

FILED  
Court of Appeals  
Division II  
State of Washington  
4/2/2019 11:07 AM

NO. 52275-6-II

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

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STATE OF WASHINGTON,

Respondent,

v.

JUSTIN JENNINGS,

Appellant.

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

The Honorable Jerry Costello, Judge

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BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. Appellant's constitutional right to present a defense was violated when the trial court excluded testimony relevant to his self-defense claim.

2. There was insufficient evidence to sustain a conviction for felony murder.

3. Appellant was denied his right to a fair jury trial when the trial court improperly refused to strike a witness' comment on his guilt.

4. The \$200 criminal filing fee and \$100 DNA fee should be stricken from the judgment and sentence.

Issues Pertaining to Assignments of Error

1. Appellant was charged with intentional murder in the second degree and felony murder in the second degree. Appellant asserted he acted in self-defense. Thus, the jury had to determine whether appellant reasonably feared he was about to be killed or seriously injured by the deceased. Appellant testified that he believed the deceased was high on methamphetamine because he was extremely aggressive and irrational, and that this contributed to appellant's fear that the deceased would have killed him. Appellant sought to introduce testimony from the medical examiner that the

deceased did indeed have a very high level of methamphetamine in his system at the time of death. The defense explained this evidence corroborated appellant's belief about the deceased being under the influence of the drug, and it was relevant to establishing the reasonableness of his fear. The trial court excluded the evidence, ruling it was speculative and thus irrelevant and misleading. Was defendant's right to present a defense violated?

2. To convict appellant of felony murder, the jury had to find he killed the deceased in the course of and in furtherance of second degree assault, or in immediate flight from such crime. The underlying assault occurred when appellant sprayed the deceased with bear spray in the back to break up a fight between the deceased and a friend. After the spraying stopped, appellant remained in place and made no gestures indicating an intent to flee. Once the spraying stopped, the deceased turned toward appellant, looked as if he had something in his hand (which appellant believed was a gun) and took angry strides toward appellant. Appellant feared for his life, so he shot and killed the deceased. No evidence suggested appellant was still in the course of assaulting the deceased with bear spray at the time of the shooting or that he tried to continue spraying the deceased with mace afterward. Was there insufficient evidence to

sustain the felony murder conviction?

3. During cross examination, an eyewitness blurted out in a nonresponsive and emotional statement that he had watched his close friend get “murdered.” Both the prosecutor and defense counsel moved to strike. The trial court denied the request, and the jury was thus permitted to consider this statement as substantive evidence. Did the trial court abuse its discretion in denying the motion to strike and thereby violate appellant’s right to a fair jury trial?

4. Under the Supreme Court’s recent decision in State v. Ramirez,<sup>1</sup> must the DNA and criminal filing fees be stricken?

B. STATEMENT OF THE CASE

1. Procedural History

On May 12, 2017, the Pierce County prosecutor charged appellant Justin Jennings with one count of intentional second degree murder and one count felony murder -- both while armed with a firearm and both pertaining to the shooting of J. Christopher Burton. CP 1-2. The prosecutor later added a charge of first degree unlawful possession of a firearm. CP 5-6. Jennings pled guilty to the firearm offense but went to trial on the other charges. CP 46-55. The jury was also instructed to consider manslaughter

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<sup>1</sup> State v. Ramirez, 191 Wn.2d 732, 735, 426 P.3d 714 (2018).

in the first degree as a lesser-included offense to intentional murder. CP 90-92. The jury could not reach a verdict as to the intentional murder charge. CP 110. However, it found Jennings guilty of manslaughter and felony murder. CP 112-15.

At sentencing, the trial court vacated the manslaughter conviction, leaving only the felony murder conviction and the firearm offense. RP (July 20, 2018) 13. It sentenced Jennings to 357 months. CP 127-41. Turning to legal financial obligations (LFOs), defense counsel represented that Jennings was unable to pay, and the trial court determined it would not impose discretionary LFOs. RP (July 20, 2018) 41, 45. Despite this, Jennings was ordered to pay a \$200 criminal filing fee and a \$100 DNA fee. CP 134.

Following entry of the judgment and sentence, defense counsel moved for an order of indigency because Jennings fell below the poverty guidelines under RCW 10.101.010 and federal law. CP 121-24. The trial court found Jennings to be indigent and lacking sufficient funds to prosecute an appeal. CP 125-126. Jennings appeals his sentence and convictions. CP 120.

## 2. Substantive Facts

In the early months of 2017, Jennings developed a

friendship with Lance Redman. RP 1283. For a brief time, Redman stayed in a mobile home located in Puyallup. RP 522, 776, 1045. The owner of this mobile home rented out rooms to different people, and there was a very transient occupancy. RP 1009, 1040. The mobile home was dirty, dark, and unkempt. RP 1164. It was also an epicenter for drug use, serious assaults, violence, and prostitution. RP 858, 945, 972-73, 1004-07, 1050-57; 1290-91, 1295-97.

