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Court of Appeals
Division III
State of Washington

33644-1-III

COURT OF APPEALS
DIVISION III
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, RESPONDENT

v.

JOSHUA FLEMING, APPELLANT

APPEAL FROM THE SUPERIOR COURT
OF SPOKANE COUNTY

BRIEF OF RESPONDENT

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I. APPELLANT’S 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.

II. ISSUES PRESENTED

Bench trial.

1. Does substantial evidence support the trial court's finding of fact 2.8 that witnesses' descriptions of the suspect were not inconsistent with the general description of the defendant?

2. Does substantial evidence support the portion of the trial court's finding of fact 2.13 that the defendant was wearing the jacket found at the crime scene where the first degree assault was committed?

3. Whether the trial court's findings of fact 2.1 through 2.13 support conclusion of law 3.1 that the defendant intended to commit great bodily harm when he stabbed the victim 17 times, piercing his skull and one or both lungs during the encounter?

4. Whether the trial court's findings of fact 2.1 through 2.13 support its conclusion of law 3.2 finding the defendant guilty of first degree assault?

5. Is there substantial evidence to support conclusion of law 3.3 finding the defendant was armed with a deadly weapon when he committed the first degree assault?

Suppression hearing.

6. Did the trial court err when it denied the defendant's motion to suppress the taking of a DNA buccal swab?

7. When examining the search warrant affidavit in a commonsense, non-hypertechnical manner, has the defendant met his burden to establish that there is not substantial evidence to support finding of fact 2.9 that there was a sufficient basis for the issuing judge to conclude there was a probability the defendant was involved in criminal activity?

8. Does substantial evidence support finding of fact 2.11 that the search warrant affidavit contained evidence that the defendant was the

last person seen wearing the jacket (with observable blood on the sleeves) and that DNA evidence would likely be present on the jacket?

9. Whether the trial court's findings of fact 2.7 through 2.12 support its conclusion of law 3.7 that: "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[?]"

10. When examining the search warrant affidavit in a commonsense, non-hypertechnical manner, did the trial court err in determining probable cause existed for the magistrate to issue the search warrant?

11. If the State is the substantially prevailing party, should this Court presume the defendant is indigent at the time of determining costs without requiring the defendant provide corroboration of his asserted indigency?

III. STATEMENT OF THE CASE

Procedural history.

The defendant/appellant, Joshua Fleming, was charged in the Spokane County Superior Court with one count of first degree assault. CP 1. The crime included a weapon enhancement allegation. CP 1

Pretrial, the defendant moved to suppress the results of the DNA testing and buccal swabs claiming, inter alia, "Probable cause is lacking.

Performing the swab procedure has no probability of linking Mr. Fleming to criminal activity unless the DNA sample exists on the jacket and bottles. There is no evidence in the affidavit to support that.” RP 5; CP 34-45 (Defendant’s motion to suppress brief). The trial court orally denied the motion and subsequently entered formal findings of fact and conclusions of law. CP 360-362.

The matter proceeded to a bench trial, and the defendant was convicted as charged. RP 295. Thereafter, the court entered written findings of fact and conclusions of law. CP 369-71.

On July 16, 2015, the defendant was sentenced as a persistent offender and received life in prison without the possibility of parole. CP 379, 392. At the time of sentencing, the court ordered the defendant pay the mandatory legal financial obligations of a \$500 victim assessment, \$200 court costs, and the \$100 DNA fee, and restitution in the amount of \$18,248.40 for a total of \$19,048.40. CP 393; RP 436. The court ordered the defendant pay \$10 per month commencing in January 2016. CP 393. The defendant did not object to the mandatory fees, but did object to paying the restitution based upon his projected monthly income in prison. RP 432.

This appeal timely followed.

Substantive facts.

Charles Benefield testified he lived at 608 East Providence in Spokane at the time of the incident. RP 61-62. On May 2, 2012, he observed two individuals near a car in the alleyway. RP 62.¹ They were conversing and drinking alcohol. RP 63. Mr. Benefield observed a container of vodka between the two individuals. RP 63-64. Shortly thereafter, he observed one of the individuals screaming and running down the alleyway. RP 62, 64, 67.

Shortly thereafter, Spokane Fire Department responded to a call in the alleyway behind 617 West Garland. RP 95. The victim² was laying on the ground in a pool of blood. He had 12 observable stab wounds to his upper back. RP 96, 99, 102, 194. A detective later documented five additional wounds to the victim's neck, left ear, and his forehead.³ RP 196. At the scene, a fire department medic observed bubbles radiating from the victim's chest, which was indicative of one or both lungs having collapsed. RP 97-98.

¹ Law enforcement later gathered information that a Native American male and a white male were together in the alleyway adjoining the residence shortly before the stabbing took place. RP 200.

² The victim was subsequently identified as Eric Stensgar.

³ One of the wounds penetrated the victim's skull. RP 196.

Mr. Stensgar's injuries appeared to be life threatening. RP 102, 124. It was later determined the victim's blood alcohol level was .246 at the time of the incident. RP 207.

Initial responding officers conducted a sweep of the area in search of the suspect to no avail. RP 126-27. Officers observed fresh blood evidence in the backyard of 617 West Providence. RP 129-30.

