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JUL 30 2010

King County prosecutor
Appellate Unit

COURT OF APPEALS NO. 63757-6-1

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

STATE OF WASHINGTON

V.

DAMARIO DILLARD,

Appellant.

CLERK OF COURT
JUL 30 2010
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ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR KING COUNTY

The Honorable Catherine Shaffer, Judge

OPENING BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. The trial court's ruling admitting irrelevant, prejudicial propensity evidence deprived appellant of his right to a fair trial.

2. The trial court erred in denying the motion for a mistrial, where the jury was allowed to hear additional prejudicial, propensity evidence, previously excluded by agreement of the parties at the court's urging.

3. Application of the felony murder statute in this case violated Dillard's rights to equal protection and due process.

Issues Pertaining to Assignments of Error

1. Whether the trial court erred in admitting evidence appellant was seen wiping his fingerprints off bullets the day before the shooting incident for which appellant was charged, as evidence of intent to commit assault, where the state's evidence, if believed, showed the shooting was the result of a *chance* encounter as opposed to one that was planned or foreseen?

2. Whether the court erred in denying the motion for a mistrial, where the jury inadvertently heard excluded evidence that appellant obtained his gun from a Hispanic man he robbed the day before the shooting?

3. Whether application of the felony murder rule under the facts of this case violates equal protection, because felony murder, when based on the underlying crime of assault, has essentially the *same* elements as manslaughter and the prosecutor has unfettered discretion to charge either offense?

4. Whether the felony murder requirement that death be caused "in furtherance of" the underlying felony is unconstitutionally vague and therefore violative of due process, when the underlying felony is assault?

B. STATEMENT OF THE CASE¹

The King County prosecutor charged appellant DaMario Dillard with alternate charges of felony murder and intentional murder for the shooting death of Antwon Horton. CP 1-5, 110-112. The state also charged Dillard with first degree assault of Jay Harris and Kevin Rogers. CP 1-5, 110-112. Horton, Harris and Rogers were wounded during an early morning shootout in south Seattle on August 28, 2007, ostensibly involving rival gangs, Low Profile (LP)

¹ The transcripts are referred to as: 1RP – 3/23/09 and 4/1/09 (morning); 2RP – 4/1/09 (morning, but later than 1RP); 3RP – 4/2/09; 4RP – 4/3/09; 5RP – 4/6/09 (start of voir dire); 6RP – 4/6/09 (CrR 3.6/CrR3.5 hearing); 7RP – 4/7/09; 8RP – 4/8/09; 9RP – 4/8/09; 10RP – 4/4/10/09; 11RP – 4/10/09; 12RP – 4/13/09; 13RP – 4/14/09; 14RP – 4/15/09; 15RP – 4/16/09; 16RP – 4/17/09; 17RP – 4/21/09; 18RP – 4/22/09; 19RP – 4/23/09; 20RP – 4/24/09; 21RP – 4/27/09; 22RP – 4/28/09; 23RP – 4/29/09; 24RP – 4/30/09; 25RP – 5/1/09; 26RP – 5/4/09; 27RP – 5/7/10.

and Deuce 8. CP 3-4. Evidence showed Dillard was not the one who shot and killed Horton. 9RP 7; 26RP 17. No evidence suggested he was the one who shot Harris or Rogers, either. 9RP 7; 26RP 17. The state claimed Dillard was an accomplice to the shootings, however. 9RP 7; 26RP 17.

The morning's events began the evening prior on August 27, at the shared apartment of Racquael Grace and Amber Corner. They lived in apartment 705 at the Dakota Apartments off of Rainier Avenue South (to the south), and between 33rd Avenue South (to the west) and 34th Avenue South (to the east). 13RP 28-30. Their apartment looked out on to the parking lot to the north and the Courtland Place Apartments to the northwest on 33rd Avenue South. 9RP 54; 10RP 25; 11RP 16.

Dillard was visiting Corner, as was Laura Jeffries and a man named "B.G." 13RP 33-34, 39; 18RP 123-24. At the same time, Grace was entertaining two sisters, Terasa and Larishica Asher, who also lived at the Dakotas. 12RP 40-42, 88.

Corner testified she saw a gun in the living room of apartment either the day of the shooting or 2-3 days before it. 13RP 40, 41. She thought Dillard put it under the couch. 13RP 40.

Corner also testified she saw B.G. cleaning it, taking out the bullets and reloading them. 13RP 43; 14RP 34.

In contrast, Jeffries testified she saw Dillard and someone named "S.S." cleaning the gun the day before the shooting. 18RP 127. She claimed Dillard and S.S. were wiping the bullets off with a black, gang "flag."² 18RP 128, 130. Jeffries assumed they were wiping off their fingerprints. 19RP 23-24.

Dillard acknowledged having a gun in his possession, as well as a friend named S.S., but denied wiping any bullets with a flag or otherwise. 24RP 75, 78.

Around 11:00 p.m., Grace received a call from Henry Harris, who said he had been sprayed with mace and needed a place to wash his face and charge his cell phone. 12RP 55; 13RP 46; 14RP 79-80, 83. He told Grace he was with Antwon Horton and Kevin Rogers, who associated with LP. 12RP 53; 14RP 78; 15RP 130, 135; 18RP 53, 136; 19RP 16; 21RP 70-71. While some witnesses claimed Dillard associated with Deuce 8, Dillard denied any such association. 13RP 32; 14RP 94; 15RP 136; 18RP 49-50; 18RP 125; 24RP 57.

² As will be discussed in the argument section, *infra*, Dillard's pre-trial motion to exclude this testimony was denied.

Because of the perceived differing associations and a supposed "beef" between them, Grace told Corner and her company to retire to Corner's bedroom in the back of the apartment. 12RP 51, 76; 13RP 46-47; 14RP 39; 15RP 132; 18RP 55-56, 58; 18RP 134. Corner and her company closed the door behind them in Corner's bedroom. 12RP 51; 13RP 45; 14RP 164; 18RP 60. Meanwhile, Harris, Horton and Rogers arrived at 11:30 p.m. and hung out in the living room. 14RP 86, 89.