Jennings was at the mobile home several times over a three-month period without incident. RP 1281-82. He became friends with several people who frequented the place, but he had come to believe it was a pretty scary place. RP 831, 1281-82, 1290. He witnessed the home owner, Amber Mecklenberg, assault someone with a baseball bat in her living room. RP 1291. One of the residents boasted about his prior conviction for homicide. RP 1291. Jennings also had learned Mecklenberg's niece and dad were involved in a kidnapping and murder. RP 1290. Additionally, he was aware that prostitution, drug deals, drug rips, and domestic violence took place there. RP 1291, 1416-17.

Specifically, Jennings was made aware that on May 4 and May 5, 2017 (the two days leading up to the shooting),

Mecklenberg had been violently assaulted while in the mobile home in retaliation for drug rips. RP 1295-97. On the first night, men came into the mobile home and assaulted her with bear mace as she was sleeping. RP 1050-51, 1298. The next day, approximately 35 members of a motorcycle gang came to the mobile home, assaulted resident Albert Duane and broke his rib, and then severely beat Mecklenberg resulting in broken ribs and a badly damaged face. RP 972-73, 1001, 1053-57.

Redman had been the person who opened the door on the first night, letting in the attackers. RP 1050, 1374. Mecklenberg was angry about this, and Redman had to move out. RP 1047, 1050, 1374. Redman moved his belongings into his car, but he could not get the car running and left it parked at the mobile home overnight. RP 783, 931.

The next day, Redman enlisted Jennings's help in getting his car from the mobile home. RP 1307. Someone had stolen an amplifier from Redman's car, making Redman angry. RP 947, 1307. Redman was a "hothead" and had irritated some of the other people who hung out at the mobile home. RP 832, 1011, 1371. Jennings agreed to go with Redman in hopes that he could defuse any ill will Redmond might stir up. RP 1309.

Jennings met Redman at a gas station, and then they went to the mobile home. RP 1310. Knowing the potential for violence in that residence, Jennings armed himself with bear spray and a gun for protection. RP 1280, 1346, 1420. Redman was also armed. RP 1316. Upon arrival, they saw Redman's car was missing. RP 1315.

Once at the mobile home, it quickly became apparent to Jennings that Redman was high on methamphetamine given his rash actions and extremely aggressive attitude. RP 1297. They first encountered Gary Tongedahl and Chris Burton who were outside working on a car. RP 792. Jennings knew Tongedahl but had never met Burton. RP 1283. Redman demanded to know where his car was. RP 1317. Burton said he did not know. RP 1317. Redman pulled out his gun and demanded that they all go into the mobile home. RP 1315-16.

Jennings was on high alert and was unsure what kind of violence might take place in there, but he remained calm as Redman was escalating the situation. RP 1319, 1387, 1417. Jennings went to the bedrooms and politely asked where Redman's car was. RP 975, 977, 1317-18. He had his gun and mace out because he had no idea who he might encounter in that residence.

RP 1318. However, Jennings was not aggressive toward anyone.

RP 833, 1015, 1318.

Meanwhile, Redman was in the living room with his gun out and was demanding to know where his car was when Burton had had enough. RP 1317, 1321-22. The two were agitated, and they aggressively argued. RP 802, 845, 981, 1298. Burton also appeared to be high on methamphetamine. RP 1297. Suddenly, Burton charged Redman, body-slammed him, and then the two wrestled in the foyer of the mobile home. RP 1321-22.

Jennings was in the kitchen where his view of the struggle was partially obstructed. RP 1321. From his location, he could not see Burton's hands during the struggle. RP 842. Jennings was disturbed that Burton had rushed at an armed Redman with such assertiveness and aggression. RP 1323-24. Jennings feared Burton was not in his right mind because he was so amped up on methamphetamine. RP 1323-24.

Standing about 10-12 feet away, Jennings deployed the bear spray, hitting Burton in the back. RP 986, 1327. Jennings merely intended to break up the fight. RP 1328. Burton turned around. RP 1328. He was very angry. RP 1330.

After spraying was complete, Burton angrily strode forward at

Jennings. RP 1330-31, 1334. Jennings believed Burton had come into possession of Redman's gun and started to take a few steps back. RP 807, 1329, 1337, 1432. Jennings feared his life was in danger, so he fired two shots in rapid succession, hitting Burton in the chest. RP 1038, 1332, 1337, 1423, 1430.

Eyewitness Albert Duane testified that when Burton turned toward Jennings it looked like he was attempting to throw something. RP 1023. Duane could not say whether Burton had a gun at the time he was shot. RP 1037. Gary Tongedahl testified that when Burton turned around, he was looking for something. RP 806. Tongedahl did not know the location of Redman's gun at the time of the shooting, and he also could not say whether anything was in Burton's hands before the shooting. RP 881, 845.

After the shooting, Jennings and Redman left. RP 809, 994. Burton died at the scene. RP 528.

