S. 319, 324, 126 S.Ct. 1727, 164 L.Ed.2d 503 (2006). The right to present evidence in one's defense is a fundamental element of due process of law. *United States v. Whittington,* 783 F.2d 1210, 1218 (5th Cir., 1986), *citing Washington v. Texas*, 388 U.S. 14, 17-19, 87 S.Ct. 1920, 18 L.Ed.2d 1019 (1967); *State v. Ellis,* 136 Wn.2d 498, 527, 963 P.2d 843 (1998). The right to

present a defense includes the right to confront and cross-examine witnesses on relevant evidence to show bias, motive, or lack of credibility. *Davis v. Alaska,* 415 U.S. 308, 316-18, 94 S.Ct. 1105, 39 L.Ed.2d 347 (1974). Further, this right includes, "at a minimum . . . the right to put before a jury evidence that might influence the determination of guilt." *Pennsylvania v. Ritchie*, 480 U.S. 39, 56, 107 S.Ct. 989, 94 L.Ed.2d 40 (1987); *accord Washington,* 388 U.S. at 19 ("The right to offer the testimony of witnesses . . . is in plain terms the right to present a defense, the right to present the defendant's version of the facts . . . [The accused] has the right to present his own witnesses to establish a defense. This right is a fundamental element of due process of law.").

The Washington Constitution provides for a right to present material and relevant testimony. Art. I § 22; *State v. Roberts,* 80 Wn.App. 342, 350-51, 908 P.2d 892 (1996) (reversing conviction where defendant was unable to present relevant testimony). The defense bears the burden of proving materiality, relevance, and admissibility. *Id.*

> The right to offer the testimony of witnesses, and to compel their attendance, if necessary, is in plain terms the right to present a defense, the right to present the defendant's version of the facts as well as the

> prosecution's to the jury so it may decide where the truth lies. Just as an accused has the right to confront the prosecution's witnesses for the purpose of challenging their testimony, he has the right to present his own witnesses to establish a defense. This right is a fundamental element of due process of law.

Washington, 388 U.S. at 19.

The evidence sought to be admitted by the defendant need only be of "minimal relevance." *State v. Jones,* 168 Wn.2d 713, 720, 230 P.3d 576 (2010). ER 401 provides that evidence is relevant if it makes a fact "of consequence to the determination of the action" more or less probable. "The threshold to admit relevant evidence is low, and even minimally relevant evidence is admissible." *State v. Gregory,* 158 Wn.2d 759, 835, 147 P.3d 1201 (2006). To be relevant, the evidence need provide only "a piece of the puzzle." *Bell v. State,* 147 Wn.2d 166, 182, 52 P.3d 503 (2002).

"[I]f [the evidence is] relevant, the burden is on the State to show the evidence is so prejudicial as to disrupt the fairness of the fact-finding process at trial." *State v. Darden,* 145 Wn.2d 612, 622, 41 P.3d 1189 (2002). The State's interest in excluding prejudicial evidence must also "be balanced against the defendant's need for the information sought," and relevant information can be barred only "if the State's interest outweighs the defendant's need." *Id.* "[T]he integrity of the

truthfinding process and [a] defendant's right to a fair trial" are important considerations. *State v. Hudlow,* 99 Wn.2d 1, 14, 659 P.2d 514 (1983). For evidence of *high* probative value "it appears no state interest can be compelling enough to preclude its introduction consistent with the Sixth Amendment and Const. art. 1, § 22." *Id.* at 16.

b. Mr. Wade proffered sufficient evidence to establish that Mr. Broutzakis was another suspect in the death of Ms. Thornton. In the classic other suspects case, the defendant blames the specific crime for which he has been charged on someone else. *State v. Hawkins*, 157 Wn.App. 739, 751, 238 P.3d 1226 (2010), *review denied*, 171 Wn.2d 1013 (2011). A criminal defendant is permitted to present evidence that another person committed the crime when he can establish "a train of facts or circumstances as tend clearly to point out someone besides the accused as the guilty party." *State v. Downs,* 168 Wash. 664, 667, 13 P.2d 1 (1932); *State v. Rehak,* 67 Wn.App. 157, 162, 834 P.2d 651 (1992), *cert. denied,* 508 U.S. 953 (1993). That foundation requires a clear nexus between the person and the crime. *State v. Condon,* 72 Wn.App. 638, 647, 865 P.2d 521 (1993).

A lesser foundational restriction applies to cases involving circumstantial proof of crime:

> [I]f 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.

State v. Clark, 78 Wn.App. 471, 563, 898 P.2d 854, 858 (1995), *citing Leonard v. The Territory of Washington,* 2 Wash.Terr. 381, 396, 7 P. 872 (1885).

