

FILED

December 7, 2015
Court of Appeals
Division I
State of Washington

NO. 73205-6-I

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

STATE OF WASHINGTON

Respondent

v.

JOSHUA T. TANOAI,

Appellant

BRIEF OF RESPONDENT

MARK K. ROE
Prosecuting Attorney

ANDREW E. ALSDORF
Deputy Prosecuting Attorney
Attorney for Respondent

Snohomish County Prosecutor's Office
3000 Rockefeller Avenue, M/S #504
Everett, Washington 98201
Telephone: (425) 388-3333

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I. ISSUES

Did the trial court commit reversible error by admitting evidence that police officers searched for the defendant for weeks following his flight from the scene of the crime, and finally found him 48 days later hiding in the rafters of the very home where the crimes were originally committed?

II. STATEMENT OF THE CASE

The State of Washington originally charged defendant Joshua Tanoai with 1st degree robbery and 1st degree unlawful possession of firearm, arising out of a November 20, 2013, incident at the defendant's Lynnwood, Washington, residence. CP 200-201, 196-197. Each count carried the additional allegations that the defendant was armed with a firearm and that he was on community custody when he committed the crimes. CP 200-201. A Violent Offender Task Force had searched for the defendant for about seven weeks following his flight from the crime scene, unable to locate him until January 7, 2014, back at his residence where the crimes occurred. CP 196-197.

Approximately ten months prior to trial the State added one additional count of 2nd degree assault. This charge also carried the firearm enhancement and community custody allegations. CP 194-

195. The defendant declared four months prior to trial the affirmative defense of alibi, alleging that he was not present when the crime occurred because he was "on Camano Island with his family preparing for Thanksgiving." ___ CP ___ (Sub #33, Answer to State's Omnibus Application p.2). A four day jury trial commenced on February 9, 2015. 1RP 1.¹ The State presented twelve witnesses and the defendant called four of his own. 1RP 2; 2RP 2; 3RP 2, 100. The defendant decided not to testify, a decision he announced prior to trial and prior to the court's ruling on motions in limine. 1RP 9; CP 123.

The jury was unable to reach a verdict on count 1, 1st degree robbery, but returned verdicts of guilty on counts 2 and 3, 1st degree unlawful possession of firearm and 2nd degree assault. CP 105-109. The jury also found in favor of the firearm enhancement for count 3, 2nd degree assault. CP 104.

In lieu of a retrial on the 1st degree robbery charge, the defendant pleaded guilty to theft of a motor vehicle on March 4, 2015. CP 7-23. The State presented testimony at the sentencing hearing supporting its contention that the defendant was on

¹ The State refers to the verbatim report of proceedings using the same convention as the appellant, as follows: 1RP = February 9, 2015; 2RP = February 10, 2015; 3RP = consecutively paginated two-volume February 11, 2015 transcripts; 4RP = February 12, 2015; 5RP = March 4, 2015.

community custody when he committed the crimes. 5RP 10-13. The court found in favor of the community custody enhancement. 5RP 14; CP 26.. The defendant received concurrent, high end, standard range sentences on all three counts, controlled by the lengthiest 116 month sentence imposed on count 2. CP 27. The defendant's total sentence, including the consecutive 36 month term for the firearm enhancement on count 3, was 152 months in prison. Id.

A. EVIDENCE AT TRIAL.

1. Motions In Limine.

The sole issue presented in this appeal was addressed during motions in limine, pursuant to the defendant's motion to exclude references to his arrest and "pending warrants." 1RP 35. The defendant clarified on the record that he was moving to exclude references to warrants *unrelated* to the current charges. Id. With that clarification, the court granted the motion. 1RP 36. The court then addressed the related motion to exclude evidence of "concurrent, uncharged crimes not before the trier of fact." CP 147; 1RP 36. Upon another request to clarify the defendant directed the court's attention to a "standoff" prior to the defendant's January, 2014, arrest. The State summarized its anticipated evidence that

police located the defendant hiding in the attic of the same home where the crime occurred. 1RP 37. The defendant argued that admission of the arrest evidence would "force him to take the stand" to clarify that he was hiding because of warrants unrelated to the current charges – the very warrants he had just moved to exclude. Id. The court denied the motion after determining that the evidence was relevant, probative of the defendant's consciousness of guilt, and that the probative value was not greater than the danger of unfair prejudice. 1RP 38-40.