C. ARGUMENT

I. JENNINGS' RIGHT TO PRESENT A DEFENSE WAS VIOLATED WHEN THE TRIAL COURT EXCLUDED EVIDENCE RELEVANT TO HIS DEFENSE.

Jennings asserted he shot Burton in self-defense. To support this defense, he sought to introduce evidence establishing Burton had high levels of methamphetamine in his system at the

time of the incident. It corroborated Jennings' belief that Burton was on methamphetamine, a factor that heightened his fear of Burton. The defense asserted this fact was relevant to establishing the reasonableness of Jennings' fear. Yet, the trial court excluded the evidence as irrelevant, speculative, and misleading. As shown below, the trial court's decision was erroneous and denied Jennings his right to present a complete defense.

(i) Pertinent Facts

Jennings testified that he had previously observed people who were high on methamphetamine. RP 1297. In his experience, people on methamphetamine get very aggressive and violent. RP 1345. Jennings believed Burton was high on methamphetamine at the time of the incident. RP 1297. Jennings saw Burton act irrationally aggressively in response to Redman. RP 1298. As events unfolded, Jennings believed Burton was "not in the right mind." RP 1324. Jennings testified that factored into his fear of Burton. RP 1323-24, 1332, 1423.

To support his defense, Jennings sought to introduce testimony from the medical examiner establishing Burton did indeed have a high level of methamphetamine in his system at the time of the shooting. RP 92, 95, 97-98, 422, 424. The defense

asserted the evidence was relevant because it corroborated Jennings' observations and tended to show his subjective fear of Burton was reasonable. RP 97-98. The defense was concerned that if there was no medical proof that Burton had drugs in his system, the jury might conclude Jennings' belief that Burton was out of his mind on methamphetamine was either unreasonable or that his testimony was a fabrication. RP 427-28.

The trial court excluded the testimony. RP 96-98, 426. It suggested that the only way the evidence could be relevant was if the medical examiner also offered an opinion that methamphetamine made Burton more aggressive and violent. RP 97-98. Because the medical examiner did not know how methamphetamine might affect Burton specifically, the trial court concluded such an opinion would be speculative. RP 425-27. Based on that premise, it excluded any mention of the fact that a large quantity of methamphetamine was found in Burton's system, finding it speculative, irrelevant, and misleading. RP 96-98, 426-27.

(ii) Legal Argument.

Both the Sixth Amendment of the United States Constitution and article I, section 22 of the Washington Constitution guarantee the criminal defendant's right to present a defense. State v.

Starbuck, 189 Wn. App. 740, 750, 355 P.3d 1167 (2015); State v. Hudlow, 99 Wn.2d 1, 14, 659 P.2d 514 (1983). “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). A defendant's right to an opportunity to be heard in his defense, including the rights to offer testimony, is basic in our system of jurisprudence. Id.

Evidence that a defendant seeks to introduce need only be of “minimal relevance.” State v. Darden, 145 Wn.2d 612, 622, 41 P.3d 1189 (2002). Evidence is relevant when it has “any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable.” ER 401. Relevant evidence is admissible unless a rule of law prohibits its admission. ER 402. “[I]f relevant, the burden is on the State to show the evidence is so prejudicial as to disrupt the fairness of the fact-finding process at trial.” Darden, 145 Wn.2d at 622.

No State interest is compelling enough to preclude the introduction of evidence that is of high probative value and is central to an articulated defense. State v. Jones, 168 Wn.2d 713, 721, 230 P.3d 576, 580 (2010). Moreover, even if evidence is of limited probative

value because it is somewhat attenuated or otherwise suspect, the trial court should admit it and allow it to be tested through cross examination. State v. Duarte Vela, 200 Wn. App. 306, 321, 402 P.3d 281, 289 (2017). “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.” Id. (emphasis in original).

When the defendant raises self-defense, “the defendant’s actions are to be judged against [his] own subjective impressions and not those which a detached jury might determine to be objectively reasonable.” State v. Wanrow, 88 Wn.2d 221, 240, 559 P.2d 548 (1977). The jury must take into account “all the facts and circumstances known to the defendant, including those known substantially before the [incident].” Id. at 234. When the defendant testifies as to what he feared, the jury must judge the credibility of the defendant. A fact bearing on the credibility or probative value of other evidence is relevant. State v. Bourgeois, 133 Wn.2d 389, 401, 945 P.2d 1120 (1997); State v. Warren, 134 Wn. App. 44, 63, 138 P.3d 1081 (2006).

When self-defense is asserted, evidence relevant to establish the reasonableness of the defendant’s fear is admissible. Duarte Vela, 200 Wn. App. at 320. In Duarte Vela, the defendant

was charged with second degree murder to which he raised a self-defense claim. Id. at 313. To prove his state of mind, Duarte Vela sought to introduce testimony establishing the victim had in the past threatened to kill his family. Id. The trial court excluded the evidence, finding it was too remote and not particularly probative. Id. at 313-14. Duarte Vela was convicted.

