COURT OF APPEALS No. 31529-1

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

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STATE OF WASHINGTON, Respondent

v.

FRANK BRUGNONE, Petitioner

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# PETITION FOR REVIEW

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253-445-7920

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I. IDENTITY OF PETITIONER

Petitioner Frank Brugnone asks this Court to review the decision by the Court of Appeals, Division III, referred to in Section II.

II. COURT OF APPEALS DECISION

The Petitioner seeks review of the Court of Appeals decision issued September 13, 2016. A copy of the Court's unpublished opinion is attached as Appendix A. This petition for review is timely made.

III. ISSUES PRESENTED FOR REVIEW

A. Was Mr. Brugnone's right to due process under Washington Constitution, Article 1, § 3 violated where the State failed to prove the essential elements of the crime of murder in the second degree, but relied on inference and presumption?

IV. STATEMENT OF THE CASE

Procedural Background

On July 18, 2011, Frank Brugnone was charged by information with one count of second-degree murder, acting as a principal or an accomplice in the 1997 murder of Carolyn Clift. CP 4. Codefendant Michael Gorski was similarly charged. Mr. Brugnone's case was tried to the court and Mr. Gorski's case was tried to a jury. CP 100; (1/17/13 RP 165).

Factual Background

On August 28, 1997, between 5:00 and 6:00 pm, Carolyn Clift went to the local liquor store and purchased a bottle of whiskey. (1/30/13 RP 688;690). She told the clerk a friend was coming over for dinner. (1/30/13 RP 689). As she left the store, Michael Gorski ("Gorski") entered and made a purchase. Ms. Clift and Gorski did not acknowledge one another in the store, but after they left, the clerk saw Ms. Clift talking to Gorski near his car. (1/30/13 RP 701). That evening, between 6:45 pm and 7:30 pm, Ms. Clift rented two movies from a video store. (2/4/13 RP1102-1106).

That same evening, after 9:00 p.m. a witness recalled seeing Ms. Clift at the Wagon Wheel bar dancing by herself. (2/1/13 RP 887-88). She left alone, before midnight. (2/1/13 RP 896). The witness also saw Mr. Brugnone that evening, but *not* with Ms. Clift. (2/1/13 RP 893). He did not remember seeing Gorski. (2/1/13 RP 894).

Megan Nunley, a former girlfriend of Gorski, reported she saw Mr. Gorski on the afternoon of August 28, 1997, at the Wagon Wheel. (2/1/13 RP 928). She invited him to her home. She left the bar sometime between 7:00 and 7:15 pm. (2/1/13 RP 939-40).

Gorski arrived at her home between 8:00 and 8:30 pm. He told her he was late because he had given a woman a ride home from the liquor store. (2/1/13 RP 940-41; 944). He stayed until 10:00 or 10:30 pm. (2/1/13 RP 942).

At 11:19 pm, a Selah Square Apartment resident called police to say she heard a scream and thought it was her neighbor, Carolyn Clift. Ms. Clift was known to local police officers; they had previously received calls about her and considered her "a little mentally challenged." (1/29/13 RP 440;448). Responding officers arrived at 11:22 pm and entered the apartment. (1/29/13 RP 450). They found Ms. Clift naked, lying in a pool of blood. (1/29/13 RP 453;482; 489-90;498).

An autopsy revealed that she had four stab wounds thru three wound entrances; one at the lower region of the left ribcage, another on the lower left chest, and one between the shoulder blades that had two wound paths from the same entrance. (1/30/13 RP 590;594). The wound to the back was unusual, requiring "a tremendous amount of force" to cut through the vertebrae. He was unable to reference the sequence of the three wounds; and while he surmised that the wound that cut through the vertebrae may have occurred latest in time, he agreed that Ms. Clift could have

been on the floor when the abdomen/chest wounds were inflicted. (1/30/13 RP 609-610; 675). He also described defensive cut wounds on the left hand and minor bruising on her face, neck, and elbow. (1/30/13 RP 606-07).

Officers interviewed neighbors in the apartment complex. Neighbor Carolee Appleton said she did not see anyone going in or out of the apartment on the night of the homicide. (2/1/13 RP 973). On September 10, 1998, a year later, Ms. Appleton told an officer that *a month prior* to the homicide she had seen two "kids" arrive in a blue pickup truck. (2/1/13 RP 981-82). At that time, Mr. Brugnone, aged 44, owned and drove an older blue pick up truck. (2/4/13 RP 1161; 2/6/13 RP 1313; SE 129 p. 47). Only one of them, the passenger, went into Ms. Clift's apartment. (2/1/13 RP 982). She again reported she *did not* see a vehicle or the "kids" the night of the murder. (2/1/13 RP 985).

