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Division III
State of Washington

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COURT OF APPEALS

DIVISION III

OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, RESPONDENT

v.

ANTHONY TUDOR, APPELLANT

APPEAL FROM THE SUPERIOR COURT

OF SPOKANE COUNTY

BRIEF OF RESPONDENT

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I. APPELLANT’S ASSIGNMENTS OF ERROR

The trial court erred in refusing to allow Tudor to present evidence and argument that another person committed the crime.

II. ISSUES PRESENTED

Did the trial court abuse its discretion by preventing the defendant from arguing or presenting a photograph of an “alternative suspect” when the defendant’s alternative suspect theory was based solely on conjecture?

III. STATEMENT OF THE CASE

Procedural history.

The defendant/appellant, Anthony Tudor, and codefendant, Richard Klepacki, were charged by second amended information on June 11, 2015 in the Spokane County Superior Court with first degree felony murder with first degree burglary as the predicate offense for the slaying of Harry Giesbrecht on January 4, 2014.¹ CP 114. The second amended information included a firearm allegation. CP 114.

The matter proceeded to a jury trial before the Honorable Harold Clarke and the defendant was convicted as charged. CP 142-143.

¹ The trial court granted a severance motion of the defendants’ trials. RP 38-41, 43-44.

The defendant was sentenced to a low end standard range of 240 months plus a 60-month firearm enhancement. CP 174.

This appeal timely followed.

Substantive facts.

During the evening hours of January 4, 2014, Terri Smilari was with her boyfriend, Mr. Giesbrecht, at 204 “D” Street in Deer Park. RP 218, 244. Shortly before 9:00 p.m., Ms. Smilari retired to the bedroom to sleep. When in the bedroom, she heard “a big crack and a pop,” and heard another guest yell that Mr. Giesbrecht had been shot. RP 219. She ran to the living room area and observed Mr. Giesbrecht was unresponsive and lying on the floor. *Id.*

The defense attorney asked Ms. Smilari if she recognized anyone in a particular photograph.² Ms. Smilari was unable to recognize anyone in the photograph. RP 223.

Gary Wright testified that he arrived at Mr. Giesbrecht’s apartment around 8:00 p.m. on the night of the shooting. RP 229. At approximately 9:00 p.m., there was a loud banging on the door and it was “violently” kicked in. RP 229-30. A male entered the apartment and shot

² The defense advised the court at a bench conference that witness “Gary Wright” would identify the person in the photograph as the person who killed Mr. Giesbrecht. RP 222.

Mr. Giesbrecht. RP 230. Mr. Wright described the assailant as 5'7" or 5'8" tall, with a dark colored hoodie, a ball cap under the hoodie, and a bandana covering his face. RP 232, 240. The assailant appeared frightened and looked directly at Mr. Wright during the incident. RP 234. He observed the assailant run from the apartment toward the "skateboard" park. RP 233.

The defense asked Mr. Wright to view a photograph from a cellular telephone. RP 238. Mr. Wright did not recognize the person in the photograph. RP 238. Mr. Wright was then handed defense Exhibit 101. He stated the person in Exhibit 101 was not the shooter. RP 238.³

Catherine Unger resided at 204 "D" Street in Deer Park at the time of the incident. She observed two unknown individuals kick open the door of Mr. Giesbrecht's apartment. RP 249-50. She then observed the pair run away from the apartment. RP 250. One of the males appeared approximately twenty years old. RP 250. One individual wore a black jacket and the other wore a beige jacket. RP 249.

Gary Misbach also lived at the apartment complex at the time of the incident. RP 252. He heard some screams and heard two bangs that sounded like firecrackers. RP 252-53. He observed two younger males walking briskly away from Giesbrecht's apartment. RP 252-53. One of the males

³ Mr. Wright's testimony and pretrial statements will be discussed in detail later in the brief.

had a hooded jacket. RP 252. The pair split up at the parking lot area. RP 252.

The residence in which Mr. Tudor lived was less than 30 seconds walking distance from Mr. Giesbrecht's apartment. RP 263. Mr. Klepacki was living at the Tudor residence at the time of the incident. RP 268-69.

a. The investigation.

Deputy Daniel Dutton was dispatched to the incident at 9:14 p.m. RP 258. When he arrived at the scene, he observed Mr. Giesbrecht on the floor with an apparent gunshot wound to his forehead. RP 259. Mr. Giesbrecht was still alive at this point, breathing on his own. RP 259.⁴

Deputies responded to the call and initially looked for the suspects. RP 271. They eventually responded to the Deer Park middle school⁵ on a report of an individual matching the description one of the suspects. RP 274, 348.⁶ Mr. Klepacki was contacted at the entrance to the school and taken

⁴ Dr. Sally Aiken, forensic pathologist, testified the victim, Mr. Giesbrecht died of an apparent gunshot wound to approximately midline to his forehead. RP 205.

⁵ The middle school was a few hundred yards from the victim's apartment. RP 265.

⁶ A K9 tracked from the crime scene to the suspect's location at the middle school. RP 277-78. Thereafter, the K9 was directed to conduct an article search. It alerted on a holster in some nearby bushes near the middle school, approximately 10 feet from the suspect. RP 278-80, 284, 746; Ex. 33, 34. The individual was ultimately identified as Mr. Klepacki.

into custody at 9:51 p.m. RP 275-76, 278, 349, 851. He was wearing a green Carhartt jacket, black jeans, blue flannel shirt, and a blue bandana. RP 349. When taken into custody, Mr. Klepacki had a receipt from Yokes for the purchase of alcohol shortly before 8:00 p.m. on January 4, 2014. RP 728-29.

The next day, on January 5, 2014, Detective Lyle Johnston responded to the Tudor residence in Deer Park based upon information that defendant Klepacki had been residing at the Tudor residence. RP 290-92. Mr. Tudor exited the residence and agreed to speak with detectives.⁷ RP 293.

Mr. Tudor stated he did not know the victim or anyone at the apartment complex. RP 295. He claimed he had been with Mr. Klepacki the night of the murder watching television all evening. RP 295-96. When Mr. Tudor was confronted with information that a video image had captured the defendants at the Yokes grocery store in Deer Park purchasing alcohol

RP 289. Deputy Thurman remarked there was some frost and snow on the ground, but not on the holster. RP 280-81.