Evidence of possible motive alone is insufficient to establish this nexus. *State v. Kwan*, 174 Wash. 528, 533, 25 P.2d 104 (1933). The offered evidence must demonstrate a "step taken by the third party that indicates an intention to act" on the motive or opportunity. *Rehak*, 67 Wn.App. at 163.

Holmes provides an ample basis for finding the trial court erroneously barred Mr. Wade from admitting the other suspect evidence. The victim in *Holmes* was found beaten, raped, and robbed in her home. She later died of complications stemming from her injuries. Mr. Holmes was convicted by a South Carolina jury of murder, first-degree criminal sexual conduct, first-degree burglary, and robbery, and was sentenced to death.

The evidence in *Holmes* included the defendant's palm print found just above the door knob on the interior side of the front door of the victim's house, fibers consistent with a black sweatshirt owned by the defendant found on the victim's bed sheets, matching blue fibers found on the victim's pink nightgown and on the defendant's blue jeans, microscopically consistent fibers found on the victim's pink nightgown and on the defendant's underwear; the defendant's underwear contained a mixture of DNA from two individuals, and 99.99% of the population other than the defendant and the victim were excluded as contributors to that mixture, and the defendant's tank top was found to contain a mixture of the defendant's and the victim's blood. *Holmes*, 547 U.S. at, 321-22. In addition, the prosecution introduced evidence that the defendant had been seen near the victim's home within an hour of the time when the victim was killed. *Id.* The defendant sought to introduce proof that another man had attacked the victim. *Id.* at 323. The trial court excluded the defendant's other suspect evidence ruling that such evidence was admissible if it "'raise[s] a reasonable inference or presumption as to [the defendant's] own innocence'" but is not admissible if it merely "'cast[s] a bare

suspicion upon another'" or "'raise[s] a conjectural inference as to the commission of the crime by another.'" *Id.* at 323-24.

The United States Supreme Court reversed Mr. Holmes's conviction, finding the trial court's refusal to allow evidence of the other suspect violated his constitutionally protected right to present a defense:

> The rule applied in this case appears to be based on the following logic: Where (1) it is clear that only one person was involved in the commission of a particular crime and (2) there is strong evidence that the defendant was the perpetrator, it follows that evidence of third-party guilt must be weak. But this logic depends on an accurate evaluation of the prosecution's proof, and the true strength of the prosecution's proof cannot be assessed without considering challenges to the reliability of the prosecution's evidence. Just because the prosecution's evidence, if credited, would provide strong support for a guilty verdict, it does not follow that evidence of third-party guilt has only a weak logical connection to the central issues in the case. And where the credibility of the prosecution's witnesses or the reliability of its evidence is not conceded, the strength of the prosecution's case cannot be assessed without making the sort of factual findings that have traditionally been reserved for the trier of fact and that the South Carolina courts did not purport to make in this case.
>
> The rule applied in this case is no more logical than its converse would be, i.e., a rule barring the prosecution from introducing evidence of a defendant's guilt if the defendant is able to proffer, at a pretrial hearing, evidence that, if believed, strongly supports a verdict of not guilty. In the present case, for example, petitioner proffered evidence that, if believed, squarely proved that

> White, not petitioner, was the perpetrator. It would make no sense, however, to hold that this proffer precluded the prosecution from introducing its evidence, including the forensic evidence that, if credited, provided strong proof of petitioner's guilt.

Holmes, 547 U.S. at 330.

Here, the State had similar evidence implicating Mr. Wade in the murder of Ms. Thornton. Mr. Wade's DNA was on several articles of Ms. Thornton's clothing. There was also evidence of DNA of another person besides Mr. Wade and Ms. Thornton in the apartment. Further, the evidence against Mr. Broutzakis which, if believed by the jury, would have proved he and not Mr. Wade committed the murder. As in *Holmes*, the trial court's ruling here violated Mr. Wade's right to present a defense.

Similarly, in *Clark,* the defendant moved to admit evidence of another suspect in a circumstantial case. *Clark*, 78 Wn.App. at 474. Division Two of this Court reversed and ordered the jury be allowed to determine the weight and credibility of the defendant's evidence regarding the other suspect. *Id.* at 480. The Court ruled:

> In the present case, as the State noted in its closing argument, the evidence against Clark was entirely circumstantial. His alleged motive was insurance proceeds. Although he was at his office the night of the fire and removed a fish tank, two witnesses said he was with them at least one hour prior to the time the fire was

> first observed. While this evidence is not insufficient to support a conviction, no evidence linked Clark directly to the fire.
>
> Similar evidence indicates that Arrington had the motive, opportunity, and ability to commit the arson. Arrington's alleged motive was revenge against Clark for having an affair with his wife and, Arrington believed, molesting his daughter. Arrington had the opportunity to set the fire because his vehicle was seen near the house prior to the fire and because, although he had a similar alibi to Clark's, he nonetheless may have had time to drive to his meeting after setting the fire. Clark also sought to offer evidence that Arrington had previously threatened to set his former wife's house afire and that he had told her he knew how to commit arson without being detected. Like Clark, while no evidence directly linked Arrington to the fire, this evidence nonetheless provides a trail of evidence sufficiently strong to allow its admission at trial.

