SUPREME COURT NO. 99852-3

NO. 80614-9-I

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

KEVIN BRAA,

Petitioner.

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

The Honorable Joseph P. Wilson, Judge

PETITION FOR REVIEW

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RULES, STATUTES AND OTHER AUTHORITIES

A. IDENTITY OF PETITIONER/DECISION BELOW

Kevin Braa, appellant below, asks this Court to grant review, pursuant to RAP 13.4, of the unpublished decision of the Court of Appeals in State v. Braa, no. 80614-9-I, entered on April 12, 2021. The Court of Appeals denied reconsideration on May 4, 2021. Copies of the opinion and order denying reconsideration are attached as an appendix.

B. ISSUES PRESENTED FOR REVIEW

1. Under RCW 10.73.170, a request for post-conviction DNA testing should be granted when a favorable DNA test would show probable innocence. Braa was beaten badly in the parking lot of a bar. He testified he shot his attacker in self-defense. DNA testing of blood droplets, blood spots, bullets, bullet fragments, and fingernail clippings could have shown his attacker was still close by when he was shot, corroborating Braa's self-defense claim. The superior court denied Braa's request for post-conviction DNA testing, citing only the fact that previous requests had already been denied for some of the items. Did the court err in failing to consider whether, when viewed cumulatively, favorable DNA testing on all the requested items would show innocence?

2. Should this Court also review the issues Braa raised in his Statement of Additional Grounds for Review?

C. STATEMENT OF THE CASE

This appeal stems from Braa's third request for post-conviction DNA testing. In this request, he asked the Snohomish County Superior Court to consider the cumulative impact of testing numerous pieces of evidence, some of which were included in previous requests. CP 89-120; State v. Braa, 2 Wn. App. 2d 510, 410 P.3d 1176 rev. denied 191 Wn.2d 1010 (2018); State v. Braa, 9 Wn. App. 2d 1065, 2019 WL 3285695 (2019) (unpublished).[1] The court denied Braa's request citing the appeals from his two prior requests. CP 30. Braa again appeals. CP 22-23.

Braa was convicted of first-degree manslaughter in 2008 after a verbal altercation in a bar led to violence in the parking lot. Braa admitted saying some provocative things regarding non-white persons. RP[2] 725-26, 738. The evidence at trial showed that Simeon Whitney followed Braa out of the bar. RP 55, 166.

Braa testified he was hit in the head just as he opened the door to leave the bar. RP 726. For what seemed like 5 to 10 minutes he was in the parking lot being beaten and fearing for his life. RP 727-28. This occurred in

[1] This unpublished decision, cited under GR 14.1, has no precedential value, is not binding on any court, and is cited only for the historical facts of Braa's prior litigation.

[2] RP refers to the Verbatim Report of Proceedings from Braa's 2008 trial. On August 11, 2020, a motion was filed to transfer the record (including these transcripts) from Braa's earlier appeal to this case.

the walkway between the bar's back door and the first row of cars parked in the parking lot. RP 108, 142, 153; Ex. 19.

Witnesses largely agreed Braa was losing the fistfight and was being badly beaten. RP 111-12, 144, 167. Whitney was five feet nine inches tall and weighed 195 pounds, three inches taller and roughly 50 pounds heavier than Braa. RP 599, 714-15. One witness testified she never saw Braa even get one punch in; he was just trying unsuccessfully to get away. RP 159.

Braa testified he ended up lying slumped on the ground between two cars, with Whitney standing over him. RP 731-32. He managed to get his hand on his gun and began firing immediately. RP 731-32. He kept firing as he got to his feet. RP 733-34. His testimony comported with witnesses who heard a total of five or six shots. RP 144-45, 177, 317-18, 334-36, 459-60. When Braa stopped firing, he saw no one nearby. RP 733-34. Braa then checked himself for injuries, got in his car, and drove home. RP 735-36.

Whitney entered the back door of the bar and collapsed in the hallway. RP 58, 630, 648. Forensic testimony showed two bullets entered Whitney's buttocks traveling from back to front and angled slightly upwards. RP 601-08. Another shot went through his left arm and another (possibly the same bullet) grazed his lower left abdomen. RP 613-19. The only other recent wounds on Whitney's body aside from the gunshot wounds were minor abrasions to his face and knee and some bruises. RP 619, 632, 635.

Police found Whitney alive just inside the back door of the bar. RP 320. He later died from shock and blood loss from the gunshot wounds. RP 627-29.

Upon arriving home, Braa told his roommate Lenny Graff he had "shot a subhuman." RP 738. Graff testified Braa told him he was jumped leaving the bar by someone who tried to steal his wallet. RP 207. Graff also claimed Braa told him to keep this to himself, and to lie and say that both of them were home watching television. RP 208-09. Graff later found Braa's 9-millimeter handgun in a black plastic bag under their deck and notified police. RP 219-20. Forensic testimony indicated Braa's handgun fired the bullets and casings found at the scene. RP 511-12.

Braa admitted he killed Whitney but testified he did so in self-defense. RP 755, 764. He was convinced that, if the beating had continued, he would have been killed or in a coma. RP 764.

Edwina Williams saw the shooter in between two cars parked in the first row behind the bar. RP 473, 482. Her husband Morey Williams saw the shooter at the driver's side of a truck with a door open. RP 556-57. After hearing shots, they looked towards the source and saw Braa standing alone in the parking lot firing towards the back door of the bar. RP 146, 283-85, 461-67, 556-57. They estimated Braa was 20 or 30 feet from the door of the bar. RP 463-65, 559-60. Morey Williams subsequently claimed he saw Braa reach inside the truck to grab the gun. RP 562-63. (In an earlier statement,

Morey had said Braa must have had the gun on his person. RP 569.). No witness saw both the beating and the shooting.

