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Court of Appeals
Division III
State of Washington

No. 33644-1-III

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

STATE OF WASHINGTON,

Respondent,

v.

JOSHUA DAVID FLEMING,

Appellant.

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

The Honorable Judge Harold D. Clarke, III

APPELLANT'S OPENING BRIEF

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A. SUMMARY OF ARGUMENT

Eric Stensgar sustained numerous stab wounds. No one observed him being stabbed, and no potential suspects were located at the scene. Property was collected from the scene, and fingerprints matching Joshua David Fleming were later found on three items. Mr. Stensgar later died, presumably unrelated to this incident. Law enforcement obtained a search warrant for a buccal swab from Mr. Fleming, to compare to a jacket and alcohol containers found at the scene. Mr. Fleming's DNA was found on the interior of the jacket. Mr. Stensgar's blood was found on the exterior of the jacket. The State charged Mr. Fleming with one count of first degree assault. Mr. Fleming's motion to suppress the buccal swab was denied. The trial court convicted Mr. Fleming as charged. He now appeals, challenging the sufficiency of the evidence regarding his identity as the assailant; the denial of his motion to suppress the buccal swabs; and preemptively objects to any imposition of appellate costs.

B. ASSIGNMENTS OF ERROR

1. The trial court erred in finding Mr. Fleming guilty of first degree assault, where the evidence was insufficient that Mr. Fleming was the individual who assaulted Mr. Stensgar.

2. The trial court erred in entering Finding of Fact 2.8:

The witnesses' description of the person seen with Mr. Stensgar immediately before the attack are not inconsistent with the general description of Mr. Fleming.

(CP 370).

3. The trial court erred in entering the following portion of Finding of Fact 2.13:

That Mr. Fleming . . . was wearing the jacket when the crime was committed.

(CP 371).

4. The trial court erred in entering Conclusion of Law 3.1:

There is sufficient evidence to find - beyond a reasonable doubt - that the defendant intended to commit great bodily harm when he assaulted Mr. Stensgar with a knife on May 1, 2012, in the State of Washington, as alleged in the Information.

(CP 371).

5. The trial court erred in entering Conclusion of Law 3.2:

The defendant is guilty of count I - Assault in the First Degree.

(CP 371).

6. The trial court erred in entering Conclusion of Law 3.3:

That the defendant was armed with a deadly weapon -a knife when he committed this assault.

(CP 371).

7. The trial court erred in denying Mr. Fleming's motion to suppress the buccal swabs taken from him pursuant to the search warrant.

8. The trial court erred in entering Finding of Fact 2.9:

The affidavit for the search warrant contained sufficient facts to determine that evidence of a crime could be found on the interior of the blood spattered jacket left at the scene.

(CP 361).

9. The trial court erred in entering Finding of Fact 2.11:

The affidavit contained evidence that the defendant was the last person seen wearing the jacket, thus DNA evidence would likely be present, and that the victim's blood was all over the exterior of the jacket. This was not a mere fishing expedition.

(CP 361).

10. The trial court erred in entering Conclusion of Law 3.7:

There is no legal basis in the State of Washington to deny or revoke a finding of probable cause based upon a lack of comparison sample from the jacket.

(CP 362).

11. The trial court erred in entering Conclusion of Law 3.8:

The warrant was based upon probable cause.

(CP 362).

12. The trial court erred in entering Conclusion of Law 3.9

The warrant is upheld and all evidence is admissible subject to the rules of evidence.

(CP 362).

13. An award of costs on appeal against the defendant would be improper.

C. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

Issue 1: Whether the trial court erred in finding Mr. Fleming guilty of first degree assault, where the evidence was insufficient that Mr. Fleming was the individual who assaulted Mr. Stensgar.

Issue 2: Whether the trial court erred in denying Mr. Fleming's motion to suppress the buccal swabs taken from him pursuant to the search warrant.

Issue 3: Whether this Court should refuse to impose costs on appeal.

D. STATEMENT OF THE CASE

On May 1, 2012, a Native American male, and a white male with short hair or "ear length" hair, were observed in an alley behind Garland Avenue in Spokane. (RP 78-81, 200; Pl.'s Ex. 247). That same day, Cynthia Barfield was working in a store nearby and heard the sound of two males arguing in the alley. (Pl.'s Ex. 247). She heard the argument stop, then, less than a minute later, she heard a male "growling" like he was in pain. (Pl.'s Ex. 247). About 5-7 minutes later, Ms. Barfield heard the sound of a fire truck arriving on scene. (Pl.'s Ex. 247).

The Spokane Fire Department responded to a 911 call reporting a male on his hands and knees bleeding from the head. (RP 92-103; Pl.'s Ex. 247). Fire Department personnel found the victim, a Native American male, lying on the ground with stab wounds in his back. (RP 95-96; Pl.'s Ex. 247). The victim was transported to Sacred Heart Medical Center for treatment. (RP 106; Pl.'s Ex. 247). Medical personnel found the victim sustained approximately 15 stab wounds, on his back, the right side of his neck, and the left side of his head, including one on his forehead. (RP 92-103; Pl.'s Ex. 247). The victim was identified as Eric Stensgar. (RP 106; Pl.'s Ex. 247). No one observed Mr. Stensgar being stabbed. (RP 76, 199-201; Pl.'s Ex. 247). No potential suspects were located at the scene. (RP 126, 129).

