NO. 72726-5-I

IN THE COURT OF APPEALS
OFTHE STATE OF WASHINGTON
DIVISION ONE

STATE OF WASHINGTON

Respondent

v.

DANNY R. GILES,

Appellant

BRIEF OF RESPONDENT

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1. When a witnesses' testimony violated a court's pretrial ruling, was any prejudice from that violation neutralized by the court's instruction to disregard that erroneous testimony?

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II. STATEMENT OF THE CASE

A. THE MURDER.

On July 31, 1995 police received a report from Patti Berry's family that she was missing. Patti[1] had been working as a topless dancer at Honey's for about one year at the time of her disappearance. She had left her 2 year old daughter in the care of her neighbor the night before while she worked. When she did not pick her daughter up as planned the next day the neighbor notified Patti's mother, Nancy Stensrude. Patti's family began to search for her. By 11:00 p.m. that night Ms. Stensrude believed that her daughter was dead. 9/29/14 RP 81-86, 91-95, 100-103; 9/30/14 RP 207-208.

On July 30, 1995 Patti began her shift at Honey's about 8:40 p.m. She left about 1:40 a.m. In the days before her last shift she had a slow leak in one her car's tires. A doorman at Honey's and two customers helped Patti repair the leak with Fix-a-Flat. She was advised to get more air in her tire before returning home that night. 9/29/14 RP 12-14, 28-29, 36-39, 45 9/30/14 RP 168-169.

Honey's was located on Evergreen Way, also known as Highway 99. The closest gas station to Honey's was a Circle K that was approximately one-third of a mile north at the intersection of Highway 99 and 128th Street. When Patti left she went north towards the Circle K. Roy Nichols was leaving with another dancer at the time Patti left. He was behind Patti when he saw her pull into the Circle K and get out of her car. Nichols also saw a black Corvette that had been in the Honey's parking lot driving behind him as he travelled north on Highway 99. 9/29/14 RP 14, 17, 20, 39-40, 46, 51-55, 70.

The air pump at the Circle K was broken. The closest air pump that worked was at a car wash on 128th Street. The car was located behind a Goodyear Tire Store, and was near the entrance

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[1] Three people associated with this case have the surname "Berry." To avoid confusion they will be referred to by their given names.

to I-5. On August 1 Patti's sister, Lisa Berry was looking for Patti when she located Patti's car at that car wash about 8:30 p.m. Lisa saw that the car had been tucked between two U-Haul trucks, as if to conceal it. Upon locating her car Lisa called the police from a nearby business. 9/29/14 RP 118-123; 9/30/14 RP 231-233, 248.

Before Patti's car was located Deputy Beatie was asked to go to Honey's to gather information about her disappearance. While he was there he was directed by his superior officer to respond to the car wash where Patti's car had been found. Beatie noted that the car was parked about 10 feet from an alleyway, between two U-Haul trucks. He looked inside the car and noticed that there was a significant amount of blood throughout the interior of the car. The driver's side window was down, and the left front tire was flat. The sunroof had been cracked. It was clear to police at that point that Patti had been murdered. Beatie did not enter the car; he and Sgt. Aljets cordoned off the area to keep people away from it. Beatie then followed the car as it was towed to the Sheriff's Office garage for processing. When the tow truck lifted the car Beatie noted there was blood on the driver's side rocker panel, but there was no corresponding blood on the ground below it. After securing the car in the garage Beatie returned to the scene to look

for any evidence that might be associated with the crime scene. He did not find any associated evidence. 9/30/14 RP 185-190, 236-237.

Deputy Fenter was assigned to look for Patti and evidence associated with the crime. On August 2 during daylight hours he went back to the area where her car was found. He located some items that looked like they belonged to Patti a few hundred yards from where her car had been found in a wooded grassy area on and near some blackberry brambles. Police thoroughly searched the area for any sign of Patti. They located a pair of blood-stained jeans, dance costumes, shoes, a blood stained pillow, and some cosmetics. The pillow was consistent with bedding located in Patti's home. The police located no other items associated with Patti's disappearance in the surrounding area. 9/30/14 RP 244-245, 300-302; 312; 10/1/14 RP 322-326, 330-343, 364, 374-375, 381-384.

On August 8 Patti Berry's body was found in a wooded lot next to the Country Club apartments near the Everett Mall. The lot contained old growth and second growth trees, scrub brush and blackberry vines. There was a dirt road and some footpaths through the lot. She was located about 30 yards from the paved roadway. Her body was about 5 to 8 yards south of the trail in

some bushes. Patti had no clothing on the lower portion of her body. Her face showed signs of decomposition. She was identified in part due to a small teddy bear tattoo. 10/1/14 RP 343-345, 392, 398-399, 425, 427.

The autopsy revealed that Patti had 16-18 stab wounds over her face and neck. The wounds were on her left side and many were concentrated within about a 6" diameter. All of the wounds were consistent with the same knife. Some wounds were as much as 2" deep. One wound was so deep it severed her right carotid artery. She also had a defensive stab wound to her left hand. She had no other significant injuries, including to the soles of her feet, suggesting that she had been carried to the body recovery site. The cause of her death was multiple stab wounds to her head and neck. The manner of death was classified as a homicide. The medical examiner believed the rate of decomposition observed on her body was consistent with her death on July 31. 10/3/14 RP 655-684.

