No. 73440-7-I

IN THE COURT OF APPEALS OF
THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

vs.

ERICK WALKER,

Appellant.

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

The Honorable Judge Wynne

APPELLANT'S CORRECTED OPENING BRIEF
(Original had two page 15's and missing page 16)

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The Court erred when it denied Appellant's motions to suppress the evidence obtained by the State during the execution of various search warrants.

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5. Does a search warrant that fails to establish probable cause for some of the crimes under investigation and which allows the police to search through digital material and records without guidance violate the suspect's reasonable expectation of privacy?

II. STATEMENT OF THE CASE

Between about 11:15 PM on June 1, 2013 and 7:00 AM on June 2, 2013, person or persons fired gunshots in six different areas of Snohomish County. The first shot struck and killed MC, a teenage girl who was walking with her friends on a dark country road near Lake Stevens. Shots also were fired at 3 homes and a car in the Lake Stevens neighborhood between 1:17 AM and 7:00 AM. (RP 496, 601, 569, 590) About 5 shots were fired on 56th Ave. NE, Marysville shortly before 2:00 AM. Four shots struck cars, with the fifth shot going through the second floor window of the Cavanaugh residence. (RP 730,

732, 734) Police recovered bullets from all of the shootings with the exception of the shooting of MC and the bullet that hit the Cavanaugh residence. The only other trace evidence recovered by the police came from 56th Ave. N.E. After hearing the gunshots Chris Johnson looked out from the Cavanaugh residence and saw an older, light colored 4 door sedan strike a gold Saturn parked on the street. (RP 780, 784) The police recovered a black paint chip from the Saturn and pieces of plastic from the ground by the Saturn. (RP 816-20) No trace evidence was recovered from the scene of the homicide.

The police sent the bullets and trace evidence to the crime lab. Criminalist Daniel Van Wyck examined the paint chip and pieces of plastic. He determined that the paint chip was consistent with paint from Erick Walkers black Pontiac G6 (RP 2016-17) and that the pieces of plastic came from that Pontiac's front headlamp assembly. (RP 2024-25, 2028) Criminalist Brian Smelser examined the ballistics evidence. He

concluded that 4 of the recovered cartridges were fired from one of two Ruger Blackhawk revolvers recovered from Walker's home while the other 4 recovered cartridges were fired from a second Ruger revolver also recovered from Walker's residence.[1] (RP 2113)

The police arrested Erick Walker on June 28, 2013 as he drove from his home to the Everett Boeing plant where he worked. An officer was designated to drive Mr. Walker to the Sheriff's department located on the fourth floor of the Snohomish County Courthouse. Although investigators did contact Mr. Walker at the arrest scene, before the patrol car left to transport him, no one advised him as to why he had been arrested. The transporting officer had been advised by Det. Pince not to question Mr. Walker, nor to advise him of his Miranda rights. (RP 1867)

The transporting officer placed Mr. Walker in an interview room within the Sheriff's Department. Detectives

[1] The police recovered the revolvers and 30 carbine caliber ammunition from Walker's home when they executed a search warrant on June 28, 2013. CP 76

Pince and Conley were the designated interrogators. They introduced themselves to Mr. Walker, but still did not tell him why he was in custody. (35RP 38) Det. Pince did read Mr. Walker his Miranda rights. At the conclusion of the reading Mr. Walker stated: "Well, is there an attorney present?" (35RP 36)[2] Detective Pince responded that there wasn't and that it would take time to have one present. Ibid. Walker, who was supposed to be at work, asked why he was in custody. The police refused to answer unless he waived his rights. (35RP 390) He did and the police questioned him over the following two hours with a majority of the interrogation being tape-recorded.

Mr. Walker told the investigators that he had not been involved in any of the shootings under investigation.[3] And the evidence introduced during the defense case corroborated that he could not have fired the shots at any of the Lake Stevens residences or vehicles. Mr. Walker arrived at his friend's house

[2] 35RP refers to the transcript from the CrR 3.5 hearing conducted on November 14, 2013.
[3] The Court admitted a slightly redacted version of Walker's taped statement as Exhibit 167.

at about 11:30 PM. His friend, T.J. Patterson recalled his arrival. (RP 1197) T.J.'s wife, Meitra snapped a photo on her phone of Mr. Walker when he entered the residence a few minutes later. The telephone showed the picture had been taken at about 11:35 PM. (RP 1222) While T.J. and Meitra were uncertain as to the time that Mr. Walker left, another person there, Taylor Wallace, recalled that he and Walker left at the same time: 1:35 AM. (RP 2368)

In addition to the search warrant for Walker's home and car, the police also obtained warrants and searched his cell phone, the records from his cell phone carrier and the records from his bank. (CP 76) During trial the State introduced items recovered from each place searched.

III. PROCEEDINGS BELOW

The State filed its first Amended Information on October 31, 2014. This document charged Mr. Walker with First Degree Murder, five counts of Drive by Shooting, and four counts of

Assault in the First Degree while armed with a firearm. (CP 86)

The Court conducted a CrR 3.5 hearing on November 14, 2013. Judge Fair determined that the statements attributed to Mr. Walker during the June 28, 2013 interrogation were admissible (CP 59). The Court pre-assigned the case to Judge Thomas Wynne. He presided over all subsequent hearings, including the defense Motion to Suppress and Motions in Limine. He also presided over the trial, which began on March 4, 2015. The jury returned verdicts of guilty on Counts 2 - 10. It could not unanimously agree on Count 1, First Degree Murder, but returned a verdict of Guilty to the lesser-included crime of Manslaughter in the First Degree. (CP 137) On April 21, 2015 Judge Wynne sentenced Mr. Walker to 1,089 months in prison. (CP 169) The defense filed a timely Notice of Appeal. (CP 176)

III. ARGUMENT

1. The Court erred when it refused to allow the defense to cross-examine the State's criminalists regarding errors previously committed in the crime lab.