Spokane Police Department Detective Kip Hollenbeck was assigned as the lead detective on the case. (RP 108). The area where the stabbing was alleged to have occurred was a transient camp, with mats where it looked like people had been sleeping, and a lot of garbage. (RP 78-79, 84, 134, 136).

That same day, property was collected from the scene, including a Coors Light bottle, a Mountain Dew bottle, a silver and black Ecko brand jacket, and a white plastic bag. (RP 107-119, 182). There were four fingerprints on the Coors Light bottle, one fingerprint on the Mountain

Dew bottle, and two fingerprints on the white plastic bag, that matched Joshua David Fleming. (RP 109-111, 116-117, 188, 229-233, 237-239). These fingerprints resulted in Mr. Fleming becoming a suspect in the case. (RP 190, 198). A knife was never found. (RP 208).

Mr. Stensgar later died.¹ (RP 198).

On September 13, 2013, Detective Hollenbeck applied for and obtained a search warrant to obtain buccal swabs from Mr. Fleming. (CP 86-91). The affidavit for the search warrant stated the following facts, in relevant part, in support of probable cause to obtain buccal swabs from Mr. Fleming:

[Mr.] Stensgar later viewed a photo lineup and identified Joshua D. Fleming as the last and only person he was with prior to the assault.

[Mr.] Stensgar also viewed a photo of the bloodstained Echo brand jacket found at the scene. He identified this jacket as having been worn by Fleming just before the assault.

. . . .

Evidence was collected at the scene, which included several Coors Light bottles . . . and a blood stained Echo brand jacket. A fingerprint on one of the Coors Light bottles was identified to Joshua David Fleming

[Mr.] Fleming matched the age and physical description of the suspect supplied by [Mr.] Stensgar.

¹ Only the fact that Mr. Stensgar is deceased came in at trial. (RP 198). However, the record reflects that Mr. Stensgar committed suicide in August 2013. (CP 29, 64, 103, 119, 157-158, 160, 162; RP 422).

Victim [Mr.] Stensgar later identified Joshua Fleming via a photo lineup, as the person that he was with just prior to being assaulted.

A bloodstained Echo brand jacket, found at the scene, was also identified by [Mr.] Stensgar as being worn by [Mr.] Fleming just before the assault.

Due to the death of the victim, additional evidence is necessary to pursue charges against [Mr.] Fleming. Your affiant believes probable cause exists to obtain buccal swabs/[deoxyribonucleic acid] DNA samples from [Mr.] Fleming to compare to the Echo brand jacket and alcohol containers found at the scene.

(CP 87-88).

Detective Hollenbeck executed the search warrant and obtained two buccal swabs from Mr. Fleming. (CP 92). The buccal swabs were submitted to the Washington State Patrol crime lab for testing. (RP 147-148). Forensic scientist Lorraine Heath conducted testing on two separate occasions. (CP 117-118, 120-121; RP 149, 152-155, 161, 172-173). On the first occasion, Ms. Heath took a cutting from the inside neck area of the jacket. (CP 120; RP 153, 157). On the second occasion, Ms. Heath took three samples from the jacket: a swab of the inside neck region; a cutting from the inside of the right sleeve cuff; and a swab of the inside of both the right and left sleeve cuff together. (CP 117; RP 153-154).

The DNA profile obtained from the inside of the right sleeve cuff, and a DNA profile obtained from a swab of the inside of the right and left sleeve cuffs together, had one major contributor, and at least two smaller,

or trace, contributors. (CP 117; RP 158, 168). This major profile matched Mr. Fleming. (CP 117; RP 158, 163-164, 168). The two smaller, or trace contributors, were not suitable for comparison. (CP 117; RP 159).

Ms. Heath also concluded that the DNA profile obtained from a stain that was consistent with blood, on the right sleeve of the jacket, was from Mr. Stensgar. (CP 120-121; RP 157).

In February 2014², the State charged Mr. Fleming with one count of first degree assault of Mr. Stensgar, with a deadly weapon sentencing enhancement. (CP 1).

Mr. Fleming moved to suppress the buccal swabs taken from him pursuant to the search warrant. (CP 34-61, 230-233; RP 4-34). He argued, in relevant part, that the affidavit for the search warrant failed to establish probable cause, because there was not a clear indication that any evidence of criminal activity would be found in the search, and the affidavit did not indicate that a comparison DNA sample was recovered from the jacket or the alcohol containers. (CP 36-41). Following argument by the parties, the trial court denied Mr. Fleming's motion to suppress. (RP 4-34). The trial court issued written findings of fact and conclusions of law. (CP 360-362).

² Although charges were initially filed on May 21, 2012, these charges were dismissed without prejudice on October 16, 2013. (CP 64-65; RP 161).

Mr. Fleming also moved to suppress evidence from the now-deceased Mr. Stensgar, including statements he made and his photo line-up identification. (CP 34-61, 230-233; RP 4-34). At the hearing on the motion, the State acknowledged “there is probably no legitimate basis to admit the victim’s statements or the photo montage on the record at trial[,]” but requested the matter be reserved for trial. (CP 361; RP 15-16). The trial court reserved the matter for trial. (CP 362; RP 27). The State did not offer this challenged evidence at trial. (RP 60-247).

Mr. Fleming waived his right to a jury trial, and the case proceeded to a bench trial. (CP 239-240; RP 39-43, 60-295).