In the parking lot, police took swabs from blood drops (evidence items 1 and 5) and marked the location with placard 38, as shown in Exhibits 26, 46, 48, 49, and 50. RP 301-04, 374. The drop of blood was approximately two thirds of the way across the walkway between the door of the bar and the first row of parked cars. Ex. 50. It also appears off to the side, closer to the cars Braa was seen standing between while shooting. Ex. 50.

Other evidence included a bullet fragment (evidence item 10) found just inches from the blood drop. Exs. 46, 48, 50, 68. Evidence item 13 was a bullet found in the middle of the parking lot. CP 103.

Forensic examination also showed bullet strikes in the doorframe and wall of the bar and indicated they were fired within 10 feet of the wall and at least 22.5 inches above ground. RP 693-94. One bullet (evidence item 21) apparently went through the door of the bar and struck the wall inside. RP 398-99. Other physical evidence included blood found on the back door jam of the bar (items 2 and 3), a bullet found near the back door (item 16), and items Whitney's fingernail clippings (items 80 and 85).

A forensic scientist testified shell casings are normally found in the vicinity of the shooter, but bullets and fragments can ricochet in unpredictable ways. RP 517-20. One officer testified that police consider a

person on foot to be an immediate threat at a distance of 21 feet because an adult can cover that distance before an officer can draw his or her gun. RP 417.

In closing argument defense counsel pointed out that the blood drop is "right in front of space 2, diagonally from space 3." RP 812. She queried whose blood it was, pointing out that, if it were Whitney's, "you know he's really close" and "not at the door" to the bar. RP 812.

The State argued Whitney must have been at or near the door when shot because no witness saw anyone else in the parking lot during the shooting and because he could not have made it from the parking lot to the hallway inside with his injuries. RP 783-84, 794. It was crucial to the State's argument that, "when [Whitney] was shot, he was at the door." RP 794.

In 2016, Braa filed a motion requesting post-conviction DNA testing of the blood drop (evidence items 1 and 5) under RCW 10.73.170. Braa, 2 Wn. App. 2d at 515. The Superior Court denied Braa's motion, and the Court of Appeals affirmed the denial on appeal. Id. at 512. The court held that post- conviction DNA testing is available in self-defense cases, but that the testing of the blood drop swabs would not, in this case, show Braa's innocence on a more probable than not basis. Id.

Braa then filed a second motion for post-conviction DNA testing, this time requesting testing of bullet fragments, item numbers 10 and 18,

marked by placards 40 and 35. Braa, 9 Wn. App. 2d 1065, 2019 WL 3285695 at *4; Ex. 68. Placard 35 appears to be right at the door of the bar, while placard 40 is out in the parking lot, mere inches from the blood drop. Exs. 46, 48, 50. Braa argued the bullet fragments would provide additional evidence that Whitney was nearby and posing an imminent threat when he fired his gun. Braa, 9 Wn. App. 2d 1065, 2019 WL 3285695 at *4. The Superior Court again denied Braa's petition, reasoning that bullet fragment DNA would not show innocence because bullets and bullet fragments may move in unpredictable ways. Braa, 9 Wn. App. 2d 1065, 2019 WL 3285695 at *5.

This, Braa's third petition, combines his requests for DNA testing on the blood droplets, bullets, and bullet fragments from the previous two requests with requests for testing of several other items: items 2 and 3 (blood on the back door jam of the bar), item 13 (a bullet found in the parking lot), item 16 (a bullet found near the back door), item 21 (a bullet found in the hallway of the bar), and items 80 and 85 (Whitney's fingernail clippings). CP 90. Braa's request specifically explains that, in addition to the impact of the newly requested items, the court should consider the cumulative impact of favorable testing on all the items together. CP 89-90. The superior court denied the request citing only this Court's opinions on Braa's two prior requests. CP 30.

On appeal, Braa argued that, when viewed cumulatively, favorable DNA test results on all the requested items would show he acted in self-defense. Braa also raised numerous additional arguments, discussed in greater detail below, in his Statement of Additional Grounds for Review.

The Court of Appeals affirmed the order denying Braa's third request for post-conviction DNA testing. The Court of Appeals opinion declares, "Braa cites no law for the proposition that the trial court must consider all the requested evidence cumulatively." Slip opinion at 12. The court also rejected the arguments made in Braa's Statement of Additional Grounds for Review.

Braa moved for reconsideration, pointing out, and further elaborating on, the authority cited in the reply brief indicating that, when a petitioner requests post-conviction DNA testing of multiple items, the court should assess the requests cumulatively, rather than in isolation. The Court of Appeals denied Braa's motion to reconsider. Braa now seeks this Court's review.

D. REASONS WHY REVIEW SHOULD BE GRANTED AND ARGUMENT

1. THE COURT ERRED IN DENYING BRAA'S REQUEST FOR POST-CONVICTION DNA BECAUSE THE COURT DID NOT ASSESS THE CUMULATIVE IMPACT OF TESTING ALL THE REQUESTED ITEMS.

To guard against the possibility that an innocent person has been condemned and imprisoned by our criminal justice system, Washington law provides that a convicted person may request DNA testing. RCW 10.73.170; State v. Crumpton, 181 Wn.2d 252, 258, 332 P.3d 448 (2014) (citing State v. Riofta, 166 Wn.2d 358, 368, 209 P.3d 467 (2009)). The purpose of the statute is to provide a means for a convicted person to obtain evidence in support of a motion for post-conviction relief, such as a personal restraint petition on the grounds of newly discovered evidence. Riofta, 166 Wn.2d at 368. Testing must be permitted when the procedural and substantive requirements of the statute are met. RCW 10.73.170.4. Braa's case meets the requirements. This Court should grant review under RAP 13.4(b)(1) because the Court of Appeals' decision that a judge need not view the requested items cumulatively is at odds with this Court's decisions in Riofta, 166 Wn.2d 358, and State v. Gentry, 183 Wn.2d 749, 356 P.3d 714 (2015).

a. Braa has met the procedural requirements for DNA testing.

