

COA NO. 49991-6-II

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

STATE OF WASHINGTON,

Respondent,

v.

GERALDO DEJESUS,

Appellant.

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

The Honorable Kevin D. Hull, Judge

BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. The court erred in denying appellant's motion for a Frye¹ hearing on ballistics identification evidence.

2. The court erred in admitting expert testimony on ballistics identification under the Frye standard.

3. The court erred in excluding "other suspect" evidence, in violation of appellant's constitutional right to present a defense.

4. The court erred in restricting defense counsel's closing argument, in violation of appellant's constitutional right to counsel.

5. The court erred in admitting evidence to show consciousness of guilt.

6. Cumulative error deprived appellant of his due process right to a fair trial.

7. The evidence is insufficient to convict on the premeditated first degree murder count involving KL.

8. The evidence is insufficient to convict on the attempted first degree murder count involving Jalisa Lum.

Issues Pertaining to Assignments of Error

1. Whether the court erred in failing to conduct a Frye hearing or in failing to exclude State expert testimony on ballistics identification

¹ Frye v. United States, 54 App. D.C. 46, 293 F. 1013 (D.C. Cir. 1923).

because the State did not show the comparison method was generally accepted in the scientific community?

2. Whether the court violated appellant's right to present a defense in excluding "other suspect" evidence because there was an adequate nexus between the alternative suspects and the crimes?

3. Whether the court violated appellant's right to counsel in prohibiting defense counsel from arguing an available inference to the jury about where appellant's gun was located?

4. Whether the court erred in admitting evidence that appellant reported to police he was kidnapped and robbed after the shooting took place because such evidence did not show consciousness of guilt for the charges crimes?

5. Whether a combination of errors violated appellant's due process right to a fair trial under the cumulative error doctrine?

6. Whether the State failed to prove the "premeditation" element of the first degree murder charge involving KL and failed to prove appellant attempted to commit first degree premediated murder against Lum because requisite factors for showing premeditation are missing?

B. STATEMENT OF THE CASE

The State charged Geraldo DeJesus as follows: first degree premeditated murder with aggravating circumstances against Heather

Kelso (count 1); first degree felony murder against Kelso (count 2); first degree burglary (count 3); first degree premeditated murder against KL (count 4); first degree felony murder against KL (count 5); first degree murder by extreme indifference against KL (count 6); attempted first degree premeditated murder against Mathew Dean (count 7); attempted first degree premeditated murder against Jalisa Lum (count 8). CP 272-82.

Heather Kelso lived in the Kariotis Mobile Home Park in Bremerton. 4RP² 1412-14, 1481. Kelso had a roommate, Jalisa Lum. 4RP 2159-60. Kelso had a relationship with Matthew Dean. 4RP 2219-20. He came over on April 27, 2015 and stayed the night with her. 4RP 2205-09. They had sex at about 1 a.m. 4RP 2209. Kelso then went to the back porch to smoke. 4RP 2209. Dean heard multiple gunshots and Kelso cry out that she was shot. 4RP 2210, 2226. Dean helped her into the house and laid her down. 4RP 2211, 2215. Dean heard multiple gunshots as he ran to Lum's bedroom and closed the door behind him. 4RP 2211-12, 2227. He realized he had been shot. 4RP 2211. Dean yelled for Lum to

² The verbatim report of proceedings is cited as follows: 1RP - 2/26/16; 2RP - 3/17/16; 3RP - two consecutively paginated volumes consisting of 3/30/16, 3/31/16; 4RP - 30 consecutively paginated volumes consisting of 7/25/16, 7/28/16, 8/1/16, 8/2/16, 8/3/16, 8/4/16, 8/8/16, 8/9/16, 8/10/16, 8/11/16, 8/15/16, 8/16/16, 8/17/16, 8/18/16, 8/22/16, 8/23/16, 8/24/16, 8/25/16, 8/29/16, 8/30/16, 8/31/16, 9/1/16, 9/6/16, 9/7/16, 9/8/16, 9/9/16, 9/12/16, 9/13/16, 9/19/16, 9/20/16, 9/21/16, 9/22/16, 9/27/16; 5RP - 11/1/16; 6RP - 12/5/16; 7RP - 12/12/16.

call 911. 4RP 2213. He smashed through the bedroom window and ran off. 4RP 2213-14.

Lum testified that she heard gunshots and Kelso and Dean call for help. 4RP 2165. Lum grabbed her two-year-old son, KL, and covered him with her body on the floor of her bedroom. 4RP 2165. The shooter entered the room and fired one shot at her. 4RP 2166, 2178. The bullet missed Lum and hit KL instead, killing him. 4RP 2396. Lum heard gunshots outside after Dean went through the window. 4RP 2167.

911 calls started coming in at 2:18 a.m. 4RP 1441-43. Police responded and found Kelso up against the back door. 4RP 1528. She had been shot twice in the thighs and twice in the head. 4RP 1941, 2365-66. Dean had been shot once in the buttocks. 4RP 3283. Lum and Dean were unable to identify the shooter. 4RP 2176, 2211.

Police quickly identified DeJesus as a person of interest. 4RP 3876. DeJesus and Kelso had a rocky relationship. 4RP 1723, 2064. For a time, they lived together in the mobile home. 4RP 2064. Kelso and DeJesus conceived a child in 2013. 4RP 2064. During the pregnancy, the relationship remained conflicted, as shown by email exchanges between the two. 4RP 3910-30, 4175-98. Kelso gave birth to their baby girl, AD, in November 2014. 4RP 2064. Shortly after, DeJesus traveled to San Diego for work. 4RP 2065. Upon his return a month later, the

relationship remained sour and they broke up. 4RP 1568-69, 2066, 4556-62, 4589-90. DeJesus expressed regret over the deterioration of their relationship and missed spending time with his daughter. 4RP 1978-79. Kelso alleged domestic violence. 4RP 1568. She told a supervisor at work that she was afraid for her life, claiming Dejesus had said he would shoot her if she prevented him from seeing their child. 4RP 1620.

On February 24, 2015, Kelso contacted Child Protective Services (CPS). 4RP 2010-11, 2051-52. She alleged DeJesus had been violent toward his oldest daughter³ and that he tried to take AD from the babysitter. 4RP 1568, 1619-20, 1763-64, 2067, 2202-03. That same day, Kelso obtained a temporary protection order prohibiting DeJesus from contacting her. 4RP 2022; Ex. 474. DeJesus was upset and disappointed about the protection order and the CPS case. 4RP 2073, 2648, 2863, 2965-66, 4573-81, 4594-4602, 4619-21, 4870. On March 5, 2015, a commissioner granted a permanent protection order. 4RP 2023; Ex. 478. The order allowed supervised visitation with AD. 4RP 2058, 2087; Ex. 478. DeJesus moved out of the house and stayed with his ex-wife, Ivy Dejesus, and their two children. 4RP 178, 2853.

³ DeJesus had two older children from a previous marriage with Ivy DeJesus. 4RP 2107, 2842.

On March 26, CPS notified DeJesus that it had closed the investigation involving his older daughter because the allegation was unfounded. 4RP 2011-13. On March 27, Kelso had a confrontation with DeJesus at a McDonalds restaurant. 4RP 2088, 2098-99. He visited the baby later that day. 4RP 2099. He was told by Elizabeth Forrester, who was taking care of the baby, that AD would be staying with her that night because she was sick. 4RP 2100. AD spent most nights at Forrester's house in March. 4RP 2150.

DeJesus talked to the police following the shooting. 4RP 3379. He said he was with his friend Billy Nicholson earlier on the night of the shooting,⁴ then returned to Ivy's house, where he had been staying. 4RP 1652-53, 1699-1703, 3379-80. Video surveillance footage showed DeJesus left Nicholson's house at 12:26 a.m. 4RP 2690. He bought items from a gas station at 12:49 a.m. 4RP 2434. Ivy was not home that night, as she was staying with her daughter at a sleep-over. 4RP 2918. She testified DeJesus was stewing about not being able to see AD. 4RP 2920. He sent a text message to Ivy at 1:26 a.m., telling her good night and "watching tv till I pass out." 4RP 4748. He made Facebook entries starting at 3:15 a.m. 4RP 4748. He watched a Netflix movie on his phone

⁴ Nicholson confirmed DeJesus came over to his house and watched a television show. 4RP 3096-97.

starting at 3:29 a.m. 4RP 4749. It took a detective 24-26 minutes to drive from Kelso's residence to Ivy's residence. 4RP 4751-53.

Police noticed a scrape on DeJesus's shin, which he said he received at work. 4RP 1660-61, 3390-91. Nicholson confirmed that DeJesus complained about an abrasion on his leg from work the night before the shooting took place. 4RP 3103-04.

DeJesus bought a 9 mm Smith and Wesson firearm from an acquaintance about five years prior. 4RP 3057-58. He initially told police he gave his gun to a friend. 4RP 1653. He later clarified that he gave it to Kelso for protection. 4RP 1653, 1706. He said he left the gun at Kelso's house when he moved out. 4RP 1706. He last saw the gun before he went to San Diego; it was under Kelso's bed. 4RP 3380-81.

According to Ivy, he took the gun out of the house before leaving for San Diego because she did not want it around the kids. 4RP 2868. DeJesus received the gun box when he got his property back from Kelso. 4RP 2869. Ivy suggested he sell the gun to get money for a lawyer to file for custody of AD. 4RP 2871, 2956-57. When he went to get the gun from the case, he discovered the gun was not inside. 4RP 2871-72. DeJesus said he would try to get the gun back from Forrester. 4RP 2912. He provided a list of belongings he wanted back to Forrester; the gun was not on the list. 4RP 2073-76. According to Forrester, he did not ask for

the gun back. 4RP 2077. While the police were at Ivy's residence, DeJesus told Ivy that he never got the gun back. 4RP 2923-24.

Police searched Ivy's residence. 4RP 2694-96. No firearm was found, but a Smith and Wesson gun case was recovered. 4RP 2700-02. A spent shell casing was inside an envelope tucked inside the inner lining of the gun case. 4RP 3448-49. This casing was a manufacture test-fired round. 4RP 3458-66, 3477-79.

11 nine mm spent shell casings were found at the scene of the shooting and nine bullets were recovered. 4RP 1796-99, 1935-36. Cathy Geil, a Washington State Patrol Crime Lab analyst, opined the markings on the recovered bullets (including those extracted during autopsy) were consistent with having been fired from the same firearm. 4RP 3535, 3637, 3655. Geil also concluded the markings on the 11 shell casings collected from the crime scene and the manufacturer's test-fired round were consistent with having been fired from the same firearm. 4RP 3637, 3657. Defense expert William Tobin challenged the validity of the science purporting to support ballistics identification. 4RP 3395-4000, 4004-06, 4018-19. Defense expert Dr. Clifford Spiegelman testified no sound validation study had been done to verify claimed results in the ballistic identification field. 4RP 4133-35. The State's expert witness, Dr. James Hamby, testified the science was fine. 4RP 4408-12.