Clark, 78 Wn.App. at 479-80 (footnotes omitted).

As in *Clark*, the evidence against Mr. Wade was entirely circumstantial. In addition, Mr. Broutzakis had as much of a motive and opportunity to kill Ms. Thornton as Mr. Arrington did to kill Mr. Clark's wife. As in *Clark*, the trial court here violated Mr. Wade's constitutionally protected right to present a defense when it barred him from providing evidence that Mr. Broutzakis was an additional suspect in the murder of Ms. Thornton.

c. The error in refusing to allow Mr. Wade to admit evidence of Mr. Broutzakis as another suspect was not harmless. Error of constitutional magnitude can be harmless if it is proven to be harmless beyond a reasonable doubt. *Chapman*, 386 U.S. at 24. An error is harmless "if we are convinced beyond a reasonable doubt that any reasonable jury would have reached the same result without the error." *Jones,* 168 Wn.2d at 724, *quoting State v. Smith,* 148 Wn.2d 122, 139, 59 P.3d 74 (2002).

The State cannot meet its burden of proving the error was harmless. The case against Mr. Wade was entirely a circumstantial case. The evidence regarding Mr. Broutzakis was also equally circumstantial and, had it been before the jury, the jury would have heard a completely different account of Ms. Thornton's death. So it is possible that a reasonable jury may have reached a different result. The trial court's error prevented Mr. Wade from presenting his theory of the murder. The error was not harmless beyond a reasonable doubt. *Jones*, 168 Wn.2d 724-25.

5. OFFICER MOORE'S REFERENCE TO MR. WADE'S BOOKING PHOTO SO PREJUDICED MR. WADE'S ABILITY TO RECEIVE A FAIR TRIAL THAT A MISTRIAL WAS THE ONLY REMEDY

Prior to trial, Mr. Wade moved to prohibit use or reference to any booking photos of him, which the trial court granted. CP 30-31. During the trial, Seattle Police Officer Randy Moore, who was one of the officers who arrested Mr. Wade, twice referred to Mr. Wade in the context of booking. In one, Moore referred to Mr. Wade, "and that he had been booked into King County Jail recently prior to that." 9/10/2012RP 78. The officer noted that he knew the person he arrested was Mr. Wade because "we had a recent booking photo." 9/10/2012RP 79.

In response, Mr. Wade moved for a mistrial as it prejudiced Mr. Wade's ability to get a fair trial. 9/10/2012RP 135. The trial court denied the mistrial motion, finding that the error could be cured through a jury instruction. 9/10/2012RP 140.

Instead of a jury instruction, the parties stipulated that the booking referred to by the police officer referred to Mr. Wade's arrest for having an open container of alcohol in a bus shelter and was not

related to any assaultive behavior on Mr. Wade's part. 9/10/2012RP 141, 150.

a. Mistrial is a proper remedy for a violation of a court's pretrial rulings. A court should grant a mistrial when the defendant has been so prejudiced that nothing short of a new trial can insure that he will be tried fairly. *State v. Mak,* 105 Wn.2d 692, 701, 718 P.2d 407 (1986).

The remedy for a violation of an *in limine* order by a prosecution witness is a mistrial. *State v. Escalona*, 49 Wn.App. 251, 256, 742 P.2d 190 (1987). In determining the effect of an irregularity in trial proceedings, courts examine (1) the seriousness of the irregularity; (2) whether the irregularity involved cumulative evidence; and (3) whether the trial court properly instructed the jury to disregard the irregularity. *State v. Weber,* 99 Wn.2d 158, 165-66, 659 P.2d 1102 (1983). A trial court's denial of a motion for a mistrial is reviewed under an abuse of discretion standard. *State v. Wade*, 138 Wn.2d 460, 464, 979 P.2d 850 (1999).

b. Detective Moore's reference to Mr. Wade's booking photo improperly implied he was guilty because he was already a convicted felon. The defense argued, and the trial court agreed in granting the *in limine* motion, that testimony that the photos for the photo montage were the booking photos of the defendant from prior arrests was inadmissible and more prejudicial than probative. Nevertheless, the investigating detective violated the order twice by telling the jury the photos were booking photos of the defendant.