On July 30, 1995 16 year old Todd Horton went to an Everett Giants baseball game with his friend Dan Simons. After the game and visiting with his girlfriend the two went to a Taco Bell on 128th Street at about 1:30 a.m. After getting their food they went to the

car wash nearby and parked in one of the stalls facing south to eat. Horton saw someone parked in front of them about 30' away. The man appeared to be about 6' tall and 200-220 lbs. He was standing by a car that was parked facing west. The back doors and trunk were open. The man was using a hose from either the car wash or the tire store next door to wash off floor mats and the trunk area. The substance washed off looked murky, and Horton thought that it was blood. About four years later Horton worked with a police sketch artist to create a composite drawing of the person that he saw at the car wash. The drawing looked very similar to photos of the defendant, Danny Giles, from that time period. In 2012 Horton viewed a photo array and selected the defendant from the array as the person that he saw in the car wash, hosing blood off the car.[2] 10/6/14 RP 915, 923-939, 953-959, 961-963; 1016; 10/8/14 RP 1401-1403; 10/10/14 RP 1543-1544; Ex. 233, 236, 323, 324.

The defendant lived and worked in the area that Patti was last seen, and where her car and body were recovered. The defendant grew up off of 4th Avenue and attended Mariner High

[2] Horton also made an in court identification of the defendant as the person that he saw at the car wash. 10/6/14 RP 906, 964.

School. Both locations are near 128th Street. The defendant frequented a bar called Kodiak Ron's that was located at 128th and Highway 99, and another Chinese restaurant on 128th. Both were within three miles of the Everett Mall. Kodiak Ron's was located in the same strip mall that the Circle K was located. 9/30/14 RP 225-226; 10/8/14 RP 1255-1256, 1260-1261, 1280; 10/13/14 RP 1706.

The defendant was in good physical condition in the mid-90's. He typically rode his bike to get around. He also worked out to get in better shape, in part by weight lifting. He talked about going to Honey's on several occasions. He had a poor opinion of women he considered prostitutes, and had been heard making derogatory comments about them. He was also known to habitually carry a knife. 10/8/14 RP 1259-1261, 1280-1284, 10/13/14 RP 1705-1707.

The defendant also worked as a temporary employee for Rod Coslett doing commercial grounds maintenance between April and June 1995. Coslett had a contract to do the grounds at the Country Club apartments near where Patti's body had been found. The defendant worked as part of the crew that did the landscaping there. The crew was allowed to dump some of the yard waste in the dumpsters, but the grounds crew also dumped yard waste in the

brush. The crew also used the brush to relieve themselves. Patti's body was found in that same brushy area between one and two months after the defendant stopped working for Coslett. 10/13/14 RP 1713-1716; 10/14/14 RP 1726-1742, 7145.

Various items from the car and Patti's belongings were collected and tested for the presence of DNA in an attempt to identify Patti's killer. In 2004 the crime lab swabbed the steering wheel of Patti's car and got a profile for a mixture of two people; one male and one female. The female DNA was consistent with Patti's DNA. The male DNA was entered into the CODIS DNA data base. 10/7/14 RP 1062-1068.

In 2008 CODIS returned with a hit; the defendant's DNA matched the DNA from the unknown sample taken from the steering wheel of Patti's car. At the request of the crime lab, police obtained a new DNA sample from the defendant. A profile obtained from that DNA was obtained and compared to the mixed profile obtained from the DNA from the steering wheel. The mixed DNA profile was consistent with originating from the known profiles of Patti Berry and the defendant. It was 580 million times more likely that the profile occurred as a result of a mixture of those two people's DNA than having originated from Patti and some unrelated

person selected at random from the population of the United States. 10/7/14 RP 1089-1091, 1096-1100.

DNA profiles taken from the underside of the headrest of Patti's car, her jeans, and her bag were also compared to the defendant's DNA profile. A sample from the opening of Patti's bag contained a mixed profile; Patti was the major contributor and the defendant could not be excluded as the minor contributor. The frequency that a random unrelated person could not be excluded from that mixture was one in 72 unrelated people. 10/3/14 RP 770-775. Y-STR DNA testing done on samples from the handles of the handbag showed that neither the defendant nor anyone in his paternal linage could be excluded as a contributor. Twelve in 4114 Caucasian males could have contributed to that profile. The defendant could not be excluded as a contributor to a partial profile taken from the handles of the bag. Two in 4114 Caucasian males could have contributed to that profile. 10/3/14 RP 821-826.

A mixture of DNA was found on the lower portion of Patti's jeans. The major contributor was Patti Berry, and the minor contributor was consistent with the defendant's DNA. A Y-STR profile was also obtained from that sample. It showed that there was a mixture of DNA from two males, and the defendant could not

be excluded as a contributor to that sample. That mixture was calculated to occur 15 times in 4114 male Caucasians. 10/3/14 RP 781-783, 827-828.

A partial Y-STR profile was obtained from a sample taken from the underside of the driver's side headrest of Patti's car. The defendant or anyone in his paternal line could not be excluded as a contributor to that profile. That profile was not expected to occur more than once in every 1200 males in the United States. 10/13/14 RP 1670-1671.

Blood evidence from the car and Patti's jeans gave an indication how she was attacked. There was blood on the driver's door, suggesting that the door was open when it was bloodstained. The blood on the exterior and interior of the car suggested that the attack occurred on the driver's side of the car, possibly while Patti was attempting to put air in her tire. There was a large deposit of blood on the driver's seat as well as on the passenger seat. There was also an area on the driver's seat that was not bloodied, suggesting that Patti was possibly seated there at some point during the attack. Blood patterns on the jeans suggested that they were being worn at the time that blood was deposited there. It also suggested that Patti was moving around when some of the blood

was deposited on the jeans. There were some blood swipes on the seats from the front seat to the back seat, and a large deposit of blood on the back seat floor boards. This suggested that Patti had been moved from the front seat to the back seat where she bled out. Each of the pedals had blood on them, indicating that someone with bloody shoes had driven the car. 10/6/14 RP 856-857; 10/14/14 RP 1824-1839, 1843-1844, 1849-1853.

