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Division II
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NO. 51833-3-II

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

STATE OF WASHINGTON, Respondent

v.

CALVIN PERRY LUARCA, Appellant

FROM THE SUPERIOR COURT FOR CLARK COUNTY
CLARK COUNTY SUPERIOR COURT CAUSE NO.17-1-02477-5

BRIEF OF RESPONDENT

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RESPONSE TO ASSIGNMENTS OF ERROR

- I. The trial court properly admitted evidence that Luarca gave a false name to paramedics while the police were present.**
- II. The State concedes that the filing fee contained in the misdemeanor judgment and sentence should be stricken.**

STATEMENT OF THE CASE

A. PROCEDURAL HISTORY

Calvin Perry Luarca was charged by second amended information with Burglary in the First Degree, Assault in the Fourth Degree, Interference with Reporting of Domestic Violence, Theft in the Second Degree, Tampering with a Witness, and Domestic Violence Court Order Violation. CP 5-7. The first four counts arose out of an incident that occurred on or about November 18, 2017 and involved Luarca's ex-girlfriend Zonnisha Meyer. CP 5-7. The Tampering with a Witness and Domestic Violence Court Order Violation counts were added later based on Luarca's jail calls between November 21, 2017 and December 11, 2017. CP 6. The burglary, assault, and theft counts each included the special allegation of domestic violence. CP 5-7.

The case proceeded to a jury trial before the Honorable John Fairgrieve on March 12, 2018 and concluded on March 15, 2018 with the jury's verdict convicting Luarca as charged. RP 20, 114, 690-91; CP 222-

230. The trial court sentenced Luarca to a standard range sentence of 85 months confinement. RP 719; CP 350, 153-54. Luarca filed a timely notice of appeal. CP 371.

B. STATEMENT OF FACTS

Zonnisha Meyer and Calvin Luarca began dating in the fall of 2017. RP 277-78, 344. Soon thereafter, however, Luarca began getting jealous, obsessive, and confrontational and would accuse Meyer of cheating on him. RP 279-280, 346. On the morning of November 18, 2017, Meyer ended the romantic relationship with Luarca via text message. RP 280-81, 319, 346-47.

That did not stop Luarca from calling Meyer, and he continually did so that morning while telling her that he knew that someone was over at her house and that he was coming over too. RP 280-81, 283. Meyer told him “you’re acting crazy, don’t come here.” RP 284.

Luarca arrived at Meyer’s house and called her to tell her that he was there. RP 285, 353-54. Meyer, who had been preparing breakfast for her 4 year-old son who was asleep in bed, went to the front door still carrying the knife she had been using to cut potatoes. RP 284-85, 287, 354-55. Meyer went to the door with the knife—she brought the knife because of Luarca’s erratic behavior—and opened it a crack and told

Luarca to leave. RP 284-85, 287, 354-55. Luarca instead pushed his way through and went downstairs and kept “running around looking around for somebody that wasn’t there.” 286-87.

Meyer, who originally froze, went to close the door of the room in which her son was sleeping when Luarca confronted her. RP 287-89.

Luarca put his head to hers, began yelling at her, and then hit her in the head. RP 289, 291, 332, 335-36. This hit caused Meyer to slip and cut her own hand with the knife. RP 289. Meyer told Luarca that she was bleeding and asked him to leave. RP 289. Meyer’s hand injury would necessitate stitches to close the wound up and included in a severed nerve ending that required surgery and physical therapy. RP 302.

After being hit, Meyer grabbed an old flip phone, told Luarca that she was going to call the police, and then tried to call 911. RP 292-94. Luarca put an end to that plan by smacking the phone out of Meyer’s hand and breaking it. RP 129, 294.

At this point, Meyer explained that the two were outside and that she was able to escape back inside and shut and lock the front door. RP 294-95. Just then Meyer remembered that the sliding glass door in her bedroom did not always lock. RP 295-96. When she ran down to check on that door, Luarca was already back inside and coming towards her. RP

296. He was angry and hit her in the head again, which lead to Meyer stabbing him. RP 296-98, 367. Luarca said “you stabbed me” before running outside through the front door and away from Meyer’s house. RP 259-262, 298.