Division Three of this Court reversed, concluding Duarte Vela's Sixth Amendment right to present a defense was violated. Id. at 327. In so holding, Division Three recognized that in a self-defense case the "vital question is the reasonableness of the defendant's apprehension of danger," and thus the jury must stand "as nearly as practicable in the shoes of [the] defendant, and from this point of view determine the character of the act." Id. at 319 (citing Wanrow, 88 Wn.2d at 235). It concluded that evidence establishing Duarte Vela's knowledge of the victim's threat to kill was "highly probative" of his defense because it established his state of mind. Id. at 320. As such, it was "the role of the jury, not the trial judge to weigh the reasonableness of Duarte Vera's fear, considering all the facts and circumstances known to him." Id. at 323.

Division Three explained, even if the probative evidence had been weak or suspect, the answer still was not to exclude it. Instead, the answer was again to allow it to be tested by cross-examination and permit the jury to determine the weight. Id. at 321.

“When it comes to ensuring a defendant’s Sixth Amendment right to present a defense, it is best to admit relevant evidence and trust the State’s cross-examination to ferret out falsities.” Id. at 323-24. Division Three explained that the jury should have been permitted to decide such factual questions as whether Duarte Vela’s fear was reasonable given the passage of time between the threat and the shooting. Id. at 323.

Ultimately, Division Three found Duarte Vela’s right to present a defense had been violated because the omitted facts, when evaluated in the context of the case, supported a reasonable doubt that did not otherwise exist. Id. at 326-27. The trial court prevented the jury from hearing that Duarte Vela had been told about the victim’s threat to kill his family. This evidence was highly probative of Duarte Vela’s defense, going to the reasonableness of his fear of the victim. Its omission violated the Sixth Amendment. Id. at 320, 327; see also, State v. Short, \_\_\_ Wn. App \_\_\_, \_\_\_ P.2d \_\_\_, No. 50673-4-II, 2019 WL 1276319, at \*1 (Unpublished, 2019)

(holding appellant's right to present a defense was violated when the court excluded evidence somewhat probative of whether the defendant's fear was reasonable).

As in Duarte Vela, the vital question for the jury to consider here was the reasonableness of Jennings' apprehension of danger. The trial court's exclusion of the quantitative fact that Burton was high on methamphetamine at the time of the incident prevented the jury from hearing a fact that corroborated Jennings observations. This fact was relevant to his assessing his credibility and to determining whether his fear at the time of the shooting was reasonable.

Unfortunately, the trial court labored under the mistaken belief that "the accuracy of Mr. Jennings observations are not relevant." RP 1550. However, evidence establishing the accuracy of a fact Jennings testified contributed to his fear of mortal injury tended to make the existence of a fact that was of consequence to the determination of the action (i.e. the reasonableness of Jennings' fear) more probable. Hence, it was relevant under ER 401.

Without the introduction of the fact that Burton had methamphetamine in his system, Jennings' testimony that Burton

was high and acting irrationally aggressively appeared speculative and self-serving. However, had the jury known that Burton was indeed high, this would have corroborated Jennings' version of events and his own testimony about his state of mind. As such, the trial court's erroneous exclusion of this evidence constituted a violation of Jennings' Sixth Amendment right.

The trial court's decision to exclude the evidence rested heavily on this Court's prior decision in State v. Lewis, 141 Wn. App. 367, 166 P.3d 786 (2007). However, the trial court read the Lewis decision too broadly. A careful reading shows Lewis actually supports Jennings' position that the jury should have been permitted to hear about the toxicology results.

In Lewis, the defendant was raising a self-defense claim to second degree murder, and he introduced testimony from the medical examiner that the deceased had a high level of methamphetamine in his body. Id. at 378. Defense counsel then asked the medical examiner for an expert opinion about whether methamphetamine can cause a person to act aggressively. Id.

Outside the jury's presence, the medical examiner testified that, in general, methamphetamine can cause some users to act irrationally and to become violent. Id. at 378, 386. However, he

explained that there were wide ranging effects of methamphetamine on different people, and he could offer no opinion about the particular effect on the deceased. Id.

The State objected, arguing that expert testimony about the general effects of methamphetamine would mislead the jury because the expert could not offer any opinion about the deceased in particular. Id. at 379. The trial court excluded this opinion testimony as irrelevant and speculative. Id. It noted “the defense will still be able to put for its theory of the case” without the drug expert speculating to the effects of the methamphetamine. Id. at 388, no. 13.

On appeal, this Court upheld the decision to exclude the medical examiner’s opinion. It concluded that since the medical examiner had no opinion about how the methamphetamine effected the deceased in particular then the testimony “would not have helped the jury.” Id. at 389. Notably, when Lewis took the stand, he never testified that he believed the deceased was high on methamphetamine or that this belief contributed to his fear. Id. at 379. Consequently, this Court found no abuse of discretion. Id.