2. State's Case In Chief.

Victim Laurene Boushee testified that she knew the defendant as the boyfriend of her good friend Tia Vaughn, whom she had known for a few years. Because Ms. Boushee had visited Ms. Vaughn's house many times she knew that Ms. Vaughn and the defendant lived together in the basement of a large house, near the Old Spaghetti Factory in Lynnwood. 1RP 98-100. The victim and the defendant's girlfriend liked to do drugs together, including smoking methamphetamine the night before the crimes occurred in this case. 2RP 54, 57.

During the month of November, 2013, the victim loaned her green Subaru station wagon to Ms. Vaughn and the defendant on a

few occasions, including once while the victim turned herself in to jail on an outstanding arrest warrant. 1RP 102. She loaned her car to the defendant again on November 19, 2013, along with some generators and other supplies, because the power was out at the defendant's house. 2RP 24. At the end of the day on November 19th, Ms. Boushee sent a friend to the defendant's house to retrieve her Subaru. Instead of returning the car, the defendant yelled at Ms. Boushee over the phone for disrespecting him by bringing a stranger to the house. The defendant said the Subaru was his car now and refused to return it. 2RP 26-27, 33. The defendant claimed in text messages between himself and Ms. Boushee that she owed him \$600, a debt which the defense attributed to the victim's methamphetamine addiction. 2RP 34-36, 58.

The next day, November 20th, 2014, the victim went to the defendant's house to look for her car. She found it parked in the yard covered by a large tarp, blocked in by another vehicle. 2RP 37. After putting her purse inside the car the victim knocked on the door to demand her car back. Tia Vaughn's brother, Jeff Vaughn, answered the door first, but the defendant soon came to the door and pointed a shotgun at the victim. 2RP 39. The defendant and the victim yelled at each other, the victim claiming she wouldn't

leave without her car and the defendant still claiming she owed him money. He then pointed the shotgun away from the victim but towards her car. The defendant then shot the victim's car with his shotgun, breaking its windows and puncturing its door with shotgun pellets. 2RP 39-40. He went back inside the house, came back outside without the shotgun, calmly moved the car that was blocking in the victim's Subaru, then got inside the Subaru and started the engine. 2RP 42-43. The victim then jumped on the hood of her own car in an attempt to prevent the defendant from leaving, but the defendant "floored it" and drove down the street (approximately the distance of two houses) with the victim still clinging to the hood. The victim was on the phone with 911 during her brief ride on top of her car, including when she threw herself off of the car and landed on the ground, suffering cuts to her knees, stomach and chest. 2RP 44-46. The defendant drove away in the Subaru and his girlfriend came out of the house to apologize before she, too, left the scene. 2RP 47. The jury heard the 911 recording without objection after it was edited to remove Tia Vaughn's comments in the background about the defendant abusing her. 2RP 48, 5-9.

Police were dispatched to the scene of the crime, 19410 24th Avenue West, at 11:26 AM on November 20, 2013. 1RP 74, 76. They spoke to the victim and took pictures of the text messages she exchanged with the defendant. 1RP 90-91. After learning that the defendant was the only suspect in the crime, police showed the victim a six person photo montage. She quickly identified the defendant by stating, "That's a hundred percent him." 2RP 117. Police examined the yard and found a tarp, broken auto glass, shotgun pellets, and green paint chips. 2RP 75. The victim's Subaru was located the next day in Marysville with broken windows and holes in the driver's side door. It had been left abandoned in the yard of a residential parcel where a house was under construction, and the construction crew called police when they discovered it. 2RP 158-159.