The location of DNA evidence was significant when considered in connection with the blood evidence found in Patti's car. That evidence was consistent with the defendant being in Patti's car and touching her clothes and bags before those items were recovered. The evidence also was consistent with Patti being driven to the body recovery site. 10/14/14 RP 1853-1854, 1862-1863.

The police spoke to the defendant about Patti's murder. The defendant admitted he was in good physical condition and that he regularly rode his bike as transportation. He told police on one occasion he even rode his bike to California, averaging about 100 miles per day. Ex. 355 page 20, 23-24.

The defendant told police that he wore his hair short in the mid-90s. Ex. 364 page 5. Photos from that era show that the

defendant wore his hair longer in back, similar to a mullet-style. Ex. 236-237.

The defendant admitted that he carried a knife when he went fishing or hiking. He denied carrying a knife regularly Ex. 364 pages 32-35.

The defendant admitted that he went to Kodiak Ron's on occasion, and a Chinese restaurant lounge on 128th. But he denied going to bars regularly. He admitted however that he was stopped by a police officer outside Kodiak Ron's one time for vehicle prowling. The defendant had admitted the car he was going through had been stolen. Ex. 355, page 13; Ex. 364, pages 10-12, 23.

The defendant admitted that he was familiar with the Country Club apartment complex in Everett, although he did not know that it was also known as "the jungle" by people who lived there. He claimed that he did not know anyone who lived there, and had only been by there, but had not been to the complex itself. Ex. 364 pages 8-9. Although the defendant told police some of the places that he worked during 1995 he did not tell them that he worked for Rod Coslett performing landscaping at the Country Club apartments. Ex. 364, pages 24-26.

The defendant told police that saw the report about Patti's murder on Washington's Most Wanted within a few months prior to their interview. He thought he may have known Patti from Mariner High School, but was not sure. Patti went to Arlington High School; the defendant denied ever meeting her at an intermural event. He denied that Patti or the facts surrounding her murder stood out when he saw her on a deck of cold case playing cards. Ex. 355 page 7, 10; Ex. 364 pages 2, 18, 27-28.

The defendant denied going to Honey's regularly, stating that he had only been there once or twice. Ex. 355 page 9. The defendant said that he had two steady relationships during the 1990's, and that he did not cheat on either girlfriend. He also stated that he may have had casual sexual encounters with women during breaks in the relationships with those two women, but he could not remember the names of those women. He denied ever dating a dancer from Honey's or paying for sex. He denied ever meeting Patti at Honey's. Ex. 355, pages 25-27; Ex 364, pages 3-4, 30-31, 43-44.

The defendant denied ever having had contact with Patti's car. He admitted that he was familiar with the car wash where her car was found, but he never found any bloody clothing or a car

whose interior was covered in blood there. He admitted that he had a history of car prowl, but never prowled Patti's car before it was recovered on 128th covered in blood. Ex. 355, pages 13, 31-32; Ex. 364, pages 39-40.

When police told the defendant that his DNA had been found in Patti's car and on her clothing the defendant suggested that it was possible that he had sex with her. He could not explain why his DNA would be in Patti's car. He denied that he had killed her. Ex. 364, pages 41-44.

B. PRE-TRIAL PROCEDURE.

The defendant was charged with one count of first degree murder with a deadly weapon.[3] 2 CP 838.

1. Motion To Admit Other Suspect Evidence.

Before trial the defense sought to introduce evidence that other suspects were involved in Patti Berry's murder. The defense offered evidence related to a former deputy sheriff Michael Beatie, one of the owners of the club where Patti Berry was employed, Frank Colacurcio Jr, and one of the patrons of the club where she

[3] The defendant was charged with a second count of first degree murder for the death of Tracey Brazzel. That count was severed from the count involving Patti Berry. 1 CP 215-216. It is not at issue in this appeal.

danced, James Leslie.[4] The evidence that the defense offered is as follows:

a. Michael Beatie

Originally the defense presented evidence relating to Beatie's character, opportunity, and conduct to argue that it should be permitted to produce evidence Beatie was a viable other suspect. In connection with his character the defense alleged that the Sheriff's Office found he had committed misconduct related to unnamed Honey's dancers and unnamed sexual assault victims in the exercise of his duties as a deputy sheriff. 2 CP 665. The defense alleged Beatie had the opportunity to commit the offense, pointing to evidence that Beatie lived and worked in the area where the murder was committed, he was not on duty that night, he was the first officer on the scene when Patti's family found her car, and he was present at the body recovery site. 2 CP 665. As to Beatie's conduct the defense pointed to evidence that when asked if he committed the murder Beatie did not respond, and Beatie called Patti's mother on the day of Patti's funeral to offer his condolences. The defense also cited Beatie's statement that he had obtained

[4] The defense named eight other men as possible suspects. 2 CP 659-668. The defendant does not challenge the court's rulings as to any of those eight persons on appeal.

scratches from looking for Patti's body in blackberry bushes, and her body was found in blackberry bushes six days later. 2 CP 665. The court ruled that if the defense could produce evidence that Beatie had no official business looking for Patti, then there would be a sufficient nexus to allow evidence that Beatie was another suspect. 8/21/14 RP 130.

After the defense conducted additional investigation it again sought to admit evidence that Beatie was another viable suspect. The defense presented additional evidence related to Beatie's character, opportunity, and conduct. The defense listed six instances of Beatie's sexual misconduct with persons other than Patti. 1 CP 392-393. They noted that Beatie had been fired as a result of these misdeeds. 1 CP 393. They also noted that when Patti's car was found Beatie was "unfazed." 1 CP 373. The defense pointed out that before he was fired Beatie often asked to work undercover at Honey's, and that before his employment as a deputy sheriff he had been employed in a different club by the same people who owned Honey's. 1 CP 371, 390. The defense said that although Beatie went to Honey's to investigate Patti's disappearance, he failed to obtain surveillance videos. The defense alleged Beatie tampered with evidence when he rocked

Patti's car by putting his foot on the bumper, and commenting that he knew Patti was not in the car. 2 CP 371, 390. The defense also alleged that Beatie went through Patti's car before it had been inventoried. 2 CP 390.