There are two major differences between Lewis and this case. First, unlike in Lewis, the trial court here refused to allow the

jury to hear the quantifiable and non-speculative fact that Burton had a high level of methamphetamine in his system at the time of his death. Instead, the trial court was under the misconception that this fact was tantamount to a speculative opinion about the effect the drug had on Burton. RP 96-98, 426. Having erroneously lumped the two together, the Court then misapplied the reasoning in Lewis to exclude the evidence Jennings sought to admit as speculative and confusing to the jury. Id.

Defense counsel was very clear, however, that he was not seeking to present the examiner's opinion as to the possible effect the methamphetamine had on Burton. RP 92, 95, 97-98, 422, 424. He only wanted the medical examiner to testify to the fact that

Burton had methamphetamine in his system at the time of the shooting (a fact that was admitted in Lewis). He explained that without that evidence a juror could conclude that Jennings' had fabricated the idea Burton was on methamphetamine to make him seem more dangerous. RP 427-28. Indeed, the prosecutor – when arguing why the jury should not find Jennings' account reasonable – highlighted the absence of proof as to Burton's

methamphetamine use.<sup>2</sup> The jury should have been told about the toxicology report and given the opportunity to decide what weight to give it.

The second difference between Lewis and this case is that Lewis never testified that he believed the deceased was high on methamphetamine and that this added to his fear. Hence, the fact that the deceased was on methamphetamine was not relevant as a corroborating factor. Given this difference, the fact that the deceased had high levels of methamphetamine in his system was far less relevant in Lewis than it is here. Yet, Lewis' jury got to hear this fact; Jennings' jury did not.

Ultimately, the trial court's reliance on Lewis was simply misplaced. Lewis actually supports the defense's position that the jury should have been permitted to hear the evidence at issue so it could independently determine its weight in light of Jennings' testimony.

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<sup>2</sup> To stay technically within the trial court's order that there be no argument suggesting the nonexistence of a toxicology report, the prosecutor carefully chose her words. RP 1549. She pointed out there was no other evidence establishing Jennings knew Burton was on methamphetamine "at the time of the shooting." RP 1540. However, in the absence of a statement by the medical examiner establishing that there was indeed methamphetamine in Burton's system, these technical semantics could have resulted in misleading the jury to infer that there was no evidence whatsoever establishing Burton was on methamphetamine. RP 1540. Indeed, this is how defense counsel heard the argument. RP 1548.

Finally, in response the State may cite to State v. Richmond, 3 Wn.App.2d 423, 415 P.3d 1208 (2018) as it did below. RP 93, 429. However, that case is similarly distinguishable. In Richmond, there was evidence that the deceased had methamphetamine in his system. Id. at 428. The defense wanted to call an expert to testify in general about the effects of methamphetamine on human behavior. Id. The trial court excluded the evidence as speculative and irrelevant. Id. Division Three upheld the trial court's ruling, citing Lewis. Id. at 432-32.

As in Lewis, Richmond did not testify that he believed the defendant was high on methamphetamine at the time of the shooting or that this belief heightened his fear. Id. 428-29. Because of this, Division Three went on to comment that the trial court acted within its discretion in ruling that any evidence of the deceased's drug use was irrelevant. Id. at 432, no. 6. However, in this case, Jennings provided such testimony. Therefore, the toxicology evidence was relevant. Richmond is thus distinguishable.

In sum, Jennings' right to present a defense was violated. He testified that he believed Burton was high on methamphetamine and that this heightened his fear of Burton. He sought to introduce

evidence establishing that in fact Burton had a high amount of methamphetamine in his system at the time of the shooting. This evidence corroborated Jennings' observations and was relevant to assessing his state of mind. Hence, this evidence should have been submitted to the jury. The trial court's failure to do so resulted in a violation of Jennings' constitutional right to present a defense, and reversal is required.

II. THERE WAS INSUFFICIENT EVIDENCE TO SUPPORT A GUILTY VERDICT FOR FELONY MURDER.

Due process requires the State to prove every element of a crime beyond a reasonable doubt. State v. Johnson, 188 Wn.2d 742, 762, 399 P.3d 507 (2017). Evidence is insufficient to support a conviction unless the reviewing court can say with certainty that rational triers of fact could have found each element of the crime beyond a reasonable doubt. State v. Hickman, 135 Wn.2d 97, 102-03, 954 P.2d 900, 903 (1998). Where the evidence is insufficient, reversal is required. State v. Felipe Zeferino-Lopez, 179 Wn. App. 592, 599, 319 P.3d 94, 97 (2014).

Jury instructions not objected to become the law of the case and, thus, set forth the elements of the crime the State must prove beyond a reasonable doubt. Hickman, 135 Wn.2d at 102-03. In

this case, the elements for felony murder were set forth in Instruction 23. CP 102. To convict Jennings, the jury had to find beyond a reasonable doubt “That the defendant caused the death of J. Christopher Burton in the course of and in the furtherance of such crime, or in immediate flight from such crime.” CP 102. The to-convict instruction went on to set forth the specific elements of assault in the second as follows.

