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Court of Appeals
Division I
State of Washington

NO. 72726-5-I

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

STATE OF WASHINGTON,

Respondent,

v.

DANNY GILES,

Appellant.

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

The Honorable Bruce Weiss, Judge

REPLY BRIEF OF APPELLANT

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A. ARGUMENT IN REPLY

1. OPINION TESTIMONY VIOLATED GILES' RIGHT TO A JURY TRIAL.

In Daniel Giles' trial, the defense moved to preclude Christopher Kern, the state's expert crime scene reconstructionist, from offering his opinion that – based on the DNA testing done by other scientists – it was likely Giles was in Berry's car and that it was likely he touched her jeans and handbag. RP 1489-90. None of the scientists who performed the testing, themselves, could offer such an opinion. Brief of Appellant (BOA) at 16-18 (citing record). The court agreed Kern could not say it was "likely" Giles was in the car or touched her belongings, but could say the evidence was "consistent with." RP 1490.

Despite this ruling, when the prosecutor questioned Kern (less than 400 pages later in the transcripts from the court's ruling), the prosecutor specifically asked if it was Kern's opinion Giles was in Berry's car:

> Q. [prosecutor Craig Matheson]. You also reviewed the various DNA reports?
>
> A. [Kern] Yes.
>
> Q. And you reviewed the report by Jean Johnston?
>
> A. Yes.

> Q. And you reviewed the report by William Stubbs?
>
> A. Yes.
>
> Q. Based on that, is it likely that the defendant, Danny Giles, was inside of that car, touching the steering wheel?
>
> A. At some point –
>
> MS. COBURN [defense counsel]: Objection. Foundation.
>
> THE COURT: Overruled.
>
> A. At some point prior to the vehicle being recovered, yes.

RP 1854. As indicated, the court overruled defense counsel's timely objection.

The court also overruled defense counsel's timely objection when the prosecutor asked whether it was likely Giles touched Berry's belongings:

> Q. You also reviewed the DNA reports from Orchid Cellmark, from Aimee Rogers and Barabara Leal?
>
> A. Yes.
>
> Q. After review of those reports, do you have an opinion whether it was likely that Mr. Giles touched those items, prior to their recovery?
>
> MS. COBURN: Objection. Foundation. This expert is not qualified to testify as to what Aimee

Rogers and Barbara Leal testified to. They can testify to what their reports indicate, not this witness.

THE COURT: Overruled.

A. Yes, prior to them being discovered.

MR. MATHESON: Mr. Kern, I don't have any further questions. Thank you.

RP 1854-55.

At the break, defense counsel reminded the court of its ruling. RP 1856-57. The court indicated it would "review that" at the recess. RP 1857. Despite the clarity of its earlier ruling, when the court later reconvened, the court indicated: "I do not find that the violation was intentional by the State. It is a violation, though, of the motions in limine."[1] RP 1858.

When the jury returned, the court instructed the jury to disregard Kern's opinion "it is likely that Mr. Giles was inside the car, touching the steering wheel" and his opinion that "it was likely Mr. Giles touched the belongings of Patti Berry, prior to their recovery." RP 1862.

[1] Unintentional or not, "[a]t a minimum, trial advocates must explain to witnesses the decorum of a courtroom, the difference between direct and cross examination, any orders in limine entered by the court[.]") State v. Montgomery, 163 Wn.2d 577, 592, 183 P.3d 267 (2008) (emphasis added).

In his opening brief, Giles argued Kern's testimony not only violated the court's ruling, but amounted to an improper opinion on guilt. Whether Giles was in Berry's car or touched her belongings was the critical issue at trial – one the state needed the jury to resolve in its favor in order to obtain a conviction. BOA at 30-37. Considering the centrality of the DNA evidence to the state's case, Giles argued the court's curative instruction was ineffective to mitigate the ensuing prejudice. BOA at 37 (citing State v. Powell, 62 Wn. App. 914, 919, 816 P.2d 86 (1991) (curative instruction ineffective to "unring the bell") (quoting State v. Trickel, 16 Wn. 18, 30, 553 P.2d 139 (1976)).