The defense pointed to evidence that postmortem changes to Patti's body suggested that she had not been at the body recovery site for long. The defense argued that Beatie had the ability to conceal the body someplace else for several days before it was placed in the woods by the apartment complex. 9/18/14 RP 29; 1 CP 395. The defense argued that Beatie as an experienced police officer had the sophistication to misdirect the investigation. 9/18/14 RP 28; 1 CP 394.

The defense stated that Patti was in financial trouble, and that she was blackmailing clients. 1 CP 389. The defense argued that Beatie was the kind of person who would put himself in a position to be blackmailed. The constellation of injuries suggested this was a statement killing, and that someone who was being blackmailed would be the kind of person to make that kind of statement. 9/18/14 RP 29.

The defense offered that according to another officer on scene when Patti's car was recovered Beatie only searched for

evidence in an open grassy field. The court reviewed Beatie's report from that incident and concluded that it indicated that he did have responsibility for searching for the body. The court therefore maintained its earlier ruling precluding the defense from presenting evidence that Beatie was another suspect. 9/18/14 RP18-21.

b. Frank Colacurcio Jr.

The defendant offered evidence relating to Frank Colacurcio Jr.'s character, motive, and opportunity. As to his character the defense offered that Colacurcio was one owner of Talents West, and Patti had described the owners as "mafia types." 1 CP 386. The defense also suggested that Colacurcio was sophisticated enough to throw off suspicion from the person who committed the crime by leaving the evidence of victim's car and clothing and her body in places known to be "trouble spots." 1 CP 387-388.

In regard to motive the defense offered that Patti had financial troubles and she owed her employer money. Patti told another dancer that she was blackmailing clients to pay her more money, including an unnamed associate of Colacurcio's. 1 CP 384-385; 2 CP 664. Patti told her mother that she assaulted Colacurcio one time when Colacurcio patted Patti on the rear end. 1 CP 383; 2 CP 664. The defendant also said an unidentified

informant said that Patti said Colacurcio threatened to kill her. Another unidentified informant said that "Colacurcio was behind the murder." 2 CP 664. Like the evidence offered to support Beatie as another suspect, the defense stated the constellation of injuries show it was a "statement killing" and the statement was "do not blackmail the Colacurcio's or anyone associated with them." 1 CP 388.

As to opportunity the defense reported that Roy Nichols, an employee of Honey's, said that Frank Colacurcio was present at Honey's the night that Patti was murdered. Colacurcio owned a black Corvette. Nichols followed Patti as she left Honey's. Nichols observed a black Corvette like Colacurcio's following Nichols. 1 CP 386; 9/18/14 RP 120. However Nichols also said that he never saw the driver, and for that reason could not be sure that it was Colacurcio behind him. 9/18/14 RP 122.

The court concluded that the some of the evidence related to Colacurcio as a suspect was speculative. Other evidence, such as Patti's debt to Talents West, cut against a motive to kill her. 9/18/14 RP 128-130. The court noted that there was no evidence that Patti was specifically afraid of Colacurcio. 9/18/14 RP 132-133. The court therefore denied the defense request to produce evidence to

argue Colacurcio was another suspect to the murder. 9/18/14 RP 130, 133.

c. James Leslie

The defense initially sought to introduce evidence James Leslie was a viable suspect in Patti's murder because she spent a lot of time with him during her last shift at Honey's. When questioned by police he gave some conflicting stories, and burned his diary instead of giving it to police. 2 CP 667. The defense further asserted that Leslie sat with a known drug dealer during that last shift. 8/21/14 RP 135-136. The court found none of that evidence was admissible, and therefore denied the motion to admit other suspect evidence regarding Leslie. 8/21/14 RP 136.

At trial the defense renewed the motion to offer evidence that Leslie was another suspect. The defense provided details concerning the conflicting statements Leslie made to police. The defense also offered that a witness saw someone who looked like Leslie carrying a duffle bag and dropping off clothing near the car was near the time when Patti's car was recovered. Also that Leslie lived near Honey's. 1 CP 395-399. The court again denied the motion to name Leslie as another suspect. 9/18/14 RP 130-131.

2. Defense Motion In Limine Regarding Expert Testimony.

The State called Kristopher Kern to testify regarding his crime scene analysis. Mr. Kern is employed by the Washington State Patrol Crime Lab as a Crime Scene Response Team manager. His specialty included crime-scene analysis and reconstruction, and bloodstain-pattern analysis. Mr. Kern holds a B.S. in biology and a master's in forensic science. He has training and experience in DNA analysis, trace evidence analysis, bloodstain-pattern analysis, fluid dynamics of blood-stain pattern formation, serology and crime-scene investigations. He has qualified as an expert in his field on average two to three times per year. 10/14/14 RP 1797-1801.

Prior to calling Mr. Kern the defense moved in limine to prohibit Mr. Kern from testifying that based on the forensic DNA analysis reports that the defendant was likely inside Patti's car prior to its recovery and he likely had contact with some of Patti's belongings prior to recovery. The defense agreed that Mr. Kern could testify that the physical evidence is consistent or not consistent with various scenarios presented to him. 1 CP 234-235.

The court ruled that Mr. Kern could not testify using the term "likely." However he could offer his opinion whether the defendant

was in the vehicle based on the evidence he reviewed. The court clarified that the question should be posed in terms of "so is the evidence consistent with that..." 10/9/14 RP 1490-1491.