Detective Kip Hollenbeck,⁴ a detective in the major crimes unit of the Spokane Police Department, responded around 7:00 p.m. to Sacred Heart Medical Center to determine the victim's condition. RP 105. Detective Hollenbeck was assigned as the lead investigator. RP 202. He then responded to the crime scene. RP 106. Ultimately, after the crime scene was cordoned off, officers collected potential evidence;⁵ namely, officers collected two Coors Light bottles (P-2)⁶, a Mountain Dew bottle (P-3), a

⁴ At the time of the incident, Detective Hollenbeck had been a police officer since 1987, with over 27 years of experience. RP 105. He was promoted to detective in 1995, and transferred to the major crimes unit in 1998. RP 105. His duties in the unit included investigating serious assaults, robberies, and homicides. RP 105.

⁵ The detective stated the evidence was located on the west side of 617 West Garland, in a vacant area, where the scene was contained. RP 113.

⁶ This designation refers to the State's admitted exhibit number at trial which have not been designated for this review.

silver-and-black Ecko brand jacket (P-4), and a plastic bag (P-9).⁷ RP 109-117. These items were located within the immediate vicinity of where the evidence indicated to the officers that the stabbing had taken place. RP 194, 199.

Officer Christopher McMurtrey responded to the crime scene to help contain the scene and assist in collecting evidence. RP 121, 124. In the backyard of the residence, he observed fresh blood on the ground and numerous Coors beer bottles that appeared recently discarded because of the lack of debris on them. RP 130. Certain bottles appeared to have been placed and recently consumed. RP 130.

Blood was observed within the crime scene area, and in the direction of where the victim was ultimately located. RP 182-83. The stabbing likely occurred in an area next to the house at 617 West Providence. RP 184. The stab wounds to the victim's body were small, sharp and thin suggesting the wounds were caused by a knife blade. RP 189. However, the knife used in the assault was not located by law enforcement. RP 208.

⁷ The jacket was located in the backyard of the crime scene by a fence, one Coors Light bottle was found in some leaves in the crime scene next to a neighbor's home, the Mountain Dew bottle and piece of plastic were found near the residence associated with the crime scene. RP 187-88.

When Detective Hollenbeck observed the jacket at the crime scene, the sleeves were inside out, suggesting that the jacket was removed quickly. RP 188. He also observed blood on the sleeves of the jacket. RP 188.

Lori Preuninger, a certified latent print⁸ examiner, prepared and analyzed the two Coors Light bottles and the Mountain Dew bottle, in addition to other pieces of evidence. RP 224, 229. Four of the five latent prints on one Coors Light bottle were identified as belonging to the defendant. RP 231. One print on the Mountain Dew bottle was identified as belonging to the defendant. RP 233. In addition, one print on the plastic bag located at the crime scene was identified as belonging to the defendant. RP 237-38. Several latent prints on the submitted evidence were identified as inconclusive regarding the victim. RP 231-33.

The defendant was developed as a suspect when his prints were identified on the beer and soda bottles. RP 190.

Lorraine Heath,⁹ a supervisor and forensic DNA analyst with the Washington State Patrol in Cheney, testified she obtained several pieces of evidence regarding the case on September 17, 2013. RP 147.

⁸ A latent fingerprint is an impression. RP 225. An impression on an item that has been touched may consist of oils, salts and amino acids that cover a person's finger friction ridge skin. RP 225.

⁹ At the time of testimony, Ms. Heath had 15 years' experience in the DNA field. She has a Bachelor of Science degree with a double major in

Ms. Heath also received DNA buccal swabs obtained by law enforcement for both the victim and the defendant for comparison purposes. RP 150, 155, 161. Ms. Heath explained the need for reference samples in this case:

We cannot produce a report that provides statistical weight to a match between a known individual and an evidence item from a crime scene without having a reference sample specifically collected for that purpose and for that case. Therefore in order to complete analysis in the time frame given, it was necessary to have both victim and suspect references up front to have any chance of meeting that court date.

RP 156-57.

Ms. Heath observed the blood staining on the right sleeve. RP 153. A DNA sample was collected and a profile was developed. RP 153.¹⁰ On the initial extraction and testing of the silver-and-black Ecko brand jacket found at the crime scene, a profile could not be developed. During a subsequent and second examination of the jacket's interior neck and a combination of both cuff regions, and the right cuff region separately, it was

molecular biology and forensic science, and a Masters of Philosophy degree. RP 142.

¹⁰ Ms. Heath explained the purpose of her forensic examination. “[T]here were two purposes to the examination: One was to look for staining consistent with blood, and one was to look for wearer DNA. Those are two separate examinations.” RP 153.

determined that the blood stain on the cuff matched Mr. Stensgar. RP 156-57.

With regard to the coat's neck region, the defendant could not be included or excluded as a potential contributor. RP 158. The defendant was identified as the major DNA contributor¹¹ of the samples taken from the inner side/layer of the sleeves/cuffs and inner side/layer of the right cuff of the jacket. RP 154, 158, 163, 168, 174.¹² Based on the investigation, no other viable suspect was identified by law enforcement. RP 210.

The defense presented no witnesses at trial. RP 246.

¹¹ The estimated probability of selecting an unrelated individual at random from the U.S. population with a matching profile is one in at least 130 quadrillion. RP 158. The two additional minor contributors were not suitable for comparison. RP 159. As explained, there is far greater number of DNA from a major contributor than a minor or trace contributor. RP 160.