⁷ Prior to trial, the court conducted a CrR 3.5 hearing, and held the defendant's statements to law enforcement were admissible at the time of trial. RP 53-92, 111-162, 162-168 (oral ruling).

on the night of the incident, he initially denied being at the grocery store. RP 297.⁸

However, after Mr. Tudor was confronted with details about the purchase at the store, he then remarked: “Oh, yeah, that’s right, we were at the store last night.” RP 297. Mr. Tudor maintained he and Mr. Klepacki then returned to the Tudor residence from the store and watched television the remainder of the evening. RP 298.

Thereafter, Mr. Tudor was confronted with the fact that Mr. Klepacki was contacted by law enforcement at the middle school. RP 298. He then alleged that Mr. Klepacki was outside pacing around the neighborhood, conversing on his cell phone. RP 298.⁹ Mr. Tudor stated Mr. Klepacki owned several handguns. RP 299. He further stated that he did not own any firearm, and he had not handled any firearm for several years. RP 299. Mr. Tudor was also asked what shoes he wore the night of the incident. Mr. Tudor remarked that he wore tennis shoes, and the shoes

⁸ Brent Town worked at the Yokes in Deer Park, and observed the store video depicting Mr. Tudor and Mr. Klepacki in the store the night of the incident. RP 366-67. In addition, Detective Shane McClury reviewed the video at the store, and observed both defendants on the Deer Park Yokes video on January 4, 2014, at 8 p.m. RP 375-76.

⁹ Mr. Tudor maintained he did not recall much detail about the evening of the murder because he consumed a considerable amount of alcohol. RP 298.

would be located near a chair in the living room. RP 648. When he was told the shoes were not at that location, Mr. Tudor had no explanation for their absence in the living room. RP 648. Black Nike brand shoes were taken from his mother's bedroom. RP 652-53.

Later in the day, on January 5, 2014, Detective Michael Drapeau also spoke with the defendant. RP 403, 408. The defendant remarked to Detective Drapeau that he and Mr. Klepacki drove to the Deer Park Yokes around 5:30 p.m. on the day of the murder and purchased some beer. RP 414-15. Both defendants became intoxicated. RP 415. Both Mr. Klepacki and Mr. Tudor's mother went to sleep around 8:00 p.m. RP 415. The defendant claimed he passed out no later than 8:45 p.m. RP 416.

Detective Drapeau confronted Mr. Tudor that he fit the physical description of one of the assailants. Mr. Tudor stated that was "impossible" and remarked: "Because I was asleep. And I'm not going to go and fucking kill somebody and shoot somebody, or whatever the hell happened. I'm just not like that[.]" RP 417. Thereafter, the defendant denied owning any firearms, and said it had been three years since he touched a firearm. RP 420. The defendant stated he wore Air Jordan tennis shoes the night of the shooting, size 10 or 11. RP 67-68, 649, 652-53.

The crime scene apartment was processed by detectives. RP 442. The door appeared forced open. RP 453. The door jamb to the apartment was splintered, and the striker plate for the door was located on the ground. RP 447-48. Detectives located a bullet strike on the rear wall of the front living room area. RP 448-49. A fired bullet was recovered from that area after removing some drywall. RP 449, 452. From the blood spatter evidence, it appeared the victim was shot at the doorway. RP 458.

The entry door was removed from the residence and taken for analysis. RP 459-60; 470. Shoe tread pattern imprints were located on the doorway and were forensically photographed for later comparison. RP 460-68, 470, 531-32. The door was also processed for latent fingerprints. RP 464, 472, 521-22, 526-30, 557. Both defendants and the victim were excluded as leaving a recovered latent print from the door. RP 546.

Several days later, the victim's brother, James Giesbrecht, located a .45 caliber shell casing in the front yard near the doorway of the victim's residence. RP 199, 303, 780. It was subsequently recovered by law enforcement. RP 303.

Search warrants were authorized for cell phone information of several individuals including the defendants and Andrew Lankford.¹⁰ RP 306. The cell phones used by Mr. Tudor and Mr. Klepacki accessed cell phone towers within the city limits of Deer Park on the night of the incident. RP 315-16. Mr. Lankford's cell phone accessed a tower near Clayton, Washington, from 8:20 p.m. to 11:00 p.m. RP 340. The tower would have connected southeast toward Deer Park. RP 341. At 11:56 p.m., Mr. Lankford's cell phone accessed a cell tower which can provide service within Deer Park. RP 344.

After both defendants' arrest, search warrants were authorized for the Tudor residence, clothing worn by both defendants, and a DNA buccal swab from both defendants. RP 404-07, 556, 641-42, 729-32. Both defendants had been living at that residence. RP 641-42, 729-30.

On January 23, 2014, detectives responded and collected a .45 caliber semi-automatic pistol that had been found by a Deer Park resident who lived at 310 "C" Street in Deer Park. RP 317-321, 383, 633-35. The resident did not have knowledge of the original location of the handgun as it had been found by a child. RP 384. The firearm was later

¹⁰ Detectives obtained information that defendant Tudor was using his mother's cell phone during the time of the murder. RP 306-07. At the time of trial, Mr. Lankford was named as the alternative suspect by the defense.

tested by a firearms examiner at the Washington State Patrol. The scientist concluded the firearm was operable, and the bullet and cartridge case collected at the crime scene were fired from the same .45 caliber pistol. RP 629.