Mr. Kern testified that he reviewed various DNA reports, including reports from Aimee Rogers and Barbra Leal, as well as a report by Jean Johnston and a report by William Stubbs. The prosecutor then asked "Based on that, is it likely that the defendant, Danny Giles, was inside of that car, touching the steering wheel?" An objection on the basis of foundation was overruled. 10/14/14 RP 1854.

Mr. Kern was then asked "After reviewing those reports [from Rogers and Leal] do you have an opinion whether it was likely that Mr. Giles touched those items, prior to their recovery?" An objection on the basis that he lacked the qualifications to testify to what the other DNA analysts testified to was overruled. Mr. Kern answered "yes, prior to them being discovered." 10/14/14 RP 1854-1855.

In a hearing outside the presence of the jury the defense reminded the court of its earlier ruling limiting the scope of Mr. Kern's testimony. The court acknowledged that the testimony violated the court's ruling but found that it was not intentional. The

defense approved the court's proposed curative instruction striking the erroneous testimony. 12 RP 1856-1861.

When the jury returned the court instructed the jury:

> So at this time I'm going to advise the jurors, and require the jurors, and you're so instructed to disregard the testimony from Mr. Kern that it is likely that Mr. Giles was inside the car touching the steering wheel. You also are instructed and required to disregard the testimony of Mr. Kern, based on review of the reports of Barbara Leal and Aimee Rogers related to his opinion that it was likely Mr. Giles touched the belongings of Patti Berry, prior to their recovery.
>
> So you will not consider that at all, for purposes of your deliberations in this case. You're not to consider that testimony whatsoever.

10/14/14 RP 1861-8162.

Thereafter Mr. Kern was permitted to testify that the DNA evidence presented was consistent with the defendant being in Patti's car before it was recovered. The DNA evidence was consistent with the defendant touching Patti's clothing and personal property before those items were recovered. 10/14/14 RP 1862-1863.

III. ARGUMENT

A. THE TRIAL COURT'S INSTRUCTION TO DISREGARD ERRONEOUS TESTIMONY NEUTRALIZED ANY PREJUDICE RESULTING FROM THAT TESTIMONY.

The defendant argues that Mr. Kern's testimony in response to questions about whether it was likely the defendant was in Patti's car and touched Patti's clothing prior to recovery was an impermissible opinion that the defendant was guilty, resulting in a violation of his right to jury trial. He dismisses the effect of the court's curative instruction arguing that it was ineffective to "unring the bell."

Appellate courts have long presumed that jurors follow the trial court's instructions. State v. Cunningham, 51 Wn.2d 502, 505, 319 P.2d 847 (1958), State v. Costello, 59 Wn.2d 325, 332, 367 P.2d 816 (1962), State v. Braun, 82 Wn.2d 157, 169, 509 P.2d 742 (1973), State v. Southerland, 109 Wn.2d 389, 391, 745 P.2d 33 (1987), State v. Imhoff, 78 Wn. App. 349, 351-352, 898 P.2d 852 (1995), State v. Montgomery, 163 Wn.2d 577, 595-596, 183 P.3d 267 (2008), State v. Barry, 183 Wn.2d 297, 306, 352 P.3d 161 (2015). This presumption applies in the context of an instruction to disregard erroneously introduced evidence. Cunningham

(improper propensity evidence), Costello (same), Montgomery (improper opinion testimony).

Evidence that the jury did not follow the court's instructions may overcome the presumption that those instructions were followed. State v. Kirkman, 159 Wn.2d 918, 928, 155 P.3d 125 (2007), Montgomery, 163 Wn.2d at 596. In the absence of such evidence the presumption prevails. Thus where an expert's opinion was found to be an improper expression that the defendant was guilty, the court found no prejudice where the jurors were also instructed that they were the sole judges of the credibility of the witness and that jurors were not bound by expert witness opinions. Id. at 595-596.

Here the error occurred on the twelfth day of trial. The court observed that the jurors had been "excellent" in following the court's instructions throughout the proceedings. The court believed that jurors would completely disregard the testimony when instructed to do so. 10/14/14 RP 1860. The court not only specifically instructed the jurors to disregard evidence that it was likely the defendant touched the steering wheel of the victim's car, her clothing, and her bag before those items were recovered, but it gave further instructions that cured any potential prejudice resulting from that

testimony. The court also instructed the jurors that they were the sole judges of the credibility of the evidence, and that they were not bound by any expert's opinion. 1 CP 110,115. The defense points to no evidence in the record that suggests that the jurors did not follow this instruction. Like Kirkman and Montgomery, this court should conclude that these instructions cured any prejudice resulting from the witnesses' testimony that was stricken.

The record did support the conclusion that jurors would not be able to follow the courts curative instruction in State v. Babcock, 145 Wn. App. 157, 185 P.3d 1213 (2008). There the defendant was originally charged with rape of a child against M.B. and child molestation against A.T. The circumstances surrounding each incident were very similar. Both children were found competent to testify. Six witnesses testified to child hearsay statements A.T. made to them. When A.T. could not testify at trial the court dismissed the charge related to her, and instructed the jurors to disregard the testimony concerning her. Id. at 160-162. The defendant was convicted solely on the jury's assessment of M.B.'s credibility. Id. at 164. The court concluded that given the nature and similarity of the evidence involving A.T. to the charges involving M.B, testimony related to A.T.'s hearsay statements was highly

prejudicial. Id. at 165. Under these circumstances the court could not be assured that even with an instruction jurors could effectively disregard that evidence. Id.

This case is significantly different from Babcock. All the evidence pointing to the defendant as Patti's killer was circumstantial. The DNA evidence was not the only evidence supporting that element of the crime. The defendant's familiarity with the area where she was likely murdered and where her body was left, his habit of carrying knives and evidence that Patti had been stabbed with a knife, his familiarity with Kodiak Ron's and Honey's where Patti worked, his attitude towards prostitutes, evidence he was at the car wash where Patti's car was recovered on the night she disappeared, and the defendant's statements to police all supported the conclusion that he was guilty of the crime.