The first statutory requirement for testing is that the person be convicted of a felony in Washington and currently serving a term of

imprisonment. RCW 10.73.170(1). It is undisputed that Braa was convicted of manslaughter in Snohomish County Superior Court in 2008 and is currently serving his 250-month sentence. State v. Braa, 150 Wn. App. 1035, 2009 WL 1591369 (2009).

The procedural burden under the statute is met when DNA testing would yield significant new information about the identity of the perpetrator. RCW 10.73.170(2); State v. Thompson, 173 Wn.2d 865, 875-76, 271 P.3d 204 (2012). The procedural burdens are lenient. Riofta, 166 Wn.2d at 367. The State agrees that, under this Court's previous published opinion, Braa has surmounted the procedural hurdles. CP 39.

b. Braa has also met the substantive requirement because the requested testing, when viewed cumulatively, would show he acted in self-defense.

The substantive burden is met when there exists a "likelihood that the DNA would demonstrate innocence on a more probable than not basis." RCW 10.73.170(3). In assessing the probability of innocence, the court must assume a favorable test result. Crumpton, 181 Wn.2d at 255. The court must also assess the impact of the DNA evidence in light of the other evidence at trial but should not focus on the weight of the other evidence, since any trial leading to a guilty verdict will likely have strong evidence of guilt. Id. at 262. The court must allow testing when a favorable DNA test would "raise a

reasonable probability the petitioner was not the perpetrator." Riofta, 166 Wn.2d at 367-68.

This requirement is met because favorable DNA testing on all the listed items would raise a reasonable probability of Braa's innocence. Braa testified he began firing his gun during a pause in an ongoing assault. RP 731. By contrast, the State claimed Whitney was heading back into the bar at the time of the shooting. RP 783-84, 794. The critical question was Whitney's location at the time of the first shot. If he was near Braa, Braa still faced imminent, serious harm and was entitled to act in self-defense.

i. The DNA testing requests for multiple items must be viewed cumulatively to assess whether favorable results would show innocence.

Taken together, DNA testing of all the requested items can show Whitney's location, and corroborate Braa's testimony, on a more probable than not basis. For purposes of post-conviction DNA testing, courts must assume the DNA test is favorable to the accused. Crumpton, 181 Wn.2d at 255. When testing is requested for multiple items, the court must consider the cumulative impact on the case if DNA testing shows favorable results on all of the requested items.

While several prior cases involve requests to test numerous items, no Washington appellate decision has expressly decided whether the presumed

favorable results from testing numerous items must be considered cumulatively. Requiring a cumulative analysis is consistent with the plain language of the statute and the legislative intent as analyzed by the Court of Appeals. State v. Braa, 2 Wn. App. 2d 510, 520, 410 P.3d 1176 (2018). Additionally, failing to require a cumulative analysis would create a conflict with this Court's decisions in State v. Riofta, 166 Wn.2d 358, 365, 209 P.3d 467 (2009) and State v. Gentry, 183 Wn.2d 749, 356 P.3d 714 (2015).

Analysis of the statute begins with its plain language. In re Est. of Patton, 1 Wn. App. 2d 342, 347, 405 P.3d 205 (2017). The law, however, does not explicitly state what should occur when a petitioner requests DNA testing of multiple items. RCW 10.73.170. The purpose of statutory interpretation when a statute is not clear is to discern and give effect to the legislature's intent. Riofta, 166 Wn.2d at 365.

The principle that testing requests for multiple items must be considered cumulatively is inherent in the legislative intent of the post-conviction DNA testing statute. The goal of the statute is to protect the innocent. State v. Crumpton, 181 Wn.2d 252, 258, 332 P.3d 448 (2014) (citing Riofta, 166 Wn.2d at 368). As the Court of Appeals explained in the opinion on Braa's first request, there is no reason to suspect the legislature intended to privilege only certain innocent parties. Braa, 2 Wn. App. 2d at 520. In that appeal, the issue was whether a self-defense claim precluded

post-conviction DNA testing. Id. at 512. The court concluded it does not because a person who acts in self-defense is not the perpetrator of any crime. Id. at 519. The court found no reason to distinguish those who were innocent due to self-defense from those who were innocent for other reasons. "[T]he State cannot explain why the legislature would have enacted a statute designed to free some—but not all—innocent persons." Id. at 520.

The same reasoning applies in the context of requests to test multiple items. It is not likely the legislature intended to aid only those whose innocence could be demonstrated by testing only one item and not those whose innocence could be demonstrated by testing multiple items. This analysis supports the conclusion that courts must consider the cumulative effect of a favorable DNA test on multiple requested items.

The conclusion that items must be considered cumulatively is also consistent with this Court's discussion in Riofta. In that case, the Court of Appeals appeared to suggest the petitioner needed to show probable innocence on the basis of the DNA testing alone. Riofta, 166 Wn.2d at 367. This Court disagreed. Id. "The statute requires a trial court to grant a motion for postconviction testing when exculpatory results would, in combination with the other evidence, raise a reasonable probability the petitioner was not the perpetrator." Id. at 367-68 (emphasis added). This reasoning suggests that this Court interprets the statute as requiring a holistic analysis of the

case, rather than an overly technical analysis focusing on individual pieces of evidence in isolation.

Requiring that the presumed favorable results be considered cumulatively is also consistent with Gentry, 183 Wn.2d 749. In that case, this Court applied a cumulative assessment to deny further testing on any other requested items. Gentry had requested DNA testing of multiple items, among them, a shoelace. Id. at 751-52. The state moved to cut off testing of the remaining items after the shoelace test showed the victim's blood. Id. at 752. This Court affirmed the trial court's conclusion that, in light of the unfavorable result on the shoelaces, even favorable results on the remaining items could not show innocence on a more probable than not basis. Id. In short, in order to decide whether to grant testing on some items, the court considered the cumulative effect if all the items were tested.