The parties stipulated to several witness statements, law enforcement reports, and medical reports. (RP 45-50, 58, 179-180; Pl.’s Ex. 247). The parties presented these stipulated materials as an exhibit and asked the trial court to consider the materials, “in addition to testimony and exhibits to be entered during trial – in determining whether [Mr. Fleming] is guilty as charged.” (RP 179-180; Pl.’s Ex. 247).

At the bench trial, witnesses testified consistent with the facts stated above. (RP 60-247). In addition, Charles Benefield, who lived near the scene of the stabbing, testified he saw two people at the scene on the day in question. (RP 61-63). He testified he later saw one of the people, a male, running down the alley yelling. (RP 62, 64, 67, 71-72). Mr.

Benefield testified he does not think he could identify either individual. (RP 67).

Mr. Benefield described the area where the stabbing occurred “as kind of a gathering place out back . . . [.]” (RP 71-72). He testified at times, a lot of drinking occurred in that area by numerous individuals, but there was not a lot of activity that day. (RP 63, 68, 72-73).

Donald Miltimore, who also lived near the scene of the stabbing, testified he saw two males at the scene on the day in question. (RP 76, 78-80). He testified he had never seen them before, and that he does not think he could identify either individual. (RP 80-81, 87). He testified one male was Native American and one was white. (RP 79-80). Mr. Miltimore described the white male as “[k]ind of maybe sandy blond hair, reddish-blond hair . . . [w]asn’t short. Maybe ear length or above the ears, maybe.” (RP 80, 85). He testified that the white male appeared to be unshaven. (RP 85). He could not describe any of the white male’s clothing. (RP 80). He described the encounter as “a brief passing.” (RP 80).

Mr. Miltimore testified “a lot of times there is a lot of homeless people there. They put up plywood, put up barricades there and they sleep in there. There is, like, cardboard back there.” (RP 79, 85, 87-89). He

testified homeless people are sometimes there drinking. (RP 84). Mr. Miltimore testified the area is usually littered. (RP 85, 87-89).

Spokane Police Department Officer Christopher McMurtrey testified he responded to the scene on the day in question. (RP 124-125). He testified the area surrounding the scene of the stabbing appeared to have been inhabited, and he described it as a “transient camp.” (RP 130, 134, 136). Officer McMurtrey testified “I noticed a lot of Coors Light bottles that seemed to be . . . more fresh than just random trash.” (RP 130, 137-138). He also observed a Coors light box that “looked more fresh than . . . the older-looking brown cardboard box.” (RP 134-136, 139).

Ms. Heath testified the jacket had “[a]t least three individuals’ DNA on it.” (RP 166). Ms. Heath testified that other than Mr. Fleming and Mr. Stensgar, “[t]here was definitely evidence of other people’s DNA [on the jacket], but not that could be used for identification purposes.” (RP 164).

Ms. Heath testified “there is a lot more DNA from a major contributor than these other trace contributors.” (RP 160). She testified the fact that someone is a major contributor of DNA found on an item “can’t really specifically relate to the immediacy or recency[]” of contact with an item. (RP 160-161). She opined “it is just not something we can

quantify, because all individuals, many shed or slough their skin in different ways and at different levels.” (RP 160).

Ms. Heath testified she cannot testify that Mr. Fleming ever wore the jacket, or whether he had internal or external contact with the jacket, but only that his DNA is on the jacket. (RP 168-170, 174). Regarding the two samples taken from the inside of the jacket sleeves, she testified “[a]ll I can say is that the largest amount of DNA was apparently from Joshua Fleming on both of those samples.” (RP 168). Ms. Heath also testified she is able to say that Mr. Fleming’s DNA is on the interior cuff of a sleeve where the exterior had Mr. Stensgar’s blood on it. (RP 177).

Lori Preuninger conducted the fingerprint identification on the items found at the scene. (RP 223-224, 226-229). She testified the Coors Light bottle contained four fingerprints that were identified to Mr. Fleming, and a fifth fingerprint that was inconclusive as to Mr. Fleming. (RP 231). She testified the Mountain Dew bottle contained one fingerprint identified to Mr. Fleming, and no unknown or inconclusive prints. (RP 233).

Ms. Preuninger testified the one fingerprint identified to Mr. Fleming on the Mountain Dew bottle was located down low, in a position like someone were drinking it. (RP 243). She testified the four fingerprints that were identified to Mr. Fleming on the Coors Light bottle

seemed to be positioned “as if you were holding a bottle of beer like to drink[.]” (RP 246-247).

Ms. Preuninger testified there were approximately 42 latent fingerprints on the white plastic bag found at the scene. (RP 237-238, 240-241). She testified as follows regarding her examination of the white plastic bag:

I contacted Detective Hollenbeck, and I said -- because I was asked to compare both Mr. Stensgar and Mr. Fleming - - I said, because this is going to take a considerable amount of time, is it okay with you if we just do a limited examination, which means you search until you identify latent fingerprints belonging to your suspect or the person in question, and then you stop the examination. It is called a limited examination procedure. So that is what we did.

(RP 238).

Once she found two fingerprints on the white plastic bag identified to Mr. Fleming, she ended her analysis. (RP 238, 240-241). She testified it is possible that the other fingerprints on the bag belonged to other people. (RP 239).

Ms. Preuninger testified she cannot tell when a fingerprint is made. (RP 241-242).