The State's case rested on the credibility of Brian Smelser. [1] Although the State introduced testimony that plastic pieces found near the gold Saturn parked on 56th Ave NE hit by a car travelling on 56th at the time witnesses heard up to 5 gunshots, there was no evidence that those shots originated from a car, much less Mr. Walker's car. The only evidence that actually linked Mr. Walker to the shootings came from Mr. Smelser.

A criminalist employed by the Washington State Patrol, it was Mr. Smelser's responsibility to perform the firearm ballistics examinations. At trial he testified that after firing bullets from the two Ruger revolvers he compared those cartridges to those found at the crime scenes and submitted to the crime lab by the investigators. Based on those comparisons it was his opinion that half of the bullets had been fired from

one Ruger with the other half of the recovered bullets having been fired from the second Ruger. Contrary to the protocol of the State Crime Lab as testified to by criminalist Van Wyck, (RP 2024) and Supervisor David Northrop (RP 1402) the State did not offer any testimony that there was peer review of the Mr. Smelser's work.

Walker contends that the trial court improperly limited the scope of its cross-examination of Mr. Smelser and Dr. Northrop to the prejudice of Mr. Walker. The State began its examination of Mr. Smelser by establishing the duties he had from the time he first was employed as a criminalist with the Washington State Crime Lab. It elicited that he worked in the bio/DNA section from 1996 through 2008 (RP 2055), advising the jury that Mr. Smelser did DNA work for the better part of a decade.

During cross-examination Mr. Smelser testified that he based his opinion concerning the comparison of the cartridges on his training and experience. Counsel next sought to question

him about prior problems with work that he had done while in the DNA section of the crime lab. (RP 2155-56) The State objected and the Court refused to allow this cross-examination.[4] The luster of DNA work enhanced Mr. Smelser's credibility as a criminalist.[5] The defense should have been allowed to diminish that luster by showing that Mr. Smelser incorrectly handled DNA samples by contaminating them, causing faulty results.

Dr. Northrop was a supervisor in the WSP crime lab. He testified to the procedures used by the lab to ensure a correct result. (RP 1402) When defense counsel inquired on cross how it was that these procedures did not reveal mistakes made in the crime lab the Court sustained the State's objection and refused to allow cross on this area. (RP 1413-18) Again the Court improperly limited cross-examination into the theory of the

[4] The defense filed an offer of proof as Exhibit 426.

[5] In 2005 Gallup published the results of a poll concerning public perceptions of DNA evidence. It found that more than 8 in 10 Americans (85%) think DNA evidence is either completely (27%) or very (58%) reliable. A majority considered it reliable when Gallup first asked the question in 2000; the percentage backing the reliability of DNA has increased since then.

defense that once the police selected Walker as its primary suspect, the investigation became myopic. This limitation violated Mr. Walker's right to present his defense and prevented him from receiving a fair trial.

The United State Supreme Court in Melendez-Diaz v. Massachusetts, 557 U.S. 305, 319-20, 129 S.Ct. 2527, 2537 (2009) dealt with the right of the accused to confront a forensic scientist whose results were admitted at trial. The Court held that the Confrontation Clause required the prosecution to call the scientist as a witness. It based its holding on the Sixth Amendment and the fact that forensic scientists frequently do substandard work resulting in erroneous convictions. It went on to state: "Like expert witnesses generally, an analyst's lack of proper training or deficiency in judgment may be disclosed in cross-examination." In accord, In re Pers. Restraint of Stenson, 174 Wash. 2d 474, 489, 276 P.3d 286 (2012).

Melendez-Diaz involved a case in which the prosecution did not produce the scientist who performed the test. However,

the importance of meaningful cross-examination, especially where the forensic evidence is the glue that holds together the State's case, cannot be over stated. If the jury found Mr. Smelser's credibility lacking and/or the procedures employed by the Crime Lab ineffective, the likelihood of a conviction is reduced significantly. This error is not harmless.

2. *The Court erred when it allowed the State to introduce testimony and exhibits of a re-enactment of the shooting of MC.*

Standard of Review

This Court reviews the trial court's decision to allow demonstrative evidence under an abuse of discretion standard. State v. Hunter, 152 Wn. App. 30, 41, 216 P.3d 421 (2009).

Supplemental Facts Pertinent to this Assignment of Error[6]

On August 14, 2013, the police, pursuant to a court order, drove Mr. Walker's Pontiac G6 to the location at which MC was shot. Detective Lewis drove Mr. Walker's vehicle while

[6] Most of the case law relied upon by Appellant discusses the introduction of a video rather than photograph re-enactment. Appellant contends that the principles discussed in the decisions apply equally to the photographs introduced in this case. A video simply is a collection of still images joined together, usually displayed at 30 photographs (frames) per second, to create a seamless image.

various actors portraying MC and her friends were placed on the side of the road. The State photographed the re-enactment in which Detective Lewis, seated in the driver's seat of the Pontiac G6, pointed a handgun out the passenger side window of the vehicle and in the direction of a person portraying MC. The exhibits also showed various mechanic devices to illustrate how a shot fired from the gun held by Det. Lewis would have left a wound consistent with that suffered by MC. (RP 1743-48)