In response, the state cites a number of cases recognizing that juries are presumed to follow the court's instructions. Brief of Respondent (BOR) at 24 (citing inter alia State v. Cunningham, 51 Wn.2d 502, 505 319 P.2d 847 (1958) (applying presumption to erroneously excluded evidence the jury was instructed to disregard).

But there are a number of other cases holding that a court's instruction to disregard testimony was ineffective to cure the resulting prejudice. See e.g. State v. Stith, 71 Wn. App. 14, 22-23, 856 P.2d 415 (1993). In Stith, although the trial court gave a

curative instruction, the appellate court held the prosecutor's misconduct was "so prejudicial" that "[o]nce made, such remarks cannot be cured." Id. at 22-23. Thus, there are circumstances where the evidence is "so prejudicial" it cannot be presumed the jury followed the court's instructions to disregard it. See also State v. Fisher, 165 Wn.2d 727, 747, 202 P.3d 937 (2009). There, the court noted that, "given the nature of the misconduct and the fact that the prosecuting attorney was well aware of the trial court's ruling and Fisher's standing objection, we do not believe that any limiting instruction could have neutralized the prejudicial effect." Id. at 748 n.4.

This is one of those circumstances where the court's limiting instruction did not neutralize the prejudicial effect of Kern's improper opinion testimony. Whether Giles was in Berry's car or touched her belongings was a hotly contested issue at trial. See e.g. CP 208, 212; RP 1449-50, 2093, 2805. As an experienced crime scene reconstructionist, Kern's improper opinion testimony served to "cast an aura of scientific certainty" to the DNA evidence, thereby increasing the weight the jury likely attached to it. BOA at 36 (quoting State v. Quaale, 182 Wn.2d 191, 202, 340 P.3d 213 (2014)).

Next, the state cites to State v. Kirkman[2] and State v. Montgomery[3] as cases where the court held the admission of improper opinion testimony was not prejudicial because jurors are presumed to follow instructions absent evidence providing to the contrary. Kirkman, 159 Wn.2d at 928. It's true the Kirkman Court cited to boilerplate language that juries are presumed to follow instructions. Kirkman, 159 Wn.2d at 928. However, in Kirkman, there was no objection to the allegedly improper opinion testimony and therefore no instruction at issue. Kirkman, 159 Wn.2d at 923, 925. Moreover, the court held the challenged testimony did not amount to improper opinion testimony. Kirkman, at 930-34. Kirkman therefore is inapposite.

The closer case is Montgomery. There, the detective testified he believed Montgomery was purchasing items with the intent to manufacture methamphetamine – which was the crime he was charged with. There was no objection and no instruction. Montgomery, 163 Wn.2d at 588. However, when the prosecutor asked why the detective believed what he did, the court sustained defense counsel's objection the question went to the ultimate issue. Id. A second detective – with no objection from defense counsel –

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[2] State v. Kirkman, 159 Wn.2d 918, 125 P.3d 125 (2007).

testified, "those items were purchased for manufacturing." Montgomery, at 588 (citing to record omitted). A chemist testified similarly about the purchases: "these are all what lead me toward this pseudoephedrine was possessed with intent." Montgomery, at 588 (citation to record omitted).

On appeal, Montgomery argued the un-objected-to testimony amounted to improper opinion evidence and could be challenged for the first time on appeal. The court agreed the state's witnesses' testimony amounted to improper opinions on guilt. Montgomery, at 594-95. The court next considered whether the error was "manifest" such that it could be raised for the first time without an objection below. The court noted: "This exception is a narrow one, and we have found constitutional error to be manifest only when the error caused actual prejudice or practical and identifiable consequences." Montgomery, at 595.