On September 17, 1998, she gave a third statement. (2/1/13 RP 987). She again reported that she did not see anyone on the night of the homicide, and again, that she had seen a person three weeks prior to the murder; a man driving a blue pick up truck dropped his friend off at the apartment. (2/1/13 RP 987-88). She described the individual who entered the apartment as late 20s to

30 years old, with a butch type haircut. (2/1/13 RP 990;1035). When he was leaving, she heard him say to the driver of the truck, "C'mon let's get out of here." (2/7/13 RP 1562). She believed she heard the same male voice on the night of the homicide. (2/1/13 RP 992).

Fifteen years later, at trial, she denied some of the content of her earlier statements and noted that she did not remember things very well. (2/1/13 RP 992;997;1012;). She testified that on the afternoon of the homicide, between 5:30 and 6:30 pm, she sat with Ms. Clift and another tenant at a picnic table. (2/1/13 RP 951). A man approached the table and said, "I've come with dessert. I'm not taking her to dinner." (2/1/13 RP 952-53). He carried a bag wrapped around a bottle, and followed Ms. Clift into her apartment. (2/1/13 RP 953). Ms. Appelton said someone driving a blue truck had dropped off the man. (2/1/13 RP 954).

Later that night, she thought she heard a man knock lightly on Ms. Clift's door between 1:30 and 2:30 am; he did not enter the apartment. (2/1/13 RP 963; 997). She heard him say, "It's taking too long. C'mon. Hurry." (2/1/13 RP 962). "The kid" then ran back to his truck and another man came running out of the apartment with a towel shielding his face. (2/1/13 RP 998). She

testified that although she gave a statement earlier to officers that she may have heard him say "Did you do it?" at trial she said:

> "Yes, but I'm not sure that I really heard that then. That's it. I just don't know. He was yelling at the other guy, 'get that started. We've got to get out of here.' He said, 'what did you do?' Something like that, in that order." (2/1/13 RP 1013).

Eighty five year old apartment resident Virginia Jones reported that neighbor Lila Powell called her at 11:15 pm saying she heard screams. Ms. Jones went to Ms. Clift's apartment and called out for her. When she did not get an answer, she went to Ms. Powell's apartment. (1/31/13 RP 867). She saw a man run by the door, with his head down, and something shielding his face. He was wearing an unbuttoned shirt, blue jeans, and was between 5'10" and 6' tall. (1/31/13 RP 849). He ran into Ms. Clift's apartment, turned around, and went back out. (1/31/13 RP 861-62). Then she heard the motor of a car start. She saw a car, not a truck. She speculated there was another person in the car, but never saw anyone. (1/31/13 RP 863-64;876).

Investigating officers collected a variety of items from inside Ms. Clift's apartment: Marlboro cigarette butts that were located

inside, near the front door, and a pair of eyeglasses from the living room. (1/29/13 RP 567).

Officers contacted Mr. Gorski on September 2, 1997, and on September 4, 1997, he gave a taped interview. He also gave an untaped interview on September 17, 1997. (1/31/13 RP 725-726). Mr. Gorski told police he had been at Ms. Nunley's home until 10:30 or 11:00 pm that evening and then went home. At the time, he lived with Mr. Brugnone and Mr. Brugnone's wife. (1/31/13 RP 730).

On April 10, 1998, officers again met with Mr. Gorski and obtained blood and hair samples from him. (1/31/13 RP 732). DNA testing results on the cigarettes and eyeglasses, as well as scrapings from Ms. Clift's fingernails, were later found to be consistent with the DNA profile of Michael Gorski. (2/4/13 RP 1190-91; 1196; 1201-02). Mr. Brugnone was *excluded* as a contributor. (2/4/13 RP 1196; 1203;1205).

In an initial interview with officers, Ms. Nunley did not mention that she had seen or talked to Mr. Brugnone in the days following the homicide, or that he ever asked her to provide him with an alibi. (2/1/13 RP 945-46). She later told police that she had a vague recollection of Mr. Brugnone asking her for an alibi.