Argument

The State realized that it had no evidence to offer the jury that would link Mr. Walker to this shooting. Rather than offer facts it elected to stage a re-enactment hoping that strong graphic images would make an indelible impression on the jurors sufficient to get them to accept the State's theory of the case. Judge Wynne abused his discretion when he allowed Det. Wells to testify to his re-enactment of the shooting of M.C. and

to admit photographs taken on August 15, 2013 as exhibits 254, 255, 257-62.[7]

Over defense objection (RP 1717) Det. Wells was allowed to give his opinion of the feasibility of the State's theory: that the shot that struck and killed MC was fired by Walker, with his Ruger revolver and from his car. The opinion was not based any undisputed facts and did not require expert testimony. The State stated its purpose for the Detective Wells testimony and accompanying photos telling the Court during argument made outside the presence of the jury:

> MR. STEMLER: Your Honor, we have had testimony that we have heard for foundation for this, in addition to what Detective Wells has to say. I think this is important for the jury to see it is possible to have this shot fired from this car given the information that we have.

The Court should not have allowed this testimony.

Det. Wells created this re-enactment knowing that he could not establish MC's orientation at the time the bullet

[7] Although the exhibits were admitted for illustrative, rather than substantive purposes, (RP 1741) appellant maintains that their admission was error and extremely prejudicial to the defense.

struck her; that his measurements were approximations; that he did not know vehicle positioning or angles (RP 1755). What he did, consistent with Mr. Stemler's explanation, was choose a scenario consistent with the State's theory of the case and then photographed it.

There was no evidence to establish the following facts included in the re-enactment:

a. **MC's anatomical position at the time the bullet struck her**. The witnesses who accompanied MC as she was walking alongside the road did not know her correct anatomical position when the bullet struck her. The exact position of MC's head would be essential to establish the position of the shooter. The Medical Examiner agreed. (RP 1866-71)
b. **Where the bullet originated**. While two of the girls believed the shot was fired from a car, a third believed the shot was fired from the bushes across the street. Even if there is support that the shot was fired from a car, there is nothing offered by the witnesses to establish that the shot came from the appellant's car or a car similar to the appellant's car. The measurements of the car's window could possibly affect trajectory, as would its position on the road relative to MC.
c. **The caliber of the bullet**. The bullet that struck and killed MC never was recovered. The medical examiner could not state from the wound path the

caliber of the bullet that struck her. This made it impossible to know the make of the firearm that fired the bullet. (RP 1871)

d. **The type of firearm that fired the shot**. Whether a handgun or a rifle fired the shot that killed MC was unknown.
e. **The lighting**. The shooting occurred on a dark rural road, but the photos offered by the State were taken during the daylight.
f. **Who fired the gun**? The driver is holding the gun, though one witness told the police that she believed there were two occupants in the car making it just as likely that the shot was fired by a passenger. (RP 1086-87, 1912)
g. **The presence of measuring devices**. The photograph shows a laser with corresponding red dot on the actress portraying MC. No laser was present on June 1st.

Since this unexpected shooting occurred on a dark road with differing accounts from the witnesses, it is impossible to find that the State's re-enactment evidence is substantially similar to what occurred on June 1, 2013. It was prejudicial error for the Court to admit it.

Under ER 702, the court may permit "a witness qualified as an expert" to provide an opinion regarding "scientific, technical, or other specialized knowledge" if such testimony

"will assist the trier of fact." The two key criteria for admission of expert testimony are a qualified witness and helpful testimony. State v. Cauthron, 120 Wn.2d 879, 890, 846 P.2d 502 (1993), overruled in part on other grounds by State v. Buckner, 133 Wn.2d 63, 941 P.2d 667 (1997).

Prior to this testimony the State had introduced photos of the Pontiac G6 and measurements of the height of the windows from the ground. Also admitted were the firearms recovered from Walker's residence. The jury knew the position of the wounds sustained by MC and their measurements from the ground, assuming that she was standing erect when struck by the bullet. Opinion testimony by Det. Wells was not needed to assist the jury that it was feasible for the shot to have come from a car. Det. Wells told the jury that based on that scenario he staged the bullet would have entered MC's neck consistent with the wound examined by the medical examiner. However, the Medical Examiner concluded that it was not possible to determine the position of the gun relevant to MC because of a

lack of information regarding MC's anatomical position when shot. The Court should not have allowed Wells to give his opinion.

The Court admitted the photographs, as explained by Det. Wells, as demonstrative evidence to illustrate and support the State's theory. The Supreme Court has established a test for admission of exhibits as illustrative evidence; they must be relevant to the ultimate fact sought to be proved and substantially similar in operation and function to the object or contrivance in issue. State v. Gray, 64 Wn.2d 979, 983, 395 P.2d 490 (1964). See also State v. Pristell, 3 Wn.App. 962, 478 P.2d 743 (1970).

This standard is similar to holdings by Courts that have considered the admissibility of re-enactment exhibits. Those cases focus on whether the proposed exhibit was created under circumstances similar to that of the crime.

In State v. Stockmyer, 83 Wn.App. 77, 920 P. 2d 1201 (1996) the trial court refused to admit a videotaped reenactment

because the tape was not subject to cross-examination and contained factual inaccuracies. The Court of Appeals affirmed the trial judge finding that factual inaccuracies and the potential prejudicial effect of the videotape justified its exclusion.