In holding that Montgomery had not shown "actual prejudice," the court relied on the court's instructions to the jury that they are the sole judges of credibility and that they are not bound by expert opinions. Because there was no jury inquiry indicating

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[3] State v. Montgomery, 163 Wn.2d 577, 183 P.3d 267 (2008).

otherwise, the court presumed the jury followed its instructions. Montgomery, at 595-96.

Granted, the jury in Giles' case was given the same instructions. CP 110, 115. However, there are two major differences between Giles' case and Montgomery's. First, Giles objected to the improper testimony. Accordingly, he does not have to show "actual prejudice." Rather, the state has to show the error was harmless beyond a reasonable doubt. Quaale, 182 Wn.2d at 201-02.

In Quaale, defense counsel objected to the improper opinion testimony, but was overruled. The court applied constitutional harmless error analysis. Presumably, the jury in Quaale received the same standard instructions about being the sole judges of credibility and not being bound by the expert's opinion. Yet, the court still reversed. Quaale, 182 Wn.2d at 202.

Thus, the questions boils down to whether the court's oral instruction cured the prejudice from Kern's improper opinion testimony. Because the court overruled both of defense counsel's objections and did not give a curative instruction until later, following a recess, the instruction likely caused confusion more

than anything. State v. Grenier, 257 Conn. 797, 778 A.2d 159 (2001).

While not binding on this Court, the circumstances of Grenier are directly analogous to those here. David Grenier was convicted of sexually assaulting a child, "S." Grenier denied the charge and provided a potential motive for "S." to fabricate. Grenier, 778 A.2d at 160-62.

Kimberly Herwerth, a certified child counselor with a sexual assault crisis center evaluated S. At Grenier's trial, Herwerth testified that S had had provided details and that her statements were very credible. Defense counsel's objection to this testimony was overruled. Grenier, 778 A.2d at 162.

During cross-examination, after the jury was excused from the courtroom, the court reviewed the contents of a bench conference held prior to Herwerth's testimony in which defense counsel stated he would object to expert testimony on the basis of credibility and ultimate issue. Thereafter, counsel moved to strike Herwerth's testimony and requested a curative instruction. The court denied the motion to strike but invited the parties to draft a curative instruction. Defense counsel did not provide a proposed instruction. Grenier, 778 A.2d at 163.

The next expert to testify was Deborah McGeehan, the clinical psychologist who had been treating S. McGeehan described the behaviors often exhibited by children who complain of being sexually abused. The state thereafter asked what McGeehan was treating S for, and McGeehan responded "the trauma of the abuse that she experienced." Again, defense counsel's objection was overruled. Grenier, 778 A.2d at 163.

At the end of trial, the court instructed the jury to disregard both Herwerth's and McGeehan's testimony bearing on S's credibility:

> Critical to your decision in this case is the testimony of [S]. In order for you to convict the defendant, you must find her testimony is credible standing alone or when coupled with other evidence in this case is established – is sufficient to establish that the defendant is guilty beyond a reasonable doubt. The veracity of a witness is to be decided by the jury.
>
> Ordinarily, our law does not permit another witness to give an opinion on the truthfulness of still another witness and that's true in this case. So, the testimony of Herwerth [and] McGeehan ... was not presented so [either] of them could tell you her opinion of [S's] truthfulness. To the extent [that either] one of the ... witnesses may have expressed her own opinion of [S]'s truthfulness, you must not consider that opinion in coming to your decision. . . .

Grenier, 778 A.2d at 164.

Significantly, Connecticut follows the same rule as Washington in that that "the jury is presumed to follow the court's curative instructions in the absence of some indication to the contrary." Grenier, at 167. And as here, the state in Grenier argued the curative instruction given by the court during its jury charge mitigated any harm that may have resulted from the improper opinion testimony. Id. Interestingly, the court did not agree:

> In the present case, however, the court did not give a curative instruction immediately following the improper testimony. Rather, the court, in the presence of the jury, overruled the defendant's contemporaneous objections to that testimony. Therefore, the jurors not only heard the highly damaging testimony, but also had no reason to believe that it was improper until after the close of evidence and closing arguments of counsel. By that late stage of the proceedings, it is reasonable to assume that the testimony already had made a substantial, and probably indelible, impression on the jury. To whatever extent the harm created by the improper testimony might have been mitigated by an immediate and forceful admonition by the court directing the jury to disregard the testimony, it is not likely that the prejudicial effect of the testimony was reduced significantly, if at all, by the court's untimely instruction.
>
> Furthermore, because the trial court overruled the defendant's objections to the challenged testimony in the jury's presence, the curative instruction conflicted with the court's own rulings

> upholding the admissibility of the testimony. In light of the inconsistency between the court's rulings admitting the testimony and the court's general instruction indicating that testimony of that sort is not appropriate for consideration by the jury, it is difficult to see how the instruction would have had its intended curative effect. Indeed, in the improbable event that the instruction had any effect on the jurors, it most likely would have been to create confusion regarding the manner in which they were to treat the improper testimony.

Grenier, 778 A.2d at 167 (footnotes omitted).

As in Grenier, the court here overruled both of defense counsel's objections to the improper testimony. As in Grenier, the court did not issue a curative instruction until later. As a result, it is likely the testimony already made an indelible impression on the jury by the time the court gave the instruction. Moreover, because the court overruled defense counsel's objections, the court's later instruction to disregard the testimony likely created confusion regarding the manner in which the jurors were to treat the improper testimony.

Next, the state argues this case is unlike State v. Babcock, 145 Wn. App. 157, 185 P.3d 1213 (2008). It's true Babcock is unlike this case in that the jury there heard evidence about the defendant allegedly committing a similar crime as the one charged.

However, its holding is not necessarily limited to ER 404(b)-type evidence:

> Here, the trial court properly instructed the jury to disregard the hearsay testimony. While it is presumed that juries follow court instructions to disregard testimony, . . . , no instruction can "'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.'"

Babcock, 145 Wn. App. at 164 (citation to other cases omitted).

Whether Giles was in Berry's car and touched her things was the pivotal issue in the case. The state's expert's testimony indicating it was "likely" he was in the car and touched her things therefore was inherently prejudicial and of such a nature as to likely impress itself upon the minds of the jurors. Babcock supports Giles' position that there are circumstances where a court's instruction is ineffective to unring the bell.

The same is true of Powell[4] and Trickel.[5] In Powell, the court held that even if the trial court crafted an instruction, it could not suffice to eradicate the prejudice from the prosecutor's misconduct:

> The remarks were made at the completion of the final closing argument, immediately prior to the jury

[4] State v. Powell, 62 Wn. App. 914, 816 P.2d 86 (1991).

[5] State v. Trickel, 16 Wn. App. 18, 553 P.2d 139 (1977).

> beginning their deliberations. This is one of those case of prosecutorial misconduct in which "[t]he bell once run cannot be unrung." State v. Trickel, 16 Wn. App. 18, 30, 553 P.2d 139 (1976). It denied Mr. Powell a fair trial.

Powell, 62 Wn. App. at 919.

Even if this was dicta, not all dicta is created equal. See e.g., State v. White, 83 Wn. App. 770, 782, 924 P.2d 55 (1996) (rejecting the prosecution's argument that part of a Supreme Court case was dicta, stating instead "not all dicta is created equal, and this is not the sort of dicta we are inclined to ignore"), reversed on other grounds, State v. White, 135 Wn.2d 761, 958 P.2d 982 (1998). And the Supreme Court has since recognized there are times when the bell cannot be unrung. State v. Fisher, supra, 165 Wn.2d at 748, n.4 ("We do not believe that any limiting instruction could have neutralized the prejudicial effect.").