Various evidentiary items were provided to the Washington State Patrol Crime lab for DNA analysis. The DNA evidence did not link the defendants to the crime scene.¹¹

Kevin Jenkins, forensic scientist in the microanalysis section of the Washington State Patrol, compared the sole pattern of the Nike Air Jordan tennis shoes with the pattern imprint on the door. Mr. Jenkins concluded

¹¹ A forensic scientist analyzed a green Carhartt brand jacket taken from the attic in the Tudor residence, a brown or black jacket (item taken from Mr. Tudor), and swabs taken from the recovered pistol and its magazine. RP 564, 575, 654-55. The blood sample taken from the Carhartt jacket matched Mr. Klepacki. RP 565, 570. The initial DNA typing profile from the handgun could not be used for inclusion, because the sample either was not a good quality sample or it was not of sufficient quality to make a comparison. RP 571. However, the scientist was able to exclude the defendants and the victim as the contributor. RP 571. The sample obtained from the pistol magazine was contaminated, so inclusion or exclusion was not possible. RP 572. The DNA sample taken from the bandana matched Mr. Klepacki. RP 576. After further testing, an individual named Richard Kind was determined to be the major contributor of the DNA sample taken from the handgun. RP 577.

The scientist remarked that a number of variables, such as ultraviolet light, temperature, and chemical factors, bacteria, or the amount of DNA deposited, could inhibit the successful extraction of a DNA sample. RP 568-70.

that the impression on the door had the same class characteristics of the pattern (the chevron pattern, the size of the chevron pattern and the spacing) as the sole of the tennis shoe. RP 602. However, he could not say with scientific certainty that the shoe he analyzed left the imprint on the door. RP 603.

b. Percipient witnesses.

Andrew Lankford was friends with both defendants. RP 673. In the past, Mr. Lankford bought drugs from Mr. Giesbrecht. RP 674. Mr. Lankford had previously spotted Mr. Tudor at Mr. Giesbrecht's apartment on December 24, 2013. RP 674-75, 681.

On January 4, 2014, Mr. Lankford travelled into Deer Park. RP 675. Upon his arrival, he dropped off Stephen Hinson at Mr. Giesbrecht's home. He then travelled to his mother's residence, to the Deer Park Yokes, back to Mr. Giesbrecht's residence, and then to a residence on Short Road outside of Deer Park where he remained for the evening. RP 675-76, 686-87.

Early in the morning on January 4, 2014, and throughout that day, Mr. Tudor attempted to call Mr. Lankford. RP 678. Mr. Lankford spoke with Mr. Tudor late in the evening on January 4, 2014. The defendant stated: "I need your help, I need your help." Mr. Lankford asked the defendant "what did you do Tony?" RP 679. The defendant stuttered, "I didn't do anything." RP 679. This was the last contact Mr. Lankford had

with Mr. Tudor. RP 679. Based upon a review of telephone records, Mr. Lankford's cell phone was bounced off a cell tower north of Deer Park during the time period surrounding the murder. RP 788.¹²

McKenzie Griffin had known Mr. Tudor as a friend of her family for seven years and had a brief dating relationship with him. RP 693, 700.¹³ She described Mr. Tudor as "an older brother figure." RP 700. At 9:25 p.m., on January 4, 2014, Ms. Griffin was in California attending her father's funeral when she received a telephone call from the defendant. RP 692, 701, 852. The defendant sounded upset. RP 697. The defendant told her that "him and Rick went to go get money from somebody who owed them." RP 697. The defendant remarked to Ms. Griffin that "... they beat the guy up." RP 697. The amount owed was between \$700 and \$1000. RP 703.

¹² Detective Dresback mentioned that if Mr. Lankford was in Deer Park several hours after the murder it would have been unremarkable with respect to the investigation. RP 789. On cross-examination, Mr. Lankford stated he travelled into Deer Park the evening of the murder. RP 689. Mr. Lankford stated he was a hunter, but he did not own a firearm on the date of the murder. RP 690. During cross-examination, Detective Dresback was questioned extensively regarding Mr. Lankford and his whereabouts the evening of the murder. RP 762-67.

¹³ Ms. Griffin initially did not want to come forward with this information, but her mother convinced her to do so. RP 696.

Jerrie Erickson anonymously contacted law enforcement several times in January 2014 regarding the murder.¹⁴ RP 825-26. She was subsequently contacted by Detective Dresback and provided a statement. RP 740.

At the time of trial,¹⁵ Ms. Erickson had not previously met Mr. Tudor and knew Mr. Tudor as “T.” RP 826, 845. She did not know Mr. Tudor. RP 845. After the murder, she was staying at Glenn Ellis’s residence located near Valley, Washington. RP 825.

Several days after the murder, Ms. Erickson had a conversation with Kari Wardlow at the Ellis residence. RP 827. Based upon the information received from Ms. Wardlow, Ms. Erickson asked Mr. Tudor several questions about the slaying. Mr. Tudor told Ms. Erickson that he and the co-defendant went to a “guy’s” house because the “guy” owed them money for drugs. RP 829. They brought a gun to the house, and Mr. Tudor kicked the door down. RP 829. Mr. Tudor then demonstrated how he kicked the

¹⁴ The first tip to law enforcement was on January 14, 2014, and the second tip was on January 16, 2014. RP 852.

¹⁵ Outside the presence of the jury, the court was advised by the deputy prosecutor that Ms. Erickson was arrested on a material witness warrant in California, and she had to be transported back to Spokane by detectives. RP 666. She did not want to testify. RP 830. She anonymously told law enforcement about Mr. Tudor because she believed the defendant committed the crime, and he needed to “admit his wrong, and deal with it.” RP 826.

door open for Ms. Erickson. RP 829. After that, Mr. Tudor stated Mr. Klepacki shot over his shoulder. RP 830. After the shooting, the defendants left the victim's residence, and Mr. Tudor ran to his mother's residence. RP 830. He ran into his mother's bedroom, removed his shoes, and placed the shoes under his mother's bed. RP 830. He did this so it would appear that Mr. Klepacki committed the murder. RP 830.

Mr. Tudor also told Ms. Erickson that during the search of the residence, and while he was in a patrol car, he attempted to rub off any residual gunpowder from the incident. RP 831. He also remarked that his fingerprints or DNA might be on the weapon because he touched it. RP 844-45. Mr. Tudor commented the murder weapon was a ".45" and that law enforcement would never find it. RP 828; 833.

When the defendant relayed the story to Ms. Erickson, he appeared scared about getting caught for the crime, but he showed no remorse for the murder of Mr. Giesbrecht. RP 832.

c. Defendant's case-in-chief.