To the extent the statute is ambiguous as to whether multiple requests must be considered cumulatively, the rule of lenity applies. State v. Slattum, 173 Wn. App. 640, 643, 662, 295 P.3d 788 (2013). Under that rule, courts construe the DNA testing statute, RCW 10.73.170, strictly against the state and in favor of the petitioner. Id. Based on this authority, Braa asks this Court to grant review and to hold that the superior court was required to consider the cumulative effect of testing all the requested items.

ii. DNA testing of all the requested items would show Whitney's location on a more probable than not basis.

Taken together, DNA testing of all the listed evidence items can show Whitney's location, and corroborate Braa's testimony, on a more probable than not basis. For the bullets and fragments and blood drops found in the parking lot near Braa's location (items 1, 5, 13) a favorable result would be that they all contain Whitney's DNA. Finding Whitney's DNA on these items would make it more probable that he was in the parking lot near Braa at the time of the shooting. By contrast, a favorable test result for the bullets, fragments, and blood spots found at the back door of the bar or inside the bar (items 2, 3, 10, 16, 18, 21) would be that they do not contain Whitney's DNA. The absence of Whitney's DNA on these items would make it more probable that Whitney was not shot while he was at or near the backdoor of the bar.

The cumulative impact reduces the probability of explanations for the evidence other than Braa's innocence. As the court pointed out in Braa's first DNA testing appeal, it is theoretically possible Whitney's blood was tracked into the parking lot by aid workers or dripped there while Whitney was being taken to the hospital. Similarly, as the court noted in Braa's second appeal, it is theoretically possible the bullets and bullet fragments found in the parking lot ricocheted or rolled to those positions. If each item is

viewed in isolation, these possibilities may defeat a showing of innocence probability on a more probable than not basis. But multiple pieces of evidence, all with results consistent with innocence, are less easily explained away. Additionally, multiple pieces of evidence are more likely to sufficiently refute the lone witness who claimed to see the beginning of the shooting. See RP 562-63 (testimony of Morey Williams). Multiple pieces of evidence make it far more probable that Williams was mistaken. "Eyewitness error is the most prevalent cause of wrongful convictions." State v. Cheatam, 150 Wn.2d 626, 664, 81 P.3d 830 (2003) (Sanders, J., dissenting) (citing C. Ronald Huff et al., Convicted But Innocent: Wrongful Conviction and Public Policy 64, 66, 86–87 (1996)).

To be entitled to testing, Braa does not have to exclude every possible conclusion other than his innocence. He merely needs to show that innocence is "more probable than not," assuming a favorable DNA result. RCW 10.73.170. The probabilities change if all the evidence found near Braa's location contains Whitney's DNA, while all of the evidence found near the bar door is devoid of that DNA. That makes it far more probable that Whitney was, in fact, in the parking lot at the time of the shooting.

Whitney's proximity would, in turn, show Braa reasonably feared Whitney's brutal assault would continue. The court erred in denying Braa's

motion for post-conviction DNA testing because the testing would show Braa acted in lawful self-defense.

iii. The remaining evidence in the case is consistent with innocence.

The remaining evidence in the case is consistent with a probability of innocence. The state argued below that testimony showed one of the bullets was likely fired from a standing position based on the trajectory. But this is consistent with innocence because Braa explained that he kept firing as he got to his feet. RP 733-34. The trajectory of one bullet is not inconsistent with the idea that the first shot struck Whitney while he was outside in the parking lot posing an imminent danger to Braa.

Also consistent with Braa's claim of innocence is the fact that some bullets hit the back door of the bar or ended up inside the bar. If Braa shot in Whitney's general direction, some bullets may have gone past him. At the farthest point, Braa was at most 30 feet from the door. RP 294-96, 463-65, 559-60. Finally, Braa's fear of being caught by the police is consistent with a reasonable fear that he would not be believed and that self-defense would be difficult to prove.

The eyewitness testimony does not establish whether Whitney was shot in the parking lot near Braa or at the back door of the bar. No witness saw where he was when the shots first began. Three witnesses saw Braa

standing apparently alone in the parking lot still firing his gun towards the back door of the bar. RP 283, 285, 463-67, 556-57. Initially, all three said they heard gunshots and subsequently looked to see Braa. RP 280-81, 459-60, 555-56.

iv. The court abused its discretion in denying Braa's request.

A court abuses its discretion when its decision is manifestly unreasonable or based on untenable grounds. State v. Rafay, 167 Wn.2d 644, 655, 222 P.3d 86 (2009). The court abused its discretion in this instance because the court relied solely on the prior two appeals without considering Braa's specific arguments. CP 30. The court's decision was also manifestly unreasonable because the court failed to consider the cumulative impact of favorable results on all of the requested items. The Court of Appeals erred when it concluded that the trial court may have already considered the cumulative effect of a favorable test on all the items Braa requested. The record contains no indication of any such consideration. The court did not express any opinion or conclusion that, if taken together, favorable tests on all the items would not indicate innocence. Instead, the court stated that testing had been denied on two prior occasions for some of the requested items, citing Braa's two previous DNA petitions. CP 30.

The court treated Braa's request as if it were merely a duplication of the previous two requests. CP 30. But neither prior case considered the blood drop alongside the bullet fragments; the previous cases considered the requests only in isolation. Braa, 2 Wn. App. 2d 510; Braa, 9 Wn. App. 2d 1065. And neither prior case considered the newly requested items at all. Id.

The constellation of favorable results described above would make it probable that Whitney was shot while in the parking lot posing an imminent threat to Braa. An imminent danger establishes self-defense and entitles Braa to post-conviction DNA testing. Braa, 2 Wn. App. 2d at 519-20; RCW 9A.16.050. This cumulative analysis is the focus of Braa's third request and shows why this request is not mere duplication of the previous requests. CP 89-90. This Court should grant review and reverse the order denying Braa's request for post-conviction DNA testing.