The victim and other residents of the house told police that the defendant and his girlfriend occupied the downstairs bedroom. 1RP 92-93, 97. A few hours later police served a search warrant on the house and discovered a number of items linking the defendant and his girlfriend to the downstairs bedroom. 1RP 75,77. They found a 12 gauge shotgun under the mattress in that room, with a fired shotgun shell casing still in the chamber and four

unfired rounds in the loading tube, plus an extra box of shotgun ammunition by the bed. 1RP 77, 78, 84. They found a .22 caliber rifle leaning against the wall in the same bedroom. 1RP 78. Police also located identification in the room – a Washington ID card for Tia Vaughn, a casino club card in the defendant's name, and the defendant's own Washington ID card. 1RP 89; 2RP 98-99, 106-107. Also located on the bedside table in that bedroom were maintenance records for the victim's stolen Subaru. 2RP 108.

The defendant's girlfriend Tia Vaughn testified as a State's witness, wearing her Department of Corrections orange jumpsuit while doing so (without objection from the defendant). 2RP 123-124. She acknowledged that she lived with the defendant "off and on" at the house where the crime occurred., but then denied that she was even at the house on November 20th, 2013. 2RP 128-129. The prosecutor impeached her with the details of a written statement she gave to police, which she said was untrue - the product of police harassment and manipulation. 2RP 130. The jury heard, without objection or request for a limiting instruction, Tia Vaughn's written statement that the owner of the house had left a shotgun "in our possession," and that on the date in question she awoke to the sound of the shotgun being fired, followed by the

sounds of the defendant and the victim arguing. The defendant then came into their shared bedroom, blamed Ms. Vaughn for the whole incident, put the shotgun back in place, then "took off in the car." She also wrote about hearing the victim screaming while riding on top of her car, then witnessing "Josh" stop at a stop sign and the victim fly off the car onto the pavement. 2RP 132-134. She told a second detective a very similar rendition. 2RP 137-138.

On cross examination defense counsel established through Ms. Vaughn that the police told her the defendant had threatened to kill her and her family, and that they believed the defendant was a vicious man who would come after her if he wasn't put away for the rest of his life. 2RP 139. She repeated her claim that her entire written statement was made up with the goal of avoiding prison and enrolling in drug court. 2RP 140.

Deputy Ryan Phillips collected the written statement of Tia Vaughn on December 27, 2013, but he disputed her version of how that occurred. He explained that his primary purpose in visiting Ms. Vaughn was not to learn what she observed during the crime itself, nor was it to promise or threaten her, but rather to gather information on where the defendant may be hiding. The Snohomish County Violent Offender Task Force had been

searching for the defendant without success for “a couple weeks” due to “some felony warrants” and “multiple probable cause charges”. All of Deputy Phillips’ testimony was admitted without objection. 2RP 142-144.

Tia Vaughn’s brother, Jeff Vaughn, established that the defendant lived together with Tia Vaughn at the house where the crimes occurred, and that all three of them were present on the morning of the crime. 2RP 149-150, 153. He heard the shotgun blast and heard the defendant arguing with the victim about her Subaru, but left as soon as he heard the gunshot. 2RP 152-153. He claimed that he did not see the defendant on that morning; he only heard him. 2RP 155.

Deputy Marcus Dill testified that he was assigned to a U.S. Marshal’s Fugitive Task Force in late 2013 into early 2014, and that he was trying to locate the defendant as part of an ongoing robbery-assault investigation which began in November, 2013, in Lynnwood. He finally located the defendant on January 7, 2014, at the same Lynnwood house where the crime occurred. Deputy Dill explained that upon initial contact, the defendant “crawled up into the crawl space and was in the rafters.” Deputy Dill provided no details about how the defendant was taken into custody from that

position. His entire testimony encompasses 2 ½ pages of transcript, it proceeded without any objection, and defense counsel conducted no cross examination. 2RP 162-164. Neither party even mentioned Deputy Dill's testimony or the circumstances of the defendant's arrest during closing argument. 3RP 132-164. The prosecutor's only reference to the defendant's consciousness of guilt came in the context of explaining why the defendant needed to hide the stolen Subaru in Marysville. 3RP 144 ("Dumped the car, because he knew he was in trouble; right?").