¹² The superior court authorized \$4000 for an independent DNA records review and consult for the defendant. CP 23-24.

IV. ARGUMENT

A. THE DEFENDANT HAS FAILED TO MEET HIS BURDEN THAT THE TRIAL COURT'S FINDINGS OF FACT 2.8 AND 2.13 ARE NOT SUPPORTED BY SUBSTANTIAL EVIDENCE. MOREOVER, THE TRIAL COURT'S FINDINGS OF FACT, AFTER A BENCH TRIAL, SUPPORT THE DEFENDANT'S FIRST DEGREE ASSAULT CONVICTION AND WEAPON ENHANCEMENT.

Standard of review.

A defendant challenging a finding of fact bears the burden of demonstrating the finding is not supported by substantial evidence. *State v. Vickers*, 148 Wn.2d 91, 116, 59 P.3d 58 (2002). Unchallenged findings of fact are verities on appeal. *State v. Homan*, 181 Wn.2d 102, 106, 330 P.3d 182 (2014). An appellate court reviews the trial court's conclusions de novo. *Id.*

Argument.

The defendant assigns error to several of the trial court's findings of fact and conclusions of law following the bench trial and the suppression hearing. Those findings and conclusions will be discussed in order.

- i) "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." (Assignment of Error 1.)

As this Court stated in *Quinn v. Cherry Lane Auto Plaza, Inc.*, 153 Wn. App. 710, 717, 225 P.3d 266 (2009), *review denied*, 168 Wn.2d 1041 (2010): "Appellate courts do not hear or weigh evidence,

find facts, or substitute their opinions for those of the trier-of-fact. Instead, they must defer to the factual findings made by the trier-of-fact.” Moreover, the credibility of witnesses and the weight of the evidence is the exclusive function of the trier of fact, and not subject to review. *See State v. Camarillo*, 115 Wn.2d 60, 71, 794 P.2d 850 (1990). The sufficiency of the evidence for the first degree assault will be discussed later in the brief.

- ii) “The trial court erred in entering the following portion of 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.’” (Assignment of Error 2.)

Several witnesses described a Native American male and a Caucasian male together in the alleyway before the assault. RP 79. One witness, Angel Garza, described the white male, accompanying the victim, as unshaven, with approximate ear length reddish blond or sandy blond hair. RP 79, 84-85, 200; Pl. Ex. 247. Obviously, the trial court was able to physically observe the defendant in the courtroom and determine if the description provided by witnesses generally fit the defendant’s description. There is no contrary evidence in the record that the witnesses’ description of the suspect did not fit the defendant. Substantial evidence supports finding of fact 2.8.

- iii) “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.’”¹³ (Assignment of Error 3.)

The silver and black Ekko jacket found and collected at the crime scene was later tested by forensic personnel. Under the trial court’s finding of fact 2.10,¹⁴ the court found the jacket was observed by law enforcement in the area where blood droplets were found at the crime scene.

When Detective Hollenbeck observed the jacket at the crime scene, the sleeves were turned inside out. RP 188. The appearance of the jacket suggested to the experienced detective that the jacket was removed quickly at the crime by the individual who was wearing it. RP 188. It can be reasonably inferred the defendant removed and abandoned the jacket at the crime scene because it was apparent that the victim’s blood was deposited on the jacket during commission of the assault, and he could easily be identified if he continued to wear the jacket after the assault. The blood stains were visible on both exterior sleeves of the jacket. Additionally, the blood matched the DNA of the victim, Mr. Stensgar. RP 157. Moreover, the

¹³ The defendant does not assign error to the portion of the finding of fact 2.13 that “Mr. Fleming was handling items near and within the crime scene...” Accordingly, it becomes a verity on appeal.

¹⁴ The defendant does not assign error to this finding.

defendant was the major contributor¹⁵ of DNA deposited on the inside of both sleeve cuffs of the jacket. RP 153-54, 158.

Based upon the weight of the evidence, the trial court properly concluded the defendant wore the jacket during the commission of the assault. The jacket was inside out suggesting it was taken off in haste and discarded. The victim's blood was on the sleeves of the jacket and the jacket was found in the area where the defendant would have held and used the knife on the victim, and where the victim's blood spatter would naturally have dropped on the outside coat sleeve, during the multiple knife thrusts. Moreover, the defendant was the major contributor of DNA located on the inside sleeves of the jacket, signifying that he wore it. The defendant presented no contrary evidence.

¹⁵ Ms. Heath explained the difference between a major contributor and a minor contributor of DNA:

So from a scientific perspective the main difference is there is a lot more DNA from a major contributor than these other trace contributors. Depending on the item, often those really low levels can come from any source. So it just depends on the history of the item, which I wouldn't have, as to why other people could be on it. It could be anything from people talking to the individual wearing that jacket while that area was exposed, or another individual wearing the jacket for some period of time. So I can't really say other than there is a lot more DNA from the major contributor than from all those others combined.

The trial court could have reasonably inferred that the defendant wore the jacket before and during the assault. Substantial evidence supports finding of fact 2.13.

- iv) “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.’” (Assignment of Error 4.)

The victim had 12 visible stab wounds to his upper back (one or more stab wounds punctured one or both lungs), and five additional wounds to his neck, left ear, and his forehead (one of which penetrated his skull).¹⁶ The injuries appeared to be life threatening. The victim’s blood alcohol level was .246 at the time of the incident. RP 207.