Detective Hollenbeck testified there were numerous unidentified fingerprints found at the scene. (RP 119, 209-210). He testified there was a lot more property collected from the scene that he did not bring into court, because he could not attribute it to Mr. Fleming. (RP 204, 210).

Detective Hollenbeck testified he did not see Mr. Fleming until several months after the incident. (RP 218). He described Mr. Fleming's appearance at that time as about the same as it was now, with hair "[a]bout a half inch or an inch in length." (RP 218). He testified Mr. Fleming might have been unshaven, but he did not have a beard. (RP 218).

The trial court found Mr. Fleming guilty as charged. (CP 369-371; RP 282-295). The trial court issued written findings of fact and conclusions of law. (CP 369-371). Mr. Fleming was sentenced as a persistent offender, to life in prison without the possibility of early release. (CP 379, 388-397; RP 436).

The Judgment and Sentence contains the following boilerplate language:

2.5 Legal Financial Obligations/Restitution. The court has considered the total amount owing, the defendant's present and future ability to pay legal financial obligations, including the defendant's financial resources and the likelihood that the defendant's status will change.

(CP 391).

When setting a restitution payment schedule of \$10.00 per month, the trial court stated: "I will set it as requested by the state, understanding the ability of Mr. Fleming to actually pay the ordered amounts or pay it at a certain rate certainly is in question." (RP 437).

The Judgment and Sentence also contains the following boilerplate language: “[a]n award of costs on appeal against the defendant may be added to the total legal financial obligations.” (CP 394).

Mr. Fleming timely appealed. (CP 380).

E. ARGUMENT

Issue 1: Whether the trial court erred in finding Mr. Fleming guilty of first degree assault, where the evidence was insufficient that Mr. Fleming was the individual who assaulted Mr. Stensgar.

In every criminal prosecution, due process requires that the State prove, beyond a reasonable doubt, every fact necessary to constitute the charged crime. *In re Winship*, 397 U.S. 358, 364, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970). Where a defendant challenges the sufficiency of the evidence, the proper inquiry is “whether, after viewing the evidence in the light most favorable to the State, any rational trier of fact could have found guilt beyond a reasonable doubt.” *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992) (citing *State v. Green*, 94 Wn.2d 216, 220-22, 616 P.2d 628 (1980)). “[A]ll reasonable inferences from the evidence must be drawn in favor of the State and interpreted most strongly against the defendant.” *Id.* (citing *State v. Partin*, 88 Wn.2d 899, 906-07, 567 P.2d 1136 (1977)). Furthermore, “[a] claim of insufficiency admits the truth of the State’s evidence and all inferences that reasonably can be drawn

therefrom.” *Id.* (citing *State v. Theroff*, 25 Wn. App. 590, 593, 608 P.2d 1254 (1980)).

Sufficiency of evidence in a bench trial is reviewed for “whether substantial evidence supports the challenged findings of fact and whether the findings support the trial court's conclusions of law.” *State v. Smith*, 185 Wn. App. 945, 956, 344 P.3d 1244 (2015) (citing *State v. Alvarez*, 105 Wn. App. 215, 220, 19 P.3d 485 (2001)). “Substantial evidence is evidence sufficient to persuade a fair-minded, rational person of the finding's truth.” *State v. Stevenson*, 128 Wn. App. 179, 193, 114 P.3d 699 (2005). Unchallenged findings of fact are verities on appeal. *State v. Lohr*, 164 Wn. App. 414, 418, 263 P.3d 1287 (2011).

“Circumstantial evidence and direct evidence are equally reliable.” *State v. Thomas*, 150 Wn. 2d 821, 874, 83 P.3d 970 (2004). “In rendering a guilty verdict, a trier of fact properly may rely on circumstantial evidence alone, even if it is also consistent with the hypothesis of innocence, so long as the evidence meets the *Green* standard.” *State v. Kovac*, 50 Wn. App. 117, 119, 747 P.2d 484, 485 (1987); *see also Green*, 94 Wn.2d at 220-22 (setting forth the standard for reviewing sufficiency of the evidence: “whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.”).

Circumstantial evidence “is sufficient if it permits the fact finder to infer the finding beyond a reasonable doubt.” *State v. Askham*, 120 Wn. App. 872, 880, 86 P.3d 1224, 1228 (2004) (citing *State v. King*, 113 Wn. App. 243, 270, 54 P.3d 1218 (2002)). The appellate court “defer[s] to the trier of fact on issues of conflicting testimony, credibility of witnesses, and the persuasiveness of the evidence.” *Thomas*, 150 Wn.2d at 874-875.

Sufficient means more than a mere scintilla of evidence; there must be that quantum of evidence necessary to establish circumstances from which the jury could reasonably infer the fact to be proved. *State v. Fateley*, 18 Wn. App. 99, 102, 566 P.2d 959 (1977). The remedy for insufficient evidence to prove a crime is reversal, and retrial is prohibited. *State v. Smith*, 155 Wn.2d 496, 505, 120 P.3d 559 (2005).

In order to find Mr. Fleming guilty of first degree assault, the trial court had to find the following the following elements, beyond a reasonable doubt:

That the defendant, [Mr. Fleming], in the State of Washington, on or about May 01, 2012, did, with intent to inflict great bodily harm, intentionally assault [Mr. Stensgar], with a firearm or deadly weapon, to-wit: a knife[.]

(CP 1); *see also* RCW 9A.36.011(1)(a) (defining first degree assault, as charged here).