Fingerprint and DNA testing was performed on the weapons and ammunition found in the defendant's bedroom, but forensic scientists were unable to collect any samples worthy of comparison. 3RP 19, 29-30, 32.

Finally, pursuant to a stipulation of the parties, the court instructed the jury that they must accept as true the fact that on the day in question, the defendant had a prior conviction for a serious offense. 3RP 37.

3. Defendant's Case In Chief.

The defendant's mother, Lorri Stohl, testified in support of his alibi defense. She said that she and her daughter Manaia Munoz picked up the defendant on November 19, 2013, the day

before the crime. 3RP 43, 45. She acknowledged that she was initially unsure about the date when she was first interviewed about the case. 3RP 48-49. According to Ms. Stohl, the defendant had called her and requested that she pick him up at his friend Kenny's house in Marysville. The defendant then spent the next several days at his mother's house on Camano Island preparing for Thanksgiving, without a car and without a cellphone, before she drove him back to Marysville around November 22nd or 23rd. 3RP 46-47.

The subject of the defendant's January, 2014, arrest at the Lynnwood scene of the crime arose briefly during the cross examination of the defendant's mother. The prosecutor asserted that the defendant's mother was absolutely certain in a pretrial interview that her son had not been arrested at that location. 3RP 52. The defendant's mother also claimed that she had met every single girlfriend the defendant has ever had, yet she had "no idea" who Tia Vaughn was. 3RP 50.

The defendant's sister Manaia Munoz said she was with her mother on November 19th to pick up the defendant in Marysville, but she agreed that in a pretrial interview she claimed it was November 20th or 21st. 3RP 55, 58. Although defense counsel

tried to rehabilitate this crucial discrepancy by claiming that she did not have access to a calendar in the pretrial interview, Ms. Munoz admitted that a calendar was "right there in front of [her]." 3RP 62.

Ultimately both of the defendant's alibi witnesses attributed their confidence in the 19th as the correct date to their memory of when the defendant's brother Gunner needed a laptop. 3RP 48-49, 62. Gunner was described as "a little different" because he goes to college, works, and plays soccer. 3RP 44. The defense did not call Gunner as a witness.

Finally, the defense presented two eye witnesses who claimed they were present in the Lynnwood home when the crime occurred on November 20th. Heather Mathis said that the defendant was living in the house at that time. 3RP 67. She said she heard a gunshot, then went to her upstairs bedroom window and observed an altercation between the victim and an unknown Mexican man holding a shotgun. 3RP 64-65. Ms. Mathis said her boyfriend Jeremain was right next to her in the upstairs bedroom when she observed all of this. 3RP 68. She acknowledged on cross that she became involved as a witness only after having an in-custody conversation with the defendant's sister. When she realized that

"Josh was looking at like 75 years" she decided "if there is anything I can do to help, I will." 3RP 70.

Ms. Mathis' boyfriend Jeremain Moore, a member of the Insane Crips gang who had used "weed, methamphetamine, [and] heroin" on the date of the crime, was the final witness. 3RP 92-93. He contradicted Ms. Mathis' testimony that he was right next to her to witness the crime from the upstairs bedroom window; instead, he saw it all from the upstairs kitchen while he was eating Froot Loops. 3RP 86. In fact, he said that his upstairs bedroom did not have any view of the yard where the crime occurred. 3RP 82. Mr. Moore said that "four Mexican dudes" jumped out of a car and one of them started arguing with the victim. He saw one of the Mexican men had a shotgun in his hand. 3RP 76-79. This apparently caused Mr. Moore to head downstairs without his pistol, which he had next to him in the kitchen. 3RP 79. On the way downstairs he heard a loud boom, so he went back upstairs to grab his pistol. When he got back downstairs he looked out the door to see the car full of Mexicans "disappear", and the victim's car "took off" as well. 3RP 80. He didn't observe anything else about the victim's vehicle because he was more concerned with locking the house before the

inevitable police response. 3RP 80 (“I can’t get got with a pistol because I’m a convicted felony.”).