The excluded testimony did not relate to a different victim in a different case. Rather it all related to the evidence supporting the charged offense. The evidence also did not have the tendency to be inflammatory, as evidence of a child molestation in an unrelated case may be. The location of an individual's DNA alone does not establish the elements of any specific crime.

Finally the evidence that was ruled admissible is not so far different from that evidence that the court excluded. Neither 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. Rather the difference is in the degree of the opinion. An opinion that something is likely suggests a stronger degree of certainty that something happened than an opinion that it was consistent with that happening. Given the nature of the testimony that was struck, and the testimony that was admitted without objection, the record supports the conclusion that the jury complied with the court's instruction to disregard the erroneous evidence.

Although the defendant does not point to evidence jurors failed to comply with the court's instructions, he nevertheless argues the court should presume the court's instructions were ineffective because the testimony went to the "heart of the defense case." In support of his position he cites State v. Powell, 62 Wn. App. 914, 919, 816 P.2d 86 (1991), review denied, 118 Wn.2d 1013 (1992). There the court dismissed an indecent liberties prosecution based on insufficient evidence. Id. at 918. The court addressed a prosecutor's improper argument, and the possibility that an

instruction could have cured prejudice resulting from that error in dicta. Id. at 918-919[5]. Because the portion of the opinion the defendant relies on was dicta, and related to a type of error completely different from that at issue here, it does not support the defendant's claim that the courts instructions did not cure any prejudice from the testimony introduced in violation of the court's evidentiary ruling.

The defendant cites the quote in Powell "[t]he bell once rung cannot be unrung." The quote was taken from State v. Trickel, 16 Wn. App. 18, 30, 553 P.3d 139 (1976), review denied, 88 Wn.2d 1004 (1977). Trickel similarly does not support the defendant's position because it was referring to the effect of publicity on a jury. While it suggested that under some circumstances a juror's exposure to that publicity may not be cured, it did not suggest that no admonition to the jury would ever be effective. In that case the court held the court's admonition, along with the presumption that the jury would follow it, was sufficient to ensure the defendant had received a fair trial. Id. at 30. The reference to an error that cannot "unring the bell" is taken out of context, and has no application to

[5] "We comment on the other two issues because they may arise in other cases." Powell, 62 Wn. App. at 918.

this case.

B. THE DEFENDANT FAILED TO ESTABLISH AN EVIDENTIARY FOUNDATION TO SUPPORT ADMISSION OF OTHER SUSPECTS EVIDENCE.

The defendant assigns error to the trial court's ruling excluding his proffered evidence that other suspects committed the murder. Specifically he challenges exclusion of evidence concerning former Deputy Sheriff Michael Beatie, Frank Colacurcio Jr., and James Leslie. Because the defendant failed to establish a sufficient foundation to support that evidence, the court did not err.

The constitution guarantees a criminal defendant the opportunity to present a complete defense. Holmes v. South Carolina, 547 U.S. 319, 324, 126 S.Ct. 1727, 164 L.Ed.2d 503 (2006). However a defendant does not have a constitutional right to introduce evidence that is minimally relevant, is repetitive, or poses an undue risk of harassment, prejudice, or confusion of the issues. Id. at 326-327; State v. Maupin, 128 Wn.2d 918, 924-925, 913 P.2d 808 (1996).

Evidence that someone other than the defendant committed the charged crime is admissible if there is "such proof of connection with the crime, such as a train of facts and circumstances as tend clearly to point out some one besides the accused as the guilty

party." State v. Downs, 168 Wash. 664, 667, 13 P.2d 1 (1932). The proposed evidence must raise more than just suspicion that another person committed the crime. State v. Franklin, 180 Wn.2d 371, 380, 325 P.3d 159 (2014). "Some combination of facts or circumstances must point to a nonspeculative link between the other suspect and the charged crime." Id. at 381.

The defendant bears the burden to show that other suspect evidence is admissible. State v. Strizheus, 163 Wn. App. 820, 830, 262 P.3d 100 (2011), review denied, 173 Wn.2d 1030 (2012). The foundation for that kind of evidence must show a clear nexus between the other person and the crime. Id. It must also show that the other person took a step indicating an intention to act on motive or opportunity to commit the crime. State v. Starbuck, 189 Wn. App. 740, 752, 355 P.3d 1167 (2015). When the State's case is based on circumstantial evidence the defendant may likewise rely on similar evidence to meet the foundational requirement for admission of other suspect evidence. Id. at 751-752.

When evaluating the defendant's proposed evidence the court must consider whether it has a logical connection to the crime. State v. Wade, 186 Wn. App. 749, 764, 346 P.3d 838, review denied 184 Wn.2d 1004 (2015). A court may not evaluate

such evidence based on the strength of the State's case. Franklin, 180 Wn.2d at 381-382, Holmes, 547 U.S. at 329-330. However, the court may consider the State's evidence as it bears on the probative value of the defendant's proffered other suspect evidence. Starbuck, 189 Wn. App. at 756.

A trial court's decision to admit or exclude other suspect evidence is reviewed for an abuse of discretion. Franklin, 180 Wn.2d at 377, n. 2. A court abuses its discretion when its decision is manifestly unreasonable or base on untenable grounds or untenable reasons. In re Marriage of Little, 133 Wn.2d 39, 46-47, 940 P.2d 1362 (1997). A decision is based on untenable reasons if the court applies an incorrect legal standard, or if the facts do not meet the requirements of the correct standard. Id.