Footwear impressions left in Lum's bedroom indicated the shooter jumped out the window. 4RP 1877-80, 1945-46. The State's footwear examiner testified a shoe manufactured by IPath was a possible source of the impressions. 4RP 3014. According to Ivy, DeJesus wore Vans, DC and Nike brand shoes. 4RP 2853, 2939-41. She never saw him wear IPath shoes, and the State produced no witness claiming he wore this kind of shoe. 4RP 2964. The shooter walked through Dean's blood trail. RP 1948-49. No blood was found on DeJesus's shoes. 4RP 3827. No blood was found in his vehicle. 4RP 2484. It was highly likely that the shooter would have blood spatter on his clothing because the gun was fired in close proximity to Kelso. 4RP 1942. No DNA from Kelso was found on DeJesus's jeans. 4RP 3741-44.

A neighbor heard male voices after the shooting started, but did not identify any of them as belonging to DeJesus. 4RP 1477-81, 1485-86. Another neighbor saw a "built," somewhat heavysset man in a ski mask at about midnight climbing a backyard fence.⁵ 4RP 2311-12, 2329. A few minutes later, he saw the man standing in front of the house between some bushes, and noticed he had facial hair and was white. 4RP 2317-18, 2321, 2331-33.⁶

⁵ He told a detective that it was 12:30 a.m. 4RP 4794, 4799, 4845.

⁶ Defense counsel argued the description did not match DeJesus's

The jury found DeJesus guilty as charged.⁷ CP 402-12. By agreement, the felony murder convictions were vacated to avoid double jeopardy. CP 459-60, 775. The court sentenced DeJesus to life without the possibility of release. CP 461-62. DeJesus appeals. CP 475.

C. **ARGUMENT**

1. **THE COURT COMMITTED REVERSIBLE ERROR IN REFUSING TO CONDUCT A FRYE HEARING AND IN ADMITTING EXPERT TESTIMONY ON BALLISTIC IDENTIFICATION BECAUSE SUCH EVIDENCE DOES NOT CURRENTLY PASS THE FRYE TEST.**

Expert testimony on ballistic identification evidence was inadmissible under the Frye standard because the State failed to prove the method used to establish comparison is generally accepted in the scientific community. There is a significant dispute among qualified experts in the scientific community about its validity — a dispute that has considerably sharpened in recent years. While ballistic identification evidence is not "novel" in the historical sense, new evidence shows there is no current general acceptance. This Court should reverse the convictions because State expert testimony linking a test-fired round in DeJesus's possession

characteristics. 4RP 5063-64.

⁷ Except for count 6 (murder by extreme indifference), which the court dismissed before jury deliberations began. 4RP 4900; CP 358-60.

with the bullets and casings used in the shooting should not have been admitted under Frye without a hearing on the matter.

a. The Frye standard: general consensus needed.

Under Frye, scientific evidence is admissible only where (1) the scientific theory or principle upon which the evidence is based has gained general acceptance in the relevant scientific community of which it is a part; and (2) there are generally accepted methods of applying the theory or principle in a manner capable of producing reliable results. State v. Riker, 123 Wn.2d 351, 359, 869 P.2d 43 (1994). Both the scientific theory underlying the evidence and the technique or methodology used to implement it must be generally accepted in the scientific community for evidence to be admissible under Frye. State v. Gore, 143 Wn.2d 288, 302, 21 P.3d 262 (2001). While unanimity is not required, scientific evidence is inadmissible "[i]f there is a significant dispute among qualified scientists in the relevant scientific community." Id.

The State, as proponent of the challenged expert testimony, bears the burden of establishing the Frye requirements. In re Marriage of Parker, 91 Wn. App. 219, 226, 957 P.2d 256 (1998). "When general acceptance is reasonably disputed, it must be shown, by a preponderance of the evidence, at a hearing held under ER 104(a)." State v. Kunze, 97 Wn. App. 832, 853, 988 P.2d 977 (1999), review denied, 140 Wn.2d 1022, 10 P.3d 404

(2000). "When general acceptance cannot be reasonably disputed, it may be judicially noticed in the same way as any other adjudicative fact." Id. at 853-54.

A de novo standard of review is applied to a trial court's decision not to conduct a Frye hearing as well as to the admissibility of evidence under the Frye standard. State v. Gregory, 158 Wn.2d 759, 830, 147 P.3d 1201 (2006), overruled on other grounds by State v. W.R., Jr., 181 Wn.2d 757, 336 P.3d 1134 (2014); Anderson v. Akzo Nobel Coatings, Inc., 172 Wn.2d 593, 600, 260 P.3d 857 (2011). The trial court's decision therefore receives no deference on appeal. Kunze, 97 Wn. App. at 854.

The reviewing court conducts a searching review that is not confined to the trial record. State v. Cauthron, 120 Wn.2d 879, 887-88, 846 P.2d 502 (1993), overruled on other grounds by State v. Buckner, 133 Wn.2d 63, 941 P.2d 667 (1997). The question of general acceptance may involve consideration of scientific literature, secondary legal authority, law review articles, and cases from other jurisdictions. State v. Copeland, 130 Wn.2d 244, 255-56, 922 P.2d 1304 (1996); Cauthron, 120 Wn.2d at 887-88. General acceptance may not be found "[i]f there is a significant dispute between qualified experts as to the validity of scientific evidence." Kunze, 97 Wn. App. at 853 (quoting Cauthron, 120 Wn.2d at 887).

b. The trial court denied the Frye motion, refusing to conduct a hearing on the matter.

Before trial, the defense moved to exclude any State's witness from testifying about toolmaker/ballistics identification based on Frye. CP 52-208; 209-22. The State in turn moved to deny the defense request for a Frye hearing. CP 481-87;488-545. The court addressed the motions over the course of several hearings. 1RP 6-10; 2RP 2-14; 3RP 29-47.

Defense counsel argued ballistics identification evidence is not generally accepted in the scientific community and the techniques employed in that area are incapable of producing reliable results. CP 55-67. The field of ballistic identification has experienced significant criticism in recent years because any conclusion of identification is subjective. CP 58; 3RP 31. No objective standard is used and there is no way to accurately measure the margin of error. 3RP 31-32, 35.

The defense presented affidavits from Tobin and Spiegelman. CP 70-129. Tobin is a metallurgy expert who has been qualified as an expert witness in 45 states and testified in 262 trials. CP 57. He worked for the FBI laboratory for over 25 years, acting as the chief forensic metallurgist from 1986 until his retirement in 1998. CP 57. Spiegelman is a forensic statistician. CP 57. He has a Ph.D. in Statistics/Applied Mathematics. CP 57. He is a university professor that has worked in the field of forensic

statistics for over 40 years, and is a member of a technical advisory group with the Houston crime lab where he advises on scientifically supportable testimony. CP 57, 210. Both experts concluded ballistics identification is not based on verifiable scientific criteria. CP 58. The opinions of ballistics identification experts are based on subjective opinions rather than objectively tested hypotheses. CP 58. Tobin listed 10 forensic scientists and multiple scholarly articles that condemn the use of ballistics identification evidence in the courtroom. CP 81-83.

The State argued the Frye test was inapplicable because the scientific theory and method of proof were not novel. CP 483-85. No court in modern times had excluded ballistics evidence as insufficiently reliable. CP 484. The State contended the method of pattern matching used by firearm examiners is well established and accepted in the relevant scientific community as reflected in case law. CP 485-86. According to the State, Tobin and Spiegelman were not experts on firearm/toolmark identification. CP 488, 490; 3RP 40. It claimed the only relevant scientific community was the Association of Firearm and Toolmarks Examiners (AFTE). CP 491; 3RP 39. It submitted a declaration from Geil, in which she described the theory and method of identification endorsed by the AFTE. CP 547-56. According to Geil, "If sufficient

agreement of class and individual characteristics is observed between two items, an identification conclusion is rendered." CP 551.

Tobin, through his affidavit, pointed out that Geil is an AFTE member. CP 62. The AFTE is a trade association formed to represent the interests of its members who are generally without significant scientific background. CP 85. Although the AFTE attests to the validity of ballistics identification, its members do not agree on the number, type, quality, and characteristics that must match before a source attribution can be claimed. CP 85-86.

The trial court said it was "not hearing anything that says" the method described by Geil was not generally accepted "in her community." 3RP 36. The court denied the defense motion, finding "based, on the offers of proof, that Ms. Geil did, in fact, use a generally accepted technique with regards to her testing and, therefore, a Frye hearing is not required." 3RP 46-47.

During trial, the defense moved for reconsideration on the Frye issue based on the newly issued President's Council of Advisors on Science and Technology's (PCAST) report entitled Forensic Science in the Criminal Courts: Ensuring Scientific Validity of Feature-Comparison Methods. CP 347-51; 4RP 3505-17. Counsel described the PCAST report as a "potential game changer in the area of forensic science." CP 348.

The report damns the theory of firearm comparison as "circular" and its conclusions as subjective. CP 349 (citing PCAST Report at 82). Firearm matching fell short of the scientific criteria for foundational validity. CP 349 (citing PCAST Report at 88). The trial court denied the motion for reconsideration, finding the PCAST report did not show lack of general acceptance in the scientific community. 4RP 3515-17, 3523-25.⁸

c. There is a significant dispute among qualified scientists in the relevant scientific community about the validity of ballistic identification methodology.

General acceptance may not be found "[i]f there is a significant dispute between qualified experts as to the validity of scientific evidence." Cauthron, 120 Wn.2d at 887. There is such a dispute here.

The State contended ballistic identification evidence is not "novel" and therefore Frye does not apply. CP 483-85. But a Frye hearing cannot be avoided based on lack of "novelty" where the record reflects there is *currently* no definitive acceptance of the challenged theory or methodology. Cauthron, 120 Wn.2d at 888 n.3. It is true that once the Supreme Court has made a determination that the Frye test is met as to a

⁸ The defense argued in the alternative that if the court denied the defense motion on Frye, the State's expert should not be allowed to testify that she was 100 percent certain of identification or that she had a reasonable degree of scientific certainty. 3RP 37-38, 45-49; 4RP 3507-08, 3567-73. The court ultimately ruled Geil would be allowed to testify that the tool marks were consistent, but she could not definitively say they came from the same tool. 4RP 3573-74.

specific novel scientific theory or principle, trial courts can generally rely upon that determination as settling such theory's admissibility in future cases. Id. There is no Supreme Court authority on ballistic identification evidence. Even where the particular theory has been previously accepted, "trial courts must still undertake the Frye analysis if one party produces new evidence which seriously questions the continued general acceptance or lack of acceptance as to that theory within the relevant scientific community." Id. Courts should not shy away from "considering whether a theory, which had been accepted in the scientific and legal communities, continues to meet the standard." Blackwell v. Wyeth, 408 Md. 575, 589, 971 A.2d 235 (Md. 2009). "Science moves inexorably forward and hypotheses or methodologies once considered sacrosanct are modified or discarded. The judicial system, with its search for the closest approximation to the 'truth,' must accommodate this ever-changing scientific landscape." State v. Behn, 375 N.J. Super. 409, 429, 868 A.2d 329 (N.J. Super. Ct. App. Div. 2005).

There is no Washington precedent on whether ballistic identification evidence is admissible under the Frye standard. The State asserted that appellate courts in Washington have already determined a Frye hearing is not required to determine the admissibility of ballistics evidence. CP 483. Not so. The only Washington case cited in support of

its assertion is State v. Lizarraga, 191 Wn. App. 530, 564-65, 364 P.3d 810 (2015), review denied, 185 Wn.2d 1022, 369 P.3d 501 (2016). CP 483 (n.2). Lizarraga did not address the Frye argument raised on appeal because the defense did not request a Frye hearing at the trial level, thus waiving the issue. Lizarraga, 191 Wn. App. at 567 n.23. Cases that fail to specifically decide an issue are not authority on that issue. In re Electric Lightwave, Inc., 123 Wn.2d 530, 541, 869 P.2d 1045 (1994).