However, at trial she testified that she didn't know what date it might have happened, didn't know the details, and didn't remember anything about an alibi. (2/1/13 RP 945).

February 22, 2007 and again in 2011, Cecil Toney, gave information to police regarding the unsolved homicide. (1/31/13 RP 783; 2/6/13 RP 1405). He knew Ms. Clift from the restaurants, bars, and lounges in Selah. (1/31/13 RP 775). Ms. Nunley was Mr. Toney's ex-wife. (2/1/13 RP 927).

In a transcribed interview, Mr. Toney reported that sometime between midnight and 12:30 am he drove a friend, whose last name he did not remember, to the apartment the night before the homicide. (1/31/13 RP 837). He made a U-turn near the parking lot and for a 'split second' saw two figures ducking between cars. (1/31/13 RP 787; 809; 843). He identified the men as Michael Gorski and Frank Brugnone[1]. (1/31/13 RP 782).

At trial, he changed the timeline account several times between his original midnight to 12:30 am frame and an 11 pm to midnight time. (1/31/13 RP 800). He testified that rather than the

[1] In the Court of Appeals opinion p. 2 the Court mistakenly writes that a witness told police he saw Ms. Clift and Mr. Brugnone outside the apartment that night. This fact is corrected on p. 7, where the Court cites that the witness saw Mr. Brugnone and the co-defendant, Mr. Gorski.

night *before* the murder, he saw them the night *of* the murder. (1/31/13 RP 800). Additionally, the original information of a "split second" view as he made his U-turn, was instead a 30 second to two minute U-turn. (1/31/13 RP 804;808;812-13).

On July 13, 2011, officers placed Mr. Brugnone under arrest. (2/6/13 RP 1491-92). Mr. Brugnone told officers he had no recollection of being at Ms. Clift's apartment in August 1997. (State Exh. 129 p. 4,14;25;35). Mr. Brugnone pieced together the evening's events over the course of approximately seven hours. ((2/6/13 RP 1506-07; State Exh. 129 p. 57-58).

He remembered he had been to Ms. Clift's apartment in July 1997, for a one-night stand with her. (State Exh. 129 p. 33). He believed that Gorski had had at least two sexual encounters with Ms. Clift. (State Exh. 129 p. 50).

On the evening of August 28,1997, he and Gorski had been drinking at the Wagon Wheel. Gorski and Ms. Clift danced. (2/1/13 RP 887-88). Ms. Clift left the tavern. Gorski asked him to take him to her home. (State Exh. 129 p. 68). When they arrived at the apartment, Ms. Clift greeted them with hugs. (State Exh. 129 p. 68). They entered the apartment and Mr. Brugnone moved aside

while Ms. Clift and Gorski whispered and kissed. (State Exh. 129 p. 68). Gorski removed Ms. Clift's robe. (State Exh. 129 p.68)

In less than 15-20 minutes, Gorski pushed or shoved Ms. Clift into Mr. Brugnone. (State Exh. 129 p. 68). Mr. Brugnone pushed her back and away from him. (State Exh. 129 p. 68; 79). He saw Gorski push, hit, or stab Ms. Clift in her back; he wasn't sure if he saw him use a rod or a knife, describing it as "a big, big long thing, long knife but I couldn't tell exactly what it looked like or what the handle looked like or anything, it was just a big long thing." (State Exh. 129 p.68-70;87). As Ms. Clift went to her knees, Mr. Brugnone tried to catch her, but she fell to the floor. (State Exh. 129 p. 70;82). He got down on the floor to see if she was injured and saw blood. (State Exh. 129 p. 82-83).

> "I come over and ask her you alright, she's kinda, well now she's kinda screaming and groaning and I went asks are you alright. She says I don't know I think so. I said well, Mike will take care of you. I said I'm leaving." (State Exh. 129 (82).

He told police that she grabbed him by his shoulder as he stood up. (State Exh. 129 p. 72). Frightened, Mr. Brugnone told Gorski he was leaving, saying, "I said I'm outta here Mike you did this, you, I'm outta here." (State Exh. 129 p.71; 72; 74). He

reported he "didn't know what he [Gorski] had done. I didn't know if he killed her or what you know at that time. I know he'd hurt her." (State Exh. 129 p. 74).