Mr. Moore confirmed that the defendant and Tia Vaughn lived in the downstairs bedroom of the house in question. RP 83. He also provided some insight into what it was like to live in a “drug house.” 3RP 88. He didn’t think the defendant or Tia would have kept valuables in their downstairs room because of the risk that “meth heads” would steal them. 3RP 83. He described troubles with “nosy neighbors” who would call the police even if someone so much as threw a rock at their house. 3RP 84. Both Mr. Moore and Ms. Mathis decided to leave before police arrived because they each had warrants for their arrest. 3RP 92. Mr. Moore said he knew the defendant wasn’t home when the crime occurred because Mr. Moore “was there tweaking all night, bro.” 3RP 94.

III. ARGUMENT

1. Standard Of Review.

Washington’s appellate courts review evidentiary rulings for abuse of discretion. State v. Franklin, 180 Wn.2d 371, 377 n. 2, 325 P.3d 159 (2014). A trial court abuses its discretion when the decision is manifestly unreasonable or based upon untenable

grounds or reasons. State v. Garcia, 179 Wn.2d 828, 844, 318 P.3d 266 (2014).

Evidence of flight is admissible if it creates a reasonable and substantive inference that a defendant's departure from the scene was an instinctive or impulsive reaction to a consciousness of guilt or was a deliberate effort to evade arrest and prosecution. State v. Nichols, 5 Wn. App. 657, 660, 491 P.2d 677 (1971). When evidence of flight is admissible, it tends to be only marginally probative as to the ultimate issue of guilt or innocence. State v. Freeburg, 105 Wn. App. 492, 497–98, 20 P.3d 984 (2001). “Therefore, while the range of circumstances that may be shown as evidence of flight is broad, the circumstance or inference of consciousness of guilt must be substantial and real, not speculative, conjectural, or fanciful.” Id. at 498; accord State v. Price, 126 Wn. App. 617, 645, 109 P.3d 27, review denied, 155 Wn.2d 1018 (2005).

The probative value of evidence of flight as circumstantial evidence of guilt depends upon the degree of confidence with which four inferences can be drawn: (1) from the defendant's behavior to flight; (2) from flight to consciousness of guilt; (3) from consciousness of guilt to consciousness of guilt concerning the crime charged; and (4) from consciousness of guilt concerning the crime charged to actual guilt of the crime charged.

State v. McDaniel, 155 Wn. App. 829, 854, 230 P.3d 245 (2010)(internal citations omitted).

2. The Evidence Of “Multiple Felony Warrants And Multiple Charges” Referred Only To The Charged Crimes.

The defendant takes issue with the admission of testimony that the defendant “had some felony warrants and was wanted on multiple probable cause charges,” claiming that no evidence linked those facts to the charges at trial. Br. App. 9; See 2RP 143. He features this testimony as a primary reason a jury could have inferred that his post-crime flight and efforts to hide from police were related to some other case not properly before the jury. See Br. App. 1. Yet trial counsel did not object to this testimony and the defendant does not formally challenge its admission in this appeal; the lack of an objection to this evidence at trial renders the issue improperly preserved. See State v. Powell, 126 Wn.2d 244, 256, 893 P.2d 615, 623 (1995).