Dunkle v. State, 2006 OK CR 29, 139 P. 3d 228 (2006), involved a fact pattern similar to those found in this case. The State introduced four computer-generated re-enactments. The first three displayed scenarios consistent with the defendant's version of events. The fourth portrayed the State's expert's theory of how the shooting occurred; his theory was inconsistent with the defendant's version of events.

In Dunkle the victim had only one bullet wound, the bullet did not pass through any other solid surface, and the bullet was never found. There was no objective physical evidence from which to determine the position of the victim's body at the time of the shooting in relation to some other known point or surface. Here no bullet was recovered and while witnesses can state that MC was part of a group of girls walking

alongside the road, no one can describe with specificity her anatomical position at the time they heard the shot, other than she was standing.

The court in Dunkle held that the four computer generated animations were inappropriate and potentially highly misleading to the jury. The court found that the trial court record did not establish that the animations were "fair and accurate representations of the evidence to which they related." While recognizing the potential value of computer generated animations the court also recognized "a computer animation can mislead a jury just as easily as it can educate them. An animation is only as good as the underlying testimony, physical data, and engineering assumptions that drive its image. The computer maxim "garbage in, garbage out" applies to computer animations." The same caution is applicable to the re-enactment, which the Court admitted in this case.

In Eiland v. State, 130 Ga.App. 428, 203 S.E.2d 619, 621 (1973) the appellate court reversed based on the admission of a

videotaped re-enactment on the basis that it contained only facts consistent with the State's theory.

In Lopez v. State, 651 S.W.2d 413, 414-15 (Tex. App. 2 Dist. 1983) the Court held that the videotape re-enactment of the crime was inadmissible and reversible error. It noted that the events portrayed in the video were not similar to those that occurred on the day of the crime. It went on to note the potential for unfair prejudice when jurors are presented with images of actors.

Other Courts that have refused to admit re-enactment evidence based on the failure to establish that the re-enactment was substantially similar to the evidence of how the crime was committed include: Loevsky v. Carter, 70 Haw. 419, 773 P.2d 1120, 1125 (Haw. 1989); State v. Leroux, 133 N.H. 781, 584 A.2d 778, 784-85 (N.H. 1990); United States v. Jackson, 479 F.3d 485, 489 (7th Cir. 2007); Hisler v. State, 52 Fla. 30, 42 So. 692, 695 (Fla. 1906).

Similarly, courts recognize that "[b]ecause of the indelible impressions that are likely to result from videotaped and other filmed evidence, such evidence must be subject to careful scrutiny." State v. Wilson, 135 N.J. 4, 637 A.2d 1237, 1245 (N.J. 1994); State v. Holota, 2 Conn. Cir. Ct. 45, 49, 194 A.2d 69 (1963); State v. Martin, 182 Vt. 377, 388, 944 A.2d 867 (2007); Hinkle v. City of Clarksburg, 81 F.3d 416 (4th Cir. 1996); United States v. Hunter, 912 F. Supp. 2d 388, 403-04 (E.D. Va. 2012).

Admitted as illustrative exhibits, the re-enactment photographs did not go to the jury. However, this does not detract from their unduly prejudicial impact. Our courts recently have had occasion to review the prejudicial impact of images used during closing argument.[8]

In the Personal Restraint Petition of Glasmann, 175 Wn.2d 696, 286 P.3d 673 (2012) the Court reviewed a power point presentation used by the prosecutor during closing

[8] The power point presentations used by the State during its closing argument in Glasmann did not go back to the jury.

argument including slides that altered the petitioner's booking photograph by adding highly inflammatory and prejudicial captions. In vacating Mr. Glasmann's conviction the Court noted that the prosecutor had committed misconduct that could not be cured through an instruction. It held "Highly prejudicial images may sway a jury in ways that words cannot" and, thus, "may be very difficult to overcome with an instruction." 175 Wn.2d at 707 (citing State v. Gregory, 158 Wn.2d 759, 866-67, 147 P.3d 1201 (2006)). Prejudicial imagery may become all the more problematic when displayed in the closing arguments of a trial, when the jury members may be particularly aware of, and susceptible to, the arguments being presented. Id. at 707-08. In accord, State v. Walker, 182 Wash. 2d 463, 477-81, 341 P.3d 976, 985-86 (2015).[9]

The belief that undue prejudice may be caused by the display of visual exhibits is well established. In State v.

[9] In closing the prosecutor reminded the jury of Detective Wells's re-enactment and how the photo showed how the trajectory lined up from the gun to the actress's neck. (RP 2470)

Strandy, 49 Wn. App. 537, 541-42, 745 P.2d 43 (1987) the Court of Appeals observed that "in order to help the jury more easily understand other evidence, modern visual aids can and should be utilized. A trial judge must, however, be careful to avoid letting the visual aids be used more for their shock value than to educate." These images, offered to illustrate testimony, can cross the line into un-admitted evidence that confuses or misleads the jury. E.g., Holland v. United States, 348 U.S. 121, 127-28, 75 S. Ct. 127, 99 L. Ed. 150 (1954).

The State's re-enactment exhibits served no purpose other than to appeal to the emotions of the jurors and expose them to powerful images of staged events in place of facts. It prejudiced Mr. Walker's right to a fair trial as guaranteed by the Washington Constitution, Article I, sections 3 and 22, Amendment 10.