Mr. Brugnone did not see Gorski stab her a second time, however, as he was leaving, he thought he saw Gorski move toward her and do something to her side. (State Exh.129 p.70;72;83;98). He never saw a hammer. (State Exh.129 p. 94).

He left, sat in his car, and waited for Gorski . (State Exh. 129 p. 73-74). Gorski came out to the car, told Mr. Brugnone not to leave, and went back into the apartment. (State Exh.129 p. 75). Mr. Brugnone waited another four or five minutes, and then drove the two of them home. (State Exh.129 p. 76).

Gorski testified he was not with Mr. Brugnone on the day of the homicide. (2/7/13 RP 1635). He saw Ms. Clift at the liquor store, gave her a ride home, and at her invitation, went inside her apartment. (2/7/13 RP 1592;1603;1654). They drank gin and smoked cigarettes. (2/7/13 RP 1603). As they sat on the sofa, they kissed and hugged. (2/7/13 RP 1608). He left her apartment between 7:30 and 7:40 pm and went to Ms. Nunley's home until 10 or 10:30 pm and then drove home. (2/7/13 RP 1592; 1609; 1614;

1656). He forgot his eyeglasses and cigarettes at Ms. Clift's apartment. (2/7/13 RP 1610).

Mr. Brugnone was found guilty of murder in the second degree with a special finding of armed with a deadly weapon. CP 126;155.

On appeal, Mr. Brugnone challenged numerous findings of fact and the sufficiency of the evidence to sustain the conviction. While acknowledging "the evidence of his direct participation is not as clear as it is for Mr. Gorski", the Court of Appeals nevertheless confirmed the conviction stating:

> He was *present* for the killing, urged Mr. Gorski to hurry up after telling the victim that Gorski would "take care of [her]", started up his truck and *waited* for Gorski before driving the two away from the scene....Given that the victim showed defense injuries and was stabbed in front and in back, the judge was permitted to *infer that his participation was more active than he admitted.* Brugnone's statement about leaving the scene also was inconsistent with the report from the apartment dwellers.

Slip Op. at 6-7. (Emphasis added).

## IV. ARGUMENT WHY REVIEW SHOULD BE ACCEPTED

This Court should accept review because due process requires the State to prove its case beyond a reasonable doubt. Sufficiency of the evidence for a conviction is a question of constitutional magnitude. RAP 13.4(3). The Court of Appeals opinion affirming the conviction does not comport with due process as it impermissibly lowers the criteria for accomplice liability to attach and rests on impermissible inference rather than substantial evidence.

If convicted as an accomplice, an individual is considered to have actually committed the crime. *State v. Carter,* 154 Wn.2d 71, 78, 109 P.3d 823 (2005). Thus, to beheld vicariously liable for the criminal conduct of another on a charge of second-degree murder requires more than knowledge, presence or even assent. *State v. Renneberg,* 83 Wn.2d 735, 740, 52 P.2d 835 (1974). It requires an overt act: actions or words that carry the crime forward and knowledge that one is facilitating a homicide. *State v. Peasley,* 80 Wash. 99, 100, 141 P.316 (1914); *Pers. Restraint of Sarausad,* 109 Wn.App. 824, 836, 39 P.3d 308 (2001). It is the intent to facilitate another in the commission of the crime by providing assistance

through presence and actions that makes an accomplice criminally liable. *State v. Galisia,* 63 Wn.App. 833, 840, 822 P.2d 303 (1992).

Here, the evidence does not meet the legal requirements to sustain a conviction based on accomplice liability. In its opinion, the Court of Appeals, like the trial court, relied on testimony that Mr. Brugnone was *present* at the apartment complex. (1/13/13 RP 782). Mere presence is an insufficient basis for accomplice liability and there was no evidence Mr. Brugnone facilitated the crime by his presence because he left the apartment. Mr. Brugnone left the apartment immediately after he saw Gorski attack Ms. Clift. Gorski remained inside. Witness testimony corroborated that Mr. Brugnone was outside the apartment and Gorski was inside with Ms. Clift. (2/1/13 RP 782; 962-63; 965).

Accomplice liability requires solicitation, command, encouragement or a request that another commit the crime, or aiding or agreeing to aid another in planning or committing the crime. RCW 9A.08.020(3)(a). Even viewed in the light most favorable to the State, Mr. Brugnone's alleged comment, whispered through a closed door, " Hurry. It's taking too long" does not rise to the level of soliciting or encouraging another. Similarly, asking "What did you do?" or "Did you do it?" (2/1/13 RP 963;1013) is

insufficient. The State must prove that the defendant was *ready to assist* in the crime." *State v. Luna,* 71 Wn.App. 755, 759, 862 P.2d 620 (1993).