Kari Wardlow¹⁶ testified that on a Sunday¹⁷ in January 2014, she received a telephone call from the defendant between 10:30 p.m. and 11:00 p.m. RP 863. She picked Mr. Tudor up at the Deer Park Yokes and drove to the Ellis' residence. RP 865, 873. She claimed when they arrived at the residence, Ms. Erickson was sitting in the "dark" drinking, and "talking to herself." RP 866. Ms. Wardlow claimed she and Mr. Tudor subsequently went to sleep in an upstairs bedroom, and they left early the next morning. RP 867-68. She asserted that Mr. Tudor did not have any conversation with Ms. Erickson. RP 869.

Tracy Tudor¹⁸ testified her son was staying with her in January 2014. RP 885. Ms. Tudor was dating Mr. Klepacki during this time period and for the previous five years. RP 886. Ms. Tudor claimed the defendant was upset the night of the murder because his girlfriend had been involved in a collision in Montana. RP 889. Ms. Tudor went to sleep around

¹⁶ Ms. Wardlow knew the defendant because she had previously dated his father for a short time. RP 863. After several brief statements to law enforcement, a formal interview was scheduled with Ms. Wardlow. RP 973. Ms. Wardlow failed to follow through with the formal interview. RP 973.

¹⁷ The crime occurred on a Friday evening. RP 898.

¹⁸ Ms. Tudor is the mother of defendant Anthony Tudor. RP 300

8:00 p.m. the evening of the murder. RP 899. Although Ms. Tudor did not mention it to the detectives during the initial investigation, she did claim four months later to detectives that the defendant was speaking on the telephone at the time of the murder. RP 892, 899.

The defendant testified he did not know the victim. RP 941. On January 4, 2014, Mr. Tudor and his mother drank a few beers. RP 942. Mr. Klepacki arrived at the Tudor residence on the day of the murder around 5:00 p.m. RP 942. They ran out of beer, so Mr. Tudor and Mr. Klepacki went to the store between 7:30 p.m. and 8:00 p.m., and purchased more beer. RP 943, 945. They returned to the residence approximately five minutes later, and continued drinking. RP 943. The defendant asserted he remained at the residence and went to sleep. RP 947-48

The defendant claimed no one owed him or Mr. Klepacki any money. RP 944. He also denied speaking with Ms. Erickson about the murder. RP 960.

Jamie Straub, a defense investigator, stated that when Mr. Wright was shown a photograph (Def. Ex. 101) of Mr. Lankford in the defense attorney's office, Mr. Wright remarked: "It could be. It is pretty damn close. I would say it's probably him." RP 911. Mr. Wright commented about Mr. Lankford's eyes and facial features. RP 911.

IV. ARGUMENT

AT THE TIME OF TRIAL, THE DEFENDANT FAILED TO PROVIDE A CLEAR NEXUS BETWEEN MR. LANKFORD AND THE MURDER. CONTRARY TO HIS ASSERTIONS ON APPEAL, THERE WAS NO DIRECT OR CIRCUMSTANTIAL EVIDENCE THAT IDENTIFIED MR. LANKFORD AS THE SHOOTER, OR THAT HE HAD A MOTIVE TO KILL MR. GIESBRECHT. HIS ARGUMENT AT TRIAL WAS NOTHING MORE THAN SPECULATION.

The defendant claims the trial court abused its discretion when it precluded him from arguing that Mr. Lankford was one of two assailants who killed Mr. Giesbrecht.

“Other suspect evidence.”

During a pretrial discussion, the defense advised the court it was relying on an “alibi” defense. RP 9. It did not inform the trial court or the State it would rely on “other suspect evidence” until after trial commenced.

During the investigation, Mr. Tudor was interviewed by detectives. Mr. Tudor had stated he and Mr. Lankford were “best friends” and they were together quite often. RP 650. The pair had a common association with Mr. Klepacki. RP 650.

At trial, the defense asked Mr. Wright if he had been shown a photograph on a cellular telephone by someone at a gas station after the

incident. RP 237. Defense then asked Mr. Wright to view a photograph in court.¹⁹ RP 238.

[DEFENSE ATTORNEY] MR. GRIFFIN: Mr. Wright, I'm handing you what has been marked as defense proposed Exhibit 101.

Q. (By Mr. Griffin) Sir, have you ever seen that document before?

A. [Mr. Wright] In your office.

Q. All right. So you have seen it before?

A. Yes.

Q. Sir, do you recognize the person in that photograph?

A. I don't know him, no.

Q. Thank you, sir. Have you ever seen that person before?

A. I have seen him in Deer Park before. But I don't know him, no.

Q. *I'll be real specific, sir: Do you recall seeing the person in that photograph the night Ed was shot?*

A. *No.*

Q. Thank you, sir. Have we -- Have I asked you these same questions before?

A. Not in the same way, no.

Q. Forgive me. But have we covered this topic before?

¹⁹ Ultimately, the individual in the photograph was identified by a detective as AJ Lankford. RP 315, 337.

A. Yep.

Q. And where was that, sir?

A. In your office.

Q. Do you recall discussing the person in that photograph with me in my office?

A. I do.

Q. What did you tell me then?

A. The eyes kind of looked like the person that had the gun.

Q. Sir, do you remember how you felt when I first showed you that photograph?

A. Yep.

Q. Sorry, but can you describe how you felt when you first saw that photograph?

A. Well, I told you that it wasn't -- said it was probably him.

Q. So it was probably him (indicating)?

A. That's what I said.

Q. Do you recall telling me anything specific about the person in that photograph that reminded you of the person you saw the night Ed was shot?

A. Just the way his head is shaped, and the eyes. And his smaller ears.

...

A. He had smaller ears; little ears. And the shape of his head. That's about all I could see.

Q. Okay. Does the gentleman in that photograph have the -- in your opinion -- a darker complexion?

A. Yeah. Yeah, I guess. Yeah.

Q. After you talked to me, did you have a conversation with the prosecutor about what you told me?

A. No.

RP 238-40 (emphasis added).

Later, when Detective Lyle Johnston was on the stand, the defense moved to admit its proposed Exhibit 101. The State objected on relevancy.