The State argued no court in any other jurisdiction has excluded ballistic identification evidence due to unreliability. Cases from other jurisdictions can be taken into account in determining whether a general consensus exists, but is only one source of information among others to consider. Copeland, 130 Wn.2d at 255-56. Most jurisdictions have forsaken the conservative Frye standard in favor of a liberal evidentiary one. See State v. Russell, 125 Wn.2d 24, 107-08, 882 P.2d 747 (1994) (recognizing the distinction). And those that still use the Frye standard are not binding on a Washington appellate court tasked with making an independent decision on the matter. Eagan v. Spellman, 90 Wn.2d 248, 255, 581 P.2d 1038 (1978). There is no requirement that Washington courts follow the herd.

Moreover, as of the filing of this brief, no appellate court anywhere in the country has addressed ballistic identification evidence under the

Frye standard in light of the newly minted PCAST report. The PCAST report is the nail in the coffin. But before addressing it, DeJesus turns to its predecessors to provide context for its significance.

In recent years, forensic firearms and toolmark identification testimony has been increasingly recognized by those in the scientific community as lacking sufficient reliability. In assessing the admissibility of forensic expert testimony, this Court is not without guidance. Landmark reports that examine the scientific underpinnings of ballistics identification testimony are available.

In 2008, a committee of scientists and statisticians assembled by the National Research Council (NRC) of the National Academy of Sciences issued a report on bullet pattern-matching analysis, Ballistic Imaging.⁹ The NRC, in assessing the feasibility and utility of establishing a national reference ballistic image database, recognized the underlying question as "whether firearms-related toolmarks are unique: that is, whether a particular set of toolmarks can be shown to come from one weapon to the exclusion of all others." Ballistic Imaging, at 1, 3. The NRC found the "validity of the fundamental assumptions of uniqueness

⁹ National Research Council, Committee to Assess the Feasibility, Accuracy, and Technical Capability of a National Ballistics Database, Ballistic Imaging (2008) (available at www.nap.edu/read/12162/chapter/1).

and reproducibility of firearms-related toolmarks has not yet been fully demonstrated." Id. at 3, 81. "[D]erivation of an objective, statistical basis for rendering decisions [about matches] is hampered by the fundamentally random nature of parts of the firing process. The exact same conditions . . . do not necessarily apply for every shot from the same gun." Id. at 55. "A significant amount of research would be needed to scientifically determine the degree to which firearms-related toolmarks are unique or even to quantitatively characterize the probability of uniqueness." Id. at 3, 82. The NRC, recognizing testimony about matches is an "inherently subjective assessment," condemned examiners who cast their assessment in bold absolutes because there is no firm statistical basis for doing so. Id. at 82.

In 2009, the NRC published a report to Congress identifying serious problems with various types of forensic evidence. Nat'l Research Council, Nat'l Acad. of Science, Strengthening Forensic Science in the United States: A Path Forward (2009) (available at www.nap.edu/read/12589/chapter/1). It summarized the state of the forensic field: "With the exception of nuclear DNA analysis . . . no forensic method has been rigorously shown to have the capacity to consistently, and with a high degree of certainty, demonstrate a connection between evidence and a specific individual or source." Id. at 7. "The principal difficulty, it appears, is that many [forensic science] techniques

have been relied on for so long that courts might be reluctant to rethink their role in the trial process. . . . in many forensic areas, effectively no research exists to support the practice." Id. at 110.

Of importance here, the NRC concluded "the scientific knowledge base for toolmark and firearms analysis is fairly limited." Id. at 154. "A fundamental problem with toolmark and firearm analysis is the lack of a precisely defined process." Id. at p. 155. The protocol developed by the AFTE detailing when an examiner may reach a certain conclusion was not defined in a sufficiently precise way for examiners to follow, particularly in relation to when an examiner can "match" two samples. Id. at 155. The AFTE protocol, "which is the best guidance available for the field of tool mark identification, does not even consider, let alone address, questions regarding variability, reliability, repeatability, or the number of correlations needed to achieve a given degree of confidence." Id.

The problem with the methodology is that the final conclusion is subjective: "[The] determination of a match is always done through direct physical comparison of the evidence by a firearms examiner, not the computer analysis of images. . . . even with more training and experience using newer techniques, the decision of the toolmark examiner remains a subjective decision based on unarticulated standards and no statistical foundation for estimation or error rates." Id. at 153-154. "Because not

enough is known about the variabilities among individual tools and guns, we are not able to specify how many points of similarity are necessary for a given level of confidence in the result." Id. at 154.

The most serious condemnation of this type of evidence came in the midst of DeJesus's trial. The President's Council of Advisors on Science and Technology (PCAST) issued a report entitled "Forensic Science in Criminal Courts: Ensuring Scientific Validity of Feature-Comparison Methods."¹⁰ The PCAST Report, among other things, reviews the scientific validity of forensic feature comparison methods, including firearms/toolmark analysis, and makes recommendations to courts and federal authorities regarding further steps to "strengthen forensic science and promote its more rigorous use in the courtroom." PCAST Report at 2.

It identified serious shortcomings in the field of ballistics identification. "Over the past 15 years, the field has undertaken a number of studies that have sought to estimate the accuracy of examiners' conclusions. While the results demonstrate that examiners can under some circumstances identify the source of fired ammunition, many of the

¹⁰ Executive Office of the President, President's Council of Advisors on Science and Technology, Forensic Science in Criminal Courts: Ensuring Scientific Validity of Feature Comparison Methods (Sept. 2016) (available at www.broadinstitute.org/files/sections/about/PCAST/2016%20pcast-forensic-science.pdf)

studies were not appropriate for assessing scientific validity and estimating the reliability because they employed artificial designs that differ in important ways from the problems faced in casework." Id. at 106. The foundational validity of a method is measured in terms of its reliability, repeatability, reproducibility and accuracy. Id. at 47-48. Many of these earlier studies on firearm analysis "were inappropriately designed to assess foundational validity and estimate reliability" and "there is internal evidence among the studies themselves indicating that many previous studies underestimated the false positive rate by at least 100-fold." Id. at 11.

The AFTE, the industry body for those who study ballistics markings, has a theory of identification that relies on circular logic. Id. at 60. "It declares that an examiner may state that two toolmarks have a 'common origin' when their features are in 'sufficient agreement.' It then defines 'sufficient agreement' as occurring when the examiner considers it a 'practical impossibility' that the toolmarks have different origins." Id.

"PCAST finds that firearms analysis currently falls short of the criteria for foundational validity, because there is only a single appropriately designed study to measure validity and estimate reliability. The Scientific criteria for foundational validity require much more than one such study, to demonstrate reproducibility." Id. at 12,112. "Without

appropriate estimates of accuracy, an examiner's statement that two samples are similar, or even indistinguishable, is scientifically meaningless: it has no probative value, and considerable potential for prejudicial impact." Id. at 46. The PCAST report casts serious doubt on the current validity of the ballistic identification method.

In assessing admissibility of under Frye, courts also consider secondary legal authority and law review articles. Copeland, 130 Wn.2d at 255-56; Cauthron, 120 Wn.2d at 887-88. Many scholars have recognized the limitations of ballistics identification testimony, and have called for limitations on, or exclusion of, such testimony. See, e.g., Adina Schwartz, A Systemic Challenge to the Reliability and Admissibility of Firearms and Toolmark Identification, 6 Columbia Sci. & Tech. L. Rev. 1 (2005) ("because of . . . systemic scientific problems, firearms and toolmark identification testimony should be inadmissible across-the-board."); Sarah Lucy Cooper, The Collision of Law and Science: American Court Responses to Developments in Forensic Science, 33 Pace L. Rev. 234 (Winter 2013); Bonnie Lanigan, Firearms Identification: The Need for a Critical Approach to, and Possible Guidelines for, the Admissibility of "Ballistics" Evidence, 17 Suffolk J. Trial & App. Advoc. 54 (2012); Paul C. Gianelli, Ballistics Evidence Under Fire, Criminal Justice v.25, no.4 (American Bar Association, Winter 2011).

"The core concern of Frye is whether the evidence being offered is based on an established scientific methodology." Russell, 125 Wn.2d at 41. As shown, there is currently a significant debate in the scientific community about the reliability of ballistics identification testimony. Frye hearings are mandatory in this circumstance. Kunze, 97 Wn. App. at 853. "[T]rial courts *must* still undertake the Frye analysis if one party produces new evidence which seriously questions the continued general acceptance or lack of acceptance as to that theory within the relevant scientific community." Cauthron, 120 Wn.2d at 888 n.3.

The State, as proponent of the evidence, has the burden of proving general acceptance by a preponderance of the evidence at a Frye hearing. Kunze, 97 Wn. App. at 853; Parker, 91 Wn. App. at 226. The trial court, in refusing to hold a Frye hearing, relieved the State of its burden of proof. Keep in mind that refusal to hold a Frye hearing is equivalent to taking judicial notice that general acceptance cannot be reasonably disputed. Kunze, 97 Wn. App. at 853; ER 201. DeJesus has demonstrated a reasonable dispute. The 2008 NRC report, the 2009 NRC report, the 2016 PCAST report, scholarly challenges, and the declarations from two defense experts show the existence of this dispute.

Again, in evaluating the admissibility of expert testimony, courts consider whether the underlying scientific theory or methodology is

"generally accepted in the scientific community." Gregory, 158 Wn.2d at 829. The State argued the only scientific community qualified to assess the validity of ballistic identification evidence is the forensic community composed of AFTE members. CP 491; 3RP 39. That is a narrow and untenable conception of the relevant scientific community. The relevant scientific community includes "the community of scientists familiar with the challenged theory." Russell, 125 Wn.2d at 41. "[T]he scientific community at large is important — a court looks not only to the technique's acceptance in the forensic setting but also to its acceptance by the wider scientific community familiar with the theory and underlying technique." Id. There can be no plausible dispute that the scientific community includes those who contributed to the PCAST Report and the 2008 and 2009 NRC reports, as well as the experts (Tobin and Spiegelman) proffered by defense counsel in support of the Frye motion.¹¹ They are all familiar with the challenged ballistics identification theory and technique.

¹¹ The State moved to exclude Tobin and Spiegelman from testifying on the ground that neither had relevant expertise in this scientific field. 4RP 107-10; CP 645. The defense opposed the motion, arguing Tobin and Spiegelman were qualified experts in the field of ballistics evidence. CP 283-88; 4RP 110-14. The court denied the State's motion, ruling they were qualified to testify as experts. 4RP 114-16.

The AFTE, meanwhile, is a trade association seeking to protect its own interests, including the interest of its members in remaining employed in forensic settings.¹² To ignore the independent views of the relevant scientific community would allow the fox to guard the henhouse, forever insulating its practices from scrutiny by skeptical outsiders. See Ramirez v. State, 810 So.2d 836, 851 (Fla. 2001) ("general scientific recognition requires the testimony of impartial experts or scientists. It is this independent impartial proof of general scientific acceptability that provides the necessary Frye foundation.").