According to Jeffries, Dillard became edgy. 18RP 138. Jeffries testified she went to the payphone at the nearby Safeway to call Dillard's friend Will Davis to come get Dillard. 18RP 139; 19RP 32. Reportedly, Davis also associated with Deuce 8. 14RP 148. Dillard testified he did not know Jeffries left the apartment or called anyone. 24RP 90.

Video surveillance showed Jeffries left the Dakotas at 11:53 p.m. and returned at 12:03 a.m. 18RP 140-42. Jeffries testified she was able to reach Davis. 18RP 143. Phone records showed someone placed a call from the Safeway payphone to a phone registered to Davis at 11:55 p.m. 18RP 67; 20RP 9; 21RP 83. Phone records also showed that at 12:06 a.m., someone placed a call from Davis' phone to a phone registered to Peter Parker, with

his address listed as the 2800 block of South Jackson Street.³ 21RP 75-76, 84. From other phone records, police believed Peter Parker was Johnny Walters, nicknamed "Johnny Mac." 21RP 51, 71-72, 76, 80. According to police, Walters associated with Deuce 8. 21RP 71-72.

After Jeffries returned, Dillard fired three gunshots out of the window. 18RP 63, 144, 147. Jeffries claimed Dillard said he was trying to scare the living room guests away. 18RP 145. Dillard testified he was bored and had never fired the gun. 24RP 92.

Police responded, but could not determine from where the shots were fired. 15RP 100-102. Although Grace and her guests heard the shots, they were unsure of their origin, although they perceived they were close. 12RP 83; 15RP 152; 18RP 64. Harris decided to move his car (a 2000, cranberry-colored Cadillac) from the Dakotas' to the Courtland Place parking lot west of the Dakotas on 33rd Avenue. 12RP 73, 95; 14RP 81, 91-92; 18RP 64. He left at 12:19 and returned at 12:26 p.m. 15RP 15, 17.

Jeffries testified that after the police left, she looked out the window and saw two individuals she thought looked similar in appearance to Will Davis and S.S. 18RP 143, 147-149; 19RP 41.

³ According to police, 28th and Jackson is a Deuce 8 hangout. 21RP 66.

According to Jeffries, Dillard also looked out the window, then asked B.G. to accompany him to the door as he was leaving. 18RP 150. Dillard testified he decided to leave, because he feared he might get caught for firing the gun. 24RP 95-96.

Jeffries claimed she saw Dillard outside below Corner's bedroom window stoop to pick something up before getting into a van that exited the parking lot onto 34th Avenue South. 18RP 152; 19RP 6-8. According to Jeffries, the van returned later, at the same time as another car.⁴ 18RP 153; 19RP 6-8. According to Jeffries, people exited the cars and went toward the left side of the building. 18RP 153-54; 19RP 8-9. Jeffries did not recognize anyone and testified none appeared to be either of the two she saw walking towards the Dakotas earlier. 19RP 48-49.

Camera surveillance showed a group of four men gathering at 12:42 p.m. at the north, front entrance of the Dakotas. 14RP 125-26. At trial, Harris testified the men wore the same clothing and looked to be the same shapes and sizes of the individuals who later shot at him, although he could not identify anyone. 14RP 126. The four men departed at 12:44 p.m. 14RP 127.

⁴ Corner also testified she saw a van and a Jeep with a broken window idling in the drive-through of the parking lot. 14RP 17, 24-25.

Camera surveillance showed Dillard left the front entrance of the Dakotas at 12:46 p.m. 14RP 127. He testified he tried to pick up a shell casing from underneath Corner's window, but had been drinking and lost his balance. 24RP 96. Dillard testified he walked over to the west side of the building and encountered Dion Macklin. 24RP 96-97. Reportedly, Macklin was there to have a secret rendezvous with Grace.⁵ 18RP 45-46, 68.

Dillard testified that as he was talking to Macklin, four others he did not know or invite showed up. 24RP 99-100. He said he recognized one as "Tiger 6." 24RP 99-100. Dillard believed Macklin was on the phone with Grace, but Dillard testified he did not talk to Grace. 24RP 101.

Gloria Lawing, who lived across the street at the Courtland Place apartments, testified she saw one tall man standing at the northwest corner of the Dakotas and as many as eight other people walking towards the Dakotas. 10RP 8-9, 30. Perceiving the situation as unusual, she called 911. 10RP 9-10. She was on the

⁵ Police believed Macklin associated with Deuce 8. 21RP 71.

phone with the operator when shots were fired.⁶ 10RP 10, 22.

Testimony suggests that just before shots were fired, Grace had walked Harris and his group to the elevators. Grace claimed that while doing so, she received a call from Macklin, who wanted into the building.⁷ 18RP 65, 68-69, 73, 101. According to Grace, Dillard broke into the conversation to ask why she invited Harris, Horton and Rogers to her apartment. 18RP 69-71. Grace claimed Dillard said he had wanted to spend the night, but now, would not. 18RP 71. Grace testified she told Dillard that Harris, Horton and Rogers were leaving. 18RP 72. Grace claimed she heard someone repeat: "they're leaving, they're leaving," and the call ended. 18RP 72-73.

Grace and the Asher sisters testified that when they returned from walking Harris, Horton and Rogers to the elevators, Corner was yelling that Grace's friends were about to get shot. 12RP 67-68, 99; 18RP 68, 75, 101-103. Grace tried to call Harris, but no

⁶ Although the timing was not clear, Lawing claimed she saw a small, red car coming and going from the Dakotas' north parking lot. 10RP 16. Lawing described seeing three gentlemen get in and out. 10RP 17-18. According to Lawing, the last time she saw the car, one of the occupants got out, ran back to the building, picked something up and ran back to the car. 10RP 18. She said there was a black van in the parking lot as well. 10RP 18.

⁷ Phone records showed a phone call was placed from Macklin's phone to Grace's at 12:51 a.m. 18RP 85.

one answered. 18RP 75. Phone records showed Grace placed a number of calls to Harris, beginning at 12:53:53 a.m. 21RP 85.