3. *The Court erred when it allowed the jury to consider the charge of Murder in the First Degree.*

The standard is that sufficient evidence supports a conviction when any rational fact finder could find the essential elements of the crime beyond a reasonable doubt when viewing the evidence in the light most favorable to the State. State v. Thomas, 150 Wash.2d 821, 874, 83 P.3d 970 (2004), aff'd, 166 Wash.2d 380, 208 P.3d 1107 (2009). An insufficiency of the evidence claim by the defense admits the truth of the State's evidence and all reasonable inferences drawn from it. Thomas, 150 Wash.2d at 874, 83 P.3d 970.

Evidence may be direct or circumstantial. When reliance is placed on circumstantial evidence, there must be reasonable inferences to establish the fact to be proved. Arnold v. Sanstol, 43 Wn.2d 94, 99, 260 P.2d 327 (1953). "The facts relied on to establish a theory by circumstantial evidence must be of such a nature and so related to each other that it is the only conclusion that fairly or reasonably can by drawn from them." Arnold, 43 Wn.2d at 99. It is a bedrock promise of our criminal justice system that the evidence supporting a conviction "must raise

more than the mere suspicion of guilt, and the jury's inferences must be more than speculation and conjecture in order to be reasonable." United States v. Truong, 425 F.3d 1282, 1288 (10th Cir.2005) (internal quotation marks omitted).

As noted by the Courts the line between permissible inference and impermissible speculation is not always easy to discern. When we "infer," we derive a conclusion from proven facts because such considerations as experience, or history, or science have demonstrated that there is a likely correlation between those facts and the conclusion. If that correlation is sufficiently compelling, the inference is "reasonable." But if the correlation between the facts and the conclusion is slight, or if a different conclusion is more closely correlated with the facts than the chosen conclusion, the inference is less reasonable. At some point, the link between the facts and the conclusion becomes so tenuous that we call it "speculation." When that point is reached is, frankly, a matter of judgment. Goldhirsh Group, Inc. v. Alpert, 107 F.3d 105, 108 (2nd Cir.1997). "A jury

will not be allowed to engage in a degree of speculation and conjecture that renders its finding a guess or mere possibility. Such a finding is infirm because it is not based on the evidence." Sunward Corp. v. Dun & Bradstreet, Inc., 811 F.2d 511, 521 (10th Cir. 1987).

Appellate courts have commented on the difference between a reasonable inference and speculation. The inference must be rationally related to the proven facts. State v. Johnson, 100 Wash.2d 607, 674 P.2d 145 (1983), overruled on other grounds in State v. Bergeron, 105 Wash.2d 1, 711 P.2d 1000 (1985); Ulster Cy. v. Allen, 442 U.S. 140, 99 S.Ct. 2213, 60 L.Ed.2d 777 (1979).

The first step in the analysis of the sufficiency of the State's evidence should be what has the State proved, either through direct or circumstantial evidence. For purposes of the sufficiency analysis, and assuming the admissibility of Brian

Smelser's testimony[10], the inference to be drawn from the State's proofs is that Mr. Walker fired shots from his Ruger Blackhawks at several locations, the earliest shot having been fired around 1:15 AM on June 2nd with the last being fired sometime prior to 7:00 AM on the same day. However, an objective review of the evidence makes it unreasonable to infer that Mr. Walker fired the shot that struck and killed MC. The caliber of the weapon, and type of weapon, that fired the shot at MC was unknown. Whether it came from a car or from the bushes was unknown. Other than testimony that a car similar to Walker's had been seen in the vicinity of the shooting perhaps 10 minutes earlier the State offered nothing that linked Walker to this crime. The Court should not have submitted the homicide count to the jury. This Court should vacate the Manslaughter conviction, dismiss the Murder charge and remand the matter for resentencing.

[10] If the June 28, 2013, search warrant was defective, the seizure of the Blackhawk revolvers would be suppressed.

4. *The Court erred when it allowed the State to introduce the post-arrest custodial statements made by the appellant.*

Mr. Walker contends that the Court erred when it entered Conclusions of Law numbers 1 through 5 as not supported by the evidence introduced at the 3.5 hearing.

Under Miranda v. Arizona, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966) and its progeny, the State bears the burden of demonstrating that a suspect knowingly and intelligently waived his Miranda rights before it may introduce incriminating statements made during the course of custodial interrogation. Miranda, 384 U.S. at 475. "Only if the 'totality of the circumstances surrounding the interrogation' reveal both an un-coerced choice and the requisite level of comprehension may a court properly conclude that the Miranda rights have been waived." Moran v. Burbine, 475 U.S. 412, 421, 106 S. Ct. 1135, 89 L. Ed. 2d 410 (1986). "[W]aiver" is the "act of waiving or intentionally relinquishing or abandoning a known right ... or privilege." Webster's Third New International

Dictionary 2570 (2002). When constitutional rights are involved, the Courts require the government to bear the burden to prove "an intentional relinquishment or abandonment." Johnson v. Zerbst, 304 U.S. 458, 464, 58 S. Ct. 1019, 82 L. Ed. 1461 (1938).

Arrested without any explanation on his way to work Mr. Walker, when told that he had the right to an attorney, immediately asked if one was present. The Det. told him there was not and that it would take time to get one. Detective Pince knew that the public defender's office was nearby and the Department of Assigned Counsel also was located in the Courthouse. Detective Pince knew that a defense attorney most likely would not allow his client to be interviewed. Detective Pince knew that Mr. Walker was on his way to work and expressed that he had no idea why he was being detained. The detectives refused to tell Mr. Walker why he was there unless he agreed to waive his rights. (35RP 36-39) Under these

circumstances the State has not established that Mr. Walker knowingly and intelligently waived his Miranda rights.