As expected, the PCAST Report generated pushback from the AFTE, prosecutors and law enforcement. See AFTE Response to PCAST Report on Forensic Science, October 31, 2016 (available at afte.org/uploads/documents/AFTE-PCAST-Response.pdf); Adam B. Shniderman, Prosecutors Respond to Calls for Forensic Science Reform: More Sharks in Dirty Water, 126 Yale L.J. Forum 348 (2017). No doubt there is vigorous disagreement about the scientific validity of ballistic

¹² To be an AFTE member, one must be a practicing firearm and/or toolmark examiner, which means "[a]n individual who derives a substantial portion of his livelihood from the examination, identification, and evaluation of firearms and related materials and/or toolmarks" or "[a]n individual whose present livelihood is a direct result of the knowledge and experience gained from the examination, identification, and evaluation of firearms and related materials and/or toolmarks." See afte.org/membership/membership-requirements.

identification evidence. But admissibility under Frye is not about who is right and who is wrong. An appellate court's task is not to determine whether a scientific method is correct because such determination is beyond the expertise of courts. State v. Sipin, 130 Wn. App. 403, 419, 123 P.3d 862 (2005). Instead, its task is to determine whether the scientific community has generally reached consensus that the method is reliable. Id. at 419-20. That consensus may have existed in the past, but it does not exist now.

d. The error in admitting the evidence is not harmless because the ballistic identification evidence formed a cornerstone of the State's case.

A Frye error is prejudicial if, within reasonable probabilities, the error materially affected the outcome of the trial. Sipin, 130 Wn. App. at 421. The erroneous admission of expert testimony is reversible error when the case is circumstantial and the other evidence is not overwhelming. State v. Huynh, 49 Wn. App. 192, 198, 742 P.2d 160 (1987) (in arson case, trial court wrongly admitted expert testimony that gas recovered from the fire could have matched gas found in the defendant's car under Frye because there was no scientific consensus on the effectiveness of gas chromatography method of comparison). The case against DeJesus was completely circumstantial. No one identified the shooter. The expert testimony linking the test-fired round from DeJesus's

gun case to the shots fired at the scene of the crime comprised the chief and most compelling evidence against him. Under these circumstances, the error was not harmless. Reversal of the convictions is required.

2. THE COURT VIOLATED DEJESUS'S RIGHT TO PRESENT A DEFENSE IN REFUSING TO ALLOW HIM TO PRESENT EVIDENCE THAT ANOTHER PERSON MAY HAVE COMMITTED THE CRIMES.

DeJesus proffered "other suspect" evidence tending to logically connect two men, James Trammell and James Houston, to the crimes. Because the evidence pertaining to each amounted to a combination of circumstances that tended to create a reasonable doubt as to DeJesus's guilt, the trial court's exclusion of such evidence violated his constitutional right to present a defense.

a. The trial court denied the defense motions to admit evidence of other suspects in the shooting.

Before trial, the defense moved to admit evidence of other suspects. CP 37-51; 3RP 11-15, 20-22. The defense wanted to present evidence that Trammell could be considered by the jury as another suspect in the crimes. Id. Trammell is the father of KL and the estranged boyfriend of Jalisa Lum. CP 39. Within a couple hours of the shooting on March 28, 2015, Trammell came to the Kariotis Mobile Home Park and approached an officer. CP 39. He had a Smith and Wesson 9 mm firearm. CP 39.

On April 20, 2015, Lum filed for a domestic violence protection order against Trammell, in which she alleged Trammell was violent and abusive toward her before the shooting occurred. CP 39, 46-49. Since the shooting, he had become even more aggressive and she feared for her life. CP 39-04, 49. A protection order was entered. CP 39-40, 42-45. Counsel pointed out parallels between DeJesus and Trammell: (1) both men were estranged boyfriends of a woman living in the mobile home; (2) both men had small children with their estranged girlfriends; (3) both had recent incidents of domestic violence against their estranged girlfriends; and (4) both men owned a Smith and Wesson 9 mm firearm. CP 41.

The State opposed the motion, arguing there was an insufficient train of facts or circumstances tending to clearly show that Trammell committed the crimes. CP 557-65; 3RP 15-20. The standard for admissibility required more than just motive. 3RP 15. Defense counsel argued the evidence showed more than just Trammell's motive. 3RP 20-21. Counsel also argued in the alternative that the Washington rule for other suspect evidence is unconstitutional. 3RP 12. DeJesus had the right to put on a defense. 3RP 12. The State could put on evidence to rebut the defense theory if it chose to do so, but the significance and weight of the evidence was for the trier of fact to decide. 3RP 12, 14-15, 21-22.

The trial court declined to find the standard unconstitutional. 3RP 22. It denied the defense motion on the ground that DeJesus had not produced the necessary train of facts and circumstances linking the other suspect to the crime. 3RP 22-23. DeJesus was given leave to renew his motion if additional information came to light. 3RP 23. The court later granted the State's motion that no evidence of any other suspect could be introduced without meeting the evidentiary standard. 4RP 44; CP 642.

The State also moved to prohibit the defense from cross examining law enforcement witnesses regarding other suspects that were investigated. CP 730-32; 4RP 1197-1208, 1213-15. In reply, the defense identified a number of other potential suspects and argued it should be allowed to impeach the quality of the investigation by showing the police failed to properly investigate them. CP 293-302; 4RP 1198, 1202-03, 1208-13, 1216-17. The court ruled the defense would be allowed to question law enforcement witnesses about its investigation of one of the identified suspects, James Houston. 4RP 1217-21. Houston sold drugs to Kelso and exchanged text messages with her shortly before the shooting in which he demanded money she owed him. Kelso said she should tell her neighbors that her drug dealer was coming over to fight with her. CP 294-95.

The court precluded the defense from referencing any other individuals identified in its reply for purposes of impeaching the

investigation because the facts associated with them were not sufficiently compelling. 4RP 1218-19. The defense, however, could question law enforcement about Trammell's presence on the scene with a firearm and its investigation regarding that firearm. 4RP 1221-22. By this time, Trammell's firearm had been analyzed by the WSP lab, which determined his firearm was not used in the incident. 4RP 1207.

During trial, following the State's direct examination of the forensic pathologist, the defense renewed its other suspect motion, this time focusing on Houston as the other suspect. 4RP 2398-2407, 2410-11. The available evidence showed Kelso had controlled substances (codeine, hydrocodone, oxycodone) in her blood, Houston was Kelso's pill dealer, Kelso owed him money, she wanted to pawn DeJesus's gun for money, Kelso had a substantial amount of cash on her when she was found, and the text messages between Houston and Kelso showed he wanted his money from her, and she was expecting a fight with him at the mobile home park. 4RP 2398-2407. The court ruled there was an insufficient nexus to allow other suspect evidence. 4RP 2412. The court also did not allow cross-examination of the forensic pathologist regarding Kelso's drug use and toxicology information, and ruled such matters were not relevant to impeach the quality of police investigation. 4RP 2411-12.

- b. The other suspect evidence was admissible because it showed an adequate nexus between the other suspects and the crime.**

The Sixth Amendment and due process require an accused be given a meaningful opportunity to present a complete defense. State v. Cayetano-Jaimes, 190 Wn. App. 286, 295-98, 359 P.3d 919 (2015); Crane v. Kentucky, 476 U.S. 683, 690, 106 S. Ct. 2142, 90 L. Ed. 2d 636 (1986); U.S. Const. amend. V, VI, XIV; Wash. Const. art. 1, §§ 3, 22. "The right of an accused in a criminal trial to due process is, in essence, the right to a fair opportunity to defend against the State's accusations." Chambers v. Mississippi, 410 U.S. 284, 294, 93 S. Ct. 1038, 35 L. Ed. 2d 297 (1973). Defendants have the right to present evidence that might influence the determination of guilt before a jury. Pennsylvania v. Ritchie, 480 U.S. 39, 56, 107 S. Ct. 989, 94 L. Ed. 2d 40 (1987). Absent a compelling justification, excluding relevant defense evidence denies the right to present a defense because it "deprives a defendant of the basic right to have the prosecutor's case encounter and survive the crucible of meaningful adversarial testing." Crane, 476 U.S. at 689-690.

A trial court's decision to exclude evidence is reviewed for abuse of discretion. State v. Franklin, 180 Wn.2d 371, 377 n.2, 325 P.3d 159 (2014). However, an erroneous evidentiary ruling that violates the defendant's constitutional rights is presumed prejudicial unless the State

can show the error was harmless beyond a reasonable doubt. Id. A claimed violation of a defendant's Sixth Amendment right to present a defense is reviewed de novo. State v. Duarte-Vela, 33299-3-III, 2017 WL 3864628, at *4 (slip op. filed Sept. 5, 2017) (citing State v. Jones, 168 Wn.2d 713, 719, 230 P.3d 576 (2010)).

Courts must safeguard the right to present a defense "with meticulous care." State v. Maupin, 128 Wn.2d 918, 924, 913 P.2d 808 (1996) (quoting State v. Burri, 87 Wn.2d 175, 181, 550 P.2d 507 (1976)). Defense evidence need only be relevant to be admissible. State v. Darden, 145 Wn.2d 612, 622, 41 P.3d 1189 (2002); Jones, 168 Wn.2d at 720. Relevant evidence is "evidence having any tendency to make the existence of any fact that is of consequence . . . more probable or less probable than it would be without the evidence." ER 401. "All facts tending to establish a theory of a party, or to qualify or disprove the testimony of his adversary, are relevant." State v. Perez-Valdez, 172 Wn.2d 808, 824-25, 265 P.3d 853 (2011) (quoting Fenimore v. Donald M. Drake Constr. Co., 87 Wn.2d 85, 89, 549 P.2d 483 (1976)).

If evidence is relevant, the burden is on the State to show the evidence is so prejudicial or inflammatory that its admission would disrupt the fairness of the fact-finding process at trial. State v. Hudlow, 99 Wn.2d 1, 15-16, 659 P.2d 514 (1983). The State must demonstrate a compelling

interest to exclude a defendant's relevant evidence. Id.; Darden, 145 Wn.2d at 621. The State's interest in excluding prejudicial evidence must "be balanced against the defendant's need for the information sought,' and relevant information can be withheld only 'if the State's interest outweighs the defendant's need.'" Jones, 168 Wn.2d at 720 (quoting Darden, 145 Wn.2d at 622). Even so, "[e]vidence relevant to the defense of an accused will seldom be excluded, even in the face of a compelling state interest." State v. Reed, 101 Wn. App. 704, 715, 6 P.3d 43 (2000).

Against this backdrop, we turn to the standard for admitting other suspect evidence. "The standard for relevance of other suspect evidence is whether there is evidence 'tending to connect' someone other than the defendant with the crime' beyond mere speculation." Franklin, 180 Wn.2d at 381 (quoting State v. Downs, 168 Wash. 664, 667, 13 P.2d 1 (1932)). The focus is on whether the proffered evidence tends to create a reasonable doubt as to the defendant's guilt. Id. at 381. "[S]ome combination of facts or circumstances must point to a nonspeculative link between the other suspect and the charged crime." Id. at 381. There is no per se rule against admitting circumstantial evidence of another person's motive, ability or opportunity to commit the crime. Id. at 373. "[I]f there is an adequate nexus between the alleged other suspect and the crime, such evidence should be admitted." Id.