In determining whether a defendant intended to inflict great bodily harm, this Court has determined “[the trier of fact] may consider the manner in which the defendant exerted the force and the nature of the victim’s injuries to the extent that it reflects the amount or degree of force necessary to cause the injury. *State v. Alcantar-Maldonado*, 184 Wn. App. 215, 225, 340 P.3d 859 (2014).

¹⁶ The trial court’s unchallenged finding of fact 2.2.

In *State v. Rodriguez*, 121 Wn. App. 180, 188, 87 P.3d 1201 (2004), the victim suffered a six-inch stab wound to his upper abdomen, with intestinal matter visible around the wound. During an examination, a doctor located and repaired a stab wound to the back of the stomach. The stab wound caused stomach contents to contaminate the abdominal cavity, and irrigation was required. The victim required attention in the intensive care unit. The injuries were potentially life threatening. This Court found a rational jury could find the element of “great bodily injury” based on those facts, under first degree assault, beyond a reasonable doubt when viewed in the light most favorable to the State. *Id.* at 187-188.

When viewed in the light most favorable to the State, the evidence in this case, consisting of the number and significance of the stab wounds, the location of the wounds, the force of at least the stab wound to the cranium and the stab wounds which punctured the lungs, provided sufficient evidence that could have persuaded the trial court beyond a reasonable doubt that the defendant acted with intent to cause great bodily harm.

It can be reasonably inferred that the defendant could have punctured several different arteries in the back, neck, and head, causing the victim to have immediately bled out at the scene. The defendant could have punctured the brain membrane or the brain itself, with the stab to the victim’s head. Finally, with a blood alcohol content of .246, the victim most

likely was vulnerable and unable to defend himself, which naturally would have been apparent to the defendant.

The trial court was entitled to give whatever weight to the evidence, and inferences from the evidence, it found credible. There was no contrary evidence presented by the defendant. Substantial evidence was presented from which the trial court found the defendant intended to commit “great bodily harm.”

- v) “The trial court erred in entering Conclusion of Law 3.2: ‘The defendant is guilty of count I - Assault in the First Degree.’” (Assignment of Error 5.)
- vi) “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.’” (Assignment of Error 6.)

Standard of review.

The State bears the burden of proving all the elements of an offense beyond a reasonable doubt. *State v. Rich*, 184 Wn.2d 897, 903, 365 P.3d 746 (2016).

To determine whether sufficient evidence supports a conviction, an appellate court views the evidence in the light most favorable to the State and determines whether any rational fact finder could have found the elements of the crime beyond a reasonable doubt. *Homan*, 181 Wn.2d at 105. “Specifically, following a bench trial, [an appellate court’s] review is limited to determining whether substantial evidence supports the findings

of fact and, if so, whether the findings support the conclusions of law.” *Id.* at 105–06.

Substantial evidence is evidence sufficient to persuade a fair-minded, rational person of the truth of the finding. *State v. Hill*, 123 Wn.2d 641, 644, 870 P.2d 313 (1994). Stated differently, substantial evidence is defined as “a quantum of evidence sufficient to persuade a rational fair-minded person the premise is true.” *Sunnyside Valley Irrigation Dist. v. Dickie*, 149 Wn.2d 873, 879, 73 P.3d 369 (2003). If the standard is satisfied, a reviewing court will not substitute its judgment for that of the trial court even though it may have resolved a factual dispute differently. *Croton Chem. Corp. v. Birkenwald, Inc.*, 50 Wn.2d 684, 314 P.2d 622 (1957). Moreover, an appellate court will not “disturb findings of fact supported by substantial evidence even if there is conflicting evidence.” *Merriman v. Cokeley*, 168 Wn.2d 627, 631, 230 P.3d 162 (2010).

In claiming insufficient evidence, a defendant admits the truth of the State’s evidence and all inferences that reasonably can be drawn from it. *State v. Witherspoon*, 180 Wn.2d 875, 883, 329 P.3d 888 (2014). These inferences are “drawn in favor of the State and interpreted most strongly against the defendant.” *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992).

The State may establish the elements of a crime by either direct or circumstantial evidence. *State v. Delmarter*, 94 Wn.2d 634, 638, 618 P.2d 99 (1980); *State v. Brooks*, 45 Wn. App. 824, 826, 727 P.2d 988 (1986).

In addition, this Court defers to the trier of fact regarding credibility, conflicting testimony, and the persuasiveness of the evidence. *State v. Walton*, 64 Wn. App. 410, 415–16, 824 P.2d 533 (1992), *abrogated on other grounds by In re Pers. Restraint of Cross*, 180 Wn.2d 664, 327 P.3d 660 (2014).

RCW 9A.36.011, in pertinent part, outlines the elements of first degree assault as charged in this case. It states:

- (1) A person is guilty of assault in the first degree if he or she, with intent to inflict great bodily harm:
 - (a) Assaults another with a firearm or any deadly weapon or by any force or means likely to produce great bodily harm or death;

“Great bodily harm” is defined as “bodily injury which creates a probability of death, or which causes significant serious permanent disfigurement, or which causes a significant permanent loss or impairment of the function of any bodily part or organ.” RCW 9A.04.110. Great bodily

harm standing alone is insufficient to prove first degree assault. *See State v. Wilson*, 125 Wn.2d 212, 218, 883 P.2d 320 (1994) (noting that assault in the first degree requires a specific intent to inflict great bodily harm).