Video surveillance showed Harris, Horton and Rogers leaving the front entry of the Dakotas at 12:56 p.m. and heading toward the northwest corner of the building.⁸ 14RP 103, 128. Harris and Rogers testified that as soon as they reached the corner, a group of men,⁹ situated 10-15 yards to the south by the Dakotas' garage entrance on 33rd, opened fire on them. 14RP 104; 15RP 22. At trial, Harris claimed Dillard was among that group, although he did not know whether Dillard fired any shots. 14RP 130. Rogers testified he did not recognize anyone. 15RP 158.

Both Harris and Rogers suffered non life-threatening gunshot wounds to their legs as they ran northbound. 14RP 105, 112-113; 15RP 74, 85, 107; 17RP 67, 71, 74. Horton was shot in the head, however, and later died at the hospital. 10RP 42-43; 12RP 69; 15RP 87; 17RP 79, 86; 22RP 133, 143. Ballistics showed he was not hit with a .40 caliber bullet, the kind that fit Dillard's Browning. 9RP 38; 20RP 87; 22RP 26-27. Similarly, no

⁸ It appeared to detective Ramirez that the phone records and time stamp on the surveillance video appeared a couple minutes off. 21RP 86.

⁹ Harris thought there were six to seven, while Rogers thought there were eight to ten in the group. 14 RP 104; 15RP 158.

evidence suggested either Harris or Rogers were hit with a .40 caliber bullet.¹⁰ 9RP 38.

Witnesses say the group on 33rd scattered. 10RP 11 (Lawing); 14RP 23 (Corner). Hibo Hassan, a tenant on the west side of the building, testified that after hearing gunfire, she saw 6 young black men walking south on 33rd Avenue in the direction of her balcony. 16RP 98, 102. Hassan testified one was heavy set and holding a black gun in his right hand.¹¹ The others she described as skinny. 16RP 103-04. As the men passed under her balcony, she claimed she heard one say, "Did you get him?" 16RP 105. Hassan recognized the heavy set man and another man wearing a white do rag as two of the individuals depicted in the surveillance video taken from the north side of the building at 12:42 a.m. 17RP 32-33.

According to Hassan, the heavy set man and one of the other men got into a dark Chevy van, which quickly pulled away and turned right onto Rainier Avenue. She testified the other four headed in the direction of Safeway (east). 16RP 106-107, 21.

¹⁰ Evidence suggested Harris was hit with a .38 or .35, not a .40. 18RP 17; 19RP 74; 22RP 29.

¹¹ Dillard is not heavy set. Supp. CP __ (sub. no. 2, Motion, Finding of Probable Cause, 1/15/08).

Hassan testified that shortly thereafter, a different man came out from the apartment building and drove away in a RV that had been parked on 33rd. 16RP 109. Where the RV had been parked, Hassan saw a gun. 16RP 110.

Dillard testified he did not understand what was happening when he suddenly heard gunfire. 24RP 104. He was standing next to Macklin by the Dakotas' garage entrance on 33rd Avenue. 24RP 102. The other four men Dillard previously noticed were standing around at the northwest corner of the building. 24RP 103, 142. Upon hearing shots, he did not know who fired. 24RP 104. Scared he would be hit, Dillard fired his gun in the air in hopes it would cause whoever was firing to duck, cover, and cease firing. 24RP 104-105, 149. He did not point the gun at anyone or intend to harm anyone. 24RP 104, 164.

Physical evidence supported Dillard's testimony about firing into the air. For instance, a .40 caliber bullet was recovered from a sixth floor apartment of Courtland Place. 17RP 100. To police, the trajectory of the bullet suggested it had come from street level. 17RP 103; 23RP 40.

Dillard testified he fired six shots, some as he was trying to run away. 24RP 105. As he ran south, he threw the .40 caliber

handgun on the ground, which was later seen by Hassan and recovered by police. 15RP 123; 17RP 140; 19RP 87-88; 24RP 106. According to Dillard, Macklin was running behind him, and someone else unknown to him passed in front of him. 24RP 106. Dillard testified he ran southeast around the Dakotas to 34th and then north toward the parking lot, where he got into a Jeep driven by an unknown female. Dillard explained the woman was with Macklin, and he had no place else to run. 24RP 108.

Dillard testified he did not have a problem with anyone associated with LP, especially Horton. 24RP 60, 65-72. Dillard and Horton attended Seattle Vocational Institute together. 23RP 75-76. In fact, it was Dillard who recommended Horton enroll, due to its music program. 24RP 61. Both were in a program called "In the Music." 23RP 77. A video showed the two enjoying a session together. 23RP 80-82. A teacher described the two as cordial. 23RP 100, 102. Harris and Rogers confirmed there were no issues between them and Dillard either. 14RP 145, 147; 15RP 136. Rogers corroborated there was likewise no issue between Dillard and Horton. 16RP 16.

The defense theory of the case was that Dillard had no intent to assault anyone (26RP 76-77), and alternatively, that he acted in

self defense. Significant to latter defense was that the surveillance video showed Horton and his group leaving *after* Gloria Lawing called 911. More specifically, the computer-aided dispatch of Lawing's 911 call showed it was made at 12:54:41 a.m. As defense counsel noted, gunshots could be heard during the call after approximately 17-20 seconds, which would mean the shooting started at 12:55 a.m. 26RP 68.

Yet, the surveillance video timed Harris, Horton and Rogers as leaving the Dakotas at 12:56:48, approximately two minutes *after* Lawing called 911. Assuming the surveillance video was ahead by two minutes, Harris and his group actually departed at 12:54:48, which would be in keeping with Lawing's 12:54:41 call to 911. 26RP 68-69. If, in fact, shots were not fired until 12:55, such would mean that there were 12 seconds between the time Harris, Horton and Rogers left the Dakotas and the time shots were fired. 26RP 69. The defense theorized this unaccounted-for time would have provided Harris and/or Rogers, who were walking ahead of Horton, ample opportunity to display a firearm or otherwise provoke the men on 33rd Avenue South. 26RP 70.

And there was evidence suggesting that both Harris and Rogers were armed. Although Harris claimed he did not have a

gun, Dakotas assistant manager Cele Jeffrey described seeing an individual come out from the same direction as Horton had previously, stand beside Horton's body, and fire a couple of shots to the south, where Jeffrey had previously seen three to four men standing, and where Jeffrey thought the previous shots originated.¹² 16RP 61, 64. Jeffrey testified the man continued firing until he reached the middle of the street as he made his way to the Courtland Place parking lot, where he got into a red Cadillac. 16RP 65. Jeffrey testified the man had a gun in his hand, but threw it in the front seat and drove off. 16RP 65.