In Franklin, the trial court excluded Andre Franklin's proffered evidence that someone else committed the cyberstalking crimes with which he was charged. Specifically, the court excluded evidence that Franklin's live-in girlfriend Hibbler had sent threatening e-mails to his other girlfriend Fuerte even though Hibbler had the motive (jealousy), the means (access to the computer and e-mail accounts at issue), and the prior history (of sending threatening e-mails to Fuerte regarding her relationship with Franklin) to support Franklin's theory of the case. Id. at 372. The Supreme Court reversed because evidence of Hibbler's motive, ability, and opportunity to commit the crime created a chain of circumstances that tended to create a reasonable doubt as to Franklin's guilt. Id. at 382.

DeJesus presented evidence of a chain of circumstances that tended to create a reasonable doubt as to his guilt as well. As pointed out by defense counsel, circumstances tending to support DeJesus's guilt also applied to Trammell: (1) both men were estranged boyfriends of a woman living in the mobile home; (2) both men had small children with their estranged girlfriends; (3) both had recent incidents of domestic violence against their estranged girlfriends; and (4) both men owned a Smith and Wesson 9 mm firearm. CP 41. Trammell had motive: animosity towards Lum, as shown by a history of domestic violence toward her. Trammell had means: he owned firearms. He had opportunity: he showed up at the

crime scene shortly after the shooting, demonstrating his proximity to the crime. The State's crime lab analyst later examined Trammell's firearm and opined it could not have fired the test-round from the gun case found in DeJesus's garage and eliminated a spent cartridge case as having been fired from Trammell's firearm. 4RP 4254-55, 4258, 4262. The evidence still shows Trammell was familiar with firearms and knew how to use them.¹³

"[T]he threshold analysis for 'other suspect' evidence involves a straightforward, but focused, relevance inquiry, reviewing the evidence's materiality and probative value for 'whether the evidence has a logical connection to the crime.'" State v. Ortuno-Perez, 196 Wn. App. 771, 790, 385 P.3d 218 (2016) (quoting Franklin, 180 Wn.2d at 381–82). The standard is met here. The evidence shows a logical connection between Trammell and the commission of the crime. That the State can come up with a competing narrative does not defeat the logical connection. It is for the jury to decide the weight and persuasiveness of the evidence.

An adequate nexus also ties Houston as an alternative suspect to the crime. He threatened Kelso on March 26, shortly before she was shot. Kelso was expecting a fight. Houston had motive: the drug dealer wanted her to pay up. He was angry with her. He had means: firearms are widely

¹³ Trammell testified he owned multiple firearms. 4RP 1380.

available. He had opportunity: Kelso expected him to be coming over to her residence. The timing of the hostile interaction is important: it occurred shortly before her death. No one from law enforcement asked where Houston was between 2 and 2:30 on the morning of March 28. 4RP 2804. The proffered evidence identifying Houston as an alternative suspect was relevant to the question of the identity of the shooter and was of a type that, if credited by the jury, would support a reasonable doubt as to DeJesus's guilt.

"Where, as here, the evidence is clear that a crime occurred . . . a defense of general denial is, of logical necessity, a defense that 'someone else did it.'" Ortuno-Perez, 196 Wn. App. at 791. Without being allowed to present evidence and argument that someone in particular did it, DeJesus was left in the without a means of planting a seed of reasonable doubt in the minds of jurors. The alternative suspect evidence was relevant to the identity of the shooter, which was the key issue in the case. Neither the State nor the trial court identified a compelling interest in preventing the jury from considering Trammell and Houston as the other suspect. The evidence should have been admitted to preserve DeJesus's right to present a defense.

- c. If the evidence was inadmissible under Washington's "other suspect" standard, then the standard violates due process.**

Assuming arguendo that the "other suspect" evidence offered by DeJesus was properly excluded under the prevailing evidentiary standard, then that standard violates DeJesus's constitutional right to present a defense. State evidentiary rules that infringe upon a weighty interest of the accused to present evidence in his defense are not controlling when they are arbitrary or disproportionate to the purposes they were designed to serve. Holmes v. South Carolina, 547 U.S. 319, 324, 126 S. Ct. 1727, 164 L. Ed. 2d 503 (2006). "This is true even if the rule under which it is excluded is 'respected [,] . . . frequently applied,' and otherwise constitutional." Jackson v. Nevada, 688 F.3d 1091, 1096 (9th Cir. 2012) (quoting Chambers, 410 U.S. at 302). "If the 'mechanical' application of such a rule would 'defeat the ends of justice,' then the rule must yield to those ends." Id. at 1096 (quoting Chambers, 410 U.S. at 302). The relevant constitutional question is the proportionality between the excluded evidence and the interests served by the evidentiary rule. Id. at 1101. Arbitrary rules are those that exclude important defense evidence but do not serve any legitimate interests. Holmes, 547 U.S. at 325.

The Ninth Circuit recognizes a broad due process right to present all evidence tending to implicate another suspect. Thomas v. Hubbard,

273 F.3d 1164, 1177-78 (9th Cir. 2001), overruled on other grounds by Payton v. Woodford, 299 F.3d 815 (9th Cir. 2002), abrogated on other grounds by Mancuso v. Olivarez, 292 F.3d 939 (9th Cir. 2002). "[F]undamental standards of relevancy ... require the admission of testimony which *tends to prove* that a person other than the defendant committed the crime that is charged." Id. at 1177. Even evidence attached to a purely speculative defense theory that another person committed the crime retains relevance. Id. at 1177-78 (citing United States v. Vallejo, 237 F.3d 1008, 1023 (9th Cir. 2001)). "[I]f the evidence [that someone else committed the crime] is in truth calculated to cause the jury to doubt, the court should not attempt to decide for the jury that this doubt is purely speculative and fantastic but should afford the accused every opportunity to create that doubt." Id. at 1178 (quoting Vallejo, 237 F.3d at 1023 (quoting 1A John Henry Wigmore, *Evidence in Trials at Common Law* § 139 (Tillers rev. ed. 1983 (alterations in original))).

The rule in Washington governing the admission of alternative suspect evidence was articulated over 70 years ago. In Downs, the Washington Supreme Court held that evidence someone else committed the offense is admissible when "there is a train of facts or circumstances as tend clearly to point to someone besides the accused as the guilty party." Downs, 168 Wash. at 667. Under Downs, neither a third party's

opportunity to commit the crime nor a third party's motive, will, by itself, satisfy this standard because it would simply invite speculation about whether an outsider committed the offense. Downs, 168 Wash. at 667-68; Maupin, 128 Wn.2d at 927. Instead, there must be specific "evidence tending to connect such outsider with the crime." Downs, 168 Wn. at 667 (quoting 16 C.J. § 1085). The Supreme Court most recently stated the Downs standard is still good law and, although the standard has since been developed, its essence remains. Franklin, 180 Wn.2d at 379-81.

If the other suspect evidence in DeJesus's case was inadmissible because the Downs "train of facts" standard requires something more than a relevant connection between the proffered evidence and the charged crime, that standard violates due process. Consistent with the Sixth Amendment, Hudlow, Darden and Jones require the admission of evidence that is even minimally relevant to the defense unless the State can show a compelling interest in its exclusion. Hudlow, 99 Wn.2d at 15-16; Darden, 145 Wn.2d at 621; Jones, 168 Wn.2d at 720. If the Downs standard is more demanding, it unfairly limits a defendant who says "not me" from presenting evidence that attempts to answer the question "then who?" See United States v. Crosby, 75 F.3d 1343, 1347 (9th Cir. 1996) (introduction of "other suspect" evidence answers this relevant question,

thereby rebutting the inference that only the defendant could have possibly committed the charged crime).

The rationale behind Downs is to ensure an orderly and expeditious trial. State v. Mak, 105 Wn.2d 692, 717, 718 P.2d 407 (1986) (citing People v. Mendez, 193 Cal. 39, 52, 223 P. 65 (Cal. 1924)). The Downs standard violates due process if it is read to exclude evidence that requires some greater, heightened foundation beyond its tendency to create reasonable doubt. Courts in other jurisdiction have rejected heightened foundational requirements for the admission of "other suspect" evidence. See, e.g., Johnson v. United States, 552 A.2d 513, 517 (D.C. Ct. App. 1989) (evidence that someone other than the defendant committed the offense "need only tend to create a reasonable doubt that the defendant committed the offense. In this regard, our focus is on the effect the evidence has upon the defendant's culpability, and not the third party's culpability."); Smithart v. State, 988 P.2d 583, 588 (Alaska 1999) (evidence need not raise a strong probability someone else committed the crime; due process merely requires that evidence tend to create a reasonable doubt as to defendant's guilt).

Particularly noteworthy is the California Supreme Court's rejection of a heightened burden because it is that court's initial rationale for the rule that has been cited in support of the Downs standard. See Mak, 105

Wn.2d at 716-17. In 1986, the California Supreme Court rejected a heightened rule because it created an indefensible "distinct and elevated standard for admitting this kind of exculpatory evidence." People v. Hall, 41 Cal. 3d 826, 833-34, 718 P.2d 99, 226 Cal. Rptr. 112 (Cal. 1986). Other suspect evidence should be treated like any other — if relevant, it is admissible unless its value is substantially outweighed by other factors such as undue delay or juror confusion. Id.

In Holmes, a murder case, there was overwhelming evidence of the defendant's guilt. Holmes, 547 U.S. at 322. In addition to attacking the forensic evidence at trial, Holmes sought to introduce proof that another man had attacked the victim. Holmes proffered witnesses who placed the other suspect in the victim's neighborhood on the morning of the assault and witnesses who would testify that the other suspect had either acknowledged his guilt or Holmes's innocence. The other suspect, however, denied making any incriminating statements and provided an alibi. Id. at 322-23. The trial court excluded the other suspect evidence. Id. at 323-24. The U.S. Supreme Court reversed, reasoning that even where the State's case is strong, evidence of other suspects cannot be excluded unless the evidence poses an undue risk of harassment, prejudice, or confusion of the issues. Id. at 1734-35. Holmes had been denied "a

meaningful opportunity to present a complete defense." Id. at 331 (quoting Crane, 467 U.S. at 485).

To the extent the Downs rule requires a defense showing beyond the usual test for relevancy, Holmes makes it clear that such a heightened standard for other suspect evidence is unconstitutional. Holmes is consistent with Hudlow, Darden and Jones. Under the standard set forth in those cases, even minimally relevant evidence that someone other than the defendant committed the offense is admissible unless the State can show a compelling interest for excluding it. Hudlow, 99 Wn.2d at 15-16; Darden, 145 Wn.2d at 621; Jones, 168 Wn.2d at 720.

There was no such showing in DeJesus's case. Claiming the evidence is not probative enough is not a constitutionally valid excuse. Excluding proffered other suspect evidence as too weak to be admitted usurps the role of the jury as finder of fact. The weight and persuasive value of the evidence is a question for the jury to decide. State v. Thomas, 150 Wn.2d 821, 874-75, 83 P.3d 970 (2004). In a recent case where the trial court erred in excluding evidence to support a self-defense theory, the Court of Appeals addressed the same type of rationale for exclusion and rejected it: "The State makes the point that weak or false evidence is not probative. But if the evidence is weak or false, cross-examination will reveal this, and any sting caused by the admission of false evidence will

not only be removed, but will invite prejudice to the defendant who introduced such evidence. For these reasons, the trial court should admit probative evidence, even if suspect, and allow it to be tested by cross-examination. In this manner, the jury will retain its role as the trier of fact, and *it* will determine whether the evidence is weak or false." Duarte Vela, 2017 WL 3864628, at *7. DeJesus asks for no less. Let the jury decide if the other suspect evidence is any good. DeJesus's constitutional right to present a defense requires that he be allowed to present evidence that someone else committed the crime because that evidence is relevant and there is no compelling justification for excluding it.

d. Reversal is required because the error was not harmless beyond a reasonable doubt.