The State must also prove intent, which is established when a person acts with the objective or purpose to accomplish a result which constitutes a crime. RCW 9A.08.010. With regard to intent, this Court has observed:

“Intent” exists only if a known or expected result is also the actor's “objective or purpose.” Where there is no direct evidence of the actor's intended objective or purpose, intent may be inferred from circumstantial evidence. A [trier of fact] may infer criminal intent from a defendant's conduct where it is plainly indicated as a matter of logical probability. This includes inferring or permissively presuming that a defendant intends the natural and probable consequences of his or her acts.

State v. Bea, 162 Wn. App. 570, 579, 254 P.3d 948 (2011) (internal citations omitted).

Here, the trial court's findings of fact support its conclusion of law finding defendant guilty of the first degree assault. The defendant essentially claims there was no direct evidence (i.e., no eyewitness) that he stabbed the victim. However, the circumstantial evidence, and the reasonable inferences drawn from that evidence viewed in a light most favorable to the State, in the form of physical evidence collected at the crime

scene and later analyzed, sufficiently linked the defendant to the commission of the crime.¹⁷

In applying the appropriate level of deference to the trial court's credibility determinations, persuasiveness of the evidence, and weight assessments, the following evidence supports the conclusion the defendant committed the first assault: (1) the defendant's fingerprints were identified on several beer bottles and a soda bottle that appeared to be recently discarded in the area of the stabbing; (2) the jacket was found within the crime scene and near the blood droplets that were found on a table and a rug;¹⁸ (3) the victim's blood was on the outside sleeves of the jacket where it can be reasonably inferred that the defendant was wearing the jacket when he stabbed the victim because that is the location where the victim's blood would naturally land during the stabbing; (4) the defendant's DNA was on the inside sleeves of the jacket, where it can be reasonably inferred the defendant wore the jacket; (5) it was uncontroverted that the jacket appeared to be removed in haste at the crime scene, and it can be reasonably inferred that the defendant noticed the blood evidence on the sleeves of his jacket

¹⁷ In a challenge to the sufficiency of the evidence, circumstantial evidence and direct evidence carry equal weight. *State v. Goodman*, 150 Wn.2d 774, 781, 83 P.3d 410 (2004).

¹⁸ Unchallenged finding of fact 2.10.

after the stabbing and quickly removed it to avoid detection; and (6) the victim had 17 stab wounds to his upper body, including penetration to the skull and the lungs – any one of which could have caused a permanent disability or death.

For purposes of determining whether a defendant is armed with a deadly weapon for a sentence enhancement, RCW 9.94A.825, in part, defines a deadly weapon as “...an implement or instrument which has the capacity to inflict death and from the manner in which it is used, is likely to produce or may easily and readily produce death.” As discussed above, the multiple stab wounds including the strikes to Mr. Stensgar’s cranium and lungs, or any number of arteries in the area of the 17 stab wounds could have easily caused death.

Substantial evidence supports the trial court’s conclusion of law 3.2 finding the defendant guilty of first degree assault, and conclusion of law 3.3 finding the defendant was armed with a deadly weapon during commission of the first degree assault.

B. SUBSTANTIAL EVIDENCE SUPPORTS THE TRIAL COURT'S FINDINGS OF FACT AND, IN TURN, THOSE FINDINGS OF FACT SUPPORT THE CONCLUSIONS OF LAW THAT THE SEARCH WARRANT AFFIDAVIT WAS SUFFICIENT TO ESTABLISH PROBABLE CAUSE FOR A SEARCH OF THE DEFENDANT'S DNA.

On September 13, 2013, Detective Hollenbeck applied for and was granted a search warrant for a buccal swab containing the defendant's DNA. CP 107-113. As previously stated, the search warrant was executed and the results were processed and analyzed by the crime lab.

Prior to trial, the defense attorney brought a suppression motion regarding the buccal swab warrant. At the time of the suppression motion, the parties provided briefing and documentation for their respective positions to the trial court. CP 27-33 (defendant's *Knapstad* motion), 34-61 (defendant's motion to suppress), 101- 233 (Declaration of defense counsel with discovery attached), 62-96 (State's response to motion to suppress and motion to dismiss). No witnesses were called at the suppression motion.

After argument, the trial court denied the motion and orally ruled:

The warrant to me contains sufficient facts from which a search can be based. In other words, there were facts about the coat being at the scene, and Mr. Stensgar identifying that coat, identifying the defendant in a lineup. There were other -- The fingerprint was in at that point. There were all kinds of facts that would be sufficient for a warrant. In my estimation I think there was clearly probable cause at that point.

RP 31-32.

The interesting -- the really, really interesting question for me is the one that Mr. Christianson has raised with regard to do you have to have the comparison sample first, or in other words, would you have to test the jacket -- excuse me -- get the other comparison first before you -- and have the sample sitting there to say, okay, now I will get the defendant's sample so I can compare it against what I have learned.

Then you'd have to go back I suppose and look at the DNA. When they look at the jacket, obviously they are comparing it against a known sample, which is the one taken. Anyway, that is how the test results come out. That is interesting to me. As counsel points out, there is no case law. You wonder how many times it goes either way. Do they have to have something to test against?