Under the evidence presented at the bench trial, a rational trier of fact could not have found Mr. Fleming guilty, beyond a reasonable doubt, of first degree assault. *See Salinas*, 119 Wn.2d at 201 (*citing Green*, 94 Wn.2d at 220-22). There was insufficient evidence to establish identity: that Mr. Fleming was the individual who assaulted Mr. Stensgar.

No witnesses saw Mr. Fleming assault Mr. Stensgar, or saw Mr. Fleming in the vicinity of the scene on the day in question. (RP 67, 76, 80-81, 87, 126, 129, 199-201; Pl.'s Ex. 247). Witnesses did see a white male and a Native American male in the area that day. (RP 78-81, 200; Pl.'s Ex. 247). Mr. Miltimore described the white male as “[k]ind of maybe sandy blond hair, reddish-blond hair . . . wasn’t short. Maybe ear length or above the ears, maybe.” (RP 80, 85). He testified the white male appeared to be unshaven. (RP 80).

This identification and description of a white male does not support a finding that it was Mr. Fleming who assaulted Mr. Stensgar. Countless white males fit this description, and therefore, this evidence does not support a finding, beyond a reasonable doubt, that Mr. Fleming was the assailant.

Further, substantial evidence does not support the trial court’s finding of fact 2.8, “[t]he witnesses’ description of the person seen with Mr. Stensgar immediately before the attack are not inconsistent with the

general description of Mr. Fleming.” (CP 370); *see also Stevenson*, 128 Wn. App. at 193 (defining substantial evidence). There was no evidence at trial of the general description of Mr. Fleming from the day of incident. (RP 67, 76, 80-81, 87, 126, 129, 199-201, 218; Pl.’s Ex. 247). Detective Hollenbeck only testified to Mr. Fleming’s appearance several months later, and at the time of trial. (RP 218). There can be no comparison made between the witnesses’ description of the white male and Mr. Fleming’s appearance on that day. In addition, Mr. Fleming’s appearance several months later, and at the time of trial, does not support an identification of the assailant on the day in question.

Mr. Fleming’s fingerprints were found on three items collected from the scene: a Coors light bottle, a Mountain Dew bottle, and a white plastic bag. (RP 109-111, 116-117, 188, 229-233, 237-239). The Coors Light bottle contained another fingerprint, not linked to Mr. Fleming. (RP 231). The plastic bag contained two fingerprints identified to Mr. Fleming, and approximately 40 other latent fingerprints. (RP 237-238, 240-241). These other fingerprints could have belonged to people other than Mr. Fleming. (RP 239).

At most, this fingerprint evidence shows that Mr. Fleming may have been in the area at some point in time. Ms. Preuninger testified she cannot tell when a fingerprint is made. (RP 241-242). Therefore, this

evidence does not show that Mr. Fleming was at the scene on the day in question.

Ms. Preuninger testified that Mr. Fleming's fingerprint on the Mountain Dew bottle, and his four fingerprints on the Coors Light bottle, were positioned like someone was drinking the beverages. (RP 243, 246-247). Mr. Benefield described the scene as a gathering place, where drinking would occur by numerous individuals. (RP 63, 68, 72-73). Mr. Miltimore testified there are "a lot of times" homeless people there, sleeping, and sometimes drinking. (RP 79, 84-85, 87-89). He testified the area is usually littered. (RP 85, 87-89).

Officer McMurtrey described the scene as a "transient camp." (RP 130, 134, 136). He testified there were Coors light bottles and a Coors light box that seemed "more fresh" than the other trash. (RP 130, 134-139). However, this testimony does not establish that these Coors light bottles and box were from the day of the incident.

The fingerprint evidence does not support a finding that it was Mr. Fleming who assaulted of Mr. Stensgar. At most, it shows that Mr. Fleming, at some point in time, may have been in the area, a transient camp littered with trash, where people came to drink alcohol and sleep. (RP 78-79, 84, 134, 136).

Mr. Fleming's DNA was found on the jacket collected from the scene, in two places: the inside of the right sleeve cuff, and from a swab of the inside of the right and left sleeve cuffs together. (CP 117; RP 112, 158, 163-164, 168, 182). There were two other contributors of DNA in these areas of the jacket, but they were not suitable for comparison. (CP 117; RP 159, 166). Mr. Fleming was the major contributor of DNA, and the other two were smaller, or trace, contributors. (CP 117; RP 158-159, 163-164, 168). The jacket had evidence of other people's DNA on it, other than Mr. Fleming and Mr. Stensgar. (RP 164). Mr. Fleming's DNA was not found on the neck of the jacket. (CP 117, 121, 157-158, 166).

A DNA profile obtained from a stain that was consistent with blood on the right sleeve of the jacket was from Mr. Stensgar. (CP 120-121; RP 157).

The DNA evidence does not support a finding that it was Mr. Fleming who assaulted Mr. Stensgar. Substantial evidence does not support the trial court's finding of fact 2.13, "[t]hat Mr. Fleming. . . was wearing the jacket when the crime was committed." (CP 370); *see also Stevenson*, 128 Wn. App. at 193 (defining substantial evidence). Ms. Heath testified she cannot determine that Mr. Fleming ever wore the jacket, or whether he had internal or external contact with the jacket, but only that his DNA is on the jacket. (RP 168-170, 174).