Violation of the right to present a defense is constitutional error. Jones, 168 Wn.2d at 724; Franklin, 180 Wn.2d at 382. The State bears the burden of overcoming the presumption of prejudice and proving harmlessness beyond a reasonable doubt. Maupin, 128 Wn.2d at 928-29; Chapman v. California, 386 U.S. 18, 24, 87 S. Ct. 824, 17 L. Ed. 2d 705 (1967). The State cannot meet its burden here. The case against DeJesus was circumstantial and less than overwhelming. The primary issue at trial was the identity of the shooter. No witness identified DeJesus as the shooter. Although Kelso was shot at close range, no blood spatter was

found on his clothes. Bloody footprints were left at the scene of the crime, but none of his shoes had blood on them or matched the prints. No trace evidence whatsoever was found on his clothing or in his car. The most powerful evidence against DeJesus was the ballistics identification testimony from the State's expert, but the defense experts disputed the scientific validity of ballistic identification. There was room for a reasonable juror to discount what the State's expert had to say on that point. DeJesus had motive to kill Kelso based on his animosity toward her, but that is one piece in a larger mosaic of evidence. Trammell and Houston had motive to kill as well, but the jury was not allowed to exercise its fact-finding function by considering them as other suspects to the crimes. The exclusion of "other suspect" evidence was not harmless beyond a reasonable doubt. The convictions should be reversed.

3. THE COURT VIOLATED THE SIXTH AMENDMENT IN PROHIBITING DEFENSE COUNSEL FROM ARGUING TO THE JURY ABOUT A KEY ISSUE IN THE CASE.

The trial court's restriction on defense counsel's closing argument violated DeJesus's Sixth Amendment right to counsel. The court precluded counsel from arguing an inference from the evidence that DeJesus's gun had been pawned by Kelso before the shooting took place. The court did so because it did not agree with the inference that counsel

wanted to draw for the jury. In so doing, the court usurped the role of counsel and hobbled the defense. A new trial is required because this constitutional error is not harmless beyond a reasonable doubt.

Some context is needed for this issue. The trial court admitted evidence of text messages sent between Kelso and Houston on March 26 to impeach the quality of law enforcement's investigation, but not as substantive evidence. 4RP 1202-03, 1221, 1602-03, 1673, 2776-77, 2783-84, 2788, 3808, 4726-27. The jury was given a limiting instruction to this effect when the text message evidence was introduced during the cross-examination of Detective Swayze. 4RP 4813-14. During closing argument, defense counsel used a PowerPoint presentation. Counsel quoted the text exchange, as reflected in one of the slides. 4RP 5105-06. The next two slides are at issue here. The first slide, captioned "Question," lists four bullet points:

- How do we reconcile Kelso's statement her check bounced and she cannot pay her drug dealer the money she borrowed with the fact she had between \$600-800 cash in her wallet?
- September 3, 2014 — "Can you pawn your gun?"
- Houston: "You will pay me my money you borrowed though."
- Where is the gun on March 28??¹⁴

¹⁴ CP 428.

The second slide, captioned "Kelso's Secret Other Life," lists three bullet points:

- Per DeJesus (recorded statement of March 28)
— "You (Kelso) need to get away from these people that are doing drugs."
- Wallet had between \$600-800 cash in it at the time of Kelso's murder (per Liz Forrester)
- Kelso was concerned her "drealdear" was "on his way to fightwme"¹⁵

Defense counsel addressed DeJesus's recorded statement from March 28 in which he referenced a previous conversation with Kelso, telling her "You need to get away from these people who are doing drugs." 4RP 5106-07. Counsel argued "Mr. Houston is apparently a drug dealer who has a connection to Ms. Kelso." 4RP 5107. At this point the State objected and the matter was argued outside the presence of the jury. 4RP 5107-08. Defense counsel referred to the slide which addressed the \$600-\$800 that Kelso had in her wallet. 4RP 5108. He argued the big issue in the case was the location of the gun: "they are basically accusing my client of lying about where the gun is, and I'm suggesting an alternative where the gun is, that Ms. Kelso either pawned it or sold it." 4RP 5108. Counsel described this as a reasonable inference because she had \$600-\$800 in her wallet. 4RP 5108. The court asked how that fact was connected to

¹⁵ CP 428.

pawning the gun. 4RP 5108. Counsel responded that Kelso suggested the gun be pawned in September. 4RP 5108. The money was found when Forrester was cleaning up after March 28. 4RP 5108. DeJesus told law enforcement that he left the gun with Kelso. 4RP 5109. Houston was pressuring Kelso for money, so it was reasonable to infer she would sell the gun to reconcile her debt with Houston. 4RP 5109.

Referring to the slide captioned "Questions" (the "first" slide), the court ruled it was impermissible insofar as it addressed evidence not admitted for substantive purposes. 4RP 5109-11. Counsel asked if he was allowed to talk about pawning the gun. 4RP 5110. The court said he could talk about the text message about pawning because that was substantive evidence. 4RP 5110. "But the \$600 to \$800, there's such a difference -- there's such a significance in time between when that money was found that I don't think you can make a reasonable inference." 4RP 5110. Counsel disagreed. 4RP 5110. Pursuant to the court's ruling, the slides were redacted.¹⁶ CP 413. The court added that some of the information violated the pre-trial ruling excluding references to Kelso's drug use. 4RP 5111. Resuming closing argument, defense counsel

¹⁶ Defense counsel filed the unredacted version of the PowerPoint presentation accompanied by a declaration summarizing the changes forced by the trial court's ruling. CP 413-35.

mentioned Kelso's pawn query but was unable to connect it to the money found in her wallet due to the court's ruling. 4RP 5114.

"The Sixth Amendment right to counsel encompasses the delivery of closing argument." Ortuno-Perez, 196 Wn. App. at 798 (citing Herring v. New York, 422 U.S. 853, 858, 95 S. Ct. 2550, 45 L. Ed. 2d 593 (1975)). Closing argument is particularly important to the effective exercise of this right. State v. Frost, 160 Wn.2d 765, 773, 161 P.3d 361 (2007). "[C]losing argument serves to sharpen and clarify the issues for resolution by the trier of fact in a criminal case. . . . And for the defense, closing argument is the last clear chance to persuade the trier of fact that there may be reasonable doubt of the defendant's guilt." Herring, 422 U.S. at 862. Trial courts may limit the scope of closing arguments but "a limitation that goes too far may infringe upon a defendant's Sixth Amendment right to counsel." Frost, 160 Wn.2d at 768.

Of particular importance for DeJesus's appeal, "[t]he court cannot compel counsel to reason logically or draw only those inferences from the given facts which the court believes to be logical." Ortuno-Perez, 196 Wn. App. at 798. "The very premise of our adversary system of criminal justice is that partisan advocacy on both sides of a case will best promote the ultimate objective that the guilty be convicted and the innocent go free. In a criminal trial, which is in the end basically a factfinding process, no

aspect of such advocacy could be more important than the opportunity finally to marshal the evidence for each side before submission of the case to judgment." Herring, 422 U.S. at 862. "Allowing attorneys to argue inferences from the evidence is a rudimentary aspect of this right." Ortuno-Perez, 196 Wn. App. at 799 (citing State v. Ciskie, 110 Wn.2d 263, 283, 751 P.2d 1165 (1988)). "[C]ounsel must be afforded 'the utmost freedom in the argument of the case' and 'some latitude in the discussion of their causes before the jury.'" State v. Perez-Cervantes, 141 Wn.2d 468, 474, 6 P.3d 1160 (2000) (quoting Sears v. Seattle Consol. St. Ry., 6 Wash. 227, 232-33, 33 P. 389 (1893)).

Counsel wanted to argue the inference that Kelso may have pawned the gun, given her expressed interest in doing so and the fact that she had \$600-\$800 in her wallet when she died. The court prohibited counsel from making this argument to the jury: "But the \$600 to \$800, there's such a difference -- there's such a significance in time between when that money was found that I don't think you can make a reasonable inference." 4RP 5110. The law is that "[t]he court cannot compel counsel to reason logically or draw only those inferences from the given facts which the court believes to be logical." Ortuno-Perez, 196 Wn. App. at 798. The court violated this law in DeJesus's case.

The whereabouts of DeJesus's gun figured prominently at trial. The State naturally argued he had the gun all along and used it to kill Kelso and KL and attempt to kill Dean and Lum before disposing of it. 4RP 5006-08, 5012-14, 5018, 5024-27. The prosecutor posited "They can't say that the gun that was used to murder Heather Kelso and [KL] was not the defendant's gun. Where is the defendant's firearm? Where is it? If the defendant's firearm wasn't used in this shooting, where's the firearm? It's not at Heather Kelso's house. He's not going to let Heather Kelso have it. It's mysteriously disappeared." 4RP 5024. The court's ruling prevented the defense from arguing a counter-narrative: that Kelso pawned DeJesus's gun before the shooting took place as shown by the money found in her wallet. That Forrester found the money in Kelso's wallet was substantive evidence. 4RP 2102. That Kelso asked about pawning the gun in September 2014 was also substantive evidence. 4RP 4198. Also admitted as substantive evidence: DeJesus's text message to the person he originally bought the gun from, Brandon Whittaker — "Don't know if she sold it or pawned it, man. I'm tripping out." 4RP 4628.

The improper restriction on defense counsel's closing argument is constitutional error. Ortuno-Perez, 196 Wn. App. at 801. The error is harmless "only if the State can prove beyond a reasonable doubt that the jury would have reached the same result in the absence of the error." Id.

The State cannot meet its burden. The State's case hinged on showing that DeJesus had the murder weapon on the night of the shooting. The State is unable to prove beyond a reasonable doubt that the argument counsel was prevented from making could not have altered the jury's view of the evidence. If the jury were allowed to consider and credit counsel's argument, the State's theory that DeJesus had the gun and used it to commit the murders crumbles. The ballistic identification testimony provided by the State's expert becomes compromised by a counter-fact. This constitutional error requires reversal of the convictions.

4. THE COURT WRONGLY ADMITTED EVIDENCE NOT PROBATIVE OF GUILT AND SUBSTANTIALLY OUTWEIGHED BY UNFAIR PREJUDICE.

The trial court committed reversible error in admitting evidence that DeJesus told police he had been kidnapped and robbed a few weeks after the shooting. This evidence did not show consciousness of guilt. Whatever marginal relevance the evidence had was outweighed by its unfair prejudicial effect under ER 403 and ER 404(b).

a. Over defense objection, the trial court admitted evidence of DeJesus's report to police that he was kidnapped and robbed to show consciousness of guilt for the charged crimes.

Prior to trial, the defense moved to exclude evidence of bank fraud and false reporting under ER 404(b). CP 262-65; 4RP 25-28, 30. On

April 15, 2015, DeJesus reported to police that he had been kidnapped at gunpoint in the middle of the night and forced to withdraw money from a bank ATM and hand it over to the assailant. CP 262. DeJesus went home and told Ivy and his father-in-law. CP 262. At their encouragement, law enforcement was contacted. CP 262. DeJesus later reported the robbery to his bank. CP 262.