It is still important to consider, and reject, the false implication that this testimony led jurors to believe that police had reasons beyond the crimes of November 20, 2013, to search for the defendant, for the mischaracterization of this evidence is crucial to the subsequent analysis of the sole issue in this appeal. The

defendant first floated this false implication during motions in limine when he claimed that evidence of his January 7, 2014, arrest would "force him to take the stand to rebut the fact he wasn't hiding because of this charge but because of the warrants." 1RP 37. But not only did the defendant decide not to testify, thereby rebutting his own assertion that the court's ruling would force him to do anything, the record contains no alternative reasons the police might have wanted to find him. Instead the record reveals that the referenced "warrants and probable cause charges" pointed clearly and exclusively to the multiple charges he faced at trial.

The only reason Snohomish County Deputies were looking for the defendant in the weeks between the November 20, 2013, crime and the defendant's January 7, 2014, arrest was because they suspected him of committing the crimes charged at trial. RP 162-163.² The defendant's trial counsel did not object to this testimony, and presumably would have done so if he felt the testimony violated his successful motion in limine to exclude evidence of warrants *unrelated* to the case. 1RP 35-36. The defendant's trial counsel, but more importantly the jury, likely

² Q: And were you and the task force looking to arrest him for a robbery-assault incident that occurred in the Lynnwood area back in November of 2013?

A: Correct. There was an ongoing investigation.

understood the testimony as its plain meaning suggests – that police were looking for the defendant exclusively because he was their only suspect in the November 20, 2013, crimes committed against Laurene Boushee.

3. The Evidence Of Flight And Concealment Supported A Reasonable Inference That The Defendant Knew He Was Guilty And Did Not Want To Get Caught.

It is true that the trial court's balancing of probative value against undue prejudice did not include a specific analysis of the four inferences set forth in McDaniel when admitting evidence of flight. Neither party brought the standard to the court's attention. 1RP 36-40. Nonetheless, appellate courts have a duty to affirm upon any ground supported by the record, even if not the ground utilized by the trial court. State v. Grundy, 25 Wn. App. 411, 415-16, 607 P.2d 1235 (1980).

The totality of the evidence at trial supported a "reasonable and substantive inference" linking his choice to hide in the rafters of his own home when police approached, to both his consciousness of guilt *and* his deliberate effort to evade arrest and prosecution for the charged crimes. See State v. Nichols, 5 Wn. App at 660. The defendant's claim that "the State presented no evidence that Tanaoi knew or would have known that police were trying to arrest

him for the November, 2013, incident” is simply incorrect. Br. App. 9-10.

The record does not support this statement. Even though the State did not present ever-elusive direct evidence of the defendant's inner thoughts, the circumstantial evidence of his consciousness of guilt as exhibited by his post-crime behavior was substantial. What other reason than the crime itself could explain the defendant's choice to abandon his home and his girlfriend for weeks immediately following the crime, then turn to threatening to kill the girlfriend and her family? 2RP 139. The jury heard evidence that a dedicated law enforcement task force was actively looking for the defendant for weeks without success, eventually resorting to asking his girlfriend if she had any leads they could follow to find him. 2RP 144. The jury would have justifiably inferred that those officers had exhausted more traditional methods before asking for help from one of the defendant's closest confidants. In other words, the defendant's successful and sustained disappearance after the crimes, which began on the day of the crimes, only increased the likelihood that he was in fact the perpetrator. This inference was both reasonable and substantive as precedent demands. See State v. Nichols, 5 Wn. App at 660.

In a case where the true disputed issues were identity of the assailant and the credibility of the defendant's alibi, evidence of the defendant's efforts to evade capture on January 7, 2014, were not only probative of consciousness of guilt; it also established a pattern of evasion consistent with the allegedly unknown perpetrator's efforts to flee and conceal the crimes 48 days prior. It was uncontroverted that whoever assaulted the victim and stole her car immediately fled the scene of the crime, and within a day had tried to conceal the stolen and gunshot-riddled car in an obscure location. 2RP 47, 158-159. The defendant's conveniently-timed disappearance, culminating in one final and desperate effort to conceal himself in the roof of his house, was dramatically inconsistent with his theory that he was simply preparing for Thanksgiving with his family when the crime occurred. Indeed, the defendant did not even attempt to present his own explanation for his post-crime disappearance. Instead the defendant's flight and efforts at concealment corroborated his identity as the perpetrator and exposed the inconsistency between his alibi and his post-crime behavior.