In *Ferreira*, the Court reasoned that an accused's presence in a car would not be sufficient to find him guilty as an accomplice. *State v. Ferreira,* 69 Wn.App. 465, 471, 850 P.2d 541 (1993). Even directing someone where to drive might not, standing alone prove accomplice liability. Rather, accomplice liability attached only if giving directions was accompanied by evidence they were given to facilitate the commission of a crime. The actions would show a desire to make the criminal undertaking succeed. *Ferreira,* 69 Wn.App. at 471. Mr. Brugnone's presence and remark of "Hurry up" are not accompanied by evidence he was facilitating the commission of a crime. His action of leaving the apartment and later telling Gorski to hurry do not evidence a desire to make the criminal undertaking succeed.

The Court of Appeals affirmed the trial court : Given that the victim showed defense injuries and was stabbed in front and in back, the judge was permitted to *infer that his participation was more active than he admitted.* An inferential fact is one "established by conclusions drawn from other evidence rather than

from direct testimony or evidence; a fact derived logically from other facts." BLACK'S LAW DICTIONARY.

In *McCreven,* the Court upheld the accomplice conviction because the evidence showed the defendant held up his hand to prevent another from coming to the victim's rescue. *State v. McCreven,* 170 Wn.App. 444, 284 P.3d 793 (2012), *rev. denied* 176 Wn.2d 1015, 297 P.3d 708. It was the overt act of preventing another from assisting the victim that aided and assisted his accomplices. His act allowed them to continue their assault on the victim. The overt act created the reasonable inference of complicity.

Similarly, in *Sanchez,* the Court affirmed a reasonable inference of complicity because the defendant knew his partner was going to sell drugs, and the purpose of his presence was to aid in carrying out the enterprise by carrying a loaded weapon. When police arrived and he reached for the gun he committed an overt act from which a trier of fact could infer complicity. *State v. Sanchez,* 60 Wn.App. 687, 806 P.2d 782 (1991).

Here, there is no overt act which points to a reasonable inference that Mr. Brugnone was complicit in the homicide. The court pointed to her numerous injuries, but the State presented no

evidence that more than one person inflicted the injuries. The fact of the injuries in and of themselves does not create a reasonable inference of participation by Mr. Brugnone. The State did not produce sufficient evidence to sustain the conviction.

## V. CONCLUSION

Based on the foregoing facts and authorities, Mr. Brugnone respectfully asks this Court accept review of his petition.

Dated this 13th day of October, 2016.

Respectfully submitted,

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**SEPT 13, 2016**
**In the Office of the Clerk of Court**
**WA State Court of Appeals, Division III**

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

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| STATE OF WASHINGTON, | ) | |
| | ) | No. 31529-1-III |
| Respondent, | ) | (consolidated with |
| | ) | No. 31563-1-III) |
| v. | ) | |
| | ) | |
| FRANK EUGENE BRUGNONE | ) | |
| and MICHAEL ORREN GORSKI, | ) | UNPUBLISHED OPINION |
| | ) | |
| Appellants. | ) | |

KORSMO, J. — Frank Brugnone and Michael Gorski appeal from their convictions for second degree murder, raising separate challenges arising from their joint trial. Determining that there was no error, we affirm.

FACTS

This joint prosecution involved a "cold case," the investigation into the 1997 murder of Carolyn Clift, who was killed in her apartment late in the evening of August 28th that year. Two men were seen leaving Ms. Clift's apartment, but police were unable to identify them at the time. Early DNA testing was inconclusive, but more sensitive testing later tied Mr. Gorski to the crime scene.

He had been a subject of the original police investigation because he was seen conversing with Ms. Clift outside a Selah liquor store on August 28th after both had

made purchases at the establishment. The two left together in his car. Later that evening Ms. Clift was seen renting a video at a video store. Brugnone, Clift, and Gorski all were seen later that evening at the Wagon Wheel, but Ms. Clift was not seen in the company of the two men at the establishment.