A tenant of the Courtland who was just returning home also described seeing someone firing at a group of young men standing near the Dakotas. 23RP 54. Samuel Lagmay testified he was about to enter the Courtland Place garage when he noticed a group of men standing outside across the street. 23RP 51. Curious, Lagmay got out of his truck to take a look. 23RP 52. He then saw a young man standing at the entrance to Courtland Place parking lot shooting toward group standing near the Dakotas. 23RP 54.

¹² Physical evidence could be viewed as corroborative. For instance, police found a bullet fragment on the west side (Courtland Place) of 33rd Avenue near the right rear passenger wheel of a BMW parked facing northbound, just north of the drive into Courtland Place. 24RP 20, 22-23, 25, 30.

Lagmay testified the young man disappeared into the parking lot, but that a red, four-door car emerged, made a quick turn on 33rd Avenue South and drove north. 23RP 55.

And significantly, an officer who was within the area on another call testified he heard a barrage of gunshots, followed by additional shots about 30 seconds to a minute later. 15RP 102-103, 126.

Both Jeffrey's and Lagmay's testimony was consistent in part with Harris' own testimony that, after hiding behind a dumpster to the north on 33rd Avenue, he returned south, got in his car and headed north on 33rd to look for Horton and Rogers. 14RP 105-117.

Meanwhile, Rogers ran to Rainier Avenue, where responding police officers encountered him and summoned aid. 15RP 79-80, 85, 104, 120, 161-62. Harris ended up at a gas station where aid and police were also summoned. 14RP 120; 15RP 56-57, 74. In the backseat of Harris' car, police found what appeared to be a handgun, although it turned out to be a pistol-shaped BB gun. 14RP 121; 15RP 58.

Rogers admitted it was his BB gun, but claimed it had run out of carbon dioxide earlier in the day. 15RP 139, 140. He also

claimed he did not have a real gun, either. 15RP 160; 16RP 21. However, later that morning, police recovered a .380 revolver from a person who found it in the bushes along the path Rogers ran to Rainier. 14RP 113-14 and 15RP 159; 16RP 3, 20-21; 19RP 87-88, 136-137; 21RP 35-37; 22RP 97, 99. Although police found no .380 caliber casings, the lack thereof did not foreclose the possibility Rogers displayed the firearm.¹³ 17RP 154-157; 22RP 99.

In closing, the prosecutor did not argue Dillard was guilty of intentional murder. Rather, the prosecutor argued: "If the defendant is aiding in an assault on another person, and the accomplice kills that other person, that's murder in the second degree." 26RP 38. The prosecutor reiterated the difference between intentional and felony murder:

One difference between this and intentional murder is that the shooters only have to intend to assault. They don't have to have the intent to inflict murder. They don't have to intend to kill the person or even intend to inflict great bodily harm. They have to be pointing the gun at the other person and scare them, and during the course of that event, if one of the victims dies through that action, that's felony murder.

26RP 39; see also 26RP 105.

¹³ Altogether, police found 29 shell casings around the street and sidewalk of 33rd Avenue South, including: six fired from a 9 mm Luger; seven from a different 9

The jury convicted Dillard of second degree murder, although they were not asked to indicate the basis for the conviction, i.e. intentional or felony based on assault. CP 129-130 (second degree murder "to convict"), CP 174 (verdict form). On the other counts, the jury convicted Dillard of the lesser included offenses of second degree assault. CP 176-177. Each conviction carried a firearm enhancement. CP 178. Altogether, Dillard was sentenced to 347 months. CP 205-213.

For brevity, additional facts pertaining to the assignments of error are set forth in their respective argument sections.

C. ARGUMENT

1. THE TRIAL COURT ERRED IN ADMITTING PREJUDICIAL PROPENSITY EVIDENCE.

The trial court erred in admitting evidence Dillard wiped his fingerprints off of bullets with a gang flag and reloaded them into his gun the day before the shooting. It is well established a defendant must be tried only for those offenses actually charged. State v. Aho, 137 Wn.2d 736, 744, 975 P.2d 512 (1999). Consistent with this rule, evidence of other bad acts must be excluded unless shown to be relevant to a material issue and to be more probative

mm; six from a .40 caliber Browning; and ten .45 caliber casings fired from one gun. 17RP 147, 159; 18RP 6; 20RP 88-93; 22RP 42-46.

than prejudicial. State v. Saltarelli, 98 Wn.2d 358, 362-63, 655 P.2d 697 (1982); State v. Wilson, 144 Wn. App. 181 P.3d 887 (2008).

The prosecution's attempts to use evidence of bad acts must be evaluated under ER 404(b), which reads:

(b) Other Crimes, Wrongs, or Acts. Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake or accident.

The purpose of ER 404(b) is to prevent a jury from convicting a defendant based on character or propensity evidence. State v. Powell, 126 Wn.2d 244, 258, 893 P.2d 615 (1995). Our state Supreme Court has long since warned of the potential risk this type of evidence has in prejudicing the defendant and to be weary of situations “where the minute peg of relevancy will be entirely obscured by the dirty linen hung upon it.” State v. Smith, 106 Wn.2d 772, 774, 725 P.2d 951 (1986).

Because of the high potential for risk of prejudice, evidence of prior bad acts must be closely scrutinized and admitted only if certain criteria are met. Saltarelli, 98 Wn.2d at 362. First, the court must identify the purpose for which the evidence is being admitted. Smith, 106 Wn.2d at 776. Second, the court must determine that

the proffered evidence is logically relevant to prove an essential element of the crime charged, rather than to show the defendant has a propensity to act in a certain manner.¹⁴ Wilson, 181 P.3d at 892. Third, assuming the evidence is logically relevant, the court must then determine whether its probative value outweighs any potential prejudice.¹⁵ Saltarelli, 98 Wn.2d at 362-63. In close cases, the balance must be tipped in favor of the defendant. Smith, 106 Wn.2d at 776; Wilson, 181 P.3d at 891-92.