I think what I'm going to do today is make the ruling that they do not. I think it is appropriate when you have probable cause and you have the belief that you have something to test for DNA, obviously you can't just go get DNA on a random whim. But here, as pointed out by counsel, I think there was, A, probable cause for it; B, they had the jacket. So they had something that they knew they were going to look to. I think that is sufficient even if a court were to hold that you have to have something to test against.

But I am going to hold today that I don't think that is a requirement in our state. If it is a requirement that you have absolutely have to do that, then it seems to me in this particular case under the facts that they -- obviously they hadn't done the test yet, but they had a certain plan lined up to do that, they knew they were going to test something. And this was an appropriate approach to take, knowing that the jacket would be tested at some point, and knowing they would need to collect the defendant's DNA in order to ultimately make that comparison one way or the other. So I think it is not a mere fishing expedition from that standpoint. But that is a fascinating question.

As in all these cases, the facts are going to drive the result in some sense. The facts are important here just like they are in every case. And I think the facts again warrant the procedure and the process that was followed. The defendant's rights were not violated in that regard.

RP 32-34.

Subsequently, the trial court entered the following findings of fact and conclusions of law regarding probable cause for the search warrant for a DNA buccal swab from the defendant.

- 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.
- 2.10 Law enforcement did not have a DNA profile from a comparison sample from the interior of the jacket prior to seeking the search warrant.
- 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.

Standard of review.

The issuance of a search warrant is reviewed only for abuse of discretion. *State v. Maddox*, 152 Wn.2d 499, 509, 98 P.3d 1199 (2004). An appellate court reviews de novo a trial court's conclusion of whether an affidavit supported probable cause to issue a search warrant. *State v. Neth*,

165 Wn.2d 177, 183, 196 P.3d 658 (2008). De novo review gives great deference to the issuing judge's assessment of probable cause and resolves any doubts in favor of the search warrant's validity. *State v. Chenoweth*, 160 Wn.2d 454, 477, 158 P.3d 595 (2007).

The affidavit supporting the search warrant application 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. *State v. Martines*, 184 Wn.2d 83, 90, 355 P.3d 1111 (2015). There must be a "nexus between criminal activity and the item to be seized and between that item and the place to be searched." *Neth*, 165 Wn.2d at 183.

It is the probability of involvement in criminal activity or the likelihood of discovering evidence of it in a particular place that governs the existence of probable cause for a search warrant. *Maddox*, 152 Wn.2d at 505.¹⁹ Probable cause requires more than suspicion or conjecture, *but it does not require certainty.*" *Chenoweth*, 160 Wn.2d at 476 (emphasis added). The judicial officer issuing the warrant is entitled to make reasonable

¹⁹ Probable cause exists when the affidavit in support of the search warrant "sets forth facts and circumstances sufficient to establish a reasonable inference that the defendant is probably involved in criminal activity and that evidence of the crime may be found at a certain location." *State v. Jackson*, 150 Wn.2d 251, 264, 76 P.3d 217 (2003).

inferences from the facts and circumstances set out in the affidavit. *Maddox*, 152 Wn.2d at 505.

An appellate court considers only the information contained within the supporting affidavit. *Neth*, 165 Wn.2d at 182. Affidavits in support of a search warrant are examined in a commonsense, non-hypertechnical manner. *State v. Chamberlin*, 161 Wn.2d 30, 41, 162 P.3d 389 (2007); *State v. Stone*, 56 Wn. App. 153, 158, 782 P.2d 1093 (1989), *review denied*, 114 Wn.2d 1013 (1990) (An affidavit must contain facts from which an ordinary, prudent person would conclude that a crime had occurred and evidence of the crime could be found at the location to be searched).

1. *Contrary to the defendant's argument, there was a "clear indication" in the probable cause affidavit that the magistrate could reasonably infer DNA recovered from the crime scene evidence would match the defendant's DNA obtained by a buccal swab.*

Here, the defendant also assigns error to several of the trial court's findings of fact and conclusions of law regarding the search warrant authorized in this case for a buccal swab to obtain the defendant's DNA. Each claim will be addressed in turn.

- vii) “The trial court erred in denying Mr. Fleming’s motion to suppress the buccal swabs taken from him pursuant to the search warrant.” (Assignment of Error 7.)
- viii) “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.’” (Assignment of error 8.)
- ix) “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.’” (Assignment of error 9.)

The defendant essentially argues, in her Assignments of Error 7, 8, and 9, that that the affidavit for the search warrant failed to establish probable cause because there was not a “clear indication” that any DNA recovered from the crime scene evidence would match the defendant’s DNA obtained by a buccal swab. Appellant’s Br. at 26, 28. Contrary to the defendant’s assertion, the search warrant authorized in this case satisfied constitutional requirements.

The taking of a DNA sample using a buccal swab constitutes a search. *Maryland v. King*, — U.S. —, 133 S.Ct. 1958, 1968–69, 186 L.Ed.2d 1 (2013); *State v. Garcia-Salgado*, 170 Wn.2d 176, 184, 240 P.3d 153 (2010).²⁰

²⁰ In *King*, the United States Supreme Court recognized “[a] buccal swab is a far more gentle process than a venipuncture to draw blood. It

The defendant fails to cite any Washington authority that requires law enforcement independently confirm the existence of DNA on crime scene evidence before a search warrant for the defendant's DNA can be authorized by a court, and independent testing and analysis of the suspect's DNA can be conducted by a crime lab.