Two detectives interviewed DeJesus. CP 653-726. DeJesus gave inconsistent accounts of how he received the cigarette burn on his cheek during the encounter and whether the assailant rode in his jeep to the bank. CP 658-60, 667, 670, 680, 697-99. The detectives insisted the bank surveillance video did not show a cigarette burn or the presence of the assailant in the jeep, that the backseat of the jeep was too small for a man to sit, that his story did not make sense, and that DeJesus was lying. CP 684-90, 695-96, 710-17. DeJesus explained the man told him he would be back if he talked to the police, suggesting he was not telling exactly what happened for this reason. CP 693-94, 696. The assailant had threatened to kill his children. CP 694, 722. He lied to protect his kids. CP 717. The detectives told him that they were looking at a potential bank fraud charge. CP 724-25.

The State argued DeJesus's report about this incident showed consciousness of guilt. According to the State, DeJesus lied about the

incident, which was evidence of his attempt to deflect suspicion from himself by creating another suspect in the shooting. CP 647-49; 4RP 28-30. Relying on State v. Freeburg, 105 Wn. App. 492, 20 P.3d 984 (2001), the trial court denied the defense motion and allowed the State to present this evidence to show DeJesus attempted to create another suspect for the murder. 4RP 30-31.

Over defense objection, the State later cross examined Ivy about the incident. 4RP 2925-35. Ivy testified that DeJesus gave inconsistent stories on how he received the cigarette burn on his face and he lied when he earlier said the assailant was in the jeep with him when he went to the bank. 4RP 2932, 2934-35. Officer McKinney testified that he took the initial report from DeJesus; he expressed skepticism about the account of what happened. 4RP 3209-21.

Before Detective Deatherage testified, the defense renewed its objection that the evidence was not admissible as consciousness of guilt. 4RP 3296-3299. The trial court denied the renewed motion to exclude the evidence. 4RP 3299-3300. Deatherage testified about DeJesus's report and her handling of it. 4RP 3324-33. The bank surveillance video and a redacted recording of the interview were published to the jury. 4RP 3328, 3334-39, 3352-54; Ex. 468(A) (video); Ex. 464(A) (transcript of interview); Ex. 464(B) (recording of interview). In the interview,

Deatherage challenged DeJesus's account, telling him no one could fit in the backseat of the jeep, no cigarette burn was visible on the surveillance video, any person who had experienced being kidnapped and robbed would not look so calm in the video, he said things that were hard to believe, and he was not being honest. Ex. 464(A).

b. The evidence was not admissible to show consciousness of guilt.

"Analytically, flight is an admission by conduct. Evidence of flight is admissible if it creates 'a reasonable and substantive inference that 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.'" Freeburg, 105 Wn. App. at 497 (footnote omitted) (quoting State v. Nichols, 5 Wn. App. 657, 660, 491 P.2d 677 (1971)). The category of flight evidence is not limited to flight from the scene of a crime. It also can include "evidence of resistance to arrest, concealment, assumption of a false name, and related conduct . . . if the trier of fact can reasonably infer the defendant's consciousness of guilt of the charged crime." Id. at 497-98.

Flight evidence is a form of ER 404(b) evidence. Id. at 497. Under ER 404(b), "[e]vidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in

conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident." "ER 404(b) is a categorical bar to admission of evidence for the purpose of proving a person's character and showing that the person acted in conformity with that character." State v. Gresham, 173 Wn.2d 405, 420, 269 P.3d 207 (2012). Evidence of prior misconduct "may, however, be admissible for any other purpose, depending on its relevance and the balancing of its probative value and danger of unfair prejudice." Id. "ER 404(b) is only the starting point for an inquiry into the admissibility of evidence of other crimes; it should not be read in isolation, but in conjunction with other rules of evidence, in particular ER 402 and 403." State v. Saltarelli, 98 Wn.2d 358, 361, 655 P.2d 697 (1982).

When determining admissibility under ER 404(b), the trial court must (1) find the alleged misconduct occurred by a preponderance of the evidence; (2) identify the purpose for admission; (3) determine whether the evidence is relevant to prove an element of the crime; and (4) weigh the probative value against its prejudicial effect. State v. Foxhoven, 161 Wn.2d 168, 175, 163 P.3d 786 (2007). This analysis must be conducted on the record. Id. The State, as the moving party, "has the burden of establishing the first, second, and third elements." State v. Ashley, 186

Wn.2d 32, 39, 375 P.3d 673 (2016). In considering whether evidence is admissible under ER 404(b), doubtful cases should be resolved in favor of the accused. State v. Bluford, 188 Wn.2d 298, 312, 393 P.3d 1219 (2017).

"If the trial court properly analyzes the ER 404(b) issue, its ruling is reviewed for an abuse of discretion." State v. Dawkins, 71 Wn. App. 902, 909, 863 P.2d 124 (1993). A trial court abuses its discretion when applies the wrong legal standard, bases its ruling on an erroneous view of the law, or otherwise fails to adhere to the requirements of an evidentiary rule. State v. Quismundo, 164 Wn.2d 499, 504, 192 P.3d 342 (2008); Foxhoven, 161 Wn.2d at 174.

The first defect in the trial court's admission of the "flight" evidence in DeJesus's case is that it did not find that the misconduct occurred by a preponderance of the evidence. "The preponderance of the evidence standard requires that the evidence establish the proposition at issue is more probably true than not true." State v. Arredondo, 188 Wn.2d 244, 257, 394 P.3d 348 (2017) (quoting Mohr v. Grant, 153 Wn.2d 812, 822, 108 P.3d 768 (2005)). The proposition at issue here is that DeJesus lied to police, not just about certain particulars of the incident, but about the incident happening at all. The premise for arguing his conduct shows consciousness of guilt is that he lied to police about being kidnapped and robbed to deflect attention away from him as the perpetrator of the

shooting. The court did not find he made the incident up out of whole cloth. The court therefore did not find relevant misconduct occurred.

While a trial court need not always reference the preponderance of the evidence standard in weighing the State's proffered evidence, it must explicitly do so unless "a finding that the standard has been met can be implied from a record clearly demonstrating as much." Arredondo, 188 Wn.2d at 258. Although the record is clear that DeJesus lied about certain aspects of the incident (he conceded as much in the interview), it is not clear from the record that the kidnapping/robbery did not happen. The detectives' opinion that DeJesus lied about the whole affair, insofar as it is reflected in the interview, is insufficient prove the fact by a preponderance of the evidence because their opinion on DeJesus's credibility has no probative value. To meet the preponderance standard, the trial court, as evidentiary gatekeeper, needed to determine whether DeJesus told the truth that he was kidnapped and robbed, even if the particulars of his account were not wholly accurate. Its failure to do so means the State failed to meet the preponderance standard for this ER 404(b) evidence.

The trial court identified the purpose of admission: to show consciousness of guilt. But its ruling further falters because the evidence does not meet the standard for showing consciousness of guilt.

Alternatively, any marginal probative value was outweighed by the danger of unfair prejudice to DeJesus.

"When evidence of flight is admissible, it tends to be only marginally probative as to the ultimate issue of guilt or innocence." Freeburg, 105 Wn. App. at 498. "[W]hile 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. The probative value of flight evidence 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. Id. (citing United States v. Myers, 550 F.2d 1036, 1049 (5th Cir. 1977)).

Courts "will not accept '[p]yramiding vague inference upon vague inference [to] supplant the absence of basic facts or circumstances from which the essential inference of an actual flight must be drawn.'" State v. McDaniel, 155 Wn. App. 829, 854, 230 P.3d 245 (2010) (quoting State v. Bruton, 66 Wn.2d 111, 113, 401 P.2d 340 (1965)). Instead, "the government must make certain that each link in the chain of inferences

that concludes with a consciousness of guilt of the crime charged is sturdily supported." United States v. Wright, 392 F.3d 1269, 1278 (11th Cir. 2004) (citing Myers, 550 F.2d at 1049).

In this case, 18 days had elapsed between the time DeJesus allegedly committed the crimes and the time he was reported the kidnapping/robbery incident to police. The passage of time between the charged criminal conduct and alleged flight is a factor to consider. United States v. Blanco, 392 F.3d 382, 395-96 (9th Cir. 2004). "The more remote in time the alleged flight is from the commission or accusation of an offense, the greater the likelihood that it resulted from something other than feelings of guilt concerning that offense." Myers, 550 F.2d at 1051. "The immediacy requirement is important. It is the instinctive or impulsive character of the defendant's behavior, like flinching, that indicates fear of apprehension and gives evidence of flight such trustworthiness as it possesses." Id. The passage of 18 days cuts against the conclusion that DeJesus's behavior showed consciousness of guilt for the charged crimes.

Evidence of flight is inherently unreliable. Myers, 550 F.2d at 1050. So there needs to be a strong evidentiary link to allow for the consciousness of guilt inference. That link is missing here. If DeJesus were truly trying to deflect attention from himself as a suspect in the

shooting, he would be expected to identify the person who assailed him as the person who committed the shooting when he was interviewed. But he did not do that. The necessary inference from DeJesus's conduct to consciousness of guilt is too tenuous. Even relevant evidence is excluded if its probative value is substantially outweighed by the danger of unfair prejudice. Saltarelli, 98 Wn.2d at 361-62. Not only was this evidence insufficiently probative, it was unduly prejudicial. This evidence permitted jurors to conclude DeJesus was consciously guilty of the charged crimes without a firm basis for making that inference. The flight evidence should have been excluded under ER 403 because whatever weak probative value it had for guilt of guilt was substantially outweighed by unfair prejudice.

Further, evidence of misconduct must not be admitted "without a careful consideration of relevance and a realistic balancing of its probativeness against its potential for prejudice." Id. at 364-65. The Supreme Court held long ago that "[w]ithout such balancing and a conscious determination made by the court on the record, the evidence is not properly admitted." State v. Tharp, 96 Wn.2d 591, 597, 637 P.2d 961 (1981). The trial court admitted the evidence to show consciousness of guilt, but its ruling is perfunctory. 4RP 30-31. No effort was made to balance probative value against unfair prejudice. The court should not

have permitted testimony about this ER 404(b) evidence without carefully weighing its probative value against its prejudicial effect on the record. State v. Venegas, 155 Wn. App. 507, 525-26, 228 P.3d 813, review denied, 170 Wn.2d 1003, 245 P.3d 226 (2010).

c. Reversal is required because there is a reasonable probability the wrongly admitted consciousness of guilt evidence affected the outcome.

Evidentiary error requires reversal if there is a reasonable probability the error affected the outcome. State v. Neal, 144 Wn.2d 600, 611, 30 P.3d 1255 (2001). "A harmless error is an error which is trivial, or formal, or merely academic, and was not prejudicial to the substantial rights of the party assigning it, and in no way affected the final outcome of the case." State v. Britton, 27 Wn.2d 336, 341, 178 P.2d 341 (1947). In assessing whether the error was harmless, admissible evidence of guilt is measured against the prejudice caused by the inadmissible evidence. State v. Bourgeois, 133 Wn.2d 389, 403, 945 P.2d 1120 (1997).