In advance of trial, the defense moved to exclude evidence that the day before the shooting, Dillard had been seen cleaning the gun, removing the bullets and "wiping off the casings with his gang flag and loading them in, to make sure that there no fingerprints on them." 4RP 82. Defense counsel argued such was prejudicial propensity evidence because it pre-dated the chance encounter at Grace's and Corner's apartment:

I guess if the argument is that prior possession is evidence of intent to kill on this particular occasion, I just think there is, um – well, it would seem to me that it's more – what the state suggests, that there was evidence, um, intent to kill on some occasion but not

¹⁴ Evidence is relevant if it has a tendency to make the existence of a fact that is of consequence to the determination of the action more or less probable than it would be without the evidence. ER 401.

¹⁵ Similarly, ER 403 provides, "Although relevant, evidence may be excluded if its probative value is substantially outweighed by danger of unfair prejudice, confusion of the issues, or misleading the jury"

on this particular occasion, if you can ascribe any purpose for wiping off the bullets. Because all of the evidence shows that this meeting or – or this was very accidental. In other words, there was nothing that was known to Mr. Dilliard [sic] a day or two before this incident that would have indicated he was going to be coming across LPs or these particular LPs at this location.

4RP 83.

The court disagreed, however, finding the evidence probative of intent:

My view on this is that the observations [sic] close in time, and that would include a day or two before the shooting, of Mr. Dilliard [sic] in possession of a gun and, more particularly, Mr. Dilliard [sic] handling the gun and using his gang handkerchief to wipe off the bullets, is probative of intent. Which is one of the charged elements of this crime. And it may be probative of intent to commit assault, which would go to another prong of this charged crime.

And the reason for that is according to the detective that the State is intending to proffer, Detective Cobane, there was bad feeling between the LPs and the Deuce 8. And also, that's something that some of the witnesses will be able to talk about as their understanding, at least, to explain their own behavior.

If a person is a member of a gang which has bad feelings towards another gang and they are in possession of a weapon which they are taking their fingerprints off of shortly before the members of each of the gangs allegedly confront each other and the defendant participates in shooting at members of the other gang, that would tend to indicate that the defendant did mean to inflict serious harm on the people he was shooting at. And that, therefore, is extremely probative in this case, particularly since

according to the statements the defendant made to the homicide detectives, he didn't have any intent.

4RP 84-85.

Ironically, in limiting expert testimony on the nature of gangs, the court ruled criminality associated with gangs not relevant and not admissible:

Gang affiliation is relevant to this case as I've outlined. But that's all. What happens to other people in gangs, the fact that there was a funeral that Mr. Dilliard [sic] was seen at, none of that's going to be coming in. . . .

And there are a lot of bad things about gangs that I'm talking about here, drug dealing, beating people up, shooting people, getting shot. All those things are just not pertinent to this case. Even though I know that you gentlemen are aware that that's the kind of thing that commonly can be associated with gangs.

4RP 79-80.

Yet, that is precisely what the court did here: it admitted evidence of extraneous criminality. That Dillard allegedly wiped off bullets with a gang flag – before Harris' phone call to Grace and the resulting chance encounter at her apartment – did not show intent to assault the particular people Dillard was accused of assaulting. Rather, it showed an intent or readiness to commit assault or other

crimes, *generally*. As such, it was completely irrelevant to the crimes charged. The trial court erred in concluding otherwise.

Unfortunately, the court's error was highly prejudicial. One of Dillard's main defenses was his lack of intent to assault anyone. There were no bad feelings between himself, Horton, Harris or Rogers. In fact, Dillard was reportedly cordial with Horton. Moreover, Dillard testified he was as surprised as anyone upon hearing shots fired, and merely fired in the air in hopes of curtailing any further shooting. There was physical evidence to support his testimony. Namely, the bullet located in a sixth floor Courtland Place apartment, fired from an upward trajectory. And perhaps most importantly, there was no evidence Dillard shot anyone. On the contrary, the evidence affirmatively showed he did not shoot Horton and he did not shoot Harris.

As a result of the bullet wiping evidence, however, the jury may have resolved any doubts it entertained against Dillard. Because the state was allowed to admit evidence tending to show Dillard's general propensity and readiness to commit crime, jurors might have presumed he must be guilty this time, too. Because of the improperly admitted, highly prejudicial propensity evidence, this Court should reverse Dillard's convictions.

2. THE COURT ERRED IN DENYING THE MOTION FOR A MISTRIAL AFTER JURORS WERE ALLOWED TO HEAR FURTHER DAMAGING PROPENSITY EVIDENCE.

The court erred in denying the motion for a mistrial after the jury was inadvertently allowed to hear prejudicial evidence that was excluded by the parties' agreement. In his interview with police, Dillard said he stole the .40 caliber gun he had the night of the shooting. Ex 6 (Pre-trial), page 14. Upon further questioning, Dillard elaborated:

RAMIREZ [detective]: Okay. And the gun that you had, 40 caliber, you said stole that gun from somebody. Was that another friend of yours that you stole the gun from or?

DILLARD: I don't even know the dude. He had it in a backpack. And I just robbed him.

RAMIREZ: Where, whereabouts?

DILLARD: Somewhere around about, like Dearborn.

RAMIREZ: And how old was the guy?

DILLARD: I Don't know. He was about my age. He was, he looked like, he was like a Mexican. I just beat him up. I took his backpack and then I found the gun. So I was like okay I won.

RAMIREZ: Okay. So you ended up actually beating the guy up and you took his backpack and you found the gun inside?

DILLARD: Yeah.

RAMIREZ: And that was a couple, how many days before, before the shooting?

DILLARD: The day, the day before.

Ex 6 (Pre-trial), pages 20-21.

Although the parties agreed to mute this portion of Dillard's statement (22RP 11-12), it was played for the jury during their deliberations. 27RP 9-10. Defense counsel's motion for a mistrial was denied, however. 27RP 10-14. The court's ruling was in error and deprived Dillard of his right to a fair trial.