As the state points out, Trickel addressed whether the jury had been improperly influenced by outside sources. The court noted there was no evidence the jury actually had been exposed to any outside source. Trickel, 16 Wn. App. at 26-27. In light of this, the court found the trial court's precautionary measures and instructions not to consult outside sources were sufficient to reasonably assure Trickel had a fair trial. Trickel, 16 Wn. App. at

30. Nonetheless, the court noted there are times when publicity may be so prejudicial and the jury's risk of exposure to it so high that no corrective procedures will suffice to "cure the evil wrought." Trickel, at 30. The court reasoned:

> In such case, the court should be guided by the somewhat analogous situation which arises when it is required to rule upon a motion for mistrial because of prosecutorial misconduct. The bell once rung cannot be unrung.

Trickel, 16 Wn. App. at 30. While the case is not analogous, it is yet another acknowledgment that there are times when the court does not follow the general rule of presuming jurors follow their instructions.

Finally, the state appears to argue there was no prejudice because "[n]either evidence that it was 'likely' nor that 'it was consistent with' the defendant touching items before they were recovered is evidence that the witness believed that the defendant 'in fact' touched those items." BOR at 28. The state's argument is disingenuous. The prosecutor asked Kern those questions because the prosecutor knew his opinion would sew up the DNA evidence for the jurors and thereby strengthened its case. "'[T]rained and experienced prosecutors presumable do not risk appellate reversal of a hard-fought conviction by engaging in

improper trial tactics unless the prosecutor feels that those tactics are necessary to sway the jury in a close case.'" State v. Fleming, 83 Wn. App. 209, 215, 921 P.2d 1076 (1996) (quoting appellant's brief). Inadvertent or not, the prosecutor here would not have asked Kern's opinion whether it was "likely" Giles was in Berry's car and touched Berry's things if the prosecutor did not believe it was necessary to sway the jury.

In short, the prejudice resulting from Kern's testimony was not cured by the court's instruction as it had overruled both of defense counsel's timely objections and did not give the limiting instruction until later. By that time, the improper opinion testimony already impressed itself upon the jury.

2. GILES PRESENTED A SUFFICIENT EVIDENTIARY NEXUS SUPPORTING ADMISSION OF OTHER SUSPECTS EVIDENCE.

At the time of her death, Berry had male DNA under her fingernails and Giles was excluded as a possible contributor. RP 1319, 1609. Berry had a history of prostitution. RP 1200. And although a partial DNA profile obtained from Berry's steering wheel was said to match that of Giles, he had a history of breaking into cars in the mid-1990s. RP 2088. Giles also admitted he had sex with many women when he was younger, possibly Berry, although

he did not remember specifically. CP 210-11; RP 1449-50. He could have been inside one of these women's car. CP 211; RP 1449-50. And as defense counsel argued in closing, "[s]cientific studies have shown that [DNA] could be there by third-party transfers." RP 2085. Giles denied any involvement in Berry's death. CP 208.

Police had a number of other suspects early on. RP 1195-97, 1206, 1223-24, 1580-81. Among them was deputy Michael Beatie, Frank Colacurcio, Jr., and James Leslie. CP 304, 375, 393, 664-665; RP 1195; 7RP 27; 5RP 134; 7RP 130. In the latest pronouncement concerning the foundation necessary for admitting other suspects evidence, the Supreme Court held evidence of motive, ability, opportunity and/or character may provide the connection necessary for admission. State v. Franklin, 180 Wn.2d 371, 325 P.3d 159 (2013). In his opening brief, Giles argued the court erred in excluding his other suspects evidence because he proffered evidence that Beatie, Colacurcio and Leslie each had the motive, ability, opportunity and character to commit the crime charged. BOA at 37-48.

In arguing to the contrary, the state essentially takes each piece of evidence providing a connection between the other

suspect and the crime and suggests there is an innocent explanation for that person's conduct or that Giles failed to prove the other suspect committed the crime. But proof the other suspect actually committed the crime is not required. Franklin, 180 Wn.2d at 382. The evidence need only create a reasonable doubt as to the defendant's guilt. Id.

Moreover, the evidence connecting the other suspect to the crime should be viewed as a whole not in isolation. And whether there may be an innocent explanation for the other suspects' behavior goes to weight not admissibility. Those are arguments the state could have made to the jury in closing. But Giles was entitled to have the jurors consider his proffered evidence and weigh it for themselves.