When Mr. Walker asked if an attorney was present questioning should have ceased. This was an unequivocal request for counsel that should terminate questioning. See, e.g., United States v. Lee, 413 F.3d 622 (7th Cir. 2005) (holding "can I have a lawyer" was a valid invocation and that police should have ended the interrogation unless they clarified the suspect's statement); United States v. Wysinger, 683 F.3d 784 (7th Cir. 2012) (citing its decision in Lee and reiterating that the phrase "can I have a lawyer" is an unequivocal, unambiguous request for counsel); State v. Dumas, 750 A.2d 420 (R.I. 2000) (holding that the phrase "can I get a lawyer" amounted to a colloquial request); Taylor v. State, 274 Ga. 269, 553 S.E.2d 598 (Ga. 2001) (holding that the phrase "can I have a lawyer present when I do that," when made in response to the police's request that a suspect tell her side of the story, was an unequivocal, unambiguous request for an

attorney); Commonwealth v. Hilliard, 270 Va. 42, 613 S.E.2d 579 (Va. 2005) (holding that "can I get a lawyer in here? . . . I already have a lawyer," in the circumstances, was an unequivocal, unambiguous request for an attorney). The Court should have suppressed Walker's statements. The admission of Exhibit 167 was error.

5. *The Court erred when it denied his motions to suppress evidence obtained by the State during the execution of various search warrants.*

a. General Principles

Article I, section 7 provides that "[n]o person shall be disturbed in his private affairs, or his home invaded, without authority of law." A search warrant may be issued only on a determination of probable cause. State v. Jackson, 150 Wash.2d 251, 264, 76 P.3d 217 (2003). Probable cause exists when the affidavit in support of the search warrant "sets forth facts and circumstances sufficient to establish a reasonable inference that the defendant is probably involved in criminal activity and that evidence of the crime may be found at a certain location." Id.

The Constitutional protection also requires that the warrant describe with particularity those items to be seized and searched. Ashcroft v. al-Kidd, 131 S. Ct. 2074, 2084, 179 L. Ed. 2d 1149 (2011). Law enforcement agents are thus barred from executing warrants that purport to authorize "a general, exploratory rummaging in a person's belongings." Coolidge v. New Hampshire, 403 U.S. 443, 467, 91 S. Ct. 2022, 29 L. Ed. 2d 564 (1971) In other words, a warrant must contain sufficient specificity "to permit the rational exercise of judgment [by the executing officers] in selecting what items to seize." United States v. Shi Yan Liu, 239 F.3d 138, 140 (2d Cir. 2000).

Three criteria are relevant to the particularity issue:

> "(1) whether probable cause exists to seize all items of a particular type described in the warrant, (2) whether the warrant sets out objective standards by which executing officers can differentiate items subject to seizure from those which are not, and (3) whether the government was able to describe the items more particularly in light of the information available to it at the time the warrant was issued." State v. Higgins, 136 Wn.App. 87, 91–92, 147 P.3d 649 (2006)

Some courts also consider a fourth factor: time limitations. See,

United State v. Cohan, 628 F.Supp. 2d 355, 465-66 (E.D.N.Y. 2009).

1. The June 28, 2013 Warrant - Probable Cause and Nexus

The first warrant, to search Walker's home and car, was issued by the Court on June 28, 2013, but prior to the Walker's arrest and interrogation. The Court erroneously found probable cause for numerous crimes including murder in the second degree; drive by shootings, assaults, and hit and run. Mr. Walker contends that the supporting affidavit failed to establish probable cause to believe that he committed any crime other than hit and run unattended.

The search warrant affidavit (CP 76) detailed the death of MC, other shootings that happened in Lake Stevens in the morning of June 2nd, and the shootings on 56th Ave. N.E., Marysville. The only facts contained in the supporting affidavit linking Mr. Walker to any crime were the results of a criminalist's examination of trace evidence located near one of

the 56th Ave N.E. shootings. The state crime lab linked this trace evidence circumstantially to Mr. Walker's car. None of the witnesses present at the 56th Ave. N.E. shootings saw the shots being fired from Mr. Walker's vehicle or from any vehicle. Chris Johnson, the only eye witness to the hit and run told the police that he saw a vehicle hit the parked Saturn, provided a description that was decidedly different from Walker's black Pontiac G6. Other than Johnson there were no witnesses at any of the other crimes scenes that saw a vehicle[11]. There were cartridges recovered from the crime scenes, other than the homicide, that the state crime lab identified by caliber[12]. A search of gun registration and sales records showed that Mr. Walker possessed guns of that caliber. However, more than mere ownership of weapons of a specific caliber is required to link a specific gun to recovered cartridges.

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[11] The two witnesses who believed that the shot was fired from a vehicle gave generic descriptions of the car that did not fit the descriptioin of a Pontiac G6. (RP 1039, 1084)

[12] According to the affidavit, Brian Smelser concluded: "The five submitted fired bullets were fired from a 30 carbine caliber firearm with similar general rifling characteristics (six land and groove right twist rifling), which includes but is not limited to, 30 carbine caliber Iver-Johnson or Universal Arms (enforcer model), Plainfield, Universal Arms, or US Military Weapons (MI carbine models), or Ruger (Blackhawk model) firearms."