Trial courts must grant a mistrial where the evidence at issue may have affected the outcome of the trial, thereby denying the defendant his right to a fair trial. State v. Davenport, 100 Wn.2d 757, 762, 675 P.2d 1213 (1984); State v. Escalona, 49 Wn. App. 251, 254, 742 P.2d 190 (1987). And in deciding whether a trial irregularity had this impact, courts examine (1) its seriousness, (2) whether it involved cumulative evidence, and (3) whether a curative instruction was given capable of curing the irregularity. State v. Johnson, 124 Wn.2d 57, 76, 873 P.2d 514 (1994); Escalona, 49 Wn. App. at 254. These factors all support a mistrial in this case.

First, the nature of the irregularity here was serious. The parties had agreed the statements should be redacted, obviously due to ER 404(b) concerns. This concern is evident from the context of the agreement. Significantly, before ruling on the admissibility of Dillard's statement to police, the court noted that even if it determined Dillard's statements were voluntary, it would not admit the entire interview:

[N]onetheless, not all of that videotape would be played for the jury. There are a number of statements by Detective Ramirez for whatever purpose and responses from the defendant that wouldn't be provided to the jury. There are discussions about whether or not the defendant knows about other homicides and about alleged other bad behavior by the defendant. And all of that will need to be redacted from the video tape if it's played for the jury.

4RP 74-75 (emphasis added).

The court also recognized the prejudicial impact of admitting evidence concerning extraneous criminality associated with gangs:

And there are a lot of bad things about gangs that I'm talking about here, drug dealing, beating people up, shooting people, getting shot. All those things are just not pertinent to this case. Even though I know that you gentlemen are aware that that's the kind of thing that commonly can be associated with gangs.

4RP 79-80 (emphasis added). Accordingly, the court's assertion in denying the motion for a mistrial that it did not exclude Dillard's statement about robbing a Hispanic man and stealing his gun the day before the shooting is not entirely correct. See 27RP 12.

Pre-trial rulings aside, however, the inadvertent playing of the video nevertheless constituted a serious trial irregularity, because Dillard's robbery the day before the shooting was irrelevant and inadmissible under ER 404(b). Dillard never denied having a gun. Where he got it therefore did not matter, especially since there was no nexus between the robbery the day before and the shooting at the Dakotas. The only value the robbery evidence had was to show Dillard's propensity for criminality.

Second, the robbery evidence was not cumulative because it had not been admitted during the trial. 27RP 9. And no curative instruction was given, as the court indicated it would not have redacted that portion of the interview in the first place. 27RP 13. In any event, no curative instruction could have been given that would have obviated the resulting prejudice. Jurors already had been permitted to hear about Dillard wiping his fingerprints off bullets. It would be hard for jurors to ignore additional propensity evidence reinforcing their perception of Dillard as a gang-banging criminal.

Because there is a serious possibility this evidence may have affected the outcome of the trial, this Court should reverse Dillard's convictions. State v. Coe, 101 Wn. 2d 772, 789, 684 P.2d 668 (1984) (cumulative error may deprive a defendant of the right to a fair trial).

3. APPLICATION OF THE FELONY MURDER STATUTE IN THIS CASE VIOLATED DILLARD'S RIGHTS TO EQUAL PROTECTION AND DUE PROCESS.

Although the state charged Dillard alternately with intentional murder and felony murder, intentional murder was never the state's theory of the case. Indeed, the prosecutor never even argued intentional murder in opening or closing. Rather, the prosecutor argued Dillard should be found guilty of felony murder, as an accomplice to the assault that led to Horton's death:

The law for felony murder is different than intentional murder because what it says is that you are committing assault in the first degree if you are shooting at them and that's a bad thing. If you or one of your accomplices happen to actually hit the people you are shooting at, the law doesn't care whether or not you were trying to kill them initially, and that's how it's different from intentional murder, where you are actually trying to kill the person. If you are committing an assault and you or your accomplice hit them or kills them, it doesn't matter what you were trying to do, the law doesn't care. It counts as felony murder.

26RP 105.

This practice was essentially the same as charging only felony murder. Based on the prosecutor's argument that the jury need only find an assault to convict, the jury would never consider whether the state carried the higher burden of proving an intent to kill. The prosecutor's exercise of discretion in this case violated Dillard's right to equal protection and due process.

Dillard recognizes that this Court rejected a constitutional challenge to the felony murder statute in State v. Armstrong, 143 Wn. App. 333, 178 P.3d 1048 (2008). In that case, however, the defendant based his equal protection argument solely on the notion that the prosecutor could arbitrarily charge felony murder rather than intentional murder when both crimes applied, thereby relieving the State of the burden of proving intent, and preventing the defense from seeking a lesser included offense. Id. at 339. The Court rejected that argument because the prosecutor's charging discretion was constrained by the different elements of felony murder and intentional murder. Id. at 341.

In contrast, Dillard's primary argument is that felony murder, when based on the underlying crime of assault, has essentially the *same* elements as manslaughter. Yet, the prosecutor has unfettered discretion to charge either crime. The result should

therefore be different in this case. In the alternative, Dillard asks this Court to reconsider its decision in Armstrong.

In Personal Restraint of Address, 147 Wn.2d 602, 56 P.3d 981 (2003), the Supreme Court addressed a former version of Washington's second degree felony murder statute, RCW 9A.32.050(1)(b). It noted that the statute required death to be caused "in the course of and in furtherance of" the underlying crime. Id. at 608. The "in furtherance" language requires the death to be "sufficiently close in time and place" to the underlying felony so as to be "part of the res gestae of that felony." Id. at 609, citing State v. Leech, 114 Wn.2d 700, 790 P.2d 160 (1990). If assault could serve as the underlying felony,

the statute would provide, essentially, that a person is guilty of second degree felony murder when he or she commits or attempts to commit assault on another, causing the death of the other, and the death was sufficiently close in time and place to the assault to be part of the res gestae of assault. *It is nonsensical to speak of a criminal act-an assault-that results in death as being part of the res gestae of that same criminal act since the conduct constituting the assault and the homicide are the same.* Consequently, in the case of assault there will never be a res gestae issue because the assault will always be directly linked to the homicide. *Therefore, if assault were encompassed within the unenumerated felonies in RCW 9A.32.050(1)(b), the "in furtherance of"*

language would be meaningless as to that predicate felony.