Giles maintains his other suspects evidence was highly relevant because it created a reasonable doubt as to his guilt. But for the sake of clarification, a defendant does in fact have the right to present even minimally relevant evidence unless the state has a compelling interest for its exclusion. State v. Hudlow, 99 Wn.2d 1, 16, 659 P.2d 514 (1983); cf BOR at (stating defendant has no right "to introduce evidence that is minimally relevant"). "Compelling" in

this respect relates to the integrity of the truth-finding process. Hudlow, 99 at 16.

A trial court's decision to exclude evidence is reviewed for an abuse of discretion. Franklin, 180 Wn.2d at 377 n.2. However, an erroneous evidentiary ruling that violates the defendant's constitutional rights is presumed prejudicial unless the state can show the error was harmless beyond a reasonable doubt. Id.

(i) Beatie

In arguing Giles' did not present sufficient evidence to provide a non-speculative link between Beatie and Berry's murder, the state argues evidence of motive was purely speculative. BOR at 36. The state claims there was no evidence to support the defense theory that Berry was blackmailing Beatie due to his harassing conduct toward other Honey's dancers. BOR at 37. Yet, the state acknowledges there was evidence Berry was blackmailing customers as a means to address her financial distress. BOR at 37. And the defense presented significant evidence Beatie "used his badge to have sex with dancers, as well as rape victims." 5RP 129.

But assuming for the sake of argument those circumstances provided only a speculative motive, there was additional evidence

of motive. Lustful disposition is evidence of motive. See e.g. State v. Kilgore, 147 Wn.2d 288, 290-91, 295, 53 P.3d 974 (2002) (affirming trial court's admission of prior bad acts to show "motive, opportunity, [and] lustful disposition") (citation to record omitted). Beatie certainly had a lustful disposition towards Honey's dancers to the point he was being investigated for offenses involving them. CP 393; 7RP 27. And there was evidence Beatie knew Berry rather intimately. He knew she had a teddy bear tattoo on her inner thigh. CP 54-55. He seemed to know how much she weighed as he could tell she was not in the trunk when he bounced it up and down. 7RP 25. He considered himself close enough to Berry to call her mother on the day of Berry's funeral. CP 389-91, 665; 7RP 25. Perhaps most telling, when asked by Sergeant Daniel Wikstrom if he killed Berry, Beatie merely hung his head and offered no denial. 7RP 28. All these facts provide circumstantial evidence of motive.

The state argues that even if there was evidence of motive, motive alone is insufficient. BOR at 37 (quoting State v. Strizheus, 163 Wn. App. 820, 830, 262 P.3d 100 (2011) ("Mere motive, ability, and opportunity to commit a crime alone are not sufficient."). But as argued in the opening brief, Beatie had motive, ability,

opportunity and a character consistent with committing the crime. BOA at 43-44.

And contrary to Strizheus, Franklin holds motive, ability and opportunity can provide a sufficient nexus. Franklin, 180 Wn.2d at 380-81. Also contrary to Strizheus, the Supreme Court did not impose upon the defendant a requirement to demonstrate a "step taken by the third party that indicates an intention to act" on the motive or opportunity. Strizheus, 163 Wn. App. at 830 (quoting State v. Rehak, 67 Wn. App. 157, 163, 834 P.2d 651 (1992)).

In any event, Strizheus claimed the statement his son made that he stabbed his mother and father, standing alone, satisfied the nexus required to admit evidence showing his son stabbed his mother (Strizheus' wife), not Strizheus. Strizheus, 163 Wn. App. at 829. As outlined in the opening brief, Giles presented much more than a statement connecting Beatie to the murder.