Under these facts the jury would have been reasonable to draw each of the four inferences required by McDaniel. The first

such inference links the defendant's behavior to flight. State v. McDaniel, 155 Wn. App. 854. Whereas the McDaniel court found no evidence supporting this inference because the defendant's girlfriend was the one who drove the getaway vehicle, in this case the evidence contained no hint of someone else helping the defendant get into the attic of his house. He climbed up there himself. 2RP 163-164.

The second inference is a link between the flight behavior and consciousness of guilt. Id. While climbing into one's attic may have any number of innocuous purposes in other contexts, the reasonable purposes reduce to one when the attic-climbing is in direct response to police knocking on one's door.

Third, the facts must support an inference that any consciousness of guilt was directly tied to the charged crime, not some other offense. Id. This factor is the one most susceptible to misinterpretation based on Deputy Phillips' testimony that the defendant had "some felony warrants" and "multiple probable cause charges." 2RP 143. As previously explained, this comment did not draw an objection from the same trial counsel who succeeded in excluding any reference to *unrelated* warrants and *uncharged* crimes. 1RP 35-36. Deputy Dill would later confirm that the only

reason police were looking for the defendant was to complete their ongoing investigation of the crimes ultimately charged at trial. 2RP 162-163. The jury had no valid basis in the record to conclude that the defendant's efforts to hide from police were tied to anything other than the charged crimes, the commission of which just happened to coincide with the beginning of the defendant's 48 day flight under law enforcement's radar.

Finally, the facts must support an inference that the defendant's consciousness of guilt of the charged crime translates into the defendant's actual guilt of the charged crime. Id. It is hard to imagine any other conclusion, except perhaps in the case of a conscientious parent who feels morally culpable for the misdeeds of a child, or maybe a domestic violence victim so transformed by her abuser's rhetoric that she feels responsible for her own injuries. These are not the facts of the current case. There is no rational conclusion other than the defendant's actual guilt, if one accepts the first three McDaniel inferences as true, to explain why the defendant hid in his attic when police tried to contact him. The facts surrounding the defendant's January 7, 2014, arrest were properly admitted into evidence.

4. Even If The Evidence Of Flight And Concealment Was Admitted In Error, The Error Was Harmless In The Face Of Overwhelming Evidence.

Erroneous admission of evidence is grounds for reversal only if the error was prejudicial. State v. Garcia, 179 Wn.2d at 848. An error is not prejudicial unless, within reasonable probabilities, the outcome of the trial would have been materially affected had the error not occurred. State v. Garcia, 179 Wn.2d at 848 (quoting State v. Bourgeois, 133 Wn.2d 389, 403, 945 P.2d 1120 (1997)). Where improperly admitted evidence is of "minor significance" compared to the evidence as a whole, the error is harmless. State v. Bourgeois, 133 Wn.2d at 403. In assessing whether the error was harmless, reviewing courts measure the admissible evidence of the defendant's guilt against the prejudice, if any, caused by the inadmissible evidence. Id.

The prejudice associated with the defendant hiding in his attic was not undue so because it fairly commented on his consciousness of guilt, but even if this Court determines the prejudice was unfair, the amount of prejudice arising from this evidence paled in comparison to the other prejudicial associations freely introduced by both sides without objection. In this case all parties realized before trial began that the defendant's lifestyle,