With regard to the homicide, while at least one witness at the scene describes shots being fired from a black, 4 door car[13] (RP 999), there was no trace evidence found at the scene that linked either the defendant's weapons or his vehicle to the shooting. The police could not establish the caliber of the bullet that fired the shot that killed MC, nor the type of firearm (rifle, revolver, semi-automatic) that fired the shot. The affidavit failed to provide a sufficient factual basis on which a neutral and detached Magistrate could find probable cause for the homicide.

If the only crime for which the affidavit established probable cause was Hit and Run Unattended, as Walker contends, there is no nexus between that crime and Mr. Walker's residence to justify the search of his home. Probable cause requires a nexus between criminal activity and the item to be seized, and also a nexus between the item to be seized and the place to be searched." State v. Goble, 88 Wn. App. 503,

[13] Mr. Walker's Pontiac G6 is a 2 door rather than 4 door car.

509, 945 P.2d 263 (1997)). State v. Thein, 138 Wash. 2d 133, 140, 977 P.2d 582, 585 (1999). The Court in Thein went on to state:

> Absent a sufficient basis in fact from which to conclude evidence of illegal activity will likely be found at the place to be searched, a reasonable nexus is not established as a matter of law. See, e.g., Smith, 93 Wn.2d at 352 ("if the affidavit or testimony reveals nothing more than a declaration of suspicion and belief, it is legally insufficient"); Helmka, 86 Wn.2d at 92 ("Probable cause cannot be made out by conclusory [23] affidavits."); State v. Patterson, 83 Wn.2d 49, 52, 61, 515 P.2d 496 (1973) (record must show objective criteria going beyond the personal beliefs and suspicions of the applicants for the warrant).

Id. at 147.

A search for evidence of hit and run unattended should have been limited to a search of Mr. Walker's vehicle. The warrant issued by the Court is overly broad[14] and included authorization to search for items unrelated to the hit and run and for which there was no probable cause. The Court erred by denying the appellant's Motion to Suppress and by admitting

[14] A discussion of the principles of over breadth and particularity following infra.

evidence recovered during the execution of the search warrant. Such evidence was obtained in violation of Walker's rights under the United States Constitution, Amendments 4 and 14 and the Washington Constitution, Article I, section 7.

2. *The July 2, 2013 Warrant - Breadth, Particularity and the Fruit of the Poisonous Tree*

Following the defendant's arrest the police requested and were granted permission to seize and search the defendant's cell phone, his bank records, and his phone records. While the affiant for these subsequent records did submit an additional affidavit, he also attached and incorporated by reference the warrant issued on June 28th. Reliance by the Magistrate on this first warrant and/or its supporting affidavit was improper for the reasons stated above.

Det. Pince included information obtained from Walker during the custodial interrogation and items seized from his home on June 28th during the execution of the first search warrant. Both his statements obtained in violation of Miranda,

see infra., and items recovered during that first unlawful search are "the fruit of the poisonous tree." See Wong Sun v. United States, 371 U.S. 471, 83 S.Ct. 407 (1963). As such, all of this information must be excised from the subsequent search warrant affidavit. United States v. Murray, 487 U.S. 533, 108 S. Ct. 2529, 101 L. Ed. 2d 472 (1988)

Excluding that information leaves an affidavit that Walker continues to maintain that the only crime for which there was a showing of probable cause was the hit and run unattended. While probable cause for that crime would allow the police to search for evidence related to the car, the acquisition of replacement parts for damage to the car, and similar items, it would not justify the extensive intrusion into the defendant's private affairs allowed by these warrants.

The issues of over breadth and particularity are especially pertinent to the search of Walker's phone. While referred to as a "phone," the HTC is what commonly is referred to as a "smart phone," essentially a computer. The warrant to search the phone

allowed a search for just about everything within its memory. The appellant challenges the inclusion in the warrant of the following items on the basis that they are overly broad, violated the particularity requirement, failed to include any time limits, and not supported by a nexus to the crimes for which there was probable cause:

> -Any internet access or searches on the internet to include each website accessed.
>
> -Any and all stored contacts within the device to include name and telephone numbers, (i .e. friends. contacts or buddy lists).
>
> -Any and all digital image files to include "metadata" (The term Metadata, as it applies to the digital image, includes information (content) that describes the file path within the phone where the data is stored, the date/time the image was created, how large the image is (in megabytes), the image resolution, when the image was created, the type of data (image/jpeg), whether it is protected from deletion and other data. The most important data contained in this metadata file was the date/time and the GPS latitude & longitude).
>
> -Any and all stored digital video files.
>
> -Any and all stored emails and content (both incoming and outgoing) to include all email addresses.

With the advances in digital technology cell phones have become ubiquitous. Information once kept in many places now can be found on one's smart phone. Principles relevant to the scope of searches will also need to evolve to keep pace with technology. It should be evident that the search of digital data is different than the search of a residence or car or other physical objects. The United States Supreme Court in Riley v. California, __ U.S. ___, 134 S.Ct. 2473, 2489-90,189 L.Ed.2d 430 (2014) and our Supreme Court in State v. Hinton, 179 Wash.2d 862, 877, 319 P.3d 9 (2014) make that abundantly clear.

Because of the vast amount of personal information stored by a computer, particularity becomes essential to avoid a broad exploratory general search. This is even more important with searches of digital information where the prosecution may hope to cast as broad a net as possible in the hopes that material not specifically requested in the warrant will be discovered and admissible under the plain view doctrine.

b. The Scope of the Warrant and Particularity

Particularity, a description of what the investigators are allowed to search for, defines the scope of the warrant. With digital storage devices the need for particularity is heightened. With the vast amount of personal information stored on computers a warrant should provide strict limitations on the data to be seized. To do otherwise is to allow the police unfettered access to a person's most private affairs. With the warrant issued for the phone, phone records and bank records the police could learn of the defendant's behavior for years preceding the crime. They could learn of all the people with whom he had contact and could read all of the emails that he sent and received since he obtained the phone. Thus the warrant becomes a prohibited general warrant. In re: Google Email Accounts Identified in Attachment A, 92 F. Supp. 3d 944 (D. Alaska 2015).