RP 337. In front of the jury, regarding relevancy of the photograph, the defense attorney stated, in part:

I believe the relevance was established earlier by asking several witnesses whether or not they could identify the person in that photograph. And whether or not he was present at the time of this incident, was in fact the shooter, perhaps.

RP 338.

Outside the presence of the jury, the defense again moved to admit its proposed Exhibit 101, arguing the person depicted in the photograph was the shooter. RP 338, 354-55. The State objected as to its relevance in that Mr. Wright had not identified Mr. Lankford as the shooter. RP 354-55.

Ultimately, the trial court denied admitting the proposed exhibit stating:

Here's the testimony that Mr. Wright had. First he was asked does he know the person; he answered "no." Has he seen that

person before? "Yes." Did he see him the night that Ed was shot? The answer was "no."

So that was the colloquy or the questions and answers over the photograph. So to have the photograph introduced as substantive evidence at this point, I don't know what the basis of that would be.

You're right, Mr. Lankford -- or Mr. Wright said it looks -- similar characteristics. However, that doesn't get the photograph in. The question of Mr. Lankford, if he's going to be here to testify, he certainly can be asked, was he there that night? You can ask him any question you want, obviously. And beyond that, then, any reference to him, Mr. Lankford at this point as being even involved, I think is inappropriate. We don't have that testimony. The fact that someone has similar characteristics doesn't allow us to make that statement.

So at this point I don't think there is a basis to introduce the photograph. It doesn't serve to add or subtract any facts that are before the jury at this point. There is no -- there is no evidentiary value to that.

And again, he's going to be here to testify. The jury can look at Mr. Lankford for themselves, and you all can ask him questions. At this point I will leave it out.

RP 355-56.

Before court resumed with testimony the next morning, and after the court had received email correspondence from the parties between sessions, the court remarked outside the presence of the jury:

So this involves the issue of what is going to be admissible at trial. This all was precipitated as a result of a conversation we had both in the presence and out of the presence of the jury yesterday. I will certainly allow of course counsel to

comment, argue as you wish. I will tell you right now what my concern is and was yesterday.

Certainly the defendant has the right to present appropriate evidence and an appropriate defense. And that is going to be honored. On the other hand, we're not going to have just a free-for-all where we're just naming people that could and could not have been involved. Somewhere along the lines I'm going to strike the appropriate balance.

What concerned me yesterday -- and I assume this was also the concern of the state but it doesn't matter -- it was my concern, Mr. Griffin, related to a comment you made in the presence of the jury, which was to the effect that there had been testimony that Mr. Lankford was the shooter. I don't recall that testimony at all. And I thought I made pretty specific notes. In fact, Mr. Wright denied Mr. Lankford was there.

Now, regardless of what Mr. Lankford may or may not have said in an interview, we all know that when we try cases what matters is what the witness says on the stand.

Frankly, that is the interesting part about trying cases, is witnesses don't always say what we think they are going to say. So be it. That is the nature of trial work. But what we can't do is in our own minds take what we think the evidence is and make that the evidence. It is what the witnesses say it is.

Yes, he said he thought the eyes had some similar characteristics. Well, given the case law that I have been provided, and given my experience, I don't think that makes some other person who has both characteristics, who may live in the same area, who may be a friend of the defendant, a possible suspect. So that is the reason I denied the picture of the individual admitted into evidence. I don't think at this point it has relevance.

Now, we have been advised, and we talked about the fact that Mr. Lankford is at least scheduled to testify, so certainly

-- and I suggested yesterday Mr. Lankford can be asked any question that counsel on both sides thinks is appropriate, including whether he was there at the time of the shooting, I assume. I don't know if he's going to answer it or not, but he certainly may be asked.

Or if he's not going to testify, counsel can present evidence that in some way links him to this event. And if so, then that theory can be talked about and discussed with the jury.

But I guess what I'm saying this morning is -- and again I will listen to argument - - but the bottom line is, we're not going to make comments like that in front of the jury. That is the bottom line. We're not going to say things to the jury that we don't have evidence for, by either side. It doesn't matter whether this is a theft of a mower out of the garage or a first-degree murder case. The rules are the same. We're going to talk about what the evidence actually is and not what we think it is or what we hope it to be.

When the jury comes out this morning, regardless of what else we talk about this morning, I will be advising them again as I started out by telling them in this case that they are to consider the comments of counsel not as evidence, and are to disregard any comment that is not supported by that. I am not going to refer to the statement again because that is just going to ring the bell one more time.

So I hope I have set the parameters for our discussion this morning. And I hope I have set the parameters for the rest of the trial.

RP 357-60.

Before Mr. Lankford's testimony, the State renewed its motion that the defendant not attempt to argue "other suspect evidence" without the proper foundation. RP 668.

After both sides rested, the defense renewed its motion to admit

Exhibit 101. RP 912. In ruling on the motion, the trial court stated:

THE COURT: Okay. It strikes me what the defense has established at this point is certainly a discussion point with the jury that there is a question of identification, there is a question of who saw what, there is a question of whether somebody can identify someone. And we have kind of done this for the last seven or eight days.

The question is whether that argument can be extrapolated into the facts of this case to say -- and it is not only not clear who was identified, but it is in fact someone else. I think that is where you are going.

I think we have talked about this three or four times about that is a significant leap.

The question is whether there is sufficient evidence for me to do that. I don't have any evidence beyond someone saying they are similar folks; if it's not him, it could be him. So I'm not sure how you can argue your -- I don't know -- now they're identifying a second party when you have no other identification that he was there or involved. Other than it is a discussion point. So do I say, well, all 20 to 25-year-old caucasian males that are in Deer Park, it's a possible discussion point and bring in their photographs? That is the problem that we're having.

I guess it comes down to final argument, I think this is a discussion we have had, like I said, for the last seven or eight days. What is the argument going to be? Is the argument going to be Mr. Wright doesn't know what happened because of the shock of the situation, the speed of it, et cetera, et cetera? Or is he identifying someone else who we don't have any other verification?

MR. GRIFFIN: If you are asking me, Judge, I am hoping to argue to the jury that Mr. Wright testified he had a very clear

view of the person, that that image of that person's face has been in his head since that date.