Neighbors heard the very tail end of the incident, saw Luarca running from the house, and observed a shaking and crying Meyer asking them to call 911. RP 259-262, 380, 383-85. One of these neighbors called 911 and handed the phone to Meyer. RP 300-01, 380, 384. She overheard Meyer telling 911 that she had been hit and strangled. RP 385-86.

Police arrived soon thereafter and received the same story from Meyer. RP 117-120, 124-25. Meyer also indicated that she stabbed Luarca because she was afraid for her life. RP 119-120, 124-25. The police observed the cellphone that Luarca broke by smacking it out of Meyer’s hand and also located the bloody knife. RP 129-130, 239-240.

Meanwhile, other officers had located Luarca at a local Urgent Care seeking medical attention. RP 136-38, 160, 390, 406. Because of the seriousness of Luarca’s injury he needed to be transported to a hospital for surgery. RP 138-39, 410. While the paramedics were prepping Luarca for transport, and while in the presence and earshot of police, they asked Luarca for his name. RP 138-39, 390, 406, 409-10. He responded by

stating Tim Carter. RP 406, 409. Following Luarca's surgery he was placed under arrest, and after being cleared by the hospital he was transported to the jail. RP 140, 377-78.

After Luarca's arrest, a no-contact order was put into place protecting Meyer. RP 498-502. That did not stop Luarca, however, from calling his mother from jail for the next three weeks and instructing her to contact Meyer for him. RP 549-556, 558-59. Luarca's mother followed his instructions and called Meyer many times to include at her job and she left long voice messages when Meyer did not answer. RP 308, 341-42. In one of the jail calls Luarca implored his mother to explain to Meyer that if she (Meyer) recanted or did not come to trial that the charges would be dropped. RP 568-69. These jail calls and voice messages formed the basis for the convictions for Domestic Violence Court Order Violation and Tampering with a Witness. And finally, a detective would locate Meyer's iPhone, which had gone missing on the morning of the incident, in Luarca's vehicle and return it to her. RP 294-95, 312-13, 331, 526-28, 533-35.

Luarca did not testify or present witnesses.

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ARGUMENT

I. The trial court properly admitted evidence that Luarca gave a false name to paramedics while the police were present.

a. Standard of Review

“Questions of relevancy and the admissibility of testimonial evidence are within the discretion of the trial court” and appellate courts review them “only for manifest abuse of discretion.” *State v. Aguirre*, 168 Wn.2d 350, 361, 229 P.3d 669 (2010); *State v. Martin*, 169 Wn.App. 620, 628, 281 P.3d 315 (2012) (“The admissibility of evidence is within the sound discretion of the trial court and an appellate court will not disturb that decision unless no reasonable person would adopt the trial court’s view.”) (citations omitted). Trial courts are often faced with evidence that “can be used both properly and improperly,” and in such situations must decide whether the evidence should nevertheless be admitted by balancing the probative value of the proper use of the evidence against the unfair prejudice present when the evidence is used improperly. *State v. Chase*, 59 Wn.App. 501, 507-08, 799 P.2d 272 (1990). “How this balance should be struck is necessarily a matter addressed to the discretion of the trial court.” *Id.*

When a trial court’s ruling on the admission of evidence is in error, reversal will only be required “if there is a reasonable possibility that the

testimony would have changed the outcome of trial.” *Aguirre*, 168 Wn.2d at 361 (citing *State v. Fankhouser*, 133 Wn.App. 689, 695, 138 P.3d 140 (2006)).

b. Evidence of a false name

Evidence is relevant if it has “any tendency” to prove or disprove a fact of consequence to the action. ER 401. Giving a false name is often relevant to show consciousness of guilt¹, “and thus to further inferences of identity and criminal intent.” *Chase*, 59 Wn.App. at 507 (citing *State v. Allen*, 57 Wn.App. 134, 143-44, 787 P.2d 566 (1990)). Some courts have held that such evidence “tends to be only marginally probative as to the ultimate issue of guilt or innocence[, so] the circumstance or inference of consciousness of guilt must be substantial and real, not speculative, conjectural, or fanciful.” *State v. McDaniel*, 155 Wn.App. 829, 854, 230 P.3d 245 (2010) (alteration in original) (quoting *Freeburg*, 105 Wn.App. at 498). Nonetheless, as with other evidentiary rulings, the decision to admit a defendant’s statement giving a false name is a discretionary one vested in the trial court. *Chase*, 59 Wn.App. at 507-08; *State v. Fulmer*, 4 Wn.App.2d 1048, 2018 WL 3456045 (2018) (holding