Id. at 610 (emphasis added). The Court therefore construed the statute to exclude assault as the underlying felony in order to avoid this “absurd result.” Id.

The Court also relied on the harsh results that would follow if assault could serve as the predicate felony. First, because manslaughter can be a lesser included offense of intentional murder but not of felony murder, the State could simply file any intentional murder case as felony murder instead, and thereby preclude the defense from seeking a verdict on a lesser charge. Id. at 613. Second, in a case where intent to kill might be difficult to prove, the State could avoid that burden by simply charging felony murder. Id. at 614. Third, it would make “little sense” to charge a reckless or negligent killing as murder when the criminal code provides for those killings to be charged as manslaughter. Id. at 615.

Because the Court decided Andress’s petition based on statutory construction, it did not reach his constitutional challenges. Id. at 605.

Despite the Court's explanation that it was nonsensical to base felony murder on the underlying crime of assault, the legislature responded by doing just that. The current version of the statute expressly includes assault as a valid underlying felony for the crime of felony murder in the second degree.

(i). The Prosecutor's Unfettered Discretion to Charge Either Manslaughter or Felony Murder Violates Equal Protection

Both the United States and the Washington Constitutions guarantee equal protection. U.S. Const. amend 14, § 1; Const. art. 1, § 12. These provisions are substantially identical and their violation is considered one issue. In re Ramsey, 102 Wn. App. 567, 573, 9 P.3d 231 (2000). Equal protection requires that persons similarly situated with respect to legitimate purposes of the law receive like treatment. In re Knapp, 102 Wn.2d 466, 473, 687 P.2d 1145 (1984); In re Bratz, 101 Wn. App. 662, 668, 5 P.3d 755 (2000). While equal protection does not require identical treatment, any distinction must have some relevance to the purpose for which the classification is made. Bratz, 101 Wn. App. at 668.

In cases such as this, where the classification implicates physical liberty, but where no suspect or semi-suspect class is involved, the rational basis test applies. Ramsey, 102 Wn. App. at

574; Bratz, 101 Wn. App. at 669. The rational basis test asks three questions:

1. Does the classification apply alike to all members within the designated class?
2. Is there some rational basis for reasonably distinguishing between those within the class and those outside of the class? and
3. Does the challenged classification bear a rational relation to the purposes of the challenged statute?

Bratz, 101 Wn. App. at 669 (citing Morris v. Blaker, 118 Wn.2d 133, 149, 821 P.2d 482 (1992)). If the challenged statute fails to satisfy all three of these conditions, it will not pass even the most minimal constitutional scrutiny. Morris, 118 Wn.2d at 149; Bratz, 101 Wn. App. at 669.

Washington's felony murder rule, which permits the assault directly causing the death to serve as the predicate felony, violates Dillard's right to equal protection.

First, the rule divides persons who kill unintentionally into two classifications: those charged with manslaughter and those

charged with felony murder.¹⁶ Manslaughter in the first degree is defined as a death caused by recklessness. RCW 9A.32.060. Manslaughter in the second degree is defined as a death caused by criminal negligence. RCW 9A.32.070. Assault in the second degree may be committed by recklessly inflicting injury. RCW 9A.36.021(1)(a). Assault in the third degree may be committed by inflicting injury through criminal negligence. RCW 9A.36.031(d). Manslaughter invariably involves some form of assault because there is no other way to cause a death. Thus, as the Andress Court noted, a defendant who is guilty of manslaughter in the second degree could be charged instead with felony murder in the second degree based on assault in the third degree. Andress, 147 Wn.2d at 615. Similarly, a defendant who is guilty of manslaughter in the first degree could be charged instead with felony murder in the second degree based on assault in the second degree. In either case, the prosecutor's charging decision is unfettered. The proof required for the manslaughter charge is invariably sufficient to

¹⁶ Although Dillard's jury was instructed on manslaughter as a lesser included offense of the intentional murder alternate means (CP 136), the jury necessarily would not have considered the appropriateness of such a conviction, as it was advised only to consider the lesser if it could not agree on the greater. CP 167. Having found the elements of felony murder met, the jury would have not considered manslaughter.

prove the felony murder charge. Thus, the classification of felony murder does not apply alike to all those who kill unintentionally.

Second, there is no rational basis for reasonably distinguishing between those within the class charged with felony murder and those outside of the class. When the killing is unintentional, the identical conduct can place a defendant in either the class charged with felony murder or the class charged with manslaughter, based solely on the whims of the prosecutor. Washington law provides no standard for choosing whether such a defendant will be charged with manslaughter or murder.

Application of the felony murder rule also fails the third requirement of rational basis analysis – the requirement that the challenged classification bear a rational relationship to the purposes of the challenged statute. The purposes of the criminal code in Washington are stated in RCW 9A.04.020(1):

- (a) To forbid and prevent conduct that inflicts or threatens substantial harm to individual or public interests;
- (b) To safeguard conduct that is without culpability from condemnation as criminal;
- (c) To give fair warning of the nature of the conduct declared to constitute an offense;

(d) To differentiate on reasonable grounds between serious and minor offenses, and to prescribe proportionate penalties for each.

Application of the felony murder rule to unintentional killings does not rationally relate to at least two of the State's stated purposes. First, application of the felony murder rule to predicate assaults does not provide fair warning of the nature of the conduct declared to constitute an offense. RCW 9A.04.020(1)(c). No one can determine in advance whether he will be charged with manslaughter or felony murder based on his conduct.

In addition, applying the felony murder rule to the underlying felony of assault bears no rational relationship to the requirement that laws defining criminal offenses differentiate on reasonable grounds between serious and minor offenses, and prescribe proportionate penalties for each. RCW 9A.04.020(1)(d). In other respects, the homicide statutes differentiate quite well between more and less serious offenses. The penalties increase as the mental state increases from criminal negligence to recklessness, to intent, and then to premeditation. With premeditated murders, additional punishment is authorized when specific aggravating factors apply. The penalties for felony murder in the second degree are generally proportionate as well. It is rational to seek

punishment beyond that authorized for manslaughter when the defendant has committed a separate, distinct felony in addition to causing a death.