The elements of assault in the second degree are:

- (1) That on or about the 6<sup>th</sup> day of May, 2017, the defendant administered to or caused to be taken by J. Christopher Burton, a destructive or noxious substance;
- (2) That the defendant acted with intent to inflict bodily harm; and
- (3) That this act occurred in the State of Washington

CP 102.

The instruction clearly identifies Jennings’ act of spraying bear mace (i.e. “noxious substance”) on Burton as the underlying assault. CP 102. Hence, to convict Jennings of felony murder, the jury had to find beyond a reasonable doubt that Jennings killed Burton either (1) in the course of and in the furtherance of said assault or (2) in immediate flight from the bear mace assault. As

explained below, the evidence was insufficient as to both these prongs.

First, the shooting did not take place in the course of the bear mace assault. Jennings had stop spraying the bear mace prior to the shooting. Moreover, based on this record, no juror could reasonably infer that Jennings shot Burton in furtherance of the bear mace assault. Jennings was not attempting to further spray Burton with the mace at the time of the shooting. Jennings did not attempt to spray Burton with bear mace afterward. By all accounts, the bear mace assault was complete prior to the shooting. Hence, there was insufficient evidence that the shooting took place in the course of and in furtherance of the bear mace assault.

Second, there was no evidence from which the jury could reasonably infer Jennings was immediately trying to flee from the bear mace assault when he shot Burton. Jennings did not run. He did not yell to Redman that they needed to leave at that point. In fact, no witness suggested that Jennings even appeared to be attempting to escape at the time of the shooting. It was not until after the shooting that Jennings fled. Hence, there was insufficient evidence that Jennings shot Burton in immediate flight from the

underlying bear mace assault.

Since there was insufficient evidence under both prongs, it cannot be said the State proved all the elements of felony murder – as instructed here – beyond a reasonable doubt. As such, due process requires the felony murder conviction be reversed and dismissed. Hickman, 135 Wn.2d at 104.

III. THE TRIAL COURT COMMITTED REVERSIBLE ERROR WHEN IT REFUSED TO STRIKE A WITNESS' IMPROPER COMMENT ON GUILT AND THEREBY VIOLATED JENNINGS' RIGHT TO A FAIR TRIAL.

While being cross-examined, an eyewitness blurted out in an emotional and nonresponsive statement that he had witnessed Burton being “murdered.” Both the prosecutor and defense counsel moved to strike this improper opinion on guilt. The trial court denied the motion. As explained below, this was an abuse of discretion that ultimately resulted in denying Jennings his right to jury trial.

(i) Pertinent Facts

During cross examination of Gary Tongedahl, defense counsel was methodically asking the witness about his statement to police when the following exchange took place.

Q. Do you agree with the statement that you were not

even aware that Justin had a handgun until that moment?

A. I agree I said that at the time? Yeah.

Q. It's a two-part question then. Thank you for the clarification. Do you agree that you made that statement to law enforcement on the day in question?

A. I agree upon that day I just witnessed my closest friend being murdered. I announced to his mother about the incident. I had been outside for six to eight hours --

Q. I didn't ask you any of this sir.

A. -- in the cold without being able to take a jacket or a cigarette.

[Prosecutor]: Your Honor, I'm moving to strike.

A. I was under a lot of stress at that moment. I didn't remember every detail.

[Defense Counsel]: Moving to strike, Your Honor.

RP 873-74. The trial court denied the motions to strike, and the jury was permitted to consider Tongedahl's statements as substantive evidence. RP 874.

(ii) Legal Argument

The defendant's constitutional right to a jury trial under the Sixth Amendment and article I, section 21 of the Washington Constitution is violated when the jury is presented with impermissible opinion testimony regarding the defendant's guilt.

State v. Quaaale, 182 Wn.2d 191, 199, 340 P.3d 213, 217 (2014).

Generally, no witness, lay or expert, may give an opinion, directly or inferentially, on the defendant's innocence or guilt. State v. Black, 109 Wn.2d 336, 348, 745 P.2d 12 (1987); State v. Johnson, 152 Wn. App. 924, 934, 219 P.3d 958, 963 (2009). The evil sought to be avoided by prohibiting a witness from expressing his belief as to the defendant's guilt is having that witness tell the jury what result to reach rather allowing the jury to make an independent evaluation of the facts. 5A K. Tegland, Wash.Prac., Evidence, § 309, at 470 (3d ed. 1989). Such opinions are unfairly prejudicial because they invade the fact finder's exclusive province. Black, 109 Wn.2d at 348.

The fact that an opinion may support a finding of guilt does not necessarily make the opinion improper; however, opinion testimony is more likely to be improper if it is framed in conclusory terms that parrot the relevant legal language. City of Seattle v. Heatley, 70 Wn. App. 573, 581, 854 P.2d 658, 662 (1993). It is also error to admit opinion testimony going to the core issue in dispute. State v. Dolan, 118 Wn. App. 323, 329, 73 P.3d 1011, 1014 (2003); State v. Farr-Lenzini, 93 Wn. App. 453, 462-63, 970 P.2d 313 (1999).