Around 11:00 p.m., a neighbor in the Selah Square Apartments heard screaming from Ms. Clift's apartment and called another neighbor. When they received no response to their knocks at her door, the two women called 911. While they were awaiting police, some neighbors saw a white male run from Ms. Clift's apartment and one of them heard him call out "get it started." An engine started up and two men drove off in a blue pickup truck.

Police discovered Ms. Clift dead on the floor of her living room. She had been stabbed four times. The final wound penetrated her vertebra and had probably been driven in by a hammer or similar object. The investigation identified several people of interest, but was unable to place any of them at the crime scene that evening. Mr. Gorski told police he had given Ms. Clift a ride home from the liquor store, but otherwise had not known her. He lived at that time at Mr. Brugnone's home. Brugnone's wife told police that her husband drove a blue pickup truck.

In 2007, a witness, Cecil Toney, came forward and told police he had seen Clift and Brugnone, whom he knew, in a blue pickup truck outside the Selah Square Apartments the night of the murder. Later that year, Selah police submitted cigarette

butts found at the crime scene for DNA testing. Mr. Gorski's DNA was found on them, as well as on a pair of eyeglasses. Y-STR testing in 2011 on mixed DNA recovered from the victim's fingernails also matched Mr. Gorski and excluded all of the other males under investigation.

Mr. Brugnone, who initially told police he had never been at Ms. Clift's apartment, later confessed that he had been in the apartment at the time of the killing, but denied involvement in the act. He described Gorski attacking Ms. Clift from behind and throwing her into him, leading Brugnone to leave the apartment. As she fell to her knees, Mr. Brugnone told her that "Mike will take care of you."

Charges of second degree murder while armed with a deadly weapon were filed against the two men and proceeded to a joint trial. Brugnone waived his right to a jury trial and his case tried to the bench while a jury heard the case against Mr. Gorski. Brugnone's statements to the police were not presented to the jury.

Both men were found guilty as charged. The trial court imposed identical high-end 244 month sentences in each case. Both men appealed to this court. The two appeals were consolidated and considered by a panel without oral argument.

## ANALYSIS

Mr. Brugnone's appeal challenges the sufficiency of the evidence to support four of the bench trial findings and to support the conviction. Mr. Gorski challenges the admission of Mr. Toney's testimony, the sufficiency of the evidence to support the jury

verdict, and the imposition of legal financial obligations (LFOs) against him. We address those contentions in the order indicated, beginning with Mr. Brugnone's issue.[1] We then will consider motions filed by both men to waive costs on appeal.

*Sufficiency of Evidence Against Mr. Brugnone*

Mr. Brugnone challenges the sufficiency of the evidence, including four findings entered after the bench trial. He contends he was merely a bystander. Well settled standards govern our review of this argument.

"Following a bench trial, appellate review is limited to determining whether substantial evidence supports the findings of fact and, if so, whether the findings support the conclusions of law." *State v. Homan*, 181 Wn.2d 102, 105-106, 330 P.3d 182 (2014) (*citing State v. Stevenson*, 128 Wn. App. 179, 193, 114 P.3d 699 (2005)). "'Substantial evidence' is evidence sufficient to persuade a fair-minded person of the truth of the asserted premise." *Id.* In reviewing insufficiency claims, the appellant necessarily admits the truth of the State's evidence and all reasonable inferences drawn therefrom.

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[1] Both men also submitted personal statements of additional grounds. RAP 10.10. Each claims the other was guilty and he was found guilty only due to the association with the other, but neither explains why a severance was required. Mr. Gorski also argues his confrontation right was violated, citing to *Bruton v. United States*, 391 U.S. 123, 88 S. Ct. 1620, 20 L. Ed. 2d 476 (1968). However, Mr. Brugnone's statement was never put before the jury, so this claim is without merit. The other arguments are either unintelligible or dependent upon evidence outside the record of this case, so we are unable to address them.

*State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). Finally, this court must defer to the finder of fact in resolving conflicting evidence and credibility determinations. *State v. Camarillo*, 115 Wn.2d 60, 71, 794 P.2d 850 (1990).