THE COURT: Not his face.

MR. GRIFFIN: Right.

THE COURT: Let's be real careful when we start down this line. I've had this issue before, as you well know. When we get to argument, you can argue within what is in the evidence. But it better not go any further than that.

I'm not going to have that. We've had this issue. It is not his face.

It's a portion of the face that was above the bandanna, below the cap, or whatever it was.

...

MR. GRIFFIN: Judge, it is really up to the jury to determine how powerful or compelling that evidence is, the testimony that he provided. Again, I don't intend to offer anything besides what he provided, but I do intend to argue it could be someone other than Mr. Tudor.

THE COURT: Not a problem with that. That is perfectly fine under the evidence that -- what is the evidence. You judge for yourself. That is the credibility.

The problem is whether we're going to take the next step, and for you to proffer it is AJ Lankford, because he's somebody that is apparently in the area on the night in question. That is all we have.

We don't have that, actually. I think that is the issue we have dealt with; right? We have tiptoed around it.

MR. GRIFFIN: Of course, Judge. I do not intend to argue that the person who fired the gun was any particular person except for Mr. Tudor, and that it could be a number of other

people, and that the characteristics described by Mr. Wright do not match Mr. Tudor. That is where I'm hoping to go.

THE COURT: Fair enough. I don't have a problem with that under the evidence. And I don't think under those scenarios, then, the photographs becomes relevant. I don't think it is necessary. You have laid all that foundation through the testimony. It's there for argument. I don't think the picture is going to add anything of any assistance to the jury except to sort of double up on that testimony in a way that doesn't - I don't think is appropriate.

We don't have an idea that somebody said this is the person. If that was the case, that would be different. So I'm not going to admit the photograph.

RP 919-22.

Argument.

A criminal defendant has a right under the Sixth Amendment of the United States Constitution and article I, section 22 of the Washington Constitution to present a defense. *State v. Maupin*, 128 Wn.2d 918, 924, 913 P.2d 808 (1996). However, the right to present a defense is not absolute. *Montana v. Engelhoff*, 518 U.S. 37, 42, 116 S.Ct. 2013, 135 L.Ed.2d 361 (1996); *Maupin*, 128 Wn.2d at 924-25. The right to present a defense does not extend to irrelevant or inadmissible evidence. *State v. Jones*, 168 Wn.2d 713, 720, 230 P.3d 576 (2010).

Standard of review.

An appellate court reviews a trial court's decision to exclude other suspect evidence for abuse of discretion. *State v. Franklin*, 180 Wn.2d 371,

377 n. 2, 325 P.3d 159 (2014); *State v. Starbuck*, 189 Wn. App. 740, 750, 355 P.3d 1167 (2015), *review denied*, 185 Wn.2d 1008 (2016).²⁰ However, a court “necessarily abuses its discretion by denying a criminal defendant's constitutional rights.” *State v. Iniguez*, 167 Wn.2d 273, 280, 217 P.3d 768 (2009)

The defendant bears the burden of establishing the relevance and materiality of “other suspect” evidence. *Starbuck*, 189 Wn. App. at 740. In establishing a foundation for admission, the defendant must show a clear nexus between the other person and the crime. *Id.* at 740. The proposed evidence also must show that the third party took a step indicating an intent to act on the motive or opportunity to commit the crime. *Id.* at 740. A showing that it was merely possible for the third party to commit the crime is insufficient. *State v. Rehak*, 67 Wn. App. 157, 163, 834 P.2d 651, *review denied*, 120 Wn.2d 1022 (1993), *cert. denied*, 508 U.S. 953 (1993).

²⁰ A court abuses its discretion when its decision is manifestly unreasonable or exercised on untenable grounds or for untenable reasons. *State ex rel Carroll v. Junker*, 79 Wn.2d 12, 482 P.2d 775 (1971). A decision is “manifestly unreasonable” if the court, despite applying the correct legal standard to the supported facts, adopts a view that no reasonable person would take. *State v. Rohrich*, 149 Wn.2d 647, 654, 71 P.3d 638 (2003). A decision based on “untenable grounds” or made for “untenable reasons” is one that rests on facts unsupported by the record or was one reached by applying the wrong legal standard. *Id.*

In *Franklin*, the court held the trial court erred in excluding other suspect evidence by considering the strength of the State's case against the defendant's case and requiring the defense to present direct rather than circumstantial evidence that someone else committed the crime. 180 Wn.2d at 378-79. The Court held the standard for the admission of other suspect evidence is whether there is evidence "tending to connect" someone other than the defendant with the crime." *Id.* at 381 (quoting *State v. Downs*, 168 Wash. 664, 667, 13 P.2d 1 (1932)). "[T]he probative value must be based on whether the evidence has a logical connection to the crime - not based on the strength of the State's evidence." *Id.* at 381-82. However, "[r]emote acts, disconnected and outside of the crime itself, cannot be separately proved for such a purpose." *Id.* at 380. "[S]ome combination of facts or circumstances must point to a nonspeculative link between the other suspect and the charged crime." *Id.* at 381.

For instance, in *State v. Downs*, 168 Wash. 664, 667, 13 P.2d 1 (1932), shortly after a burglary, police discovered the defendants, armed with a gun, in a parked car within two miles of the crime scene, with money spread around the car. *Id.* at 664-65. At trial, the court properly refused to admit the defendant's proposed evidence that a well-known burglar was in town and had the opportunity to commit the burglary because there was no

evidence to show that the burglar was in any way connected with the burglary. *Id.* at 667-68.²¹

Likewise, in *State v. Thomas*, 150 Wn.2d 821, 857, 83 P.3d 970 (2004), the defendant argued he should have been able to cross-examine law enforcement witnesses on “other suspect” evidence and present results from a polygraph test. The Supreme Court disagreed stating:

When there is no other evidence tending to connect another person with the crime, such as his bad character, his means or opportunity to commit the crime, or even his conviction of the crime, such other evidence is irrelevant to exculpate the accused. *See State v. Downs*, 168 Wash. 664, 667, 13 P.2d 1 (1932); *State v. Maupin*, 128 Wash.2d 918, 925, 913 P.2d 808 (1996). Mere opportunity to commit the crime is not enough as such evidence is “the most remote kind of speculation.” *Downs*, 168 Wash. at 668, 13 P.2d 1.