Ms. Heath testified to the following two statements. First, regarding the two samples taken from the inside of the jacket sleeves, “[a]ll I can say is that the largest amount of DNA was apparently from Joshua Fleming on both of those samples.” (RP 168). Second, she indicated that Mr. Fleming’s DNA is on the interior cuff of a sleeve where the exterior had Mr. Stensgar’s blood on it. (RP 177).

Ms. Heath further testified the fact that someone is a major contributor of DNA found on an item “can’t really specifically relate to the immediacy or recency[]” of contact with an item. (RP 160-161). She opined “it is just not something we can quantify, because all individuals, many shed or slough their skin in different ways and a different levels.” (RP 160).

At most, Mr. Fleming’s DNA on jacket cuffs shows that at some point in time, his DNA got on the jacket. There is no evidence that this transfer occurred on the date in question. Two other people’s DNA was found on the jacket. (CP 117; RP 159, 164, 166). The fact that Mr. Fleming was the major contributor of DNA does not necessarily mean his DNA was the last to transfer to the jacket. (RP 160-161).

A rational trier of fact could not have found Mr. Fleming guilty, beyond a reasonable doubt, of first degree assault, based on the fact that his DNA was found on the interior of a jacket sleeve where Mr. Stensgar’s

DNA was found on the exterior. *See Salinas*, 119 Wn.2d at 201 (*citing Green*, 94 Wn.2d at 220-22). There was no evidence that Mr. Fleming ever wore the jacket; and the jacket was found in a transient camp littered with trash, where people came to drink alcohol and sleep; and there was evidence of other individuals' DNA and other individuals' latent fingerprints in the area. (CP 117; RP 78, 79, 84, 134, 136, 159, 164, 166, 168-170, 174, 237-241). There was also a lot more property collected at the scene that could not be attributed to Mr. Fleming. (RP 204, 210).

Examined together, the identification and description of a white male, not linked to Mr. Fleming, the fingerprint evidence, and the DNA evidence does not support a finding that it was Mr. Fleming who assaulted Mr. Stensgar. This evidence is not more than a mere scintilla. *See Fateley*, 18 Wn. App. at 102. And, the circumstantial evidence does not meet the *Green* standard. *See Kovac*, 50 Wn. App. at 119; *see also Green*, 94 Wn.2d at 220-22.

Based on the evidence presented at the bench trial, a rational trier of fact could not have found Mr. Fleming guilty, beyond a reasonable doubt, of first degree assault. *See Salinas*, 119 Wn.2d at 201 (*citing Green*, 94 Wn.2d at 220-22). The trial court's findings of fact do not support its conclusion of law that there is sufficient evidence to find Mr. Fleming guilty of first degree assault. *See CP 370-371; see also Smith*,

185 Wn. App. at 956 (citing *Alvarez*, 105 Wn. App. at 220). Mr. Fleming’s conviction for first degree assault should be reversed and the charge dismissed with prejudice. *See Smith*, 155 Wn.2d at 505 (setting forth this remedy).

Issue 2: Whether the trial court erred in denying Mr. Fleming’s motion to suppress the buccal swabs taken from him pursuant to the search warrant.

The Fourth Amendment provides that “[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated.” Article I, section 7 provides that “[n]o person shall be disturbed in his private affairs, or his home invaded, without authority of law.” While the protections guaranteed by the Fourth Amendment and article I, section 7 are qualitatively different, the provisions protect similar interests. *State v. Eisfeldt*, 163 Wn.2d 628, 634, 185 P.3d 580 (2008). “In some cases, article I, section 7 may provide greater protection than the Fourth Amendment; however, article I, section 7 ‘necessarily encompasses those legitimate expectations of privacy protected by the Fourth Amendment.’” *State v. Garcia-Salgado*, 170 Wn.2d 176, 183, 240 P.3d 153 (2010) (quoting *State v. Parker*, 139 Wn.2d 486, 493–94, 987 P.2d 73 (1999)).

Swabbing a cheek to procure a DNA sample constitutes a search under the Fourth Amendment and article I, section 7.” *Id.* at 184.

Therefore, “the search must be supported by a warrant unless the search meets one of the jealously and carefully drawn exceptions to the warrant requirement.” *Id.* (quoting *State v. Winterstein*, 167 Wn.2d 620, 628, 220 P.3d 1226 (2009) (internal quotation marks omitted)).

“A warrant may issue only where (1) a neutral and detached magistrate (2) makes a determination of probable cause based on oath or affirmation and (3) the warrant particularly describes the place to be searched and the items to be seized.” *Id.* at 184-185. In addition, a search that intrudes into the body requires three additional showings:

First, there must be a “clear indication” that the desired evidence will be found if the search is performed. Second, the method of searching must be reasonable. Third, the search must be performed in a reasonable manner.

Id. at 185 (internal citations omitted) (citing *Schmerber v. California*, 384 U.S. 757, 769-772, 86 S. Ct. 1826, 16 L. Ed. 2d 639 (1966)).

While the courts must evaluate an affidavit in a commonsense, rather than a hypertechnical, manner, “the [reviewing] court must still insist that the magistrate perform his ‘neutral and detached’ function and not serve merely as a rubber stamp for the police.” *State v. Lyons*, 174 Wn.2d 354, 360, 275 P.3d 314 (2012). (citations omitted) (internal quotation marks omitted) (alteration in original). The existence of probable cause is a legal question which the reviewing court considers *de novo*. *State v. Chamberlin*, 161 Wn.2d 30, 40, 162 P.3d 389 (2007).