2. THIS COURT SHOULD ALSO GRANT REVIEW OF THE CHALLENGES RAISED IN BRAA'S STATEMENT OF ADDITIONAL GROUNDS FOR REVIEW.

In his Statement of Additional Grounds for Review, Braa made six arguments: He argued: (1) his trial was fundamentally unfair and tainted by prosecutorial misconduct when the prosecutor illegally stopped the crime lab from performing a firing distance determination; (2) his trial was unfair due to constructive denial of counsel because his attorney failed to advise him regarding instructing the jury on the lesser included offense of second-degree

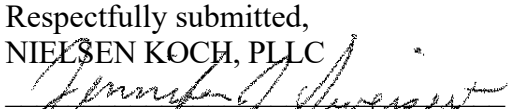
manslaughter; (3) the trial court failed to inquire into and remedy the constructive denial of counsel; (4) his trial was unfair due to cumulative error; (5) he is entitled to DNA testing because photos of evidence item numbers 2 and 3 show a smear from blood-soaked clothing rather than a spray or spatter, indicating a time gap between when Whitney was shot and when he contacted the doorframe of the bar; (6) he is entitled to DNA testing because favorable test results on items 80 and 85, the fingernail clippings, would establish Braa's injuries were the result of Whitney's assault, rather than incurred during his arrest. See Statement of Additional Grounds for Review (filed Sept. 21, 2020) and Pro se Reply brief (filed Dec. 30, 2020 and accepted for filing as supplemental Statement of Additional Grounds for review on Jan. 25, 2021). The Court of Appeals rejected Braa's arguments, finding them not worthy of consideration due to his failure to cite authority. App. at 13-14. Braa respectfully also requests review of these issues.

E. CONCLUSION

For the foregoing reasons, Braa respectfully requests this Court grant review and reverse.

DATED this 2nd day of June, 2021.

Respectfully submitted,
NIELSEN KOCH, PLLC



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Appendix

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

STATE OF WASHINGTON, Respondent, v. KEVIN J. BRAA, Appellant.	No. 80614-9-I ORDER DENYING MOTION FOR RECONSIDERATION

Appellant Kevin J. Braa has moved for reconsideration of the opinion filed on April 12, 2021. A majority of the panel has considered the motion pursuant to RAP 12.4 and has determined that the motion should be denied.

Now, therefore, it is hereby

ORDERED that the motion for reconsideration is denied.

FOR THE COURT:

Chun, J.

Judge

FILED
4/12/2021
Court of Appeals
Division I
State of Washington

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent, v. KEVIN J. BRAA, Appellant.	No. 80614-9-I DIVISION ONE UNPUBLISHED OPINION

CHUN, J. — Kevin Braa shot Simeon Whitney in a bar fight. Whitney died as a result. A jury found Braa guilty of first degree manslaughter with a firearm and five counts of unlawful possession of a firearm. Following his conviction, Braa moved multiple times for post-conviction DNA testing of evidence from the crime scene to establish a self-defense claim. We previously considered two appeals of denials of those motions in State v. Braa, 2 Wn. App. 2d 510, 410 P.3d 1176 (2018) (Braa II), and State v. Braa, No. 77446-8-I (Wash. Ct. App. Jul. 22, 2019) (unpublished) http://www.courts.wa.gov/opinions/pdf/774468.pdf (Braa III), and affirmed the trial court in both cases. Braa now appeals the trial court's denial of a third motion for post-conviction DNA testing. We affirm.

I. BACKGROUND

We summarized the facts in an opinion deciding a direct appeal of his conviction:

> On the evening of November 11, 2006, Kevin Braa was sitting at the bar reading a book in Kuhnle's Tavern in Marysville. Simeon

Whitney was there playing pool with his brother, Roger Enick, and a friend, Kenny Celestine. Whitney, Enick, and Celestine are Native American and went to Kuhnle's Tavern because it is a hangout for Native Americans.

Enick and another bar patron argued over a game of pool, and the other patron used racial slurs about Native Americans. At some point, Braa went over to the pool table and made offensive comments toward Enick. Whitney pushed Braa out of the way and told him, "Leave my homeboy alone." Braa told Whitney, "Go back to Mexico where you belong. You're a sub-human." When the bartender heard this, she told Braa that he would be asked to leave if he continued to talk that way. Braa did not comply, so she escorted him to the back door. A minute or two later, Whitney went out through the same door.

A fight ensued between Whitney and Braa outside behind Kuhnle's Tavern. Witnesses saw Whitney repeatedly punch Braa and pull Braa's shirt up over his head. After the fight, Whitney started toward the back door of Kuhnle's, and Braa went over to his truck. Braa fired four to six shots at or toward the back door. Some witnesses saw Braa standing by his truck with the door open and his arm extended as he fired. Whitney staggered through the back door and collapsed by the bathrooms. When the bartender heard the gunshots and saw Whitney on the floor, she ducked down and called 911. Two witnesses saw Braa drive away in a white Chevy S-10 pickup.

A police officer who happened to be a few blocks away heard the gunshots and responded to the scene. Whitney had a pulse but was bleeding from the abdominal area and was nonresponsive. He was airlifted to Harborview and died en route. Later, an autopsy determined Whitney had suffered four gunshot wounds. The wounds showed that the bullets traveled from back to front through Whitney's body. One bullet and fragments from another were recovered from his abdomen. Another bullet exited through the front of his abdomen. The cause of Whitney's death was shock, trauma, and loss of blood due to the gunshot wounds.

Officers found bullet jacket fragments near where Whitney had lain. There were shell casings in the parking lot, as well as the book the defendant had been reading at the bar. Detectives recovered three bullets and bullet shrapnel from the back door area and the carpet just inside the back door. There were two indentations in the metal of the back door, which were consistent with bullet strikes. Detectives also located a bullet hole in an interior wall just inside the back door. Forensic analysis later confirmed that the bullet taken from Whitney's abdominal wall and the bullet found by the back door

were fired from the same gun. The four shell casings found in the parking lot were compared and it was forensically determined that all had been fired from one gun.