associates (victim included), and his residence carried a significant yet inescapable potential for prejudice. The court made sure to clarify before trial that the defendant had no objection to the jury learning that "there's drug activity all over the place here." 1RP 35-36. At various points in the testimony the jury learned that nearly every resident of the defendant's home had a warrant for his or her arrest on the date of the crimes. 3RP 65 (Tia Vaughn, Heather Mathis), 3RP 92 (Jeremain Moore). The defendant's housemates included an Insane Crip gang member who told the jury that he had been convicted of 11 felonies, and despite having no right to possess guns testified that he ate his breakfast with a pistol by his side after already consuming heroin, marijuana, and methamphetamine. 3RP 79, 91, 93, 95. The defendant's girlfriend said that police considered him dangerous and said he threatened to kill her and her family. 2RP 139. Defense counsel introduced the idea that the victim may have owed \$600 to the defendant as a drug related debt. 2RP 58-59. He then remarked in closing argument that the house where the defendant lived was a "rolling drug dormitory flophouse," and commented on the "sad and disgusting" drug culture it represented. 3RP 151, 154. Considering the totality of this evidence, the revelation that the defendant hid

from police in the attic was inconsequential. The facts related to the defendant's arrest drew not a single reference during closing arguments. There was no possibility that this evidence affected the jury's verdict.

The minor significance of the challenged evidence is even more apparent in light of the strong State's case compared to the inconsistent and incredible defense case. The State had two witnesses who indicated that the defendant was the perpetrator (Laurene Boushee, Jeff Vaughn). 2RP 38-40; 2RP 152-153 (defendant and victim arguing about her car just before the gunshot). The prosecutor stressed the credibility of the victim's "blow by blow" account of the defendant's crime captured by the 911 recording, including her identification of the defendant on the tape itself. 3RP 147-148. The defendant's bedroom contained paperwork associated with the stolen car, multiple pieces of the defendant's identification, and a shotgun with a fired shell in the chamber. 1RP 77-78; 2RP 98-99, 106-108.

In contrast, the defense presented two eye witnesses who could not agree on whether one or four unknown Mexicans committed the crime. 3RP 64-65, 76-77. The defense eye witnesses directly contradicted each on whether they were together

during their observations, or whether Heather Mathis' vantage point had any view of the crime scene at all. Compare 3RP 67-68, with 3RP 82, 86.

Most damaging of all to the defendant's case was the fact that the defendant's alibi witnesses (his mother and his sister) initially were unsure about which date they picked the defendant up in Marysville. 3RP 48-49, 58 As the prosecutor commented in closing, the sister's initial estimate of November 20th or 21st fit perfectly with the State's theory that the defendant abandoned the car in Marysville, then traveled about 4.4 miles to his friend's house where he later arranged for his family to pick him up. 3RP 143-145. Given these facts, any undue prejudice arising from the evidence of flight was significantly outweighed by overwhelming evidence of the defendant's guilt.

IV. CONCLUSION

The State respectfully asks this Court to affirm the defendant's convictions in this case.

Respectfully submitted on December 7, 2015.

MARK K. ROE
Snohomish County Prosecuting Attorney

By:



ANDREW E. ALSDORF, #35574
Deputy Prosecuting Attorney
Attorney for Respondent

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

THE STATE OF WASHINGTON,

Respondent,

v.

JOSHUA T. TANOAI,

Appellant.

No. 73205-6-1

DECLARATION OF DOCUMENT
FILING AND E-SERVICE

AFFIDAVIT BY CERTIFICATION:

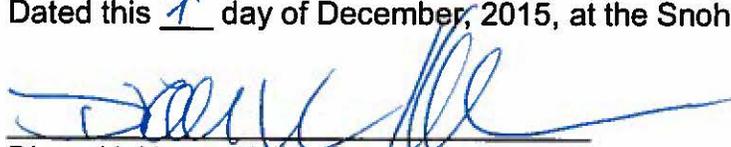
The undersigned certifies that on the 7th day of December, 2015, affiant sent via e-mail as an attachment the following document(s) in the above-referenced cause:

BRIEF OF RESPONDENT

I certify that I sent via e-mail a copy of the foregoing document to: The Court of Appeals via Electronic Filing and Kevin A. March, Nielsen, Broman & Koch, Marchk@nwaterney.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 7th day of December, 2015, at the Snohomish County Office.



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