Review of the issuing judge's decision to issue a search warrant is limited to the four corners of the affidavit. *State v. Neth*, 165 Wn.2d 177, 182, 196 P.3d 658 (2008).

In order for an affidavit to establish probable cause, it “must set forth sufficient facts to convince a reasonable person of the probability the defendant is engaged in criminal activity and that evidence of criminal activity can be found at the place to be searched.” *Lyons*, 174 Wn.2d at 360 (citing *State v. Maddox*, 152 Wn.2d 499, 509, 98 P.3d 1199 (2004)). “[P]robable cause requires a nexus between criminal activity and the item to be seized, and also a nexus between the item to be seized and the place to be searched.” *State v. Thein*, 138 Wn.2d 133, 140, 977 P.2d 582 (1999) (quoting *State v. Goble*, 88 Wn. App. 503, 509, 945 P.2d 263 (1997)).

Here, Mr. Fleming first asserts that the buccal swab in this case violated the Fourth Amendment and article I, section 7 because the search warrant did not contain “a ‘clear indication’ that the desired evidence will be found if the search is performed.” *See Garcia-Salgado*, 170 Wn.2d at 185 (stating this additional requirement for searches that intrude into the body) (citing *Schmerber*, 384 U.S. at 771). The likelihood of a match between Mr. Fleming's DNA and DNA recovered from the crime is what our Courts meant by “a ‘clear indication’ that the desired evidence

will be found if the search is performed.” See *Garcia-Salgado*, 170 Wn.2d at 187 (stating “[a]s we find the probable cause determination dispositive, we do not address whether the record clearly indicates that Garcia-Saldago’s DNA would match any DNA recovered from the rape.”).

In *State v. Gregory*, our Supreme Court upheld a search that intruded into the body made pursuant to a CrR 4.7 order.³ *State v. Gregory*, 158 Wn.2d 759, 820-29, 147 P.3d 1201 (2006), *overruled on other grounds by State v. W.R.*, 181 Wn.2d 757, 769, 336 P.3d 1134 (2014).

In *Gregory*, the trial court ordered the defendant to permit the State to take blood samples in order to compare his DNA with DNA evidence discovered in a rape kit examination of the victim. *Id.* at 820. Our Supreme Court upheld the search as valid because the order met the six requirements of a search warrant, including the three additional *Schmerber* requirements for searches that intrude into the body. *Id.* at 822-25; *see also Garcia-Salgado*, 170 Wn.2d at 185 (citing *Schmerber*, 384 U.S. at 769-772).

³ Although the search was made pursuant to a CrR 4.7 order, such a search has the same six requirements as a search that intrudes into the body made pursuant to a search warrant. *See State v. Garcia-Salgado*, 170 Wn.2d 176, 186, 240 P.3d 153 (2010) (“In the case of a search that intrudes into the body, such an order must meet both the requirements of a warrant and the additional requirements announced in *Schmerber*.”).

The Court found, in relevant part, that the evidence established a “clear indication” that the desired evidence would be found if a search was performed; specifically, that the defendant’s DNA *would match the DNA recovered in the rape kit*. *Id.* at 822–825 (emphasis added).

Here, there was no “clear indication” that Mr. Fleming’s DNA would match DNA recovered from the jacket found at the scene because no DNA was recovered at the scene. (CP 86-88). Detective Hollenbeck’s affidavit stated the jacket was bloodstained, but no presumptive testing had been done on these samples to determine if the substance was in fact blood or if it contained DNA. (CP 87-88). Since no DNA was recovered from the scene, there was no “clear indication that the desired evidence would be found” by procuring Mr. Fleming’s DNA. *See Gregory*, 158 Wn.2d at 822-25; *see also Garcia-Salgado*, 170 Wn.2d at 185 (citing *Schmerber*, 384 U.S. at 770).

In addition, the affidavit did not provide evidence that Mr. Fleming was bleeding at the crime scene, but only that Mr. Stensgar was found with multiple apparent stab wounds. (CP 86-88). The trial court did not have evidence, from the search warrant affidavit, to support a clear indication that a DNA match could be made.

Because no DNA was recovered at the scene, substantial evidence does not support the trial court’s finding of fact 2.9: “[t]he affidavit for the

search warrant contained sufficient facts to determine that evidence of a crime could be found on the interior of the blood spattered jacket left at the scene.” (CP 361); *see also Stevenson*, 128 Wn. App. at 193 (defining substantial evidence). For this same reason, substantial evidence does not support the trial court’s finding of fact 2.11: “[t]he affidavit contained evidence that the defendant was the last person seen wearing the jacket, thus DNA evidence would likely be present, and that the victim's blood was all over the exterior of the jacket. This was not a mere fishing expedition.” (CP 361). Without DNA recovered at the scene, there was not substantial evidence that “DNA would likely be present.” (CP 361); *see also Stevenson*, 128 Wn. App. at 193.

Second, Mr. Fleming asserts that the buccal swab in this case violated the Fourth Amendment and article I, section 7 because there was not probable cause to issue the search warrant. Specifically, there was no nexus between the item to be seized (the buccal swab from Mr. Fleming) and the place to be searched (the jacket found at the scene). *See Thein*, 138 Wn.2d at 140 (stating the required nexus to establish probable cause) (quoting *Goble*, 88 Wn. App. at 509). This required nexus is absent because the affidavit does not state that a comparison DNA sample was found on the jacket. (CP 86-88). The affidavit only states that a jacket allegedly belonging to Mr. Fleming was collected. (CP 87-88).