With the broad scope of the search of the records and phone authorized by the warrant, isn't that exactly what has

occurred? If you ask the detective investigating a homicide what information he or she is seeking from the computer, the response would probably be similar to Justice Stewart's statement in his concurring opinion in Jacobellis v. Ohio, 378 U.S. 184 (1964), "I know it when I see it." Is this not the essence of a general exploratory search? The investigator is going to rummage through every digital file on the computer hoping to come across something that will be recognized as evidence of the crime. Such broad authorization may be appropriate and has been upheld in complicated cases in which digital information is inherently related to the crime. United States v. Regan, 706 F. Supp. 1102, 1113 (S.D.N.Y. 1989); accord United States v. Abboud, 438 F.3d 554, 575 (6th Cir. 2006); United States v. Majors, 196 F.3d 1206, 1216 (11th Cir. 1999). However, in cases such as this where the crime allows the police to state a more precise definition of that which they hope to find: i.e., a gun, a greater degree of particularity is

required. This is not a complicated case dependent upon broad, undefined searches through digital information.

Previous warrants requested by Det. Pince show that he was aware of how to limit his requests for the items to be seized. In his June 28th warrant application he did narrow the scope of the search through digital devices to find information relevant to damage to a car.

Inexplicably in his subsequent warrant for the phone he abandoned particularity opting instead for generality. While he limited his request for certain information by setting out date parameters (i.e., Any and all stored data indicating GPS coordinates indicating where the device was located between the dates of 06-01-2013 and 06-02-20 I 3; Any and all stored call logs (incoming and outgoing telephone numbers) between the dates of 06-01-2013 and 06-28-2013; Any and all stored text messages (incoming and outgoing telephone numbers) between the dates of 06-01-2013 and 06-28-2013) his other requests contained no such filer. He wanted access to

everything in the phone's memory regarding Internet searches, Walker's contacts, digital images and digital videos without limitation. This transformed the warrant into a prohibited general warrant.

The information contained on a Smart Phone also implicated the First Amendment. When there is potential conflict between the First and Fourth Amendments (and corresponding state constitution provisions), the Courts will closely scrutinize compliance with the particularity and probable cause requirements. Zurcher v. Stanford Daily, 436 U.S. 547, 564, 98 S.Ct. 1970, 56 L.Ed.2d 525 (1978); State v.Perrone, 119 Wash.2d 538, 547, 834 P.2d 611 (1992) ("Where a search warrant authorizing a search for materials protected by the First Amendment is concerned, the degree of particularity demanded is greater[.]"); In accord, State v. Besola, __ Wash.2d __, # 2015 - 90554-1. (11/05/2015). Allowing the police to search the defendant's emails, internet history, texts, and contacts without limitation violates the

particularity requirement and infringes on his First Amendment rights.

The scope of the warrant to search Walker's bank records includes access to his entire financial history.[15] Rummaging through his banking and credit card records since the creation of the accounts with the hope of finding something relevant runs afoul of the particularity requirement. Even if the Court finds that there was probable cause to believe that the defendant committed some of the other crimes stated in the search warrant, the affidavit offers no basis that would justify such a

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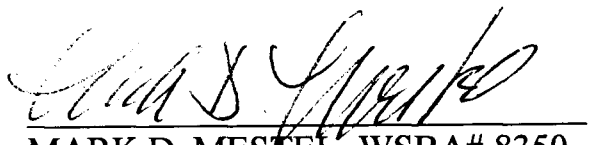
1. [15] It asked for the following: Any and all bank/credit union account information in the name of Erick Nathaniel Walker 07-02-1986. Information is to include; all known accounts in the name of Erick Nathaniel Walker, 07-02-1986, all transaction information (debit/credit/ATM withdrawal/bank check issuance) since the inception of the account(s) (debit/credit/ATM withdrawals information date, time, and location of each transaction).
2. Any and all account information regarding the following debit MasterCard from the inception of the account to present to include; date, time and location of usage as well as any purchase related information regarding each purchase of goods or services. Any ATM inquiries to include date, time and location of each inquiry.

broad general search. The admission of material from the phone, from Verizon and from the defendant's bank violated his rights under the United States Constitution, Amendments 4 and 14 and the Washington Constitution, Article I, section 7.

IV. CONCLUSION

The Court prevented Mr. Walker from receiving a fair trial when it improperly allowed the State to introduce a "staged" re-enactment and improperly limited his right to effectively cross-examine pivotal State's forensic witnesses. The police violated Mr. Walker's reasonable expectation of privacy through the execution of defective search warrants. The Court should not have allowed into evidence Mr. Walker's custodial statements and should not have allowed the homicide charge to go to the jury. For the reasons stated above the Court should vacate the convictions and either dismiss the prosecution or remand the matter for a new trial.

DATED THIS 27 DAY OF JANUARY, 2016.



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V. CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Appellant's Corrected Opening Brief was served upon the following by United States Postal Service, addressed to:

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DATED this 27 day of January, 2016.

Brandy L. Ellis

Brandy L. Ellis, Secretary