Next, the state claims the fact Beatie lived and worked near Honey's, had been to Honey's previously and was not on duty the night of Berry's disappearance provides "no reasonable conclusion that Beatie had something to do with her death." BOR at 37. But this is evidence of opportunity – which is one consideration in establishing a foundation for the admission of other suspect

evidence, articulated in Franklin. Whether Beatie "could have as easily been out of town, or at home on his day off" (BOR at 37) goes to weight and would have been an argument properly made to the jury for it to consider in evaluating the evidence. In Franklin, the court did not require Franklin to prove his live-in girlfriend was at home using the computer at the time the emails were sent to Franklin's other girlfriend. Franklin, 180 Wn.2d at 376.

The state claims Beatie's familiarity with the area and a potential opportunity to be involved in the crime is no more than what was found insufficient in State v. Downs, 168 Wash. 664, 13 P.2d 1 (1932). The state is incorrect. The only other suspects evidence offered in that burglary trial against Downs was that "Madison Jimmy" – a notorious burglar – was in town the night of the burglary. Downs, 168 Wash. at 665, 668.

In contrast, Beatie was harassing Honey's dancers, knew Berry well enough to know her weight and that she had a teddy bear tattoo on her inner thigh. He was not working the night of her murder and acted strangely throughout the investigation. He claimed to see Berry's teddy bear tattoo at the recovery site before anybody else, which seemed highly unlikely in light of evidence that the location was already cordoned off and off-limits to non-

detectives before Beatie checked in at 7:15 p.m. RP 287, 251-54, 428-29, 459, 2034, 2036. This case is nothing like Downs.

Next, the state argues Beatie's conduct during the investigation provided no non-speculative link between him and Berry's murder. BOR at 37. According to the state, "[a] comment that she was not in the trunk after rocking the car's bumper may have been careless police work, but it also showed that he did not know where Patti was." BOR at 38. It's unclear how Beatie's statement shows he did not know where Berry was. It shows he knew she was not in the trunk. Whoever murdered and disposed of Berry's body likewise would know Berry's body was not in the trunk. In any event, guilty people often try to cover up their crimes or deflect suspicion.

The state further claims: "His demeanor at the vehicle recovery site and prediction where Patti would be found is consistent with being an experienced police officer who has dealt with similar situations in the past." BOR at 38. That is one inference the state could have argued to the jury. However, Beatie's prediction kids would find Berry's body in the woods (7RP 26) and the fact she was found by kids in the woods is a startling

coincidence that also supports an inference he was involved in her death. RP 481.

It's true Beatie said he obtained the scratches on his legs when he fell down an embankment looking for Berry's body. 5RP 129, 131; 7RP 18. He also filed a report stating he obtained scratches while looking for Berry's body after her car was found. 7RP 18-19. Nonetheless, there was a different police report indicating sergeant Aljets was the one who looked in the blackberry bushes, while Beatie looked in a grassy field north of the car. But again, the evidence connecting Beatie to Berry's murder should be viewed as a whole not in isolation.

Contrary to the state's assertion, Giles presented considerable evidence Beatie had the motive and opportunity to murder Berry. See BOR at 38. Under Franklin, Giles was not required to prove Beatie took steps to act on that motive or opportunity. All the evidence combined shows a non-speculative link between Beatie and Berry's murder.

(ii) Frank Colacurcio, Jr.

Moving to Frank Colacurcio, Jr., the state claims there was an insufficient nexus because some of the evidence was inadmissible. Specifically, the state argues:

> Statements from unidentified informants to the police that Colacurcio threatened to kill Patti, and that he was behind her murder were only relevant to the other suspect issue if they were offered to prove the truth of the matter asserted. As such they were hearsay, and therefore inadmissible. ER 802.

BOR at 39.

The state is incorrect. The statements could have been offered to show the thoroughness – or lack thereof – of the police department's investigation. State v. Roche, 114 Wn. App. 424, 444, 59 P.3d 682 (2002). In any event, admissibility issues were largely left unresolved, as the court simply found there was an insufficient nexus. 5RP 143; 7RP 122, 130.