¹ “[A]dmission by conduct” evidence includes a defendant who gives a false name, flees from arrest, resists an arrest, or conceals himself. *State v. Freeburg*, 105 Wn.App. 492, 497, 230 P.3d 245 (2001).

that the trial court did not abuse its discretion by admitting defendant's statement giving a false name).²

Chase, *Allen*, and *State v. Hebert* are all instructive. 59 Wn.App. at 507-08; 57 Wn.App. at 143-44; 33 Wn.App. 512, 656 P.2d 1106 (1982). *Chase* and *Allen* both involved a defendant who gave a false name to the police—upon first contact with the police and to the arresting officer, respectively—and trial courts that admitted the false name evidence to show “consciousness of guilt” or “guilty knowledge.” 59 Wn.App. at 507; 57 Wn.App. at 143. In *Hebert*, evidence of the defendant's flight was admitted to show the same. 33 Wn.App. at 514-15. On appeal each defendant argued that the “admission by conduct” evidence was improperly admitted.

Notably, *Allen* and *Hebert* affirmed the trial courts' decisions to admit the evidence despite the fact that each defendant explained that their behavior was based on some other prejudicial, bad act that would have, standing alone, been inadmissible and was not prompted by consciousness of guilt for the crimes for which they were eventually found guilty. In *Allen*, the defendant explained that he gave a false name because “he was avoiding a warrant for traffic violations” while the defendant in *Hebert* claimed that he fled from the police because “he was

² This Court's opinion in *Fulmer* is unpublished. Pursuant to GR 14.1 “[U]npublished opinions . . . may be accorded such persuasive value as the court deems appropriate.”

a parolee in possession of marijuana.” 57 Wn.App. at 143; 33 Wn.App. at 515. Nevertheless, *Allen* concluded that there was “substantial probative value to the [false name] evidence” and that the evidence of defendant’s claim of avoiding a warrant—to which he testified at trial in an attempt to avoid the inference of guilt—only had “a minimal prejudicial effect.” 57 Wn.App. at 143-44. Similarly, *Hebert* rejected the defendant’s claim that “the admission of the flight testimony unfairly put him in the position of either informing the jury of his parole status or remaining silent and allowing the jury to draw an inference of guilt from his flight” by concluding that his “flight from the officer reasonably could be considered a deliberate effort to evade arrest and prosecution for the burglary and could also reasonably be considered probative of his consciousness of guilt.” 33 Wn.App. at 515. Thus, *Hebert* concluded that the trial court did not abuse its discretion in admitting the flight evidence. *Id.*

Here, Luarca makes essentially the same arguments as those made by the defendants, and rejected, in *Allen* and *Hebert*. Brief of Appellant at 8-10. For example, he specifically claims that he “could not fairly rebut the inference of guilt urged by the State without also informing the jury of this highly prejudicial explanation [(federal probation warrant)] for the false name.” Br. of App. at 9. And while standing alone the

evidence of Luarca's warrant would not be able to be admitted by the State,³ that Luarca's alternative explanation for giving a false name⁴ may be prejudicial does not, in and of itself, insulate him from the admission of the false name evidence against him. *Chase*, 59 Wn.App. at 507-08. Hence, the trial court acknowledged the "tough area for [Luarca] to be in" but still concluded that "a reasonable inference . . . based on the allegations that have been made . . . this statement would reflect a consciousness of guilt, so I find it's admissible. . . ." RP 399.

