

NO. 43870-4-II

**COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON**

STATE OF WASHINGTON, RESPONDENT

v.

KISHA LASHAWN FISHER
COREY TROSCLAIR, APPELLANTS

Appeal from the Superior Court of Pierce County
The Honorable Vicki L. Hogan

No. 11-1-01011-4; 11-1-01002-5

BRIEF OF RESPONDENT

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A. ISSUES PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR.

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B. STATEMENT OF THE CASE.

1. Procedure

In March, 2011, the State charged KISHA LASHAWN FISHER (Fisher) and COREY TROSCLAIR (Trosclair) each with one count of murder in the first degree, committed in furtherance of robbery. CPF¹ 1; CPT 1. On February 23, 2012, the State amended each information to include one count of murder in the second degree, predicated upon an attempt to commit assault in the second degree. CPF 25-26; CPT 11-12. The case was called for trial on May 10, 2012, before the Honorable Vicki L. Hogan. RP 4. On May 22, 2012, the parties held a CrR 3.5 hearing to determine whether statements made by the defendants to police were admissible. RP 44-143. The court determined the statements were admissible. RP 156-58.

¹ Fisher and Trosclair were tried together and their cases have been consolidated on direct appeal. However, as both defendants filed their designations of clerk's papers separately, they are not sequentially numbered. The State will cite to clerk's papers for Fisher as "CPF" and for Trosclair as "CPT." The entirety of the trial transcript is sequentially numbered; therefore citations to the verbatim report of proceedings for the trial will be to "RP." Citations to any proceedings which were not part of the sequentially-numbered trial transcript will be to "RP" followed by the date of the hearing.

On July 12, 2012, the parties were still engaged in pretrial matters. *See* RP 206. On that date, Trosclair filed a motion to sever his case from Fisher, arguing that Fisher's statements to officers could not be sufficiently redacted to remove references to him. RP 208-19. The court denied the motion, but made additional redactions to Fisher's statement. RP 218-19, 220-21, 237-46. The court also considered whether statements made by Michelle Davis, made the day of the crime and the day following, were admissible as excited utterances. RP 283-94. The court admitted the statements made shortly after the crime, but excluded statements made the following day. RP 293-94.

Testimony began July 23, 2012 before a jury. RP 378. On July 30, 2012, during the State's case-in-chief, Trosclair moved for mistrial alleging that the State improperly elicited testimony regarding a polygraph test that Trosclair's cellular phone was within a specific distance of the victim, that Michelle Davis identified Trosclair from a photomontage, and that Fisher's statement to the police identified Trosclair as her brother. RP 867-68. The court denied the motion for mistrial. RP 872-73, 880.

On August 15, 2012, the jury found both defendants guilty as charged, and that the defendants, or an accomplice was armed with a firearm during the commission of the crime. CPF 198, 199, 200; CPT 237, 238, 239. The State dismissed the second degree murder charge, as

the defendants had been convicted of the more serious crime of murder in the first degree. CPF 213-15; CPT 240-42.

On August 24, 2012, the court sentenced Fisher to standard-range² sentence of 290 months, with a 60-month firearm sentence enhancement, for a total sentence of 350 months in custody. CPF 218-31. On September 21, 2012, the court sentenced Trosclair to a high-end, standard-range³ sentence of 493 months, together with a 60-month firearm sentence enhancement, for a total sentence of 553 months in custody. CPT 409-24.

Each defendant filed a timely notice of appeal. CPF 242; CPT 425.

2. Facts

On January 16, 2011, at approximately 8:30 p.m. in Lakewood, Washington, Lenard Masten received a telephone call, informed his girlfriend, Michelle Davis⁴, that he was going to the store and asked if she wanted anything. RP 519-20. Shortly after Mr. Masten left the apartment,

² Fisher had an offender score of one, giving her a standard range of 250-333 months for murder in the first degree. CPF 218-31.

³ Trosclair had an offender score of eight, giving him a standard range of 370-493 months for murder in the first degree. CPT 218-31.