Mr. Brugnone first challenges five of the findings from the bench trial, which we group into three contentions. The first challenge is to finding 70, which determined that Carolee Appleton had overheard the driver (Brugnone) ask Mr. Gorski, "did you do it?" In her statement to the police, she had quoted Brugnone as stated in finding 70. At trial, defense counsel asked Ms. Appleton if she had told the officer she heard the man say, "did you do it?" Report of Proceedings (RP) at 1012. She stated that the officer got that part right, but she was not sure of the order of the statement with respect to the other statements. She recited it thus: "He was yelling at the other guy, get that started. We've got to get out of here. He said, 'What did you do?' Something like that, in that order." RP 1013. While the latter formulation does vary, the trial court was free under the evidence to credit her original statement ("did you do it?") that she had just affirmed for defense counsel. At most, there was a conflict in the evidence. The trial judge was permitted to accept the first statement in the place of the second.

The next challenge is to finding 75, which states that "Megan Nunley testified that she has some memory of Defendant Frank Brugnone asking her for an alibi for the date

of August 28, 1997." This finding is amply supported by the evidence. Ms. Nunley's direct statement in court was "I vaguely remember him asking for an alibi." RP at 926. Replacing "vaguely" with "some memory" is an accurate recitation of the meaning of the statement. This finding, too, is supported by substantial evidence.

The remaining challenges relate to credibility determinations made in the findings. The court found that Mr. Brugnone's statement to the police was both "self-serving" and inconsistent with the physical evidence, and that Mr. Brugnone was not an innocent bystander.[2] Credibility determinations are for the trier of fact and cannot be changed by this court. *Camarillo*, 115 Wn.2d at 71. These findings summed up the trial court's view of the evidence and were within its purview. There was no error.

The ultimate question is whether the evidence supported the bench verdict. Although the evidence of his direct participation is not as clear as it is for Mr. Gorski, it was sufficient to support the verdict. He was present for the killing, urged Mr. Gorski to hurry up after telling the victim that Gorski would "take care of [her]," started up his truck, and waited for Gorski before driving the two away from the scene. Thereafter he lied to the police and maintained that story for 10 years. Given that the victim showed defensive injuries and was stabbed in front and in back, the judge was permitted to infer

[2] *See* Findings of Fact 92-94. CP at 155.

that his participation was more active than he admitted. Brugnone's statement about leaving the scene also was inconsistent with the report from the apartment dwellers.

The evidence supports the bench verdict. The trial judge was not required to accept Mr. Brugnone's version of the events.

*Testimony of Cecil Toney*

Mr. Gorski initially argues it was error for prosecutor to refresh Toney's memory on redirect examination after Toney had changed his testimony on cross-examination concerning the time frame when he had seen the two men at the apartment complex. The claim of error was not preserved and also is without merit.

On direct examination, Mr. Toney testified he had seen Gorski and Brugnone at the apartments between 11 p.m. and midnight. RP at 780. On cross examination, after reviewing a transcript of his 2007 statement, Toney indicated the time was between midnight and 12:30 a.m. RP at 791. He subsequently adjusted his time frame and maintained that time during his testimony. RP at 800. The prosecutor subsequently showed Toney his initial statements, made before the interview, that placed the two men there between 11 p.m. and midnight. No objection was lodged to this effort. Nonetheless, Mr. Toney maintained the 12-12:30 time frame even after being shown the initial report. RP at 843.

No objection was raised to the prosecutor's re-examination. Accordingly, the failure to object waived any objection. *State v. Guloy*, 104 Wn.2d 412, 421, 705 P.2d 1182 (1985); RAP 2.5(a). Moreover, the redirect examination was utterly harmless. Even after seeing his original remarks, Mr. Toney stuck with his answer to defense counsel that the incident occurred between 12:00 and 12:30 a.m. The re-examination did not change the witness's testimony in the least.

There was no error at all. This issue is without merit.

*Sufficiency of the Evidence Against Gorski*

Mr. Gorski likewise challenges the sufficiency of the evidence to support the conviction, arguing that he left the apartment complex near 7:30 p.m. and could not have committed the crime. The jury was free to conclude otherwise.

The standards of review, previously mentioned, require that we consider the evidence in a light most favorable to the State and determine whether there was evidence that permitted the jury to find each element of the offense proven beyond a reasonable doubt. *Salinas*, 119 Wn.2d at 201. As also noted in the earlier discussion, the case against Mr. Gorski was quite strong. Despite his protestation that he was not at the scene, DNA from his glasses and cigarette butts put him there, and he was seen leaving the apartment complex soon after the victim's screams alerted the neighbors. Ms. Clift's body showed several defensive wounds and Mr. Gorski's DNA was recovered from her fingernails. Like Mr. Brugnone, he lied to the police about his presence at the crime scene.