Braa lived in a two-bedroom trailer that he shared with a roommate, Lenny Graff. Braa returned home around 10:30 on the night of the crime and asked Graff to get some beer, which Graff did. Graff recalled that Braa looked like he had been in a fight, with black eyes and a bloody nose. When Graff returned with the beer, Braa had changed his clothes and no longer looked dirty or bloody. Graff asked what had happened, and Braa told him that he had "killed a subhuman." When Graff asked what a subhuman was, Braa responded, "It means if you're not white, you're not right." He told Graff he had been jumped by some Mexicans who wanted to steal his wallet. He refused to discuss further the topic of killing someone and asked Graff to lie and say he had been home all night.

That night, Braa parked his car several feet further from the roadway than he usually did, and he did not move it for the next three days. On November 14, 2006, officers arrived at Braa's trailer to execute a search warrant and arrest him. They could see Braa inside, through the kitchen window. They announced their presence over the patrol car PA systems. They also used a "hailer," a box equipped with a loudspeaker, a handle for throwing, and hundreds of feet of cable, to communicate with Braa. Several times, an officer announced, "Kevin Braa, this is the Sheriff's Office. We have a warrant for your arrest. Identify yourself and surrender," but Braa did not come out. Officers shone lights into the home, and a helicopter was also used to illuminate the area. After Braa failed to respond to repeated voice commands, officers deployed two pepper spray projectile canisters through a window of the trailer. Braa came outside a few seconds later, complied with officers' verbal instructions, and was taken into custody.

Four and a half months later, while doing yard work, Graff discovered a plastic garbage bag under the deck of the trailer. Inside, he discovered Braa's 9mm semiautomatic Ruger handgun. He called 911, and police picked up the gun. Forensic analysis confirmed that the bullet extracted from Whitney's abdominal wall had been fired from that weapon and that one of the four spent shell casings found in the parking lot had also been fired from that weapon. The other bullets and casings were not analyzed because it had already been determined that they had been fired from the same weapon as the tested bullet and casing. An expert in trajectory analysis testified that at least one bullet had been shot from a height of about four and a half feet, within 10 feet of where bullet fragments were imbedded in

> the wall inside the tavern. The evidence was consistent with the trajectory from a gun held by a person of average height while standing up.
>
> At trial, Braa conceded that he shot the gun and argued that it had been in self-defense. He testified that he had a verbal exchange with some guys he thought were Mexican and that he had called them "Mexicans" and "sub-humans" and "invited them to go back to their own country." He recalled that the bartender had asked him to be quiet and go sit down, and he testified that he did so. Shortly afterward, he left the bar through the back door and as he was leaving was hit over the head and lost consciousness. When he came to, he was being beaten by an unknown assailant. He did not fight back but tried to protect himself by curling up. He tried to get away but was beaten more and shoved to the ground. He thought he was going to be beaten until he was killed. After being slammed into a vehicle, he got his gun out and fired immediately. He testified that he was slumped, lying on the ground when he fired.
>
> Braa was charged with second degree murder and, in the alternative, first degree manslaughter. The jury found Braa guilty of the alternate charge of first degree manslaughter.

State v. Braa, noted at 150 Wn. App. 1035, 2009 WL 1591369, at *1–3 (Braa I).

In 2016, Braa moved the court under RCW 10.73.170,[1] seeking appointment of counsel and DNA testing of a blood drop in the parking lot

[1] RCW 10.73.170 provides, in applicable part:

> (1) A person convicted of a felony in Washington state court who currently is serving a term of imprisonment may submit to the court that entered the judgment of conviction a verified written motion requesting DNA testing, with a copy of the motion provided to the state office of public defense.
>
> (2) The motion shall:
>
> (a) State that:
>
> (i) The court ruled that DNA testing did not meet acceptable scientific standards; or
>
> (ii) DNA testing technology was not sufficiently developed to test the DNA evidence in the case; or
>
> (iii) The DNA testing now requested would be significantly more accurate than prior DNA testing or would provide significant new information;

(evidence items 1 and 5). Braa III, No. 77446-8, slip op. at 5. The trial court denied Braa's motion, and in a published opinion, Braa II, this court affirmed, concluding

> that a favorable DNA test result of the blood drop would not establish Braa's innocence on a more probable than not basis. State v. Braa, 2 Wn. App. 2d 510, 523, 410 P.3d 1176 (2018). It reasoned that even if Braa were entitled to a "favorable presumption" that a DNA test would reveal the blood belonged to Whitney, Braa was not entitled to the presumption that the existence of Whitney's blood in that specific location in the parking lot meant Braa shot Whitney in that location. Id. at 521. It noted that Whitney's blood could have ended up in that spot in a number of ways, including during the fist fight itself; it did not mean that Braa shot Whitney in that location. Id. at 522. Thus it concluded that the trial court had not abused its discretion when it denied Braa's motion.

Braa III, No. 77446-8, slip op. at 5–6.

In 2017, Braa moved a second time, seeking DNA testing of bullet jackets or fragments from the parking lot (evidence items 10 and 18). Braa III, No. 77446-8, slip op. at 6. "Braa claimed that DNA testing of these bullet jackets or fragments 'would provide new information about where [Whitney] actually was when shot, confirming Braa's claim of necessity due to self defense/imminent danger.'" Id. (alteration in original). The trial court denied the motion because Braa had not met his substantive burden of demonstrating that any favorable

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> (b) Explain why DNA evidence is material to the identity of the perpetrator of, or accomplice to, the crime, or to sentence enhancement; and
>
> (c) Comply with all other procedural requirements established by court rule.
>
> (3) The court shall grant a motion requesting DNA testing under this section if such motion is in the form required by subsection (2) of this section, and the convicted person has shown the likelihood that the DNA evidence would demonstrate innocence on a more probable than not basis.