As argued in section C.2.d. supra, the circumstantial evidence against DeJesus was not overwhelming. The dueling experts disagreed about the validity of the method for ballistics identification. Evidence that DeJesus was trying to deflect law enforcement attention away from himself as a criminal suspect in the shooting by concocting a story of being victimized was extremely damaging and succeeded in painting

DeJesus as a desperate liar and a guilty man. In closing argument, the prosecutor pointed to the flight evidence to argue he lied about the incident and had a guilty conscience. 4RP 5019-20, 5039-42. The point was important enough to return to in rebuttal argument at length. 4RP 5143-46. The prosecutor exhorted the jury to convict based on the flight evidence. The danger is that the jury took the prosecutor up on this offer. Within a reasonable probability, this flight evidence affected the outcome.

5. CUMULATIVE ERROR DEPRIVED DEJESUS OF HIS DUE PROCESS RIGHT TO A FAIR TRIAL.

Every defendant has the due process right to a fair trial. State v. Davenport, 100 Wn.2d 757, 762, 675 P.2d 1213 (1984); U.S. Const. amend. V, XIV; Wash. Const. art. 1, § 3. Under the cumulative error doctrine, a defendant is entitled to a new trial when it is reasonably probable that errors, even though individually not reversible error, cumulatively produce an unfair trial by affecting the outcome. State v. Coe, 101 Wn.2d 772, 788-89, 684 P.2d 668 (1984); Parle v. Runnels, 505 F.3d 922, 927 (9th Cir. 2007). As discussed above, an accumulation of errors affected the outcome and produced an unfair trial here. These errors include (1) admission of expert testimony on ballistics identification under Frye (section C.1., supra); (2) exclusion of other suspect evidence

(C.2., supra); (3) restriction on closing argument (C.3., supra); and (4) admission of evidence to show consciousness of guilt (C.4., supra).

6. THE EVIDENCE IS INSUFFICIENT TO SUSTAIN THE CONVICTIONS FOR PREMEDITATED MURDER AGAINST KL AND ATTEMPTED PREMEDITATED MURDER AGAINST JALISA LUM.

The State failed to prove beyond a reasonable doubt that DeJesus killed KL with premeditation or intended to kill Jalisa Lum with premeditation. The first degree murder conviction involving KL under count 4 and the attempted first degree murder conviction involving Lum under count 8 must therefore be reversed.

Due process requires the State to prove all necessary facts of the crime beyond a reasonable doubt. In re Winship, 397 U.S. 358, 364, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970); State v. Hundley, 126 Wn.2d 418, 421, 895 P.2d 403 (1995); U.S. Const. amend. V, XIV; Wash. Const. art. I, § 3. Evidence is sufficient to support a conviction only if, after viewing the evidence and all reasonable inferences in a light most favorable to the State, a rational trier of fact could find each element of the crime proven beyond a reasonable doubt. State v. Green, 94 Wn.2d 216, 221, 616 P.2d

628 (1980). The sufficiency of the evidence is a question of law reviewed de novo.¹⁷ State v. Rich, 184 Wn.2d 897, 903, 365 P.3d 746 (2016).

Evidence showed that Dean opened Lum's bedroom door and shut it behind him. 4RP 2165-66. The room was dark. 4RP 2165-66, 2212. Lum heard Dean break the window. 4RP 2166. Lum was the only witness to describe the shooting at issue here: "So after the shatter, somebody opened up the door again, shot towards me and [KL], and so -- and then that's it." 4RP 2166. KL was shot from a distance of 18-24 inches. 4RP 2415-16.

A person is guilty of first degree murder when "[w]ith a premeditated intent to cause the death of another person, he or she causes the death of such person or of a third person[.]" RCW 9A.32.030(1)(a); see also CP 380 ("to convict" instruction involving KL). To convict for attempted first degree murder, the State needed to prove intent to commit first degree murder with premeditation and a substantial step towards the commission of that crime. RCW 9A.32.030(1)(a); RCW 9A.28.020(1); see also CP 393 ("to convict" instruction involving Lum). Count 8 involving Lum was charged as an attempted first degree murder only because the bullet missed Lum and hit KL instead. Count 4 involving KL was based

¹⁷ The court denied DeJesus's post-trial motion to dismiss these counts based on insufficient evidence after the State rested its case. 4RP 32-36; CP 436-40 (defense motion); CP 770-73 (State's response).

on a transferred intent theory. 378 (transferred intent instruction); CP 380 ("to convict" instruction).

Premeditation must involve "more than a moment in point of time." RCW 9A.32.020(1). Mere opportunity to deliberate is insufficient to support a finding of premeditation. State v. Pirtle, 127 Wn.2d 628, 644, 904 P.2d 245 (1995). Rather, premeditation requires "the deliberate formation of and reflection upon the intent to take a human life," and involves the "mental process of thinking beforehand, deliberation, reflection, weighing or reasoning for a period of time, however short." State v. Hoffman, 116 Wn.2d 51, 82-83, 804 P.2d 577 (1991).

Premeditation may be proved with circumstantial evidence. State v. Gentry, 125 Wn.2d 570, 597, 888 P.2d 1105 (1995). "Inferences based on circumstantial evidence must be reasonable and 'cannot be based on speculation.'" State v. Hummel, 196 Wn. App. 329, 357, 383 P.3d 592 (2016) (quoting State v. Vasquez, 178 Wn.2d 1, 16, 309 P.3d 318 (2013)). In determining whether there is sufficient evidence of premeditation, courts consider these relevant factors: (1) motive, (2) procurement of a weapon, (3) stealth, and (4) method of killing. Pirtle, 127 Wn.2d at 644.

Looking at the evidence in the light most favorable to the State, DeJesus had a motive to kill Kelso: he had a hostile relationship with her and she interfered with his parental rights to his daughter. He did not have

a motive to kill Lum or, by extension, her two-year old son. He bore no animosity towards them.

Looking at the evidence in the light most favorable to the State, DeJesus brought a firearm to the residence to kill Kelso. He did not bring the firearm to kill Lum and her son. The attempted killing of Lum and the killing of KL was at worst an afterthought, a situation to be taken advantage of as he pursued his real target, Dean, out the window, after firing multiple shots at him. Alternatively, because the room was dark, DeJesus likely mistook Lum for Dean in the heat of the moment and quickly fired off a single shot before realizing his mistake and continuing his pursuit of Dean. The State will argue this is speculation, but it is no more speculative than the State's theory that he deliberately planned to kill Lum and KL.

There was no stealth employed against Lum and KL. After firing multiple shots, he pursued Dean into Lum's room. He did not try to sneak up on them or hide in wait for them.

The method was a single shot in the dark. Unlike with Kelso and Dean, he fired once toward Lum, accidentally killing KL in the process. Evidence of multiple acts of violence is a factor that supports an inference of premeditation. Hoffman, 116 Wn.2d at 84. There are no multiple acts

of violence perpetrated against Lum and KL, so this factor does not support premeditation.

The prosecutor argued in closing that premeditation did not require DeJesus coming to the residence with the intent to kill Lum. 4RP 5046. That is accurate, but then what evidence shows premeditation to try to kill her once he entered the house? The prosecutor argued "when he walked in that home, he knew he was going to kill everybody that he saw, and he showed that intent by first killing Heather and then shooting at Matt Dean multiple times and following Matt Dean into a room where he knew there was another individual there, because he knew there was a roommate. And he, I'm sure, heard Matt Dean yelling at Jalisa to call 911. He knew there was another person in there, and he looked down, and he saw her, and he pointed his firearm at her, and he shot, and he killed [KL]. That, members of the jury, is premeditation." 4RP 5046-47.

No, it's not. That's speculation about premeditation, which is insufficient to prove the State's case. Hummel, 196 Wn. App. at 357. If a person could be convicted of premeditated murder every time that person saw another and fired a single shot at that person, the distinction between intentional murder and premeditated murder would collapse. DeJesus knew Kelso had a roommate. 4RP 2836-37, 3099-3100. But contrary to the State's argument, the fact that he shot at a specific individual does not

show premeditation to kill. 4RP 5047. There must be evidence to show reflection apart from the commission of the fatal act itself. State v. Bingham, 105 Wn.2d 820, 827-28, 719 P.2d 109 (1986). Noticing someone crouching on the floor in the dark as he pursued Dean and taking a shot at her shows no more than intent to kill. Premeditation cannot be inferred from intent to kill. State v. Commodore, 38 Wn. App. 244, 247, 684 P.2d 1364 (1984). Further, "[h]aving the opportunity to deliberate is not evidence the defendant did deliberate, which is necessary for a finding of premeditation." Bingham, 105 Wn.2d at 826. The shooter did not go from room to room seeking Lum out. He came across her while in pursuit of Dean. If the shooter's premeditated intent was to kill everyone in the house, he would not have stopped at firing once at Lum, missing her. The shooter was after Dean, as shown by the fact that the shooter continued to pursue Dean after the latter escaped through the window.

The State's evidence of premeditation falls short of the evidence deemed sufficient in other cases. In each of those cases, it was apparent the killing was truly the product of deliberation and reflection.¹⁸ The

¹⁸ See, e.g., Gregory, 158 Wn.2d at 811-812, 817 (victim stabbed multiple times, hands tied behind her back, raped, and throat slashed multiple times); Pirtle, 127 Wn.2d at 644-45 (multiple motives, taking weapon to scene, waiting for opportunity, rendering victims unconscious, cutting victims' throats, and then cutting one victim's throat a second time to finish her off); State v. Ollens, 107 Wn.2d 848, 849-853, 733 P.2d 984

convictions must be reversed because "[n]o reasonable trier of fact could reach subjective certitude on the fact at issue here." Hundley, 126 Wn.2d at 422.

D. CONCLUSION

For the reasons stated, DeJesus requests reversal of the convictions.

DATED this 14th day of September 2017

Respectfully Submitted,

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(1987) (robbery motive, use of knife brought to scene, evidence victim struck from behind, numerous defensive wounds, multiple stab wounds, and subsequent slashing of throat); State v. Rehak, 67 Wn. App. 157, 164, 834 P.2d 651 (1992) (victim shot three times in the head, two times after he had fallen on the floor), review denied, 120 Wn.2d 1022 (1993); State v. Woldegiorgis, 53 Wn. App. 92, 93-94, 765 P.2d 920 (1988) (victim went to bed prior to the attack, was stabbed multiple times, had defensive wounds and there was longstanding animosity between victim and defendant), review denied, 112 Wn.2d 1012 (1989); State v. Gibson, 47 Wn. App. 309, 311-12, 734 P.2d 32 (multiple blunt force injuries to skull followed by strangulation), review denied, 108 Wn.2d 1025 (1987); State v. Bushey, 46 Wn. App. 579, 585, 731 P.2d 553 (victim tied, strangled, and received blunt injuries to her face), review denied, 108 Wn.2d 1014 (1987); State v. Giffing, 45 Wn. App. 369, 375, 725 P.2d 445 (victim transported some distance to an isolated spot and killed; defendant approached her from behind and slit her throat with a sharpened knife after stabilizing her), review denied, 107 Wn. 2d 1015 (1986); State v. Sargent, 40 Wn. App. 340, 353, 698 P.2d 598 (1985) (victim struck by two blows to the head, with some interval passing between the blows, while she was lying face down).

NIELSEN, BROMAN & KOCH P.L.L.C.

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