⁴ Michelle Davis died prior to trial for reasons unrelated to this case. RP 259. Her statements to Denise were admitted as excited utterances. RP 293-94. Also, as evidence was presented from sisters Michelle Davis, Denise Davis, and Nadise Davis, and their mother, Marlene Davis, the State refers to each woman by her first name only to avoid undue confusion. The State does not intend any disrespect by the familiarity.

Michelle heard a loud noise and looked out the apartment window. RP 519-20. She saw a black male standing over Mr. Masten. RP 519-20.

Michelle's sisters Nadise and Denise, lived at the same apartment complex, along with their mother Marlene, who worked as the manager for the apartments. RP 474-75, 559. Nadise was visiting Denise when she heard a gunshot. RP 479. When she looked outside, she saw Mr. Masten trying to fight someone. RP 479. She immediately went out to assist because she thought he looked like he was hurt. RP 479. She saw a black man digging through Mr. Masten's pockets before looking up at her. RP 480-81. She also saw a second black man, this one with a 9 mm handgun in his left hand, come running down the stairs from the direction of Mr. Masten's apartment. RP 480-81. Both men ran past her and she saw what looked like a truck drive quickly away. RP 480, 485. She went to Mr. Masten and saw that he had been shot in the stomach. RP 486. Nadise called 911. RP 489. Michelle, who had been screaming through the window of the apartment she shared with Mr. Masten, came down and took Mr. Masten's cellular telephone. RP 488, 494.

Denise also heard the gunshot. RP 510. She looked out her window and saw a black male leaning over someone lying on the ground and heard the male cursing loudly. RP 510. She thought people were fighting, so she ran outside and drove her van toward the altercation. RP

510-11. She saw a dark Ford Expedition with its lights off and a black male driving pull out of the parking lot just as she arrived. RP 511.

When she reached Mr. Masten, Michelle and Nadise were already with him. RP 512, 515. She heard Mr. Masten tell Michelle to call his mother. RP 512. As other residents and police started to arrive, Michelle handed her a wad of bills and asked her to keep it for her. RP 516. Michelle then took two backpacks from her apartment and put them in Denise's apartment. RP 517.

A neighbor drove Michelle and Denise to the Hilltop so they could go to St. Joseph's Hospital, where Mr. Masten had been taken. RP 517. Hospital staff would not allow Michelle to see Mr. Masten, so the women walked to their brother's house, which was nearby. RP 520. Michelle called Mr. Masten's nephew⁵, Joseph Adams, to inform him of the situation. RP 520.

Joseph Adams picked up the women from their brother's house. RP 521. Michelle informed him that she had left Mr. Masten's drugs, gun, and money at Denise's apartment. RP 522. The trio went to Denise's apartment to retrieve the backpacks, which had the listed items inside. RP 523-24. Michelle informed Denise that she had taken the backpacks because she thought that Mr. Masten would survive his injuries and did

not want the police finding the unlawful items and filing drug or gun charges against him. RP 524.

Shannon Henderson lived at the apartments and was home the night of the shooting. RP 429, 433. She heard a man say, “what’s up nigga,” then she heard one gunshot. RP 433. She peeked out her window and saw a man standing over Mr. Masten and going through his pockets. RP 434-35. She also saw another man go up the stairs toward Mr. Masten’s apartment and come back down quickly. RP 434. When the second man came back down the stairs, both men left the area immediately. RP 435. She saw a black SUV leave the parking lot. RP 436. Later, she did not identify any person presented in a photomontage containing Joseph Adams. RP 439, 673-75, 1565.

Aaron Howell also lived in the apartments in Lakewood on the night of the shooting. RP 1044. He was in his living room when he heard what he immediately recognized as a gunshot. RP 1045. He went outside and saw a man standing in the parking lot. RP 1047. He and the man looked at each other for a couple of minutes before the man turned around and left. RP 1047-48. He was able to see three-quarters of the man’s face very well, as it was lit from the side by overhead lights. RP 1057. He saw

⁵ Joseph Adams is not related to Mr. Masten, but several people testified that they referred to each other as “nephew” and “uncle.” *See* RP 1314, 1324.