Thomas, 150 Wn.2d at 857-858.

Our high court found the police never considered the other suspect to be the actual suspect because he had a valid alibi (conclusive evidence that he was somewhere else when the crime was committed). Accordingly,

²¹ In *Leonard v. The Territory of Washington*, 2 Wash. Terr. 381, 396, 7 P. 872 (1885), a murder defendant laid a proper foundation supporting his defense that someone else committed the crime. There was no direct evidence against the defendant, and the defendant was able to show that the other suspect had a motive and opportunity to commit the crime, and the other suspect had previously threatened to kill the victim. *Id.* at 383. The Supreme Court held that when faced with a circumstantial case, the defendant may respond with similar circumstantial evidence that another person committed the crime. *Id.* at 396.

the proposed cross-examination regarding an alternative suspect would have been irrelevant.

Similarly, in *State v. Russell*, 125 Wn.2d 24, 75, 882 P.2d 747 (1994), *cert. denied*, 514 U.S. 1129 (1995), the defendant was convicted of two aggravated murders and one first degree murder. On appeal, the defendant argued the trial court erred in rejecting his “other suspect” evidence. In part, the defendant argued that a person named Brent Carlson dated the murder victim, and the two were friends up to her death. Carlson initially did not have an alibi for the night of the victim’s death. Later he admitted that he had been with another woman the night of the murder, but he could not produce the woman.

The Supreme Court found no evidence linking Carlson to the murder and it affirmed the conviction. In its holding, the court stated:

[M]ere evidence of motive in another party, or motive coupled with threats of such other person, is inadmissible, unless coupled with other evidence tending to connect such other person with the actual commission of the crime charged.

Id. at 77.

In like manner, in *State v. Wade*, 186 Wn. App. 749, 765, 346 P.3d 838, *review denied*, 184 Wn. 2d 1004 (2015), no physical evidence connected the alternative suspect to the charged crime. Nonetheless, the defense attorney argued the evidence did not “preclude”

the possibility that the alternative suspect committed the murder. The defense pointed to a 2009 assault conviction of the alternative suspect prohibiting him from contacting the victim, and to voicemails he left on the victim's answering machine which "contained implied threats" that established motive and "a substantial step towards committing future acts of violence." The defense also pointed to previous statements made by the alternative suspect that he previously assaulted the victim. *Id.* at 765.

Division One of this Court found the trial court did not abuse its discretion by excluding speculative and inadmissible evidence that the alternative suspect murdered the victim. As the court stated:

There was no physical evidence connecting [the alternative suspect] to the murder and no evidence [the alternative suspect] was anywhere near Thornton's apartment when the crime occurred. While, as the trial court described, the evidence indicates [the alternative suspect] was a "bad actor with a violent history involving Ms. Thornton," the facts and circumstances do not show a nonspeculative link between [the alternative suspect] and the crime.

Id. at 767.

Similarly, in *State v. Hilton*, 164 Wn. App. 81, 102, 261 P.3d 683 (2011), *review denied*, 173 Wn.2d 1030 (2012), *cert. denied*, 133 S.Ct. 349 (2012), the defendant wanted to introduce evidence the murder victims' daughter killed her parents. This Court found an insufficient foundation where the victims' daughter was proffered as an alternative suspect based

on a motive of inheritance from the victims. There was no showing that the daughter had access to or knew how to use the murder weapon and there was no evidence placing her at the murder scene. *Id.* at 100-101.

In *State v. Strizheus*, 163 Wn. App. 820, 825, 262 P.3d 100 (2011), *affirmed on other grounds*, 178 Wn.2d 180 (2013), *cert. denied*, 134 S.Ct. 1329 (2014), the court held there was an insufficient foundation to admit “other suspect” evidence when the defendant’s son stated, “[I]t’s my fault, arrest me. I should be in jail,” but later recanted, and also later assaulted the victim (his mother). The court concluded that there was no evidence of any step taken by the son indicating an intent to act on his alleged motive, noting that there was no physical or eyewitness evidence placing him at the scene and the victim did not identify him as her attacker.

Similarly, in *Rehak*, the defense sought to introduce evidence that the victim’s son could have murdered his father. 67 Wn. App. at 162. In support of this theory, defense counsel wanted to present evidence of disagreements between the father and son, and of how the son stood to benefit financially if his stepmother were convicted. Defense counsel also sought to establish that the son had the opportunity to commit the murder. He knew where the murder weapon was kept and, without explanation, was not at work on the morning of the murder. *Id.* at 160-61. The court held that

absent evidence indicating that the son actually committed the murder, the other suspect evidence was properly excluded. *Id.* at 163.

Likewise, in *State v. Drummer*, 54 Wn. App. 751, 755, 775 P.2d 981 (1989), the defendant attempted to introduce evidence that several other persons had a motive to kill the victim, but failed to present any evidence directly linking the other persons to the crime. The court of appeals found the trial court properly excluded the evidence because it would only have encouraged the jury to speculate as to possible other assailants.

In contrast, in cases where courts have found it appropriate to allow “other suspect” evidence, there was a sufficient foundation for admitting other suspect evidence because of the other suspect’s actions, either directly or circumstantially, established either a direct involvement in the crime or an intent to commit the crime, which is not the case here with anyone except the defendant.

For example, in *Franklin*, the trial court excluded evidence that someone else committed the cyberstalking-related crimes with which the defendant was charged. 180 Wn.2d 371. Specifically, it excluded evidence that the defendant’s live-in girlfriend had sent threatening e-mails to the defendant’s other girlfriend and the live-in girlfriend had a motive (jealousy), the means (access to the computer and e-mail accounts at issue), and a prior history (of sending earlier threatening e-mails to the victim

regarding her relationship with Franklin) to support Franklin's theory of the case. *Id.* at 372.