DNA evidence would show his innocence on a more probable than not basis. Id. And this court affirmed. Id. at 10. The reviewing panel recognized that even if the bullet jacket near Braa's shooting position tested positive for Whitney's DNA, it would not establish that he acted in self-defense, since the position of the bullet shrapnel does not necessarily show that Whitney was shot in same location as the shrapnel. Id. at 8. It also reasoned that if the bullet shrapnel near the back door tested positive for Whitney's DNA, "this evidence would place Whitney exactly where witnesses observed him when Braa shot him." Id. Finally, it noted that Braa's actions following the shooting, such as hiding the gun, admitting he had "killed a sub-human," and telling his roommate to lie to police about his whereabouts, did not support his self-defense claim. Id. at 10.

In 2019, Braa moved a third time for post-conviction DNA testing. Braa's motion seeks testing of:

- The blood spot and bullet jackets or fragments identified in his previous two motions (evidence items 1, 5, 10, and 18); and
- Blood from the bar's back doorjamb (evidence items 2 and 3);
- A copper bullet from the parking lot (evidence item 13);
- A lead bullet from the parking lot near the back door (evidence item 16);
- A lead bullet in the bar hallway that went through the wall (evidence item 21); and
- Whitney's fingernail clippings taken at autopsy (evidence items 80 and 85).

Braa requested that the deciding court examine the newly requested evidence cumulatively with the evidence from the previous motions: "[a]ny item examined in solitary isolation previously becomes a completely new issue and

grounds/argument when combined collectively with the numerous other items." The trial court again denied his motion because he had not met his substantive burden under RCW 10.73.170(3), stating that "even assuming DNA testing of the requested evidence was favorable, such favorable result when considered along with all the other evidence from the trial would NOT demonstrate his innocence on a more probable than not basis." Braa appeals.

II. ANALYSIS

Braa says the trial court abused its discretion in denying his motion for post-conviction DNA testing since a favorable testing result for the requested items would render it more probable than not that he shot Whitney in self-defense. We disagree.

We review for abuse of discretion a trial court's decision on a motion for post-conviction DNA testing. State v. Crumpton, 181 Wn.2d 252, 257, 332 P.3d 448 (2014). "A court abuses its discretion when an 'order is manifestly unreasonable or based on untenable grounds.'" State v. Rafay, 167 Wn.2d 644, 655, 222 P.3d 86 (2009) (quoting Washington State Physicians Ins. Exch. & Ass'n v. Fisons Corp., 122 Wn.2d 299, 339, 858 P.2d 1054 (1993)). For example, a court "abuses its discretion if the decision rests on facts unsupported in the record or was reached by applying the wrong legal standard." Crumpton, 181 Wn.2d at 257.

In deciding a motion for post-conviction DNA testing under RCW 10.73.170, "[a] court should look to whether, considering all the evidence

from trial and assuming an exculpatory DNA test result, it is likely the individual is innocent on a more probable than not basis," and if so, grant the motion. Id. at 260–61; RCW 10.73.170(3). But the court must look at the potentially exculpatory DNA evidence in the context of all the other evidence at trial when deciding whether the DNA evidence might show innocence. Id. at 262–63. The substantive hurdle imposed by RCW 10.73.170(3) is meant to be onerous, and "[t]esting should be limited to situations where there is a credible showing that it could benefit a possibly innocent individual." Id. at 261. And while a petitioner is entitled to an inference of a favorable DNA result, they are not entitled to additional favorable presumptions. See Braa II, 2 Wn. App. 2d. at 521–22 (while Braa was entitled to inference that the blood drop contained Whitney's DNA, Braa was not entitled to inference that blood proved Whitney was shot in that spot).

A claim of self-defense can support a motion for post-conviction DNA testing. Id. at 520.[2] A person may justifiably commit homicide "when there is reasonable ground to apprehend a design on the part of the person slain to commit a felony or to do some great person injury to the slayer . . . and there is imminent danger of such design being accomplished." RCW 9A.16.050(1).

[2] The trial court denied Braa's motion for post-conviction DNA testing because he did not meet his substantive burden under RCW 10.73.170(3). The trial court did not rule that Braa failed to meet his procedural burden under RCW 10.73.170. Braa says that he met his procedural burden under the statute; the State agrees. And in deciding Braa's first motion for post-conviction DNA testing, we decided that Braa met his procedural burden under the statute and that a motion for post-conviction DNA testing can rest on a self-defense claim. Braa II, 2 Wn. App. 2d at 520. We assume that Braa met his procedural burden under the statute.

"A person who kills in lawful self-defense is not a perpetrator because justifiable homicide is not a crime." Braa II, 2 Wn. App. 2d at 519.

Braa contends that a favorable outcome of testing the copper bullet in the parking lot (item 13) would be that it contains Whitney's DNA; since the copper bullet was near Braa's position, he says that the presence of Whitney's DNA would support his theory that he shot Whitney in self-defense. This theory aligns with his argument regarding testing of the blood drop in the parking lot (items 1 and 5) and the testing of the copper shrapnel (items 10 and 18) from his earlier motions—there, as here, he said that Whitney's DNA on items close to him would establish that he shot Whitney in close range and thus in self-defense. By contrast, Braa says that a favorable outcome of testing the doorjamb blood (items 2 and 3), the lead bullet near the back door (item 16), and the lead bullet in the bar hallway (item 21) would be that they lack Whitney's DNA; since these items were not close to Braa, he says the lack of DNA would support his assertion that he did not shoot Whitney while Whitney was far from him.

But as addressed in this court's previous decisions on Braa's motions for DNA testing, while he is entitled to an inference of favorable DNA testing, he is not entitled to an inference that the presence of Whitney's DNA in a given location establishes that Whitney was shot in that location; the presence of Whitney's DNA on an item in a particular location does not necessarily show that Whitney was shot in that item's position. See Id. at 521–22. And as discussed

below, testing of the requested items would not make it more probable than not that Braa acted in self-defense.