The defendant does not argue that the trial court employed the wrong legal standard when it rejected his other suspect evidence. Rather he argues that the evidence was sufficient to draw a nexus between each of the three persons he identified and the murder of Patti Berry. Thus he claims that the court abused its discretion when it excluded that evidence.

A sufficient nexus existed to introduce other suspect evidence in Maupin. There a witness testified that he saw the

defendant carrying the victim off in the middle of the night of January 25, 1988. Maupin, 182 Wn.2d at 922. The State argued that the victim was murdered at or near the time that she had been abducted. Id. at 926. The defense was prevented from introducing evidence that the victim was seen with another person the day after she was abducted. Id. at 922-923. The court held this was error; while the evidence did not necessarily exculpate the defendant, as he may have been acting with another, it did cast doubt on the State's theory of the case. Id. at 928.

A defendant was erroneously deprived of the right to present other suspect evidence as well in State v. Clark, 78 Wn. App. 471, 898 P.2d 854, review denied, 128 Wn.2d 1004 (1995). There a defendant charged with the arson of his business office was prevented from introducing evidence that his girlfriend's estranged husband committed the crime. In addition to motive and opportunity, there was evidence that the estranged husband had taken steps against the defendant; he tried to have the defendant's business shut down by having the defendant's phone shut off the day before the fire and instigated a campaign to get the defendant's professional license revoked. Id. at 480 n. 10. The estranged husband had also made statements that verged on a confession,

and indicated that the defendant had not committed the arson. Id. at 475-476.

In contrast, other suspect evidence was properly excluded in Downs. There a defendant charged with burglary sought to introduce evidence that a notorious burglar was in the vicinity of the burgled premises at the time the crime was committed. Downs, 168 Wash. at 666. The court held that his opportunity to commit the crime was insufficient to allow the defense to name that person as another suspect absent evidence of circumstances that the person was somehow connected to the crime. Id. at 667-668.

Similarly in Wade the defendant sought to present a murder victim's ex-boyfriend as a potential other suspect. The former boyfriend had been convicted of assaulting the victim six months before her murder. Wade, 186 Wn. App. at 757. The defense argued that the messages the ex-boyfriend left for the victim in the months leading up to her murder contained implied threats, and the victim had expressed fear of an ex-boyfriend getting out of jail. Id. at 765. However, the investigation revealed no forensic evidence that tied him to her murder, and there was no evidence from the building's surveillance system that he had entered her apartment building at the time she was murdered. Id. at 758. This court found

that the trial court did not abuse its discretion when it denied the defense motion to argue the ex-boyfriend was another suspect, because the evidence presented no nonspeculative link between that person and the crime. Id. at 767.

Likewise this court found no basis to admit other suspect evidence in State v. Mezquia, 129 Wn. App. 118, 118 P.3d 378 (2005), review denied, 163 Wn.2d 1046 (2008). There the defendant sought to admit evidence a murder victim's former boyfriend committed the crime. He pointed to evidence that the victim expressed her anger toward her ex-boyfriend and that she was looking for him the night she was killed. In addition, the victim said the ex-boyfriend sometimes went "crazy" and attacked her on two occasions. Finally the day after she was killed the ex-boyfriend called the victim's roommate looking for her, and expressed disbelief that the victim would be in the shower. Id. at 124. This court held the evidence was properly excluded. The proffered evidence did not clearly point to the ex-boyfriend, and there was no evidence that the victim had any contact with the ex-boyfriend that night, or that he had the opportunity or motive to commit the crime. Id. at 125.

A trial court did not abuse its discretion when it rejected other suspect evidence in Strizheus, supra. There was no physical evidence connecting a third person to the crime, and although the person identified as another suspect may have had a motive, there was no evidence that person had taken any steps indicating his intention to act on that motive. Strizheus, 163 Wn. App. at 832.

In Starbuck evidence that a murder victim had sexual relations with several men and text messages between the victim and two men she dated supported only speculation that those men were connected to her murder. Starbuck, 189 Wn. App. at 754-755. Other evidence clearly showed where one of the two suspects was at the time of the murder, and showed that he had no opportunity to commit the crime. Id. at 755-756.

The defendant's proposed evidence was similar to the evidence held insufficient in each of the forgoing cases. As to each other suspect there was no evidence that presented a nonspeculative link between the person and the murder.

Evidence offered to support the inference that Michael Beatie had a motive for murdering Patti was purely speculative. While the defense suggested that Beatie was the kind to put himself in a position to be blackmailed, due to his misconduct with

other women, and there was some evidence Patti blackmailed customers as a means to address her financial distress, there was no link between the two circumstances. There was no evidence that even if Beatie knew Patti, that he had been involved sexually with her, or that she had attempted to blackmail him. Even if there had been that evidence, a motive to murder her alone is insufficient to establish the necessary foundation to admit other suspect evidence. Strizheus, 163 Wn. App. at 830 ("Mere motive, ability, and opportunity to commit a crime alone are not sufficient.").

Similarly the assertion that Beatie lived and worked near Honey's, and had been to Honey's previously, and that he was not on duty on the night Patti was murdered provides no reasonable conclusion that Beatie had something to do with her death. The defense presented no evidence Beatie was actually in the area that night; he could have as easily been out of town, or at home on his day off. His familiarity with the area and a potential opportunity to be involved in the crime is no more than what was found insufficient to admit other suspect evidence in Downs.

Beatie's alleged conduct during the investigation also provided no nonspeculative link between him and the murder. Beatie was directed by his supervisor to perform acts associated

with the investigation, including contacting Patti's mother, going to Honey's, going to the vehicle recovery site, and arranging to impound the vehicle. Beatie denied that he had entered the victim's vehicle or touched anything inside it. 9/18/14 RP 58-74. 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. 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. It does not support the conclusion that he had anything to do with her murder.