The trial court did not abuse its discretion when it so ruled as the uncontroverted evidence elicited at trial supported its conclusion that a real inference of consciousness of guilt could be drawn from the fact that Luarca gave a false name. Luarca fled Ms. Meyer's home after being stabbed, but also as after he stopped her attempts to call for the police by breaking her phone. RP 259-262, 291-94, 298, 361-63, 367. By that time he also would have known that Meyer's hand was cut and bleeding, and that she would need medical help. RP 289. Moreover, having engaged in the other acts that Ms. Meyer alleged such as entering her house against her wishes wherein he hit her twice in the head and placed his hands

³ Pursuant to Luarca's motion the trial court properly ruled that the State could not elicit evidence of Luarca's probation or warrant status.

⁴ Because Luarca did not testify no alternative reason was admitted into evidence as to why he gave a false name to paramedics.

around her neck, Luarca had every reason to suspect that the police would soon be looking for him. RP 289, 291, 296-97, 332, 335-36, 360.

And in fact, the police did respond and quickly found themselves at the same Urgent Care at which Luarca sought treatment. RP 390, 406, 409. The police were present and within earshot of Luarca when he was being prepared for transport to the hospital by the paramedics, and thus, it is no surprise that when paramedics asked him for his name that Luarca gave them a false one. That local police just happened to be at the same Urgent Care as Luarca, shortly after the incident in which Luarca assaulted Ms. Meyer, for the purposes of serving a federal probation warrant is not believable now and it is doubtful Luarca believed it at the time he gave a false name. Accordingly, the fair and real inference from Luarca giving a false name is his consciousness of guilt for the crimes he committed against Ms. Meyer. Thus, trial court properly admitted the evidence and did not abuse its discretion in doing so despite Luarca's alternative reason for giving a false name.

c. Harmless Error

Even if the false name was improperly admitted, however, any error is harmless. When a trial court's ruling on the admission of evidence is in error, reversal will only be required "if there is a reasonable possibility that the testimony would have changed the

outcome of trial.” *Aguirre*, 168 Wn.2d at 361. Luarca cannot show that there is a reasonable possibility that had the false name evidence not been admitted that he would have been acquitted of some of the crimes for which he was convicted. For one, the evidence was scarcely discussed in the State’s closing argument. RP 636-37.⁵ Second, the evidence of guilt was uncontroverted and corroborated by physical evidence, eyewitness testimony from neighbors, and colored in favor of conviction by Luarca’s jail calls in which he directed contact with Ms. Meyer for the purposes of tampering with her as a witness and in violation of a no-contact order. The evidence was overwhelming and any error in admitting the false name evidence was harmless.

II. The State concedes that the filing fee contained in the misdemeanor judgment and sentence should be stricken.

The criminal filing fee is now a non-mandatory legal financial obligation and cannot be imposed on indigent defendants. *State v. Ramirez*, 191 Wn.2d 732, 747-48, 426 P.3d 714 (2018); RCW 36.18.020(2)(h). At sentencing the trial court waived all non-mandatory

⁵ State: “Paramedics asked the defendant what his name was. They need to identify him. What did he tell them? He told them -- he gave them a false name: Tim Carter. Tim Carter. Okay? And we’ll get back to that. So he was taken to the hospital, and he was treated and then was released and was arrested and taken to jail.” RP 636-37. The State did not “get back to that” in either closing argument.

legal financial obligations after finding Luarca indigent. RP 722.⁶ Despite striking the filing fee as part of Luarca’s felony judgment and sentence, the trial court did not strike the filing fee in the misdemeanor judgment and sentence. CP 352; 364. Moreover, as part of the misdemeanor judgment and sentence the trial court checked a box that states “See companion felony order for financial obligations.” CP 364. Thus, the misdemeanor judgment and sentence contradicts itself when it directs to the “felony order for financial obligations” and at the same time imposes a filing fee.

Accordingly, whether as a scrivener’s error or because the filing fee cannot be imposed on the indigent, this Court should remand the case to the trial court to strike the filing fee in the misdemeanor judgment and sentence.

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⁶ The trial stated this orally, but did not make a finding in the requisite section of the judgment and sentence. CP 350.

CONCLUSION

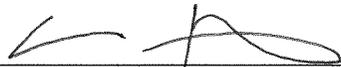
For the reasons argued above, this Court should affirm Luarca's convictions and remand to strike the imposed filing fee.

DATED this 11th day of February, 2019.

Respectfully submitted:

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