This is an issue of first impression in Washington. Other jurisdictions have held that in order to establish probable cause, a warrant for a buccal sample requires proof that DNA evidence exists on the item seized. See *United States v. Myers*, 2014 WL 3384697, at *7-8 (D. Minn. July 10, 2014); *Hindman v. United States*, 2015 WL 4390009, at *22 (N.D. Ala. July 15, 2015); *People v. Turnbull*, 2014 WL 4378809, at *3 (V.I. Super. Sept. 4, 2014).

“To authorize collection of DNA from a free citizen suspected of crime, the one seeking the search must demonstrate probable cause to believe that such collection will yield evidence of criminal wrongdoing.” *Hindman*, 2015 WL 4390009, at *22. “In this context, the government must possess a testable DNA sample sufficiently linked to the subject crime, which might then be compared to the suspect's sample to attempt to establish a “match” placing him at the scene.” *Id.* “[A]bsent law enforcement's recovery of [a] comparison sample of DNA, a buccal swab search warrant is unsupported by probable cause.” *Turnbull*, 2014 WL 4378809, at *3 (quoting *Myers*, 2014 WL 3384697, at *8).

Mr. Fleming urges this Court to follow these other jurisdictions and adopt a requirement that for a DNA swab search warrant to be supported by probable cause, law enforcement must recover a comparison sample of DNA.

The trial erred in denying Mr. Fleming’s motion to suppress. The buccal swab in this case violated the Fourth Amendment and article I, section 7 because the search warrant did not contain a “clear indication” that the desired evidence would be found in the search, because no DNA was recovered from the scene, and there was no probable cause to issue the search warrant because the affidavit does not state that a comparison DNA sample was found on jacket. For these reasons, the buccal swabs should have been suppressed. The conviction should be reversed and remanded for a new trial.

Issue 3: Whether this Court should refuse to impose costs on appeal.

Mr. Fleming preemptively objects to any appellate costs should the State be the prevailing party on appeal, pursuant to the recommended practice in *State v. Sinclair*, No. 72102–0–I, 2016 WL 393719, at *2-7 (Wash. App. Jan. 27, 2016).

Mr. Fleming remains indigent and unable to pay costs that may be imposed on appeal. The imposition of costs would be inconsistent with those principles enumerated in *State v. Blazina*. See *State v. Blazina*, 182 Wn.2d 827, 835-37, 344 P.3d 680 (2015).

The Judgment and Sentence contains boilerplate language stating the “court has considered the total amount owing, the defendant’s past, present, and future ability to pay legal financial obligations, including the

defendant's financial resources and the likelihood that the defendant's status will change." (CP 391). However, this language has no support in the record: the trial court did not actually consider Mr. Fleming's ability to pay when it imposed legal financial obligations. (RP 420-447). To the contrary, when addressing the monthly payment towards restitution, the trial court stated "the ability of Mr. Fleming to actually pay the ordered amounts or pay it at a certain rate *certainly is in question.*" (RP 437) (emphasis added). There is no support in the record that Mr. Fleming has the ability to pay costs on appeal.

For these reasons, Mr. Fleming respectfully requests that no costs on appeal be assigned to him.

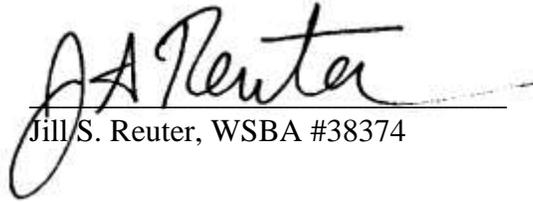
F. CONCLUSION

The evidence presented at trial was insufficient to find Mr. Fleming guilty of first degree assault. This conviction should be reversed and the charge dismissed with prejudice.

In the alternative, the conviction should be reversed and remanded for a new trial because the trial court erred in denying Mr. Fleming's motion to suppress the buccal swabs taken from him.

Mr. Fleming also objects to any appellate costs should the State prevail on appeal. The record does not reflect that Mr. Fleming has the ability to pay.

Respectfully submitted this 22nd day of March, 2016.


Jill S. Reuter, WSBA #38374

/s/ Kristina M. Nichols
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Attorney for Appellant

COURT OF APPEALS
DIVISION III
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON)
Plaintiff/Respondent) COA No. 33644-1-III
vs.)
JOSHUA DAVID FLEMING)
Defendant/Appellant)
PROOF OF SERVICE)
_____)

I, Jill S. Reuter, of counsel for Nichols Law Firm, PLLC and Kristina M. Nichols, assigned counsel for the Appellant herein, do hereby certify under penalty of perjury that on March 22, 2016, I deposited for mailing by U.S. Postal Service first class mail, postage prepaid, a true and correct copy of the Appellant's opening brief to:

Joshua David Fleming DOC #768895
Clallam Bay Corrections Center
1830 Eagle Crest Way
Clallam Bay, WA 98326

Having obtained prior permission from the Spokane County Prosecutor's Office, I also served the Respondent State of Washington at scpaappeals@spokanecounty.org using Division III's e-service feature.

Dated this 22nd day of March, 2016.



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