The defense made much of scratches that Beatie had and his explanation that he was looking for Patti when he got those scratches. But Beatie had a role in the investigation, which included looking through brambles for any evidence associated with Patti's car after it was recovered. 9/18/14 RP 72. Thus even if he made those statements the circumstances under which he got scratches is unremarkable.

Just because Beatie may have been a "bad actor" the defense presented no evidence that Beatie had any motive or opportunity to murder Patti. Nor did it present any evidence that

Beatie had taken any steps to act on any motive or opportunity that he may have had to murder her. The evidence presented was no better than that at issue in Wade and Strizheus. The trial court did not err when it concluded the defense failed to establish a foundation to present Beatie as a viable other suspect.

Nor was the evidence advanced in support of Frank Colacurcio Jr. as another suspect sufficient to establish the required foundation to admit it. Some of the proffered evidence was inadmissible. A defendant's Sixth Amendment right to compulsory process does not include the right to offer testimony that is inadmissible under the standard rules of evidence. Taylor v. Illinois, 484 U.S. 400, 410, 108 S.Ct. 646, 98 L.Ed.2d 798 (1988).

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 therefor inadmissible. ER 802.

Similarly Patti's statement to her mother about assaulting Colacurcio was hearsay. The defendant argued that statement was admissible as a statement against penal interest. ER 804(b)(3) permits hearsay if the declarant is unavailable, it so far tends to

subject the declarant to criminal liability that a reasonable person would not have made the statement unless she believed it to be true, and it must be corroborated by circumstances clearly indicating its trustworthiness. ER 804(b)(3), State v. Gee, 52 Wn. App. 357, 361-362, 760 P.2d 361 (1988), review denied, 111 Wn.2d 1031 (1989). While Patti was unavailable, it is questionable whether that statement would subject her to criminal liability. Further the defendant offered no corroboration indicating that statement was trustworthy. That statement was therefore not admissible.

The defendant did not produce any evidence that Colacurcio had any real motive to kill Patti. The 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. In the absence of that evidence it was more likely that he had a motive to keep her alive and working in order to pay back that debt. Evidence that Patti may have blackmailed an associate of Colacurcio's gave him no motive to kill Patti without some evidence that Colacurcio would have cared whether she blackmailed that person or not. Without more the proffered evidence left only speculation that Colacurcio had a motive to kill Patti.

Even if evidence that he threatened her was admissible, and evidence of his motive was not speculative, absent evidence that he took steps indicating an intention to act his motive, there would an insufficient foundation to allow evidence Colacurcio was another suspect. "Mere evidence of motive in another party, or motive coupled with threats of such other person, is inadmissible unless coupled with other evidence tending to connect such other person with the actual commission of the crime charged" Maupin, 128 Wn.2d at 927 quoting, State v. Kwan, 174 Wash 528, 533, 25 P.2d 104 (1933).

The only evidence proffered to support an intention to act on the threat was evidence that Colacurcio *may have* followed Patti from Honey's just before she was murdered. Like the other evidence presented in support of Colacurcio as another suspect, that evidence was speculative. The witness could only say that a car *like Colacurcio's* had been travelling in the same direction as Patti at that time; because he did not see the driver he could not say that Colacurcio *in fact* was following her.

Thus the defendant presented no nonspeculative link between Colacurcio and Patti's murder. The trial court did not

abuse its discretion when it prevented the defendant from presenting evidence of Colacurcio as another suspect.

Finally, the court did not err when it precluded the defense from presenting evidence regarding James Leslie as another suspect. None of the proffered evidence indicated that Leslie had a motive to kill Patti. Nor was there any evidence that Leslie committed any act suggesting that he wanted to hurt her. Although Leslie spent a lot of time with Patti during her shift at the club, he was not the last person to have seen her that night before she was murdered. Evidence that someone who looked like Leslie dropped off clothing at a place and time near where Patti's car was recovered is not evidence that Leslie was in possession of Patti's belongings that were subsequently found in the field near the car wash where her car was recovered. Leslie's inconsistent account of when and where he was at various times, and disposing of a diary he promised to give to police only leads to speculation that he had anything to do with her murder. The defense presented no evidence that consisted of a clear nexus between Leslie and Patti's murder.

None of the evidence the defense produced to support Beatie, Colacurcio, or Leslie constituted "a train of facts or

circumstances as tend clearly to point out someone besides the accused as the guilty party." Downs, 168 Wash. at 667. For that reason the court did not err when it prevented the defendant from introducing evidence that any of those men were another suspect to the crime.

IV. CONCLUSION

The trial court's curative instructions were sufficient to neutralize any prejudice from the expert testimony admitted in violation of the court's in limine ruling. The defendant failed to produce sufficient evidence to establish the necessary foundation to admit other suspect evidence. For the foregoing reasons the State asks the court to affirm the defendant's conviction.

Respectfully submitted on February 18, 2016.

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

THE STATE OF WASHINGTON, Respondent, v. DANNY R. GILES, Appellant.	No. 72726-5-I DECLARATION OF DOCUMENT FILING AND E-SERVICE

AFFIDAVIT BY CERTIFICATION:

The undersigned certifies that on the 19th day of February, 2016, affiant sent via e-mail as an attachment the following document(s) in the above-referenced cause:

REPLY BRIEF OF RESPONDENT-CROSS-APPELLANT

I certify that I sent via e-mail a copy of the foregoing document to: The Court of Appeals via Electronic Filing and Dana Nelson, Nielsen, Broman & Koch, nelsond@nwattorney.net; and Sloanej@nwattorney.net.

I certify (or declare) under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

Dated this 19th day of February, 2016, at the Snohomish County Office.

Diane K. Kremenich
Legal Assistant/Appeals Unit
Snohomish County Prosecutor's Office