The defendant argues that officers did not conduct any presumptive testing or DNA testing for blood on any evidence found at the crime scene to ensure a DNA comparison with that evidence could be made prior to securing the DNA warrant from the defendant. Appellant's Br. at 28. The defendant places weight on the fact that in *State v. Gregory*, 158 Wn.2d 759, 860, 147 P.3d 1201 (2006), *overruled on other grounds by State v. W.R., Jr.*, 181 Wn.2d 757, 765, 336 P.3d 1134 (2014), the State had an existing DNA profile from a victim prior to obtaining a discovery order which required the defendant provide a sample of his DNA for comparison.

In *Gregory*, the Supreme Court merely found that the evidence available to the trial court was sufficient to fulfill the "clear indication" requirement; the court did not articulate a minimum standard before

involves but a light touch on the inside of the cheek; and although it can be deemed a search within the body of the arrestee, it requires no surgical intrusions beneath the skin. The fact that an intrusion is negligible is of central relevance to determining reasonableness, although it is still a search as the law defines that term." (Internal citation omitted). *Id.* at 1969.

securing a warrant or an order for a defendant's DNA. *Id.* at 825. Moreover, it did not mandate a rule that requires presumptive testing of crime scene evidence to ensure that a DNA profile exists before a warrant issues for a suspect's DNA.

In the present case, and contrary to the defendant's assertion, there was a sufficient and logical nexus between the defendant's DNA and the suspected crime of first degree assault. The affidavit contained the following information: (1) Mr. Stensgar, the victim, identified the defendant, via a photographic lineup, as the last and only person he was with prior to the assault, (2) Mr. Stensgar also was asked to view the bloodstained jacket found at the crime scene and he identified it as worn by the defendant before the assault, (3) the defendant's fingerprint was identified on a Coors beer bottle collected at the crime scene, (4) the defendant matched the age and physical description of the suspect provided by Mr. Stensgar, and (5) Mr. Stensgar had multiple stab wounds as a result of the assault. CP 86-89.

A magistrate certainly could have reasonably inferred that there was a clear indication the defendant's DNA would be located on the jacket because it was identified by the victim as being worn by the defendant prior to the assault, and the jacket was abandoned at the crime scene. Although *Gregory* does not stand for the proposition advanced by the defendant.

Nonetheless, the evidence established a clear indication that the defendant's DNA would match the DNA, if any, recovered from his jacket after the assault when viewing the search warrant and accompanying affidavit in a common sense, non-hypertechnical manner.

The warrant signed in this case satisfied constitutional requirements. It was reviewed and authorized by a neutral and detached magistrate, a probable cause determination was made based upon oath or affirmation, and the warrant sufficiently described the place to be searched and the item to be seized (i.e., a buccal swab for the defendant's DNA) based upon the evidence contained within the supporting affidavit.

Substantial evidence supports the trial court's finding of fact 2.9 and 2.11.

2. To mandate, as the defendant suggests, that a search warrant be authorized for a suspect's DNA only upon a showing that there is an established specimen to compare it to would be contrary to federal and state constitutional requirements governing search warrants.

The defendant also assigns error to the following trial court's conclusions of law.

- x) “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.’” (Assignment of Error 10)
- xi) “The trial court erred in entering Conclusion of Law 3.8: ‘The warrant was based upon probable cause.’” (Assignment of Error 11)
- xii) “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.’” (Assignment of Error 12)

The defendant relies on United States District Court opinions for the proposition that the State must first acquire a testable DNA sample sufficiently linked to the crime, which can then be compared with a suspect’s DNA.

Apparently, this standard was adopted by a federal district court judge in *United States v. Pakala*, 329 F.Supp.2d 178 (D. Mass. 2004). In that case, the defendants were charged with felon in possession of a firearm and other related crimes. The firearms were collected in two different cities in Massachusetts. The district court found, under the circumstances of the case, that the defendants or third parties would only have to submit to a DNA swab test if the firearms collected by law enforcement were tested and

yielded a DNA profile for comparison. The district court ordered such without citation to authority or providing a basis for its ruling.²¹

Additionally, the defendant, in part, relies on *United States v. Myers*, 2014 WL 3384697, at *7 (D. Minn. July 10, 2014),²² in which the United States District Court for the District of Minnesota found no probable cause existed for the issuance of a DNA buccal swab search warrant where the affidavit provided only that the defendant's DNA would be compared to "possible DNA to be recovered from seized firearms," without any indication that law enforcement officials had tested the firearms for a comparison sample. Significantly, the district court in *Myers* relied on *Pakala* for "guidance" when issuing its ruling, again not citing to any appellate court precedent for its ruling.

²¹ Although not apparent from the case, it can be inferred there was not a sufficient nexus between the firearms, the defendants and third parties, and the requested DNA in *Pakala*.

²² It is uncertain whether several of the district court opinions relied on by the defendant are published opinions. Federal district court opinions may be persuasive authority, but they are not binding on any court. *See, e.g., Dow Jones & Co. v. Kaye*, 256 F.3d 1251, 1258 (11th Cir. 2001). For instance, the Second Circuit Court of Appeals has recognized the value of federal district court precedents is "less compelling" than appellate court opinions because district court opinions and judgments "create no rule of law binding on other courts." *ATSI Commc'ns, Inc. v. Shaar Fund, Ltd.*, 547 F.3d 109, 112 (2d Cir. 2008).