While Mr. Gorski's testimony conflicted with the State's theory of the case, the jury accepted the latter instead of the former. The evidence amply supported the determination that Gorski was the last person to see Ms. Clift alive and was undoubtedly the killer. It was sufficient.

*Gorski LFO Contentions*

Mr. Gorski's final contention is a claim that the court erred in imposing LFOs without first determining his ability to pay them.[3] We decline to consider this issue, which was not presented to the trial court.

Mr. Gorski was represented at trial by retained counsel and did not claim indigency until after he was sentenced when he then sought to appeal at public expense. The trial court imposed LFOs consisting of restitution ($3,694.21), the $500 crime victim assessment, the $200 filing fee, a $100 DNA collection fee, and a $250 jury demand fee. It is unclear to us whether the $250 jury demand fee is a mandatory or discretionary cost.[4]

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[3] The judgment and sentence forms used in this case do not include the standard language indicating that the defendant has the ability to pay the LFOs.

[4] *Compare* RCW 10.01.160(2) (indicating in relevant part that the jury fee "under RCW 10.46.190 may be included in costs the court may require a defendant to pay"), *with* RCW 10.46.190 (stating that "every person convicted . . . shall be liable to all the costs . . . including . . . a jury fee . . . for which judgment shall be rendered and collected"). *See also State v. Diaz-Farias*, 191 Wn. App. 512, 524, 362 P.3d 322 (2015) (concluding demand fee could be imposed per RCW 10.01.160(2)) and *State v. Munoz-Rivera*, 190 Wn. App. 870, 894, 361 P.3d 182 (2015) (defendant considered jury demand fee as mandatory cost).

All of the remaining assessments have previously been determined to constitute mandatory costs that, therefore, are not subject to a determination of ability to pay before imposition. *State v. Lundy*, 176 Wn. App. 96, 102-103, 308 P.3d 755 (2013).

In these circumstances, where there is no more than $250 that possibly may be at issue, and where Mr. Gorski did not claim indigency until after sentencing, we exercise the discretion granted us under *State v. Blazina*, 182 Wn.2d 827, 830, 344 P.3d 680 (2015), and decline to consider this claim initially on appeal.

*Costs on Appeal*

Lastly, both defendants filed similar motions to enlarge time and to deny costs on appeal in accordance with a recent general order of this court, effective June 10, 2016. That order requires the requests to have the panel hearing the appeal exercise its discretion to deny costs in the event the State substantially prevails, must make the request in the appellant's opening brief or by motion filed within 60 days of the filing of the brief of appellant. Both opening briefs in this case were filed in 2015, well before the effective date of the general order.

We grant the motion to extend time and will consider the requests on the merits. Both men note they are serving lengthy sentences and will be quite elderly upon release and, therefore, unable to earn a living. Both men were ordered to pay restitution and will have extensive LFO balances due to the interest attached to the existing

judgments. In these circumstances, we exercise our discretion and direct that costs not be awarded to the State in these appeals.

Affirmed.

A majority of the panel has determined this opinion will not be printed in the Washington Appellate Reports, but it will be filed for public record pursuant to RCW 2.06.040.

Korsmo, J.

WE CONCUR:

Siddoway, J.

Siddoway, J.

Pennell, J.

Pennell, J.

CERTIFICATE OF SERVICE

I, Marie Trombley, do hereby certify under penalty of perjury under the laws of the State of Washington, that on October 13, 2016, I served by USPS, first class, postage prepaid a true and correct copy of the Brief of Appellant to:

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# TROMBLEY LAW OFFICE

## October 13, 2016 - 3:02 PM

**Transmittal Letter**

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|---|---|
| Document Uploaded: | 315291-Brugnone Petition315291.pdf |
| Case Name: | State v. Frank Brugnone |
| Court of Appeals Case Number: | 31529-1 |
| Party Respresented: | Frank Brugnone Petitioner |
| Is This a Personal Restraint Petition? | ☐ Yes ☑ No |
| | Trial Court County: Yakima - Superior Court # ___ |

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- ☐ Cost Bill / ☐ Objection to Cost Bill
- ☐ Affidavit
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**Comments:**

No Comments were entered.

Proof of service is attached and an email service by agreement has been made to gaschlaw@msn.com and david.trefry@co.yakima.wa.us.

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