Next, the state claims Berry's statement to her mother about assaulting Colacurcio was hearsay. BOR at 39. However, as defense counsel argued, it qualified as a statement against penal interest. ER 804(b)(3). Moreover, Berry made a similar statement to her sister Lisa, but said she used a bottle. 7RP 118. Hitting somebody with a bottle is in all likelihood a crime, unless Colacurcio had a weapon as well. But Berry did not suggest he did. Accordingly, the statement likely subjected Berry to criminal liability and was corroborated by the fact she said it to more than one person.

Next, the state claims Giles did not present "any evidence that Colacurcio had any real motive to kill Patti." BOR at 40. This is also incorrect. She owed him money, there was bad blood between the two and she was blackmailing Honey's customers and possibly one of Colacurcio's associates. This is ample evidence of motive.

According to the state, however, "[t]he defense presented no evidence that the money Patti allegedly owed Colacurcio or his company meant less to him than revenge for failing to pay back the debt." BOR at 40. It is not possible to prove what is going on in somebody's mind. Franklin does not set the bar that high. This is yet another argument the state could have made to the jury in closing. The same is true of the state's supposition that Berry's blackmailing of other people "gave him no motive to kill Patti without some evidence that Colacurcio would have cared whether she blackmailed that person or not." BOR at 40. It is reasonable to infer Colacurcio would not be happy about Berry blackmailing his customers and associates.

Finally, the state argues that even if Giles presented evidence of motive, evidence Colacurcio was an other suspect was not admissible absent evidence "he took steps indicating an

intention to act on his motive[.]" BOR at 41. Giles disagrees this is required under Franklin.

Regardless, there was evidence Colacurcio took steps to act on his motive. He was at Honey's the night of Berry's murder. The last witness to see Berry alive saw a black corvette – the same type of car Colacurcio drives – following Berry right after she left the strip club and disappeared. 7RP 120, 122, 128; 5RP 112, 116, 118, 120. These facts provide a non-speculative link between Colacurcio and Berry's murder.

(iii) James Leslie

James Leslie was detective John Padilla's prime suspect. 5RP 134; 7RP 130. The state claims there was no evidence of motive. BOR at 42. Nevertheless, Leslie spent a great deal of time with Berry the night she was murdered. Berry was seen with Leslie just before leaving the club. There was evidence Berry sometimes left early to meet customers outside the club. Leslie gave inconsistent stories when interviewed by Padilla. He burned his diary instead of turning it over to police. There was evidence that someone who looked like Leslie dropped off clothing at a place and time near where Berry's car was recovered. Franklin does not hold evidence of motive is always required. Rather, it is one of the

circumstances that may provide a non-speculative link between the other suspect and the crime. Leslie's actions show a consciousness of guilt. This Court should find the circumstances establish a non-speculative link between Leslie and Berry's murder.

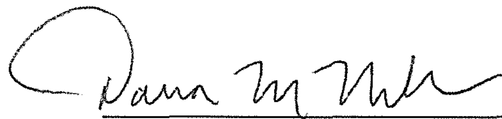
B. CONCLUSION

For the reasons stated in this reply and in the opening brief of appellant, this Court should reverse Giles' conviction.

Dated this 14th day of March, 2016.

Respectfully submitted,

NIELSEN, BROMAN & KOCH



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

STATE OF WASHINGTON/DSHS	)	
Respondent,	)	
v.	)	COA NO. 72726-5-I
DANNY GILES,	)	
Appellant.	)	

DECLARATION OF SERVICE

I, PATRICK MAYOVSKY, DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOLLOWING IS TRUE AND CORRECT:

THAT ON THE 14TH DAY OF MARCH, 2016 I CAUSED A TRUE AND CORRECT COPY OF THE **REPLY BRIEF OF APPELLANT** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

[X] DANNY GILES
DOC NO. 923602
CLALLAM BAY CORRECTIONS CENTER
1830 EAGLE CREST WAY
CLALLAM BAY, WA 98326

SIGNED IN SEATTLE WASHINGTON, THIS 14TH DAY OF MARCH, 2016.

X Patrick Mayovsky