Similarly, in *Hindman v. U.S.*, 2015 WL 4390009, *50 (N.D. Ala. July 15, 2015), the district court heard a motion, and, relying, in part, on *Myers* and *Pakala*, ruled: “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.” This court did not cite any appellate court jurisprudence for its ruling.

Likewise, in *People v. Turnbull*, No. SX-11-CR-832, 2014 WL 4378809, at *3 (V.I. Super. Sept. 4, 2014), after a motion by the government to compel a DNA sample to compare to DNA that could be found on a firearm recovered by law enforcement, the district court, relying, in part, on *Myers*, ordered that “absent law enforcement’s recovery of [a] comparison sample of DNA, a buccal swab search warrant is unsupported by probable cause.”

The above opinions are distinguishable from the present case in that the magistrate in the present case could have reasonably inferred a nexus between the DNA evidence that would likely be recovered from the jacket recovered at the crime scene and the defendant’s DNA. After all, the defendant was the last person seen wearing the jacket, and it was covered with visible blood – a substance readily known to contain DNA.

In contrast, the firearms at issue in the above referenced cases may or may not have contained the suspects' DNA depending on the circumstance in which the firearms were handled or used prior to its collection by law enforcement.

Moreover, with respect to the above federal district court memorandum opinions, it is unclear on what legal basis or policy the courts based their decisions. Similarly, the defendant fails to proffer *any* legal basis or justification, other than relying on the above cited district court opinions, for why this Court should adopt the rule outlined by these courts. Furthermore, the defendant has failed to provide any public policy rationale for this Court to adopt the view taken by these few district courts.

This Court should not adopt this rule for several reasons. First, it is contrary to established federal and state constitutional principles governing the issuance of a search warrant. Probable cause is established if the affidavit sets forth sufficient facts to lead a reasonable person to conclude *there is a probability* that the defendant is involved in criminal activity and that evidence of the criminal activity can be found at the place to be searched. A magistrate's finding in favor of a search warrant does not require a *certainty* or an *established fact* that evidence of criminal activity has been found on items taken from a crime scene or the place searched.

Such a requirement is contrary to established precedent of the Supreme Court and our high court.²³

If this Court adopted the rule, it would increase the State's burden regarding a probable cause determination to obtain a search warrant for a sample of a suspect's DNA, without constitutional justification. The federal district court opinions should be rejected by this Court.

Finally, as previously stated, the issuance of a search warrant already requires a connection or nexus between the criminal activity and the items to be seized or searched. It does not require certitude.

The trial court's findings of fact support its conclusions of law regarding the issuance of the search warrant. This Court should reject the defendant's request to adopt the non-analytical federal district court rule which is contrary to established constitutional principles.

²³ See *Illinois v. Gates*, 462 U.S. 213, 238, 103 S.Ct. 2317, 76 L.Ed.2d 527 (1983) (probable cause requires a probability of criminal activity, not a prima facie showing of criminal activity); *Lyons*, 174 Wn.2d 354, 359, 275 P.3d 314 (2012) (“[t]o establish probable cause, the affidavit 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”); *State v. Seagull*, 95 Wn.2d 898, 907, 632 P.2d 44 (1981) (“[i]t is only the probability of criminal activity and not a prima facie showing which governs the standard of probable cause.”)

C. IF THE STATE IS THE SUBSTANTIALLY PREVAILING PARTY, THIS COURT SHOULD REQUIRE THE DEFENDANT AFFIRMATIVELY ESTABLISH A CLAIM OF INDIGENCY AS SET FORTH IN THIS COURT'S JUNE 10, 2016 ORDER BEFORE THIS COURT DETERMINES WHETHER TO AWARD COSTS AS AUTHORIZED IN RCW 10.73.160 AND RAP 14.2.

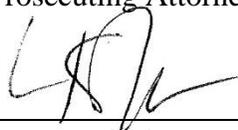
If the defendant is unsuccessful in this appeal, the defendant requests this Court decline to impose the appellate costs authorized in RCW 10.73.160 and RAP 14.2.²⁴ This Court should require the defendant to provide the requested information as set forth in this Court's general order dated June 10, 2016, regarding his claimed of continued indigency.

V. CONCLUSION

The State respectfully requests this Court affirm the defendant's conviction for first degree assault.

Dated this 20 day of July, 2016.

LAWRENCE H. HASKELL
Prosecuting Attorney



Larry D. Steinmetz #20635
Deputy Prosecuting Attorney
Attorney for Respondent

²⁴ It appears this Court has addressed this issue in its General Order dated June 10, 2016, dealing with motions on costs.

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

STATE OF WASHINGTON,

Respondent,

v.

JOSHUA FLEMING,

Appellant,

NO. 33644-1-III

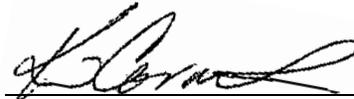
CERTIFICATE OF MAILING

I certify under penalty of perjury under the laws of the State of Washington, that on July 20, 2016, I e-mailed a copy of the Brief of Respondent in this matter, pursuant to the parties' agreement, to:

Kristina M. Nichols
Wa.appeals@gmail.com

7/20/2016
(Date)

Spokane, WA
(Place)



(Signature)