In *Escalona,* the defendant was charged with assault while armed with a deadly weapon, a knife. 49 Wn.App. at 252. Before trial, the court granted a defense motion *in limine* to exclude any reference to Mr. Escalona's prior conviction for the same crime. *Id.* At trial, Vela, the State's primary witness, testified that Escalona "already has a record and had stabbed someone." *Id.* at 253. Although the trial court instructed the jury to disregard the statement, Escalona moved for a mistrial, which was denied. *Id.*

On appeal, this Court held that the trial court abused its discretion in denying Mr. Escalona's motion for a mistrial, concluding that the prejudicial effect of Vela's statement could not be cured due to "the seriousness of the irregularity here, combined with the weakness

of the State's case and the logical relevance of the statement." *Escalona,* 49 Wn.App. at 256.

In analyzing the first *Weber* factor, the seriousness of the irregularity, this Court held that Vela's statement was "extremely serious" in light of ER 609 and ER 404(b). *Id.* at 255. This Court emphasized the weakness of the evidence against Mr. Escalona, pointing out that the State's entire case essentially rested on Vela's testimony, which contained many inconsistencies. *Id.* This Court next determined that the second *Weber* factor, whether the statement was cumulative, undermined the trial court's ruling since it ruled *in limine* to exclude evidence relating to the prior conviction. *Id.* Finally, in applying the third *Weber* factor, whether the trial court's instruction to disregard the statement could cure the error, the *Escalona* Court determined that Vela's statement was inherently prejudicial due to "the logical relevance of the statement," reasoning that "the jury undoubtedly would use it for its most improper purpose, that is, to conclude that Mr. Escalona acted on this occasion in conformity with the assaultive character he demonstrated in the past." *Id.* at 256.

Here, as in *Escalona*, the detective's statements were extremely serious in light of ER 609 and ER 404(b). This is even more so in light

of the entirely circumstantial case against Mr. Wade. In addition, the detective's statements were not cumulative or repetitive of other evidence. In fact, the trial judge had ruled that this information could not be admitted. Finally, the parties' stipulation to the underlying facts of Mr. Wade's arrest resulting in the booking photograph could not "remove the prejudicial impression created [by evidence that] is inherently prejudicial and of such a nature as to likely impress itself upon the minds of the jurors." *Escalona,* 49 Wn.App. at 255, *quoting State v. Miles,* 73 Wn.2d 67, 71, 436 P.2d 198 (1968). Further, a "bell once rung cannot be unrung." *State v. Trickel*, 16 Wn.App. 18, 30, 553 P.2d 139 (1976). In light of the *Escalona* decision, the trial court's failure to declare a mistrial was an abuse of discretion. This Court must reverse Mr. Wade's conviction.

6. THE CUMULATIVE EFFECT OF THE MULTIPLE ERROR REQUIRES REVERSAL OF MR. WADE'S CONVICTION

The cumulative error doctrine applies when several trial errors occur which standing alone may not be sufficient to justify reversal, but when combined deny a defendant a fair trial. *State v. Greiff,* 141 Wn.2d 910, 929, 10 P.3d 390 (2000). Here, should this Court determine that multiple errors occurred which alone would not require

reversal, Mr. Wade submits the cumulative effect of the multiple errors requires reversal of his conviction.

E. CONCLUSION

For the reasons stated, Mr. Wade asks this Court to reverse his conviction and remand for a new trial. Alternatively, Mr. Wade seeks reversal of his sentence and remand for resentencing without the Utah prior conviction included in his offender score.

DATED this 28th day of October 2013.

Respectfully submitted,

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

STATE OF WASHINGTON,	)	
	)	
Respondent,	)	
	)	NO. 69527-4-I
v.	)	
	)	
GARY WADE,	)	
	)	
Appellant.	)	

DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ARRANZA RILEY, STATE THAT ON THE 29TH DAY OF OCTOBER, 2013, I CAUSED THE ORIGINAL **OPENING BRIEF OF APPELLANT** TO BE FILED IN THE **COURT OF APPEALS – DIVISION ONE** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

[X] KING COUNTY PROSECUTING ATTORNEY APPELLATE UNIT KING COUNTY COURTHOUSE 516 THIRD AVENUE, W-554 SEATTLE, WA 98104	(X) ( ) ( )	U.S. MAIL HAND DELIVERY _____
[X] GARY WADE 362423 WASHINGTON STATE PENITENTIARY 1313 N 13TH AVE WALLA WALLA, WA 99362	(X) ( ) ( )	U.S. MAIL HAND DELIVERY _____

SIGNED IN SEATTLE, WASHINGTON THIS 29TH DAY OF OCTOBER, 2013.

X_____

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