Items 2 and 3

As to the blood on the doorjamb, Braa's claim that a lack of Whitney's DNA in the blood would help establish his self-defense claim is unavailing. The presence of another unidentified person's blood on the door frame has nothing to do with Whitney's proximity to Braa when he was shot.[3]

Items 16 and 21

As to the bullet near the back door and the bullet inside the bar hallway, it is hard to see how their lack of Whitney's DNA would show that Braa shot Whitney while Whitney was close to Braa. The lack of DNA would show that Braa missed while firing at Whitney, regardless of proximity. Indeed, common sense dictates that Braa would be more likely to miss Whitney if Whitney were far away when he fired. A lack of Whitney's DNA on the bullet fragment at the back door and inside the bar hallway would not support Braa's self-defense claim.

[3] In his SAG, Braa says that, in the alternative, if it does contain Whitney's DNA, the blood is a smear, not a spray, so there would have to be "bleed time" to get through Whitney's clothing, showing that he did not shoot Whitney while Whitney was near the door. Braa's claim about "bleed time" requires another inference about the permeability of Whitney's clothing to which he is not entitled. Braa II, 2 Wn. App. 2d at 521–22. This assertion also ignores the large amount of other evidence suggesting Braa's guilt, as addressed below. And Braa makes no meaningful citation to the record supporting his characterization of the blood spot as a "smear" rather than a spray. The presence of Whitney's DNA on the doorjamb does not bolster Braa's self-defense claim.

Item 13

As to the copper bullet in the parking lot near Braa's position, even if it contained Whitney's DNA, it would not necessarily show that Braa shot Whitney in that location. A forensic scientist testified that it would be difficult to tell where a shooter fired their weapon based on the location of shrapnel. And it was windy the night of the shooting and the bar patrons had walked through the crime scene; also some evidence placards had no evidence next to them. Finally, this court considered and rejected a similar argument about another bullet fragment in the parking lot—item 10—in Braa's previous appeal. Braa III, No. 77446-8-I, slip op. at 8–9. Even assuming favorable testing of this item, it would not establish that Braa more probably than not acted in self-defense.[4]

Other Evidence

As this court pointed out in Braa's direct appeal and his previous two appeals, the other evidence from trial strongly cuts against Braa's self-defense claim. For instance, Braa shot Whitney from behind at least three times. Braa II, 2 Wn. App. 2d at 522. The bartender saw the back bar door open, heard three shots, then saw Whitney walking through; that Whitney could open the door before Braa fired the shots shows that Whitney was no longer near Braa when he fired. Multiple eyewitnesses to the shooting saw Braa either with his arm up or

[4] In his SAG, Braa says testing of Whitney's fingernail clippings (items 80 and 85) will show wounds to Braa's face, neck, and body were caused by Whitney's attack and not by Braa's arrest. Thus, he says, they will show that he more probably than not acted in self-defense. But Whitney and Braa fought. And it is unclear, from Braa's SAG, why testing of the fingernail clippings would show that Whitney's attack on Braa was so violent that he needed to respond to it with deadly force.

firing toward the bar's back door, and did not see Whitney or any other person near him. Braa hid his gun after the shooting. When he arrived at home, Braa told his roommate that he had "killed a sub-human" and asked the roommate to lie to police as to his whereabouts that evening. This evidence strongly undercuts Braa's assertion that he shot Whitney in self-defense.

Previous Requests

Finally, Braa recognizes that he previously requested testing for some of the items identified in the motion here in his previous motions for testing: a blood spot and bullet jackets or fragments from the parking lot (evidence items 1, 5, 10, and 18). As addressed above, this court affirmed dismissals of testing of those items in Braa II and Braa III. But Braa says the trial court still abused its discretion in dismissing this motion because it did not consider the cumulative impact of testing those previously identified items with the newly identified items in this motion.

Braa cites no law for the proposition that the trial court must consider all the requested evidence cumulatively and we need not consider an argument unsupported by legal authority. See Cowiche Canyon Conservancy v. Bosley, 118 Wn.2d 801, 809, 828 P.2d 549 (1992) (arguments not supported by legal authority need not be considered). Even if it needed to consider the evidence cumulatively, nothing in the court's decision shows that it failed to do so. And neither we nor the trial court must reweigh whether to grant Braa's motion for testing as to the evidence identified in his previous two motions, since those

motions were denied on their merits. See In re Pers. Restraint of Haverty, 101 Wn.2d 498, 503, 681 P.2d 835 (1984) (holding that a court will not consider a collateral attack to a conviction if it (1) presents the same grounds as those from a previous collateral attack, and the prior court determined those issues adversely to the petitioner, (2) the prior determination was on the merits, and (3) the ends of justice would not be served by reaching the merits of the later application).[5]

And the trial court would not have abused its discretion in denying Braa's petition if considered the evidence cumulatively. As repeatedly addressed above, the presence of Whitney's DNA in a given location does not establish that he was shot in that same location, and the other evidence from trial strongly cuts against his self-defense claim.

SAG

Braa says in his SAG that we should order testing because of prosecutorial misconduct at trial, because his trial counsel and the trial court constructively denied his right to counsel, and because of cumulative error at trial. He cites no law establishing that these issues can serve as grounds for a court to grant a motion for testing. We need not consider arguments unsupported by legal authority. See Cowiche Canyon, 118 Wn.2d at 809 (arguments not supported by legal authority need not be considered). And it

[5] Braa says we should grant him leniency on this issue because he filed those motions self-represented, but Washington courts hold a self-represented litigant to the same standards to which they hold attorneys. Edwards v. Le Duc, 157 Wn. App. 455, 460, 238 P.3d 1187 (2010).

appears none exist, since as addressed above, RCW 10.73.170 allows a court to order testing only when considering all the evidence from trial and assuming an exculpatory DNA test result, it is likely the individual is innocent on a more probable than not basis. We reject these claims.

Affirmed.

Chun, J.

WE CONCUR:

Appelwick, J.

NIELSEN KOCH P.L.L.C.

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