The Supreme Court held the trial court erred in excluding other suspect evidence by considering the strength of the State's case against the defendant and requiring the defense to present direct rather than circumstantial evidence that someone else committed the crime. *Id.* at 378-79. The court held the standard for the admission of other suspect evidence is whether there is evidence "'tending to connect' someone other than the defendant with the crime." *Id.* at 381. "[T]he probative value must be based on whether the evidence has a logical connection to the crime - not based on the strength of the State's evidence." *Id.* at 381-82.

State v. Maupin involved an eyewitness who saw the victim being carried by another person the day after the victim was allegedly kidnapped. 128 Wn.2d 918. The Court concluded this evidence pointed directly to someone else as the guilty party and "at least would have brought into question the State's version of the events of the kidnapping." *Id.* at 928.

Similarly, in *State v. Clark*, the defendant proffered evidence of the alternative suspect's motive, opportunity, and ability to commit the arson for which he had been charged. 78 Wn. App. 471, 474-476, 898 P.2d 854 (1995), *review denied*, 128 Wn.2d 1004 (1995). The other suspect believed Clark had an affair with his wife and had molested his daughter and was

obsessed with damaging Clark. The other suspect had warned his former spouse (Clark's girlfriend) to "watch it" because he knew how to start fires without detection. He also told her it was "too bad" Clark was in jail for something he did not do. The court in *Clark* concluded the other suspect evidence was admissible because it clearly pointed to someone other than the defendant as the guilty party. *Id.* at 480.

Here, the defendant failed to meet his burden and did not provide the trial court with *any* evidence of Mr. Lankford's ability to commit the murder, his motive to commit the murder (such as prior quarrels or disputes, hostility, drug debt, ect.), or his opportunity to commit the murder. The defendant's offer of proof to the trial court was nothing more than raw speculation and it failed to support even the slightest inference that Mr. Lankford was one of the perpetrators. Moreover, the defense's speculation was contradicted by the only witness he claimed established Mr. Lankford as a suspect. He has not provided any direct or circumstantial evidence tending to show that Mr. Lankford in fact shot the victim, or was otherwise involved in the crime. The evidence the defendant sought to introduce was inadmissible to support an "other suspect" theory.

Additionally, Mr. Tudor claims on appeal that he had no known relationship with Mr. Giesbrecht. Whether or not Mr. Tudor personally knew Mr. Giesbrecht had no consequence regarding the determination of

his guilt. He independently told Ms. Griffin and Ms. Erickson the reason for the murder was Mr. Giesbrecht owed a financial drug debt. Association or familiarity with Mr. Giesbrecht is irrelevant.

He also argues that Mr. Lankford matched eyewitness' description of the shooter. This claim is directly contrary to the testimony of the only person who saw a part of the shooter's face. When Mr. Wright was asked whether a photograph of Mr. Lankford matched the shooter, Mr. Wright said "no." Although the defense attempted to impeach Mr. Wright with a previous ambivalent statement, he unequivocally answered "no" on the witness stand.²² It has long been held that the purpose of impeachment is to attack the credibility of the witness and it cannot be considered as substantive evidence. *State v. Jefferson*, 6 Wn. App. 678, 683, 495 P.2d 696 (1972).

²² The defendant also argues that Ms. Smilari's testimony, in part, provided a sufficient link between the murder and Mr. Lankford. *See* Appellant's Br. at 14. During trial, Ms. Smilari clarified her earlier testimony and stated she observed Mr. Lankford at Mr. Giesbrecht's residence in the morning hours of the murder. RP 934-35. Indeed, Mr. Lankford also testified that he was at Mr. Giesbrecht's house the morning of the murder. As Mr. Lankford stated: "Walked up to Ed's door, knocked on the door and Stephen came outside and we left." RP 934. During cross examination, Ms. Smilari reflected that a person named "Steven" and an unknown individual arrived at the apartment in the morning hours attempting to sell "gas for a boat." RP 221. Mr. Giesbrecht told the individuals no, and to quit bringing things to his house. RP 221. This claim has no merit.

With regard to Ms. Unger, she briefly observed the two suspects. On cross-examination, she remarked that one of the suspects looked like an individual that used to frequent Mr. Giesbrecht's apartment. RP 250. She was uncertain, but thought his name was "Steve." RP 250. This evidence was presented to the jury for its consideration. However, it certainly does not support the defendant's argument that Mr. Lankford matched the description of the shooter.

Finally, the above argument was before the jury for its consideration and determination as to the weight and credibility of the evidence.

With respect to the defendant's argument that detectives observed footprints in the snow that appeared to lead toward the Lankford residence, the defendant or Mr. Klepacki could have attempted their escape by running toward the Lankford residence, and changed direction, or the footprints could have been left by any number of Deer Park residents before or after the murder. Outside of guesswork, it is not a fact of consequence.

Contrary to the defendant's argument, the trial court permitted testimony regarding the identification of the perpetrators and whether Mr. Lankford fit that description, and the trial court remarked to defense counsel that when Mr. Lankford testified, counsel could ask him any relevant question surrounding the commission of the murder. The fact that the defense did not ask certain questions or get the answers from witnesses

they were hoping for is of no consequence. Moreover, none of the physical evidence, cell phone information, or any eyewitness account placed Mr. Lankford at the crime scene. In point of fact, the trial court permitted the defense many opportunities to provide even slight evidence that Mr. Lankford was the perpetrator. They failed to do so. The trial court did not commit error.

V. CONCLUSION

The defense offered no direct or circumstantial evidence of a nexus between Mr. Lankford and the murder. The trial court did not abuse its discretion. The State respectfully requests this Court affirm the defendant's conviction.

Dated this 29 day of July, 2016.

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

STATE OF WASHINGTON,

Respondent,

v.

ANTHONY TUDOR,

Appellant.

NO. 33769-3-III

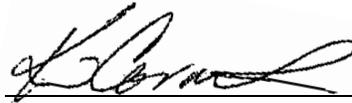
CERTIFICATE OF MAILING

I certify under penalty of perjury under the laws of the State of Washington, that on July 29, 2016, I e-mailed a copy of the Brief of Respondent in this matter, pursuant to the parties' agreement, to:

Andrea Burkhart
andrea@burkhartandburkhart.com

7/29/2016
(Date)

Spokane, WA
(Place)



(Signature)