Whether testimony constitutes an impermissible opinion about the defendant's guilt depends on the circumstances of the case, including (1) the type of witness involved, (2) the specific nature of the testimony, (3) the nature of the charges, (4) the type of defense, and (5) the other evidence before the trier of fact. State v. Hudson, 150 Wn. App. 646, 653, 208 P.3d 1236 (2009). Applying these factors here, Tongedahl's testimony that he witnessed Burton being "murdered" by Jennings amounted to an impermissible comment on guilt.

First, Tongedahl was an eyewitness. Therefore, his testimony had a powerful pull on the jury. "Eyewitness testimony is undeniably powerful." United States v. Correa-Osorio, 784 F.3d 11, 29 (1st Cir. 2015). As one scholar has recognized, "eyewitness testimony persuades more powerfully than any other evidence and has the power to determine the fate of defendants almost single-handedly."<sup>3</sup> In fact, juries tend to give more weight to eyewitness identifications than virtually all other forms of evidence.<sup>4</sup>

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<sup>3</sup> Bethany Shelton, *Turning A Blind Eye to Justice: Kansas Courts Must Integrate Scientific Research Regarding Eyewitness Testimony into the Courtroom*, 56 U. Kan. L. Rev. 949, 950 (2008).

<sup>4</sup> Jennifer L. Overbeck, *Beyond Admissibility: A Practical Look at the Use of Eyewitness Expert Testimony in the Federal Courts*, 80 N.Y.U. L. Rev. 1895, 1898 (2005).

As Justice Brennan of the United States Supreme Court recognized years ago, “despite its inherent unreliability, much eyewitness [testimony] has a powerful impact on juries.” Watkins v. Sowders, 449 U.S. 341, 352, 101 S.Ct. 654, 66 L.Ed.2d 549 (1981) (Brennan, J., dissenting).

“[Eyewitness] testimony is likely to be believed by jurors, especially when it is offered with a high level of confidence, even though the accuracy of an eyewitness and the confidence of that witness may not be related to one another at all. All the [scientific] evidence points rather strikingly to the conclusion that there is almost nothing more convincing than a live human being who takes the stand, points a finger at the defendant, and says “That’s the one!”

Id. (citations omitted). Given the powerful pull of eyewitness testimony, it is just as convincing to have an eyewitness take the stand and say the defendant committed the charged offense of murder.

Second, the specific nature of Tongedahl’s testimony underscores the impropriety of his comment. This eyewitness for the State told the jury Jennings “murdered” Burton. Tongedahl did not merely state that Jennings had killed Burton. He did not merely testify Jennings shot Burton. He did not say that Burton died in his arms. Instead, this eye witness blurted out his own opinion that Jennings “murdered” Burton – using conclusive legal language.

Moreover, the testimony was nonresponsive to the questioned being asked of the witness. Instead, it appeared to be an impromptu statement made from the heart conveying this witness' belief that his friend was "murdered." This gave this testimony a stronger aura of reliability. Additionally, the opinion testimony carried a large emotional impact, making it particularly inflammatory. As such, the nature of this opinion testimony impeded the jury's ability to fairly and independently weigh the evidence on multiple levels.

Next, the nature of the charge, defense, and other evidence also demonstrate Tongedahl's testimony constituted an impermissible and prejudicial comment on guilt. Jennings was charged with second degree felony murder, and Jennings put forth a self-defense claim. The core issue for the jury to decide was whether Jennings was guilty of murder or whether the killing was justified as an act of self-defense. As such, the distinction between a factual statement from Tongedahl that he had witnessed his friend being killed, and an opinion that he witnessed his friend being "murdered" was significant in the context of this case.

Because Tongedahl set forth his opinion in conclusive legal language as to the core issue in dispute rather than simply sticking

to the facts, his testimony constituted an improper comment on guilt that invaded the province of the jury.

All factors considered, the record shows Tongedahl's testimony was an impermissible comment on guilt. Indeed, both the prosecutor and defense counsel recognized that this testimony was inappropriate and should have never been considered by the jury. There was no logical reason for the trial court not to strike it.

By not striking Tongedahl's comment on guilt, the trial court limited the jury's ability to independently and dispassionately reach a conclusion as to whether Jennings was guilty of murder.

Indeed, from a constitutional standpoint, the trial court's error here was no different than that in Black, 109 Wn.2d at 349. There, the Washington Supreme Court held a witness's conclusion that the victim was suffering from rape trauma syndrome amounted to an impermissible comment that the defendant was guilty of rape. Id. at 349. The Court reached this conclusion even though the witness had formed her opinion based on inferences she drew from facts she had personally observed (i.e. the victim's psychological and emotional state the months following the alleged rape). Id. at 339.