For example, suppose a defendant sets out to commit a burglary and ends up fighting with the occupant and unintentionally killing him. It is rational to treat his crime as more serious than that of a defendant who unintentionally kills during a fight that breaks out after an argument at a bar. If the second defendant can be charged with felony murder, however, then all proportionality is lost. His punishment will be the same as someone who committed a crime in addition to the act that resulted in death, and also the same as someone who actually intended to cause death. In the words of the Andress Court, this “makes little sense.” Andress, 147 Wn.2d at 615.

For these reasons, the prosecutor’s unfettered discretion to charge any manslaughter as felony murder violates equal protection.

(ii). The Prosecutor’s Ability to Charge Either Felony Murder or Intentional Murder in Some Cases Also Violates Equal Protection

Another reason the current felony murder statute violates Equal Protection is that it permits a prosecutor to select between

two different levels of proof for the same crime: murder in the second degree.

The statute setting out murder in the second degree creates two classifications: those charged with felony murder and those charged with intentional murder. As noted above, there is no infirmity with these classifications as long as the felony murder charges are based on some felony distinct from the assault that caused the murder. The commission of a separate felony takes the place of the intent to kill. When no separate felony is involved, however, the only difference between the two classifications is that one requires proof of intent to kill while the other does not.

Second, there is no rational basis for reasonably distinguishing between those within the class and those outside of the class. Nothing prevents a prosecutor from charging felony murder even when there is evidence of intent to kill. This permits the prosecutor to arbitrarily decide what level of proof will be required for the same crime. See State v. Tamalini, 134 Wn.2d 725, 746 n.17, 953 P.2d 450 (1998) (Sanders, J., dissenting) (in second degree murder cases the prosecutor could elect to prove all requisites for intentional murder or simply prove negligence and death for the same second degree murder conviction), denial of

habeas corpus affirmed by Tamalini v. Stewart, 249 F.3d 895 (2001); State v. Collins, 55 Wn.2d 469, 470, 348 P.2d 214 (1960) (“The principle of equality before the law is inconsistent with the existence of a power in a prosecuting attorney to elect, from person to person committing this offense, which degree of proof shall apply to his particular case”).

In addition to the State’s ability to sustain the same second degree murder conviction with a lesser mens rea showing by charging felony murder with the deadly assault as the predicate, defendants so charged face an additional detriment in regard to lesser included offenses. Felony murder based on assault does not include any lesser offenses, unlike intentional murder. Tamalini, 134 Wn.2d at 729-30, 733. Thus, in cases charged under the felony murder statute, the jury must either acquit or convict, rather than “correlate more closely the criminal acts with the particular criminal conviction.” See e.g., State v. Labanowski, 117 Wn.2d 405, 420, 816 P.2d 26 (1991) (discussing the benefits of the “unable to agree” instruction). Accordingly, the defendant charged with intentional murder charge has the option of requesting a lesser included offense instruction (if the facts permit) rather than gambling on outright acquittal. There is no rational basis for

denying the same option to other defendants who have committed the same act, simply because of the prosecutor's charging decision. See Andress, 147 Wn.2d at 610.

Granted, Dillard received lesser included instructions on manslaughter. However, the state never argued intentional murder, most likely because the evidence did not support it. Because the state chose only to rely on felony murder, there would have been no reason for the jury to consider the lesser included offenses for intentional murder.

Further, as discussed above in section 2, application of the felony murder rule fails the third requirement of rational basis analysis – the requirement that the challenged classification bear a rational relationship to the purposes of the challenged statute. It makes little sense to impose the same penalty on a defendant who kills intentionally as on one who kills unintentionally, when all other factors are the same.

(iii). Applying the Felony Murder Rule to the Underlying Crime of Assault Violates Due Process Because the Standard Becomes Unconstitutionally Vague

Dillard's jury was required to find that the murder was committed "in the course of and in furtherance of" the underlying crime. As the Andress Court explained, however, that language is

“meaningless” when the underlying crime is, as here, the very assault that caused death.

“A conviction fails to comport with due process if the statute under which it is obtained fails to provide a person of ordinary intelligence fair notice of what is prohibited, or is so standardless that it authorizes or encourages seriously discriminatory enforcement.” United States v. Williams, 553 U.S. 285, 128 S.Ct. 1830, 1845, 170 L.Ed.2d 650 (2008) (citations omitted). Because the felony murder statute’s “in furtherance” requirement is meaningless when the underlying felony is assault, persons of ordinary intelligence cannot be expected to apply it. There is no telling how a jury will interpret that phrase. Dillard’s murder conviction therefore violated the Due Process Clause of the Fourteenth Amendment.

D. CONCLUSION

All three of Dillard's convictions should be reversed and remanded for a new trial, because he was deprived of his right to a fair trial due to prejudicial propensity evidence. He murder conviction should be reversed on the additional ground it violates equal protection and due process.

Dated this 30th day of July, 2010.

Respectfully submitted

NIELSEN, BROMAN & KOCH

A handwritten signature in cursive script that reads "Dana M. Lind". The signature is written in black ink and is positioned above a horizontal line.

DANA M. LIND, WSBA 28239

Office ID No. 91051

Attorneys for Appellant

**IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE**

STATE OF WASHINGTON,)	
)	
Respondent,)	
)	
v.)	COA NO. 63757-6-I
)	
DAMARIO DILLARD,)	
)	
Appellant.)	

DECLARATION OF SERVICE

I, PATRICK MAYOVSKY, DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOLLOWING IS TRUE AND CORRECT:

THAT ON THE 30TH DAY OF JULY, 2010, I CAUSED A TRUE AND CORRECT COPY OF THE **BRIEF OF APPELLANT** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

[X] DAMARIO DILLARD
DOC NO. 332257
WASHINGTON CORRECTIONS CENTER
P.O. BOX 900
SHELTON, WA 98584

SIGNED IN SEATTLE WASHINGTON, THIS 30TH DAY OF JULY, 2010.

x *Patrick Mayovsky*

2010 JUL 30 PM 4:19
FILED
CLERK OF COURT
COURT OF APPEALS
DIVISION ONE
SEATTLE, WA