The Supreme Court explained the jury was free to consider the witness' fact-based observations establishing the emotional

trauma suffered by the victim but not the witness' opinion as to whether the charged crime had been committed. Id. at 349. The opinion testimony impeded the jury in its duty to independently weigh the facts known to the witness and draw its own conclusion as to whether the victim had been raped. Id. Hence, the Supreme Court reversed Black's conviction and remanded for a new trial. Black's reasoning applies with equal force here, and the same result should also apply.

Finally, this error was not harmless. "Constitutional error is harmless only if the State establishes beyond a reasonable doubt that any reasonable jury would have reached the same result absent the error." Quaale, 182 Wn.2d at 202. Here, the jury found Jennings guilty of felony murder. As instructed, the jury had to find that Jennings killed Burton in furtherance of the assault with bear spray or in flight from that act. As explained above, the evidence is either insufficient or exceptionally weak in this regard. Given this, it cannot be said beyond a reasonable doubt that absent Tongedahl's impermissible opinion that he witnessed a murder the jurors would have reached the same verdict. Hence, this error was not harmless.

To sum up, Tongedahl's testimony that Burton was "murdered" by Jennings constituted an impermissible opinion on guilt that impeded the jury's ability to make an independent determination regarding Jennings' guilt. The trial court's failure to strike this testimony when requested to do so by both the State and the defense was an abuse of discretion. Given that this was constitutional error and given the exceptionally weak evidence supporting the felony murder charge, this error cannot be dismissed as harmless. Consequently, this Court should reverse the murder conviction.

IV. THE \$200 FILING FEE AND \$100 DNA FEE MUST BE STRICKEN BASED ON INDIGENCY.

In State v. Ramirez, the Supreme Court discussed and applied Engrossed Second Substitute House Bill 1783, 65th Leg., Reg. Sess. (Wash. 2018) (HB 1783), which became effective June 7, 2018 and applies prospectively. Ramirez, 191 Wn.2d at 747-49.

HB 1783 "amends the discretionary LFO statute, former RCW 10.01.160, to prohibit courts from imposing discretionary costs on a defendant who is indigent at the time of sentencing as defined in RCW 10.101.010(3)(a) through (c)." Ramirez, 191 Wn.2d at 747 (citing LAWS of 2018, ch. 269, § 6(3)); see also RCW

10.64.015 (2018) ("The court shall not order a defendant to pay costs, as described in RCW 10.01.160, if the court finds that the person at the time of sentencing is indigent as defined in RCW 10.101.010(3) (a) through (c)."). Under RCW 10.101.010(3)(a) through (c), a person is "indigent" if the person receives certain types of public assistance, is involuntarily committed to a public mental health facility, or receives an annual income after taxes of 125 percent or less of the current federal poverty level.

HB 1783 also amends RCW 36.18.020(2)(h), which now states the \$200 criminal filing fee "shall not be imposed on a defendant who is indigent as defined in RCW 10.101.010(3)(a) through (c)." Laws of 2018, ch. 269, § 17. This amendment "conclusively establishes that courts do not have discretion" to impose the criminal filing fee against those who are indigent at the time of sentencing. Ramirez, 191 Wn.2d at 749. In Ramirez, the Supreme Court accordingly struck the criminal filing fee due to indigency. Id. Here, the record indicates Jennings is indigent under RCW 10.101.010(3). CP 125-26. Thus, the sentencing court lacked authority to impose the \$200 filing fee.

The \$100 DNA fee also must be stricken. HB 1783 amends RCW 43.43.7541 to read, "Every sentence imposed for a crime

specified in RCW 43.43.754 must include a fee of one hundred dollars *unless the state has previously collected the offender's DNA as a result of a prior conviction.*" Laws of 2018, ch. 269, § 18 (emphasis added). It "establishes that the DNA database fee is no longer mandatory if the offender's DNA has been collected because of a prior conviction." Ramirez, 191 Wn.2d at 747.

RCW 43.43.754(1)(a) requires collection of a biological sample for purposes of DNA identification analysis from every adult or juvenile convicted of a felony or certain other crimes. Jennings has previous felony convictions. CP 132. He would necessarily have had his DNA sample collected pursuant to RCW 43.43.754(1)(a).

Because Jennings's DNA sample was previously collected, the DNA fee in the present case is no longer mandatory under RCW 43.43.754. The fee is discretionary. And, under the current version of RCW 10.01.160(3), discretionary fees may not be imposed on indigent defendants. The sentencing court lacked authority to impose the \$100 DNA fee.

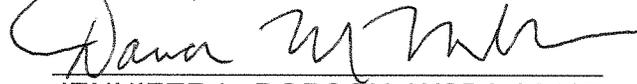
D. CONCLUSION

For reasons stated above, this Court should reverse appellant's convictions.

Dated this 2<sup>nd</sup> day of April, 2019.

Respectfully submitted

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**April 02, 2019 - 11:07 AM**

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**Appellate Court Case Number:** 52275-6  
**Appellate Court Case Title:** State of Washington, Respondent v. Justin Nicholas Jennings, Appellant  
**Superior Court Case Number:** 17-1-01867-0

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